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Social Security Rights

Campaigns and Courts

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1. INTRODUCTION

Almost one third of the South African population (16 million people out of a total population of 50 million) benefitted from social assistance grants as at 30 September 2012 (South African Social Security Agency [SASSA], 2012). The social security system in South Africa has grown dramatically over the past decade and a half. It is considered by government and non-government sectors to be the most successful poverty alleviation programme in the country, given its wide reach and developmental impact on high levels of poverty and unemployment.

This chapter tries to understand which strategies were most effective in ensuring that the government met and increased its obligations to realise the right to social security in South Africa's Bill of Rights. The chapter suggests that litigation played an important role, in combination with advocacy and lobbying by civil society, to both pressure the government and support progressive elements within it to implement and expand the reach of the right to social security (through extending existing grants). Efforts to introduce new grants within anti-poverty campaigns and through lobbying and advocacy strategies were less successful in achieving realisable results, although they may have contributed to change in symbolic and political terms by raising awareness of socio-economic rights provisions and of the high levels of unmet needs in poor communities.

These strategies are explored through four case studies. The chapter considers two successful efforts to extend social assistance grants: the Child Support Grant to all children up to the age of eighteen and the Old Age Pension to men between the

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ages of sixty and sixty-five. In contrast, the chapter explores two still unsuccessful efforts to secure the right to social security for people with chronic illnesses and for those members of the poor not encompassed within the social assistance net (the call for a chronic illness benefit and the campaign for a basic income grant [BIG], respectively). The chapter evaluates the impact of strategies by looking at the resulting policy and legal changes, the increased or improved delivery of grants, progressive shifts in government attitudes and approaches, and public awareness of rights and entitlements. How strategies cause change to occur is examined by looking at the relationship among the various actors pushing for change, the strategies they use, and the impact these have. The causal links are explored through seven qualitative interviews with key players in civil society and government, through participant observation, and with reference to literature and press coverage of the events described. The chapter uses interviews with government officials from the Department of Social Development and officers of non-governmental organisations (NGOs), together with relevant documents, to support its arguments. The authors were also directly involved in some of the litigation and advocacy strategies and draw on their own experiences to inform their arguments.¹

This chapter does not claim to provide a comprehensive overview of all strategies employed within the realm of the right to social security. It focuses on four case studies dealing with different existing and proposed grants. It has not entered into an examination of the range of administrative justice court challenges and campaigns that have also had a profound impact on the realisation of the right to social security in South Africa (see de Villiers, 2002; de Villiers, 2006; Liebenberg, 2005; Jagwanth, 2004; Plaskett, 2000). For example, litigation brought by the Black Sash to force the Department of Social Development to make back payments to grant recipients who had waited for long periods before receiving their grants, resulted in people being paid from date of application rather than date of approval.² This led to more than R2 billion (US\$250 million) being made available from the budget to ensure implementation.³ Attempts by others to understand these strategies are encouraged.

¹ The following interviews were conducted: Selwyn Jehoma, Deputy Director-General of social security, Department of Social Development, Pretoria, 16 July 2010 (Goldblatt and Rosa); Wiseman Magasela, Deputy Director-General of policy, Department of Social Development, Pretoria, 17 July 2010 (Goldblatt and Rosa); Ratula Beukman, advocacy program manager, Black Sash Trust, Cape Town, telephone interview, 11 August 2010 (Goldblatt); Sarah Sephton, attorney, Legal Resources Centre, Grahamstown, telephone interview, 17 August 2010 (Goldblatt); Jonathan Berger and Umunyana Ragege, Section27, Johannesburg, telephone interview, 19 August 2010 (Goldblatt); Paula Proudlock, manager of child rights, Children's Institute, Cape Town, telephone interview, 7 September 2010 (Rosa); and Neil Coleman, strategies coordinator, COSATU, Cape Town, telephone interview, 9 September 2010 (Rosa). Although only two government officials were interviewed, we believe that this is sufficient given their central, high-level positions and knowledge of historical events. The interviews showed consistency with one another regarding key events and developments within the department.

² Jehoma interview, 2010.

³ Jehoma interview, 2010.

2. SOCIAL SECURITY REFORM IN POST-APARTHEID SOUTH AFRICA

2.1. *Historical Background*

During the apartheid era a welfare system was created primarily for whites, to protect them against risk and poverty by means of social insurance (Van der Berg, 2002). South Africa's first social assistance programme was initiated with the enactment of the Children's Protection Act of 1913,⁴ which provided maintenance grants largely for white children. Very few of these grants reached black people, and none was given to black people residing in rural areas (Bhorat, 1999).

The Old Age Pension Act of 1928⁵ provided grants in the form of social (non-contributory) pensions for Coloureds and Whites. Blacks and Indians were initially excluded but were covered in 1944. Coloureds and Whites also benefitted from a disability grant, which was introduced in 1937. Disability grants were extended to Blacks and Indians in 1947. The State Maintenance Grant, to support poor parents and their children, was mainly of benefit to White, Coloured, and Indian families, with black Africans largely falling outside of its reach.

2.2. *Social Security Reform after Democracy*

The new South African Constitution provided for the right to social security in Section 27 as follows:

- (1) Everyone has the right to have access to –
 - ... (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

After the advent of democracy in 1994, a racially integrated social security system was introduced to cover the population as a whole. Various policy processes followed to consider reforms to the major features of the system. The Lund Committee for Child and Family Support, which met in 1996, recommended the replacement of a family benefit with a new cash grant for poor children. This led to the introduction of the Child Support Grant in 1997. The grant has since become the largest social assistance grant in terms of the number of people it reaches.

The White Paper on Social Welfare of 1997⁶ dealt with key substantive issues in the restructuring of social welfare services, programmes, and social security. It used

⁴ Child Protection Act, 1913 (No. 25 of 1913).

⁵ Old Age Pension Act, 1928 (No. 22 of 1928).

⁶ White Paper for Social Welfare, August 1997, <http://www.info.gov.za/view/DownloadFileAction?id=127937>.

the concept of developmental social welfare as the new policy framework for the restructuring of the social service delivery system. It was an important document in providing a progressive, though contested, framework for social development (Hassim, 2006).

In 2002, a commission was established under Professor Vivienne Taylor to examine the social security system and make recommendations for policy and law reform. Prominent labour, church, and civil society organisations, such as the South African Council of Churches (SACC), the Congress of South African Trade Unions (COSATU), and the Black Sash, as well as academics and research institutes, contributed research and made submissions on a comprehensive social security system for South Africa. The Taylor Committee Report⁷ called for a comprehensive social assistance scheme to meet the medium- to long-term goals of social and economic transformation in South Africa, which included the extension of the Child Support Grant, a BIG, the equalisation of the Old Age Pension, and a grant for people with HIV/AIDS. This was the scheme recommended in the context of high levels of unemployment in South Africa, in particular amongst the African population. There was no wholesale acceptance of the report, but a number of its findings have found their way into government policy and legislation.

In 2004 a new Social Assistance Act⁸ was legislated, which defines social assistance as income transfers in the form of grants that are provided by the government to vulnerable groups. The grants provided for in the Act and their rand values in 2012 were as follows: the disability grant (R1200); a grant for older persons (R1200 or 1220 if over 75 years); a war veterans' grant (R1220); a foster child grant (R770); a care dependency grant (R1200); child support grant (R280), and a grant-in-aid (R280).⁹ The South African Social Security Agency Act of 2004¹⁰ was enacted to provide for the establishment of the South African Social Security Agency as an agent for the administration, management, and payment of social assistance.

In 2005, the Constitutional Court in the *Mashavha*¹¹ case defined "social grants" as "welfare services" in Schedule 4 of the Constitution. The assignment of the Social Assistance Act to provinces thus reverted to a national competency. The national minister was vested with clear national control over social assistance to set national policy in relation to the administration of social grants and to establish clear regulations, norms, and standards in relation to matters such as grant-processing time, administrative requirements, eligibility requirements, and suspension and termination procedures.

⁷ 'Transforming the Present – Protecting the Future,' report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002, <http://www.cdhaarman.com/Publications/Taylor%20report.pdf>.

⁸ Social Assistance Act, 2004 (Act No. 13 of 2004) as amended.

⁹ South African Government Services 'Social Benefits' <http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/en_ZA>.

¹⁰ South African Social Security Agency Act, 2004 (Act No. 9 of 2004).

¹¹ *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC).

2.3. Impact of the Social Security System

During the past two decades, extensive fiscal space and sweeping reforms have enabled South African policy makers to develop an unusually large social grants system. South Africa had the ninth-highest value in a recent comparison of the ratios of social assistance spending to gross domestic product in seventy-four developing and transition countries (Weigand and Grosh, 2008). This redistribution of R80.4 billion in 2009–10 through the fiscus has substantially improved conditions in poor households. The share of households that reported that pensions and social grants formed their main source of income rose from 23 per cent to 34 per cent between 2002 and 2005 (Siebrits and Van der Berg, 2010).

The developmental impact of grants has been the subject of much debate in South Africa, in particular in the local context of the desired shift from a welfare State to a developmental State, as well as globally. The debate revolves around the financial sustainability and developmental outcomes of social grants. Commentators have argued that the widening net of social grants is unsustainable, that grants are squandered by the poor on such things as alcohol, and that grants create high levels of dependency that disincentivise people from searching for employment opportunities. However, the evidence shows that social grants do have developmental attributes. Studies on developmental outcomes of grants have shown that grants boost the food spending of beneficiaries (Community Agency for Social Enquiry, 2008) and increase nutritional benefits to children (Aguero et al, 2007; Yamauchi, 2005; Williams, 2007). They also show that households that receive grants spend relatively more on basic necessities (food, fuel, housing, and household operations) and relatively less on medical care, debt service, and tobacco than households that do not receive grants (Samson et al, 2004). In addition, grants encourage school attendance among recipients of child support grants and children living with pensioners (Case et al, 2005; Budlender and Woolard, 2006; Leibbrandt et al, 2010).

2.4. Policy Gaps and Inequities

Despite reforms and the extensive reach of the social security system post-apartheid and up to and including the introduction of the Social Assistance Act of 2004, a number of policy gaps and inequities existed. First, different age thresholds were applicable to men and women eligible for the Old Age Pension – it was made available to men from the age of sixty-five and women from the age of sixty. Second, only children younger than age seven were initially eligible for the Child Support Grant. Third, no provision for social assistance for ‘able-bodied’ persons of working age (between the ages of eighteen and sixty) existed, despite the large number of poor, unemployed people facing long-term joblessness in the context of massive structural unemployment. Fourth, persons with chronic illnesses such as HIV/AIDS were not covered by the disability grants. Fifth, non-citizens were excluded from the grant system. And sixth, problems with the administration of grants (for example, delays on

appeals, requirements of birth certificates and identification documents, application of financial eligibility criteria caused delays, uncertainties, and inequities in access to social grants.

As a result, civil society organisations lobbied and advocated for a comprehensive social security system to address these issues and to ensure that all people who could not support themselves or their dependants would be covered by the social safety net. This was considered especially important in the context of the lack of basic services and limited realisation of other socio-economic rights, such as housing and health care, as discussed elsewhere in this book. This is the subject of the following section, which provides an analysis of the strategies utilised by these organisations and campaigns to progressively realise the right to social security with regard to the first four gap areas listed earlier.

The fifth and sixth issues are not discussed in this chapter. Nonetheless, the issue of non-citizen access was raised in the Constitutional Court case of *Khosa* in relation to the social security rights of permanent residents, and its impact is discussed in chapter 14, by Polzer, Ngwato and Jinnah. The issue of grant administration, though strongly challenged with a range of strategies by civil society groups such as the Legal Resources Centre and the Black Sash, is not discussed in this chapter.

3. STRATEGIES FOR SOCIAL SECURITY RIGHTS

3.1. *Child Support Grant*

Turning to the first policy gap, the Child Support Grant (CSG) was introduced in 1997 to provide social assistance to the country's vulnerable children. It initially covered only children younger than seven years of age, thus leaving many children living in poverty without financial support. In 2005 the CSG was extended incrementally to children younger than fourteen years of age, and then to eighteen years in 2010.¹² The grant, currently R280 per month, is payable to the child's primary caregiver, who qualifies on the basis of a means test. The means test is calculated as the amount of the grant multiplied by ten. More than 11 million children currently benefit from the Child Support Grant.¹³

The gradual extension of the coverage of children eligible for the Child Support Grant over the past few years, from children younger than the age of seven to all children younger than the age of eighteen,¹⁴ is considered, by governmental officials

¹² In terms of Section 6(1) of the amended Social Assistance Act of 2004, the government extended the Child Support Grant in phases to children younger than the age of eighteen years over a period of three years, from 1 January 2010 (younger than age sixteen on or after 1 January 2010; seventeen years on or after 1 January 2011; and eighteen years on or after 1 January 2012).

¹³ South African Government Services 'Social Benefits' <http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/en_ZA>.

¹⁴ The definition of a *child* in the Constitution, Section 28(3).

and community organisations alike, a huge success because of the advocacy efforts of civil society and the commitment of the then Minister of Social Development, Zola Skweyiya, to poverty alleviation.¹⁵

The Alliance for Children's Entitlement to Social Security (ACCESS) was established in March 2001 at a workshop attended by NGOs, community-based organisations, faith-based organisations, service providers, members of Parliament, and representatives of government. It was believed that an alliance representing the children's sector would be an effective way to promote a comprehensive social security system. The initial focus of ACCESS was largely on advocating for the extension of the Child Support Grant to all children younger than the age of eighteen, as part of a comprehensive package of cash grants, social welfare services, health care, education, nutrition, and water and sanitation. It also placed a lot of emphasis on ensuring access to grants for those children who were already eligible, through grant jamborees and advocacy on administrative barriers to access (for example, children without birth certificates). The alliance grew to more than a thousand community-based and NGO member organisations in just a few years. The advocacy strategies utilised by ACCESS from its inception included policy research, campaigns (including a protest march at the African National Congress (ANC) Policy Conference in Stellenbosch in 2002); a letter-writing campaign to the Minister of Social Development, submissions on legislation, lobbying of the Department of Social Development and the Portfolio Committee on Social Development and the Minister for Social Development, media publicity, and litigation. The Basic Income Grant Coalition, and its members, which included COSATU and the SACC, also lent their weight to the extension of the Child Support Grant to children up to the age of eighteen years.

The grant was extended from age seven to fourteen because of substantial pressure from ACCESS and its partners (Proudlock, 2010). According to a senior government official: "ACCESS has done a lot of work in reinforcing our commitment as a country and understanding of the importance of children's rights."¹⁶

The ANC National Policy Conference in June 2007, as well as the National Conference in Polokwane in December 2007, passed a resolution calling for the gradual expansion of the Child Support Grant to children younger than the age of 18. Although the Department of Social Development had previously voiced strong support for the extension, it had stopped short of making the regulatory changes to facilitate this.

The Children's Institute, a child rights policy think tank at the University of Cape Town, consequently supported the launch of a High Court challenge by a mother of a fourteen-year-old boy, on the basis that the Department of Social Development was denying impoverished fourteen- to eighteen-year-olds their constitutional right to social security, the right to equality, and other related children's socio-economic

¹⁵ Jehoma interview, 2010.

¹⁶ Magasela interview, 2010.

rights. The applicant was Florence Mahlangu, who lived in Ga-Motle Village (fifty kilometres from Pretoria) in North West Province. Mrs Mahlangu had three children who were too old to qualify for the CSG. She was employed as a domestic worker and earned up to R1000 per month. Her income fluctuated because of the casual nature of her employment. Her husband was unemployed and had been so for seven years. Mrs Mahlangu was therefore the sole provider for her family. She used her income to pay for all the household expenses, including water, electricity, transport, food, and school fees. Her disabled daughter attended a special school with fees of R225 per month.¹⁷

Mrs Mahlangu was supported by lawyers at the Legal Resources Centre and a number of civil society organisations that work on children's rights, including the Children's Institute and the Centre for Actuarial Research, both at the University of Cape Town, the Community Agency for Social Enquiry, the Black Sash, and ACCESS.

Mrs Mahlangu's lawyers argued that the Constitution guarantees everyone the right to have access to social assistance (grants) if they are unable to provide for themselves and their children. The Social Assistance Act of 2004 gives effect to this right by providing for a range of social grants for people in need. The Child Support Grant was introduced primarily to provide income support to caregivers of children; however, the regulations to the Act said that children had to be younger than the age of fifteen years to qualify. The result was that there was no social grant for poor caregivers caring for children between the ages of fifteen and eighteen. This is despite the fact that approximately 2.4 million of the children in this age group live in poverty and would qualify under the Child Support Grant means test as eligible for the grant. Many caregivers desperately need income support to ensure that their children have food and clothes. The grant is also needed to pay for transport to schools and clinics; to pay for school supplies; and to use towards payment for rent, water, and electricity. Mrs Mahlangu's lawyers thus argued that the limitation of the age of the Child Support Grant to age fifteen infringed on a number of constitutional rights: the rights to social assistance, food and nutrition, social services, basic education, equality, dignity, and life.¹⁸

The government's responses emanated from two quarters: the Minister of Finance and the Department of Social Development. The Minister of Finance opposed the *Mahlangu* case on the basis that there are finite resources and that these have to be shared between a number of competing social policies. The minister was not yet convinced that the extension of the grant to older children was the appropriate policy intervention for this particular vulnerable group, and chose to instead consider vocational training and other options. In addition, it was argued that it was not the prerogative of the judiciary, but of the executive, to decide on such complex matters

¹⁷ Proudlock interview, 2010.

¹⁸ *Ibid.*

of policy.¹⁹ The Department of Social Development, in contrast, did not argue very strongly against the extension of the Child Support Grant because it was in fact in favour of it.

The case was heard in March 2008 before Judge Mavundla, and at the time of writing, judgment was still pending (more than four years overdue). On 31 December 2009 and in March 2010, the Minister of Social Development gazetted amendments to the Social Assistance Act 2004 that extended the Child Support Grant to all poor children younger than eighteen who were born on or after 31 December 1993. This effectively extended the grant in a phased manner, with the result that by the end of 2012, all poor children younger than eighteen were eligible for it. The court case has thus become moot, as the government has essentially granted Mrs Mahlangu the relief she was seeking. Mrs Mahlangu's lawyers are in talks with the State attorneys to suggest a settlement, as judgment is no longer necessary.²⁰

The Children's Institute and ACCESS took two other cases regarding the CSG to court: one focused on barriers to access to the grant (lack of birth certificates and identity documents) and the other on the retrogressive nature of eligibility for the grant (the means test had not been adjusted for inflation since its inception). In both of these instances, litigation was a last resort; years of research, dissemination, dialogue, and campaigning had failed to achieve the requisite reforms. Litigation in these cases resulted in the almost immediate revision of the regulations to the Social Assistance Act, in line with the arguments from civil society. The Children's Institute and ACCESS were co-applicants in both cases. A lawyer involved in the cases said that the "government works hard to avoid judgments against them".²¹ She expressed frustration at the amount of time spent on these cases and in reaching agreement with the government, only to have agreements break down, which requires court challenges and immediate legislative changes before judgment is given.

All three of the cases related to the reach of the CSG and its implementation illustrate that litigation is undoubtedly a powerful tool for bringing about legislative and policy change. The Children's Institute believed that in the case of the identity documents, without the pressure of litigation, the reform would not have been made, and similarly in the cases of the means test threshold and the age threshold (Children's Institute, 2007–8).

3.2. *Old Age Pension*²²

The Old Age Pension, now known as the Older Person's Grant, is a means-tested grant paid at a relatively high rate to almost 80 per cent of the relevant age group in South Africa. It is a highly effective poverty alleviation tool that assists millions

¹⁹ Ibid.

²⁰ Ibid.

²¹ Sephton interview, 2010.

²² This section is drawn in part from Goldblatt (2009: 460–62).

of older persons and many members of their households (Dufflo, 2003; Moller and Ferreira, 2003). It provides this group with status and respect, as well as some authority over household spending. Until recently, the Old Age Pension was provided to women who had reached the age of sixty and men who had reached the age of sixty-five. This distinction was a legacy from the 1930s in recognition of women's earlier marrying age and shorter working lives. When the new government came to power under democracy in 1994, there was an acknowledgment that retaining the policy was problematic in terms of the constitutional commitment to equality. This was, however, the subject of debate, with some considering the privileging of women to be an appropriate response to their greater disadvantages (Minister of Welfare, 1995). Despite the recommendation of the Taylor Committee of Inquiry (Taylor, 2002: 98) to equalise the Old Age Pension, nothing was done to change the legacy of age-differentiated pension benefits. It was only in 2005 that the government was forced to confront this issue when a group of men between the ages of sixty and sixty-five (supported by the State-funded Legal Aid Board) brought an application to the High Court to declare the legislation, differentiating between men and women on the basis of age for the purpose of the Old Age Pension, unconstitutional on the basis of an infringement of the rights to equality and social security (the *Roberts* case).

The government's response to the case (by the ministers of social development and finance) was that the age differentiation was not unfair discrimination or a violation of the applicant's rights to social security, but it was a positive measure designed to advance the rights of women as an economically, socially, and politically vulnerable group in society.

Women's rights and human rights organisations, aware that this was a case that might benefit from *amicus curiae* interventions, debated the merits of the arguments on both sides. There was a concern that a court might find that the appropriate remedy was a 'downward' equalisation to, say, sixty-three, thus removing the grant from a group of women in need. Some organisations felt, like government, that women should be advantaged over men through early provision of the grant and so chose not to intervene. Others chose to intervene to argue against a remedy that might harm women and because they viewed the case as important in extending the social security system to an additional group of disadvantaged people.²³

The case was heard in September 2007, but before any judgment was given, the President announced in his State of the Nation speech at the beginning of 2008 that the Old Age Pension was to be equalised at age sixty over a period of three years, ending in April 2010 (Mbeki, 2008). He said this would benefit about half a million men. The Minister of Finance confirmed this soon after in his budget speech, when he explained that "the progressive extension of social security is a central element

²³ The Centre for Applied Legal Studies at the University of the Witwatersrand and the Community Law Centre at the University of the Western Cape were admitted as *amici curiae*. The South African Human Rights Commission also intervened but with respect to different arguments concerning the rights of same-sex couples.

of our anti-poverty strategy, made possible by the fiscal space created over the past decade” (Manuel, 2008).

The government’s decision, in all likelihood a response to pressure from the court case, was framed as part of “the country’s war against poverty, in pursuit of socio-economic inclusion” (Mbeki, 2008). The decision by government to extend the Old Age Pension to men younger than sixty-five appears to have been based on the belief that the government was in violation of the Constitution. Government then waited until challenged before addressing the violation. Interestingly, government chose to oppose the equalization case in court but proceeded, in any event, to change the law before judgment was handed down. This may have been based on a fear that the judgment would go against government and on a desire to increase public support. This view was confirmed by a government interviewee who suggested that the government believed that it was in the wrong and would lose the case, and that bringing men in was supported within sections of the ruling party and was an election issue.²⁴ Another government interviewee also felt that it was likely that the litigation pushed the government to make the changes.²⁵ It is also possible that the government wished to pre-empt the judgment so as to control the remedy. Had a decision come from the court requiring immediate increase of the pension to all eligible men, the government would not have had the space to phase in the increase over time. The role of civil society was relatively limited in this case. Individual men affected by the inequality approached the Legal Aid Board, which prepared the test case. Although certain organizations joined as amici curiae, there was not an organised campaign around the issue or any advocacy or lobbying of any kind. The litigation was the site of the struggle and appeared to directly and effectively influence the government’s subsequent decision. The impact of the decision was the immediate inclusion of thousands of men into the grants system and the longer-term inclusion of millions more.

In March 2010, two and a half years after the hearing in the *Roberts* case, a judgment was finally given by Justice Mavundla²⁶. The judge dismissed the application for equalisation of the pension on the basis that women were discriminated against unfairly, that the government did not have sufficient resources for such a change, and that the Court should not interfere in the “legislative domain”. The judgment did not consider the right to social security. The judgment also made no mention of the fact that the law had changed in the period between the hearing and the judgment, a clear indication that the change was in fact affordable. Thus, the case created the strange situation in which the Court has ruled against equalisation but the government has already legislated for it. Had the government failed to change

²⁴ Jehoma interview, 2010.

²⁵ Magasela interview, 2010.

²⁶ *Roberts and Others v Minister of Social Development and Others* (unreported decision of the Transvaal Provincial Division, Case Number 32838/05).

the law, it is likely that this judgment would have been appealed with the strong possibility that the Constitutional Court would have come to a different conclusion.

3.3. *Chronic Illness Benefit*

During the past decade there has been a huge increase in the uptake of the Disability Grant, from 600 000 in 2000 to 1.3 million in 2006. (This has since dropped somewhat, which may reflect the government's tightening up of grant approvals). The grant is provided to people who are unable to work as a result of their disability. The AIDS epidemic is likely the reason for this huge increase, but poverty, changes to the grant system, and large-scale structural unemployment have also led to people turning to State assistance wherever possible (Nattrass, 2006). Commentators have noted the potential danger of perverse incentives in which people, fearing the loss of their Disability Grants if they go onto antiretroviral medication, may purposefully fail to do so to stay ill enough to continue receiving the Disability Grant (Hardy and Richter, 2006; Nattrass, 2006). The Disability Grant was not designed for people with chronic illnesses whose health conditions vary over time and are sometimes, at least in theory, able to work. The difficulty is that poverty coupled with chronic disease creates a group of particularly vulnerable people who have additional associated costs, such as frequent travel to clinics; the need for more nutritious food; medication; and the need for shelter, warmth, and hygiene facilities beyond those required by healthy people. The social assistance system does not address the needs of this group. This gap in provision led to calls for a basic income grant (Nattrass, 2006; Hardy and Richter, 2006), as recommended in the Taylor Committee Report (Taylor, 2002) as a possible response. Another idea to emerge was the suggestion of a social assistance grant specifically designed to meet the needs of people with chronic illnesses.

The Department of Social Development, mindful of this gap and the huge increase in the Disability Grant, in 2007 commissioned a study of the possibility of creating a chronic illness grant. The department, aware that the Department of Health was trying to address the broader needs of HIV-positive patients through nutritional and related support, felt that it was best placed to offer direct material support to such people.²⁷ The department also saw the importance of assisting people with diseases other than HIV/AIDS such as tuberculosis and diabetes. This was politically important in the context of the battle between civil society groups working on the issue of AIDS and the Mbeki government. The study, prepared by the Human Sciences Research Committee (HSRC) proposed a chronic illness grant of a smaller size than the Disability Grant (Schneider et al, 2007). It seems that the Department of Social Development took the proposal to the Cabinet, but the idea was turned down; however, the issue may be raised again in the future.

²⁷ Jehoma interview, 2010.

The idea of a chronic illness benefit seems to have emerged from government but was picked up by NGOs. It was included in the National Strategic Plan for HIV & AIDS and STI 2007–2011 of the South African National AIDS Council (SANAC, 2007: 120–1). In 2007 the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand held a workshop on social assistance, disability, and chronic illness (Goldblatt, 2007b). The HSRC was invited to present its findings, and the Department of Social Development also attended, along with a number of representatives of non-governmental organisations. The government speaker saw constitutional compliance as a challenge, but civil society representatives framed their arguments for a chronic illness benefit in rights terms. Advocacy following this workshop included letters to the Minister of Social Development from the workshop participants and a meeting with the department in 2007 to call for a chronic illness grant. At that meeting, members of the department expressed concern that civil society was not providing a united voice on what it wanted government to do about chronic illness. They said that the disability sector in particular needed to be more vocal on the issue (Goldblatt, 2007a).

In June 2008 the SANAC Technical Task Team (TTT) for Treatment, Care, and Support released a discussion paper advocating the implementation of a Chronic Diseases Grant. The discussion paper was adopted in principle by the Programme Implementation Committee (PIC) of SANAC, and the TTT was mandated to develop a proposal for its implementation. It set up a working group with expert sub-committees on health, law and policy, economics and costing, and community mobilisation. Despite this ambitious approach, little appears to have been done since then.²⁸

In 2009 the Minister of Social Development introduced the Social Assistance Amendment Bill to Parliament (Parliamentary Monitoring Group, 2010). The Portfolio Committee considered the Bill in 2010, and public hearings were held. It appears from the introduction of the Bill by the Director-General of the Department of Social Development that the purpose of the Bill was to tighten the definition of disability so that people with chronic illnesses would no longer be able to benefit from the Disability Grant. This was required following the exponential rise in Disability Grant applications. Despite submissions from organisations such as Black Sash, the Aids Law Project, and the Treatment Action Campaign concerned about the plight of the chronically ill, the committee accepted the Bill without major change. The result is that rather than moving towards a chronic illness grant, chronically ill people are being “squeezed out of the system”.²⁹

The Bill also added a step in the process of appealing a decision to refuse a Disability Grant. This appears to have made the process more cumbersome, added to the burden on applicants, and lengthened the already extremely long appeals

²⁸ Berger and Ragege interview, 2010.

²⁹ Beukman interview, 2010.

backlog.³⁰ The Legal Resources Centre is involved in planned litigation on the length of the appeals backlog.

According to Selwyn Jehoma, Deputy Director-General of Social Security in the Department of Social Development,³¹ the grant did not succeed at the Cabinet level for two reasons: first, because of territorialism between the Departments of Health and Social Development, with the former wanting to prevent the latter from getting a larger share of the budget for a group that it felt was its responsibility; second, because the HSRC calculations did not take account of income levels in relation to disease types, which resulted in a very large number of people in need of the grant. This was because of a lack of adequate health data. The result was that the Department of Social Development felt that it would be asking for an unaffordable amount to cover this new grant.

Wiseman Magasela, the Deputy Director-General, Policy in the Department of Social Development noted that chronic illness, while though an issue, has not yet been finalised in government, as government “seems somewhat unconvinced that they need to support people with chronic illnesses [that] . . . these people need to take their medication”.³² Magasela also noted that organisations such as the National Association of People Living with Aids have not been strategic in their advocacy on the issue by failing to compromise and by occupying government offices.

Activists felt that the challenge to the Bill was unsuccessful because of the lack of careful and coordinated strategies between organisations on the issue of a chronic illness benefit and because of the weakness of the portfolio committee, whose members lack the hard skills to be able to deal with the policy complexities of HIV/AIDS, chronic illnesses, and barriers to access services.³³

Civil society’s efforts to secure a chronic illness grant appear to have been responsive (rather than proactive) to government’s own commissioned research, to SANAC’s statement and to the Social Assistance Amendment Bill 2010. They have also been sporadic (the CALS workshop and the SANAC working group) and uncoordinated (the various parliamentary submissions). Divisions in government on this issue and the lack of proper costing also created obstacles to success. The Black Sash is committed to taking this issue forward,³⁴ but its ability to overcome these various obstacles remains to be seen.

3.4. *Basic Income Grant*

From as early on as the development of the White Paper on Social Welfare in 1997, COSATU had called for an incremental approach to building on the pre-1994 social security system and for a comprehensive social security system. These

³⁰ Sephton interview, 2010.

³¹ Jehoma interview, 2010.

³² Magasela interview, 2010.

³³ Berger and Ragege interview, 2010.

³⁴ Beukman interview, 2010.

elements were incorporated into the final white paper. In an effort to build on that commitment, COSATU subsequently tabled a Basic Income Grant (BIG) for the first time at the Jobs Summit in 1998. The BIG concept was based on research commissioned by COSATU that looked at the options of a BIG and comprehensive unemployment insurance. The notion of a comprehensive social security system was placed on the agenda as a contrast to the patchwork social security system that left out most people. As discussed earlier, the idea of a comprehensive social security system was proposed by the government-appointed Taylor Committee of Inquiry. COSATU played a key role in shaping the conclusion of the committee, through its lobbying efforts and submissions to the committee.³⁵ The adoption of this concept by an official government committee of inquiry meant that it increasingly began to resonate and have legitimacy in society more broadly. Also, COSATU went further to embrace comprehensive social protection beyond social security.

The Basic Income Grant Coalition was formed in 2001 to develop a common platform among advocates of a universal income support grant and to mobilise popular support for the introduction of the grant. It was set up by representatives of various sectors of civil society, namely church, labour, human rights, HIV/AIDS, children's rights and youth organisations, as well as the elderly.

Proponents of a BIG based their argument on Section 27 of the Constitution, which provides for a right to social security and social assistance for those who are unable to support themselves and their dependents. They argued that working-age adults were not able to support themselves because of a shortage of available employment in the economy. These adults thus needed assistance from government to support themselves and their families. More substantial, incorporating a BIG as part of a comprehensive social security reform was argued to be developmental in nature.³⁶ The extensive research clearly documented that comprehensive social security reform could effectively reduce poverty while potentially contributing to social development and economic growth (Samson, 2003). Effectively addressing poverty in a developmental manner supports job-creating economic growth. Income grants support workers' productivity as they bolster consumption: better nutrition, health care, housing, and transportation all support the increased productivity of workers (Samson, 2003).

They also calculated the costs to the fiscus and proposed tax models to recoup those costs (Samson, 2003), to counter the National Treasury's argument that a BIG was an unaffordable policy option and would "bankrupt the country" (Manuel, 2008).

After much lobbying by members of the BIG Coalition, in 2002 the Taylor Committee Report recommended the extension of the CSG and the foundation of a BIG

³⁵ Coleman interview, 2010.

³⁶ *Ibid.*

as integral to a comprehensive social assistance scheme to meet the medium- to long-term goals of social and economic transformation in South Africa.³⁷

The BIG Coalition used various strategies to promote a BIG, such as mobilization; campaigning; protest marches; a national conference; submissions on legislation; research reports; the People's Budget campaign;³⁸ lobbying of government, parliamentarians, and ministers; and the media. The BIG campaign was very important because it provided a focus on poverty and social security. Although it did not succeed in having a BIG implemented, the policy changes to other grants such as the Child Support Grant and the Old Age Pension resulted from the public debate about poverty levels and the economic policies that were worsening the situation of poverty in communities. Many of the gains, particularly in relation to the Child Support Grant, were a response to the national campaigns around the BIG and other campaigns that were connected to these.³⁹ The BIG campaign incorporated the Child Support Grant as part of a continuum of increasingly comprehensive social security measures. It saw the extension of the Child Support Grant as an interim position. The COSATU spokesperson said, "I believe quite strongly that the BIG Coalition's support for the extension of the Child Support Grant helped push the Child Support Grant forward."⁴⁰

The BIG campaign stated that everyone has a right to income transfers and that the Constitution provides for progressive realisation in this regard. However, litigation on the issue was not taken up partly because there was a belief that the case would be lost because of the Treasury's arguments on the lack of 'available resources', and also because moves to extend the Child Support Grant had been on the cards for a number of years, as had extensions to the social insurance system. These moves were considered incremental victories for the social safety net, and the BIG campaign did not want to impede them.

Eventually, the BIG Coalition collapsed for a number of internal reasons, including the lack of both personnel resources for the campaign and the required support from member organisations. The coalition faced the difficulty of a single-issue campaign that struggled to diversify and adapt in the face of serious obstacles to progress. At a certain point, the issue and the coalition ran out of steam.

4. ASSESSING THE IMPACT OF STRATEGIES

This chapter suggests that changes to social security provision have come about through pressure from outside of the State in the form of litigation, advocacy,

³⁷ Ibid.

³⁸ The Peoples' Budget Campaign is a civil society coalition consisting of COSATU, SACC, and the South African National NGO Coalition that, for the past twelve years, has tabled proposals on spending and revenue. The Peoples' Budget Campaign bases its proposals on a pro-poor perspective within the framework of the realisation of socio-economic rights, including but not limited to the rights to life and human dignity.

³⁹ Coleman interview, 2010.

⁴⁰ Ibid.

lobbying, and campaigning. Public opinion also contributed to change. An added factor was the progressive role played by Minister Skweyiya and certain officials in the Department of Social Development in challenging more conservative forces within the government. These conditions allowed non-governmental groups to win key victories related to the extension of existing grants. The Child Support Grant extension resulted from a combination of sustained advocacy and litigation, whereas the extension of the Old Age Pension followed a court challenge and perceived public pressure on the State. The demand for a chronic illness benefit has not yet resulted in success, in part because of the lack of cohesive lobbying and campaigning by activists. The BIG campaign has also failed to deliver a new grant. It would be simplistic to assume that the lack of litigation with regard to the chronic illness benefit and BIG is the reason for the lack of positive change. A number of contextual factors have weighed against the establishment of these new grants. Primary among these is the fiscal conservatism of the dominant elements in the government. The Minister of Social Development during the period of the case studies here, Zola Skweyiya, fought difficult battles within the Cabinet about the overly restricted budget. He was jokingly referred to as a member of the Black Sash by the then finance minister when a challenge by that organisation resulted in billions of rand being set aside in the Department of Social Development's budget to make back payments on grants⁴¹. Litigation on a BIG could have been argued on the basis of the strong Section 27 right of access to social assistance for those who are "unable to support themselves or their dependants", given the high rate of unemployment in the country. But a BIG would have required a huge financial commitment, and the government would have argued a lack of 'available resources' with which to implement it.

The case studies here point to a pattern of the government succumbing to pressure from the courts or sometimes, as illustrated in this chapter, to the mere threat of litigation. In the case of the extension of the Old Age Pension to men of age sixty to sixty-five, the court challenge seems to have been the direct trigger for government action. Jehoma acknowledged that this extension was not a policy priority for the government, but when faced with a court challenge, it felt compelled to act.⁴² In the Child Support Grant means test and the accompanying identification cases, the instigation of litigation led to prompt action by government where all other forms of pressure had proved fruitless. In all three cases the government avoided waiting for adverse judgments against it.

In the case of the Child Support Grant, significant lobbying and campaigning contributed to the extension of the grant to age fourteen. Continued campaigning coupled with a court challenge pushed the government to extend the grant to the age of eighteen. Again, this occurred before the judgment was given but after the government had opposed the application. A lawyer who worked on many of these

⁴¹ Jehoma interview, 2010.

⁴² Ibid.

cases said that lawyers and civil society organizations needed one another because of their distinct roles and contributions to changing laws and policies.⁴³

Government officials interviewed also pointed to the importance of the role of civil society in supporting the efforts of progressive elements of government against the more conservative factions.⁴⁴ Magasela emphasised that government is not monolithic and that there are tensions within the State. Jehoma described the relationship between advocacy groups and government as “symbiotic” because “we needed them to strengthen our arm” within government. At the same time, these groups also engaged and challenged government and continued to fight the battles that these officials sometimes lost to the government.

The same officials also stressed the important role of the former minister of social development, Zola Skweyiya. They felt that his status in the ANC gave him the credibility within the Cabinet to push for reforms where there was significant opposition from the Treasury and other quarters in areas such as the extension of the Child Support Grant from age fourteen to age eighteen. Jehoma also pointed to the minister’s seniority, stature, and awareness of the poverty and hardship facing ordinary South Africans, which motivated his approach. The Department of Social Development has consistently arranged public forums in which ministers and officials engage with members of the public around the country. The feedback from some of these forums appears to be influential in directing policy developments.⁴⁵

With regard to the BIG campaign, the lack of success in achieving a grant does not indicate a complete failure of the strategy. Both the activists involved and the government officials interviewed viewed the BIG Coalition as influential in the national poverty debate. Magasela noted, “We don’t have the basic income grant in South Africa[,] but we cannot say that the coalition therefore never attained or achieved its objectives. There’s a very critical matter [at] issue here . . . about keeping an issue on the national agenda. . . [W]e can never overlook that important contribution.” He went on to say that despite government’s refusal to accept a BIG, it did other things in response to the campaign, such as the expanded public works campaign and the reconfiguration of higher education to address youth unemployment.⁴⁶ As mentioned, the massive cost of a BIG was a major barrier to the success of the campaign, given the economic stance of the Mbeki government. This economic approach was also coupled with an ideological framework held by many in government who saw social grants, and particularly a BIG, as promoting dependency on government. Magasela pointed out that the idea of universal social assistance as opposed to targeted grants has not been “entertained at all” in government.⁴⁷ He noted that although government turned down a BIG, the campaign was very

⁴³ Sephton interview, 2010.

⁴⁴ Jehoma and Magasela interviews, 2010.

⁴⁵ Magasela interview, 2010.

⁴⁶ Ibid.

⁴⁷ Ibid.

important in putting the issue on the national agenda. It forced the government to consider and implement a number of other interventions to address the needs of the unemployed.

The case study of the chronic illness benefit points to an issue initiated by government and inadequately responded to by civil society. Unlike the BIG campaign, this issue never achieved a high profile in the public realm. It also seems that conflict within the government over this issue led to its shelving. Problems with administration of the Disability Grant and its reliance on the Department of Health assessments may also have led to reluctance to introduce a grant of a similar sort. The future of this issue remains unclear. Greater legal and policy work, as well as coordinated efforts within civil society, are needed to ensure that this issue is promoted within the government.

The case studies also point to an issue regarding the role of the courts and strategic impact litigation in the arena of the right to social security. The Old-Age Pension and Child Support Grant cases (as well as the *Khosa* case) dealt with the relationship between the right to social security and the right to equality in that they pointed to the unfair discrimination involved in keeping certain groups from existing grant entitlements.⁴⁸ The courts have been (perhaps understandably) more comfortable entering the terrain of prohibiting discrimination than intervening to require the government to create new policies, laws, and grants where none exist.

5. CONCLUSION

Civil society, in the form of coalitions of ~~organisations~~, advocacy organisations, research and advocacy bodies, public-interest litigators and others, has played a major role in efforts to realise the right to social security. It has used a variety of strategies, including campaigns, advocacy, lobbying, and litigation to challenge the government to direct greater resources to the poor and disadvantaged in South Africa. Elements within the government were sympathetic to many of the issues raised by these groups, and they worked hard to advance their own agendas within a sometimes-divided State. The courts, and the threat of litigation, also played an important role in extending rights to groups of people who were denied access to social security. However, the broader political and economic context meant that there were strong forces against change within the government, which limited the effectiveness of the range of strategies employed.

Despite this, the result of these strategies has been major growth in the number of social assistance grants in South Africa and budgetary allocations to this crucial area. The larger social assistance net has had an important impact on alleviating poverty and has had some impact on development. The constitutional right to

⁴⁸ See Liebenberg and Goldblatt (2007) for a discussion of the relationship between the right to equality and social and economic rights.

social security and the discourse around a comprehensive social security system, as well as the idea of developmental social welfare, continue to shape new strategies.

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