

SOCIAL SECURITY FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA: COMPLIANCE WITH ARTICLE 28(2) OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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SUMMARY

The United Nations Convention on the Rights of Persons With Disabilities (CRPD) was adopted in 2006 in order to address continued marginalisation of persons with disabilities. Since the adoption of the CRPD, the rights of persons with disabilities have received more scrutiny than previously. The Preamble to the CRPD states that “persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world”. The founding principle of the CRPD is that persons with disabilities are entitled to participate fully and equally in society, irrespective of their individual disability. To achieve this goal, the CRPD provides for a number of rights that must be implemented by States Parties that have signed and ratified it. The rights included in the CRPD contribute towards the achievement of full and equal participation in society. Article 28 of the CRPD guarantees two rights that contribute towards the achievement of full and equal participation in society of persons with disabilities. These are the right to an adequate standard of living, and the right to social protection.

This article establishes the scope and content of the right to social security as a component of the rights guaranteed in article 28. To this end, the obligations created by the CRPD related to social security provided by States Parties are established. The current South African social security system pertaining to persons with disabilities is discussed and analysed to determine whether it is compliant with the obligations created in article 28 of the CRPD. Finally, shortcomings in the existing social security system are identified and potential remedies suggested to address these.

1 INTRODUCTION

Persons with disabilities are among the most marginalised in societies around the world.¹ The United Nations Convention on the Rights of Persons With Disabilities (CRPD) was adopted in 2006 in order to address such continued marginalisation.² Since the adoption of the CRPD, the rights of persons with disabilities have received more scrutiny than previously.³ The Preamble to the CRPD states that “persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world”. The founding principle of the CRPD is that persons with disabilities are entitled to participate fully and equally in society, irrespective of their individual disability.⁴ To achieve this goal, the CRPD provides for a number of rights that must be implemented by States Parties that have signed and ratified it.⁵ The rights included in the CRPD thus contribute towards the achievement of full and equal participation in society. Article 28 of the CRPD guarantees two rights that contribute towards the achievement of full and equal participation in society of persons with disabilities. These are the right to an adequate standard of living, and the right to social protection.

1.1 The right to an adequate standard of living

Article 28(1) of the CRPD provides:

“States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families.”

Article 28(1) provides that persons with disabilities have the right to an adequate standard of living, which includes certain necessities (food, clothing, housing) and the continual improvement of living conditions of persons with disabilities.⁶ The proper implementation of the right to an adequate standard of living will empower persons with disabilities to participate fully and equally in society, on an equal basis with others.⁷

¹ Agmon, Sa'ar and Araten-Bergman “The Person in the Disabled Body: A Perspective on Culture and Personhood From the Margins” 2016 15 *International Journal of Equity Health* 146 147.

² United Nations (UN) *Convention on the Rights of Persons with Disabilities* A/RES/61/106 (2006). Adopted: 13/12/2006; EIF: 03/05/2008.

³ Basson “Towards Equality for Women With Disabilities in South Africa: The Implementation of Articles 5 and 6 of the Convention on the Rights of Persons with Disabilities” 2021 9 *African Disability Rights Yearbook* 3 3.

⁴ *Ibid.*

⁵ Signature accompanied by ratification makes the CRPD binding on such States Parties.

⁶ UN Ad Hoc Committee on an International Convention *Compilation of Proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons With Disabilities* (A/AC.265/CRP.13) submitted at the second session of the Ad Hoc Committee, 16–27 June 2003, New York.

⁷ Basson “State Obligations in International Law Relating to the Right to an Adequate Standard of Living for Persons With Disabilities” 2017 21 *Law, Democracy and Development* 68 79.

1 2 The right to social protection

Article 28(2) of the CRPD provides that States Parties recognise the right to social protection of persons with disabilities and that States Parties “shall take appropriate steps to safeguard and promote the realization of this right”. Social protection is considered one of the means through which persons with disabilities can achieve an adequate standard of living and thereby achieve full and equal participation in society.⁸ Social protection measures are generally aimed at promoting social justice and enabling economic equity.⁹ The inclusion of the right to social protection in the CRPD is the first time that this right has been expressly guaranteed for persons with disabilities in international law.

Article 28(2) of the CRPD guarantees the right to social protection for persons with disabilities. Social protection includes financial support and extends to goods, services and programmes aimed at realising full participation in society for all persons.¹⁰ Article 28(2)(b) further provides that States Parties must ensure access to social protection programmes and poverty reduction programmes as part of the broader mandate to provide social protection to persons with disabilities. Many countries have implemented a form of poverty reduction programme called social security. The purpose of social security measures is to provide financial support to persons who require it, either permanently or temporarily.¹¹ Social security measures are meant to alleviate the costs and/or loss of income associated with certain contingencies.¹² Disability is widely regarded as one of the core contingencies that must be provided for in social security schemes.¹³

There are approximately 4 million persons with disabilities in South Africa.¹⁴ This is a significant proportion of the population and they should, in theory, all have access to some form of social security benefits when they need them. Considering that South Africa has signed and ratified the CRPD,¹⁵ and is therefore bound by its provisions, it is important to consider periodically whether the country is meeting its obligations or whether there is

⁸ Preamble to the CRPD.

⁹ Merrien “Social Protection as Development Policy: A New International Agenda for Action” 2013 *International Development Policy* 83 93.

¹⁰ Article 28(2) lists a number of goods, services and programmes that must be provided as part of social protection.

¹¹ International Labour Organization (ILO) *Social Security (Minimum Standards) Convention* C102 (1952). Adopted: 28/06/1952; EIF: 27/04/1955.

¹² Berghman *Basic Concepts of Social Security* (1991) 9; Dreze and Sen *Social Security in Developing Countries* (1991) 15.

¹³ Employment injury, sickness and invalidity were all included in the ILO’s *Social Security (Minimum Standards) Convention* 102 of 1952 as contingencies for which financial support must be provided.

¹⁴ This is based on a reported percentage of 6.6 per cent in Statistics South Africa “General Household Survey 2021” 2021 26. This survey excluded children under the age of five for purposes of disability.

¹⁵ Article 4 of the CRPD. South Africa ratified the CRPD on 30 November 2007; see United Nations “Treaty Body Database” https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 2023-04-23).

progress towards meeting those obligations.¹⁶ The purpose of this article is to establish what is required by States Parties in implementing the social security element of the right to social protection, as guaranteed in article 28(2) of the CRPD. The current social security measures available for persons with disabilities in South Africa are then measured against those obligations to determine whether there is compliance with article 28(2).

2 THE SCOPE AND CONTENT OF THE RIGHT TO SOCIAL SECURITY IN THE CRPD

Since international law sets standards to which states must conform, it is logical that international law be used to establish guidelines for implementation of the rights created. Article 28(2) lends itself to the generation of a number of indicators that may be used to determine whether a State Party is currently meeting its obligations in terms of article 28(2).

Article 28(2) places an obligation on States Parties to provide social protection to persons with disabilities. In interpreting this obligation, regard must be had to the context and purport of this obligation. One element of social protection includes having the financial means to provide for maintenance needs.¹⁷ As such, social security measures that aim to alleviate income loss or additional costs incurred that were caused by disability contribute towards the broader purpose of full and equal participation in society of persons with disabilities.

Since the achievement of an adequate standard of living is the overarching goal of article 28, it stands to reason that any social security measures provided by States Parties as part of their article 28(2) obligation to provide social protection must contribute meaningfully to the achievement of an adequate standard of living. Social security benefits provided by States Parties must therefore be of such a nature that these benefits contribute towards achieving an adequate standard of living for persons with disabilities. In the following paragraphs, the nature of the social security benefits required in terms of article 28 is discussed.

2.1 Access to social security benefits

Article 28(2)(b) provides that “States Parties ... shall take appropriate steps ... to ensure access by persons with disabilities ... to social protection programmes and poverty reduction programmes”.¹⁸ This means that States Parties have an obligation to implement the right to social protection. Since social security is an essential element of the right to social protection, this in turn means that social security schemes must be implemented by States Parties and, further, that persons with disabilities must have access to these schemes. States Parties must thus ensure that there are social security

¹⁶ The CRPD itself requires that States Parties submit periodic reports on the status of the implementation of the rights in the CRPD; see article 35 of the CRPD.

¹⁷ UN Economic and Social Council *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World: Report of the Secretary General E/CN.5/2001/2* (13–23 February 2001).

¹⁸ Author’s own emphasis.

measures available for persons with disabilities, and that persons with disabilities are able to apply for social security benefits on an equal basis with others.

For social security benefits to be accessible by persons with disabilities, unduly restrictive qualifying criteria should be avoided when awarding social security benefits. Such avoidance would prevent social security benefits from excluding persons with disabilities who genuinely need the financial benefits offered. The aim of social security for persons with disabilities should therefore be to include as many recipients as reasonably possible.

2 2 Adequacy of social security benefits

When investigating whether social security benefits contribute towards realising an adequate standard of living, and achieving full and equal participation in society, the level of benefit paid must be taken into consideration. While any financial assistance for persons in poverty-stricken circumstances is valuable, this financial assistance should facilitate equal participation in society.¹⁹ In situations where state-provided financial assistance is the only source of income for a person, such assistance should take into consideration the unique financial needs of each recipient, in order to alleviate the particular financial burdens that that person experiences.²⁰ The adequacy of social security benefits refers to the level of benefit received by each person and how this benefit contributes towards the achievement of full and equal participation in society.²¹ In providing benefits that meaningfully contribute towards full and equal participation in society, the financial needs of persons and the resources available to States Parties for distribution must be balanced for optimal efficacy.²²

Social security benefits should provide a recipient with income to meet their basic individual needs, and ultimately facilitate full and equal participation in society. Since the aim of social security benefits is to relieve the person with the disability of both the costs borne and any income lost as a result of disability, it is submitted that States Parties should be cognisant of the financial consequences faced by persons with disabilities. Benefits provided to a person with a disability who has lost income should therefore aim to replace that income (at least partially) as well as cover the expenses incurred as a result of the disability experienced. In other words, it is submitted that social security benefits provided to persons with disabilities should consist of two components – an income replacement component, since the recipient may not be able to work, and a further benefit aimed at relieving the costs borne by the recipient in relation to their disability. The determination of which of these components is payable should be done on a

¹⁹ Wiid *The Right to Social Security of Persons With Disabilities in South Africa* (doctoral thesis, University of the Western Cape) 2015 160.

²⁰ *Ibid.*

²¹ Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 238.

²² Chenwi "Unpacking Progressive Realisation, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance" 2013 46(3) *De Jure* 742 744.

case-by-case basis to take into consideration the unique nature of disability and its impact on the person experiencing it.

In summary, social security benefits for persons with disabilities should be adequate to meet their financial needs. In determining an adequate amount, both income replacement and increased costs should be taken into consideration.

2 3 Use of social security benefits to realise other rights

The provision of financial assistance to persons with disabilities creates opportunities for social inclusion and better participation in society.²³ For example, the provision of adequate financial assistance may enable a person with a disability to make use of rehabilitation services or create the opportunity for further education. The provision of adequate social security benefits is thus vital for a number of related rights provided for in the CRPD.²⁴ In order to gauge whether a particular set of social security benefits contributes towards full and equal participation in society, the “buying power” of the amounts received must be evaluated to determine the extent to which a recipient remains financially marginalised.

3 THE RIGHT OF ACCESS TO SOCIAL SECURITY FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

Section 27(1) of the Constitution provides:

“Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

Section 27(1)(c) guarantees the right of access to social security including social assistance. This right of access to social security is not a direct right, but rather provides that a provider of social security can choose to whom it pays benefits.²⁵ In the context of the right of access to social security, including social assistance, the primary provider of benefits is the State.²⁶ In addition to the eligibility criteria that the State can apply, section 27(2) provides for internal limitations on the right of access to social security. Section 27(2) provides that the right of access to social security must be progressively realised, using reasonable measures within the resources available to the State. The impact of these limitations is discussed in the context of meeting the obligations created by article 28(2) of the CRPD below.

²³ Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 304.

²⁴ Such as the right to an adequate standard of living, which incorporates the right to social protection.

²⁵ The eligibility criteria for social assistance in South Africa is established in the Social Assistance Act 13 of 2004 (SAA).

²⁶ Strydom *Essential Social Security* (2006) 7.

“Social protection” has been defined in South Africa by the Taylor Commission. According to the Commission,

“[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.”²⁷

The term “social security” is undefined in South African law.²⁸ The reason for this lack of a definition is simple: the concept of social security is in a state of flux and is considered too dynamic to be confined to a single definition.²⁹ In addition, the understanding of social security as a concept may differ from country to country, and even from person to person.³⁰ It would therefore be difficult to construct a definition of social security that includes the various conceptualisations of social security. Despite the general consensus that social security cannot be defined, numerous institutions have put forward explanations of the term in order to provide some clarity as to what social security means in a particular context. The preferred South African description was suggested in 1997 by the Department of Welfare (now known as the Department of Social Development).³¹ According to the White Paper for Social Welfare,

“[s]ocial security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual’s earning power ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children.”³²

The White Paper considers that social security measures are to include cash benefits as well as benefits that are “in-kind” and that such benefits could include the provision of health care, housing and other social services. Social security measures are therefore not limited to the provision of financial benefits to persons in the South African context, although it could be argued that these goods and services are better categorised under the broader category of social protection. While the importance of the provision of these services for persons with disabilities cannot be denied, the focus of this article is the adequacy of cash benefits provided to persons with disabilities in terms of the social security system applicable in South Africa.

The White Paper’s explanation of social security refers to “public and private measures” aimed at providing financial and other types of support to needy individuals. Social security for persons with disabilities in South Africa thus consists of both public and private measures, which can broadly be categorised as social assistance and social insurance, respectively.³³ The

²⁷ Taylor *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (2002) 41.

²⁸ Olivier *Introduction to Social Security* (2004) 13.

²⁹ Strydom *Essential Social Security* 6.

³⁰ Pieters *Social Security: An Introduction to the Basic Principles* (2006) 1.

³¹ Department of Welfare *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* (1997).

³² Department of Welfare *White Paper for Social Welfare* 1997 49.

³³ Department of Welfare *White Paper for Social Welfare* 50.

source of such assistance depends on the type of social security measure in place, but is usually the individual themselves, the State or a combination of both.³⁴ The primary objective of social security legislation is to provide a framework in terms of which financial support can be provided to individuals in need of such financial assistance.³⁵ The purpose of this assistance is to provide income in situations where a person is unable to provide for their own financial needs.³⁶

3 1 Social assistance for persons with disabilities in South Africa

The primary social assistance available to persons with disabilities in South Africa is the state-administered disability grant, which is non-contributory.³⁷ The Social Assistance Act³⁸ provides the eligibility criteria for this grant – primarily, reaching the prescribed age (currently 18), and providing proof of disability that prevents the person from being able to provide for their own maintenance needs. In addition, the applicants for the disability grant are means-tested, and applicants who exceed the asset and income thresholds will have their applications denied.³⁹

In addition to the disability grant, there are two further grants that may be paid to persons with disabilities in certain circumstances. The grant-in-aid is paid to disability grant recipients who need full-time care by a third party.⁴⁰ This supplemental grant consists of monthly payments of R480 per recipient.⁴¹ Social relief of distress is a grant that is paid independently of any other grants in situations of crisis where a person with a disability requires temporary financial assistance.⁴²

3 2 Social insurance for persons with disabilities in South Africa

Social insurance is the branch of social security comprising measures aimed at providing financial security for employees in the event that they become unable to work.⁴³ Participation in most social insurance schemes is inextricably linked to employment, and is thus only available to persons who

³⁴ Strydom *Essential Social Security* 6.

³⁵ ILO *Introduction to Social Security* (1984) 3.

³⁶ *Ibid.*

³⁷ Liffmann “Scope of Application” in Olivier *Social Security Law: General Principles* (1999) 50.
³⁸ 13 of 2004.

³⁹ Regulations relating to the application for and payment of social assistance and the requirements of conditions in respect of eligibility for social assistance GN R898 in GG 31356 of 2008-08-22.

⁴⁰ Olivier *Social Security: A Legal Analysis* (2003) 217.

⁴¹ South African Government “Grant-in-aid” (no date) <https://www.gov.za/services/social-benefits/grant-aid> (accessed 2023-04-23).

⁴² South African Government “Social Relief of Distress” (no date) <https://www.gov.za/services/social-benefits/social-relief-distress> (accessed 2023-04-23).

⁴³ S 9 of the SAA.

are (or previously were) employed.⁴⁴ Social insurance measures include occupational retirement funds,⁴⁵ the Compensation for Occupational Injuries and Diseases Fund⁴⁶ and the Unemployment Insurance Fund.⁴⁷ The benefits paid by each of these funds is highly individual and depends, *inter alia*, upon contributions made by or on behalf of the member of the fund.

4 MEASURING SOUTH AFRICAN COMPLIANCE WITH ARTICLE 28(2) OF THE CRPD

The obligations created by article 28(2) of the CRPD are binding on South Africa. It is therefore necessary to determine whether South Africa is meeting these obligations. Each obligation (as established above) is applied in this article to the South African social security system as it applies to persons with disabilities. This application involves a review of legislation and policy applicable to social security for persons with disabilities. The ultimate goal of this analysis is to determine whether South Africa is meeting the obligations created by article 28(2) of the CRPD, and whether there are any steps that need to be taken to improve compliance with article 28(2).

4.1 The impact of section 27(2) of the Constitution on article 28 of the CRPD

According to section 27(2), “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.” The terms “reasonable measures”, “available resources” and “progressive realisation” have specific meanings for the right of access to social security, which are discussed below.

Section 27(2) is an internal limitation on the right of access to social security, since it provides that access to social security only needs to be provided through reasonable measures with the resources available to the State, and that the right should be realised progressively. Section 27(2) effectively also acts as a limitation to the right to social protection in article 28 of the CRPD, since international law is binding only to the extent that it is not in conflict with domestic law. Since the Constitution has this internal limitation on the right of access to social security, the right to social protection in the CRPD is subject to those same limitations.

According to the Constitutional Court, when assessing measures taken to realise the right of access to social security the court is not concerned with the availability of “more desirable” measures, but rather with whether the measures taken were “reasonable”.⁴⁸ The court recognises that many different measures may be considered reasonable in any set of

⁴⁴ The Road Accident Fund, which technically forms part of social insurance, does not require that a claimant be an employee or former employee. See the Road Accident Fund Act 56 of 1996.

⁴⁵ Established in terms of the Pension Funds Act 24 of 1956.

⁴⁶ Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

⁴⁷ Established in terms of s 4 of the Unemployment Insurance Act 63 of 2001.

⁴⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 41.

circumstances and, as long as the particular measures chosen can be considered reasonable in the circumstances, this requirement is met.⁴⁹ There is no established test for reasonableness, and the reasonableness of a series of measures must be considered on a case-by-case basis.

Section 27(2) provides that the right of access to social security must be progressively realised within the resources available to the State. The problem of funding social security measures is ever present, and this has been taken into consideration by the drafters of the Constitution.⁵⁰ Essentially, the right of access to social security is limited by the stipulation that the State is only compelled to provide social security benefits where it has the resources to do so.

The term “progressive realisation” has been defined by the UN Committee on Economic and Social Rights, and this definition has been met with some criticism.⁵¹ According to the Committee on Economic and Social Rights, progressive realisation creates an obligation on a state “to move as effectively and expeditiously as possible to securing its ultimate goal”. It was previously said that the right of access to social security cannot be enforced (or realised) upon demand, and this is echoed in the requirement that the right be progressively realised. According to the Constitutional Court in the *Grootboom* case, the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.⁵²

The right to social security in the CRPD must therefore also be realised progressively, through reasonable measures, and within the resources available to the State.

4 2 Access to social security benefits

As discussed previously, section 27(1)(c) of the Constitution guarantees everyone a right of access to social security, including social assistance. This right must be progressively realised within the available resources of the State.⁵³ This is essentially also what is required in terms of article 28, read with article 4(2) of the CRPD.⁵⁴ In order for South Africa to be in compliance with its obligation to make social security benefits accessible to persons with disabilities, the number of persons covered by social security measures must be reasonable. The CRPD makes no qualification as to which persons with disabilities should have access to social security, but emphatically states that persons with disabilities as a group have a right to

⁴⁹ *Ibid.*

⁵⁰ *Government of the Republic of South Africa v Grootboom supra* par 94.

⁵¹ Barbeton “‘Progressive Realization’ of Socio-Economic Rights” 1999 2(2) *ESR Review* 2.

⁵² *Government of the Republic of South Africa v Grootboom supra* par 45.

⁵³ S 27(2) of the Constitution of the Republic of South Africa.

⁵⁴ Article 4(2) provides that the rights in the CRPD must be progressively realised within the maximum of the available resources of States Parties, without prejudice to those obligations in the CRPD that must be implemented immediately according to international law.

social security.⁵⁵ It can therefore be inferred that the purport of article 28(2) is that all persons with disabilities should have access to some form of social security.

As discussed above, the primary social assistance available to persons with disabilities is the state-administered disability grant. In September 2022, there were 1.4 million disability grant recipients in South Africa.⁵⁶ This represents approximately 35 per cent of persons with disabilities in South Africa. It should be borne in mind that the purpose of social assistance is to provide financial support only to those persons with disabilities who cannot provide for their own maintenance needs – as such, coverage of social assistance should in theory never be 100 per cent. If 100 per cent of the persons with disabilities were receiving social assistance, this would mean that all persons with disabilities are in a position where they are dependent on social assistance for income. The more important question is whether the qualifying criteria for social assistance are unduly exclusive, therefore making assistance inaccessible to persons with disabilities.

The criteria for the disability grant are: the applicant must be at least 18 years of age;⁵⁷ the applicant must not be able to provide for their own maintenance as a result of a physical or mental disability;⁵⁸ the applicant must be resident in South Africa at the time of making the application;⁵⁹ the applicant must be a South African citizen or permanent resident;⁶⁰ and the applicant must meet the requirements of a means test.⁶¹

The means test has been identified as a substantial barrier to accessing social assistance. The means test effectively serves as a disincentive to work or save money, since any income will reduce the amount payable in terms of the grant.⁶² While there are ongoing endeavours to provide social assistance to more persons with disabilities and to increase these benefits,⁶³ these endeavours will not have a substantial impact until the means test is either substantially revised or removed entirely.⁶⁴ It can therefore be argued that persons with disabilities in South Africa do not have adequate access to social assistance as a result of the excluding effect of the means test.

⁵⁵ Article 28(2) provides that “States Parties recognise the right of persons with disabilities to social security”. This is an unequivocal statement, without qualification.

⁵⁶ South African Government “Disability Grant” (no date) <https://www.gov.za/services/social-benefits/disability-grant> (accessed 2023-04-23).

⁵⁷ Reg 3 of the Regulations to the SAA.

⁵⁸ S 9(b) of the SAA.

⁵⁹ S 5(1)(b) of the SAA.

⁶⁰ S 5(1)(c) of the SAA provides that only South African citizens may apply for social grants. The Regulations, however, provide that permanent residents and refugees may also apply for the disability grant. See also *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) and s 27(b) of the Refugees Act 130 of 1998.

⁶¹ S 5(2)(b) of the SAA. The formula for the means test is found in the Regulations to the SAA.

⁶² Walker, Sinfield and Walker *Fighting Poverty, Inequality and Injustice* (2011) 145. See also Standing and Samson *A Basic Income Grant for South Africa* (2003) 21 and Ringen “Social Security, Social Reform and Social Assistance” in Pieters *Social Protection of the Next Generation* (1998) 40.

⁶³ This is required in terms of the “progressive realisation” component of s 27(2) of the Constitution.

⁶⁴ Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 219.

A significant number of persons with disabilities are statutorily excluded from certain social insurance schemes,⁶⁵ since these schemes are inextricably linked to employment. Persons with disabilities who have never worked are therefore immediately excluded from social insurance benefits. Considering the high level of unemployment in South Africa, a substantial portion of the population is also barred from accessing social insurance measures.⁶⁶ This high unemployment rate is a significant barrier to accessing social insurance for persons with disabilities, who experience extremely low levels of employment across all skill levels in South Africa.⁶⁷ The average employment rate for persons with disabilities hovers around 1 per cent from top management to unskilled labour with very little variation across skill levels.⁶⁸

Once access to social insurance is gained via employment, the membership of social insurance schemes is not guaranteed. For example, membership of occupational retirement funds in South Africa is not compulsory.⁶⁹ Membership is granted on a voluntary basis, and if an employee chooses not to join an occupational retirement fund, there will be no benefits payable to them from that fund.⁷⁰ The current lack of a national social security scheme also compounds the problem of access. Compulsory national social security schemes provide extensive coverage to persons, both in the form of social assistance and social insurance.⁷¹ A national social security fund has been mooted in South Africa for a number of years, but very little progress towards its implementation has been made.⁷²

In effect, social insurance remains inaccessible for large numbers of persons with disabilities because of its link to employment. The barriers of high unemployment, the voluntary nature of certain occupational funds, and the lack of access to a national social security fund create a situation where it cannot be said that persons with disabilities have adequate access to social insurance.

Despite the fact that social assistance is adequately accessible to persons with disabilities, the same cannot be said for social insurance. This means that elements of the social security system in South Africa are inaccessible for persons with disabilities, which conflicts with the obligations imposed on States Parties by the CRPD. In light of the barriers that restrict access to social insurance described above, it is submitted that South Africa is not

⁶⁵ For e.g., self-employed persons are excluded from COIDA and government workers are excluded from the UIF. Persons with disabilities working in these roles are therefore excluded from these social insurance schemes.

⁶⁶ According to Statistics South Africa, the unemployment rate in the third quarter of 2022 was approximately 33 per cent; see Statistics South Africa *Quarterly Labour Force Survey Q3 2022* 2022 3.

⁶⁷ See generally the 22nd Commission for Employment Equity *Annual Report 2021–22* 2022.

⁶⁸ *Ibid.*

⁶⁹ Department of Social Development *Reform of Retirement Provision* (2007) 61.

⁷⁰ For e.g., s 12 of the Unemployment Insurance Act 63 of 2001 requires that an applicant for benefits be a contributor to the fund to claim such benefits.

⁷¹ National Treasury *Retirement Fund Reform: A Discussion Paper* (2004) 13.

⁷² Department of Social Development *Green Paper on Comprehensive Social Security and Retirement Reform* (2001) 11.

currently in compliance with the requirement of providing access to social security for persons with disabilities as required by article 28 of the CRPD.

4 3 Adequacy of social security benefits

To comply with article 28(2) of the CRPD, social security benefits paid should be adequate. For purposes of this article, adequacy relates to the extent to which the amount paid contributes towards full and equal participation in society.

The benefits provided in terms of social security are meant to assist in the achievement of full and equal participation in society.⁷³ In South Africa, social assistance benefits are quite low: each recipient is paid R1 990 per month.⁷⁴ The amount paid to recipients of the disability grant is considered insufficient to meet the cost of living of persons in receipt thereof, since the amount payable is considerably lower than the national minimum wage.⁷⁵ Consequently, recipients of the disability grant often find themselves living in relative poverty.⁷⁶

Social insurance benefits are claimed by a person with a disability who was employed, and who has either lost their income entirely or has had their income reduced because of their disability.⁷⁷ Social insurance benefits are generally higher than social assistance benefits because benefits for most social insurance schemes are based on the earnings of the person before acquiring their disability.⁷⁸ Social insurance benefits can be paid on a temporary or permanent basis, depending on the nature of the disability and the future employment prospects of the person with a disability.⁷⁹ Considering that the unemployment rate is disproportionately high among persons with disabilities,⁸⁰ a temporary benefit from social insurance schemes may not meet the financial needs of the person. Furthermore, low benefits will not assist in the realisation of full and equal participation in society since the costs associated with disability will not be offset.⁸¹ Persons with disabilities may therefore find themselves in a situation where their social insurance benefit has been exhausted and they have no recourse to

⁷³ Social security benefits alone are insufficient to achieve full and equal participation in society but are a major element in achieving such. See Basson 2017 *Law, Democracy and Development* 73.

⁷⁴ South African Government <https://www.gov.za/services/social-benefits/disability-grant>.

⁷⁵ The 2022 minimum wage of R23,19 equates to approximately R4 019 per month, based on an average 40-hour work week. The R23,19 was announced by the Minister of Employment and Labour in terms of s 6(5) of the National Minimum Wage Act 9 of 2018 on 8 February 2022.

⁷⁶ Department of Social Development *Draft White Paper on a National Disability Rights Policy* (2014) 64.

⁷⁷ Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 180.

⁷⁸ For e.g., sch 2 of COIDA provides that benefits for permanent disablement are capped at a maximum of 75 per cent of earnings prior to disablement.

⁷⁹ For e.g., s 47 of COIDA provides for compensation in the event of temporary partial disablement and temporary total disablement, and s 49 for permanent disablement.

⁸⁰ 22nd Commission for Employment Equity *Annual Report 2021–22* (2022).

⁸¹ Department of Social Development *Elements of the Financial and Economic Costs of Disability to Households in South Africa* (2015).

other income, or where the benefit provided is too low to meet their maintenance needs.⁸²

From the foregoing discussion, it can be concluded that South Africa is currently providing social assistance benefits to persons with disabilities that do not allow for the achievement of an adequate standard of living since the benefit provided is so low. Social insurance generally provides higher benefits that are linked to the income of the recipient. While these amounts are higher than those received in terms of social assistance, it is submitted that these benefits may still not be adequate to address the maintenance needs of the recipients, although this is difficult to establish firmly, since the benefits paid are highly individualised.

4 4 Use of social security benefits to realise other rights

According to the Committee on Economic, Social and Cultural Rights (CESCR), social security benefits should enable the recipient to “acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education”.⁸³ These are all elements of an adequate standard of living, which is inextricably linked to the right to social security. The right of access to social security is considered a chief contributor to achieving an adequate standard of living, which is guaranteed in terms of international law.⁸⁴ The social security benefits in South Africa must therefore contribute towards an adequate standard of living by enabling the recipient to access essential health care, basic shelter and housing, water and sanitation, foodstuffs and basic education.

It has already been established that the benefits provided in terms of the disability grant are very low.⁸⁵ At R1 990, the disability grant amount is just more than half of the national minimum wage amount. It can therefore be argued that the amount provided does not enable recipients to acquire the goods and services listed by the CESCR. At the very least, the amount payable is unlikely to completely cover the housing and health care costs that disability grant recipients need to meet. Social assistance for persons with disabilities is therefore not currently sufficient to realise the right to an adequate standard of living.

It is not simple to assess whether social insurance benefits are being used to realise an adequate standard of living for persons with disabilities. This is because each recipient of social insurance benefits receives a benefit that is based partially on their salary, which means benefits are highly individualised.⁸⁶ The level of social insurance benefits available to individuals may contribute greatly towards the realisation of an adequate standard of living on a case-by-case basis. However, while access to social insurance

⁸² Wiid *The Right to Social Security of Persons With Disabilities in South Africa* 239.

⁸³ United Nations Committee on Economic, Social and Cultural Rights *General Comment 19 Social Security* E/C.12/GC/19 (2008).

⁸⁴ Basson 2017 *Law, Democracy and Development* 75.

⁸⁵ See heading 4 3 above.

⁸⁶ See heading 3 2 above.

remains limited for so many persons with disabilities owing to high unemployment, the level of benefit is essentially irrelevant. Even if the benefit received were more than enough to realise an adequate standard of living, the problem of accessibility is not solved. The fact that so few persons with disabilities have access to social security benefits make the inquiry into the ability of the recipient to use their benefits to realise other rights somewhat premature. It is thus submitted that social insurance benefits are not currently contributing towards the achievement of an adequate standard of living for persons with disabilities, since so many are excluded from social insurance schemes.

5 RECOMMENDATIONS

From the analysis conducted above, it becomes apparent that the social security measures available to persons with disabilities in South Africa do not comply with the requirements of article 28(2) of the CRPD. As a signatory State Party, South Africa is therefore in contravention of the CRPD until such time as the non-compliance with article 28(2) is remedied. This begs the question: how can this non-compliance be remedied? In the paragraphs below, suggested remedies for each of the key indicators are discussed.

5.1 Recommendations to improve accessibility

Article 28 of the CRPD requires that persons with disabilities have access to some form of social security. Social assistance is generally easily accessible for persons with disabilities who meet the qualifying criteria. However, the means test has been identified as a barrier to accessing the disability grant. While removing the means test has been mooted as a measure that would extend social assistance to more persons with disabilities by removing a problematic eligibility criterion, the issue of available resources must be borne in mind. The source of funding of social grants in South Africa is general revenue –, mainly income tax. There are currently approximately 7.5 million registered taxpayers in South Africa, while there are approximately 26 million social grant recipients. Social spending is thus already very high, especially considering the proportion of taxpayers to social grant recipients. The resources available to the State are therefore limited by the revenue generated by income tax. Considering that unemployment figures are worsening over time, the resources available to the State are concurrently decreasing. It is submitted that removing the means test as a qualifying criterion would place an undue burden on the State to fund a potentially substantial increase in disability grant recipients. In the case of social assistance, it is submitted that the removal of the means test is not reasonable in the circumstances.

With regard to social insurance, the major limiting factor in accessing social insurance schemes is the high unemployment rate in South Africa. There are two ways in which this problem can be approached – either by aiming to reduce the unemployment rate in South Africa, or by making occupational funds available to persons with disabilities irrespective of their

employment status. Both potential solutions have advantages and disadvantages.

While reducing unemployment is the ideal solution, since it would permit access to social insurance schemes that are otherwise exclusive, reduction in unemployment is not a simple exercise. There are issues to be considered relating to the available economic resources such as the funds available to create jobs, as well as the growth of the economy. To date, South Africa has not been able to implement any form of sustained job creation to alleviate the unemployment experienced. The reduction of unemployment is therefore not a practical solution to the inaccessibility of social insurance benefits.

The other option is to make social insurance schemes that have traditionally been linked with employment available to persons with disabilities who are not employees. This option does not make sense in the case of COIDA, since these benefits are predicated on injury or illness sustained in very specific conditions; providing benefits outside of these conditions would amount to a change in the nature of the funds. The same is true for many UIF benefits. In relation to retirement funds, even if membership were to be opened to all persons with disabilities, these persons may be unemployed or low-income earners, and therefore be unable to contribute towards these funds on a regular basis.

The implementation of a national social security fund that is partially contributory may address both the issue of funding benefits and that of the accessibility of benefits. There has also been movement towards the implementation of a national retirement/social security fund that will attempt to extend the coverage of social insurance to all vulnerable and previously excluded workers.⁸⁷ Membership of this fund will be mandatory and currently available discussion documents show that it will most likely allow for irregular contributions. In this way, persons with disabilities who may often be unable to work may still make some provision for their own retirement. This will improve the numbers of persons with disabilities having access to this aspect of social insurance once it is implemented.

5 2 Recommendations to improve adequacy of benefits

As discussed above, the amount paid to disability grant recipients is very low. The amount is slightly less than half the national minimum wage. How can the level of benefit paid be increased to better offset daily expenses as well as those incurred as a result of disability, while bearing in mind that the State is constrained by the limitation of available resources.

It has already been discussed that the pool of funds from which social grants is paid is finite and the long-term sustainability of current social spending is questionable. It is thus submitted that the solution to adequacy of benefits is not to dramatically increase the amount paid to disability grant recipients, but rather to aim to reduce the number of persons with disabilities who are solely reliant on social assistance for income. This involves creating

⁸⁷ National Treasury *Retirement Fund Reform: A Discussion Paper* (2004) 13.

employment for persons with disabilities. Job creation, while not an easy or simple task, alleviates the pressure on the current social grant system by simultaneously reducing the number of persons claiming benefits and increasing the number of persons who could potentially contribute to the funds available for redistribution through paying income tax.

Social insurance benefits are generally higher than social assistance benefits, because benefits for most schemes are calculated on the basis of earnings before acquiring the disability. However, considering that the unemployment rate is high among persons with disabilities, a low and temporary benefit from social insurance schemes may not meet the financial needs of the person (or their dependants). Persons with disabilities may find themselves in a situation where their social insurance benefit has been exhausted and they have no recourse to other income.

As far as the level of benefit received in terms of social insurance is concerned, the benefits tend to be more substantial than those received in terms of social assistance, since they are based on the recipient's former earnings.⁸⁸ While the benefits are not often reviewed or increased, the potential benefit that may be received is increased with an increase in the earnings of the employee. While these amounts are higher than those received in terms of social assistance, it is submitted that these benefits may still not be adequate to address the maintenance needs of the recipients, although this is difficult to establish firmly, since the benefits paid are highly individualised. It is therefore not possible to make a recommendation on improving the level of benefits paid, although the exclusive nature of social insurance in South Africa should not be forgotten.

5 3 Recommendations to improve the realisation of other rights through social security

As discussed previously, social security benefits should enable a recipient to realise other rights. Social assistance and social insurance should therefore be paid to enough persons with disabilities at a level that can make a meaningful difference to their daily lives. Considering that aspects of the current South African social assistance measures do not provide adequate coverage for persons with disabilities, since they are excluded from accessing benefits, and that the benefits provided are very low, it is submitted that social assistance alone is not sufficient to realise the right to an adequate standard of living as envisaged in the CRPD.

As is the case with assessing the adequacy of social insurance benefits, it is not simple to assess whether social insurance benefits are being used to realise an adequate standard of living for persons with disabilities. This is because each recipient of social insurance benefits receives a benefit that is based on their salary or earnings, which means benefits are highly individualised.⁸⁹ The level of social insurance benefits available may contribute greatly towards the realisation of an adequate standard of living. However, while access to social insurance remains limited for so many

⁸⁸ See heading 4 3 above.

⁸⁹ See heading 3 above.

persons, the level of benefit is irrelevant. It is submitted that social insurance benefits are not currently contributing towards the achievement of an adequate standard of living of persons with disabilities, since so many are excluded from social insurance schemes.

6 CONCLUSION

The CRPD is clear and unequivocal that persons with disabilities have the right to social security (as part of the broader right to social protection). Article 28 of the CRPD lends itself to the generation of a number of requirements that should be met by states when providing social security benefits. These requirements relate to the accessibility of benefits, the adequacy of benefits and the use of benefits to realise other rights. Each of these indicators has a scope and content that should be applied to determine whether a State Party to the CRPD is in compliance with their duty to provide social security benefits to persons with disabilities.

The application of these requirements to the social security system in South Africa reveals some concerning aspects of the current system. Social assistance in South Africa not only provides extremely low benefits, but also potentially creates a disincentive for disability grant recipients to work, through the use of certain qualifying criteria. Social insurance is exclusive and inaccessible to the large proportion of persons with disabilities who are unemployed. It is therefore clear that South Africa is currently not compliant with its social security obligations in terms of the CRPD.

Potential solutions for the shortcomings in the current social security benefits available to persons with disabilities include large-scale job creation and the introduction of a national social security fund. However, no solution is simple to implement, and any solution will require an ongoing commitment to improving the standard of living of persons with disabilities in South Africa. Such a commitment has not been evident to date, either through legislation or policy implementation. In order for South Africa to comply with the requirements established in article 28 of the CRPD, an increased prioritisation of the right to social protection for persons with disabilities must be forthcoming. Until such time, persons with disabilities remain economically marginalised and excluded from social security measures that could improve their prospects of full and equal participation in society.