



The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)

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Abstract

This article gives a broad overview of the fundamental right of social assistance. The central question is to what extent the fundamental right to social assistance can count on universal recognition and what legal consequences are drawn from this right when it is invoked in national courts. In order to answer this question, we have looked at this right from a global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa). On the basis of this study we discern a broad synergy in the normative context, not only transgressing through but also operating above the national constitutional jurisdictions. It is observed that from a legal perspective the added value of this right lies in the possibility for an individual to address structural shortcomings in the existing architecture of social assistance schemes. This possibility places courts in the position to critically review the system in the light of human rights requirements.

Keywords

social assistance, guaranteed minimum income, socio-economic fundamental rights, constitutions, justiciability

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Introduction

Is social assistance a human right? Yes, it is. Sometimes it is seen as part of the right to social security or some other fundamental right, but equally often it is formulated as a separate, independent right. In essence, it regards an obligation on the part of the state to provide minimum protection to needy persons who are unable to take care of themselves in any other way.

Over the past decades, more attention has been paid to the human right to social security.¹ But, the fundamental right of social assistance has hardly been the subject of any separate academic interest.² The purpose of this article is to break this silence by giving a broad overview of the position, content and functioning of the fundamental right to social assistance. We are in particular interested in the question of whether the fundamental right to social assistance has gained universal recognition and what the legal consequences are when this right is invoked before the national courts.

In order to answer this question, we will look at the fundamental right of social assistance in a global, a regional and a national context. As the space available to us in this issue of the journal is not unlimited, we had to narrow the focus of our investigation. We have chosen to pay attention to two very different regions in which the fundamental right of social assistance plays a vibrant role, i.e. Europe (which has a long-standing tradition of income support programmes for needy citizens) and Africa (where such programmes are now increasingly being introduced). As far as Europe is concerned, the situation of two countries will be contrasted: Germany which has developed robust constitutional guarantees and the Netherlands where such guarantees are mostly toothless in practice. As for Africa, we will look specifically at the situation in the Republic of South Africa, where the constitution guarantees a right to access appropriate social assistance and where the Constitutional Court has been active in promoting social assistance rights.

We start off by giving a very brief overview of the place of social assistance in our social security systems and the major policy frameworks for social assistance in the two continents (Section 2 ‘Setting the scene: the function of social assistance in the wider context of the welfare state and social protection’). Then we present an overview of global and regional clauses in fundamental rights catalogues that recognise the right to social assistance (Section 3 ‘The place of the fundamental right of social assistance’). Next, we zoom in on the legal nature of the governmental obligations created by the fundamental right to social assistance (Section 4 ‘Legal nature of the fundamental right of social assistance’). This is followed by an exploration of the substantive meaning of the fundamental right to social assistance, as elaborated by international supervisory bodies, in particular the European Committee for Social Rights (ECSR Section 5 ‘Substantive meaning of the fundamental right of social assistance’). We then address the application of the fundamental right in the three selected countries: Germany (Section 6.1), the Netherlands (Section 6.2) and South Africa (Section 6.3). We conclude by answering the central research question raised above (Section 7 ‘Conclusions’).

1. Cf. inter alia Heredero (2007), Riedel (2007), the respective contributions of Eberhard Eichenhofer, Lieneke Slingenberg, George Katrougalos, Ida Elisabeth Koch and Frans Pennings in Pennings and Vonk (2015), and Leijten (2018).

2. There are some exceptions. For example Sepúlveda and Nyst (2012). Other relevant publications are often written from the perspective of national doctrine, for example Germany and South Africa, which established strong constitutional guarantees. Cf. *infra* Section 6.

Setting the scene: the function of social assistance in the wider context of the welfare state and social protection

Europe

General social assistance systems in Europe are often direct successors to the pre-war systems of poor relief. These systems expressed a form of governmental charity and provided an organisational and financial framework for supporting poor people at local level, strictly on the basis of subsidiarity and discretion and subject to harsh working conditions for the able bodied. After the war, the basis for support changed: from charity to a right. Although this does not preclude a margin of local administrative discretion, such schemes nevertheless offer a general safety net based on a legally defined right to statutorily regulated minimum subsistence benefits.³ Social assistance schemes in Europe come under different names, but they are mostly characterised by a means test and flat rate minimum benefit levels. Furthermore, they do not attach any conditions as to previous periods of insurance or the payment of contributions. The schemes are financed from general taxation.

Countries that operate with a general social assistance system have often introduced other minimum income schemes for special groups, which are very similar to social assistance, but that work with a gentler means test. Such schemes are sometimes referred to as 'special non-contributory benefits' in typical EU jargon.⁴

Not all developed countries have a general social assistance system. For example, Southern European countries such as Italy, Greece, Spain and Portugal traditionally have a fragmented system of separate means-tested schemes for specific groups, ranging from the elderly, orphans and the disabled to earthquake victims.⁵ The absence of a general safety net is sometimes explained by the large degree of family solidarity that traditionally exists in the southern European countries.

It must also be noted that there are also countries with general social assistance schemes that operate with levels that are considerably lower than the average European standard, both in absolute and relative terms. This is the case for some Eastern European countries.

Social assistance is a species of the wider concept of social security, just as social insurance, health care benefits and family benefits are. The constitutions of all European countries, with the exception of the UK which does not have a written constitution, dedicate one or more provisions related to the project of social security. Their nature and specific formulation are very different, but on the whole they converge around three main approaches: affirming social security as an individual right of a human being; defining the social responsibility of the State in social security provisions; and placing social security among the guiding principles of state policy.⁶ If we scan the constitutional provisions of 47 European states,⁷ it appears that a substantial number contain

3. For a systematic overview of the systems of national social assistance operating in Europe, see *inter alia* Bahle, Hubl and Pfeifer (2011).

4. Or, according to the literal text of Article 70 Regulation 883/2004: Special non-contributory benefits. Cf. furthermore Verschuere (2009: 1-2).

5. Italy has introduced a general social assistance system in 2017. In Spain, only Catalonia operated a general social assistance scheme, but since 2011 this scheme pays only a range of benefits for very needy people. For a general overview cf. Frazier and Marlier (2015).

6. Egorov and Wujczyk (2016).

7. Neatly brought together in alphabetical order in an ILO document: Alabasio (2012).

specific references to social assistance, either directly referring to the term or indirectly by formulating duties to provide protection, support or welfare services to needy persons, poor families or other vulnerable groups.

For the EU, the main policy challenge is to realise a universal guaranteed minimum income in all countries up to the level of the poverty line, accompanied by well-functioning activation and re-integration regimes.⁸ The question is very much how to find budget, political consensus and EU powers to realise this ideal.

Africa

While there is no tradition of general public income support systems in Africa, nowadays social assistance has increasingly, particularly in recent years, become a significant policy tool for addressing vulnerability, social exclusion and more generally social injustice. It should be borne in mind that the traditional preference for social insurance found in European countries is not always suitable to meet the needs of African countries today. In particular, the size of the informal economic sector in these countries poses a problem. The rudimentary social insurance systems that have developed in poorer countries cover individuals who work in the formal economy, such as civil servants and employees in regulated sectors. However, the large majority of such populations work in the informal sector and this sector is still growing. As long as this is the case, expansion of social insurance to broader layers of the population remains an illusion – save for recent attempts to develop dedicated insurance-based mechanisms to reach sizeable parts of those who work in the informal economy.⁹ The non-contributory approach which is characteristic of social assistance may offer an alternative, although this also raises concerns about affordability given the considerable numbers of those who work in the informal sector.

Also, in Africa, the growing view is that social assistance is a government responsibility, and no longer a matter of charity, or as something relegated to the informal forms of social support that have traditionally characterised social and economic survival of African communities and households. This is evidenced by an explicit reflection on the scope and function of social assistance in the ever-expanding number of social protection policies and strategies that are now to be found in a large number of African countries, and the exponential growth in state-executed social assistance transfer programmes in Africa, especially since 2006 – by 2015 no less than 114 such programmes had been recorded.¹⁰

The policy emphasis on social assistance is also reflected in the specific guarantee of social assistance indicated – either directly or indirectly – in a number of (mostly) recent African constitutions,¹¹ and is increasingly accompanied by specific social assistance laws, which give effect to the constitutional guarantee.¹² The constitutional guarantee of social assistance is indeed a growing phenomenon, as also appears from the South African example discussed more fully later

8. Vandenbroucke, Cantillon, Van Mechelen, Goedemé and Van Lancker (2012).

9. See Barrientos (2007: 99).

10. See Dafuleya (2018). See also Sabates-Wheeler, Abdulai, Wilmink, de Groot, and Spadafora (2017).

11. Based on the analysis of one of the authors of this contribution, the constitutions of 14 African countries provide explicitly for either “social welfare” or “social assistance”.

12. Social Assistance Act 2013 (Kenya); Social Assistance Act 2004 (South Africa). See the discussion in Olivier (2019).

in this article. For example, Article 38 of the Tunisian Constitution (2014) stipulates that the state shall guarantee the right to social assistance in accordance with the law.¹³

Several of these constitutional texts emphasise the individual entitlement to social assistance – a central element of a rights-based approach. Other constitutional provisions place an emphasis on the duty of the State to take action. Some constitutions contain provisions that highlight both an individual's entitlement and the duty to provide imposed on the State.¹⁴ Yet, it has also been remarked that in reality, many governments are apprehensive of the fiscal costs and the potential legal challenges that are associated with a rights-based approach.¹⁵ As noted in a 2013 study assessing social protection programmes in sub-Saharan Africa, social assistance schemes or programmes often lack a proper legal mandate.¹⁶

The place of the fundamental right of social assistance

Global standards

Global fundamental rights catalogues such as the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not contain any direct references to the term social assistance. These catalogues formulate a right to social security (Article 22 Universal Declaration and Article 9 ICESCR) and a right to an adequate standard of living (Article 25 Universal Declaration and Article 11 ICESCR). It is as if this latter right recognises the underlying objective of providing a minimum subsistence level without linking it to a general assistance scheme as an instrument. But according to the Committee of Economic, Social and Cultural Rights (CESCR), the right to social security of Art. 9 ICESCR includes an obligation for states to work towards a non-contributory safety net. This not only follows from General Comment No. 9 on the right to social security,¹⁷ but also from the 2018 communication of a complaint procedure in *Marcia Cecilia Trujillo Calero v. Ecuador*, which touched on the lack of retirement provisions in Ecuador for women. In this particular context the CECR held that:

In accordance with their core obligations with regard to the right to social security as established in the Covenant [...], States should provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income. [...]¹⁸

13. Other examples increasingly abound. Article 43 of the Kenyan Constitution (2010) provides that every person has the right to social security and specifies this to include what would typically be covered by social assistance measures: “The State shall provide appropriate social security to persons who are unable to support themselves and their dependents”. (Constitution of Kenya (2010) art 43(3)). Similarly, art 17 of the 2014 Egyptian Constitution stipulates that “[A]ll citizens who have no access to the social security system have the right to social security to ensure a decent life, if they are unable to support themselves and their families in the event of incapacity to work, old age or unemployment”.

14. In particular, the Ethiopian, Kenyan and South African constitutions. See Olivier (2019).

15. See Devereux (2017: 11-32 at 12, 30).

16. Olivier, Adrianarison and McLaughlin (2013: 31).

17. *Infra* section 4.

18. ECSR *Marcia Cecilia Trujillo Calero v. Ecuador*, Case 10/2015, 26 March 2018 Consideration 14.2.

Curiously, the ILO does not have its own instrument containing minimum standards with regard to the scope and architecture of social assistance. The paradigmatic social security convention, No. 102 from 1952, is based on an implicit preference for social insurance, because the minimum standards are linked to the various social risks that are typically covered by social insurance schemes (unemployment, sickness, old age, etc.).¹⁹ Nevertheless, the 2012 Recommendation No. 202 on national floors of social protection does contain some explicit references to social assistance.²⁰ Indeed, the relevance of social assistance for the establishment of social protection floors was highlighted in the General Survey concerning Recommendation No. 202, published in February 2019. In particular, the Survey stressed that, ‘while relief and anti-poverty measures provide some form of protection and constitute an essential component of social protection floors in many countries, securing a life in health and decency for all people requires the establishment of other types of social security measures, such as tax-funded social assistance and adapted social insurance mechanisms enshrined in law which are sustainable, rights-based and provide adequate levels of protection.’²¹

European regional standards

Against this background of the highly developed nature of the general safety net, it is not surprising that the fundamental right to social assistance in Europe is often treated as an independent category. The most profiled in this respect is Article 13 ESC recognising a right to social and medical assistance for persons who have no means of subsistence. The core of Article 13 ensures that that any person who is without adequate resources and who is unable to secure such resources by his own efforts or from other sources, in particular by benefits under a social security scheme, should be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.

Article 13 ESC is formulated as a supplement to the broader Article 12 ESC that relates to the right to social security and is separate from Article 14 ESC that specifically relates to social care. All these rights contribute their own part to the purpose of Article 30 ESC, namely the right to protection against poverty and social exclusion.

In the Charter of Fundamental Rights of the European Union, the right to social security and the right to social assistance are brought together in a single article (Article 34). Also of interest is Article 1 of the EU Charter, which, like Article 1 of the German Constitution, refers to the inviolability of human dignity. This article has been used by the German courts to develop a right to an *Existenzminimum* (see Section 6.1 below.1), but there are also indications that it may have significance in the law-making of the CJEU regarding, among other things, minimum reception standards for asylum seekers.²²

19. Cf. Vonk (2013).

20. Ibid, see paragraphs 8(b) and 9(3). Moreover, the latter provision does not express an exclusive preference for social assistance as an instrument for creating a safety net. Literally: ‘Schemes providing such benefits may include universal benefit schemes, social insurance schemes, social assistance schemes, negative income tax schemes, public employment schemes and employment support schemes’.

21. General Survey concerning the Social Protection Floors Recommendation, 2012 (202), 87.

22. Case C-79/13 *Saciri and others* [2014] ECLI: C:2014:103, in which Art. 1 of the Charter was used to guarantee the adequacy of benefits under the Reception Directive for asylum seekers 2003/9. For an example in which Article 34 of the Charter was used as a direct basis for the interpretation of a legal dispute about the application of EU law, in this case the right to housing for a permanent resident in Italy, see Case C-571/10 *Kamberaj* [2012] ECLI: C:2012:233.

It is interesting to note that the latest catalogue of rights in the EU, the non-binding European Pillar of Social Rights (2017), recognises a right to assistance as part of a broader notion of minimum income protection. Under the title minimum income, principle 14 states that everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. Although it is still unclear what the significance is of this new formulation, it attests to an evolution in thinking towards a broader notion of a minimum income which can be realised through different types of minimum income benefits, not necessarily only by schemes that qualify as social assistance. That is quite a novel approach.

Finally, within the regional European context, the European Convention on Human Rights (ECHR) should not remain unmentioned. This Convention is rapidly gaining in importance for social rights.²³ The right to life (Article 2) and the prohibition of torture and degrading treatment (Article 3) play a role in this. According to the ECtHR, the Convention does not guarantee, as such, socio-economic rights, including the right to claim financial assistance from a State to maintain a certain level of living.²⁴ But this does not mean that, in situations of extreme need, some government obligation to provide protection is totally ruled out.²⁵ In this way, the ECtHR is creating a 'safety net under the safety net' to prevent people from totally falling into the abyss. Where such a fall is imminent and an individual is completely dependent on the government,²⁶ an obligation of state support may come into play. The ECHR is also relevant from the perspective of other fundamental rights, such as the principle of non-discrimination. The much-discussed *Gaygusuz*-judgement of the European Court of Human Rights of 16 September 1996²⁷ is an illustration of this. In this judgment, the Court ruled for the first time that unequal treatment in social security (*in casu*: unemployment assistance for the long term unemployed) solely on nationality grounds constitutes a violation of Article 14 of the ECHR, unless it is justified by very weighty reasons.

African regional standards

The right to social security, and for that matter the right to social assistance, is not specifically protected in the AU's African Charter on Human and Peoples' Rights (1982) (also known as the Banjul Charter; ratified by all 55 AU Member States). Nevertheless, as noted by the African Commission on Human and Peoples' Rights (ACmHPR) in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, this right can be derived from a joint reading of a number of rights guaranteed under the Charter including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled, in addition to be strongly affirmed in international law.²⁸ The ACmHPR further stresses that the right

23. Cf. Koch (2009) and Leijten (2018).

24. *Pancenko v Latvia* Application No 40772/98, Admissibility, 28 October 1999.

25. *Hunde v The Netherlands* Application No 17931/16, Admissibility, 26 July 2007.

26. As was the case in *Case of M.S.S. v Belgium and Greece* Application No 30696/09, Merits and Just Satisfaction, 21 January 2011.

27. *Gaygusuz v Austria* Application No 19371/90, Merits and Just Satisfaction, 16 September 1996.

28. African Commission on Human and Peoples' Rights, *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights* (African Commission on Human and

to social security imposes, amongst others, an obligation on States parties to ensure a minimum level of support and to adopt social assistance measures.²⁹

Similarly, the AU Social Policy Framework argues for the extension of social protection through measures that include publicly financed, non-contributory cash transfers.³⁰ The Framework notes that there is a consensus that a minimum package of essential social protection should cover: basic health care, and benefits for children, informal workers, the unemployed, older persons and persons with disabilities. The idea of a minimum package of support that should be extended to vulnerable persons is also reflected in other AU instruments, notably the Social Protection Plan for the Informal Economy and Rural Workers (SPIREWORK).³¹ In fact, there is a clear tendency for recent AU legal instruments concerning particular vulnerable groups to include social protection, as well as social assistance, as critical components. For example, the AU Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa (2016), among others, stipulates that States' Parties shall ensure that, in the event of incapacity, older persons shall be provided with legal and social assistance in order to make decisions that are in their best interests and promote their wellbeing (Article 5(2)). Moreover, several other (binding) AU instruments also provide for social assistance support, often within the framework of the broader entitlement to social security or protection.

At the sub-regional level, the most prominent attention paid to social assistance is visible in several instruments of the Southern African Development Community (SADC). Its Protocol on Employment and Labour (2014) enjoins each State Party to aim at developing an integrated and comprehensive social protection system which ensures meaningful coverage of all through social protection programmes, including social assistance (Art 11(3)(a)). Article 11(1)(b) provides that persons who are unable to enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.³² Other provisions of the Protocol contain more specific references to social assistance, meant to cover particular contexts. Also, the 2007 Code on Social Security in the SADC provides that everyone in the SADC who has insufficient means of subsistence to support themselves and their dependents should be entitled to social assistance, in accordance with the level of socio-economic development of the particular Member State (par 5.1).

Finally, it is noteworthy to point at the jurisprudence in relation to vulnerability emanating from decisions of the African Commission on Human and Peoples' Rights (ACmHPR) and the African Court of Human and Peoples' Rights (ACHPR) with reference to rights enshrined in the African

Peoples' Rights, 2010), available at: <http://www.achpr.org/instruments/economic-social-cultural/> [last accessed 2 October 2018], at para 81.

29. *Ibid*, at para 82(a). It is noteworthy that per the African Union Executive Council decision, a mandate was given for the development of an additional protocol to the African Charter of Human and People's Rights on the Rights of Citizens to Social Protection and Social Security. The accompanying text of the decision endorses the pursuit of a rights-based approach to social protection and social security for all citizens, aiming at inclusive development that leaves no one behind, through appropriate legal and policy frameworks, complementing the African Charter.
30. CAMSD/EXP/4(I), *Social Policy Framework for Africa* First Session of the AU Conference of Ministers in Charge of Social Development (2008) at para 31.
31. LSC/EXP/5(VIII), *Social Protection Plan for the Informal Economy and Rural Workers 2011-15 (SPIREWORK)* 8th Ordinary Session of the Labour and Social Affairs Commission of the African Union (2011), at paras 10, 27.
32. Similarly, Article 14(b) stipulates that, "Every worker who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence shall be entitled to adequate social assistance to cater specifically for basic needs including medical care".

Charter on Human and People's Rights and in other human rights instruments falling under its jurisdiction. One could say that this jurisprudence mirrors the case law of the ECtHR referred to above, in the sense that it recognises state obligations to alleviate vulnerability in a variety of situations, without actually embracing a general right to social assistance as such. Thus, for example, in applying principles of equality in the enjoyment of rights and freedoms, the Court and Commission have confirmed the operation of the principles in favour of among others indigenous people exposed to prejudicial treatment³³; to persons with a mental disability or judicially interdicted persons owing to their mental health conditions³⁴; and to detained women subject to acts of gender-based violence³⁵; but not in relation to (government) workers voluntarily participating in privatised pensions schemes.³⁶ Also the right to life,³⁷ said to include the right to dignity³⁸ has come into play in the jurisprudence, as has the right to health.³⁹ The Commission held, for example, that the failure to provide basic services such as safe drinking water and electricity and the shortage of medicine constituted a violation of the right to health.⁴⁰ Similarly, the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells, exposed the victims to serious health risks and amounted similarly to a violation of this right.⁴¹

Legal nature of the fundamental right of social assistance

The fundamental right of social assistance, whether or not as part of the right to social security, is a socio-economic human right. Traditionally legal doctrine has considered these rights as mere programmatic instruction norms for the government, not as legally enforceable rights. Nowadays, according to the canon of the international human rights community, all fundamental rights are 'indivisible, interdependent and interrelated'.⁴² If human rights are truly indivisible, then the legal character of social rights should be brought more into line with the legal effect which is generally attributed to civil human rights. But not everyone holds this opinion, and legal doctrine in many countries still does not agree with this ideal. Nonetheless, it is not disputed that fundamental social rights do at least create certain obligations for the government.

What then is the legal nature of these obligations? This question opens the Pandora's Box of national and international theory on fundamental social rights. To avoid confusion, we refer to the approach adopted in the General Comment No. 19 (2008) of the Committee of Economic, Social and Cultural Rights (CESCR), as a legally non-binding yet authoritative source of interpretation.

33. *African Commission on Human and Peoples' Rights v Republic of Kenya* (Application No 006/2012, judgment of 26 May 2017); *The Nubian Community in Kenya v The Republic of Kenya* (Application No 317/2006).

34. *Purohit and Moore v Gambia* (Application No 241/2006).

35. *Egyptian Initiative for Persona Rights and Interights v Egypt* (Application 323/2006).

36. *Dabalarivhuwa Patriotic Front v South Africa* (Application No 335/06).

37. Art 4 of the Charter.

38. *Sudan Human Rights Organisation and Another v Sudan* (2009) AHLRL 153 (ACHPR 2009); Communication 279/2003. Additionally, Art 5 of the Charter provides for the right to dignity and physical and mental integrity.

39. Article 16(1) states that, "Every individual has a right to enjoy the best attainable state of physical and mental health"; Article 16(2) provides that "States parties to the present Charter shall take all necessary measures to protect the health of citizens and ensure that they receive medical attention when they are sick."

40. *Free Legal Assistance Group and Others v Zaire* Communications 25/89, 47/90, 56/91 and 100/93.

41. *Sudan Human Rights Organisation and Another v Sudan* (2009) AHLRL 153 (ACHPR 2009); Communication 279/2003 par 212.

42. Taken from the Vienna Declaration and Programme of Action, endorsed by the UNGA in: GA Res 48/121, World Conference on Human Rights, 20 December 1993, A/RES/48/121.

General Comment No. 19 attempts to establish the effect and the normative content of the fundamental right to social security set out in Article 9 ICESR. In line with the other general comments, General Comment No. 19 also distinguishes between three kinds of obligations: (a) to respect, (b) to protect and (c) to fulfil.

It is also certainly not the case that it is primarily the state that is called upon to take charge of the social security system. On the contrary, the document formulates a hands-off policy as the first obligation for the state. The government must respect non-state support systems; these may not be the subject of negative interventions. This is the duty to respect. Furthermore, existing private and collective social security must be given legal protection by a regulatory and financial framework. This is the duty to protect. General Comment No. 19 only sees a role for the state as a direct provider of social security in situations where people are no longer protected against poverty and the traditional social risks. Obligations relating to this fall under the duty to fulfil. Creating entitlements for everyone at a minimum level is a direct obligation for the government, at least inasmuch as the individual or society can no longer guarantee the safety net.⁴³ This is a fortified government obligation. For extra minimal (additional) protection, the state's obligation is less far reaching: developing a policy framework for social security is sufficient. It is submitted that this fortified government obligation for 'non-contributory schemes or other social assistance measures' is not based on a coincidence; it stems from the role that social assistance fulfils as the last safety net in the system of social security as a whole.

In line with its own tradition, the CESCR has also formulated the minimum core of the right to social security. This minimum core is, *inter alia*, to ensure access to the minimum essential level of social security that is essential for acquiring water and sanitation, foodstuffs, essential primary health care and basic shelter and housing, and the most basic forms of education. Also, access to social security must be ensured on a non-discriminatory basis, especially for disadvantaged or marginalized groups.⁴⁴

Substantive meaning of the fundamental right of social assistance

According to the CESCR, the concept of social assistance is part of the right to social security set out in Article 9 ICESR. But as far as the content of the fundamental right to social assistance is concerned, General Comment No. 19 does not become very concrete; neither do the general comments dealing with other relevant socio-economic fundamental rights.⁴⁵

ILO Recommendation No. 202 on national floors of social protection contains some references to social assistance as an instrument to achieve a minimum level of protection. For example, paragraph 9(3) indicates that social assistance has a role to play here, alongside other methods of income protection such as social insurance and forms of negative income tax. This is a testimony to the existence and the importance of social assistance in achieving a minimum level of protection, but we are still left in the dark as to the substantive meaning of social assistance.

For concrete substantive norms we must therefore leave the global forum and revert to the regional and national level. Below, we focus specially on the ESC which, as already mentioned, formulates an independent right to assistance in Article 13. The supervisory body for the ESC, the ECSR has collected its supervisory findings in a document dating back to 2008: *Digest of the Case*

43. UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security (art. 9), 4 February 2008, at paragraph 50.

44. *Ibid.*, at paragraph 59.

45. Such as General Comments No. 4 (housing), No. 12 (adequate food) and No. 15 (water).

Law of the European Committee of Social Rights.⁴⁶ This Digest also contains an explanation of the interpretation of the right to social assistance set out in Article 13 ESC. It is a ten-page exegesis, not legally binding in the formal sense of the word, but nonetheless an authoritative source of interpretation. African treaty bodies have not (yet) developed a social assistance doctrine as specific as the ECSR; at least not beyond the jurisprudence referred in Section 3 'The place of the fundamental right of social assistance'.

The ECSR has tried to steer clear of the controversial issue regarding the difference between social security and social assistance by using its own definition of social assistance. It thus considers as social assistance benefits for which individual need is the main criterion for eligibility, without any requirement of affiliation to a social security scheme aimed to cover a particular risk, or any requirement of professional activity or payment of contributions. According to the Committee, social assistance must be an individual statutory right, supported by an effective appeal procedure. Furthermore, social assistance should have a universal personal scope of application: every individual is to be covered solely on account of his or her needy situation. The minimum amount of payments is linked to the average income of families in a country. The Committee considers that social assistance is appropriate when the monthly amount of the (basic and/or supplementary) benefits paid to a single person is not clearly below 50 per cent of the so-called medium equivalent income in a country. Social assistance must be provided as long as the need continues. Apart from the training and work requirement, the right to social assistance can only be made dependent on the criterion of need. Reducing or suspending social assistance benefits by means of sanctions can only be in line with the Charter if it does not deprive those concerned of the means of their livelihood and it is possible to appeal against a decision.⁴⁷

A final observation concerns the legal status of foreign nationals. The Committee considers that it is permissible for European states to use minimum periods of residence for the right to equal treatment, but not when it comes to providing emergency assistance to those in need. According to the Committee, emergency assistance should be provided to all, with the understanding that it does not concern the provision of regular minimum benefits, but forms of assistance intended to relieve the emergency situation. The ECSR has issued a number of important rulings in collective complaints procedures about the right to emergency assistance for foreign nationals who do not have legal residence, in particular asylum seekers who have exhausted all legal remedies.⁴⁸

Implementation of the fundamental right of social assistance in Germany, the Netherlands and South Africa

Germany

The catalogue of basic rights in the German constitution does not contain an explicit reference to a right to social assistance. Not long after the formation of the Federal Republic of Germany,

46. Officially referred to as: Council of Europe, *Digest of the Case Law of the European Committee of Social Rights* (European Committee of Social Rights, 2008), available at: <http://www.refworld.org/docid/4a3f52482.html>.

47. For more about this test, see Eleveld (2016).

48. *Defence for Children International v The Netherlands* Application No 47/2008, Committee Decision, 20 October 2009; *Conference of European Churches v The Netherlands* Application No 90/2013, Committee Decision, 10 November 2014; *European Federation of National Organisations Working with the Homeless (FEANTSA) v The Netherlands* Application No 86/2012, Committee Decision, 10 November 2014.

however, the country's Constitutional Court (*Bundesverfassungsgericht*) developed a general right to a guaranteed subsistence minimum (*Garantie des Existenzminimums*).⁴⁹ This unwritten right builds upon two basic rights laid down in Articles 1(1) and 20(1) of the German Constitution. Article 1(1) addresses the inviolable human dignity, which is protected by granting individuals a right to a guaranteed existence minimum. Article 20(1), which formulates the social state principle, has a more programmatic character: it obliges the state to enact legislation which materialises the social rights of the citizens. The central piece of legislation in the area – the German Social Security Code (*Sozialgesetzbuch*), is a central example of the concretisation of this general basic right.⁵⁰

The legal nature of the basic right to a guaranteed subsistence minimum has long been subject of controversy. In the early case law following a judgment from 1951, the Constitutional Court firmly rejected the justiciability of this right by referring to the responsibility of the national parliament to concretise it in subsequent legislation.⁵¹ The judges saw a role for the basic right in court proceedings only in the extreme case of arbitrary shortcomings of the legislature. This stance remained unchanged until a ground-breaking judgment of the Constitutional Court from 2010.⁵² The Court recognised for the first time that the national constitution confers a direct, subjective right to a guaranteed subsistence minimum that can be invoked to support individual claims before courts of justice. The justiciability of the basic right was thus officially recognised, notwithstanding an important limitation. The open character of the right to an existence minimum still requires a respective national legal act that determines the nature and the scope of the state support. Accordingly, judges will not honour individual claims for the provision of social assistance based on this basic right. Instead, the proceedings must be used as a weapon to force the legislature to adopt respective legislation that fulfils certain qualitative criteria. In that sense, the basic right to social assistance conferred by the German constitution can be regarded as a *recht auf recht*, i.e. as right to have one's right confirmed in court.⁵³

The normative content of the right to a guaranteed subsistence minimum has two dimensions.⁵⁴ The first one addresses the physical existence of the individual and covers the expenses necessary for food, clothing, accommodation, heating, hygiene and health. The second dimension is of a socio-cultural character – it aims to ensure the possibility of maintaining interpersonal relationships, as well as a basic level of participation in social, cultural and political life. This normative content must be respected by the legislature when implementing the basic right into social assistance legislation. The amount of social assistance benefits paid is determined in a procedure which calculates the standard needs in an abstract manner (so-called *Regelbedarf*). The 2010 judgment of the Constitutional Court clearly outlines a set of requirements which must be met by the legislature. In the first place, the calculation of the standard needs must be realistic and it must be the outcome of a systematic, transparent procedure. The determination of the standard needs is not a

49. Cf., *inter alia*, Könemann (2005), Banafsche (2015), and Grüner (2009).

50. This relationship is made explicit in § 1(1) SGB I, § 1 (1) SGB II and § 1 (1) SGB XII which create a direct link between the purposes of social assistance and the guarantee of an existence minimum as a component of the protection of the human dignity.

51. BVerfGE 1, 97 (19 December 1951).

52. BVerfGE 125, 175 (09 February 2010).

53. See Mayen (2012) at 1451-1474, 1460 with reference to Enders, 'Die Menschenwürde in der Verfassungsordnung', pp. 501-502 (Tübingen: Mohr Siebeck, 1997).

54. BVerfGE 125, 175 at 223 (09 February 2010).

one-off action – instead, the state is obliged to continuously monitor the scope of granted social assistance and, where necessary, adjust it in accordance with the most recent economic developments. In the second place, the benefit level may not be ‘evidently insufficient’ to address the two dimensions of the basic right. When reviewing the conformity of national legislation with the right to a guaranteed subsistence minimum, the Constitutional Court observes a margin of appreciation which is awarded to the legislature. This margin of appreciation is narrower with regard to the physical dimension of the right and broader in the context of its socio-cultural dimension.⁵⁵

In cases where the adopted legislation does not live up to the qualitative expectations set by the basic right to a guaranteed existence minimum, individuals can invoke their right before a national court. If the judicial review supports the conclusion that some of the requirements described above have not been met, the court can declare the national legal act unconstitutional and impose a deadline on the state to enact new legislation. The Constitutional Court took this step in the above-mentioned 2010 judgment, after reaching the conclusion that the legislature did not apply the statistical model for the determination of the standard needs in a coherent manner. A similar outcome was reached in a subsequent judgment from 2012, where the Court ruled that the social assistance granted to asylum seekers was evidently insufficient, given that the level of benefits had not been revised since 1993.⁵⁶

Interestingly, the impact of the international right of social assistance on the German legal order has been limited. This is partially related to the strong foundation provided by the national constitution. A related explanation is that Article 13 ESC and Article 9 ICESCR are regarded as obligations of the state under international law, meaning that they lack direct applicability in the German legal system. These articles can only be taken into account indirectly, as part of the doctrine of ‘international law friendliness’ of the German Constitution, which allows judges to interpret national legislation in conformity with international obligations only where the German legislature has not explicitly deviated from the international legal provisions. Sporadically, some of the international instruments may be briefly mentioned in national court rulings, without attributing any further importance to their normative content.⁵⁷

The Netherlands

As far as the Dutch Constitution is concerned, we should first establish that a provision on social assistance, or rather, its predecessor in the form of poor relief, is much older than the cluster of fundamental social rights that have been added to the Constitution during the last review in 1983. The first Constitution of 1815 contained an article that entrusts ‘poor relief and the education of poor children’ to ‘the sustained care of the government.’ The background to this provision, which has existed in various formulations up to the constitutional revision of 1983, is the acknowledgement that the government bears primary responsibility for the organisation of poor relief in relation to the church and civic private initiatives. In the 19th century, this primacy was not yet a matter of course. According to the Explanatory Memorandum to the last constitutional revision of 1983, the then existing constitutional clause on poor relief carried the ‘stamp of a bygone period.’⁵⁸ Instead,

55. *Ibid.*, at 225.

56. BVerfGE 132, 134 (20 June 2012).

57. An example can be found in the above-mentioned case concerning social assistance for asylum seekers, cf. BVerfGE 132, 134 at 154 (20 June 2012).

58. Parliamentary papers, TK 1975-1976, 13 873, No. 3, 12.

the right to social assistance had to be formulated in accordance with the principles of the post war social assistance act which was no longer based upon a charitable obligation but upon a right. Article 20 of the Dutch Constitution now reads as follows:

1. It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.
2. Rules concerning entitlement to social security shall be laid down by Act of Parliament.
3. Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to assistance from the authorities.

Note that only the right to social assistance in Article 20(3) of the Constitution is formulated as a subjective right, be it ‘to be regulated by Act of Parliament’. The broader right to social security in 20(2) does not have this privileged treatment.

According to the Dutch courts, Article 20 is not justiciable.⁵⁹ Moreover, Dutch courts are not empowered to test the constitutionality of formal acts of parliament.⁶⁰ Together, this prevents the courts from investigating the meaning of this fundamental right and its possible relevance in the actual dispute. This also applies for Article 20(3) of the Dutch Constitution, even though this clause has been formulated as a subjective right. According to the courts, it is not the Constitution but rather the relevant social assistance act that must serve as a benchmark for the adjudication of rights.⁶¹

The courts show less restraint when it comes to upholding civil and political fundamental rights in the area of social assistance. This subject plays a role, *inter alia*, in the question of whether irregular foreign nationals should receive (emergency) assistance, which is not possible according to the present social assistance act, the *Participatiewet* (Participation Act).⁶² The highest social security court, the Central Appeals Tribunal (*Centrale Raad van Beroep*, CRvB), has formulated an exception for persons in medical need, by referring to the obligations contained in Article 8 ECHR.⁶³ Another exception has been made in relation to children of failed asylum seekers. On 21 September 2012, the Dutch Supreme Court (*Hoge Raad*, HR) concluded that there is an obligation to provide care for these children, on grounds of a whole complex of international and European standards being invoked, without making a formal distinction between civil and political fundamental rights and socio-economic fundamental rights.⁶⁴

The State has the obligation to safeguard the rights and interests of minors who are on its territory, including foreign national minors without a valid residence permit, partly because they cannot be held responsible for the conduct of their family members. This is supported by the case

59. For recent examples CRvB 22 December 2013 ECLI: NL: CRVB: 2013, 2161; CRvB 13 February 2015, ECLI: NL: CRVB: 2015: 364 and CRvB 22 December 2015, ECLI: NL: CRVB: 2015, 4737.

60. Article 120, Constitution.

61. For a recent example see CRvB June 19, 2017, ECLI: NL: CRVB: 2017: 2810: “The court rightly considered that the appellant cannot directly derive the right to assistance from Article 20(3) of the Dutch Constitution. The legislature has regulated the right to assistance in the Participation Act. Whether or not there is a genuine entitlement to assistance should be assessed based on this act. Whether or not the provisions set out in the Participation Act are in conflict with this constitutional provision cannot be assessed, since the court does not, pursuant to Article 120 of the Dutch Constitution, act to review the constitutionality of laws”.

62. Article 112(2) and 16(2) *Participatiewet*.

63. CRvB 29 April 2010, ECLI: NL: CRVB:2010: BM0956.

64. HR 21 September 2012, ECLI: NL: HR:2012:328.

law of the ECtHR, the principles underlying the Reception Directive and the Return Directive and the ESRR and Committee of Ministers' position adopted on the basis of the ESC.

The question regarding the effect of the fundamental right to social assistance in the Dutch legal system came to the fore following the ECSR's opinion of 10 November 2014 in complaint no. 90/2013, *CEC v. the Netherlands*. In this, the Netherlands was accused in very strong terms of violating the ESC, in particular the right to equal treatment in access to social assistance (Article 13(4) ESC) and the right to care (Article 31(2) ESC). According to the government, this opinion of the ECSR should remain without consequences because such opinions have no binding legal force. But the preliminary relief judge of the Central Appeals Tribunal already ordered the municipality of Amsterdam by way of a provisional remedy to provide night care during the winter including a shower, a meal and breakfast.⁶⁵ This refers to the night shelter that, on the basis of the 2015 Dutch Social Support Act, other homeless people also use. The preliminary relief judge considered that even if the provisions set out in the ESC are not justiciable, this does not automatically imply that they are meaningless for the assessment of requests for care. Thus, Article 13 ESC began to gain a foothold in Dutch legal doctrine. Nevertheless, on 26 November 2015, the highest administrative appeal court ruled that municipalities may refuse care and assistance to irregular foreign nationals and may refer them to expulsion centres.⁶⁶ This was contrary to the express opinion of the CESR. The administrative appeals court summarized the status of the relevant ESC-rights as follows:

The [...] provisions [...] of the ESC [...] do not lend themselves for direct application by the courts. Furthermore, decisions of the ECSR are not binding on the contracting parties, so that no direct claims can be derived from them in proceedings such as these. Such decisions are, however, authoritative [...]. Decisions by the ECSR may play a role in the interpretation and application of other - directly applicable - provisions, such as Articles 3 and 8 of the ECHR. However, this does not detract from the fact that in the end the interpretation given by the ECtHR to the latter treaty provisions is decisive.

With this judgment, the Court carefully removed the fundamental right of social assistance from the judiciary's menu, at least for the time being.

*South Africa*⁶⁷

In its entrenched Bill of Rights chapter, the South African Constitution of 1996 recognises that access to social assistance is both an individual right and a state obligation – although, as indicated below, private role-players are not divested from their constitutional duties in this regard. It affirms the universal right to access to social security, including appropriate social assistance for those unable to support themselves and their dependants (section 27(1)(c)), and orders the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights (section 27(2)). It needs to be pointed out that no reference is made in the Bill of Rights to the distinction traditionally drawn between first-, second- and third-generation rights. Social rights thus have exactly the same status as other civil and political rights. The lack of differentiation between these apparent 'categories' emphasises the notion that the rights are

65. Preliminary relief court CRvB 17 December 2014, ECLI: NL: CRVB: 2014: 4178.

66. ABRvSt26 November 2015, ECLI: NL: RVS:2015:3415 and CRvB 26 November 2015, ECLI: NL: CRVB:2015:3803.

67. See, among others, Liebenberg (2014) and Olivier (2003).

inter-related, interdependent and indivisible.⁶⁸ They are in fact capable of enforcement – the legislature or executive can be ordered to take action or be required to consider and arrange for a more equal distribution. The Constitutional Court is specifically empowered to decide that Parliament, or the President, has failed to comply with a constitutional duty (see section 167(4)(e) of the Constitution). In addition, constitutionally-speaking, wide-ranging remedies are at the disposal of the courts. Courts may therefore require the state to review programmes and policies. In certifying the draft text of the 1996 Constitution, the Constitutional Court stressed that the socio-economic rights contained in the Constitution are justiciable, even though the inclusion of the rights may have direct financial and budgetary implications.⁶⁹ In fact, where necessary, the court will also allow a class action to be brought before it, in order to protect the interests of the poor and vulnerable, in particular.⁷⁰ Also, section 167(5) of the Constitution stipulates that the Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force. Also, only the Constitutional Court may decide on the constitutionality of any parliamentary or provincial Bill (section 167(4)(b)).

The South African Constitution contains important provisions regarding the role and importance of international law. The Constitution generally supports an international law-friendly approach. It stipulates that to the extent South Africa has ratified international instruments, it is bound by their standards and provisions (section 231(1)). However, as a rule, any international agreement becomes law in the Republic only when it is enacted into law (i.e., incorporated) by national legislation (section 231(4)). According to the Constitutional Court, incorporation transforms relevant provisions of international agreements into statutory rights and obligations, to be enforced on par with national legislation.⁷¹ Also, section 232 stipulates that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Furthermore, when interpreting fundamental rights contained in the Bill of Rights, courts, tribunals and forums must consider international law. According to the Constitutional Court, the international law referred to includes both binding and non-binding international law

68. See among others *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA*, 1996 10 BCLR 1253 (CC); 1996 10 BCLR 1253 (CC).

69. *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the RSA*, 1996 supra pars 76–78 at 77. See also *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) at para 20.

70. See section 38 of the Constitution. In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzza* 2001 10 BCLR 1039 (A); 2001 4 SA 1184 (SCA) the court commented on the institution of a class action in circumstances where disability grants were suspended unilaterally by the responsible provincial government: “The situation seemed pattern-made for class proceedings. The class the applicants represent is drawn from the very poorest within our society – those in need of statutory social assistance. . . . It is the needs of such persons, who are most lacking in protective and assertive armour that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution’s provisions. And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights”. See also *Mashava v President of the RSA* 2004 12 BCLR 1243 (CC).

71. *Glenister v President of the RSA* 2011 3 SA 347 (CC); 2011 7 BCLR 651 (CC) pars 99, 100, 102, 181. See also *Azanian Peoples Organisation (AZAPO) v President of the RSA* 1996 8 BCLR 1015 (CC); 1996 4 SA 671 (CC) par 26.

– i.e. also international instruments not binding on South Africa.⁷² This has major implications when courts and arbitrators consider the interpretation and application of the constitutional right to fair labour practices and other fundamental rights. Also, there is a constitutional preference for statutory interpretation which is aligned to international law. Section 233 stipulates: ‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

The nature and purpose of the constitutional right to access to social assistance, and its inter-relationship with other fundamental rights, have continually been indicated by the South African Constitutional Court. In *Government of the Republic of South Africa v Grootboom*,⁷³ the Court stated that, if under section 27 ‘[t]he state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state’s obligations in respect of other socio-economic rights.’⁷⁴ Also, when considering the purpose of providing access to social security to those in need, the Court noted that: ‘A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.’

The application of the above constitutional principles in the area of social assistance is clearly illustrated in the *Khosa* case, dealing with the exclusion of permanent residents from the purview of the South African social assistance system.⁷⁵ The court once again stressed the importance of adopting a holistic approach which takes into account the fact that all rights are interrelated, interdependent and equally important, the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness, and other factors that may be relevant in a given case.⁷⁶ The Court noted the operation of the constitutional right to equal treatment (section 9) and held that to exclude permanent residents from entitlement to social assistance would fundamentally affect their human dignity as well.

As is evident from *Khosa* and other Constitutional Court judgments, there is a specific constitutional focus on addressing the plight of the most vulnerable and desperate in society. In particular, where categories of people belonging to deprived and impoverished communities are marginalised or excluded, and the right infringed is fundamental to their well-being, such as appropriate social assistance, or adequate housing, the Constitutional Court appears to be willing to intervene. This is, in particular, the case where the appellants are members of communities that have been historically marginalised and/or excluded or appear to be particularly vulnerable.

72. Section 39(1)(b). See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Government of RSA v Grootboom* 2000 (11) BCLR 1169 (CC). See also *Glenister v President of the RSA* 2011 3 SA 347 (CC); 2011 7 BCLR 651 (CC) par 96.

73. *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC). Cf. Liebenberg ‘The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa’ (2001) 17 *South African Journal on Human Rights* 232.

74. *Ibid*, para 35.

75. *Khosa and Others v Minister of Social Development and Others* 2004 6 BCLR 569; 2004 6 SA 505 (CC) at para 40.

76. *Ibid*, paras 43-44.

Yet, as far as the constitutional standard to be met is concerned, the Court has consistently rejected the adoption of a ‘minimum core’ approach, and has in fact emphasised that the constitutional yardstick is that of reasonableness – i.e. whether, given the context concerned, it could be said that the measures (whether legal or administrative) were indeed reasonable.⁷⁷

Finally, the Constitutional Court has made it clear that both state and non-state actors bear responsibility for giving effect to the fundamental rights enshrined in the Constitution. From Constitutional Court jurisprudence, it would appear that the state’s duty to realise the right to access to social security and to social assistance may differ according to whether the ability of those affected to realise the right is absent or not. While this principle still has to be concretised in the area of social assistance, the Court has confirmed this in other areas. For example, where the ability to afford, for instance, adequate housing exists, the state’s primary obligation is not that of direct provider, but of ‘unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance.’ For those who cannot afford to pay, issues of development and social welfare are raised.⁷⁸ The point is that state policy needs to address both these groups, and that the poor are particularly vulnerable and that their needs and, therefore, require special attention. This was forcefully brought home in another judgment, where the Constitutional Court assumed that flood victims left homeless have a constitutional right to be provided with access to housing. In *Minister of Public Works v Kyalami Ridge Environmental Association*,⁷⁹ the Court had to deal with the erection of temporary transit housing on state land for the victims.

Given the progressive nature of both the South African constitutional provisions and the constitutional jurisprudence outlined above, the South African Constitutional Court does not have to rely much on the international fundamental right of social assistance. Nevertheless, it has to be borne in mind that the Court’s emphasis on social security and in particular social assistance must be seen against the background of a desire to align the Constitution with basic human rights principles as developed in international doctrine. Nevertheless, it is also clear that, to date, the Court has not determined the specific content of the right to social assistance. Also, given the approach adopted by the Constitutional Court in other matters, it is doubtful whether an individual could lay claim to a specific form, or quantum, of social assistance.⁸⁰

The Court will at least, so it seems, review existing policies, programmes and laws against a (broad) constitutional standard, and may order the legislature to adopt, or adjust, existing legislation if this were to be found not to be appropriately aligned to the constitutional right to access social assistance (using the reasonableness criterion). In addition, the Constitutional Court in *SANDU v Minister of Defence*⁸¹ held that a litigant may not bypass available legislation covering a particular matter and rely directly on the constitutional provision: the case should in the first place be based on any legislation enacted to regulate the right – i.e. the provision of the applicable law should be challenged on constitutional grounds if it is alleged that the law does not comply with the constitutional prescripts.

77. It needs to be added that this persistent refusal is even more questionable following the ratification of the ICESCR by South Africa in 2015.

78. *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) at para 36.

79. 2001 7 BCLR 652 (CC); 2001 3 SA 1151 (CC) at para 52.

80. To the same effect, see the Constitutional Court judgment in *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

81. [2007] 9 BLLR 785 (CC).

Conclusions

In light of the analysis set out above, we can conclude that the fundamental right of social assistance has gained normative recognition, both at an international level and at the national constitutional level. On the basis of this article, which includes a study of two regions and three countries, it is probably too early to conclude that there is a 'universal recognition' of this right. Nonetheless, of importance here is the broad synergy discernible in the normative context not only transgressing through, but also operating above the national constitutional jurisdictions. Legal doctrine has embraced the notion of a government obligation to work towards a universal safety net, which can be accessed by individuals by means of a right. The global, European and the African instruments and standards all suggest that such a right should be recognised, even if this result has been achieved via interpretation by supervisory and monitoring institutions in the form of a derivative right to social assistance. In this context, we referred to a 'fortified government obligation', which stems from the role that social assistance fulfils as the last safety net in the system of social security as a whole.

Yet, it must be borne in-mind that this emerging normative consensus merely exists on an abstract level. Not only have rights-based social assistance schemes not emerged everywhere in reality, but also, as soon as the notion is to be translated in more concrete standards, the consensus starts to falter. There are various ways states can work towards the objective of providing minimum income protection to the most vulnerable citizens. The fundamental right to social assistance does not really express a preference for a specific method. This is not even the case in Europe, where the ECSR has developed its own doctrine on the interpretation of art. 13 of the ESC. This doctrine embodies a broad definition of social assistance and includes a number of principles dealing with the nature of the right (individual statutory right), the minimum level of benefits (50 per cent of the median income equivalent), sanctions (not full) and the personal scope of application (universal). Nevertheless, it is still a far cry from prescribing a specific architecture for the social assistance system. In our view, this is only for the good. From a human rights perspective, detailed system prescriptions are unnecessary and a wide margin of discretion allows for flexibility for countries to adjust their programmes to their own needs and political preferences. More concrete international standards should rather be an ambition from the point of view of further global or regional social integration; for example, as part of an EU effort to introduce a minimum income floor⁸² or as part of the ILO standard-setting activities.

Another nuance to the universal character of the right to social assistance pertains to the second element raised in our research question: what are the legal consequences if this right is invoked before the national courts? It has become apparent that, in the national legal sphere, the application of the fundamental right of social assistance can vary greatly. While Germany and South Africa have developed a thriving constitutional doctrine relating to basic needs of the most vulnerable groups in the society, the fundamental right to social assistance in the Netherlands lies almost entirely dormant. Here, European standards are knocking on the door, but so far, they have not been allowed except on the back of the ECHR or some other provision with direct effect.

Further, it has become apparent that courts are reluctant to base direct and concrete individual entitlements to financial assistance or other types of government support solely on the fundamental

82. Such as Council Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems [1992] OJ L 245/46. No further binding measures have been taken within the EU framework as of yet.

right to social security. The doctrine clearly has embraced a rights-based approach and does underpin the importance of a legal framework, but these are requirements that are imposed on the legislature and/or on the executive when they design their social assistance schemes, not anchors for allowing individual financial claims through the judiciary. As such, a rights-based individual entitlement, read together with the state's obligation to act, is generally restricted to ensure that structural adjustments to social assistance design, regulation and execution are made. If this is the case for the two countries (Germany and South Africa) that have been specifically selected for the far-reaching powers of their constitutional courts and their thriving constitutional doctrines on social human rights, the same is likely to be true for other countries where such powers and doctrines are lacking. Nevertheless, this legal situation must not be confused with a lack of justiciability, at least not necessarily. As the German and the South African cases show, courts are prepared to apply a constitutional test to social assistance legislation on the basis of individual claims. In our view, the importance of the fundamental right to social security is, indeed, not the possibility of enforcing concrete benefits in individual court cases, but the possibility for an individual to ask the court to address structural shortcomings in the existing architecture of social assistance schemes. In this way, courts are placed in a position to critically review a system in light of the fundamental right to social assistance and other human rights requirements. The German and South African constitutional courts have taken up this role in an admirable manner. In contrast, the Dutch courts have failed to give meaning to the fundamental right, with the result that, in the Netherlands, essential values underlying the social assistance system are not addressed or recognised as constitutional human rights.

While the German and the South African constitutional courts have not refrained from giving concrete orders to the legislature, ultimately, real progress depends on the political will to cooperate in this process. Thus, for example, in South Africa, in light of the relevant constitutional provisions and developing jurisprudence, it could be expected that the government would roll out a comprehensive programme to realise a general safety net for all those people who are left unprotected by the present system. Yet, at present, it is not doing so. Such failure may be signalled by the courts or even actively repudiated, but it cannot be amended without the co-operation of the legislature and government. The classical disconnect between constitutional rights and practice is a more stubborn phenomenon in some parts of the world than in others.

A few comments concerning further research into social assistance as a human right can be made. It is acknowledged that this research should be extended both in scope (covering more regions and countries) and in depth. In particular, the question needs to be addressed of how the human rights approach to social assistance can be reconciled with the inherent features of the designs of many social assistance schemes, such as the exclusion of non-nationals, the prevalence of administrative discretion, the low levels of benefit, civil society and third party involvement and harsh entitlement conditions.

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