



**UNIVERSITY OF CAPE TOWN**

**Faculty of Law**

**Commercial Law Department**

**A Critical Tax Theory Approach to Income Tax Relief for Black-Middle Class Taxpayers Contributing to the Support of Family**

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## **Declaration**

I **ZANDILE NDEBELE** hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

Signature

Date :

## **Dedication**

This work is dedicated to my son, Andile.

## Acknowledgments

My biggest thank you goes to my supervisors Associate Professors Tracy Gutuza and Elena Moore. Thank you for the hard work you both put in so that I successfully complete this thesis. You have both been supportive beyond what most supervisors would be. You encouraged me throughout the writing process and constantly checked in. Associate Professor Gutuza, thank you for always encouraging me with your words especially when you would say “you write so well, Zandile” during meetings. Those words always encouraged me even when the content was lacking in many parts of the thesis.

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The strength to complete this thesis came from the word of God. Isaiah 43:1-2 says:

*But now thus says the Lord,  
He who created you, O Jacob,  
He who formed you, O Israel:  
Fear not, for I have redeemed you;  
I have called you by name, you are mine.  
When you pass through the waters I will  
be with you; and through the rivers, they shall not  
overwhelm you;  
when you walk through the fire you shall not be burned,  
and the flame shall not consume you.*

Amen!

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## **List of Acronyms and Abbreviations**

|      |  |
|------|--|
| EITC | Earned Income Tax Credit                               |
| NIDS | National Income Dynamics Study                         |
| OECD | Organisation for Economic Co-operation and Development |
| U.S  | United States  |
| STE  | Social Tax Expenditures                                |

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## **Abstract**

The purpose of this thesis is to examine income tax relief measures for taxpayers with dependants in South Africa. This research has found that taxpayers who are black and middle-class are likely to make contributions to the support of household member and non-household member dependants. This is also supported by literature from the United States, where black middle-class individuals are found to make significant contributions towards the support of their kin when compared to other races. This support which a black middle-class taxpayer gives to their dependants entwines with their ability-to-pay in tax law. A taxpayer's ability-to-pay is reduced by the contributions made to their dependants. For this reason, it is relevant to examine the intersectionality of race, class, and family circumstances with tax law. The black middle-class are an interesting demographic in South Africa and are referred to as a "precariat class" because of the uncertainty and insecurity linked to this class. In 2021, the black middle-class carry a burden to contribute towards the support of dependants. This burden was imposed on them first by apartheid policies which excluded black South Africans from receiving social welfare assistance and then by racial and economic inequalities in post-apartheid South Africa. Through discussions on social justice and tax equity, the thesis finds a basis for income tax relief measures for taxpayers with dependants in South Africa. The introduction of such a tax system would allow the black middle-class taxpayers to take advantage of the income tax benefits. The definition of family and the definition of a dependant in allowing for the income tax benefits will be important. These definitions should reflect the meaning of family as understood by South African taxpayers. That way, the disparate impact, and unintended consequences of the income tax benefits on those that use these benefits are avoided to an extent.

## CHAPTER 1 INTRODUCTION AND BACKGROUND TO STUDY

*I wish to plant a seed of doubt in your mind that will cause you to begin to question concepts like tax equity, that otherwise seem normal, natural, or plainly incontestable...my further hope is that some among us will begin to offer ideas about what makes a tax system fair- ideas that will embrace not only fairness to the privileged among us, but to the oppressed as well.<sup>1</sup>*

### 1.1 Introduction

Taxpayers with equal incomes are treated as a homogenous group in tax law despite the racial, cultural, and socio-economic differences in post-apartheid South Africa. This is the basis of the horizontal equity and ability-to-pay principles of tax law. In terms of these principles, taxpayers earning the same income have the same ability-to-pay. The traditional approach to tax equity has been criticized as being focused on economic differences and as a result taxation “performs a sanitizing and a screening function...it effectively forecloses consideration of non-economic forms of difference...”<sup>2</sup> Tax equity excludes race, ethnicity, gender or sexual orientation in the determination of fairness despite these forms of difference being the basis for “..invidious discrimination that already imposes heavy burdens on its victims.”<sup>3</sup> Tax law and policy in South Africa marginalizes and ignores the transformative potential of law for historically disadvantaged groups. The impact and intersection of race, class, identity or cultural values and practices on one group which has been historically subordinated and another which has been historically privileged should allow for a more critical perspective on tax law and policy.

On this basis, the thesis makes proposals for tax credits or deductions targeted at middle-class taxpayers who support dependants. In particular, the black middle-class taxpayer may be overlooked by redistributive tax and social policies because of their levels of income. However, it is demonstrated in the thesis that the black middle-class taxpayer may support many kin from their income. As explained in the background in 1.4 below, this has to do with the broad economic oppression experienced by black South Africans through colonial and apartheid regimes in addition to the specific apartheid social welfare and tax policies which neglected black families. This encouraged greater interdependency between individuals in black families, extended-family structure most common in black families and the practices of *ubuntu* and

---

<sup>1</sup> A C Infanti ‘Tax Equity’ 2007 55 *Buffalo Law Review* 1191, 1196.

<sup>2</sup> Infanti (note 1 above)

<sup>3</sup> *Ibid*

living customary law. Thus, the black middle-class taxpayers' ability to bear the income tax burden is significantly affected by the high dependency ratio within their families which has resulted from historical colonial practices as well as ongoing cultural obligations.

This chapter explains the research problem, research questions and places the research in context by explaining the background to how black individuals came to carry a greater responsibility towards their families than other races in South Africa. This explanation contributes to the larger discussion on why tax credits or deductions for taxpayers with dependants are needed and how such credits or deductions can be designed to achieve social justice. Throughout the thesis the terms kin support, inter-household/interfamily transfers, private transfers, contributions, transfers, and support are mutually interchangeable.

## **1.2 Problem statement**

In 1987, the Margo Commission was the first to recommend that the tax system was not the appropriate vehicle for providing relief to individuals who contributed towards the support of their dependants.<sup>4</sup> The commission recommended the repeal of the dependants' rebate because tax law should not have been used to achieve social objectives.<sup>5</sup> They further recommended that although they recognised the need for the dependants' rebate, the rebate was subject to abuse by taxpayers attempting to reduce their tax liability.<sup>6</sup> Up to that point, income tax legislation had provided relief in respect of contributions made by a taxpayer towards the support and maintenance of a dependant. Section 13(2)(c) of the Income Tax Act of 1941 and section 14(2)(e) of the Income Tax Act of 1925 respectively provided rebates and abatements for taxpayers who supported dependants. These rebates and abatements were deductible from normal tax payable. The social welfare system remained as the only vehicle for providing relief directly to taxpayers with dependants after the tax relief deductions and rebates were repealed. The social welfare system in South Africa has not managed to satisfactorily address the inequalities of the past as there are still high levels of poverty, income inequality and wealth inequality in South Africa. Other low-income countries such as Mozambique, middle-income countries like Mauritius and high-income countries such as the United States of America (U.S)

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<sup>4</sup> First Report of the Commission of Inquiry on the Tax Structure of South Africa, 1987 discussed in detail in section 4.4 of the thesis.

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

and Canada which have social protection programmes, also provide relief to taxpayers supporting dependants through income tax legislation. Should South Africa also use the income tax system as a vehicle to reduce poverty, income inequality and wealth inequality? Such relief through the tax system should be targeted such that taxpayers in the lower- and middle-income<sup>7</sup> categories benefit the most. But race and class remain profoundly entangled in South Africa.<sup>8</sup> A discussion of race and class is what makes critical tax theory relevant in this thesis. Amongst other categories which differentiate taxpayers, critical tax theory is centred on the intersection of tax law, race, and class. Will it be fair, just, and reasonable to expect that relief be granted to all taxpayers who contribute towards supporting a dependant despite ability-to-pay? Or will it be fair, just, and reasonable to have a threshold for a taxpayer to qualify for this relief? What does social justice, distributive justice, and tax equity demand when a certain group of taxpayers and their families have simultaneously been divided by colonialism and apartheid and yet made interdependent?<sup>9</sup> Apartheid forced individuals in black families to rely on the most common traditional form of clustering, the extended family.<sup>10</sup> Individuals with a wage income have an obligation to give support to family members.<sup>11</sup> This is the concept of “black tax” which is used to refer to the financial support black professionals give to immediate and extended family in South Africa.<sup>12</sup> The current South African Income Tax Act 58 of 1962 gives limited relief to taxpayers who contribute towards the support of their dependants in the form of medical aid contributions credit

### **1.3 Statement of purpose**

This research primarily aims to examine the need for tax relief for taxpayers who contribute to the support of a dependant in South Africa. All taxpayer’s providing kind support, irrespective of the taxpayers’ race and class, with the black middle-class taxpayers being major

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<sup>7</sup> I acknowledge that the categories middle-income and middle-class are not interchangeable, but I suggest there is significant overlap for the purposes of this research.

<sup>8</sup> M Hunter *Race for Education* (2019) 175.

<sup>9</sup> *Ibid*

Hunter explores the term “black tax” and states “That the principle behind the “black tax”-family support-resonates so strongly in Umlazi shows how capitalism and apartheid simultaneously divided black family members and yet made them interdependent.’

<sup>10</sup> S Mosoetsa *Eating from One Pot: The Dynamics of Survival in Poor South African Households* (2011) 25.

<sup>11</sup> Hunter (note 7 above) 175.

<sup>12</sup> The concept is explained in detail in section 1.4 below.

beneficiaries of such tax relief, which is an outcome that is supported under the critical tax theory approach adopted in the thesis. This research is in part a challenge to the position of the Margo and Katz Commissions which recommended that such tax relief should be repealed. The Margo Commission's recommendations were that expenses incurred by a taxpayer for the support of a dependant had to be disregarded for tax purposes because it was a social objective and that taxpayers abused these provisions to reduce their tax liability. However, considering the high levels of poverty and inequality in South Africa, tax relief for taxpayers supporting dependants proves necessary. The research shows that a black-middle class taxpayer's ability-to-pay is likely "reduced by the number of mouths a taxpayer feels legally and morally obligated to support."<sup>13</sup> This justifies the need for tax relief for taxpayers who contribute to the support of a dependant. The research adopts a critical tax theory approach to unpack the intersectionality of tax law, race, class, and extended families. Critical tax theory primarily enquires into the impact tax laws have on traditionally disempowered groups and the need to recognise taxpayer differences and identity characteristics. The secondary aim of the research is to validate that to achieve social justice, distributive justice, and tax equity, maybe an income tax system which provides for relief to taxpayers for the costs they incur in supporting dependants is ideal.

#### **1.4 Background of the research problem**

On the 12<sup>th</sup> of June 2018, ABSA, a South African bank, tweeted a #blacktaxpoll on twitter which got 10 898 votes. The poll inquired about the meaning of black tax. The poll asked whether "black tax" was a source of anxiety, source of pride, a financial burden, or a responsibility. The results from the twitter poll were as follows: source of anxiety (10.6%), source of pride (10.5 %), a financial burden (43.7%) and a responsibility (35.1%).<sup>14</sup> On their blog, ABSA defined "black tax" as a financial responsibility which black professionals have towards family members.<sup>15</sup> However, these responses are not mutually exclusive as "black tax" can be a source of anxiety, a source of pride, a financial burden and a responsibility to the respondents. In grey literature, "black tax" has been defined as extra money black professionals

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<sup>13</sup> B I Bittker 'Federal Income Taxation and the Family' (1975) 27(6) *Stanford Law Review* 1389, 1447.

<sup>14</sup> <https://twitter.com/search?q=absa%20black%20tax%20&src=typd> accessed on 10 July 2018

<sup>15</sup> Planning for your financial future while paying 'Black Tax' <https://blog.absa.co.za/category/money-matters/planning-for-your-financial-future/> Accessed 3 March 2020

give to support their extended families.<sup>16</sup> Moyo in the ABSA blog states that in light of inequality and unemployment, the expectation to provide for family places great pressure on young black people.<sup>17</sup> Mangoma and Wilson-Prangley also define “black tax” as ‘a pressure to care financially for people in a broad family or kin network, while at the same time trying to build sustainable wealth.’<sup>18</sup> However, there are some individuals who do not view “black tax” as a burden, rather “black tax” is a duty done as an expression of gratitude to family members who sacrificed for one to get an education.<sup>19</sup> However, one twitter user was not impressed with the four options provided under the #blacktaxpoll and stated that apartheid should have been an option as “black tax” is a result of apartheid. “Black tax” is indeed a result of the discriminatory welfare and tax policies of apartheid and a result of poverty, inequality and lack of generational wealth which affected black South Africans after apartheid. Thus, “black tax” can be a responsibility or burden but the role of apartheid in engineering interdependency among black South African families is germane to “black tax.”

In his popular book, Mhlongo explores whether “black tax” is a burden or *ubuntu*. *Ubuntu* is explored in detail in chapter 3 but in summation *ubuntu* is expressed by the phrase *umuntu ngumuntu ngabantu* and translates into “a person is a person through other people.”<sup>20</sup> The book is based on personal family experiences of giving and receiving “black tax” amongst a group of popular black South Africans. In his personal family account, Mhlongo states that as the black middle-class moved away from the traditional way of life, they distanced themselves from communal family values and demonised assisting family by referring to it as “black tax.”<sup>21</sup> Mhlongo describes how he benefitted from “black tax”<sup>22</sup> when a cousin who had been

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<sup>16</sup> Ratlebjane, M, 2015. No title. Mail & Guardian, 30 October. Retrieved from <https://mg.co.za/article/2015-10-29-how-black-tax-cripples-our-youths-aspirations>. Accessed on 30 October 2020.

<sup>17</sup> *Ibid.*

<sup>18</sup> Mangoma & A Wilson-Prangley ‘Black Tax: Understanding the Financial Transfers of the Emerging Black Middle Class’ (2018) 36(1) *Development Southern Africa* (note 53 above) 2.

<sup>19</sup> *Ibid.*

<sup>20</sup> R Bolden. Ubuntu. In: D Coghlan & M Brydon-Miller (eds) *Encyclopedia of Action Research* (2014)2. D Cornell ‘uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa’ (2009) 20(1) *Law and Critique* 20 (1):43-58 (2009)111

<sup>21</sup> N Mhlongo *Black tax: Burden or Ubuntu* (2019) 86.

<sup>22</sup> *Ibid*

Mhlongo says that the responsibility to take care of family is not a tax and says that the term “black tax” has negative connotations.

taken care of by his father later paid for his university registration and monthly allowance.<sup>23</sup> “Black tax” is a cycle of family responsibility as he later states that when his cousin was retrenched he (Mhlongo) took on the responsibility of paying for his cousin’s son’s education.<sup>24</sup> Mhlongo states that the term “black tax” should be replaced with the term “family upliftment.”<sup>25</sup> Makholwa story in Mhlongo’s book also displays a similar viewpoint and states that caring for kin is a practice of *ubuntu* and compassion.<sup>26</sup> Mncube explores the concept of “black tax” further in the book and from his own family experiences concludes that “black tax” is not a burden but rather it is an investment into family.<sup>27</sup> In this study, the working definition of “black tax” which will be used is that of Mhlongo who defines “black tax” as a family responsibility or family upliftment which individuals have towards their immediate and extended family members. The bedrock of this working definition is the concept of *ubuntu* which speaks to the interconnection and responsibility individuals have for each other.

The financial transfers made between family members are intra- and inter-generational. These are termed “intergenerational transfers” and means “resources transferred from one generation or age group to another.”<sup>28</sup> These transfers are made by parents to their children and by adult children to their parents. These transfers are also made by adult children to their siblings and to other extended family members belonging to an older, same, or younger generation. The transfers can be in the form of cash payments, payment of rent or the payment of bills.

We now turn to the reasons behind “black tax” and the high intergenerational interdependency in black South African families. Although the discussion begins with the apartheid system, the discriminatory policies of colonialism are also discussed to contextualise interdependency in black South African families.

Apartheid in South Africa was a system that decreed the separateness of races and that supported the deliberate exploitation and exclusion of those classified as non-white by the South African government from enjoying the full spectrum of political, economic and social

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<sup>23</sup> Mhlongo (note 21 above) 88.

<sup>24</sup> Mhlongo (note 21 above) 89.

<sup>25</sup> *Ibid.*

<sup>26</sup> Mhlongo (note 21 above) 100.

<sup>27</sup> *Ibid* 108.

<sup>28</sup> N Folbre & D Wolf ‘The Intergenerational Welfare State’ (2012) *Population and Development Review* 36, 37

rights.<sup>29</sup> Apartheid created a system where those classified as “whites” ( “whites”) economically advanced, as they were the main beneficiaries of affirmative action during this period.<sup>30</sup> The opportunities that those classified as black were given for social, entrepreneurial and economic development were fewer and inferior to the opportunities whites had during this period of racial exclusion.<sup>31</sup> Modiri states that the legacy of oppression is still reflected in post-apartheid South Africa through racial divisions prevailing in power, income, wealth and education.<sup>32</sup> Modiri further states that direct and indirect racial marginalisation of black people in South Africa continues systemic exclusion and encourages white supremacy and white privilege to persist and reproduce.<sup>33</sup> In earlier literature, the legacy of apartheid in South Africa post- 1994 was discussed and it concluded that poverty and inequalities in South Africa are systemic and deeply ingrained.<sup>34</sup> Poverty is highly concentrated among black people<sup>35</sup> because historical disadvantages and the limitations on access to land resources. It is within this context that the systemic nature of oppression and exclusion needs to be recognized and the country must introduce systems that counteract the social and economic injustices and segregation brought on by white political domination and racial capitalism enforced through unsustainable systems like apartheid.<sup>36</sup>

In post-apartheid era, South Africa remains an unequal country. During the parliamentary debate on reconciliation and nation-building in 1998, then deputy president Thabo Mbeki described South Africa as a country of “two nations, the one black and the other white.”<sup>37</sup> He stated in his speech that the first nation in South Africa was white and relatively prosperous, with an access to “a developed economic, physical, educational, communication and other infrastructure.”<sup>38</sup> The second nation, he stated, although larger, was black and poor, living

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<sup>29</sup> I Frye *et al.* Inequality in South Africa. In: H Jauch and D Muchena (eds). *Tearing Us Apart: Inequalities in Southern Africa*. (2011) 266.

<sup>30</sup> M Mbatha ‘Sharing Wealth’ (1994) 11(3) *Indicator South Africa* 43, 46.

<sup>31</sup> S Terreblanche *A History of Inequality in South Africa, 1652-2002* 2ed (2002) 396.

<sup>32</sup> J M Modiri ‘The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in Post-Apartheid South Africa’ (2012) 28 *SA Journal on Human Rights* 405, 406.

<sup>33</sup> *Ibid* 406.

<sup>34</sup> Terreblanche (note 31 above) 371.

<sup>35</sup> J May & J Govender ‘Poverty and Inequality in South Africa’ (1998) 15 *Indicator South Africa* 53, 55.

<sup>36</sup> Terreblanche (note 31 above)5.

<sup>37</sup> Hansard House of Assembly Debates 29 May 1998, col. 33.

<sup>38</sup> *Ibid* col. 33.

under “grossly underdeveloped economic, physical, educational, communication and other infrastructure.”<sup>39</sup> The cycle of unequal racial distribution of income and wealth is one of the structural or systemic consequences of apartheid that still persists in the democratic era.<sup>40</sup> The National Income Dynamics Study (NIDS) measured wealth in post-apartheid South Africa through individual and household questionnaires in five waves. Data analysis from Wave 4 of the survey indicated that in the 2014-2015 period for every R1 held by a black household, a white household held R22.84 and the racial wealth gap was R622 446.<sup>41</sup> In 2016, it was estimated that 90-95 per cent of all wealth is owned by the wealthiest 10 per cent of the population who receive an income of 55-60 per cent and the middle class who make up 40 per cent of the population, own 5-10 per cent of all wealth whilst earning 30-35 per cent income.<sup>42</sup> For the period 2014-2015, white households in South Africa held more wealth than black households which held 4 per cent of the wealth average of the white household.<sup>43</sup> The differences in income and wealth amongst racial groups can therefore make race-neutral tax laws have a disparate impact across racial groups.<sup>44</sup> With this data in mind, it is impossible not to have a critical tax theory approach to tax law provisions.

In the data analysed from the NIDS survey, the size of the racial wealth gap was the “absolute difference between the median household’s wealth amongst populations based on racial groupings.”<sup>45</sup> The NIDS data displays that South Africa has a large racial wealth gap and

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<sup>39</sup> *Ibid* col. 33.

<sup>40</sup> M Leibbrandt ‘Trends in South African Income Distribution and Poverty since the Fall of Apartheid’ (2010) OECD Social, Employment and Migration Working Papers No. 101 Available at <http://www.oecd-ilibrary.org/> (Accessed: 10 July 2017).

<sup>41</sup> S Mbewe & I Woolard ‘Cross-Sectional Features of Wealth Inequality in South Africa: Evidence from the National Income Dynamics Study.’ (2016) SALDRU Working Paper No. 55 [http://www.nids.uct.ac.za/images/papers/2016\\_12\\_NIDSW4](http://www.nids.uct.ac.za/images/papers/2016_12_NIDSW4) (Accessed: 14 September 2017) 10.

<sup>42</sup> Wealth gap: Tax SA super-rich to boost middle class- recommendations (2016) <https://www.biznews.com/undictated/2016/10/10/wealth-gap-tax-sa-super-rich-to-boost-middle-class-recommendations/>

A Orthofer ‘Wealth Inequality in South Africa. Evidence from Survey and Tax Data’ (2016) REDI3X3 Working Paper No. 15 Available at <http://www.redi3x3.org/papers> (Accessed: 5 November 2017).

<sup>43</sup> Equality Report 2017/2018 Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa available at <https://www.sahrc.org.za> accessed on 20 February 2019.

<sup>44</sup> T S Neubig Disparate racial impact: tax expenditure reform needed CEP Policy brief March 2021 available at SSRN 3831961 (2021).

<sup>45</sup> *Ibid*.

growing race-wealth inequality. Even with its status as an upper middle-income country, South Africa is highly unequal in terms of the distribution of income and wealth.<sup>46</sup> This status quo is an effect of apartheid.

Fiscal redistribution in the form of tax expenditures is necessary to transform South African society and reduce income and wealth inequality. In 2015, social grants and remittances were important in reducing the income inequality gap between the bottom and top deciles in South Africa<sup>47</sup> In comparison, labour market income was the largest contributor to income inequality in the country.<sup>48</sup> Racialised inequality is typical of the South African labour market. White individuals earned significantly higher wages than the rest of the population and their mean real earnings between 2011 and 2015 was R24 646.<sup>49</sup> Black individuals earned the lowest wages amongst the population groups and their mean real earnings between 2011 and 2015 was R6 899.<sup>50</sup> The top 20 percent of the population holds 68 percent of the income whilst the bottom 40 percent hold 7 percent of the income.<sup>51</sup> South Africa remains a highly unequal country even though social grants and remittances reduce income inequality amongst races.

Whilst notwithstanding the cultural ethos of *ubuntu* and interdependency, which will be discussed in more detail later in the thesis, the policies during apartheid in South Africa shaped the need for support practices in black families and contributed to the increased need for interdependency within black communities and families. Apartheid legislation in South Africa shaped support practices in black families and contributed to interdependency within black communities and families.<sup>52</sup> Interdependence in communities has been highly linked to third world and developing countries.<sup>53</sup> Within the South African context, there is interdependence in families within black communities because they share resources such as money, shelter and

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<sup>46</sup> May & Govender (note 35 above) 54.

<sup>47</sup> Inequality Trends in South Africa A multidimensional diagnostic of inequality available at <http://www.statssa.gov.za/>.

<sup>48</sup> *Ibid*

<sup>49</sup> Inequality trends in South Africa report (note 796) 61-62.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid*.

<sup>52</sup> Mosoetsa (note 10 above) 25.

<sup>53</sup> E Costandius 'Independent and Interdependent Concepts of Self: A Meeting of Worlds' (2009) 41(2) *Acta Academica* 158, 161.

food<sup>54</sup> and there is a movement to households with more stable income.<sup>55</sup> Reciprocity is expected and responsibility for kin becomes a lifetime obligation.<sup>56</sup> For example, reciprocity exists in these family setups when a parent provides for their child and an expectation arises that the child will provide for their parents and younger siblings later in life.<sup>57</sup> Kamwangamalu exploring *ubuntu* in South Africa, explains that interdependence is characterised by people who have strong connections to each other with great involvement in each other's lives.<sup>58</sup> He explains further that "members of a household are bound for life in cycles of expectations and obligations to each other and to their extended families, friends, tribes, and clans."<sup>59</sup> These interdependent relationships among kin can be formal or informal. In South Africa, there is a large population which depend on support from relatives and others on social welfare grants.<sup>60</sup> Bozalek states that the conditions and patterns of interdependency in black South African families have been shaped by apartheid policies thus the relationships of care, and, I add, relationships of support, should be understood within the effects of apartheid such as migratory labour, poverty, discrimination and the lack of access to educational, health and welfare facilities.<sup>61</sup> Button *et al* state that whilst white individuals enjoyed support and care from the market and state during apartheid, the responsibility of support and care among black people was pushed to their kin.<sup>62</sup>

The welfare system was racialized. Van Nierkerk states that in the apartheid state, the economic privileges of the white minority were preserved, and they enjoyed "unrestricted entitlement" to benefits under private and public welfare whilst black people were poor and had

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<sup>54</sup> V Bozalek 'Contextualizing Caring in Black South African Families' (1999) 6(1) *Social Politics: International Studies in Gender, State and Society* 85, 95.

<sup>55</sup> Mosoetsa (note 10 above) 24.

<sup>56</sup> *Ibid.*

<sup>57</sup> Bozalek (note 54 above).

<sup>58</sup> N M Kamwangamalu 'Ubuntu in South Africa: A Sociolinguistic Perspective to a Pan-Black Concept' (1999) 13(2) *Critical Arts* 24,30.

<sup>59</sup> *Ibid* 30.

<sup>60</sup> Seekings, J., & Moore, E. (2013). Kin, market and state in the provision of care in South Africa (CSSR Working Paper No. 327). Retrieved from Centre for Social Science Research website: [http://www.cssr.uct.ac.za/sites/default/files/image\\_tool/images/256/files/WP%20327\\_0.pdf](http://www.cssr.uct.ac.za/sites/default/files/image_tool/images/256/files/WP%20327_0.pdf)

<sup>61</sup> Bozalek (note 54 above) 95.

<sup>62</sup> K Button, E Moore & J Seekings 'South Africa's Hybrid Care Regime: The Changing and Contested Roles of Individuals, Families and The State After Apartheid' (2018) 66(4) *Current Sociology Monograph* 602, 607.

“circumscribed entitlements” to welfare benefits.<sup>63</sup> The welfare policies were introduced during apartheid to aid poor whites and used the “deserving” approach to give benefits.<sup>64</sup> Looking at family policy for South African families, Rabe argues that the inability to cope with the needs of individuals in South African families is not a new phenomenon because the apartheid state placed demands and pressures on families, especially black families.<sup>65</sup> A shift in policy in the late 1970’s saw the state become a measure of last resort after all avenues of support had been exhausted and this policy change shifted the burden of supporting kin to individuals.<sup>66</sup> This residual system of welfare was applied to black families whilst whites enjoyed an institutional welfare system.<sup>67</sup> A residual system of welfare uses means-tests and targets the poorest in the community whilst in an institutional system of welfare everyone qualifies for assistance, not just the poorest in society. Thus, apartheid created interdependency in black families by limiting welfare benefits, forcing families to assume responsibility for individuals and shaping the current social welfare policies where the state assumes responsibility for individuals after the family has failed. This phenomenon is based in an existing economic oppressive apartheid and colonial history where restrictions on work, mobility and residential arrangements existed.

To worsen the condition of black South Africans, discriminatory tax policies were introduced for black people and these policies affected the working black taxpayers and their families. The complex relationship between whites and black people shaped the history of taxation in South Africa. Taxation served an “administrative, disciplinary and political” role in addition to the economic function.<sup>68</sup> Landis states that discrimination between whites and black people was more apparent under the income tax which applied to income earning individuals in the

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<sup>63</sup> R van Nierkerk ‘The Evolution of Health and Welfare Policies in South Africa: Inherited Institutions, Fiscal Restraint, and the Deracialization of Social Policy in the Post-Apartheid Era’ (2003) 88 (4) *The Journal of Black American History* 361, 363.

<sup>64</sup> *Ibid* 364 Seekings & Moore (see note 60).

<sup>65</sup> M Rabe ‘Family Policy for all South African Families’ (2017) 60(5) *International Social Work* 1189.

<sup>66</sup> van Nierkerk (note 63 above) 366.

<sup>67</sup> L Patel ‘Getting it Right and Wrong: An Overview of a Decade of Post-Apartheid Social Welfare, (2008) 20 (2) *Practice: Social Work in Action* 71, 72.

<sup>68</sup> T Ndlovu ‘Fiscal Histories of Sub-Saharan Africa: the Case of South Africa’ Public Affairs Research Institute (PARI), University of the Witwatersrand Working Paper Series: No.2, July 2017.

Republic.<sup>69</sup> She states that the black male was liable for tax on their gross annual income if it was over £180 but received no deductions or allowances whilst white taxpayers received deductions in income tax.<sup>70</sup> Employed black people became liable to pay income taxes under the Natives Income Taxation and Development Act of 1925, Native Income Taxation Act of 1962<sup>71</sup> and later the Bantu Taxation Act of 1969. However, the tax system was separate and unequal.<sup>72</sup> Black people were taxed on the same rate as whites on incomes which were lower than whites, coloureds and Indians.<sup>73</sup> The employed black people who paid income taxes also did not get deductions for supporting family whilst whites, coloureds and Indians got deductions.<sup>74</sup> Whilst the income tax law introduced abatements, deductions and credits through the Income Tax Acts of 1914, 1917, 1925 and 1941 for taxpayers with dependants, black people were not granted deductions and credits as their tax regime was governed by the Natives Income Taxation and Development Act of 1925, the Native Income Taxation Act of 1962 and later the Bantu Taxation Act of 1969. In apartheid South Africa, the black individual and family did not receive relief from the taxation system.

It must be stated that even before the discriminatory apartheid policies, colonial policies had already laid the foundation for discrimination. The tax policies during the British colonial system were not only discriminatory against black taxpayers, but they disregarded the structure of the black family. Discussing the hut tax and poll tax<sup>75</sup> during the British colonial system, Redding states that:

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<sup>69</sup> E S Landis 'South African Apartheid Legislation: Extension, Enforcement and Perpetuation' (1962) 71(3) *The Yale Law Journal* 437, 456.

<sup>70</sup> Landis (note 69 above) at 457.

<sup>71</sup> *Ibid*

<sup>72</sup> *THE WORLD; Tax-Table Apartheid available at* Milt Freudenheim and Henry Giniger <https://www.nytimes.com/1983/04/03/weekinreview/the-world-tax-table-apartheid.html?auth=link-dismiss-google1tap> Accessed on 10 March 2020.

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid*

<sup>75</sup> The hut tax was imposed in the 1870's. A wife would be given an arable piece of land in her husband's name and he had to pay 10 shillings per year. The hut tax was used to finance British administration of Black affairs.

There were features of Black family structure that many whites deplored and hoped to change to make them more like the emerging ideal for white (especially British colonial) families...<sup>76</sup>

The collection of the hut tax and poll tax continued despite the administrator's knowledge of the fact that the tax laws did not reflect the structure of the black families paying the tax.<sup>77</sup> The hut tax, used to finance the colonial administration, which was paid in cash only, affected black families lodging them deeper into poverty.<sup>78</sup>

Although the racialized apartheid social welfare policy fostered greater interdependency in black families and income tax policy discriminated against black taxpayers from getting deductions for their families, I argue that the lack of intergenerational wealth, inequality, socially engineered black poverty and the practice of *ubuntu*, has maintained the interdependence which exists in South African black families. The individual owes their existence to the community and the individual's welfare is dependent on the community. In turn, the individual has an obligation to provide for the needs of their kin. *Ubuntu* is recognised when "black tax" is defined as "financial *obligations* that the black middle-class have towards their extended family members as a result of continued inequality caused by the apartheid legacy."<sup>79</sup> *Ubuntu* places an obligation on the individual and South African case law has applied *ubuntu* and held that "*customarily* the child who is financially able to do so, is under a financial obligation to maintain his needy parent."<sup>80</sup> The courts show that there is perception that black kinship relationships are binding and create moral claims and obligations which one cannot escape from.<sup>81</sup> Forte has described black kinship as a moral order which is structured around generalised reciprocity and involving mutual obligations of support between relatives.<sup>82</sup> Sagner and Mtati state that the obligations of support cannot be ignored and to do so is not only

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<sup>76</sup> S Redding 'Legal Minors and Social Children: Rural Black Women and Taxation in the Transkei, South Africa' (1993) 36(3) *Black Studies Review* 46, 56.

<sup>77</sup> *Ibid* at 55.

<sup>78</sup> R Boswell 'Tax systems are inhumane. It's time this changed' available at <https://theconversation.com/tax-systems-are-inhumane-its-time-this-changed-68239> Accessed on 10 March 2020.

<sup>79</sup> N N Magubane 'Black tax: the emerging middle-class reality' MBA dissertation. University of Pretoria 2016

<sup>80</sup> *Fosi v Road Accident Fund* 2008 (3) SA 560 (C)

<sup>81</sup> M Fortes *Kinship and the Social Order: The Legacy of Lewis Henry Morgan*. (1969) 242.

<sup>82</sup> A Sagner & R Mtati 'Politics of Pension Sharing in Urban South Africa' (1999) 19 *Ageing and Society* 393, 400.

“morally outrageous but tantamount to the denial of the very kinship relationship itself.”<sup>83</sup> In addition to *ubuntu*, interdependency in black families is a result of the lack of intergenerational wealth and high levels of inequality which are a legacy of apartheid. Magubane also defines “black tax” as “a deeper societal level of discrimination, and continued inequality because of the legacy of apartheid that the majority of South Africans still face.”<sup>84</sup> This definition shows that the legacy of apartheid which are inequality and lack of generational wealth has strengthened interdependency in black families by placing great pressure on individuals to support themselves and their extended kin from their income.

Despite the effects of socially engineered interdependency and the past discriminatory income tax legislation, the black middle-class individual is presumed to have the same ability-to-pay with their white middle-class counterparts because of their education, professional status, and income levels. With the role of *ubuntu*, lack of intergenerational wealth, inequality and a racialised past, it is no surprise that in post-apartheid South Africa, the black middle-class households have strong economic connections to other households. Through apartheid economic policies, the black middle-class household has had different historical trajectories in the ability to accumulate wealth advantages acquired by other races whilst carrying the responsibility to provide for kin.<sup>85</sup> It can be argued that black middle-class taxpayers’ ability-to-pay, is restricted by past injustices in income and wealth distribution and by familial financial obligations to immediate and extended kin. In a progressive income tax system, a measurement of the ability-to-pay of the individual which does not take into account the dependency payments is not truly reflective of ability-to-pay, from a critical lens.

In addition to greater interdependency, the black middle-class household begins with an “initial asset deficit” perpetuated by poorer backgrounds marked by student debt, lack of generational wealth support or intergenerational resource transfer.<sup>86</sup> The black middle-class individual is structurally disadvantaged and has limitations to their upward mobility.<sup>87</sup> It is not denied that

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<sup>83</sup> *Ibid* 405.

<sup>84</sup> Magubane (note 79 above) 1.

<sup>85</sup> R Southall. *The New Black Middle Class in South Africa*. (2016) 180.

<sup>86</sup> *Ibid* 175. Southall bases his argument on the data collected from the Income and Expenditure Survey carried out by Statistics South Africa.

Also see Special Report: “black tax” Huffington Post Online. 12 July 2017 Available at <http://www.huffingtonpost.co.za> Accessed on 21 October 2017.

<sup>87</sup> Southall (note 77 above) 175.

the black middle-class have benefitted from affirmative action policies, but this has not weakened the connection to their economically disadvantaged family members.<sup>88</sup> The Triple Jeopardy research into the black middle-class estimates that the middle-class individual earns a net income of between R5 600 and R40 000 per month.<sup>89</sup> But, Ndinga-Kanga argues that a net income of R40 000 per month in a black middle-class household which has to remit is not at par with other races who enjoy their income from a young age.<sup>90</sup> Thus, the black middle-class individual does not have the same ability-to-pay with individuals from other races because of the need to make financial contributions to their extended families.

Making financial contributions to extended family impacts on the saving and investment ability of the black middle-class, hence increasing their vulnerability. Although “black tax” is income redistribution<sup>91</sup> and helps in alleviating poverty among less economically advantaged family members, its negative impact on the black middle-class has been studied. Di Falco and Bulte describe this as the dark side of social capital in a study conducted in KwaZulu-Natal.<sup>92</sup> They define social capital as “norms that enhance the incentive compatibility of non-contractual or legally enforceable exchange.”<sup>93</sup> They state that in black societies, kinship relationships make up social capital and that the obligations arising from the kinship relationships are a “tax” which reduces household income and savings.<sup>94</sup> They call this the family tax and they find that sharing income has negative effects especially on higher income earners.<sup>95</sup> They further find that the financial support an individual gives or receives from the kinship network depends on the income of the individual relative to other members of the kinship network.<sup>96</sup> Squires conducts

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<sup>88</sup> M Ndinga-Kanga Towards an understanding of ‘black tax’ and the black middle class Available at [www.dailymaverick.co.za](http://www.dailymaverick.co.za) Accessed on 18 November 2020.

<sup>89</sup> *Ibid.*

“black tax” in black middle-class households has been measured through remittances in other studies. See A Mangoma & A Wilson-Prangley ‘Black Tax: Understanding the Financial Transfers of the Emerging Black Middle Class’ (2018) 36(1) *Development Southern Africa*.

<sup>90</sup> Ndinga-Kanga (note 88 above)

<sup>91</sup> Mhlongo (note 21 above).

<sup>92</sup> S di Falco & E Bulte ‘A Dark Side of Social Capital? Kinship, Consumption, and Savings (2011) 47 (8) *Journal of Development Studies* 1128, 1142.

<sup>93</sup> *Ibid*

<sup>94</sup> di Falco & Bulte (note 92 above) 1143.

<sup>95</sup> *Ibid*

<sup>96</sup> *Ibid*

a study of kinship tax and how it affects the decisions made by young entrepreneurs in Kenya.<sup>97</sup> He states that in developing countries, individuals have the pressure to share economic resources with extended family and this kinship tax is distortionary.<sup>98</sup> He defines the kinship tax as “an additional constraint which specifies a minimum level of net transfers, given an agent’s income.”<sup>99</sup> He states that the key to understanding the distortions caused by altruistic transfers between households with familial and social ties distort an individual’s economic decisions.<sup>100</sup> An interesting finding by Squires is that education and earning ability increased the level of kinship tax one must pay.<sup>101</sup> This is a finding like di Falco and Bulte’s who found that the level of income relative to other family members determined the giving and receiving of support to the kin network. These two studies demonstrate that sharing resources with kin can be a barrier to saving and investment and ultimately wealth accumulation.

If “black tax” is distortionary, it then can be argued that tax law ought to recognise that black middle-class taxpayers have a lesser ability-to-pay in comparison to taxpayers from other groups. A black middle-class taxpayers’ ability-to-pay is indeed reduced by the “number of mouths that the taxpayer feels legally and morally obligated to support.”<sup>102</sup> Utz states that fair taxation should have regard to the ability-to-pay principle.<sup>103</sup> The ability-to-pay principle entails that the taxpayer has capacity to bear the tax burden.<sup>104</sup> Income has been universally accepted as the best measure of ability-to-pay. Grassi posits that even when income is used as a measure of ability-to-pay, the taxpayer’s personal and family circumstances which reduce the net amount and limits the taxpayers’ capacity to contribute to the public expenditure should be considered.<sup>105</sup> Other jurisdictions such as the United States, Canada and Mozambique discussed in Chapter 6 provide tax relief for personal and family circumstances such as

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<sup>97</sup> M Squires ‘Kinship Taxation as an Impediment to Growth: Experimental Evidence from Kenyan Microenterprises’ Working Paper, 1

<sup>98</sup> *Ibid*

<sup>99</sup> *Ibid* 5.

<sup>100</sup> *Ibid*.

<sup>101</sup> Squires (note 97 above) 21.

<sup>102</sup> Bittker (note 13 above) 1447.

<sup>103</sup> S Utz ‘Ability to Pay’ (2002) 23 (3) *Whittier L. Rev.* 950.

<sup>104</sup> *Ibid*.

<sup>105</sup> C M Grassi *Status and impact of the ability-to-pay principle in the ECJ's case law concerning tax benefits based on personal and family circumstances CFE Working Papers series No. 52* CFE Working Papers Available at the website of the Centre for European Studies [www.cfe.lu.se](http://www.cfe.lu.se) Accessed on 10 May 2020.

university fees paid for a person who qualifies as a dependant of the taxpayer. In South Africa, the ability-to-pay principle homogenizes taxpayers based on income earned in a year of assessment and excludes other factors which reduce the taxpayer's ability-to-pay. The current tax position does not take into cognisance the complex nature of racial, economic, and cultural circumstances that a taxpayer who is black and middle-class would face in comparison to a "similarly situated" or horizontally equal white middle-class taxpayer. A subtle difference between two middle-class taxpayers involves the greater obligations of support on a black middle-class person due to culture and socio-economic conditions of immediate and extended kin within the black family and household which are socially engineered through colonial histories.

Progressive taxation has been a measure of equity. As theories of taxation developed, progressive personal income taxation was justified as the application of ability-to-pay as those with higher incomes are taxed more. Thus, income earned in the year of assessment is the measure of the fairness of a tax system and has been the index of equity used in South Africa through progressive personal income taxation. For the 2019 year of assessment (1 March 2018-28 February 2019), individual income tax rates range from 18 percent for amounts below R195 850 to 45 percent for amounts above R1 500 001.<sup>106</sup> Finding the best measure of ability-to-pay in personal income taxation has been problematic due to the differing opinions on whether to use income, consumption or wealth to measure taxpayers' ability-to-pay.<sup>107</sup> The index chosen by a Government can be based on what the society in question sees as equitable and fair.<sup>108</sup> South Africa has opted for income as an index of equity regardless of the cultural and socio-economic conditions affecting individuals' ability to bear the tax burden equally with those the tax law deem as their equals based on the income index.

Of importance too in South Africa, is the household which is a structure for the distribution and transfer of income.<sup>109</sup> The recognition by the tax system that the imposition of tax should consider differences among families requires examination. Past research concluded that "a tax system cannot be fair to individuals unless it takes into account the differences in ability-to-

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<sup>106</sup> <http://www.sars.gov.za>

<sup>107</sup> Utz (note 103 above).

<sup>108</sup> R A Musgrave 'In Defense of an Income Concept' (1967) 81 (1) *Harvard Law Review* 45.

<sup>109</sup> Biyase, M., Tregenna, F. (2016). Determinants of remittances in South Africa. Cape Town: SALDRU, University of Cape Town. SALDRU Working Paper Number 176/ NIDS Discussion Paper 2016/3.

pay that result from the way that resources are shared within families of different sizes and types.”<sup>110</sup> It is trite that individuals and families are taxed based on their ability-to-pay in income tax law.<sup>111</sup> It has been accepted in literature that the ability-to-pay increases with income and decreases with the size of the family unit and the number of dependants supported.<sup>112</sup> Then, a dependency exemption is an acceptance of this theory as it considers the differences in the ability-to-pay “based on the number of taxpayer’s dependants.”<sup>113</sup>

This thesis is an interdisciplinary approach to law and social science. Tax law scholarship continues to contribute to an intersectional approach to close the gap between tax law and the social structure.<sup>114</sup> San Juan cites Schumpeter who stated that “the kind and level of taxes are determined by the social structure, but once taxes exist they become a handle, as it were, which social powers can grip in order to change this structure.”<sup>115</sup> Bernandi *et al* state that social structure is the “idea of an ordered or organized arrangement of elements.”<sup>116</sup> Martin and Lee define social structure as “patterning in social relations that have some sort of obduracy.”<sup>117</sup> They go on to state that the term “structure” can refer to two things. On a macro level, it can refer to “abstract organization of reciprocally defined social categories that are seen to comprise some social whole.”<sup>118</sup> On a micro level, the term “structure” can refer to “configurations of concrete relationships among individuals without reference to a notion of a larger societal

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<sup>110</sup> Taxation of the Family Testimony before the House Ways and Means Committee available at <https://www.urban.org> accessed on 10 May 2020.

<sup>111</sup> L Burns & R Krever. Individual Income Tax. In V Thuronyi (ed) *Tax Law Design and Drafting*. (1998) 542  
Also see J A Pechman & G V Engelhardt ‘The Income Tax Treatment of the Family: An International Perspective’ (1990) 43(1) *National Tax Journal*.

<sup>112</sup> *Ibid* Pechman & Engelhardt (note 111 above).

<sup>113</sup> C Garrison Lepow ‘Teenagers, Twenty Somethings, and Tax Inequality: A Proposal to Simplify the Age Requirements of the Dependency Exemption’ (2016) 19(4) *New York University Journal of Legislation and Public Policy* 797, 798.

<sup>114</sup> E A San Juan ‘The Distributive State and the Function of Tax Expenditures’ (2018) 71(3) *Tax Lawyer* 673, 678.

<sup>115</sup> J A Schumpeter ‘*The Crisis of the Tax State*’ In R Shweder (ed) *The Economics and Sociology of Capitalism* (1991 )

<sup>116</sup> F Bernandi, J J Gonzalez & M Requena ‘The Sociology of Social Structure’ In B. Bryant & D. Peck (eds) *21<sup>st</sup> Century Sociology: A Reference Handbook* (2007) 162, 162.

<sup>117</sup> J L Martin & M Lee ‘Social Structure’ In James D. Wright (ed) *International Encyclopedia of the Social & Behavioral Sciences* (2015) 713, 715.

<sup>118</sup> *Ibid* 715.

totality.” Martin and Lee explain the duality of social structure and culture. Structure and culture place expectations on individuals such as the expectation on an adult child to provide financially for aging parents.<sup>119</sup> The introduction of subsidies for taxpayers with dependants in income tax law is a recognition of the intersectionality of tax law with structure and culture in families.

Despite the need for deductions and credits for especially black taxpayers who contribute to supporting their dependants, it must be emphasised that the tax system needs to have a neutral effect on citizens. According to Galvin, tax policy should be a system which is blind to gender and colour because the assumption of a democratic ideal is a society with equal opportunity for all.<sup>120</sup> But, a departure from this position can be justified by critical tax theory. Critical tax theory is an investigation of how tax law intersects with race, class, and family circumstances.

### **1.5 Research questions**

The research question which flows from the research problem, statement of purpose and the background to the research problem is: **Should South African income tax law provide relief to taxpayers for the costs they incur when they support a dependant, and if so, how should such an income tax expenditure system be designed?**

To elaborate on the research question above, the following sub- research questions have been formulated:

1. Do black middle-class taxpayers have a greater responsibility than other taxpayers to provide financial support to individuals within their family?
2. How do we account for variance in support made by individuals to their kin and what causes financial support given by individuals to their families to vary?
3. How do we appropriately consider in tax law, family responsibility in the evaluation of an individual’s ability-to-pay income taxes, accounting for the sharing of income within the family?
4. How have other countries designed their income tax systems to recognise the family responsibilities and costs of supporting dependants within the taxpayers’ family?

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<sup>119</sup> *Ibid* 715

<sup>120</sup> C O Galvin ‘Taking Critical Tax Theory Seriously--A Comment’ (1998) 76 (5) *North Carolina Law Review* 1749, 1750.

5. What could make the tax system a better vehicle for providing relief to taxpayers in comparison to the social welfare system?
6. Will the introduction of relief for black middle-class taxpayers contribute to social justice, poverty alleviation and democratic transformation?

### **1.6 Rationale and significance of study**

The rationale for this research were the conversations about “black tax” I had with family members, friends, and colleagues. In the early stages of the research, ABSA had a twitter thread where it asked whether “black tax” was a responsibility or a burden. The responses of the thread were interesting, and this informed my own thought process as I began the work of defining what “black tax” is for the research. However, my thinking went beyond “black tax” and I questioned whether there was a group of people who felt the ‘burden’ of the “black tax” more. That is, would there be a greater expectation on a graduate to support their immediate and extended family than there was on their sibling who did not have a university education and just got by. Hence, because my interactions were mostly with university colleagues and fellow legal practitioners I decided to focus on the black middle-class. At some point, I began to think beyond what the “black tax” was and who had a greater responsibility to support kin. I began to think of ways tax law and policy intersected broadly with race and class and narrowly with “black tax.” As I read the literature, I discovered that South African income tax law once had an inclusive approach to family as it provided rebates and deductions to taxpayers with dependants who were immediate or extended family. I also discovered that other jurisdictions still provide credits and deductions to taxpayers with dependants who may be immediate or extended family. These other jurisdictions had social welfare programmes but still used the income tax system to give taxpayers with dependant’s credits and deductions. The interesting aspect was the definition of a dependant. Some jurisdictions broadly defined the term dependant for income tax purposes such that a taxpayer could claim a credit or deduction for any dependant (not only a nuclear family member) they supported from their income.

### **1.7 Definition of key terminology**

#### ***a) Social justice and distributive justice***

Stack and Cronje suggest that the principle of equity should be interpreted in line with the broader principles of social justice as taxes should not only be found fair in terms of the ability-

to-pay principle and the equity of sacrifice but in terms of their ability to reduce economic inequalities.<sup>121</sup> Taxes should redistribute income and wealth to reduce economic inequalities.

The link between social justice and taxation is relevant in the examination of tax relief for taxpayer's who support dependants. But the concept of justice needs to be unpacked. Rawls conceptualises justice as fairness.<sup>122</sup> He investigates justice as one of the many virtues of social institutions or practices.<sup>123</sup> Justice involves the removal of arbitrary differences and the setting-up of a balance between competing claims within the structures of the social institution.<sup>124</sup> In tax law and policy, justice is in the form social justice, distributive justice, and equity. Every society is however just in its own way. There is no universal form of justice, social justice, or equity. After apartheid, South Africa's hope in structural transformation rested in the concept of social justice. In *A Theory of Justice*, Rawls writes that principles of social justice are needed to assign rights and duties in the "basic institutions of society" and for determining the "appropriate distribution of the benefits and burdens of social cooperation."<sup>125</sup>

The concept of justice has not been easy to define in law.<sup>126</sup> Taite states that in tax policy, social justice entails that those with "greater means and who receive greater benefits of tax policy should be responsible for a greater weight of the tax burdens."<sup>127</sup> She maintains that doing so would allow a shift of tax policies towards the middle- and lower-income taxpayers and rebuild the taxpayers in these demographics.<sup>128</sup> This way, tax policies do not exacerbate income and wealth inequality which have disadvantaged the poor and middle-class taxpayers.<sup>129</sup> Taite identifies a two-pronged approach to achieve social justice in tax law and policy.<sup>130</sup> Justice is achieved if burdens and duties in a tax system are allocated according to a taxpayer's income

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<sup>121</sup> E M Stack & M Cronje *The Taxation of Individuals and Companies* (1996) 3.

<sup>122</sup> J Rawls 'Justice as Fairness' (1958) 67(2) *The Philosophical Review* 164, 166.

<sup>123</sup> *Ibid*

<sup>124</sup> *Ibid*

<sup>125</sup> W E Afield 'Social Justice and the Low-Income Taxpayer' (2019) 64 *Vill. L. Review* 347

<sup>126</sup> *Ibid* 12.

<sup>127</sup> P C Taite 'Exploding Wealth Inequalities: Does Tax Policy Promote Social Justice or Social Injustice?' (2014) 36 *W. New Eng. L. Rev.* 201, 202.

<sup>128</sup> *Ibid* 218.

<sup>129</sup> Taite (note 127 above) 202.

<sup>130</sup> *Ibid* 205.

and wealth and through wealth taxes.<sup>131</sup> This is in essence horizontal and vertical equity. The discussion is further elaborated in the following section.

The archaic and flawed view that tax law is about the relationship between the taxpayer and the revenue authority has been challenged.<sup>132</sup> Boyd and Young state that this view ignores the redistributive and expenditure functions of the tax system.<sup>133</sup> Distributive justice through the tax system emerged with the welfare state.<sup>134</sup> The redistribution of income through progressive tax rates where those who earn higher incomes pay more taxes became the norm in the welfare state. So, the tax system has been used for the advancement and articulation of issues of justice.<sup>135</sup> Abreu states that it is not surprising that “tax is at the heart of the inquiries about the meaning of justice.”<sup>136</sup> She links her theory of justice to distributional equity and states that the tax system is largely used to redistribute wealth.<sup>137</sup> When used in this way, the tax system is a means to reverse existing inequities. Porcano maintains that to assess the fairness of a distribution, there needs to be a consideration of what is deserved and what is received by an individual.<sup>138</sup> Other individuals or the group determine what is deserved and what is received by an individual.<sup>139</sup> In that way, the social, economic and political values of a society are articulated through the tax system.<sup>140</sup> The principles of equity and justice adopted by the welfare state show the importance of the tax system in correcting inequalities and injustices.<sup>141</sup> Boyd and Young further state that the use of tax deductions and tax credits in place of grants for families makes the tax system a chief public policy instrument.<sup>142</sup>

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<sup>131</sup> *Ibid*

<sup>132</sup> S B Boyd & C F Young ‘Feminism, Law and Public Policy: Family Feuds and Taxing Times’ (2004) 42(4) *Osgoode Hall Law Journal* 545, 554.

<sup>133</sup> *Ibid*.

<sup>134</sup> R Joao Sergio ‘Distributive Justice Through Taxation: European Perspective’ (2006) 80(2) *Jurisprudencija* 80, 81.

<sup>135</sup> *Ibid*

<sup>136</sup> A G Abreu ‘Tax counts: Bringing Money-law to Latcrit’ 2001 78(4) *Denver University Law Review* 575, 578.

<sup>137</sup> *Ibid* 577.

<sup>138</sup> T M Porcano ‘Distributive Justice and Tax Policy’ (1984) 59(4) *The Accounting Review* 619, 620.

<sup>139</sup> *Ibid*

<sup>140</sup> Abreu (note 136 above) 578. Also see M E Komhauser, *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*’ (1998) 76 *North Carolina Law Review* 1609, 1627.

<sup>141</sup> Infanti (note 1 above) 1242.

<sup>142</sup> *Ibid*.

## ***b) Race in South Africa***

South Africa's apartheid system relied on racial segregation and race categories to give and to withhold benefits. The Population Registration Act 30 of 1950 identified three racial categories which were white, native, and coloured. In terms of section 1(x) of the Act, a native was "a person who is in fact or is generally accepted as a member of any aboriginal race or tribe of Africa." The apartheid laws were imprecise in defining the racial categories.<sup>143</sup> The Employment Equity Act 55 of 1998 identifies "black people" as a "generic term which means Africans, coloureds and Indians." Although race has been accused of perpetuating and institutionalising apartheid "group think" and identity, others find that racial categories and apartheid-era classification still matters when determining transformative policies.<sup>144</sup> Erwin states that the "eliminating racial categories from research may limit social scientists' ability to expose unequal and unjust practices."<sup>145</sup> Posel states that the division of South African society into white, Indian, coloureds and Africans has been normalized and the racial categories have emmeshed themselves into other lived classifications of class and status.<sup>146</sup> The racial categories used in this research are white, Indian, coloured and African. The National Income Dynamics Study Wave 5 collects data using these racial categories.

For this research, racial categories, based on apartheid era classifications, continues to matter for projects of social justice and building a transformative society. Redistributive policies in both the U.S and South Africa are shaped by racial inequalities between and among groups. Racial cleavages and racial overtones dominate redistributive policies because of the history of apartheid in South Africa.

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<sup>143</sup> D Posel 'Race as Common Sense: Racial Classification in Twentieth-Century South Africa' (2001) 44(2) *African Studies Review* 87, 103

<sup>144</sup> D Ncayiyana 'The vexed question of race-based admission to medical school' (2012) 102(4) *South African Medical Journal* 193,193.

<sup>145</sup> K Erwin 'Race and race thinking: reflections in theory and practice for researchers in South Africa and beyond' (2012) 79(1) *Transformation: Critical Perspectives on Southern Africa* 93, 96

<sup>146</sup> Posel (see note 143 above) 90.

### c) *Black middle-class in South Africa*

The conceptualization of middle-class varies in several studies. However, a substantial size of black South African's in post-apartheid are now considered middle-class.<sup>147</sup> The growth of the black middle-class in post-apartheid South Africa has been accredited to affirmative action measures in favour of blacks, occupational upward mobility and better access to education.<sup>148</sup> This section of the population has been referred to in literature as the "black middle-class" or "African middle-class."<sup>149</sup> Although there is no consensus on the definition of the black/African middle-class, this class has been defined and measured in sociological and economic literature in terms of level of education, level of expenditure, profession, occupation, level of affluence, standard of living, level of income, lifestyle patterns and consumption choices.<sup>150</sup> Ndletyana also considers being middle-class as a "subjective cultural phenomenon" that influences a person's way of life and directs them to adopt certain values and worldviews.<sup>151</sup> In *Class in Soweto*, the respondent's defined their "middle-ness" by their lifestyle, type of clothing, places of entertainment, car model and brand of beers.<sup>152</sup> In the surveys and interviews, individual experiences influenced the responses to how one perceived middle-class status in Soweto.<sup>153</sup> No correlation was made between the middle-class identity and occupations during the interviews. The middle-class identity was given where a person could afford a certain lifestyle such as going to mid-week dinners without struggling financially and this is termed "affordability" as a sign of class.<sup>154</sup> Affordability is defined in *Class in Soweto* as the "ability to consume and maintain a lifestyle."<sup>155</sup> In their study of middle-class black Carribeans in the United Kingdom, Rollock *et al* state their awareness to the fact that presumptions cannot be made about a fixed and homogenous black identity when studying the

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<sup>147</sup> R Mattes 'South Africa's Emerging Black Middle Class: A Harbinger of Political Change?' (2015) 27(5) *Journal of International Development* 665, 685.

<sup>148</sup> J Seekings & N Natrass *Class, Race and Inequality in South Africa* (2005) 12.

<sup>149</sup> Southall (note 77 above).

<sup>150</sup> *Ibid.* Also see N Mabandla *Lahla Ngubo: The Continuities and Discontinuities of a South African Black Middle Class* (2013). Also see M Ndletyana Middle-class in South Africa: significance, role and impact. Paper presented at BRICS Academic Forum (Rio – Brazil March 10, 2014 at 12.

<sup>151</sup> Ndletyana (note 150 above) 4.

<sup>152</sup> P Alexander *et al Class in Soweto* (2013) 144.

<sup>153</sup> *Ibid* 144.

<sup>154</sup> Alexander *et al* (note 152 above) 154.

<sup>155</sup> *Ibid* 155.

black middle-class.<sup>156</sup> He notes that perceptions from individuals about the significance of their ethnic identity to their lived experiences varies in his sample.<sup>157</sup>

The concept of class and class analysis is an approach that is central to sociology and in tax law. Class is relevant in this thesis because of the focus on the black middle-class taxpayer. Wright (ed), in sociology, states that “if class is the answer, what is the question?”<sup>158</sup> He states that the different perspectives and approaches to class are determined by the questions that class is thought to answer.<sup>159</sup> Four questions by Wright assist with the concept of class in this thesis.<sup>160</sup> These questions show how class can be defined along standards of living using income or wealth as an index, how class is used to shape subjective identities used by people, how class is a relational concept when used to explain inequality and how the concept of class requires an analysis of macro-level variations through time and space.<sup>161</sup> The four questions ask:

- a) How are people objectively located in distributions of material inequality?
- b) What explains how people, individually and collectively, subjectively locate themselves and others within a structure of inequality?
- c) What explains inequalities in life chances and material standards of living?
- d) How should we characterise and explain the variations across history in the social organisation of inequalities?

When class is used by people to objectively locate themselves within the material inequality distributions, we get people putting themselves in the upper class, upper middle class, middle class, the lower middle class and lower class and thus class becomes a gradational concept.<sup>162</sup> People can also subjectively locate themselves within social categories such as class.<sup>163</sup> Class as subjective salient classification will vary per context with lifestyle, occupation or income

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<sup>156</sup> N Rollock *et al* ‘Middle Class by Profession: Class status and identification amongst the Black middle classes’ (2012) 13(3) *Ethnicities* 253, 255.

<sup>157</sup> *Ibid* at 255.

<sup>158</sup> E O Wright (ed) *Approaches to Class Analysis* (2005) 180.

<sup>159</sup> *Ibid*.

<sup>160</sup> Wright (note 158 above) 180.

<sup>161</sup> *Ibid* 180.

<sup>162</sup> *Wright* (note 158 above) 180 .

<sup>163</sup> *Ibid* 184.

levels.<sup>164</sup> However, the definition of class changes when it is used to explain inequality. Class is then defined as the “relationship of people to income-generating resources or assets of various sorts.”<sup>165</sup> Here class can be contrasted to geographical location or discrimination which can be used in class analysis to explain the location of people in different classes.<sup>166</sup> The concept of class can be defined through the question it is thought to answer. In this thesis, the concept of class is used to compare the “financial responsibility” to support extended family members undertaken by black South African individuals and individuals from other races.

Education level, skilled employment and professions have been used to define the middle-class. Thurlow, Resnick and Ubogu propose that the concept of middle-class should be defined in classical terms.<sup>167</sup> In classical conceptualization the focus is on identifying the necessary and jointly sufficient minimal conditions that need to be present or absent for a concept to be defined.<sup>168</sup> They further state that the classical terms “require defining categories based on attributes that are variously stressed by different scholars, joined together by a logical ‘and,’ thereby requiring all attributes to be met to qualify as an instance of that category.”<sup>169</sup> In defining the black middle-class, Thurlow *et al* use the completion of secondary education, decent housing, and skilled employments to define the middle-class.<sup>170</sup> For them, being middle-class is about being secure against economic vulnerability and the prospects they have for social mobility.<sup>171</sup> Southall on the other hand uses a professional category to define the black middle-class in South Africa. He states that the middle-class are those whose primary source of income is from non-manual employment as “white-collar employees, managers, self-employed businesspersons, or professionals.”<sup>172</sup>

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<sup>164</sup> *Ibid.*

<sup>165</sup> Wright (note 158 above) at 185. Also see R Southall ‘The Black Middle Class and Democracy in South Africa’ 2014 52(4) *The Journal of Modern Black Studies* 647, 650.

<sup>166</sup> Wright (note 158 above) 186.

<sup>167</sup> J Thurlow, D Resnick & d Ubogu ‘Matching Concepts with Measurement: Who Belongs to Africa’s Middle Class?’ (2015) 27 *Journal of International Development* 588, 593.

<sup>168</sup> *Ibid* 593.

<sup>169</sup> Thurlow, Resnick & Udogu (note 167 above) 593.

<sup>170</sup> *Ibid* at 594.

<sup>171</sup> Thurlow, Resnick & Udogu (note 167 above) 593.

<sup>172</sup> *Ibid* at 522

Occupations and income have been used in research which uses NIDS data. In their research, Burger *et al* use the 2008 NIDS data to explain the main empirical approaches to the study of the middle-class.<sup>173</sup> The four analysis of class which they explain are the skill or occupation, vulnerability, income and self-identification.<sup>174</sup> The occupation or skill analysis focuses on classifying the middle-class using occupations such as professionals and managers.<sup>175</sup> Burger *et al* note that this definition of the middle-class excludes those households with employed persons thus leaving these households without any classification.<sup>176</sup> To get around this problem, they suggest that the definition of occupation or skills analysis be divided into four classifications to include the highly skilled, medium skilled, low skilled and unemployed individuals.<sup>177</sup> This approach would draw domestic workers, clerks, managers, and professionals among many other professions. In order to have these skills in the household variable, Burger *et al* convert the skills at the individual-level to the household variable by classifying households using the highest occupational skill level of any household member.<sup>178</sup> After the classification, they find that the black households makes up 86 percent of low-skill occupations, 76 percent of medium-skill occupations and 54 percent of high-skill occupations.<sup>179</sup> The vulnerability approach classifies middle-class by the risk of sliding back into poverty.<sup>180</sup> With this approach, Burger *et al* find that there is a strong association between race and class as the black individuals make up a higher percentage of the lower class and vulnerable class.<sup>181</sup> When the income approach is used, Burger *et al* find that one in four black individuals is middle-class in South Africa.<sup>182</sup> They state that income approach is used to categorise the middle-class because “it provides a measure of an individual’s economic power and is viewed as a correlate of social status because it determines a household’s buying power and reflects market value and negotiating power in the labour market.”<sup>183</sup> For class analysis,

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<sup>173</sup> R Burger et al ‘The Emergent Middle Class in Contemporary South Africa: Examining and Comparing Rival Approaches’ (2015) 32 (1) Development Southern Africa 25

<sup>174</sup> *Ibid* 29.

<sup>175</sup> Burger et al (note 173 above) 29.

<sup>176</sup> *Ibid* 29.

<sup>177</sup> Burger et al (note 173 above) 29.

<sup>178</sup> *Ibid* 29.

<sup>179</sup> Burger et al (note 173 above) 32.

<sup>180</sup> *Ibid* 32.

<sup>181</sup> Burger et al (note 173 above) 31.

<sup>182</sup> *Ibid* 33.

<sup>183</sup> *Ibid*.

they opt for Esteban *et al's* polarisation method which develops polarisation measures to fit into the “identification-alienation” framework.<sup>184</sup> Burger *et al* state that;

Assuming that income patterns capture and reflect important differences in lifestyle and life chances that will correlate with patterns of socialisation and social identification, such an approach can offer an empirically grounded and defensible avenue to identifying a reasonably homogeneous and cohesive middle class within an unequal and divided society.

Prior to Burger *et al* research, Visagie and Posel investigate alternative ways of identifying and defining the middle-class in South Africa using NIDS Wave 1 data.<sup>185</sup> In their approach, they focus on the middle class as defined by their “absolute level of affluence” (absolute approach) and on the middle-class as defined by the “middle share of the national income distribution” (relative approach).<sup>186</sup> They use per capita total household income from Wave 1 of NIDS to find the middle-class. The relative approach is based on economics literature which identifies the middle class through the median income or middle quantiles after the households have been divided into income quantiles.<sup>187</sup> With the relative approach, the number of middle-class households ranges from 1.96 million to 4.56 million households depending on whether the median income or middle quantiles definition is followed.<sup>188</sup> Of these middle-class households, there are households which are pulled below the poverty line.<sup>189</sup> With the absolute approach, affluence is determined using total household income threshold.<sup>190</sup> Visagie and Posel use occupations commonly associated with the middle-class to develop their income range.<sup>191</sup> After considering occupations such as legislators, professionals and associate professionals and clerks, they find that the mean individual income is between R4 221 and R12 738 per month whilst the mean household income is between R2 749 and R8 228 per month.<sup>192</sup> However,

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<sup>184</sup> J Duclos ‘Polarization: Concepts, Measurement, Estimation’ *Econometrica* (2004) 72 (6) 1737, 1737.

<sup>185</sup> J Visagie & D Posel ‘A Reconsideration of What and Who Is Middle Class in South Africa’ (2013) 30(2) *Development Southern Africa* 149.

<sup>186</sup> *Ibid* 152.

<sup>187</sup> Visagie & Posel (note 185 above) 152.

<sup>188</sup> *Ibid* 154.

<sup>189</sup> Visagie & Posel (note 185 above) 152.

<sup>190</sup> *Ibid* 152.

<sup>191</sup> Visagie & Posel (note 185 above) 152.

<sup>192</sup> *Ibid* 157.

Visagie and Posel lower the means to between R1 400 and R10 000 per capita per month for international comparison.<sup>193</sup> Thus, they use the “middle strata of 50% to 150% of the median household income” and “middle-class affluence of R1 400 and R10 000 per capita per month” to define who is middle class in South Africa. They find that black individuals make up 84.3 percent of the middle-class when the middle strata is used, and that black people make up 50.5 percent when they define the middle-class by affluence.<sup>194</sup>

In another study by Visagie, the middle-class fall with a total household net income of R5 600 and R40 000 per month.<sup>195</sup> This definition was accepted into the Triple Jeopardy study and Ndinga-Kanga states that although the gap between R5 600 and R40 000 is wide, it allows us to unpack the emerging dynamics of the black middle-class and the complexity of the South African case.<sup>196</sup> The definition of the black middle-class in this research is informed by Visagie’s definition of the black middle-class.<sup>197</sup> The black middle-class are classified in this research as individuals earning a net income between R5 600 and R40 000 per month.

#### **d) Income**

The income concept must be defined to understand the classification of middle-class using income. Defining the concept of income helps in evaluating the rules of income tax and is of critical importance in determining what those rules should be.<sup>198</sup> Despite the attempts to define income, it has been noted that defining income is a difficult task and there are different measures of the concept of income for different purposes in income tax law.<sup>199</sup> Regardless of the difficulty of defining income, the Haigs-Simon definition of income has been widely used by economists and has been adapted into law. The Haigs-Simon definition states that “an individual's income is the sum of his consumption plus accumulation during the taxable

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<sup>193</sup> Visagie & Posel (note 185 above)158.

<sup>194</sup> *Ibid* 160

<sup>195</sup> J Visagie "Who are the middle class in South Africa? Does it matter for policy." In *A Web Forum for Accessible Policy-Relevant Research and Expert Commentaries on Unemployment and Employment, Income Distribution and Inclusive Growth in South Africa*. 2013 Accessed on 10 January 2020 Available at <http://us-cdn.creamermedia.co.za>

<sup>196</sup> Ndinga-Kanga (note 88 above).

<sup>197</sup> Visagie (note 195 above)

<sup>198</sup> V Thuronyi ‘The Concept of Income’ (1990) 46(1) *Tax Law Review* 45, 45.

<sup>199</sup> J R Brooks ‘The definitions of income’ (2018) *Tax Law Review* 253, 269.

period.”<sup>200</sup> It has also been stated that the Haigs-Simons definition differs from the measure of income for determining a taxpayer’s taxes.<sup>201</sup> Sherlock and Maples make the example of contributions made by an employer to a health insurance on behalf of the employee and how such income is excluded in calculating the taxable income of an employee.<sup>202</sup> They state that the Haigs-Simon definition would include the employers contributions towards the employees’ health insurance. In South Africa, individual income tax is based on gross income received from various sources. Section 1 of the Income Tax Act 58 of 1962 defines “gross income” as the total amount, in cash or otherwise, received by or accrued to or in favour’ of a resident in a year or period of assessment.<sup>203</sup> The gross income of individuals can be from remuneration (salaries, wages, allowances, taxable fridge benefits, bonuses), directors fees, investment income, rental income or losses, income from royalties, pension income, profits and losses from a business or trade, income, or profits as a beneficiary of a trust.<sup>204</sup> The NIDS survey includes all these incomes in the adult questionnaire. Section 1 of the Income Tax Act defines “income” as “the amount remaining of the gross income...after deducting therefrom any amounts exempt from normal tax.” The taxable income of an individual is calculated by deducting exempt income and allowable deductions from the gross income.

#### *e) Family*

The concept of family is difficult to define due to the diversity of family structures and practices, the fluid nature<sup>205</sup> of family and the multiple forms it takes as applied in different cultures and practices.

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<sup>200</sup> Thuronyi (note 198 above) 48.

<sup>201</sup> CRS Report R45145, Overview of the Federal Tax System in 2018, <https://crsreports.congress.gov/product/pdf/R/R45145/5> Accessed on 10 July 2020.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Section 1 of the Income Tax Act 58 of 1962 provides that 'gross income', in relation to any year or period of assessment, means- (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or 22 (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued...*

<sup>204</sup> South African Revenue Service <https://www.sars.gov.za>

<sup>205</sup> A Spiegel, V Watson & P Wilkinson 'Domestic diversity and fluidity among some African households in Greater Cape Town' (1996) 22(1) *Social Dynamics* 7, 15.

As held in the three cases of *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs*<sup>206</sup> heard together in the Constitutional Court, the learned Judge O'Regan held that the "family is the 'natural' and 'fundamental' unit of our society" and that despite the importance of the family, "the definition of the family also changes as social practices and traditions change" and that "families come in all shapes and sizes." The White Paper on Families<sup>207</sup> whose intention is to inform family policy, acknowledges family diversity in South Africa by stating that "there are different types of families in South Africa which are products of various cultures and social contexts."<sup>208</sup> Earlier, Ziehl<sup>209</sup> stated that the definition of family relies on "context and purpose of the user."<sup>210</sup> She further states that the family is a social institution where members or a group are connected by blood and/or marriage and on this basis, can share a place of residence (the household). The White Paper defined a family as "a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence."<sup>211</sup> Other literature opts for the use of the term *family household* to understand the conceptual and theoretical bases of relationships between individuals considered a "family."<sup>212</sup> Laslett et al wrote on relationships within familial groups and they defined the family as "a group of persons living together, a household..."<sup>213</sup> This reflects a preference in research for the use of the term "household" which unlike family is not problematic to define but nonetheless complex.<sup>214</sup>

Boyd and Young submit that the "characterization of family law as purely private law- or the notion that family law exclusively regulates private relations between individuals in families-

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<sup>206</sup> 2000 (3) SA 936 (CC) para 31.

<sup>207</sup> White Paper on Families Available at [https://www.westerncape.gov.za/assets/departments/social-development/white\\_paper\\_on\\_families\\_in\\_south\\_africa\\_2013.pdf](https://www.westerncape.gov.za/assets/departments/social-development/white_paper_on_families_in_south_africa_2013.pdf) accessed on 20 May 2020.

<sup>208</sup> *Ibid* 9.

<sup>209</sup> S Ziehl 'Families and households in South Africa' In: C B Hennon & S M Wilson (eds) *Families in a Global Context* (2011) 183.

<sup>210</sup> *Ibid*.

<sup>211</sup> White Paper on Families (note 207 above) 3.

<sup>212</sup> *Ibid* 83

<sup>213</sup> P Laslett & R Wall 'Household and family in past time: comparative studies in the size and structure of the domestic group over the last three centuries in England, France, Serbia, Japan and Colonial North America (1972)

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<sup>214</sup> M Rabe Family and households 83.

is out of date” and that “the public, or the state, has an interest in family law’s ability to enforce private economic obligations between family members.”<sup>215</sup>

Despite the substitution of “family” with the term “household,” the two terms do not refer to the same thing. The household is argued to be a concept with three non-overlapping dimensions.<sup>216</sup> It is stated that the household refers to “a person or group of persons who eat together; live together and share economic resources.”<sup>217</sup> Wallerstein and Smith refer to the household as a place for sharing resources and pooling income to reproduce.<sup>218</sup> They make a clear distinction between the household and family. Two main forms of households have been identified. These are the *family household* and *non-family household*.<sup>219</sup> Thus, the household can either have biologically related (blood) relatives, who live together in a common residence (*family household*) or they can be non-biologically related members sharing a common residence (*non-family household*).<sup>220</sup> Wallerstein and Smith state that the household is distinguished by ongoing mutual obligations that entail income-pooling arrangements on a long-term basis.<sup>221</sup> The members of the household are therefore involved in an ongoing redistributive process of income and resources received by the household members. Within this reproduction and redistributive process, the members of the household learn their sharing obligations in terms of whom within the household they ought to share or pool income and resources with.<sup>222</sup> Households are “porous” and “fluid.” The household composition and individuals’ relations to household units change over time.<sup>223</sup> It is also possible for individuals to simultaneously be part of more than one household if they divide their time and resources between residences. Households are also porous and fluid because resources such as unpaid labour and money can move between individuals in different households.

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<sup>215</sup> Boyd & Young (note 118 above) 554-555.

<sup>216</sup> S. Ziehl (2002) Black South Africans do live in nuclear family households — a response to Russell’ (2002) 33(1) *Society in Transition* 26, 36.

<sup>217</sup> *Ibid.*

<sup>218</sup> I Wallerstein & J Smith Households as an institution of the world-economy (1992) *Creating and Transforming Households* 3, 7.

<sup>219</sup> Rabe (note 214 above) 83.

<sup>220</sup> Wallerstein & Smith (note 218 above) 7.

<sup>221</sup> *Ibid* 13.

<sup>222</sup> Spiegel *et al* (note 194 above) 16.

<sup>223</sup> *Ibid*

## 1.8 Research methodology

This research used quantitative and qualitative research to answer the research question.

The National Income Dynamics Study (NIDS) Wave 5 2018 dataset is used to examine and investigate the private transfers and support given and received by individuals in South Africa. Quantitative data analysis was undertaken. The quantitative data relied on in this thesis is from Wave 5 of NIDS which was collected in 2018. Wave 5 of NIDS target population were private households and residents across South Africa. NIDS is the ‘first national household panel study of income dynamics among individuals of all ages in South Africa to track and understand the changes in the lives of South Africans, rich and poor.’<sup>224</sup> NIDS is commissioned by the South African Governments’ Department of Planning, Monitoring and Evaluation (DPME) and the survey was conducted by the Southern Black Labour and Development Research Unit (SALDRU) at the University of Cape Town. The survey was conducted in five periods which are referred to as waves. Wave 1 was conducted in 2008 and Wave 5 in 2018. The sample size for the surveys was a nationally representative sample of 28000 individuals and 7 300 households across the country and among all racial groups. The study interviewed the same household members in each of the waves which were repeated every two to three years. The reason for choosing the NIDS data is because of the module on interhousehold transfers. The module on interhousehold transfers records transfers received and transfers sent, and it excludes remittances sent by migrants.<sup>225</sup> Also, the NIDS data has collected data on transfers at the individual and household levels. This study used the individual analysis to answer the empirical research questions.

In survey research, the sample can be used to answer questions relating to an entire population with a degree of certainty.<sup>226</sup> This degree of certainty helps to answer the two hypotheses with greater certainty and contributes to answering the first part of the main research question with greater certainty as well. The first part of the research question states: Should income tax law provide relief to taxpayers for the costs they incur when they support a dependant? The primary

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<sup>224</sup> Department of Planning Monitoring and Evaluation Republic of South Africa <http://www.psppd.org/national-income-dynamics-study-nids/> accessed on 10 April 2019.

<sup>225</sup> D Posel, (2016). Inter-household transfers in South Africa: Prevalence, patterns and poverty Cape Town: SALDRU, University of Cape Town. SALDRU Working Paper Number 180/ NIDS Discussion Paper 2016/7 available at SALDRU Working Paper Number 180/ NIDSDiscussion Paper 2016/7 Accessed on 10 June 2019.

<sup>226</sup> S Sukamolson Fundamentals of quantitative research (2007) *Language Institute Chulalongkorn University 1,*

purpose of the study is to examine the need for tax relief for taxpayers who contribute to the support of a dependant in South Africa. The three hypotheses state:

1. H<sub>0</sub> Black individuals are not most likely, compared to other races, to give support to family members.  
H<sub>1</sub> Black individuals are most likely, compared to other races, to give support family members.
2. H<sub>0</sub> Black individuals are not most likely, compared to other races, to receive support from family members.  
H<sub>1</sub> Black individuals are most likely, compared to other races, to receive support from family members.
3. H<sub>0</sub> There is no positive relationship between class (income level) and support given to extended family.  
H<sub>1</sub> There is a positive relationship between class (income level) and support given to extended family.

The methodology seeks to show that taxpayers who largely contribute to the support of dependants are black and middle-class. In the theoretical framework, it will be argued that there should be a link between the individual tax burden and family circumstances.

## **1.9 Organisation of the thesis**

To answer the research question, the chapters will address the various aspects of the research question as follows:

**Chapter 2** explains the theoretical framework. This chapter examines critical tax theory and the principles of equity namely horizontal equity, vertical equity and the ability-to-pay. The chapter answers the research question by discussing the intersection of race, class, culture, family, and tax law. The purpose of this chapter is to highlight the characteristics which make individual taxpayers a non-homogenous group with differing ability to bear the tax burden. Thereafter, **Chapter 3** explains “black tax” in South Africa. It begins with a discussion on the family structure and patterns of support in black South African families. The aim of this discussion is to explain the extent of support in black families. The chapter provides evidence from the National Income Dynamics Study (NIDS) and shows the black support differs from support given by other races. The chapter shows that support given in families responds to

historical, social, and economic influences. The chapter further shows that incomes from family members makes up a substantial part of the recipient household income. **Chapter 4** then examines how the tax system in South Africa accommodated individual taxpayers who make private transfers to their kin. The chapter begins with a historical overview of how income tax legislation has provided rebates, credits and deductions for taxpayers with support dependants who are frequently relatives. The chapter goes on to examine the change in policy which saw the rebates and deductions available to taxpayers with dependants abolished as the tax commissions stated that tax policy was not the appropriate vehicle to provide support to families with dependants. The chapter concludes with a discussion on medical contributions credits which are the only provisions available for a taxpayer who pays medical aid for dependants. **Chapter 5** takes the discussion further by examining the use of tax expenditures in providing relief to taxpayers with dependants. The chapter discusses the use of credits and deductions in the income tax system as alternative method to the social welfare system for taxpayers supporting dependants. In **chapter 6**, a comparative analysis of the credits and deductions available to individuals providing support to dependants in the United States, Canada, Mozambique, and Mauritius is examined. The purpose of the chapter is to illustrate how other countries provide support through the income tax to taxpayers with dependants. The chapter examines several income tax legislation provisions in these jurisdictions and the aim is to show that even though little uniformity in these jurisdictions exist, one can draw general conclusions and suggestions for the design of income tax which considers transfers made by individual taxpayers to their immediate and extended families. **Chapter 7** concludes the analysis by discussing the design of an income tax legislation for taxpayers who provide support to their kin. This leads to a discussion of tax expenditures as a policy instrument for the introduction of credits and deductions for taxpayers with dependants. This develops from chapter 5 and chapter 6 where the tax expenditures in the form of credits, deductions and rebates in South Africa and other countries is examined.

## **1.8 Conclusion**

This chapter introduced the area of study, discussed the research problem and outlined the reasoning and justification for the research which will be guiding the discussions to follow in the thesis.

## **CHAPTER 2 CRITICAL TAX THEORY AND INCOME TAX RELIEF FOR TAXPAYERS WHO CONTRIBUTE TO THE SUPPORT OF A DEPENDANT**

### **2.1 Introduction**

The purpose of this chapter is to introduce and engage with critical tax theory as the relevant theoretical framework for this thesis. The chapter argues that critical tax theory is important as a lens to understanding the intersection of race, class, and culture in the tax treatment of the family and the distribution of income among immediate and extended kin (black tax/kinship taxation). As stated by Knauer, writing on U.S. tax policy, a critical lens ensures that proposals for tax reform are “informed, transparent, and responsive to the needs and abilities of individual taxpayers.”<sup>227</sup>

Critical tax theory assists in building the larger argument in my thesis, which is that taxpayers are not a homogenous group and that tax law and tax policy have a false assumption of taxpayer sameness through the principles of equity, mainly the ability-to-pay principle.<sup>228</sup> The argument is made that a critical approach allows tax scholars to address the relationship between the taxation system, transformation, the individual and the family.

The first section of this chapter discusses the genesis of critical tax theory in the U.S and the theories which influenced it. The chapter then proceeds to examine the major premises of critical tax theory. Further, the chapter then engages with the perspectives by critical tax scholars on race, class, and culture. Dependency and dependants within the family is then discussed to show how tax law intersects with the family. Although this chapter is divided into these subsections, the concepts discussed are not mutually exclusive. In many ways an individual taxpayer has multiple identities which play into a specific social and economic context. Although this debate originated in research on African American taxpayers, comparable questions on the intersectionality of race, class and family circumstances in other contexts in the global South, such as South Africa, have not been explored.

This chapter begins with discussing what would be the fair treatment of family circumstances in the assessment of tax liabilities and the appropriate tax treatment of dependants. It is hoped that this chapter shows how taxpayers are homogenized by principles of tax equity which leads

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<sup>227</sup> N J Knauer ‘Critical Tax Policy: a Pathway to Reform?’ 2014 9(2) *Northwestern. Journal of Law and Social Policy* 206, 207.

<sup>228</sup> Infanti (note 1 above) 1201 & 1242. Also see Knauer (note 227 above) 209.

to the adoption of legislation that does not reflect the identity characteristics of individuals and the family ties they have.

## **2.2 Foundations of Critical Tax Theory**

Before engaging with the main premises and methodologies of critical tax scholarship, a discussion of the main theories which have informed the work of critical tax theorists is necessary. These main theories are black feminist theory, critical race theory and intersectionality. Knauer states that the roots of critical tax scholarship can be traced back to critical legal studies, critical race studies, queer theory and other methods of outsider scholarship.<sup>229</sup>

### **2.2.1 Intersectionality and Tax Law**

Intersectionality is a theory rooted in critical race theory and black feminism. Kimberlé Crenshaw, a critical race theorist, coined the term “intersectionality.” Crenshaw used the metaphor of a crossroad to describe the theory and stated:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.<sup>230</sup>

Commenting on this metaphor, Infanti states that Crenshaw illustrates the violence, which is characteristic of all intersections of a path, with the intersections being “the product of an ordinary, violent collision of the paths themselves.”<sup>231</sup> An intersectional approach questions, what happens when multiple forms of disadvantages an individual has cross? Hill Collins has engaged with the definitional dilemma of intersectionality, and she provides an understanding of what intersectionality is. She states that “intersecting identities” is one of the focal points

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<sup>229</sup> Knauer (note 227 above) 223-224.

<sup>230</sup> K Crenshaw ‘Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory And Antiracist Politics’ 1989 *University of Chicago Legal Forum* 139, 149.

<sup>231</sup> A C Infanti LGBT Taxpayers: A Collision of ‘Others’ 2012 13 (1) *The Georgetown Journal of Gender and the Law* 1, 1.

when scholars use intersectionality as an analytical strategy.<sup>232</sup> Citing other scholars, Hill Collins states that intersectionality gives key attention to specific social experiences of individuals and groups in society.<sup>233</sup> The “violent collision”<sup>234</sup> of identities results in a new and peculiar discriminating process that requires a different approach to the unexpected consequences.

Intersectionality has been used to understand processes of discrimination by using the race, class, and gender multiple axis. Intersectionality was originally used by Crenshaw in studying cases of violence involving immigrant women of colour, that is, black women. Crenshaw argued that race, gender, and class intersected in cases of gender violence against women of colour and emphasises the use of “multiple grounds of identity when considering how the social world is constructed.”<sup>235</sup> Over time, the concept of intersectionality has come to include considerations of social inequality, social context, social justice, power, and complexity as the underlying ideas of intersectionality.<sup>236</sup> The concept allows for the understanding of the complex nature of inequalities to be understood through various axis. In this study, intersectionality would explain the multiple identities of a black middle-class taxpayer through the intersections of race, class, and culture.

The understanding of kinship practices and family ties within the black middle-class through the race, class and cultural identities is crucial and deepens understanding.<sup>237</sup> This thesis makes use of multiple identities of a black middle-class individual to interrogate issues of tax policy and equity in tax. These multiple identities as a black and middle-class person impacts the application of the ability-to-pay principle and the understanding of tax burdens as compared to individual taxpayers from other races in South Africa.

Despite Crenshaw’s notable contributions to the field of intersectionality, as a method and analytical tool, intersectional scholarship did not begin when Crenshaw coined the term in her article *Mapping the margins: intersectionality, identity politics, and violence against women*

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<sup>232</sup> P Hill Collins ‘Intersectionality’s Definitional Dilemmas’ 2015 41 *Annual Reviews of Sociology* 1, 12.

<sup>233</sup> *Ibid* 12.

<sup>234</sup> Infanti (note 231 above) 1.

<sup>235</sup> K Crenshaw ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43(6) *Stanford Law Review* 1241, 1245.

<sup>236</sup> P Hill Collins & S Bilge (2016). *Intersectionality*. Malden, MA: Polity Press. 11.

<sup>237</sup> J M Modiri ‘The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in Post-Apartheid South Africa’ (2012) 28 *SA Journal on Human Rights* 405, 406.

*of color* or in her earlier work *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*.<sup>238</sup>

Intersectionality began with critical race theory and black feminist political movements in the 1960's and 1970's. But these black feminist movements did not use intersectionality as a term or a theory for their view that race, class, and gender were interconnected.

### **2.2.2 Black Feminism and Critical Race Theory**

In the 1960's and 1970's black feminist movements were a locale for women to highlight the interconnectedness of race, class, gender.<sup>239</sup> Black feminist theory which was reflected in these movements was an offshoot of critical race theory and critical legal studies. In these feminist movements, women of colour (these movements included black women, Hispanic women and Asian women) faced a peculiar discrimination which was racial discrimination, class discrimination and gender discrimination. For these women race intersected with gender. For these feminists, gender could no longer serve as the only category of analysis for their oppression.<sup>240</sup> The individual lived experiences of women of colour<sup>241</sup> dominated the agenda leading to a new analysis which looked at the intersectionality of gender, race, and class in these women's lives. Citing several feminist scholars, Holguín Cuádriz and Uttal show that the terms "interlocking systems of oppression" and "simultaneity of oppressions" are often used to describe the intersectionality of women's social position.<sup>242</sup> They quote the following paragraph from Hill Collins:

First, the notion of interlocking oppressions refers to the macro level connections linking systems of oppression such as race, class, and gender. This is the model describing the social structures that create social positions. Second, the notion of intersectionality describes micro level processes - namely, how each individual and

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<sup>238</sup> Hill Collins (note 225 above) 10.

<sup>239</sup> Hill Collins (note 225above) 7.

<sup>240</sup> G Holguín Cuádriz & L Uttal 'Intersectionality and In-depth Interviews: Methodological Strategies for Analyzing Race, Class and Gender 1999 6 (3) *Interdisciplinary Issues On Race, Gender, Class* 156, 158.

<sup>241</sup> Women of colour is a term used especially in the United States to refer to women who are black, Hispanic or Asian and who experience life at the intersections of race and gender. The term unified and continues to unify women who were experiencing multiple layers of marginalization and oppression.

<sup>242</sup> *Ibid* 159.

group occupies a social position within interlocking structures of oppression described by the metaphor of inter- sectionality. Together they shape oppression.<sup>243</sup>

The interesting analysis Holguín Cuádriz and Uttal make is how the individual is linked to the social structure and how to understand the individual experience we need to look to the institutional arrangements and the response individuals have to their social position.<sup>244</sup>

Critical race theory started with black legal scholars.<sup>245</sup> Critical race theory began as a movement in law critiquing legal reasoning and legal institutions, but it gained momentum and spread beyond into other academic disciplines. Upon its start in the United States, critical race theory addressed the social construction of race and looked at how people of colour were oppressed through the system. It was based on the premise that society is structured along racial lines which were unequal and that systemic power disenfranchised the racially oppressed.<sup>246</sup> Critical race scholarship exposed the racial discrimination that otherwise was not visible in neutral concepts and institutions of power.<sup>247</sup> Thus, like black feminism, race was at the centre of the movements against oppression but unlike the off-shoot of critical race theory, intersectionality, did not use a single lens when dissecting individual problems in society. Both black feminism and intersectionality go beyond the scope of race to include class and gender as intersecting with race and with each other.

### **2.2.3 Critical Tax Theory**

Critical tax theory was influenced by the above theories when they filtrated into tax law. Critical tax theory emerged in the United States, with Grace Blumberg believed to have pioneered this area with her work on feminist tax analysis.<sup>248</sup> Critical tax scholarship has centred its themes on the intersection of tax law with race, class, and gender. Over time, critical

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<sup>243</sup> Holguín Cuádriz & Uttal (note 229 above) 492 citing P Hill Collins, P ‘Symposium: On West and Fenstermaker's Doing Difference’ 1999 9(4) *Gender & Society*.

<sup>244</sup> Holguín Cuádriz and Uttal (note 229 above) 159.

<sup>245</sup> C A Aylward ‘Intersectionality: Crossing the Theoretical and Praxis Divide’ 2010 1(1) *Journal of Critical Race Inquiry* 1, 3

<sup>246</sup> K Hylton (2012) ‘Talk the talk, walk the walk: defining Critical Race Theory in research’ 2012 15(1) *Race Ethnicity and Education* 23, 24

<sup>247</sup> A P Harris ‘Symposium: Critical Race Theory’ 1994 82(4) *California Law Review* 741, 750

<sup>248</sup> L Zelenak ‘Taking Critical Tax Theory Seriously’ 1998 76 (5) *North Carolina Law Review* 1521, 1521. Also see G Blumberg ‘Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers, 1971 21 *Bufallo Law Review* 49.

tax scholarship has indeed expanded discussions on tax fairness through uncomfortable discussions on race, sexual orientation, sexism, disability and heterosexism.<sup>249</sup> Critical tax scholars have endeavoured to explain the impact of tax laws on traditionally disempowered groups such as women and black people. Critical tax scholarship has even gone beyond these identity characteristics to look at the impact of tax laws on extended family structures.<sup>250</sup> Uy in *Tax and Race* explores how tax law intersects with the culture of Asian- American families when resources and income is shared among several family members.<sup>251</sup>

Critical tax theory developed as a distinct mode of inquiry into why tax laws are the way they are, and the effect tax laws have on historically disempowered groups.<sup>252</sup> Critical tax scholarship has been underpinned by the fundamental assumption that “tax law is political.”<sup>253</sup> Infanti and Crawford state the following:

Tax law is political. That is a fundamental assumption of critical tax theory. Critical tax scholars ask why the tax laws are the way they are and what impact tax laws have on historically disempowered groups, such as people of color; women of all colors; lesbian, gay, bisexual, and transgendered individuals; low-income and poor individuals; the disabled; and non-traditional families.<sup>254</sup>

Thus, critical tax scholarship has been an engagement through commentary on the role of the taxation system in protecting dominant institutions.<sup>255</sup> Also, critical tax scholarship has been an examination of the relationship between the tax system and the social, economic and political standing of traditionally subordinated groups.<sup>256</sup> In criticising tax policy in the United States, Knauer states that the identities of taxpayers are glossed over by the public welfare approach to traditional tax policy, with income being the only exception to taxpayer identity that matters.<sup>257</sup> Because of the indifference to the effect of taxation on social, economic and

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<sup>249</sup> Infanti (note 1 above) 1196 & 1201.

<sup>250</sup> A C Infanti & B Crawford *Critical Tax Theory; An Introduction* (2009) xxi. Non-traditional families are used here to refer to non-nuclear families. See Chapter 3 for the discussion on traditional and non-traditional family.

<sup>251</sup> M Uy ‘Tax and Race: The Impact on Asian Americans’ 2004 11(1) *Asian American Law Journal* 117

<sup>252</sup> Infanti & Crawford (note 250 above).

<sup>253</sup> *Ibid*

<sup>254</sup> Infanti & Crawford (note 250 above) xxi.

<sup>255</sup> N E Shurtz ‘Critical Tax Theory: Still Not Taken Seriously’ 1998 76 *North Carolina Law Review* 1837, 1841

<sup>256</sup> *Ibid*

<sup>257</sup> Knauer (note 227 above) 208.

political disparities in participation and access that exist and the forms of existing inequities or biases reinforced by taxation, a critical tax approach which enquires into the nature and role of tax laws is necessary.<sup>258</sup> Knauer states that it is within the crevices of these indifferences and surface level tax neutrality that unintended consequences are produced. Tax policy again overlooks these unintended consequences as being objectively undesirable but irrelevant to its goals.<sup>259</sup>

Johnson argues that a comparative evaluation is necessary in critical tax theory analysis.<sup>260</sup> In order to arrive at an on-balance conclusion, Johnson advises that a consideration of all provisions in tax legislation and the effects of these provisions on the factual lives of the specific taxpayer must be done.<sup>261</sup> The quantitative analysis of this study comparatively examines the experiences of kin support amongst black middle-class individuals and middle-class individuals from other racial categories. The quantitative analysis in this study aims to show that the lives of black middle-class individuals are characterised by financial responsibilities which intersect with their ability-to-pay in tax law. The position of the black middle-class individual is compared to middle-class individuals from other races. So, although there may be no specific provisions in tax law in South Africa which discriminate against black middle-class taxpayers who provide financial support to family and kin, there is some hidden bias as argued above. The discussion that will be considered in the following chapters of the thesis does not consider tax provisions which intentionally discriminate against black taxpayers but rather it focuses on the unintended consequences and implicit bias of not having provisions that consider family differences and ability-to-pay differences between taxpayers who earn the same income. The thesis discusses kinship support networks to show that individual taxpayers' ability-to-pay is reduced by the number of dependants that a taxpayer has a legal or moral obligation to support ("black tax"). The thesis also seeks to use race and class to demonstrate how historical disadvantages and vulnerability to poverty plays into a reduced ability-to-pay for black taxpayers.

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<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> S R Johnson 'Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform' 1998 76 (5) *North Carolina Law Review* 1771, 1773.

<sup>261</sup> *Ibid.*

### 2.3 Major Premises of Critical Tax Theory

Three key premises have been identified in critical tax theory scholarship. In this chapter, these will be examined in turn and will be returned to throughout the thesis. The following are the three key premises which will be discussed:

- a) First, the common view in critical tax theory is that principles of tax law and policy “proceed from a very strong presumption of *taxpayer neutrality* where the only salient distinction among taxpayers is that of income level.”<sup>262</sup> This is referred to as the “*fiction of taxpayer neutrality*.”<sup>263</sup>
- b) Secondly, there is need to recognize taxpayer differences, identity characteristics and avoid *false assumptions of sameness*<sup>264</sup> in tax law and policy. This is linked to the principle of equity. In tax law, equity and equality in tax means fairness and impartiality in the treatment of all taxpayers through the fair distribution of the tax burden.<sup>265</sup> Equity can be horizontal meaning the “equal treatment of equals,” or vertical meaning the “appropriate differentiation of unequal individuals.”<sup>266</sup> Also, according to Adam Smith equity in taxation prevails where contributions “match benefits received” and “reflect ability-to-pay” in tax law.<sup>267</sup> The goal of equity would be to see that there is impartiality and fairness in the treatment of all taxpayers through the fair distribution of the tax burden.<sup>268</sup>
- c) Lastly, linked to both (a) and (b) is that a critical tax approach uncovers *hidden biases* and investigates *unintended consequences* piercing the structural assumptions of neutrality.<sup>269</sup> The *false assumptions of sameness* perpetrated by the *fiction of taxpayer*

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<sup>262</sup> Knauer (note 227 above) 209

<sup>263</sup> *Ibid* 210

<sup>264</sup> Knauer (note 227 above) 209

<sup>265</sup> Infanti (note 1 above) 1197- 1199

<sup>266</sup> RA Musgrave. *The Theory of Public Finance*. (1959) 113. L Kaplow. ‘Horizontal Equity: Measures in Search of a Principle.’ (1989) 42(2). *National Tax Journal* 140-141.

RA Musgrave. Progressive Taxation, Equity, and Tax Design. In J. Slemrod (eds) *Tax Progressivity and Income Inequality* 1996: 341-356 .

<sup>267</sup> RA Musgrave. A Brief History of Fiscal Doctrine. In AJ Auerbach and M Feldstein (ed) *Handbook of public economics* (1985) 16.

<sup>268</sup> Infanti (note 1 above) 1197- 1199

<sup>269</sup> *Ibid*.

*neutrality* leads to *unintended consequences* through explicit and implicit bias in tax provisions.

### 2.3.1 The Fiction of Taxpayer Neutrality

The approach by critical tax scholars has clearly been a challenge to the principle of taxpayer neutrality which presumes that equity is achieved where taxpayers' abilities are distinguished using income levels and no other identity characteristics such as race, socio-economic class or family structures.<sup>270</sup>

The principle of neutrality like equity is a principle that should be considered in designing a good tax system, but which means that a tax system should not have biases that influence a taxpayers' choices<sup>271</sup> and the tax system should impartially treat taxpayers.<sup>272</sup> With tax neutrality, *neutral standards* are supposedly applied in taxing individuals and *no preferential treatment* through tax deductions, tax credits, tax benefits or different tax rates is given.<sup>273</sup> To this, Groves states that neutrality calls for impartial treatment of taxpayers.<sup>274</sup> However, are there instances for the justified and unjustified departure from the principle? Would introducing deductions, rebates or credits for the financial expenses incurred in supporting family where there is legal and moral duty of support be defensible or indefensible in tax policy? Would such a deviation from traditional equity and neutrality amount to bad tax policy or could it be justified under critical tax theory?

It is within this analysis that I argue that the notion of taxpayer neutrality falls short of achieving equity when identity characteristics of taxpayers are arranged by income level and not by other identity characteristics such as race, ethnicity, culture, or family structures. Thus, Knauer states that tax neutrality is the "belief that identity characteristics are irrelevant for tax purposes."<sup>275</sup> She cites Infanti's work and the term 'homogenizing effect' which he uses in his critical tax

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<sup>270</sup> L P Martinez 'A Critique of Critical Tax Policy Critiques (Or, You've Got to Speak Out Against the Madness)' 2017 28 *La Raza Law Journal* 49, 55.

<sup>271</sup> D A Kahn 'The Two Faces of Tax Neutrality: Do They Interact or Are They Mutually Exclusive?' 1990 18 *N. Ky. L. Rev.* 1, 11 & 15.

<sup>272</sup> H M Groves 'Neutrality in Taxation' 1948 1(1) *National Tax Journal* 18, 18.

<sup>273</sup> Kahn (note 271 above) 5.

<sup>274</sup> Groves (note 272 above) 18.

<sup>275</sup> Knauer (note 227 above) 219.

work. Infanti writes of the “homogenizing effect” of tax law and tax policy.<sup>276</sup> What Knauer and Infanti highlight in their separate work is how tax law and policy assumes to have clear answers and solutions based on objective measures such as income level.<sup>277</sup> The approach of the Government to the question of ability-to-pay is a specific example of the homogenizing effect of tax law and policy, because other than income, the law does not look into such aspects as cultural customs and practices intersecting with a taxpayers ability-to-pay.<sup>278</sup> Knauer suggests that “policy makers must look through the false neutrality of taxation to see the actual taxpayers and determine who bears the burdens and who reaps the benefits.”<sup>279</sup>

### **2.3.2 Hidden Bias, Explicit and Implicit Bias and Unintended Consequences**

Critical tax theorists state that a critical approach helps to uncover hidden biases and unintended consequences. Specifically, Knauer states that “critical tax policy can help policymakers evaluate these unintended consequences and pierce the structural assumptions of neutrality.”<sup>280</sup> Adopting a critical race approach Moran and Whitford uncover hidden biases of income tax benefits received by black and white groups with the same income.<sup>281</sup> Uy and Abreu uncover the biases against Asian and Latino families through the definition of family and the definition of a dependant in the U.S Income Tax Code.<sup>282</sup> They find that Asian and Latino families have wider kin support networks which is overlooked by the Code.<sup>283</sup> This is detailed below.

Johnson advanced the argument that there are four elements which need to be satisfied by critical tax scholars to show the intentional or unintentional disadvantage of the Tax Code.<sup>284</sup> Johnson states that first, they need to show that there is a specific feature or provision in the Code which discriminates against a particular group for example in a situation where members of that group pay proportionately more tax than non-members. Secondly, they need to show that there are no other features in the Code to remedy the offending provision or feature by

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<sup>276</sup> Infanti (note 1 above) 1203.

<sup>277</sup> Knauer (note 227 above) 219.

<sup>278</sup> *Ibid.*

<sup>279</sup> Knauer (note 227 above) 221.

<sup>280</sup> Knauer (note 227 above) 208.

<sup>281</sup> B I Moran & W Whitford ‘A Black Critique of the Internal Revenue Code’ 1996 *Wisconsin Law Review* 75.

<sup>282</sup> Uy (note 251 above) and Abreu (note 136 above).

<sup>283</sup> *Ibid.*

<sup>284</sup> Johnson (note 260 above)1771-1772.

disproportionately benefitting the specific group that is, the favourable Code provision must hurt the group members more than the unfavourable Code provision hurts them. Thirdly, the offending provision in the Code should be remedied by changing the Code and lastly, a reasonable solution to reform the offending provision exists.<sup>285</sup> These four elements by Johnson will be addressed within this chapter and entire thesis as I first argue that the Income Tax Act 58 of 1962 has implicit bias in who benefits the most from deductions and credits, secondly that the failure to consider tax benefits in personal income taxation for families with dependants is implicit bias<sup>286</sup> and lastly, there are no provisions within tax law which remedy this implicit bias against black taxpayers who provide financial assistance to immediate and extended family and kin. Thus, this chapter and thesis is a demonstration of the intentional and unintentional disadvantage that a historically disadvantaged group has.

Critical tax theorists have challenged tax neutrality by “exploring the role tax laws play in the construction of social meaning and by exposing *explicit and implicit bias*”<sup>287</sup> against groups which are historically disadvantaged. American critical tax scholars have criticised the Tax Code in America citing features which produce different effects (predominantly negative effects) for different taxpayers especially those falling under historically disadvantaged groups.

An example of hidden bias and unintended consequences in South Africa would be black taxpayers not being able to take advantage of benefits targeted at saving for retirement. Contributions to a retirement annuity are tax deductible in South Africa. An individual can get a tax refund if they contribute 27.5 percent of their total annual income to a retirement fund.<sup>288</sup> I argue that “black tax” has an impact on retirement funding adequacy among black middle-class taxpayers. The South African black family structure is diverse with individuals looking out for the financial well-being of their immediate and extended family.<sup>289</sup> *Szinovacz et al*

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<sup>285</sup> *Ibid.*

<sup>286</sup> This is so because the principles of tax law such as horizontal equity, vertical equity and the ability-to-pay use income levels only as a form of difference and a measure of ability-to-pay. Financial obligations to take care of extended family should be a measure of one's ability-to-pay such that deductions or credits should be introduced.

<sup>287</sup> Knauer (note 227 above) 225.

<sup>288</sup> “retirement fund” refers collectively to a pension fund, provident fund, pension preservation fund, provident preservation fund and retirement annuity fund, all of which are approved under their separate definitions in section 1(1);

<sup>289</sup> B Zeka ‘Retirement funding adequacy in black South African townships (2020) *Black Journal of Economic and Management Studies* 1, 2.

found that economic kin obligations and ties had an effect on retirement decisions, in that, adult individuals who had a financial responsibility towards their parents delayed retirement.<sup>290</sup> They recognise that black American families are characterised by close kin networks and households have “mutual economic and support exchanges” thus, these complex family obligations and relationships should inform policy.<sup>291</sup> The 2019 Triple Jeopardy report, found that young South Africans assisted family because they were expected to do so and that “this is just the way things are done” and that “it is important to support others.”<sup>292</sup> The 10X South African Reality Report found that the sandwich generation<sup>293</sup> could not save for retirement because of the financial pressure of family financial obligations.<sup>294</sup> The report further states that “black tax” affects the historically disadvantaged communities the most.<sup>295</sup> The fact that family obligations factor into retirement decisions directly impacts a black professionals ability to save, create generational wealth and to take advantage of tax benefits.

However, tax legislation in South Africa showed explicit bias. As discussed in Section 1.4 of the thesis, there were deductions which black taxpayers could not benefit from. Explicit bias would be specific provisions of legislation that treat taxpayers differently based on race or gender.

The next section builds on this by looking at the intersection of race, class, culture with tax law. The argument below is that race, class and culture are used as lens’ to investigate the disparate impact of tax and avoid hidden biases, implicit bias and unintended consequences.

## **2.4 Race, Class and Culture in Critical Tax Scholarship**

Race differences and the history of black racial oppression has been used as a lens to investigate the disparate impact of income tax in the United States. Moran and Whitford’s *A Black Critique*

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<sup>290</sup> M E Szinovacz, S DeViney & A Davey ‘Influences of Family Obligations and Relationships on Retirement: Variations by Gender, Race, and Marital Status’ (2001) 56B(1) *Journal of Gerontology* S20, s21.

<sup>291</sup> *Ibid.*

<sup>292</sup> Triple Jeopardy 2019 Report.

<sup>293</sup> The sandwich generation is used to refer to individuals who are wage between two dependent generations which are their parents and children. They are the generation which is burdened by “black tax.”

<sup>294</sup> 10X South African Retirement Reality Report 2019 available at 10X Retirement Reality Report 2020 accessed on 5 May 2020.

<sup>295</sup> *Ibid* 9.

of the *Internal Revenue Code*<sup>296</sup> is the *locus classicus* of investigating the black and white tax gap using a race-based analysis. Moran and Whitford hypothesised that the history of racial subordination greatly contributed to typical black people and typical whites leading different lives even when receiving the same income which further triggered different results.<sup>297</sup> They questioned “whether the Internal Revenue Code systematically favor (ed) whites over blacks.”<sup>298</sup> In their analysis they examine the exclusion of gifts from income, tax benefits for home ownership and tax benefits for wealth among other provisions of the U.S Income Tax Code. To investigate their hypothesis and research question, Moran and Whitford compared similarly situated black and white individual taxpayers to determine which group of taxpayers benefitted more than the other from tax benefits in the Income Tax Code. They controlled for “income, education, region and marital status” in their investigation and found that race significantly influenced the tax benefits received by whites and black people who have the same income, with whites benefitting disproportionately.<sup>299</sup> The use of a race lens by Moran and Whitford in income tax law has influenced other work in critical tax law.<sup>300</sup>

The consideration of economic class differences has also been suggested as a way of addressing black-white economic disparities.<sup>301</sup> Hyman considers the approach and arguments made by Moran and Whitford in *A Black Critique of the Internal Revenue Code*. He argues against a race-based analysis because in his view, a class-based analysis can be used to uncover the tax disparities affecting black people.<sup>302</sup> The class approach considers class differences between black people and whites and within the black community.<sup>303</sup> For Hyman, the findings by Moran and Whitford that taxpayers with higher incomes are the recipients of greater income tax benefits demonstrates the intersection of race and class because “blacks, as a group, have lower incomes and lower wealth holdings than whites.”<sup>304</sup> However, Moran has defended their race-

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<sup>296</sup> Moran and Whitford (note 281 above).

<sup>297</sup> *Ibid* 769.

<sup>298</sup> *Ibid*

<sup>299</sup> Moran and Whitford (note 281 above) 769. Also see W Hyman ‘Race, Class and the Internal Revenue Code: Class based Analysis of black critique of the internal revenue code’ 2006 35(1) *Capital University Law Review* 119, 120.

<sup>300</sup> Uy (note 251 above). Also see Hyman (note 299 above).

<sup>301</sup> Hyman (note 299 above).

<sup>302</sup> *Ibid* 128.

<sup>303</sup> *Ibid*.

<sup>304</sup> Hyman (note 299 above) 153.

based analysis prior to the class-based approach being suggested. Defending their approach, Moran suggests that looking at progressivity and vertical equity introduces a class-based analysis to the federal tax system and this requires a look at lower class people.<sup>305</sup> This might then lead to the argument that the tax system falls heavily on lower income groups and that it is harder for lower-class groups to save efficiently because cash savings are taxed whilst tax on investments is deferred and this favours higher income individuals.<sup>306</sup> The exemption of lower income groups from all federal taxes is an example of a class-based solution. Moran states that not only will such an exemption be politically unacceptable, but it will complicate the tax system.<sup>307</sup> South Africa has a tax threshold and the relevant amounts for the 2021 year of assessment are R83 100 if you are younger than 65 years, R128 650 if you are 65 years of age or older and R143 850 for taxpayers 75 years and older.<sup>308</sup> Taxes fall on middle- and higher-income groups in South Africa.<sup>309</sup>

Hyman does agree that neither race nor class can provide a complete understanding of the economic conditions of black people.<sup>310</sup> Otherwise, as Moran puts it, “if America's race problem is essentially a class problem, then as black people move into the upper income groups, the race problem disappears.”<sup>311</sup>

A significant critique is whether discrimination in South Africa is a racial or class question. Friedman argues that class analysis is wrong to suggest that race is not a stubborn factor affecting life chances especially because the black middle-class is still economically vulnerable.<sup>312</sup> He states that race, and not class, is the major fault line in society post-1994 as

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<sup>305</sup> B Moran ‘Setting an Agenda for the Study of Tax and Black Culture’ 1999 21(4) *University of Arkansas at Little Rock Law Review* 779, 784.

<sup>306</sup> *Ibid.*

<sup>307</sup> Moran (note 305 above) 787.

<sup>308</sup> <http://www.sars.gov.za>

<sup>309</sup> There are exceptions to this as we have the Value Added Tax which lower income groups are subjected to.

<sup>310</sup> Hyman (note 299 above) 154.

<sup>311</sup> Moran (note 305 above)

<sup>312</sup> S Friedman ‘Beyond race or class: the politics of identity and inequality’ 2019 100 *Transformation: Critical Perspectives on Southern Africa* 78, 79.

the racial hierarchies of apartheid still exist.<sup>313</sup> The recognition of class as an epiphenomenon of race is a recognition of the lived experiences of the majority of black South Africans.<sup>314</sup>

In the same vein, if South Africa's problem is a class problem, then as black South African's move into the upper income groups, the race problem should disappear. The race problem does not disappear. As far back as 1990, it was theorised that the South African society can be understood by studying the interconnections between race and class.<sup>315</sup> The theory on intersectionality responds to the one-dimensional nature of race-based and gender-based research which neglected the lived experiences and the overlap of multiple identities.<sup>316</sup> Thus, an intersectional approach explaining the interconnection of race and class would be wise.

The intersection of tax law and culture is another approach which can be used to address economic disparities between races. The intersection of race and class informs this approach. Like race, taking cultures into consideration in tax law and policy is acceptable so long as the notion of fairness is maintained.<sup>317</sup> Abreu states that "our cultural heritage and our perspective as critical tax scholars" offers a different way of analysing how the tax system is structured.<sup>318</sup> Abreu also discusses culture in the context of Latino/as and the Income Tax Code. She states that the US Income Tax Code makes cultural assumptions on who is family in its definition of a dependant.<sup>319</sup> She highlights that in the Latino culture families have strong bonds between generations and it is common for multiple generations to share households.<sup>320</sup> Therefore, the structure of the Latino family makes it difficult to sort familial relationships into the 'more atomistic and money-based categories of Anglo culture' reflected by the US Income Tax Code. Thus, culture provides a critical perspective to understanding racial differences and tax law.

In some instances, the economic relationships in the extended families and households are influenced by cultural practices which the individual taxpayer is connected to. Uy uses culture in her research on the intersection of tax law and race focusing on the Asian-American

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<sup>313</sup> *Ibid* 80

<sup>314</sup> Friedman (note 312 above) 80.

<sup>315</sup> H Wolpe Race, class & the apartheid state Africa (1990).

<sup>316</sup> L McCall 'The Complexity of Intersectionality' (2005) 30 (3) *Signs* 1771, 1780.

<sup>317</sup> Moran (note 305 above) 791.

<sup>318</sup> Abreu (note 136 above) 577.

<sup>319</sup> *Ibid* 592.

<sup>320</sup> Abreu (note 136 above) 592.

experience in tax law.<sup>321</sup> Uy poses the question, “why is the law so often disconnected from the understanding and expectations of the taxpayers?”<sup>322</sup> She enquires whether the race of a taxpayer affects how she or he is taxed. She questions if the demographic makeup of the lawmakers or “cultural understanding” play a role in the disconnect in the tax laws and the taxpayers’ expectations. Through the examination of scholarship on critical tax theory, she argues for the attention to the Asian-American experience and argues that critical tax theory is necessary to level the playing field in a system with minimal representation of other cultures in the legislature, wage disparities between races and a system which does not accommodate the differences between Asian-American and white families and households.<sup>323</sup> Her suggested way forward is that legislators have to understand that the tax system needs to achieve fairness and justice by considering the different beliefs, values and cultural perspectives of each race group. Doing so, would avoid the disparate impact of taxes on previously disadvantaged groups and minorities. Thus, in this thesis, introducing living customary law practices and beliefs that emerge from *ubuntu* which justify the duty or responsibility that a black South African individual has towards the financial support of immediate and extended kin is necessary and required to avoid the disparate impact of tax law.

Moving forward, the race and class dichotomous approach to fairness and equity in taxation has been informed by whether a critical tax theorist uses a horizontal or vertical equity approach.

## **2.5 The Family and household in critical tax scholarship**

Diversity across families is investigated in family law scholarship. In South Africa, the definition of family is inclusive of blood relations and non-blood relations formed through adoption, marriage, a marriage-like relationship or a civil union.<sup>324</sup> The family can include immediate family members such as children, brothers and sisters or can include extended family such as grandparents, uncles, aunts, cousins, nephews and nieces.<sup>325</sup> When it comes to immediate and extended family, the law on family recognises rights and responsibilities in respect of such. Skelton *et al* consider the law of parent and child in traditional and wider family

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<sup>321</sup> Uy (note 251 above) 118.

<sup>322</sup> *Ibid.*

<sup>323</sup> Uy (note 251 above) 122, 123 & 130.

<sup>324</sup> J Heaton & H Kruger *South African Family Law* (2015) 3.

<sup>325</sup> Heaton & Kruger (note 324 above) 3.

settings.<sup>326</sup> Their discussions on family are based on various sources which result from historical developments with the Constitution being recognised as the most important source which binds all other sources.<sup>327</sup> Despite the diversity in family structures and the recognition of cultural practices now accepted in our law, income tax law in South Africa does not adequately consider the notion that family is not static and that individual taxpayers are not a homogenous group defined along lines of income. Tax law in other countries as discussed in Chapter 6, addresses family units through income taxes by allowing for dependency exemptions and deductions.

It is argued that the recognition by South African courts in Road Accident Fund (RAF) cases of the customary law duty of support that an adult child has towards their parent should be considered in tax law. A customary law duty of support creates an obligation which can interact with an individual taxpayers' ability-to-pay as they redistribute their incomes to wider kin than other racial groups as shown by the data in Chapter 3. For that reason, I argue within the thesis that income level, as defined in chapter 1, is not an appropriate measure for horizontal equity and the ability-to-pay.

Critical tax theorists were once criticised for being unsuccessful in developing a blueprint on which reform in the taxation of the family could be based.<sup>328</sup> In the 1970's in America, the blueprint for tax reform debate was centred on rules which linked tax burdens to family circumstances.<sup>329</sup> It was argued that despite a look at an individuals' tax burden and the factors such as domestic obligations and marital status which have an effect on it, a set of fairness criteria could not be advanced by any tax theorists as one suggestion for improving individual tax burdens would seem like an attack on another group who would be disadvantaged by the proposed reforms.<sup>330</sup> Tax theorists in the U.S have indeed focused on the link between family circumstances on an individual's tax burden.<sup>331</sup>

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<sup>326</sup> A Skelton, M Carnelley, S Human *et al* Family Law in South Africa (2010) 9.

<sup>327</sup> *Ibid.*

<sup>328</sup> M J McIntyre & O Oldman 'Taxation of the Family in a Comprehensive and Simplified Income Tax' 1977 90(8) *Harvard Law Review* 1573, 1573-1574.

<sup>329</sup> *Ibid*

<sup>330</sup> McIntyre & Oldman (note 328 above) 1573.

<sup>331</sup> Infanti (note 328 above).

Infanti and Crawford state that in comparison to issues of race, gender and sexual orientation, the family is a topic that has featured greatly in mainstream tax literature.<sup>332</sup> However, critical tax theorists in South Africa have not engaged with the intersection of the family and tax law. Issues of family relationships involving the pulling together of resources or the financial support in families has received limited focus. The focus of the family and taxation in the U.S focuses on joint income tax returns,<sup>333</sup> joint and several tax liability of married couples,<sup>334</sup> child-care or the conflicting meaning of family for estate tax purposes.<sup>335</sup>

### **2.5.1 The Individual and the Family in Tax Law**

Economic theory is a theoretical justification for using the individual as the unit of taxation and for taking family and personal circumstances into consideration through tax allowances and tax credits. In their work on family in tax policy, Bogenschneider and Bogenschneider made the point that the “jurisprudence of income taxation is now premised on the economic theory of the individual taxpayer, as it was from the very beginning.”<sup>336</sup> The greatest challenge as presented by Bogenschneider and Bogenschneider is the presentation of a tax jurisprudence which considers the role of both the family and the individual.<sup>337</sup> It has been argued that the notion of “individualism” has been favoured by critical tax theorists who have stressed the decline of the “traditional family” or nuclear family in modern society.<sup>338</sup> Kornhauser states that “..today the family still plays an important role in an individual's social and economic status, but the individual is not nearly as dependent on the family for social and economic achievement.”<sup>339</sup> Kornhauser’s statement is not applicable to the South African context as the individual has several ties to the family which are familial, economic, and cultural. True to economic theory, South Africa adopted the individual as the unit of taxation with personal and

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<sup>332</sup> Infanti and Crawford (note 250 above) 8.

<sup>333</sup> M Kornhauser ‘Love, Money, and the IRS: Family, Income Sharing and the Joint Income Tax Return’ 1993 45 (1) *Hastings Law Journal*.

<sup>334</sup> L Kahng ‘Innocent Spouses: a Critique of the New Tax Laws Governing Joint and Several Tax Liability 2004 49(2) *Villanova Law Review*.

<sup>335</sup> B J Crawford ‘The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law’ 2005 3 *Pittsburgh Tax Review*.

<sup>336</sup> B Bogenschneider & K Bogenschneider ‘An evidence-based approach to family in tax policy’ 2015 51(2) *Gonzaga Law Review* 283, 293.

<sup>337</sup> *Ibid*.

<sup>338</sup> Bogenschneider & Bogenschneider (note 324 above) 293.

<sup>339</sup> Kornhauser (note 321 above)

family circumstances considered in some instances by means of tax deductions, tax allowances and tax credits. Thus, families may not follow the traditional, nuclear family but the individual is dependent on the family as shown by the tax allowances and tax credits available for economic family relationships in other countries in chapter 6.

### **2.5.2 ‘Decentralizing’ the Family Households: Traditional v Non-Traditional Family Household**

Tax law acknowledges interdependency by allowing for dependency exemptions, credits, and deductions in income tax law. But tax law has been critiqued by critical tax scholars for prioritising traditional families over non-traditional families.<sup>340</sup> The traditional family they draw on is the nuclear family comprising of a heterosexual couple and their children. Infanti theorises that for tax purposes, the traditional family is privileged and mentions that families which do not fit the mould of the traditional family are not considered a family and are generally ignored in tax law.<sup>341</sup> A breakaway from the privileging of the traditional family in tax law to a more inclusive approach for determining family is required for tax purposes.<sup>342</sup> This approach would be helpful in dealing with non-traditional family arrangements such as the support that a taxpayer would give monthly to his or her parents who are retired or sick. Although Infanti looks at families for the purposes of tax filing, his work is relevant as he suggests approaches to family arrangements which do not fit the traditional family mould.<sup>343</sup> Starting with the individual, the individuals tax family, that is those that have economically interdependent relationships with the individual, can be traced.<sup>344</sup> This tracing can allow income tax law to include family support in personal income taxation by giving relief through deductions, credits or rebates.

Extending from these non-traditional family arrangements are the diverse economic relationships in families. Uy investigates the intersection of race, family, and tax law by looking into practices within the Asian-American families in comparison to white American families. In comparison to white families, Uy states that the Asian-American nuclear family is more

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<sup>340</sup> A C Infanti (2010) ‘Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States’ 2010 3 *Utah Law Review* 605, 606

<sup>341</sup> *Ibid.*

<sup>342</sup> Infanti (note 340 above).

<sup>343</sup> *Ibid.*

<sup>344</sup> Infanti (note 340 above) 607.

likely to live with non-working relatives thereby increasing the number of people the family income pool supports.<sup>345</sup> Uy takes these points further and analyses tax incentives for home ownership and concludes that because the tax system benefits nuclear families, not many Asian Americans can take advantage of the tax benefits.<sup>346</sup> Further, Uy analyses the marriage penalty and marriage bonus. She states that the tax system does not consider family members which a married couple may be supporting from their income as part of their extended family but who certainly fall outside the definition of a dependant for tax purposes.<sup>347</sup> As such, Asian Americans fail to take advantage of the deductions for dependants for family members they support from their income.<sup>348</sup> In the same vein as Uy's research, Infanti keenly observes that there are ties between households which are social, emotional, familial and economic.<sup>349</sup> Reflecting on the economic ties inter- and intra-household, he states that:

These ties might take the form of the financial support..., that parents and children or stepparents and stepchildren provide each other, that siblings or other relatives provide each other ... This financial support might take the form of a transfer of cash or property (or of the use of cash or property) that is entirely gratuitous, in exchange for less than full consideration, or motivated by gratitude for services, support, or kindness that the other person provided with no expectation of payment or profit whatsoever.<sup>350</sup>

Thus, part of Uy's and Infanti's work argues for the recognition of all "economically interdependent relationships" in income tax law, those relationships which are modelled after non-traditional families and households too.<sup>351</sup> The "economically interdependent relationships" which a taxpayer has are relevant to income tax law with it being argued as best suited to support and accommodate the economic issues which an individual has.<sup>352</sup>

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<sup>345</sup> Uy (note 251 above) 132.

<sup>346</sup> *Ibid* 137.

<sup>347</sup> Uy (note 251 above) 138. Also see the American definition of a dependent/dependant in chapter 6 section 6.5.5. The definition of a dependant means a qualifying child or qualifying relative.

<sup>348</sup> Uy (note 251 above) 138 Also see section 6.4 for a discussion on the credits and deductions available to a taxpayer with dependants.

<sup>349</sup> Infanti (note 340 above) 608.

<sup>350</sup> *Ibid*.

<sup>351</sup> Infanti (note 340 above) 609.

<sup>352</sup> *Ibid* 639.

## 2.6 Criticisms of Critical Tax Theorists

The critical tax theory and theorists have been critiqued as being overly eager to accuse tax laws of bias and unfairness and that a selection bias exists in the tax laws studied.<sup>353</sup> Several other critiques of the theory have been summarised as follows;<sup>354</sup>

- critical tax scholarship was viewed as “troubling”, “underdeveloped” and “dangerous” for tax policy intervention;
- the theory was deemed as opposed to the principle of equity by adopting an identity-blind position based on race, gender and other identity characteristics;
- the progressive rate structure and entitlement programmes were side-lined by critical tax theorists.

Despite the arguments advanced against the use of the critical tax theory in policy, the theory serves as one of the lenses that can be used to develop socially just and identity sensitive tax policy. The strength in critical tax theory is its ability to “urge policymakers to acknowledge and address the connection between taxation and equality by examining taxation through a critical lens, one which foregrounds relevant identity characteristics and prompts policy makers to ask difficult questions.”<sup>355</sup>

Critical tax theorists have faced criticisms from mainstream tax theorists<sup>356</sup> and Knauer states the following regarding the criticisms:

The efforts of critical tax scholars to bring an outsider perspective to tax policy and question the base premise of taxpayer neutrality have often been met with stiff and sustained resistance from mainstream tax scholars who write primarily from an economics or public welfare perspective tax theory has remained essentially a critique—a view from the margin that can both inform and illuminate—but it has failed to find a wide audience among tax scholars or application for its insights within tax policy.<sup>357</sup>

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<sup>353</sup> Zelenak (note 248 above) 1523.

<sup>354</sup> Knauer (note 227 above) 231.

<sup>355</sup> *Ibid* 231.

<sup>356</sup> Zelenak (note 248 above).

<sup>357</sup> Knauer (note 227 above) 227.

This thesis, like many other works in critical tax theory, discusses the implicit bias and unintended consequences of not having tax relief for black middle-class taxpayers who support their dependants.

## **2.7 Horizontal Equity or Vertical Equity Approach in Critical Tax Scholarship**

This chapter does not ignore the principles of equity and equality which have been central to tax reforms concerning expenses incurred to support dependants. The Margo and Katz Commissions of enquiry discussed in sections 3.4 and 3.5 respectively applied principles of equity when dealing with the issue of how to take account of families in the income tax system of South Africa. Tax fairness and equity are principles that should be considered in tax reform because they embrace diverse questions and issues but are sometimes misinterpreted as argued by Vivian.<sup>358</sup> However, these principles of taxation are important in determining “...what types of taxes should be levied? Who should pay them? How should they be administered? What processes should be used to make these decisions?”<sup>359</sup> In engaging in the recognition of the support for dependants in tax law and providing relief through the income tax system, principles of tax fairness and equity allow us to ask questions on the administrability of such mechanisms for dependency and possibly, the requirements that must be satisfied by a taxpayer to qualify for the relief. Thus, principles of tax fairness and equity are central to any tax reform discussion.

### **2.7.1 Defining principles of tax equity**

The above discussion has highlighted the significance of equity and fairness in critical tax theories and the tax system.

Vertical equity which is the notion that taxpayers with unequal incomes should be “appropriately differentiated” in the distribution of the tax burden, has been the popular subdivision of tax equity. The other branch of tax equity, horizontal equity requires that taxpayers who are “similarly situated” should be treated equally and bear the tax burden the same.

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<sup>358</sup> R W Vivian ‘Equality and Personal Income Tax – The Classical Economists and the Katz Commission’ (2006) 74 (1) *South African Journal of Economics*.

<sup>359</sup> S M Sheffrin *Tax Fairness and Folk Justice* (2013) 1.

### *Horizontal and Vertical Equity*

The principle of horizontal equity is rooted in public economics theory and Richard Musgrave is accredited with the current definition of the term. Horizontal equity seeks to establish that “similarly situated” individual taxpayers and not “identically situated” individual taxpayers receive equal treatment in tax law by bearing an equal tax burden.<sup>360</sup> This argument entails that for tax purposes, horizontal equity considers taxpayers as equal and “similarly situated” despite the non-income difference prevailing circumstances of the taxpayers.<sup>361</sup> The circumstances of the taxpayers therefore do not need to be identical for horizontal equity to be seen as effectively in action. As a principle of equity, horizontal equity has been challenged on various grounds but has continued to be justified on welfare and revenue collection grounds.<sup>362</sup> In comparison to horizontal equity, vertical equity has received significant respect as a principle that “objects to inequality and promotes equality.”<sup>363</sup> Vertical equity has been associated with progressivity in taxation where the “effective tax rate increases as the tax base or economic income increase”<sup>364</sup> to support income and wealth redistribution. Therefore, from the above definitions, horizontal equity is concerned with the tax treatment of equals whilst vertical equity is concerned with unequal individual taxpayers.

It has been argued that in designing a tax system, horizontal equity has no independent significance from vertical equity. Primarily, Musgrave and Kaplow engaged in a series of arguments on the normative foundation and independent significance of the principle of horizontal equity in relation to vertical equity. Initially, Musgrave argued that horizontal and vertical equity are linked as they are different sides of the same coin and he rhetorically asked “if there is no specified reason for discriminating among the unequal, how can there be a reason for avoiding discrimination against equals?”<sup>365</sup> Writing decades later, Kaplow stated that as a principle of taxation, horizontal equity not only lacked normative content but also did not have

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<sup>360</sup> D Elkins. ‘Horizontal Equity as a Principle of Tax Theory.’ (2006) 24(1). *Yale Law & Policy Review* 43, 44-45

<sup>361</sup> Elkins (note 361 above) 44-45. Also see B Galle ‘Tax Fairness’ (2008) 65. *Wash. & Lee L. Rev.* 1325.

<sup>362</sup> Galle (note 361 above) 1328.

<sup>363</sup> L Kaplow ‘Horizontal Equity: Measures in Search of a Principle’ (1989) 42(2) *National Tax Journal* 140, 147.

<sup>364</sup> A S Silke *et al. Silke : South African Income Tax 2017* 22nd ed (2017) 1197.

<sup>365</sup> RA Musgrave. *The Theory of Public Finance.* (1959) 160.

a separate significance from vertical equity.<sup>366</sup> For Kaplow, the compliance of vertical included horizontal equity compliance as well.<sup>367</sup> At this point, both Kaplow and Musgrave adopted a similar position. However, after the argument by Kaplow, Musgrave later wrote and located his argument in distributive justice formulations such as Lockean entitlement, utilitarianism, and other fairness criteria. He argued that horizontal equity was a firmly established primary rule existing outside vertical equity despite vertical equity serving horizontal equity outcomes.<sup>368</sup> Kaplow disagreed further and requested that examples be given where horizontal equity operated independently from vertical equity and where the outcomes of horizontal equity could be achieved without satisfying vertical equity.<sup>369</sup> Musgrave responded that horizontal equity is a distinct norm and that an ideal setting horizontal and vertical equity can be jointly satisfied by a single arrangement.<sup>370</sup> The above exchange summarises that horizontal equity has no independent significance from vertical equity as it embodies a general principle of fairness in taxation that equals must be treated equally.<sup>371</sup>

The lack of objective criteria to measure equal positions, likeness, or similarity of individual taxpayers under horizontal equity has been problematic.<sup>372</sup> Income level of taxpayers has been used as criteria to determine likeness in equity.<sup>373</sup> There is a need to recognise taxpayer differences and other identity characteristics other than income level. Disregarding the multiple identities of a black middle-class taxpayer produces unintended bias and consequences. The thesis argues that a black middle-class taxpayer is part of a vulnerable and precariat class which supports dependants. As such, the thesis uses a critical lens to explain the intersectionality of race and class and to justify tax relief for contributions made by a taxpayer to kin.

As a principle of tax theory, vertical equity emphasises the tax treatment of differently situated individuals and requires the “appropriate” differentiation of the unequal. The understanding of

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<sup>366</sup> Kaplow (note 351 above)139-140.

<sup>367</sup> P R McDaniel & J R Repetti ‘Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange’ (1993) 1(10) *Florida Tax Rev* 608.

<sup>368</sup> R A Musgrave ‘Horizontal Equity, Once More’ (1990) 43 (2) *National Tax Journal* 116-117.

<sup>369</sup> L Kaplow ‘A Note on Horizontal Equity’ (1992) 1(3) *Florida Tax Review* 192.

<sup>370</sup> R A Musgrave ‘Horizontal Equity: A Further Note’ (1992) 1(6) *Florida Tax Review* 355.

<sup>371</sup> J H Kahn ‘Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity’ (2006) 57 (4) *The Hastings LJ* 645.

<sup>372</sup> Miller (note 48 above) 544. Also see J Repetti & D Ring ‘Horizontal Equity Revisited’ (2012) 13 (3) *Florida Tax Review* 137 states that the measure of equal positionality must appeal to some form of distributive justice

<sup>373</sup> JJ Cordes ‘Horizontal Equity’ *The Encyclopedia of Taxation and Tax Policy*. 195

vertical equity rests on defining the ambit of the term “appropriate” used in defining it. In general, the word means “suitable or right for a particular situation or occasion.”<sup>374</sup> Thus, appropriate differentiation could refer to theories of distributive justice that underlie vertical equity and which tax policymakers agree is “appropriate.”<sup>375</sup> Thus, what is suitable or right in imposing equal burdens among taxpayers is influenced by economic hypothesis of what the right tax system is.

### ***Ability-to Pay Principle***

The modern conceptualisation of the ability-to-pay doctrine has its origins in the work of John Stuart Mill and Adam Smith who wrote on theories of justice in taxation.<sup>376</sup> In these theories, Mill perceived justice to mean the redress of inequalities and ultimately theorised that rules of social justice ought to shape just taxation.<sup>377</sup> Mill argued for the principle of distributive justice through the **sacrifice theories**. The argument was that the taxpayer makes a sacrifice in paying taxes and thus depriving themselves of their money.<sup>378</sup> The distribution of tax burdens was possible through the theory of sacrifice developed based on principles of utilitarianism which demand the greatest good to the greatest number.<sup>379</sup>

Also, despite the sacrifice being equal among taxpayers, it is put forward that equal sacrifice is concerned with equal tax burdens rather than the equality of net resources post-taxation.<sup>380</sup> This analysis goes beyond the equal sacrifice principle and applies to other provisions of equity and fairness where the position of a taxpayer pre-tax is considered relevant. The pre-tax position of a black middle-class taxpayer is relevant in determining their ability-to-pay. The position can relate to the historical positioning of the taxpayer and the inequalities that taxpayer still faces.

Moreover, others consider objective measures of ability such as income, consumption, or wealth as the best determinants of taxable capacity and ability. The objective approach is known as the **faculty theory** and predates sacrifice theories. Seligman detailed the faculty

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<sup>374</sup> Cambridge English Dictionary.

<sup>375</sup> McDaniel & Repetti (note 367 above) 612.

<sup>376</sup> RA Musgrave. A Brief History of Fiscal Doctrine. In AJ Auerbach and M Feldstein (ed) *Handbook of public economics* (1985) 16-18.

<sup>377</sup> *Ibid.*

<sup>378</sup> M Slade-Kendrick ‘The Ability-to-pay Theory of Taxation’ (1939) 29(1) *The American Economic Review* 93.

<sup>379</sup> A G Buehler ‘Ability to Pay’ (1946) 1 *Tax Law Review* 243, 247. Also see Elkins (note 360 above) 56.

<sup>380</sup> MJ Fitzgerald ‘Justice in Taxation’ (1957) 15 (2) *Review of Social Economy* 140.

theory of ability which originated during the middle ages influencing Latin, French and English legislation along with Greek philosophy.<sup>381</sup> The faculty theory is an objective approach which determines taxable capacity and ability to bear the burden in monetary terms rather than sacrifice and feelings.<sup>382</sup> The interpretation of faculty changed over time from testing faculty through property and later through revenue or income.<sup>383</sup> In support of objective tests of ability, sacrifice is viewed as being “rather meaningless as a measure of the comparative burdens of taxation.”<sup>384</sup> This argument comes from the subjective and immeasurable nature of relative economic circumstance when applying sacrifice theories. Also, it has been argued that objective tests of ability are positive in comparison to the more subjective sacrifice theories. Under objective tests of ability, the positive side of ability is shown as income, consumption or wealth are assumed to be clear indicators that the taxpayer does not face undue hardship. In comparison, sacrifice emphasizes the “losses occasioned by tax payments” and reflects the negative side of ability.<sup>385</sup> The differing views between objective and subjective approaches show the difficulties in finding the best measure for ability-to-pay in taxation.

The enquiry above shows that the measurement, definition, and scope of ability-to-pay makes it a difficult principle to apply in practice to address matters of nuance differences among a certain group of taxpayers such as the middle-class. The assumption with ability-to-pay is that taxpayers are equal based on their income levels as discussed in the following sections on measurements of ability-to-pay. The subjective and objective measurements of ability-to-pay revolve around equality of taxpayers’ pre-tax incomes, consumption, or wealth. Although ability-to-pay and other equity principles recognise the need to redress inequalities, the broad and visible realities of society and the economic systems are not acknowledged in their application and literature.<sup>386</sup> In that regard, according to ability-to-pay approach, a tax system is fair and equal for taxpayers when loss of welfare or equal sacrifices are made equally or proportionally.

The measurements of ability-to-pay demand that taxpayers are equal if they have equal incomes. The measurements of ability-to-pay also dictate that those taxpayers who are unequal

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<sup>381</sup> E R Seligman *Studies in Public Finance* (1925) 188.

<sup>382</sup> *Ibid.*

<sup>383</sup> Seligman (note 381 above) 231-234.

<sup>384</sup> Buehler (note 379 above) 249.

<sup>385</sup> *Ibid.*

<sup>386</sup> Slade-Kendrick (note 378 above)

and have different incomes must pay different amounts in taxation (vertical equity). This is the position proposed under vertical equity. The principles of equity and fairness in taxation juxtapose each other on the treatment of same, equal, unequal, and different taxpayers to achieve a fair distribution of the tax burden.

### **2.7.2 The approach to horizontal, vertical equity and the ability-to-pay in critical tax scholarship**

Fairness in taxation is an elusive concept but whose importance requires acceptance.<sup>387</sup> In discussing the fairness of a tax system, most critical tax theorists analyse the meaning and application of the ability-to-pay principle, horizontal and vertical equity.<sup>388</sup> Under horizontal equity, individuals who are similarly situated are taxed the same. If there is a Taxpayer A who earns R100 and there is Taxpayer B who earns R100 it is “fair” in terms of horizontal equity to tax both individuals at the same rate. Martinez and Martinez state that when applied, the principle of horizontal equity potentially produces an “unfair” result.<sup>389</sup> Laws that seem to be neutral are in fact not neutral as they affect individuals differently and produce different outcomes for those individuals who have different realities. Although horizontal and vertical equity are defined in economic terms,<sup>390</sup> Infanti states that non-economic forms of difference such as race, ethnicity or gender should not be overlooked through a homogenization and sanitization of taxpayers.<sup>391</sup>

Schmalbeck critiques Moran and Whitford’s *A Black Critique of the Internal Revenue Code*.<sup>392</sup> He states that “vertical equity is inevitably somewhat subjective and does not lend itself to definitional crispness in the way that horizontal equity does.”<sup>393</sup> Livingstone states that critical tax scholarship blurs the lines of horizontal and vertical equity arguments when they step outside of the common economic analysis to include non-economic criteria such as race or

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<sup>387</sup> L P Martinez & J M Martinez ‘The Internal Revenue Code and Latino Realities: A Critical Perspective’ 2011 22 *University of Florida Journal of Law and Public Policy* 377, 378.

<sup>388</sup> R Schmalbeck ‘Race and the Federal Income Tax: Has a Disparate Impact Case Been Made’ 1998 76 *North Carolina Law Review* 1817. Also see A Livingstone ‘Radical Scholars, Conservative Field: Putting Critical Tax Scholarship in Perspective’ 1998 76 (5) *North Carolina Law Review* 1791, 1792.

<sup>389</sup> Martinez and Martinez (note 387 above) 383.

<sup>390</sup> *Ibid* 384.

<sup>391</sup> Infanti (note 1 above) 1196.

<sup>392</sup> Moran & Whitford (note 281 above).

<sup>393</sup> Schmalbeck (note 388 above) 1819.

gender.<sup>394</sup> He goes further to argue that critical tax scholarship makes an assumption that individuals with different racial identities have a different status even at the same income level.<sup>395</sup> Regarding Moran and Whitford's work, Livingstone questions whether it would not be better for critical tax scholars to adopt an approach which looks at the broader issues using a vertical equity analysis<sup>396</sup> rather looking at whether or not specific provisions in tax law discriminate against a certain group.<sup>397</sup> In the South African context, one does not need to assume that a black middle-class taxpayer and a white middle-class taxpayer have a different status at the same income level. The experiences and status of black people in South Africa are indeed different from other racial groups because of the effects of colonialism and apartheid. Thus, a horizontal equity approach and critical lens is justifiably adopted in this thesis to analyse the taxpayer differences of "similarly situated" individuals based on race, class, and family practices of kin support.

Further, Schmalbeck's and Livingstone's critiques are misplaced as some critical tax theorists look at the disparate impact of tax law. This makes it reasonable to identify similarly situated individuals by race and to compare their circumstances using non-economic forms of difference. Critical tax theory allows researchers to uncover hidden biases and unintended consequences which would otherwise go unnoticed because tax equity is concerned with economic differences, that is, income. Thus, a horizontal equity analysis makes a relevant and significant contribution making it possible to begin the work on a tax system that is fairer for two individuals who are similarly situated.

Infanti also engages with the horizontal equity approach adopted by Moran and Whitford. First, he has observed that for Moran and Whitford,<sup>398</sup> it seems that horizontal equity caused race to be greater in impact only if it coincides with economic class.<sup>399</sup> Critical tax theory and intersectional theory envisions that when multiple axes of disadvantage meet, they produce a greater effect than a single axis of disadvantage. Secondly, he observes that tax equity does not recognise the multiplicity of disadvantages such as race and class in one taxpayer, with race

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<sup>394</sup> Livingstone (note 376 above) 1797.

<sup>395</sup> *Ibid* 1798.

<sup>396</sup> *Ibid*.

<sup>397</sup> Livingstone (note 376 above) 1810.

<sup>398</sup> Moran & Whitford (note 270 above).

<sup>399</sup> *Ibid*.

serving as a proxy for economic class.<sup>400</sup> Thus, race is not a separate disadvantage in addition to class in the traditional tax equity approach.

Although there is no agreement on whether to use horizontal equity or vertical equity in critical tax theory analysis, this research considers both horizontal and vertical equity as essential analytical tools. The important issue when using horizontal equity is to clearly identify the horizontal inequities in the income tax and avoid blurring horizontal and vertical equity arguments. Horizontal equity arguments look at similarly situated individuals receiving the same income. These individuals can be differentiated through family circumstances, family structure, race, and class. By providing tax deductions and tax credits for dependants, tax law recognises in some part that there are differences between similarly situated individuals which can go beyond income.

## **2.8 Conclusion**

In conclusion, critical tax theory, which is underpinned by an intersectional lens, is a fitting perspective to review tax law in South Africa especially in relation to a transformative agenda. It is useful when integrated with transformative agendas in family law, welfare reform or tax expenditure programs for dependants. It can challenge the skewed distribution of income and wealth. It shows that law is political because laws are crafted through a political process by those with power. Often those who do not have power are the historically disadvantaged. Those whose race and culture is not at the centre of tax law policy discussions. Thus, it seems fair to conclude that this chapter demonstrates in Shurtz's words that "just beneath the surface of apparently innocent and reasonable taxation principles may lurk the spirit of oppression."<sup>401</sup> Because of this understanding of tax law and the principles of equity, deconstruction of tax law structures has been an agenda of critical tax scholars.<sup>402</sup>

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<sup>400</sup> Infanti (note 1 above) 1207.

<sup>401</sup> Shurtz (note 255 above) 1881.

<sup>402</sup> *Ibid* 1879.

## CHAPTER 3 INTERSECTIONALITY OF KIN SUPPORT NETWORKS (BLACK TAX) AND INCOME TAX RELIEF FOR TAXPAYERS

*Tax law is not merely a series of technical rules that is the domain of the “experts.” It is a living, breathing body of jurisprudence that can be truly understood only when one places it in the **social context** (own emphasis) in which it operates.”<sup>403</sup>*

### 3.1 Introduction

This chapter describes the social context in which personal income tax law operates in South Africa. A tax system that recognises a family, which is extended, and fluid is essential to achieve social justice and tax equity in South Africa. The discussion in this chapter shows the size and strength of kin support in black families. The discussion seeks to show that the identities of taxpayers cannot be glossed over with income being the only taxpayer identity recognised for income tax purposes. This is one of the major premises of critical tax theory discussed in section 2.3.1 of this thesis. The discussion of the concept and scope of family in South Africa ensures against one family form being disadvantaged over another by tax law and policy.

In this chapter, the research question on the black middle-class taxpayer having a greater responsibility to provide financial support to individuals within their families is answered. The chapter further answers why kinship support networks are wider and stronger in black families. Understanding kinship support networks in South Africa strengthens the argument that taxpayers are not a homogenous group, and that income level should not be the only identity that matters to determine a taxpayer’s ability-to-pay. In doing so, the need for tax relief for taxpayers is demonstrated.

The chapter is guided by the following sub-questions:

- Is a black individual likely to have a higher dependency ratio than a person of another race in South Africa?<sup>404</sup>
- How do intergenerational family relationships intersect with tax law? Does the vulnerability of the black middle-class due to the financial interdependency make a case for the need for tax relief in income tax law? If so, will the use of deductions and credits

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<sup>403</sup> C Young ‘Tax Policy, Theoretical Explorations, and Social Realities’ (2003) 51 (5) *Canada Tax Journal* 1922-1930

<sup>404</sup> B Nkosi & P Daniels ‘Family Strengths: South Africa’ (2007) 41(1-2) *Marriage and Family Review* 11, 13.

for dependants help in achieving social and distributive justice amongst taxpayers in South Africa?

### 3.2 Descriptive statistics: family and kin support networks in South Africa

In the 1990's, the view was that the black family and household patterns in South Africa were in a process of converging and diverging around the nuclear family system.<sup>405</sup> In 2007, Amoateng, Heaton and Kalule-Sabiti found that black South Africans were more likely than white South Africans to be a part of an extended family pattern and that extended family living was more common among black people than other racial groups.<sup>406</sup> In 2018, Hall and Mokomane use the General Household Survey (2016) and conclude that the extended household is the largest type of household and it constitutes 36 percent of the household types surveyed.<sup>407</sup> On whether households are becoming smaller and nuclear, they state that the change in the composition and size of household is a result of the change in the composition and size of the family.<sup>408</sup> Despite this, for them, “the challenge is for policies and programmes to respond to diverse and changing living arrangements so that the state can support families...”<sup>409</sup> Tax policy introduced to relieve taxpayers supporting dependants will indeed have to respond to the diverse and changing living arrangements in households and families.

Despite the views expressed by scholars above, the extended family pattern is regarded the norm in black South African families.<sup>410</sup> Siqwana-Ndulo defines the extended family as a “collectivity of people who live together, whose relationship could be traced through kinship

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<sup>405</sup> M Russell ‘Do Black people Live in Nuclear Family Households? An Appraisal on Steyn’s Work on Urban Family Structure in South Africa’ (1994) 6 (2) *South African Sociological Review* 57.

M Russell ‘Understanding Black Households: The Problem’ (2003) 29 (2) *Social Dynamics* 5, 6.

SR Nzimande Family Structure and Support Systems in Black Communities. In A Steyn HG Strijdom, S Viljoen & F Bosman (Eds) *Marriage and Family Life in South Africa*. Pretoria. HSRC.

<sup>406</sup> AY Amoateng, TB Heaton & I Kalule-Sibiti ‘Living Arrangements in South Africa’ In AY Amoateng & TB Heaton (eds) *Socio-demographic perspectives of families and households in post-apartheid South Africa* 43, 48.

<sup>407</sup> K Hall (2018) The shape of children’s families and households. In: Hall K, Richter L, Mokomane Z & Lake L (eds) *South African Child Gauge 2018* 34

<sup>408</sup> *Ibid* 40.

<sup>409</sup> Hall (note 407 above) 43.

<sup>410</sup> *Ibid*.

or marriage and who considered themselves as family.”<sup>411</sup> The extended family consists of kinship bonds among those related by blood (consanguineal). To understand how the household works, the kinship system needs to be explained.<sup>412</sup> Murdock states that within a kinship system, persons are tied by “complex interlocking and ramifying ties” within what is considered a “structured system of relationships.”<sup>413</sup> This moral order was also said to be intertwined with the cultural ethos of *ubuntu*, which embodies the value of the interdependence and emphasises the importance of ensuring the wellbeing of the collective over self-interest.<sup>414</sup> Thus, in a South African black family, individuals help other less advantaged family household members.

In a survey study carried out among rural black, urban black, and urban whites to compare family norms it was found that 51 percent of whites and 14 percent of rural black people agreed with the statement that “when your parents are old and helpless it is best to send them to an institution where they will be cared for until they die.”<sup>415</sup> In stage 3 of the survey of the urban black sample, 60 percent of urban black people disagreed with this statement. Russell argues that this reflects the traditional view that in black families, children are a source of sustenance and security for their parents, resulting in the practice of children supporting parents.<sup>416</sup> She goes further to cite this as a major difference between white and black families in South Africa.<sup>417</sup> Beittel earlier wrote that after the 1930’s, there were differences in the income-pooling practices of white and black households in the Witwatersrand. These differences and data show that for some reason, individuals in black families consider taking care of family as a responsibility and obligation that one has. It is unfortunate that analysis of the data did not explain the motivation behind the negative and positive responses. It merely highlighted in a single question that taking care of one’s parents was the right thing to do.

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<sup>411</sup> N Siqwana-Ndulo ‘Rural Black Family Structure in the Eastern Cape Province, South Africa’ (1998) 29(2) *Journal of Comparative Family Studies* 407, 415.

<sup>412</sup> Russell (note 393 above) 8.

<sup>413</sup> G P Murdock *Social Structure* (1949) 91.

<sup>414</sup> Sagner & Mtati (note 82 above) 400.

<sup>415</sup> M Russell ‘Are Urban Black Families Nuclear? A Comparative Study of Black and White South African Family Norms’ (2003) 29(2) *Social Dynamics* 153, 161.

<sup>416</sup> *Ibid* 161.

<sup>417</sup> Russell (note 415 above) 161.

Posel has used the dataset to conduct research on inter-household private transfers.<sup>418</sup> Inter-household transfers are transfers received from people not living in the same household and they are an important source of income for the household. They are a “black tax” to those that give these transfers. In her research, Posel uses the household level of analysis to investigate the characteristics of inter-household private transfers and how widespread inter-household private transfers are in South African households.<sup>419</sup> Posel finds that inter-household private transfers received increased from Wave 1 to Wave 4 of NIDS with the transfers being high in 2014/2015.<sup>420</sup> The incidence of inter-household private transfers received was 21 percent in 2014/2015.<sup>421</sup> The incidence for both inter-household private transfers received and sent was 39 percent in 2014/2015.<sup>422</sup> The importance of private transfers is their contribution to poverty reduction as they greatly contribute to household income upon receipt.<sup>423</sup> Posel states that private transfers contribute between 34 and 41 percent to the average monthly household income and eliminating private transfers when calculating total household income would be a significant flaw.<sup>424</sup> Posel also found that the transfers were between adult children and their parents and that 43-52 percent of the recipients were parents or a partner of the sender, sibling or family member of the sender.<sup>425</sup>

Ssebagala’s research uses NIDS to investigate private transfers between familiarly related individuals to “identify the roles extended family and kinship networks play in inter-household smoothing in South Africa by interrogating the patterns, functions, and significance of these transfers.”<sup>426</sup> Ssebagala finds that support is concentrated amongst immediate relatives and that support for each other declines the further the relative.<sup>427</sup>

Like Posel’s study, my research only measured inter-household transfers. However, Posel does not make a racial comparison of inter-household private transfers. The interesting finding she

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<sup>418</sup> Posel (note 225 above)

<sup>419</sup> *Ibid*

<sup>420</sup> *Ibid* at 44.

<sup>421</sup> Posel (note 225 above) 19.

<sup>422</sup> *Ibid* at 4.

<sup>423</sup> Posel (note 225 above) 19.

<sup>424</sup> *Ibid* at 5.

<sup>425</sup> Posel (note 225 above) 11.

<sup>426</sup> R A Ssebagala (2020): Plugging the Welfare Gap: The Role of Kinship Transfers in South Africa, *The Journal of Development Studies* 1, 2

<sup>427</sup> *Ibid* 9.

makes is that the sender is a family member of the recipient. This is relevant for the argument that there is an obligation and a duty on a black middle-class taxpayer to make contributions to support family members resulting in what is known as “black tax.” Contributions or private transfers are significant to the income of a household, and they are high because of poverty, inequality, family fragmentation and migration patterns which because of the long history of internal labour migration.<sup>428</sup> My research draws a descriptive of private transfers or contributions made and given between individuals in households of different racial groups. NIDS can only provide data for inter-household transfers not intra-household transfers. The findings in this study are most useful to show the differences in support between racial groups. For this research, the NIDS questions for the dependent variables for contributions received and contributions sent are the following:

- F3.1 In the last 12 months, did you receive money, food, or any other kind of contribution from people who do not usually sleep under this roof for four nights a week? If you receive maintenance for you or your child, please include it here.
- F3.2 In the last 12 months, did you send money, food, or any other kind of contribution to other people, who do not usually sleep under this roof four nights a week? If you send maintenance or child support payments, please include it here.

### **3.2.1 Race and Contributions received and given**

The following hypothesis is to be tested in this section:

1. H<sub>0</sub> Black individuals are not most likely, compared to other races, to give support family members.  
H<sub>1</sub> Black individuals are most likely, compared to other races, to give support family members.
2. H<sub>0</sub> Black individuals are not most likely, compared to other races, to receive support family members.  
H<sub>1</sub> Black individuals are most likely, compared to other races, to receive support family members.

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<sup>428</sup> Posel (note 225 above) 10.

A cross-tabulation of population group with the NIDS Wave 5 variable of contributions received showed that 2 548 black participants out of the 19 113 black participants received contributions from a non-household member. As a percentage, this is 13.3 percent of the number of black participants in the survey. In comparison, amongst the coloured and white participants, 7.8 percent and 5.6 percent of the participants received contributions from a non-household member. This is captured in Figure 1 below.

**Figure 1 Contributions received from non-household members**

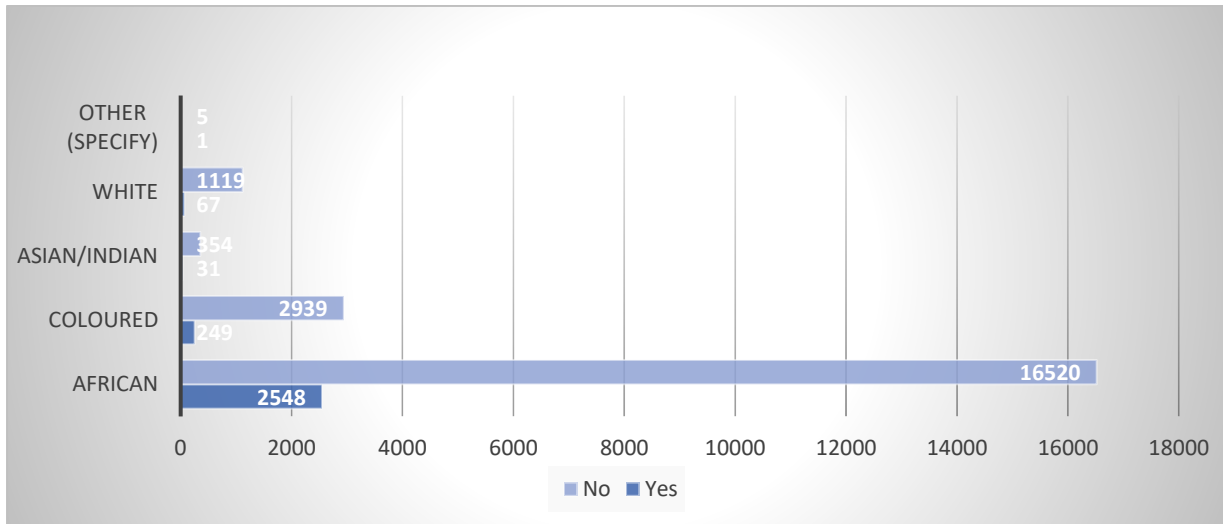
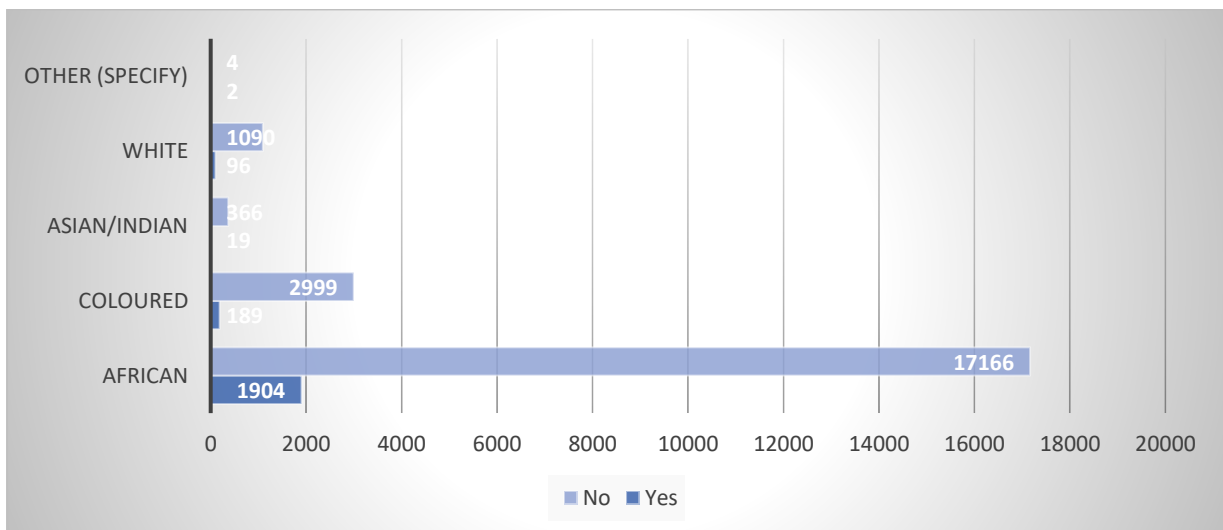


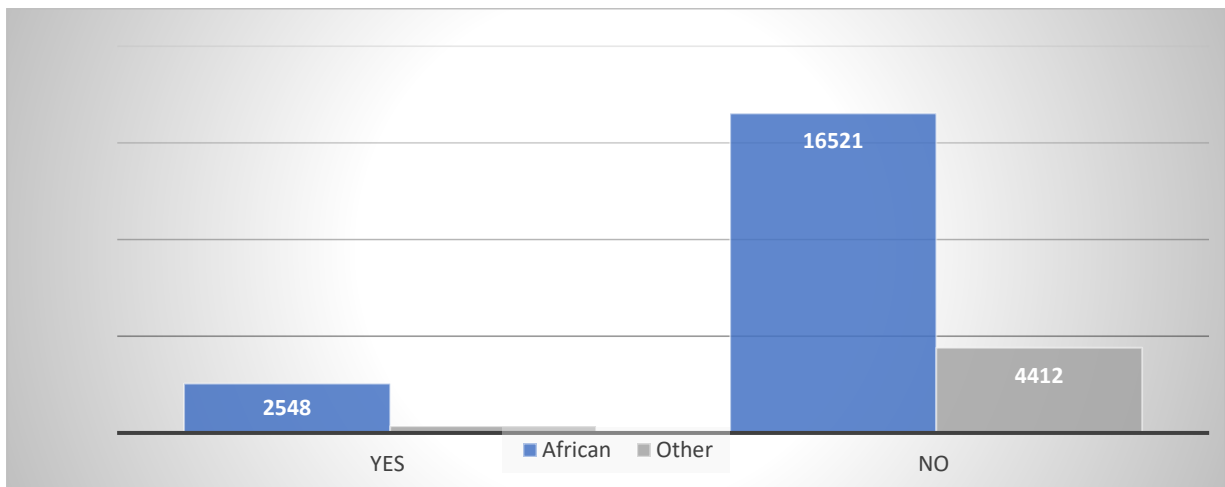
Figure 2 below summarizes the contributions given by each racial group to non-household members. The figure shows that 9.96 percent of black participants gave contributions to members of other households. In comparison, 5.9 percent of coloured and 8.1 percent of white participants give contributions to members from other households.

**Figure 2 Contributions given from non-household members**



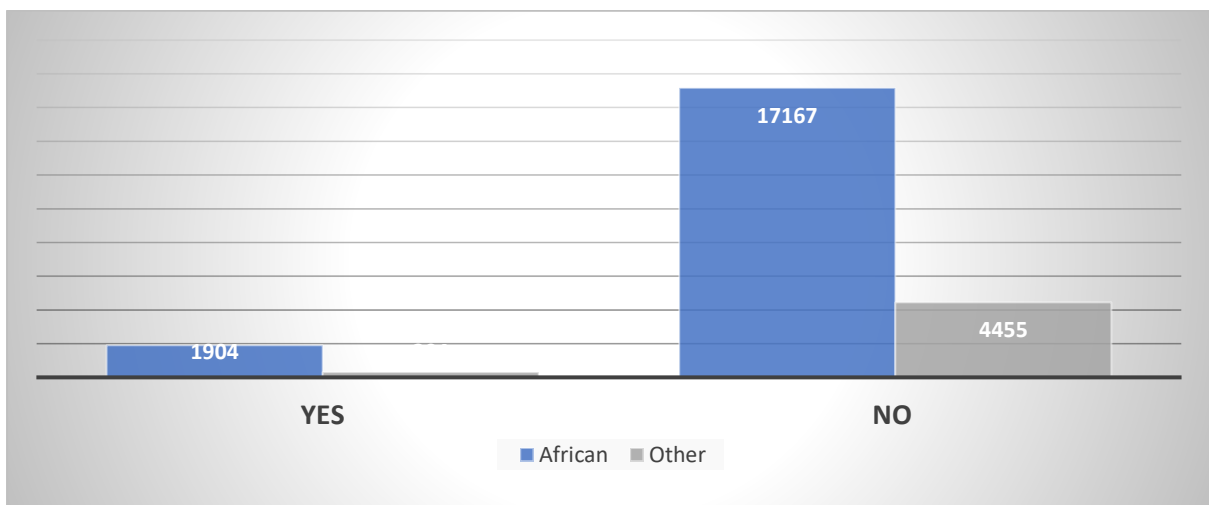
After recoding the race variable (population group) into a different variable in SPSS to *Race*, *Black v Other*. The missing values were removed in the creation of the new variable. In analysing the data, the recoded variable of race has the value “1” for black and the value “0” for other races. Figure 3 below shows that 2 548 black/African population group received contributions from non-household members in comparison with 347 “other” which is made up of whites, coloureds, and Indians. The number of individuals who did not receive support is high for all race groups including black/African.

**Figure 3 Contributions received from non-household residents by race**



In the above discussion, the flows of support can move from adult child to parent, adult child to grandparents or adult child to siblings or any other immediate and extended family such as an aunt who might need regular financial assistance.

**Figure 4 Contributions given to non-household residents by race**



Results of the chi-square test for contributions received and given from non-household members approves that we can reject the null hypothesis. The null hypothesis states that black

individuals are not most, compared to other races, to support their family members. Race is statistically significant and positively related to giving and receiving. There is a significant association between race and contributions given and received because the chi-square p-value is less than 0.05 level of significance.

### **3.2.2 Class, income and kin support networks**

In Chapter 1, the middle-class has been described using education level, skilled employment, professions, occupations, level of affluence and income level. For this research, the interest is in tax relief or tax benefits for taxpayers who support dependants especially wider kin whom they do not have a responsibility for. The following hypothesis is to be tested in this section:

H.<sub>0</sub> There is no positive relationship between class (income level) and support given to extended family.

H.<sub>1</sub> There is a positive relationship between class (income level) and support given to extended family.

Income level is a ratio independent variable and contributions sent or received is a nominal dependent variable. Thus, logistic regression was used to analyse the relationship between income level and contributions sent or received.

A dummy variable for annual income was created with income level categories. The recoded data showed that most participants from the survey were in the R35 001 and R40 000 annual income group. The second highest annual income group was between R25 001 and R30 000. The third highest annual income group were participants between R5 001 and R10 000. However, these participants are outside the scope of this research. The purpose of the low-income group is as a comparator to middle-class participants. The recoding of the income variable assists in identifying who the black middle-class taxpayers are as defined in chapter 1 of this thesis. The dummy variable is informed by Visagie who finds that the middle-class have a net income of R5 600 and R40 000.<sup>429</sup> The annual net income for the middle-class individuals would be between R67 200 and R480 000 before any deductions. Applying this definition of the middle-class this research finds that there are 2416 participants who are middle-class out of a total 30 110 participants in the NIDS dataset. From the recoded variables these were participants in categories 13 to 95 of the frequency table attached as Annexure B hereunder.

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<sup>429</sup> Visagie (note 195 above) 4.

Category 13 were participants with an annual net income between R65 001 and R70 000, and category 95 were participants with an annual net income between R475 001 and R480 000.

***Middle-class taxpayers are givers of support and not receivers***

The findings from a cross-tabulation of the new income dummy variable with the dependant variable on contributions received from other non-household members shows that those who are in the lower income categories received the most support. As the annual net income of the participants got higher, less support was received from non-household others. These findings prove that black-middle class taxpayers are not receivers of support but rather are likely to be send support in the form of inter-household transfers and remittances because of their connection to the lower-income family members.

The research further finds from the logistic regression that both race and income were statistically significant to whether an individual gave support to another individual in a different household. The result was statistically significant at the 0.01 level. The null hypothesis for hypothesis 2 is rejected. This means that there is a positive relationship between class (income level) and support given to extended family. This confirms the finding by Ssebagala who also finds that there is a significant positive relationship between income and financial and being a net donor.<sup>430</sup> Thus, those family members with the financial means give support mostly to their kin. The deduction here is that a black middle-class taxpayer is mostly likely to feel obligated to give support to their kin.

***Low-income and middle-class taxpayers give more support in comparison to higher income earners***

The findings from a cross-tabulation of the dummy income variable and contributions sent shows that those in the annual income category of R35 001 and R40 000 contributed the most amongst the participants. Those with an annual income of R67 200 gave more to non-household members than individuals in the middle- and higher income groups. An explanation of this is that there were less participants in the middle- and higher-income groups than the lower-income groups hence the difference in these figures. As the incomes become higher, there are less individuals making contributions to non-household members. If the definition of the middle-class as per Visagie's study is used, the middle-class would have contributed more towards non-household members. This is because from the data, the middle-class makes up a

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<sup>430</sup> Ssebagala (note 426 above) 11.

greater part of the categories in comparison to members from the lower- and higher income groups.

However, the analysis for race, income level and contribution sent showed that income was not statistically significant to whether individuals give support or not. Race was still statistically significant at the 0.01 level of significance as represented in the logistic regression done. Race still affected the likelihood of an individual giving support to others. The findings on this can be explained by the arguments that have been made in Chapter 1. Among black kinship networks, giving to kin is a duty to express gratitude and is a financial responsibility which is motivated by *ubuntu* and living customary law practices. The black kinship network is structured around reciprocity which involves mutual obligations of support. Individuals are likely to give regardless of income level. In the discussion, the patterns, and motivations behind the giving of support among black families will be elaborated.

### **3.3 The size and strength of kinship support networks in black families in South Africa**

In chapter 1 it was argued that the prevalence of intergenerational transfers and interdependency is a result of apartheid and colonial policies in South Africa. The following sections 6.3.1 and 6.3.2 elaborate on the concepts of *ubuntu*, living customary law and case law. These three concepts have remained as the major justifications for the continuing practices of support among black individuals and their families. Clark *et al* note that researchers fall into two camps when explaining kin support networks.<sup>431</sup> They state that there are researchers who study kin support as a function of structural factors and those who explain differences in kin support using cultural practices.<sup>432</sup> The structural approach explains kin support through socio-economic conditions of the giver and receiver of support.<sup>433</sup> This research discusses both approaches to explain transfers and support among kin in South Africa and in other jurisdictions. The historical and socio-economic conditions were also explained as the reason for greater interdependency amongst black South Africans in chapter 1. Burman researched on intergenerational care and support and states that it is “crucial to future welfare and legal planning to know how families have been coping with these duties in practice in the

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<sup>431</sup> S Clark *et al* Who helps single mothers in Nairobi? The role of kin support (2017) 79(4) *Journal of Marriage and Family* 1186, 1188.

<sup>432</sup> *Ibid*

<sup>433</sup> *Ibid*

circumstances of family disruption and need generated by apartheid.”<sup>434</sup> Apartheid policies attacked the black family in two ways; first, they attacked family cohesion and the ability of the family to provide for its members; secondly, they led to greater interdependency in the black family as state benefits were given discriminately despite the attack on the family to provide for its members.<sup>435</sup>

*Ubuntu* and living customary law are discussed in this chapter as cultural practices that can explain differences in kin support networks. This has been a view held by our courts in matters involving a parent who claimed loss of support on the basis that their deceased adult child supported them prior to their death.<sup>436</sup> The mention of customary law and living customary in this chapter is to show that cultural practices underlie greater income distributions in black families and households. The development of customary law is beyond the scope of the chapter. But, for context, the chapter will define and explain the application of customary law and living customary law within South African jurisprudence.

### **3.3.1 Socio-economic conditions**

Kin support networks in black families can be understood through socio-economic conditions and cultural practices. Siqwana-Ndulo states that black families in South Africa have made changes due to the conditions they faced.<sup>437</sup> Citing Siqwana-Ndulo, Nkosi & Daniels state that the unique history of South Africa and the resultant changes in family form is not a simple argument of family forms moving from “primitive to modern.”<sup>438</sup> Challenges impacting the black family include high levels of poverty and inequality faced by South African society today.<sup>439</sup> Apartheid created systemic inequalities and poverty which have continued to deepen despite South Africa being an upper middle-income country.<sup>440</sup> The social and economic exclusion policies of apartheid have had an effect on the asset-base, resource- allocation and

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<sup>434</sup> S Burman ‘Intergenerational Family Care: Legacy of the Past, Implications for the Future’ (1996) 22(4) *Journal of Southern Black Studies* 585, 587.

<sup>435</sup> *Ibid.*

<sup>436</sup> *Fosi v Road Accident Fund* 2008 (3) SA 560 (C) Also see cases under section 3.3.3

<sup>437</sup> Siqwana-Ndulo (note 399 above) 407-409.

<sup>438</sup> Nkosi & Daniels (note 404 above) 13.

<sup>439</sup> M Adato, MR Carter & J May ‘Exploring Poverty Traps and Social Exclusion in South Africa Using Qualitative and Quantitative Data’ (2006) 42(2) *The Journal of Development Studies* 226, 226-227.

S Terreblanche *A History of Inequality in South Africa, 1652-2002* 2ed (2002).

<sup>440</sup> Adato *et al* (note 439 above) 227.

support within the family and household.<sup>441</sup> Apartheid state policy and administrative mechanisms had a role in the current structure of the household in the country.<sup>442</sup> The migrant labour system changed family patterns and household structures because black labourers and breadwinners had to leave their families behind to work in mines or farms.<sup>443</sup> Thus, the legacy of apartheid and socio-economic inequalities not only changed the black family patterns but led to a system where the burden of supporting is greater in black families.

Despite the socio-economic environment being a reason for greater income redistributions and stronger support networks, Siqwana-Ndulo argues that:

...while the organisation of Black households is affected by the conditions under which they live and the way they earn their living, ...a recognition of the fact that the ways in which they organise themselves under new conditions, and the choices they make, are greatly influenced by their cultural values.<sup>444</sup>

The socio-economic conditions affect how the household organises itself, but the cultural values affect the ways of addressing these new conditions. For example, socio-economic conditions affect the resources that are at the disposal of the household, but then using cultural values of *ubuntu*, the household uses living customary law to address the new condition or challenge by redistributing income. Thus, when sharing these resources or income with others does not become a “black tax” or burden but rather it is a cultural practice centred in living customary law and *ubuntu*. The individuals in the black family and household have responsibilities and obligations to fulfil when it comes to taking care of the family and community interests.<sup>445</sup> For this reason, others describe cultural values such as *ubuntu* as a strength for the black family in overcoming challenges and organising the household around new conditions.<sup>446</sup>

### 3.3.2 Ubuntu and living customary law

South Africa is a legal pluralist society, and the lives of South Africans is regulated by multiple legal systems. Legal pluralism is when there are two or more normative orders applicable to a

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<sup>441</sup> Adato *et al* (note 427 above) 229 & 236. Also see Nkosi & Daniels (note 392 above).

<sup>442</sup> M Beittel Introduction (to Southern Africa). *Creating and Transforming Households* (1992) 192.

<sup>443</sup> Nkosi & Daniels (note 404 above) 13.

<sup>444</sup> Siqwana-Ndulo (note 399 above) 411.

<sup>445</sup> *Ibid* 411.

<sup>446</sup> Nkosi & Daniels (note 404 above) 23.

population.<sup>447</sup> The legal system in South Africa is a mixed legal system which is a hybrid of Roman-Dutch law, common law, African customary law, and personal religious laws. African customary law is recognised as a legal system in terms of section 211 of Constitution of South Africa.<sup>448</sup> The Constitution encourages the development of customary law under section 8(3) and 39 (2).<sup>449</sup> Section 211 (3) of the Constitution states that “the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” There is no definition for customary law in the Constitution thus we must turn to case law and other legal literature. The distinction between official and living customary law must be made to understand customary law. Official customary law has been regarded as a distorted form of customary law that does not reflect the everyday lives of the people’s rules and practices.<sup>450</sup> Living customary law has been adopted as the best practice of customary law which captures the customs and practices people do in their day to day lives.<sup>451</sup> Living customary law also adapts to evolving social and economic conditions.<sup>452</sup> The courts have defined living customary law as “a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.”<sup>453</sup> Thus, a practice such as giving financial support to ones parents and siblings can qualify as living customary law and people believe this is what they ought to do to adapt to the social and economic conditions.

Living customary law and *ubuntu* have been used to justify the duty or responsibility that one must support their immediate and extended kin in the black family and household. *Ubuntu*, living customary law, and case law are the drivers for what Hoffman and later Reynolds Whyte

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<sup>447</sup> S Larcom ‘Problematic legal pluralism: causes and some potential “cures” (2014) 46(2) *Journal of Legal Pluralism and Unofficial Law* 193, 194

<sup>448</sup> Constitution of the Republic of South Act 108 of 1996.

<sup>449</sup> R Ozoemena ‘Living Customary Law: A Truly Transformative Tool? (2016) *Constitutional Court Review* 147, 149.

<sup>450</sup> C Himonga ‘The Future of Living Customary Law in Black Legal Systems in the Twenty-First Century and Beyond , with Special Reference to South Africa’ In J Fenrich, P Galizzi & T E Higgins (eds) *The Future of Black Customary Law* (2011) 32.

<sup>451</sup> C Himonga & C Bosch ‘The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning’ *South African Law Journal* 117, 319.

<sup>452</sup> *Ibid* 319.

<sup>453</sup> *Pilane and Another v Pilane and Others* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) at para 55.

term the “intergenerational contract.”<sup>454</sup> Reynolds Whyte *et al* define the intergenerational contract as:

the implicit expectation that parents will care for their children until they can care for themselves, that children will support their parents when they can no longer support themselves...<sup>455</sup>

Hoffman considers the intergenerational contract to be deep-rooted as the way of life in Africa and still holds as the fabric of the black extended family despite apartheid, the migrant labour system or globalisation.<sup>456</sup> It creates a moral obligation. In defining generations, Reynolds Whyte *et al* state that it seems that the preferred definition in the social sciences for the term “generation” sees individuals as belonging to a culture or society with a flow of life preceding the individual identity.<sup>457</sup> Generation has been conceptualized as genealogical relationships, a principle for structuring society and ‘generation as cohort.’<sup>458</sup> Generation as genealogical relationships is about the links between grandparents, parents, children and grandchildren.<sup>459</sup> I however argue that “generations” is broader than parent/child. This is so because, as a principle for structuring society, generation is like “age” and is used to put members of society into categories and groups.<sup>460</sup> These two concepts differ with the conceptualisation of generation as cohort that is historical location of members of society who share common experiences.<sup>461</sup> There is great reciprocity between generations which is what Hoffman terms the intergenerational contract which is premised on concepts of ubuntu, customary law and case law. Reynolds Whyte *et al* consider reciprocity to be the most important aspect of intergenerational relationships.<sup>462</sup> Mtshali considers interdependence and reciprocity as the

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<sup>454</sup> J Hoffman ‘What Motivates Intergenerational Practices in South Africa?’ (2003) 1(1) *Journal of Intergenerational Relationships* 173, 174.

<sup>455</sup> S Reynolds Whyte, E Alber & S van der Geest ‘Generational Connections and Conflicts in Africa: An Introduction’ In E. Alber, S. van der Geest, & S. Reynolds Whyte (Eds.), *Generations in Africa: connections and conflicts* (2008) 1, 7.

<sup>456</sup> Hoffman (note 538 above)174.

<sup>457</sup> Reynolds Whyte *et al* (note 455 above) 3

<sup>458</sup> *Ibid* 6.

<sup>459</sup> *Ibid*.

<sup>460</sup> Reynolds Whyte *et al* (note 455 above) 3.

<sup>461</sup> *Ibid*.

<sup>462</sup> Reynolds Whyte *et al* (note 455 above) 7.

most important values in a black family.<sup>463</sup> Reciprocity involves the flow of resources between older and younger generations or between children and their parents. The concept of reciprocity in relationships has been discussed where Bozalek, Sagner and Mtati respectively find that reciprocity underlies *ubuntu* and that it is expected among black kinship relationships.<sup>464</sup> Although the thesis focuses on the sharing of income between generations or between extended family, there are other non-material resources such as providing labour or nursing an elderly which form the pattern of reciprocity.

*Ubuntu* is an ideal of living customary law. It is a philosophy that derives from the Nguni family of languages including isiNdebele, isiZulu and isiXhosa and has variant meanings across other black and Southern black languages such as chiShona and sePedi.<sup>465</sup> In isiNdebele and isiZulu languages, the concept of *ubuntu* is expressed in the phrase *umuntu ngumuntu ngabantu* and is directly translated into the English phrase “a person is a person through other people.”<sup>466</sup> *Ubuntu* is a concept centred on “human-ness” and the expression of innate humanity. It is an ethical philosophy that reminds one to take the first ethical step without an expectation of reciprocity.<sup>467</sup> Also, if one is living in terms of the ethical standards of *ubuntu*, they accept that everyone lives through the help of others as part of a community.<sup>468</sup> For an individual who belongs in the black family household, this philosophy of *ubuntu* invokes a sense of responsibility and duty of support towards extended family as the underlying principles are on inter-dependence and collectivism.<sup>469</sup> Under the philosophy of *ubuntu*, the individual must act ethically as a part of the collective and the social group which they are a member of. Cornell summarises the idea of the collective by saying “*ubuntu* calls us to an aspirational community in which my well-being or welfare is built and enhanced by seeking to ensure the well-being of the larger community in which it is necessarily rooted.”<sup>470</sup> Thus,

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<sup>463</sup> M Nkosingathi & G Mtshali ‘The Relationship Between Grandparents and Their Grandchildren in the Black Families in South Africa’ (2015) 46(1) *Journal of Comparative Family Studies* 75, 79.

<sup>464</sup> Sagner & Mtati (note 82 above).

<sup>465</sup> TW Bennett *Ubuntu: An African Jurisprudence* (2018) 10

<sup>466</sup> Bolden (note 20 above) and Cornell (note 66 above).

<sup>467</sup> Cornell (note 20 above) 112.

<sup>468</sup> *Ibid* 112.

<sup>469</sup> *Ibid*

<sup>470</sup> Cornell (note 20 above) 113.

*ubuntu* emphasises the ethical actions of the individual especially in relation to the wider community which they are a member of.

### 3.3.3 Case law

As stated above in 3.3.2, South Africa has a hybrid legal system. Common law is part of that hybrid legal system and is applicable where legislation does not govern a specific matter. Common law in South Africa is judicial precedent (or case law), 17<sup>th</sup>, and 18<sup>th</sup> century Roman-Dutch law. Judicial precedent has held that there is a reciprocal duty of support between persons when there is first, a legal relationship between parties such as a parent-child relationship or sibling relationship; secondly, there is necessary means of support possessed by person from whom support is claimed from and; lastly, there is necessary support that is, the person claiming the support is in need of it.<sup>471</sup> In *Oosthuizen v Stanley*,<sup>472</sup> the court cited the case of *Waterson v Mayberry*<sup>473</sup> where it was held that a plaintiff does not only have to prove that there was support given by a deceased but only that the deceased had a legal duty to support them due to circumstances that made that support necessary, that is, the plaintiff is an indigent person. The test for indigency was set out in *Smith v Mutual Co Ltd*.<sup>474</sup> In the *Smith* case, the plaintiff who was the father of the deceased instituted action against the defendant for damages sustained due to the death of his son. The plaintiff claimed that his deceased son had owed him, his mother and dependant brother a legal duty of support, thus the defendant had to compensate them for damages incurred because of the negligent driving of the defendant. The court held that “if the parents are indigent, their children, even minors, are liable to support them in whole or in part, according to their ability.” Specifically, the court held that:

To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Accordingly, when the plaintiff pleads indigence, it is not sufficient to show that the plaintiff lives on very little or nothing. The plaintiff must prove something more. The plaintiff must prove that there is an extreme need or want for the necessities of life.<sup>475</sup>

Indigency and ability to support are the two tests to prove that a duty was owed by the child and without that support the parents could not maintain themselves.

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<sup>471</sup> P Q R Boberg *et al Boberg's Law of Persons and the Family* 2 ed (1999) 233-234.

<sup>472</sup> 1938 AD 322.

<sup>473</sup> 1934 T.P.D. 210.

<sup>474</sup> 1998 (4) SA 626 (C)

<sup>475</sup> Para 632 D-E

Further, several cases in South Africa dealt with under the Road Accident Fund Act,<sup>476</sup> have applied, customary law, living customary law and the philosophy of ubuntu to determine whether there was a duty on a child to support parents and grandparents. Indigenous African customary law and *ubuntu* have been considered as the source of the duty to support a parent that is indigent or in need. This is in terms of South Africa's jurisprudence in the cases of *Fosi*, *Jacobs*, *Seleka*, *Mokhati* and *Keforilwe*.<sup>477</sup>

In the case of *Fosi v Road Accident Fund*,<sup>478</sup> the courts applied African customary law to determine the issue of a child's obligation to support their parents. In the *Fosi* case, the plaintiff was the mother of the deceased and the court had to determine whether there was a legal duty of support between the plaintiff and her deceased son and whether the plaintiff was indigent, in need of the support and maintenance from her deceased son. The court considered the test set out in *Smith v Mutual Co. Ltd* as too onerous and difficult to prove and reverted to earlier decisions of *Oosthuizen v Stanley* and *Wigham v British Traders Insurance Co Ltd*.<sup>479</sup> However, the interesting aspect of the case, was the Indigenous Black law perspective of the duty of support which the court deliberated in detail. The plaintiff told the court that her son gave her money monthly because he knew "where he was coming from and who had given birth to him."<sup>480</sup> The court reasoned in *Fosi v Road Accident Fund* that there was indeed a duty of support between the deceased child and his parent, and that this duty of support given by a child to his parents showed an appreciation of their unforgotten roots and demonstrated *ubuntu*. The court held that "...customarily the child who is financially able to do so, is under a financial obligation to maintain his needy parent."<sup>481</sup> The court held that the duty to support one's parents after obtaining a job was inborn and a trend in rural and urban black families. Further, this duty by the child to support the parent was well known in indigenous or customary law such that the parent expected the child to honour this duty. The courts considered 'living' customary law by looking at the practices of the child prior to his death to hold that the duty of support was owed to the mother after his death.

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<sup>476</sup> 56 of 1996

<sup>477</sup> These cases are cited below.

<sup>478</sup> 2008 (3) SA 560 (C)

<sup>479</sup> *Ibid* 10.

<sup>480</sup> 2008 (3) SA 7.

<sup>481</sup> *Ibid*.

In *Jacobs v Road Accident Fund*<sup>482</sup> the plaintiff claimed loss of support as a parent of the deceased. The court held that the deciding principle was that the parent prove that they depended on the child's support for necessities of life. The station of the parent will determine what the court accepts as necessities of life. In *Keforilwe v Road Accident Fund*,<sup>483</sup> the mother claimed loss of support after the death of her child in a motor vehicle collision. The court had to decide the issue of quantum and regarding a parent claiming loss of support after the death of a child, it cited several cases including *Oosthuizen, Smith, Jacobs and Fosi*. Relying on these cases, the court found that it was established that a parent could claim loss of support from a child based on customary law depending on the circumstances of each case. In *Seleka v Road Accident Fund*<sup>484</sup> the court had to determine three issues on the correct legal approach for claims of loss of support from children brought by biological parents, requirement of indigence of the parent and the test for proving indigency, and whether customary law allows for a duty of support to parents especially under Tswana custom.

Again, in the unreported case of *Mokhati v Road Accident Fund*,<sup>485</sup> the court had to make a finding on whether the plaintiff, who is father to the deceased, had a right to claim loss of support suffered because of the death of his son in a motor vehicle collision involving the defendant. The plaintiff testified that in terms of South-Sotho customs, his deceased son had a duty to support him. The court referred to the *Jacobs, Fosi* and *Seleka* cases and held that it was already established in law that custom must be taken into consideration to determine the duty of support owed by a child to an indigent parent.<sup>486</sup>

The above cases show that it is an established customary practice that a child, with the ability to do so, has a duty to support their indigent parent. A black middle-class individual has a customary obligation to provide financial assistance to their indigent parents. Failure to do so would amount to breach of custom and personal responsibility. The observation of customary practices in black families and households, increases the redistribution of income and resources within the family.

The following section discusses the connection between tax law and kinship support.

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<sup>482</sup> 2010 (3) SA 263 (SE)

<sup>483</sup> [2015] ZANWHC 74

<sup>484</sup> 2016 (4) SA 445 (GP)

<sup>485</sup> [2016] ZAGPPHC 1041.

<sup>486</sup> *Ibid* at para 6.

### 3.4 Individual tax burden and kinship support of the black middle-class

In tax law, kin support primarily features in the taxation of intragenerational transfers, that is, estates, bequests and *intervivos* gifts. However, tax law in some jurisdictions provides income tax relief when there is kin support between a taxpayer and a dependant as a way of promoting and strengthening the family. A taxpayer can receive tax relief through a deduction or credit for supporting a dependant who may be a parent, grandparent, or a child.<sup>487</sup> Intergenerational kinship support is promoted in Canada, the United States of America, Mozambique, and Mauritius. This is akin to judgements which have been made in South Africa which recognise the duty of a child to financially support their indigent parent. In some jurisdictions such as Canada, the United States of America, and Mauritius, intergenerational support through the tax system focuses on providing tax relief to taxpayers with children. Butts *et al* state that it may seem that such a policy is designed to strengthen the family but, such a policy weakens the extended family as grandparents and other relatives of the taxpayer are excluded.<sup>488</sup> They challenge government policies including tax policy to be reflective of the “changing roles and demands on each generation of a family.” For example, government policy in South Africa could reflect the demands on a black middle-class taxpayer whose ability-to-pay is reduced by legal and moral obligations to support family. This would support intergenerational relationships and strengthen the family as an essential societal unit. This is however not the case in comparator countries discussed below. Their tests of a dependant are wide to include grandparents and other relatives.

In section 2.4 of the thesis Hyman’s critique of the intersection of race and class in Moran and Whitford’s *A Black Critique* was outlined.<sup>489</sup> Hyman argues that “blacks, as a group, have lower incomes and lower wealth holdings than whites” thus black taxpayers benefit less from tax benefits.<sup>490</sup> The concept of disparate impact discrimination has been primarily used in employment law to refer to indirect discrimination against an employee. In tax law, the concept of disparate impact has been used to analyse the indirect discrimination of tax law on similarly

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<sup>487</sup> DM Butts *et al* Policies and Programmes Supporting Intergenerational Relations Background paper available at [https://www.un.org/esa/socdev/family/docs/bp\\_intergenerationalsolidarity.pdf](https://www.un.org/esa/socdev/family/docs/bp_intergenerationalsolidarity.pdf) Accessed in September 2018.

<sup>488</sup> *Ibid.*

<sup>489</sup> Hyman (note 299 above)153.

<sup>490</sup> *Ibid.*

situated taxpayers from different racial groups. Uy maintains that “tax systems empower those who can take advantage of the tax benefits.”<sup>491</sup> Moran and Whitford’s study in *A Black Critique*, which has been discussed thoroughly in Chapter 2, finds that in comparison to black taxpayers, white taxpayers benefit disproportionately from tax benefits.<sup>492</sup> The limited access that black taxpayers have to tax benefits ultimately worsens the economic inequalities between black and white taxpayers. Moran & Whitford state that “a disparate impact analysis looks at how a system adversely affects a disproportionate number of people in one group over those in another group.”<sup>493</sup>

Sarkisian and Gerstel analyse the differences in kin support between black families and white families in the United States.<sup>494</sup> Individuals in black families have rich family ties and a wider kin support network in comparison to white individuals.<sup>495</sup> Sarkisian and Gerstel show that there are different patterns of kin support participation among blacks and whites.<sup>496</sup> There is more practical support and involvement among blacks in the form of transportation, household work, and childcare whereas there is more financial and emotional kin support and involvement amongst whites.<sup>497</sup> In addition, gender is a critical axis in understanding these racial differences in support.<sup>498</sup> There are significant differences in kin support participation between black women and white women whilst black men and white men are very much alike.<sup>499</sup> Furthermore, in understanding kin support, diversity within racial groups appears to matter more than race itself.<sup>500</sup>

In the United States, the middle-class African American families disproportionately provide financial support to their families in comparison to white middle-class.<sup>501</sup> The kin support given

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<sup>491</sup> Uy (note 251 above) 120.

<sup>492</sup> Moran & Whitford (note 281 above) discussed in section 2.4 above.

<sup>493</sup> *Ibid* 758.

<sup>494</sup> N Sarkisian & N Gerstel ‘Kin Support among Black people and Whites: Race and Family Organization’ (2004) 69 (6) *American Sociological Review* 812, 812.

<sup>495</sup> *Ibid* 812.

<sup>496</sup> *Ibid*.

<sup>497</sup> *Ibid*.

<sup>498</sup> *Ibid*.

<sup>499</sup> *Ibid*.

<sup>500</sup> Sarkisian and Gerstel (note 234 above) 833.

<sup>501</sup> J D Hill ‘Kin Support of the Black Middle Class: Negotiating Need, Norms, and Class Background’ (2020) *Social Problems* 1, 1-2.

by African American middle-class individuals diverts resources away from wealth producing investments and from retirement savings.<sup>502</sup> In her study, Hill explores the reasons why the black middle-middle class in America provide financial support to their immediate and extended kin. Some of the reasons advanced for the stronger kin support networks between the black-middle class and their kin is the closer proximity of the black middle-class individual to needy networks, the responsibility to give back is tied to their racial identity and the intra-community support which goes back to slavery.<sup>503</sup> In her study, Hill finds that privileged individuals are not burdened by having to save family members from financial problems and that black middle-class had to consider giving support to kin at one point or another.<sup>504</sup> Thus, the black middle-class is still disadvantaged and overburdened by the need to provide support to kin in the United States.

The following chapter discusses social tax expenditures in South Africa before they were repealed. Chapter 6 then draws comparative analysis between South Africa and other countries which have managed to incorporate kinship support networks in determining a taxpayer's income tax position. This supports critical tax theorists such as Knauer who states that the identities of taxpayers are glossed over with income being the only taxpayer identity that matters. It also supports Infanti who states that taxpayers are not a homogenous group and that non-economic forms of difference should be considered for income tax purposes.

### **3.5 Conclusion**

This chapter explained the practices of support in black families which affect a black-middle-class taxpayer's ability-to-pay. Black individuals are most likely than whites to give and receive assistance from their kin support networks. It seems that the black middle-class taxpayers are a precariat class, existing in relative privilege, earning high incomes in their professions but still are disadvantaged by "black tax."<sup>505</sup> As Ndinga-Kanga writes, "black tax does the real work of income redistribution in the country."<sup>506</sup> The size and strength of kinship support networks in black families makes it likely that a black taxpayer's ability-to-pay is

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<sup>502</sup> R L O'Brien 'Depleting Capital? Race, Wealth and Informal Financial Assistance' (2012) 91(2) *Social Forces* 375, 378.

<sup>503</sup> J Aschenbrenner *Lifelines: Black Families in Chicago* (1975) 90. Sarkisian & Gerstel (note 234 above).

<sup>504</sup> *Ibid.*

<sup>505</sup> Ndinga-Kanga (note 88 above)

<sup>506</sup> *Ibid*

reduced by the support they must give to others. The exclusion of a taxpayer's family circumstances from income tax calculations in South Africa directly impacts historically disempowered groups and non-traditional families. These groups remain economically vulnerable and poor as they support wider kin networks.

## CHAPTER 4 OVERVIEW OF INCOME TAX RELIEF FOR TAXPAYERS WHO CONTRIBUTED TOWARD THE SUPPORT OF A DEPENDANT IN SOUTH AFRICA BETWEEN 1914 AND 2020

### 4.1 Introduction

For context, it has been stated that the history of South African income tax legislation is very recent with adjustments being made to income tax in line with the modern global economy which South Africa re-joined after its isolation during the apartheid era.<sup>507</sup> Income tax legislation in what was the Union of South Africa began with the Income Tax Act of 1914 which was based on the New South Wales Act of 1895.<sup>508</sup> The 1914 Act was followed by the Income Tax (Consolidation) Act of 1917, Income Tax Act of 1925, Income Tax Act of 1941 and the current act in force which is the Income Tax Act of 1962. This chapter discusses the provisions in these statutes. This chapter deals with the development of South African income tax law which applies to persons that provide financial support to their dependants who are a member of their family. The chapter gives an account of the tax relief provisions applicable to taxpayers who contribute towards the support of their dependants and it also “attempts to systematically recapture the complex nuances, ...ideas of the past that have influenced and shaped the present.”<sup>509</sup> This will show how the Margo and Katz Commissions recommended that tax was not the appropriate vehicle for providing assistance to individuals with dependants and that income tax law steadily shifted away from providing tax relief to taxpayers supporting dependants.

The chapter looks at two periods which are the pre-democracy period (1914-1994) and the post-democracy period (1995-present) in South Africa. The chapter begins by defining who was a dependant in terms of income tax legislation and precedent. Defining a dependant assists in understanding which taxpayers and family members were eligible for income tax relief for contributions sent and received, respectively. The definition is thereafter followed by a discussion on the abatement and rebate systems of tax relief for taxpayers who contributed to the support of a dependant as defined which were introduced under the Income Tax Acts of 1914, 1917, 1925, 1941 and 1962. The chapter then examines the development of income tax

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<sup>507</sup> J Hattingh & J.J Roelveld *Income tax in South Africa: the first 100 years, 1914-2014* (2016)

<sup>508</sup> *Ibid.* Also see P Surtees ‘History of Tax’ (2017) 63 *TAXtalk*. 58 – 59.

<sup>509</sup> H Lune & B L Berg ‘*Qualitative Research Methods for the Social Sciences*’ (2012) 305

reforms on the tax relief available to taxpayers supporting dependants recommended by the Steyn, Franzsen and Margo tax reform commissions.

## **4.2 The propriety tax relief for taxpayers who support a dependant**

### **4.2.1 Theories on tax relief for taxpayers supporting dependants**

The family unit is an important primary social structure in South Africa which plays a role in the distribution and transfer of income for the support and nurturing of children and other dependents. Of importance too in South Africa is the household which is a structure for the distribution and transfer of income. The support for families and households through the tax system is a debate which requires examination. It is correct to argue that “a tax system cannot be fair to individuals unless it considers the differences in ability-to-pay that result from the way that resources are shared within families of different sizes and types.”<sup>510</sup>

The use of income as an index of horizontal equity and the ability-to-pay principle perceives taxpayers with equal incomes as a homogenous group despite the racial, cultural, and socio-economic divides and inequities that present themselves in post-apartheid South Africa. As such, the traditional approach to tax equity has been criticized as being focused on economic differences and as a result “performs a sanitizing and a screening function...it effectively forecloses consideration of non-economic forms of difference...”<sup>511</sup> Infanti goes further to explain that tax equity excludes race, ethnicity, gender or sexual orientation in the determination of fairness despite these forms of difference being the basis for “..invidious discrimination that already imposes heavy burdens on its victims.”<sup>512</sup> Thus, where there is theoretical fairness in the distribution of the tax burden due to the supposition of homogeneity in tax equity that sees taxpayers as equal on unequal based on their incomes, in practice, marginalizes and ignores the transformative potential of law for historically disadvantaged groups.

Even though income is often chosen as the appropriate index for equity in tax law, adjustments and refinements based on need and “interpersonal transfers” are made. The tax systems in some

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<sup>510</sup> Taxation of the Family: Testimony before the House Ways and Means Committee by C. Eugene Steuerle Available at <https://www.urban.org/sites/default/files/publication/67151/900281-Taxation-of-the-Family.pdf> Accessed on 20 May 2020.

<sup>511</sup> Infanti (note 328 above) 119.

<sup>512</sup> *Ibid*

jurisdictions recognise transfers made and received by individuals and have introduced credits and deductions for such amounts in income taxes. However, some theorists still maintain that expenses incurred in supporting dependants should not be included in a system where income tax is based on ability-to-pay.<sup>513</sup> As has been mentioned throughout the thesis, a taxpayer's capacity is reduced by "the number of mouths that the taxpayer feels legally or morally obligated to support."<sup>514</sup> Bittker identifies four theories that have been used to debate the propriety of tax allowances for dependants. The theories are:<sup>515</sup>

*a) Dependency-as-consumption* which is centred on the argument that the taxpayers support for dependants is a form of personal consumption. The taxpayer makes a voluntary choice to support extended family thus does not have to be compensated for such decisions. The taxpayer has no legal obligation towards his siblings, aunts, uncles, or grandparents to provide for them financially. This theory is one of the theories used to add to the understanding of the public/private divide theories which view the decision to have children or to provide financial support to extended family as personal or private matters.

*b) Dependency as investment* which views the taxpayer's expenses towards supporting dependants, specifically their minor children, as investments.<sup>516</sup> These investments will pay off in the future when the dependants provide financial support to the taxpayer. Bittker argues that in this case the cost of supporting dependants should be deductible in income tax.<sup>517</sup> Tax theorists have used this theory as a "makeweight argument when debating the propriety of tax allowances for dependants' rather than as an analysis of society for fear of 'its exotic or even faintly comic overtones.'<sup>518</sup>

This theory links with the customary duty of support owed by adult children to their indigent parents which was discussed in detail in section 3.3.3. There is an intergenerational contract that parents will care for children who in turn will support their parents when they can no longer support themselves.<sup>519</sup>

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<sup>513</sup> Burns & Krever (note 111 above) 542.

<sup>514</sup> Bittker (note 13 above) 1447.

<sup>515</sup> Ibid 1446-7

<sup>516</sup> *Ibid.*

<sup>517</sup> Bittker (note 13 above) 1447

<sup>518</sup> *Ibid.*

c) *Dependants as reducing taxpaying capacity* theory posits that the taxpayer's ability-to-pay is affected by "the number of mouths that the taxpayer feels legally or morally obligated to support."<sup>520</sup> This theory which explains the propriety of tax allowances for dependants is the most relevant for this thesis.

d) *Population policy* theory maintains that if the national goal is to encourage the increase in the population then dependency allowances are a good thing but if the national goal is to reduce the population then the dependency allowances may be deemed as counterproductive.<sup>521</sup>

#### 4.2.2 The public-private divide

In South Africa, the Commission of Inquiry into the Tax Structure of South Africa (Margo Commission) of 1987, considered expenses incurred to support dependants and the deductions thereof as a non-tax issue by stating that the tax system should not be used to further "social objectives." In this regard, in South African tax law, expenses incurred in supporting extended family are non-deductible personal expenses. However, dependency in South Africa is considered for the purpose of medical aid credit in terms of the Medical Schemes Act 131 of 1998 and section 18 of the Income Tax Act 58 of 1962. Young states that "the privatization of economic responsibility for dependent persons" is what we get when a tax system views some forms of dependency as deserving of tax relief and not others.<sup>522</sup>

The taxation of the family is a thorny area of taxation because of theories of the public/private divide where issues of childcare expenses and dependency are considered personal matters falling within the private family. The *Symes v Canada*<sup>523</sup> case brought into perspective ways of thinking about tax policy and the family. The case, which is discussed in detail in chapter 7, dealt with the child-care expense deductions and business expenses deductions. Analysing the *Symes* case and using it as a vehicle, Johnson uses the intersection of class, gender, parenthood and the law.<sup>524</sup> Explaining the public/private divide, Johnson states that this is "a conceptual framework which is used to draw the boundary between those matters that fall in the public

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<sup>520</sup> *Ibid.*

<sup>521</sup> Bittker (note 13 above) 1449.

<sup>522</sup> Young (note 403 above) 1927.

<sup>523</sup> (1993) 4 SCR 695

<sup>524</sup> R Johnson *Taxing Choices the Intersection of Class, Gender, Parenthood, and the Law* (2002) 13.

domain and those that fall within the private.”<sup>525</sup> Young who reviews Johnson’s work states that there is for example “the (public) state in contrast to the (private) market or the (private) family and sometimes the (public) market in contrast to the (private) family.”<sup>526</sup> When it comes to certain matters of the family such as child-care costs or the costs of giving financial support to extended family, depending with the particular context, tax law has viewed them as matters of the private family. However, O’Connell and Sadiq analyse the judgement of the *Symes* case and other childcare expenses cases in the United Kingdom and Australia and state that although the decision regarding childcare expenses is personal, it does not make the expenses private.<sup>527</sup> Extending this argument to the tax treatment of dependency however seems difficult. The decision to financially support dependant family members can be strongly argued as a private family matter because they do not allow the taxpayer to engage in business activities or gainful employment unlike in the case of the decision to get childcare.

Further, the decision to support family members including children is regarded as a private or personal matter which can be understood through the dependents-as-consumption theory explained by Bittker. Bittker explains that the dependents-as-consumption theory views the decision to have children as voluntary and an indulgence of personal preferences which the treasury ought not to compensate.<sup>528</sup> Having children is viewed as a form of consumption by the parents.<sup>529</sup> This is the position even though the taxpayer has a legal duty to support their offspring. The decision by the taxpayer to financially support his or her siblings and extended relatives also falls within the dependent-as-consumption theory.<sup>530</sup> This decision to support relatives is even more voluntary than the decision to support one’s minor children and is capable of being terminated without any legal consequences.<sup>531</sup> However, the financial support given by the taxpayer to his or her parents is not a voluntary choice as the decision to have parents is not voluntary but is dictated by biology. The corollary of the dependents-as-consumption theorists are two-fold, first, the extreme argument is that if parents have more than enough income for their own support they should be taxed and any negative effects of this

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<sup>525</sup> *Ibid* 13 .

<sup>526</sup> Young (note 403 above)1925.

<sup>527</sup> A O’Connell & K Sadiq ‘Tax: Women, Work, and Family’ 2019 16(2) *Pittsburgh Tax Review* 179, 185.

<sup>528</sup> Bittker (note 13 above) 1446.

<sup>529</sup> B Bridges ‘Family Need Differences and Family Tax Burden Estimates’ 1971 24(4) *National Tax Journal* 423, 424.

<sup>530</sup> Bittker (note 13 above) 1446.

<sup>531</sup> *Ibid*

affecting the children's standard of living should be remedied through government grants.<sup>532</sup> Secondly, there should be a tax on the dependant's expenditures for his support "as though these amounts were the price charged by him for providing the personal satisfactions 'consumed' by his patron."<sup>533</sup>

### **4.3 Tax treatment of family care and support in income tax law between 1914 and 1995**

#### **4.3.1 Tax relief systems for dependency in South Africa 1914-1962**

In sections 4.3.2 and 4.3.3, I describe the two tax relief systems that were used to provide relief for a taxpayer that incurred expenses for supporting a dependant or dependants. There was an abatement which is a deduction from the total tax payable and a tax rebate system consecutively.

#### **4.3.2 Abatement system**

The Income Tax Act 41 of 1917 introduced the first system of abatements in respect of dependants. The Act allowed an abatement of £20 for a person 'whose maintenance during the period assessed any person not entitled to the fixed abatement of £300 was mainly responsible.'<sup>534</sup> In *Income Tax Case No. 11*, the court held that the law under the Income Tax Act 41 of 1917 was favourable to the taxpayer as it did not require the taxpayer to be *entirely* responsible for the maintenance of the indigent dependant person but only *mainly* responsible for the maintenance of the indigent dependant person. The amendment in the 1920 Act restricted the taxpayers' abatement and amended provisions of the 1917 Act to read "a sum of £30 for each dependant of the taxpayer." Further, the definition of a dependant became restricted and stated as:

any person incapacitated by old age or infirmity from maintaining himself...provided that such person...has been maintained throughout the year of assessment at the expense of such taxpayer.<sup>535</sup>

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<sup>532</sup> Bittker (note 13 above) 1447.

<sup>533</sup> *Ibid.*

<sup>534</sup> Silke (note 523 above) 229.

<sup>535</sup> 1 SATC 115 at 116

Looking into the changes made by the legislation, the court gave reasons for the amendments in legislation for the tax relief to taxpayers who made contributions toward the support of a dependant. The court held that:

It was an alteration in the scope of the abatement itself. In the opinion of the Court the reason for the change was that as the Legislature was providing for a single allowance of £30 and making no provision for splitting up that amount, it provided under the Act only for cases where a single payment had been made. Accordingly, the abatement was not available to a person who was only mainly or partially responsible for the maintenance nor to a person who did not maintain the dependant throughout the year.<sup>536</sup>

### **4.3.3 Rebate system**

The system of rebates in the Union of South was introduced by Income Tax Act of 1941. Section 13 of the 1941 Act provided for the deduction of certain rebates from the normal tax payable which included the primary rebate, child rebate, dependants rebate, insurance rebate, super tax rebate, primary super tax rebate. The system of rebates in the Union was criticised as offering little incentive to the taxpayer and favouring taxpayers with lower incomes.<sup>537</sup> Specifically, the secondary rebates for children and dependants were argued as offering little relief for the taxpayer. Silke states that the slogan for the secondary rebates seemed to be “increase your progeny and pay less tax”<sup>538</sup> but the system of rebates during this period was very limited, meagre and did not offer enough incentive for the taxpayer.<sup>539</sup> With regard to the dependant rebate which was set at 2 10s.0d by the 1941 Act, Silke states that it could be referred to as a “miserable rebate” offering poor relief or comfort to a taxpayer contributing towards the maintenance of his or her parents or other relatives in straightened circumstances.<sup>540</sup> Thus, the system of rebates of 1941 was criticised and the recommendations by the Steyn Committee of 1951 and the Franzsen commission of 1967 for the system to be changed to abatements or concessional deductions.

The Income Tax Act of 1941 made provision for a primary rebate available for all persons in terms of section 13(1)(b), a child rebate in respect of each unmarried child or stepchild in terms

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<sup>536</sup> 1 SATC 115

<sup>537</sup> Silke (note 523 above) 240.

<sup>538</sup> Silke (note 523 above) 241.

<sup>539</sup> Silke (note 523 above) 242.

<sup>540</sup> *Ibid*

of section 13 (2)(a) and for a dependant rebate in respect of each dependant in terms of section 13(2)(c). In terms of section 13(c), where a taxpayer had contributed at least £30 towards the maintenance of the dependant in cash or otherwise during a year of assessment, he or she could claim a dependants' rebate. The dependant rebate was then deductible in full where the period of assessment was 12 months.<sup>541</sup> In terms of section 13(3) of the 1941 Act, where the period of assessment was less than 12 months, the dependant rebate was deductible proportionately according to the same ratio as the period assessed bears to one year.<sup>542</sup> For the dependant rebate it would be calculated as the period assessed divided by a period of 12 months multiplied by £ 2 10s.0d. These provisions would also apply to the primary and child rebates claimed for a period of assessment less than 12 months.

Section 12 of the Income Tax Act of 1941 provided for cases when deductions could not be made. Section 12 (a) of the Act provided that no deduction shall be made in respect of "the cost incurred in the maintenance of any taxpayer, his family or establishment."

The Income Tax Act 58 of 1962 came into operation after the Income Tax Act of 1941. Section 6 of the Income Tax Act 58 of 1962 made provision for the deduction of normal tax rebates from normal tax payable by natural persons. The normal tax rebates were the primary rebate, child rebate and over 65 years of age rebate.<sup>543</sup> These rebates differed among taxpayers who were married, unmarried or were married women.<sup>544</sup> At that time, married taxpayers, unmarried taxpayers, and married women were treated differently for tax purposes and consequently rebates.<sup>545</sup> Natural persons who were married had a primary rebate of R 2 225 and an unmarried natural person had a primary rebate of R1 950. For a married woman, a primary rebate of R 900 could be deducted. The child rebate could be deducted by natural persons who were not separated from their husbands. However, married women could not claim for child rebates. The child rebate was for the cost of maintaining wholly or partially a child who was below the age of 18 on the last day of the year of assessment and who did not earn a taxable income. The child rebate could be claimed for the whole or partial maintenance of a child who was dependent on the taxpayer for maintenance, was not above the age of 21 on the last day of the year of assessment and did not earn any taxable income. Also, a taxpayer could claim a child's

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<sup>541</sup> Silke (note 523 above) 235.

<sup>542</sup> *Ibid.*

<sup>543</sup> Section 6 of the Income Tax Act 58 of 1962. Also see Stack & Cronje (note 113 above) 20.

<sup>544</sup> *Ibid* 1.

<sup>545</sup> Stack & Cronje (note 113 above) 17.

rebate if they paid for the maintenance of a full-time student who was studying at an educational institution, who had no taxable income and was not over the age of 26 on the last day of the year of assessment.<sup>546</sup> Moving on to the over 65 rebates, taxpayers (married women included) who on the last day of the year of assessment were above 65 years could claim a rebate of R2 500.

#### **4.4 Definition of a dependant in Income Tax Law prior to 1995**

In the years 1914 to 1995, the personal income tax system was characterised by abatements and multiple rebates that applied when a person provided support to a dependant.<sup>547</sup> More specifically between 1914 and 1940, South Africa had a system of abatements which was subject to reduction as the taxable income increased.<sup>548</sup> The tax relief for dependency was in the form of an abatement system or a system of concessional deductions characterised by deductions of a *fixed* amount from the *taxable income*.<sup>549</sup> In 1941, the system changed from an abatement system to a rebate system. The relief that was offered took the form of a rebate system characterised by deductions of a *specified* amount from the *tax to be paid*.<sup>550</sup> Generally, the grant of the primary rebate or abatement as well as the secondary rebate or abatement for children and dependants was to ensure that tax was not paid on the portion of income that should be spent by the taxpayer on their basic maintenance.<sup>551</sup> In 1951, the commission of enquiry into the Income Tax Act, hereinafter referred to as the Steyn Committee, recommended the adoption of a system of abatements and or concessional deductions to replace the system of rebates.<sup>552</sup> Again in 1967, the commission of enquiry into fiscal and monetary policy in South Africa, hereinafter referred to as the Franzsen commission, then recommended the reintroduction of the abatement system arguing that the rebate system favoured those in higher income groups than those in lower income groups.<sup>553</sup> However, the tax system for tax relief for dependants remained a rebate one despite the commission's recommendations.

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<sup>546</sup> Section 6 of the Income Tax Act 58 of 1962

<sup>547</sup> E Gavin & W Steyn. The personal income taxation of women in South Africa. In J Hattingh & J.J Roelveld (eds) *Income tax in South Africa: the first 100 years, 1914-2014* (2016) 325.

<sup>548</sup> First Report the Commission of Enquiry into the Fiscal and Monetary Policy in South Africa (1968) 22

<sup>549</sup> A S Silke *Tax Avoidance and Tax Reduction* (1958) 229, 229.

<sup>550</sup> *Ibid.*

<sup>551</sup> Silke (note 549 above) 229.

<sup>552</sup> First Report of the Committee of Enquiry into the Income Tax Act 1951,38.

<sup>553</sup> Franzsen Committee Report (note 522 above) 24.

In using a tax-based system to provide relief for taxpayers providing support to their kin, the income tax legislation and case-law have primarily focused on whether the person supported by the taxpayer was a dependant as defined by the legislation. However, it has been argued that it would be administratively difficult to define a dependant in an income tax system compared to a social welfare system.<sup>554</sup> This argument is explained further in section 5.3 below when the use of tax expenditures and direct expenditure programmes to provide relief to taxpayers supporting a dependant are compared. But, social welfare laws are considered more flexible in identifying dependency. Burns and Krever give the case where a non-blood relative lives with the taxpayer or where support is through extended families and family support networks both inside and across households<sup>555</sup> which is the case in South African households.

The cases below and extracts from legislation instead focused on the physical capacity of the so-called dependant and on the duration of giving such support. Based on the definition applied by the reported income tax cases, it would cover cases of support provided through extended families and family support networks.

In the 1924 case reported as *Income Tax Case No. 11*<sup>556</sup> the court dealt with contributions made in equal shares by the appellant and his two brothers towards the maintenance of their mother. The appellant claimed for an abatement<sup>557</sup> under section 7 of the Income Tax Act 41 of 1917 as amended by section 3 of Income Tax Act 29 of 1921 on the grounds that his mother was a dependant as defined under section 11 of the Income Tax Act 45 of 1920. The definition of a dependant under section 11 of Income Tax Act 45 of 1921 was under scrutiny by the court. Section 11 of the 1921 Income Tax Act required that the dependant be “maintained throughout the year ...at the expense of such taxpayer.” The argument of the commissioner for Inland Revenue who disallowed the abatement was that because the appellant’s two brothers also contributed towards supporting their mother, it could not be said that the mother was maintained throughout the year at the expense of the appellant.<sup>558</sup> The court held that the abatement was not available for a person who did not maintain the dependant throughout the year.<sup>559</sup> The court held that the apportionment of the appellant and his brother’s contribution

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<sup>554</sup> Burns & Krever (note 111 above) 247.

<sup>555</sup> *Ibid* 545.

<sup>556</sup> (1924) 1 SATC 115 (C)

<sup>557</sup> An abatement is a reduction in, or an exemption of the taxation owed and an example is a rebate.

<sup>558</sup> 1 SATC 115 (C) at 116.

<sup>559</sup> *Ibid*.

towards their indigent mother meant that neither of them maintained her throughout the year as neither of them was responsible entirely nor individually for maintaining her.<sup>560</sup> The court applied the law but it highlighted the limitation of the law when applied to family support practices. This meant that taxpayers who gave huge lumpsum payments or who took turns to support a dependant would be excluded from receiving the payment. A better approach would be where the law considers the amount of contribution that a taxpayer expended to support a dependant to ascertain how much a taxpayer's ability-to-pay was reduced during the year of assessment.

In the 1927 case, reported as *Income Tax Case No. 84*<sup>561</sup> the appellant sought an abatement in respect of his minor daughter who was over the age of 18 years old whom he had forbade from earning a living. His grounds for the abatement were that his daughter was incapacitated as required by section 72 of Income Tax Act 40 of 1925. Section 72 read as follows:

Dependent in relation to any taxpayer means: – (a) any person incapacitated by old age, infirmity, or any other reason satisfactory to the Commissioner from maintaining himself... to whose maintenance during the year of assessment the taxpayer has contributed whether in cash or otherwise to an amount of not less than thirty pounds.

In the case, the court dealt with the meaning of dependant as used in section 72. The court held that the term incapacitated as used in the legislation referred to an “inherent defect in the person who is a dependant” and could not mean and apply to a situation where there was outside interference with a person's right to work.<sup>562</sup> Thus, the appellant could not claim for the abatement under this section because his daughter was not incapacitated as required by provisions of the Income Tax Act.

In terms of section 1 of the Income Tax Act 31 of 1941, a dependant meant:

- a) Any person (other than a child or stepchild qualifying for the child rebate in terms of section 13(2)(a)) incapacitated by old age, infirmity or any other reason satisfactory to the Commissioner from maintaining himself; and
- b) Any child (other than the child or stepchild of such taxpayer) under the age of 18 years on the last day of the year of assessment,

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<sup>560</sup> 1 SATC 115 (C) at 116.

<sup>561</sup> (1927) 3 SATC 145(U)

<sup>562</sup> *Ibid* at 146

towards whose maintenance the taxpayer has expended in cash or otherwise during the year of assessment not less than £30.

A dependant rebate is not available to be claimed by a person who renders herself or himself incapacitated and unable to maintain themselves due to circumstances within their control. Silke provides an example of a university student as someone who does not qualify as a dependant within section 13 of the 1941 Act.<sup>563</sup> Section 13 provided for certain rebates deductible from normal tax payable.<sup>564</sup> This issue was dealt with in *Income Tax Case No. 739*<sup>565</sup> where the court disallowed the rebate and held that the taxpayer claiming for a dependant's rebate had to show that the person in respect of whom they claimed the rebate was old or has an infirmity that prevents them from maintaining themselves. The court held that the taxpayer had not satisfied the old or infirmity requirement to claim for a dependant rebate for his son who was at university.<sup>566</sup> The court held further that the son was not a dependant as defined by the Act because his failure to maintain himself was voluntary.<sup>567</sup> Also, in terms of this section it is not required that the taxpayer be the sole support of the dependant and that the taxpayer can still claim the rebate for maintaining the dependant for only part of the tax year if she or he has not contributed an amount less than £30.<sup>568</sup> For example, a brother and a sister who contribute on a monthly rotational basis to the maintenance of their parent who for the purposes of this section is a dependant can both claim a rebate in respect of their dependant mother provided that they did not contribute less than £30 during the tax year. Further, the contribution towards the maintenance of the dependant should be at least £30 whether in cash or otherwise.

The above cases show how the provisions of the tax legislation regarding abatements for contributions towards supporting a taxpayers' dependant were interpreted by the courts. A further point to note here is that the rebates, deductions, and abatements applied at a time when South African society was divided along racial lines. In the background in Chapter 1, it was explained that the tax system served an "administrative, disciplinary and political" role in addition to the economic role of raising revenues. Whilst whites, Indians and coloureds could

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<sup>563</sup> Silke (note 549 above) 234.

<sup>564</sup> *Ibid* 230

<sup>565</sup> 18 SATC 216

<sup>566</sup> *Ibid*.

<sup>567</sup> *Ibid* 217.

<sup>568</sup> *Ibid*.

claim deductions for expenses incurred in supporting a dependant in terms of the Income Tax Acts of 1914, 1917, 1925 and 1941, black South Africans could not claim under this Act or the Natives Income Taxation and Development Act of 1925, the Native Income Taxation Act of 1962 and later the Bantu Taxation Act of 1969 which applied to them. The tax system had explicit bias on taxpayers then, but it continues to have a disparate impact on taxpayers now especially looking at the income tax benefits such as retirement annuities and rebates.

#### **4.5 Tax reforms for tax relief for taxpayers who support dependants 1951 to 1987**

##### **4.5.1 Committee of enquiry into the Income Tax Act: Steyn Committee 1951**

A committee of enquiry into the Income Tax Act was formed by government notice No. 351 of 1949 with a wide scope of the terms of reference. Widely, the committee of enquiry chaired by Raymond Steyn had a mandate to:

investigate the working of the Union Income Tax Law in all its aspects and in relation to all classes of persons whether presently subject to the taxes imposed or not and to make any recommendations for amendment of the law...

In addition to the above broad mandate, the committee of enquiry also had to ensure the fair and equitable distribution of the burden of taxation by extending or limiting the scope of taxes, to ensure that there are no hardships or anomalies in the incidences of taxes, and to improve and simplify the tax system.<sup>569</sup> Within the wide scope of the terms of reference, the committee considered the allowance for dependants and made recommendations. They considered three principal criticisms discussed below against the relief granted to taxpayers for contributions made towards the maintenance of dependants. Thus, although the scope of the terms of reference was wide, this allowed the commission to address several issues of the Income Tax Act without any limitation to a specific tax area.

In its first report, the Steyn Committee considered the allowance for dependants and noted some criticisms that had been made against the relief for taxpayers contributing towards the maintenance of dependants.<sup>570</sup> The first criticism cited by the committee was that the “extent of the income effectively relieved from taxation by virtue of the granting of the tax rebate of £2.10s varies according to the size of the contributing taxpayer’s income.”<sup>571</sup> They noted that

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<sup>569</sup> First Report into the Committee of Enquiry into the Income Tax Act (1951) 1.

<sup>570</sup> *Ibid*

<sup>571</sup> *Ibid* 41.

this meant that a taxpayer in the lower income category received relief equivalent to a deduction of £40 from income whilst a taxpayer in a higher income category could be afforded relief that may be equivalent to a deduction of a sum considerably less than £30 actually expended on maintenance. Further, the committee noted that taxpayers who spent more than the stipulated £ 30 on their dependants received no relief for the amount spent in excess of £ 30. Lastly, another criticism related to circumstances where several taxpayers contributed towards a single dependant amounts that totalled more than £ 30 even though no single amount was the £ 30 required by section 13 of the 1941 Act. The committee then addressed these criticisms making the following recommendations.

In answering the criticisms above, the committee held that contributions made by the taxpayer towards the maintenance of a dependant would be in the form of a deduction from income rather than a tax rebate as was the case in the 1941 Income Tax Act.<sup>572</sup> The deduction from income meant that the relief granted to taxpayers for same contributions towards the maintenance of a dependant would be on the same margin of income. Further, the committee stated that those taxpayers who made contributions in excess of the £ 30 provided for by legislation should be subject to an upper limit because it would be unreasonable to relieve the taxpayer to the full extent of his contributions that went beyond the dependant's basic needs. The committee noted that it is however desirable that contributions to the support of a dependant which are greater than the sum stipulated in the legislations be recognised for purposes of relief.<sup>573</sup> Regarding the third criticism, the committee stated that it would not be unreasonable to lower the minimum to £24, to address situations where the allowance for a singular dependant contributed by several taxpayers amounts to less than the stipulated amount individually but more than the stipulated amount together.

The committee recommended that the relief for taxpayers that made contributions towards the maintenance of dependants should continue subject to some changes. The first recommendation was regarding the minimum amount that the taxpayer contributed to the dependant for maintenance. The committee held that the relief would not be granted where the taxpayer contributed less than £24 per year towards the maintenance of a dependant.<sup>574</sup> With this recommendation the committee held that there was no undue hardship foreseeable by

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<sup>572</sup> First Report Steyn Committee (note 436 above) 41-42.

<sup>573</sup> *Ibid*

<sup>574</sup> First Report Steyn Committee (note 436 above) 41-42.

excluding those contributing less than £24 to maintaining dependants during the year of assessment.<sup>575</sup> Further, the committee recommended that those taxpayers who exceeded the prescribed minimum amount would be permitted to deduct amounts for a dependant's expenses up to a prescribed limit.<sup>576</sup> Of note, the committee recommended that the system of relief for taxpayers providing maintenance for a dependant be a deduction from income instead of a rebate. In their view this meant that the relief would be a "deduction from income of one pound for each pound actually expended by the taxpayer."<sup>577</sup>

#### **4.5.2 Commission of inquiry into fiscal and monetary policy in South Africa: Franzsen Commission of 1967**

A commission of Inquiry was formed in 1967 with a wide scope of terms of reference and with Dr. D.G. Franzsen as chairman. The commission terms of reference were to inquire into the prevailing tax system at the time, the financial structure of South Africa and the fiscal and monetary policies of South African institutions.<sup>578</sup> The commission had to submit recommendations after the inquiry. Again, the terms of reference of the commission allowed it to look at the existing system of rebates and, the allowance for dependants.

The commission inquired into the substitution of abatements for the system of rebates that was in force through Income Tax Act 58 of 1962.<sup>579</sup> Regarding the substitution, the commission stated that the rebates were not primarily intended to be a reimbursement of the expenses that a taxpayer spent on supporting himself and his family.<sup>580</sup> The commission went further to state that full reimbursement was not a possibility as this would erode a big part of the tax base.<sup>581</sup> Of note and to support the substitution, the commission stated that the uniform rebates could not provide taxpayers with the actual expenditure that the taxpayers used on necessities because this varied from household to household.<sup>582</sup> The commission stated that:

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<sup>575</sup> *Ibid*

<sup>576</sup> First Report Steyn Committee (note 526 above).

<sup>577</sup> *Ibid* 42.

<sup>578</sup> First Report Franzsen Commission (note 527 above) iii.

<sup>579</sup> *Ibid* 22.

<sup>580</sup> First Report Franzsen Commission (note 527 above).

<sup>581</sup> *Ibid*.

<sup>582</sup> First Report Franzsen Commission (note 527 above).

The object of deductions or rebates in the determining of the ultimate tax liability of a taxpayer is to acknowledge the fact that *a person's ability-to-pay decreases according to the number of children he has, the number of his dependants, his medical expenses, etc*<sup>583</sup>

With the object of deductions or rebates in mind and after analysing the abatement and rebate systems, the commission recommended a replacement of the system of rebates with a system of abatements and that after a taxable income of R 6000, the abatement should be reduced by R1 for every R10 of the taxable income that is above R6000. The commission was of the view that the system of rebates offered greater tax relief to the higher income taxpayers than the lower income earners.<sup>584</sup> Thus, the commission recommended substitution of the rebates with abatements.

Dealing specifically with tax relief in respect of dependants, the commission recommended a reintroduction of abatements and an adjustment of the amount of abatement determined by marital status. The commission saw no need to distinguish between married and unmarried taxpayers in respect of abatements thus recommended that taxpayers receive the same abatement regardless of marital status “since the support of a dependant has the same effect on a married person’s ability-to-pay as an unmarried person.”<sup>585</sup> The income tax system at the time offered tax relief in the form of a rebate with the effect of the amount for a dependant varying according to whether a taxpayer was married or not. In my view, the commission erred in its view that the taxpayer who is married and unmarried have the same ability-to-pay after providing support to immediate or extended kin. Taxpayer X who is married has the same ability-to-pay as taxpayer Y because they receive the same income but taxpayer X (married) has a husband whose income she can rely on after providing support to a dependant. However, because of the equality clause in section 9 of the 1996 Constitution of South Africa, a law that discriminates on marital grounds would be unconstitutional.<sup>586</sup> Further, the commission noted that in the 1941 Act, the tax rebate for dependants varied according to whether a dependant was completely dependent on the taxpayer.<sup>587</sup> The commission recommended abatements for

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<sup>583</sup> *Ibid.*

<sup>584</sup> First Report Franzsen Commission (note 527 above).

<sup>585</sup> *Ibid* 25.

<sup>586</sup> Section 9 guarantees that everyone is equal before the law and has a right to equal protection and benefit of the law” and that the state may not unfairly discriminate against anyone or one more grounds which include race and marital status

<sup>587</sup> First Report Franzsen Commission (note 527 above) 24.

a completely dependent dependant be R200 and R80 for a dependant who was not completely dependent on the taxpayer on the condition that the support towards the dependant by the taxpayer amounted to at least R200 and R80 respectively.<sup>588</sup> However, the change to a system of abatements would mean that less revenue would be collected by the State despite the abatements or concessional deductions favouring the higher income groups as the relief for the taxpayer will be at the maximum rate of tax.<sup>589</sup> Thus, with respect to tax relief for dependants, the commission sought to reintroduce abatements, do away with the distinction between married and unmarried taxpayers and adjust amounts for completely dependent and not completely dependent dependants.

#### **4.5.3 Commission of inquiry on the tax structure of South Africa: Margo Commission of 1987**

The commission of inquiry on the tax structure of South Africa, known popularly as the Margo commission, began the process of reforming South Africa's tax system in 1986 guided by principles of equality, equity and fairness. The main objective of the commission was the equitable distribution of the tax burden and the achievement of a neutral tax system with a broad tax base.<sup>590</sup> The commission made several recommendations within the theme of lowering tax rates and whilst widening the base on which they are collected.<sup>591</sup> The 1987 report from the commission expounded on the guiding canons of taxation. They expressed that equity is a principle closely related to the ability-to-pay, vertical equity and horizontal equity. They acknowledged that the ability-to-pay principle was a difficult concept to define but went on to state that "the underlying idea is that tax is a sacrifice levied upon some kind of personal economic well-being."<sup>592</sup> The commission stated that the determination of economic well-being translated in tax terms to the choice of the tax base and the tax unit, that is, the family or the individual. They further stated that these choices especially of the tax unit affected equity significantly.<sup>593</sup>

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<sup>588</sup> *Ibid* 25.

<sup>589</sup> Silke (note 549 above).

<sup>590</sup> First Report of the Margo Commission (note 5 above) 30.

<sup>591</sup> *Ibid* 1.

<sup>592</sup> First Report of Margo Commission (note 5 above) 50.

<sup>593</sup> *Ibid* 51.

The Margo commission also recommended reforms on the tax unit in personal income taxation. In taxation, there is a choice of the individual or family to be the tax paying unit. In South Africa, the tax unit in personal income tax became the individual and not the family or the household.<sup>594</sup> Gavin and Steyn state that the family as a unit of taxation encouraged the discrimination of the second recipient of income (a spouse) in the family.<sup>595</sup> They further state that the adoption of the individual as a unit of taxation in South Africa in 1995 was to eradicate gender bias and encourage gender equality.<sup>596</sup> In South Africa's personal income taxation dependants are only considered for taxation purposes under section 6A of the Income Tax Act dealing with the medical scheme fees tax credit. The scope or definition of the tax unit is not being addressed by the thesis but rather the individual as the unit of taxation justifies the individual as the level of measurement in the thesis.

On equity, the commission stated that the income tax complied with equity norms. The commission made this recommendation using the argument that income was the widely preferred tax base thus there was a likelihood that annual income truly reflected one's ability-to-pay taxes.<sup>597</sup> The commission stated further that where the tax is progressive then the income tax complies with equity norms.

Regarding the question on rebates for dependants, the Margo commission recommended the abolishment of the rebate for dependants stating that rebates were not the appropriate vehicle for the pursuit of social objectives. The commission stated that although it was commendable that people supported to a lesser or greater extent others in need of support, the tax system was not the proper vehicle. In detail the commission stated the following:

A taxpayer who makes a contribution to the maintenance of his parents, other relatives or any other person qualifies for the rebate on the basis of the value of his contribution irrespective of the extent to which the dependant is maintained by other people. The rebate if not subject to control measures, is open to abuse, and is often merely a means whereby taxpayers can reduce their tax liability.<sup>598</sup>

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<sup>594</sup> Gavin & Steyn (note 547 above) 320.

<sup>595</sup> *Ibid* 320.

<sup>596</sup> Gavin & Steyn (note 547 above) 321.

<sup>597</sup> First Report of the Margo Commission (note 5 above) 73.

<sup>598</sup> *Ibid* 102.

On this basis, the Margo commission recommended the following reforms for individual rebates:

- Primary rebates to be maintained with married and unmarried persons having the same primary rebate;
- The abolishment of the dependant's rebate;
- Child rebates should be maintained but be limited to a specific number of children.

On the system of rebates and the Steyn Committee report, Silke argued that there was little incentive for the taxpayer to take advantage of the rebates in income tax and that the narrow field in which the rebates operated limited the likelihood of abuse by the taxpayer.<sup>599</sup>

#### **4.6 Tax reforms for tax relief for taxpayers who support dependants post-1995**

Changes were recommended by the Margo commission (commission of inquiry into the tax structure of the Republic of South Africa) and Katz commission (commission of inquiry into certain aspects of the tax structure of South Africa) to the personal income tax system and to the tax rebates a natural person who financially supported extended family could claim.

Since 1995, personal or primary rebates are no longer available for taxpayers dependants who wholly or partially are financially responsible for or contribute towards the maintenance of dependants. Thus, the legislation has done away with normal tax rebates for taxpayers who provide financial support to their dependants who are immediate and extended kin.

#### ***Commission of inquiry into certain aspects of the tax structure of South Africa: Katz Commission 1995***

The Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, otherwise referred to as the Katz Commission, sought to inquire into the prevailing tax system at that time and make recommendations based on internationally accepted principles and practices in tax.

The tax reforms in personal income taxation introduced by the 1994 Katz Commission have been criticised for failing to apply the principles of equity and equality in taxation correctly. In their inquiry into the tax system, the commission report states that it was guided by the Interim Constitution of the Republic of South Africa of 1993 and by the canons of taxation which are

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<sup>599</sup> Silke (note 549 above) 242.

equity, simplicity, neutrality, and efficiency.<sup>600</sup> For the personal income tax system, the commission was concerned with the relationship between income taxation and income distribution, poverty, and income inequality.<sup>601</sup> Vivian, an economist, discusses the meaning of equality of taxation from the perspective of the classical economists and the Katz commission.<sup>602</sup> He argues that the standard for equality of taxation used by the Katz commission produced an outcome different from when the standard of equality of taxation of the classical economists is used.<sup>603</sup> Vivian further argues that the historical equality of taxation substituted by the Constitutional declaration of equality during the Katz commission Inquiry was an inadequate substitute of equality.<sup>604</sup> He states that the equality of taxation applied by the Katz commission was not applied correctly leaving lower income groups, families and single income households worse off than others.<sup>605</sup> For Vivian, equality of taxation for classical economists meant that from gross income, the amounts of a capital nature, amounts from non-South African sources and amounts that sufficiently cover necessities-of-life for the individual taxpayer and those that the taxpayer has an obligation to support, are deducted.<sup>606</sup> He then states that the Katz commission failed to understand the purpose of rebates for the taxpayer to cover necessities-of-life and that there was an increase of the tax burden on lower- and middle-class individuals who pay for services twice.<sup>607</sup> Thus, it has been said the Katz commission failed to apply equality of taxation principle correctly.

Most significant in Vivian's criticism of the Katz commission is the argument that the commission failed to enquire whether the rebates covered the necessities-of-life thus adhering to equality of taxation. To explain the necessities-of-life argument, the definition of equality of taxation by Adam Smith is important. Adam Smith states that equality of taxation is when:

The subjects of every state ought to contribute to the support of the government, as nearly as possible, *in proportion to their respective abilities*; that is, in proportion to revenue which they

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<sup>600</sup> Interim report of the Katz Commission 1994 69.

<sup>601</sup> *Ibid* 9.

<sup>602</sup> *Ibid*

<sup>603</sup> Vivian (note 358 above) 89.

<sup>604</sup> *Ibid*.

<sup>605</sup> Vivian (note 358 above) 90.

<sup>606</sup> *Ibid*

<sup>607</sup> Vivian (note 358 above) 90

respectively enjoy under the protection of the state. In the observation or neglect of this maxim consists, what is called the equality or inequality of taxation.<sup>608</sup>

The phrase “in proportion to their respective abilities” is interpreted by Vivian to mean the ability-to-bear the burden of taxation.<sup>609</sup> Vivian states that in taxation, the point of departure is the taxpayers’ ability-to-pay and that taxes must be levied after the deduction from the taxpayers’ income of the taxpayers’ necessities-of-life for their own sustenance and those the taxpayer has an obligation to support.<sup>610</sup> Vivian posits that the ‘rebates adequate to cover the necessities-of-life’ are important for the achievement of equality in tax and without them, families are driven into poverty.<sup>611</sup> The reforms which removed rebates resulted in horizontal and vertical inequality where the burden fell the greatest on the poorer households, families with children and single income families.

The Katz commission used constitutional equality as a reason behind its reforms instead of transformation of taxation. The commission was on an expedition to assess whether tax legislation infringed upon the taxpayers right to equality under the interim constitution of 1993. From the Income Tax Act, the commission removed the words that discriminated taxpayers’ rights on the grounds of gender and marital status. Vivian states that the reforms of the Katz Commission failed in achieving equality as “equality of taxation can never be achieved by the mere removal of words from the legislation, without any regard to the principles underpinning them, especially when those words were, in the first place, inserted to achieve equality of taxation.”<sup>612</sup>

It cannot be ignored that the tax relief provided through the income tax legislation above likely did not benefit many black individuals and black taxpayers in the country. In chapter 1, in the background to the study, it was highlighted that whites enjoyed support from the state whilst the responsibility of support and care among black individuals was pushed to their kin and communities.<sup>613</sup> It was also discussed how the tax system was discriminatory during apartheid

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<sup>608</sup> A Smith. *An Inquiry into the Nature and Causes of the Wealth of Nations*. 1910 Vol. 2 quoted by Vivian (note 209 above) 83.

<sup>609</sup> Vivian (note 358 above) 92.

<sup>610</sup> *Ibid.*

<sup>611</sup> *Ibid.*

<sup>612</sup> Vivian (note 358 above) 106.

<sup>613</sup> Button et al (note 54 above).

and that it did not give black taxpayers the same deductions as white, coloured, and Indian taxpayers for the support they gave to family. The direct expenditure and income tax systems were explicitly biased against black taxpayers because these systems assumed responsibility for individuals along racial lines. It was also explained in chapter 1 that during apartheid, whites had access to institutional welfare system and that black taxpayers did not receive benefits from the tax system when they supported their families.

Thus, income tax relief should be provided for the black middle-class taxpayers because black taxpayers were excluded from receiving any relief through the tax system for supporting their families during apartheid. It has also been highlighted and black South Africans were forced to rely on their kin support networks for financial support.

#### **4.7 The tax treatment of family support in income tax law post-1994**

The calculation of income tax liability for natural persons allows for the deduction of the primary, secondary, and tertiary rebates during the year of assessment as provided for under section 6 of the Income Tax Act 58 of 1962. The rebates are meant to lower the tax liability of the individual. In South Africa the ground for a rebate is age. The rebate system is designed to enshrine principles equity in taxation and the first canon which is equality of taxation. In a report by the South African National Treasury, the purpose of rebates is “to provide relief for subsistence living.”<sup>614</sup> Subsistence living can be interpreted to mean the necessities-of-life which Vivian argues is connected to the first canon of taxation by Smith. The first canon of taxation by Adam Smith which a good tax system ought to have is that equality or equity and it requires that the tax burden should be distributed equally or equitably. The canon finds expression through the ability-to-pay principle of taxation which requires the distribution of the tax burden according to the taxpayers’ income level with allowance for necessities-of-life for the taxpayer to support himself and his dependants. Thus, a tax system which allows for rebates seeks to ensure equality and equity among taxpayers as provided for under section 6 of the Income Tax Act.

Under current personal income tax legislation, the calculation of income tax liability for natural persons allows for the deduction of the primary, secondary, and tertiary rebates during the year of assessment as provided for under section 6 of the Income Tax Act 58 of 1962. The rebates

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<sup>614</sup> South African National Treasury Report 2012 Available at <http://www.treasury.gov.za/publications/annual%20reports/national%20treasury/default.aspx> Accessed on 5 March 2019.

are meant to lower the tax liability of the individual. In South Africa, the ground for a rebate is age. In terms of section 6(2) of the amended Income Tax Act of 1962, which is applicable to taxpayers at present, all taxpayers who are natural persons are entitled to a primary rebate. The taxpayer is further qualified to a rebate if he or she “was or would have been, had he or she lived, 65 years or older on the last day of the year of assessment.”<sup>615</sup> A taxpayer is also entitled to the primary, secondary and tertiary tax rebates if he or she “was or would have been, had he or she lived, 75 years of older on the last day of the year of assessment.”<sup>616</sup> The 2021 and 2022, tax tables show the primary rebate for natural persons under 65 years old to be at R14 958 and R15 714 respectively. The secondary rebate for natural persons 65 years or older is R8 199 and R8 613 for 2021 and 2022, respectively. The tertiary rebate for natural persons 75 years or older is R2 736 and R2 871 for the 2021 and 2022, respectively. Under the Income Tax Act of 1962, the personal or primary rebate is a tax credit. One needs to understand the population which benefitted from these rebates and who benefits from these rebates in the country.

#### **4.7.1 General deduction formula and primary rebates in Income Tax Act 58 of 1962**

In South Africa, the costs of maintaining immediate and extended kin can possibly be deductible in terms of the provisions of section 11(a) read with section 23(g) of the Income Tax Act 58 of 1962, commonly referred to as the general deduction formula.

The provision in section 11(a) reads as follows:

For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived-

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature.

Deductions for supporting children and extended family is excluded under the section 11(a) of the Act unless the taxpayer can show that such expenses and losses were incurred in the production of income and are not of a capital nature. Section 23 (g) of the Act disallows the deduction of “moneys claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade”.

Furthermore, the expenditure should not be prohibited under the rest of the provisions in section 23 of the Income Tax Act which provides for deductions not allowed in determination of

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<sup>615</sup> Silke, Aubrey S. et al. *Silke : South African Income Tax 2020* . 22nd edition. 152.

<sup>616</sup> *Ibid.*

taxable income. Of interest are sections 23(a) and 23 (b) of the Act which specifically disallow deductions for the “cost incurred in the maintenance of any taxpayer, his family or establishment” and “domestic or private expenses” respectively.

These sections do not recognise the deductibility of “black tax” or any support to family by a taxpayer. Thus, payments made in supporting kin are not deductible expenses for a taxpayer in South Africa.

However amounts for maintenance provided for as a result of divorce or separation towards a spouse, former spouse or children are exempted from income. Section 10 (u) provides for the exemption of amounts “received by or accrued to any person from any such person’s spouse or former spouse by way of alimony or allowance or maintenance of such person or any children under an order of judicial separation or divorce granted.”

Further, where a taxpayer creates a special trust, she or he receives concessions in the Income Tax Act. A special trust is:

a trust created- (a) solely for the benefit of a person who suffers from- (i) any 'mental illness' as defined in section 1 of the Mental Health Act, 1973 (Act 18 of 1973); or (ii) any serious physical disability, where such illness or disability incapacitates such person from earning sufficient income for the maintenance of such person, or from managing his or her own financial affairs: or (b) by or in terms of the will of a deceased person, solely for the benefit of beneficiaries...

Thus, a taxpayer who creates a trust for their disabled relative receives several concessions and assist them alleviating the financial burden.

#### **4.7.2 Medical scheme fees tax credit**

Sections 6A and 6B provisions of the Income Tax Act 58 of 1962 regulate monthly benefits that persons receive for contributions made to a medical scheme or fund for themselves or their dependants. This section is relevant to discuss because the contributions made to a medical scheme can be categorised as family care and support. Section 6B(1)(b) of the Act makes a reference to family care and support in the definition of a dependant by stating that a dependant means “any other member of a person’s family in respect of whom he or she is liable for family and care.” This definition of a dependant that includes the phrase “family care and support” is also used in the Medical Schemes Act 131 of 1998. Important to note is that section 6A of the

Act's definition of a dependant relies on that used in the Medical Schemes Act. Thus, dependency is family care and support.

#### **4.7.2.1 Section 6A and 6B medical scheme fees tax credit and additional medical expenses tax credit**

In South Africa, expenditure which is personal in nature may not be considered in the calculation of a taxpayer's income tax liability. However, the medical scheme fees tax credit phased in between 2012 and 2014 is an exception to this. Tax relief is granted by section 6A of the Income Tax Act 58 of 1962 for medical expenditure. Contributions to medical aid are now treated on the income tax return as a reduction to tax payable rather than as a deduction against taxable income as had been the case previously in terms of section 18 of the Income Tax Act.<sup>617</sup> Thus, the medical tax credit operates as a tax rebate and consists of the medical scheme fees tax credit and the additional medical expenses tax credit. Taxpayers who are under 65 years of age, who are 65 years and older or who have a disability can claim for a rebate for contributions made to a registered medical scheme.

Section 6A of the Income Tax Act provides for a rebate termed the medical scheme fees tax credit which is applicable to the fees a taxpayer pays to a registered medical scheme for benefits for the taxpayer and his or her dependants.<sup>618</sup> In terms of section 6A(2)b(i)-(iii) of the Income Tax Act in the 2019 year of assessment, a monthly tax credit of R310 is given to the taxpayer for contributions made to a registered medical scheme or fund and where the taxpayer is not a member of a medical scheme or fund then the monthly tax credit would be for a dependant who is a member of a medical scheme or fund or the credit would be for a dependant of a member of a medical scheme or fund. Further, according to this section, a monthly tax credit of R620 is available to a taxpayer and one dependant or two dependants.<sup>619</sup> Further to this, R209 shall be given in respect of each additional dependant.<sup>620</sup> According to section 6A subsection (3A), in circumstances where two taxpayers are paying fees for a person or dependant then the medical tax credit allowed will be a pro rata portion of the total amount for

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<sup>617</sup> N Courtney-Clarke & A Human 'Dissecting Medical Aid Credits' (2017) TAXTalk 74, 76.

<sup>618</sup> *Ibid* 74

<sup>619</sup> *Ibid*

<sup>620</sup> Silke (note 615 above)

that person or dependant “in the same ration that the fees paid by that person bear to the total amount of the fees payable.”<sup>621</sup>

Section 6B of the Act also makes provision for additional medical expenses tax credit. In terms of this section, a person can claim an additional medical credit based on age (65years and older), disability, and where the limit for medical expenses is exceeded.

#### **4.7.2.2 The design of South Africa’s medical tax credits**

The medical deductions under section 18 of the Income Tax Act were repealed in phases and medical tax credits were introduced in 2012. The repealed section 18 allowed for a deduction of contributions and out-of-pocket medical expenses from the taxpayers’ income. The amounts paid as contributions to a registered medical scheme were allowed as deductions up to a prescribed monthly capped amount.<sup>622</sup> Amounts which were made as contributions, and which fell over the capped amounts could be claimed as further deductions on the condition that they did not exceed 7.5 percent of taxable income. The out-of-pocket medical expenses could also be claimed as a further deduction on the condition that they did not exceed 7.5 percent of taxable income. Medical expenses could be deducted in full where a taxpayer was aged 65 and over, the taxpayer had a disability, or the taxpayer had an immediate family member with a disability.<sup>623</sup>

Deductions have been criticised as inequitable in that they offer a greater tax-saving benefit to taxpayers in higher income tax brackets than to taxpayers in lower income tax brackets.<sup>624</sup> When it comes to medical tax deductions, the specific argument is that although medical tax deductions relieves taxpayers who contribute to medical schemes and protects the family from huge health expenditure it provided a greater benefit to higher income taxpayers for necessary services such as health “through the effect of the progressive marginal rate structure.”<sup>625</sup> In comparison to medical tax deductions, medical tax credits reduce a taxpayers liability rather than a taxpayers taxable income.

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<sup>621</sup> *Ibid* Chapter 10 Individuals § 10.27A Medical expenses — medical tax credit

<sup>622</sup> National Treasury Report 2011 ‘Conversion of medical deductions to medical tax credits -tax policy discussion document for public comment available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/medical-tax-creditsdiscussion-doc17-june-20110.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/medical-tax-creditsdiscussion-doc17-june-20110.pdf) accessed on 17 October 2019.

<sup>623</sup> *Ibid*

<sup>624</sup> R Hoff ‘The appropriate role for tax credits in an income tax system’ (1982) 35(2) Tax Lawyer 339, 342.

<sup>625</sup> National treasury 2011 (note 612 above) 2.

#### **4.7.2.3 Definition of a dependant**

The rebate for contributions made to a registered medical scheme or fund is available to the taxpayer and to his or her dependants. Section 6A (4) provides that the definition of ‘dependant’ used for the medical scheme tax credit is the definition provided in the Medical Schemes Act 131 of 1998.<sup>626</sup> The Medical Schemes Act defines the term dependant in section 1 as:

- a) A spouse or partner, dependant children or other members of the member’s immediate family in respect of whom the member is liable for family care and support; or
- b) Any other person who, under the rules of a medical scheme, is recognised as a dependant of a member.

Also, the term dependant as used in section 6A of the Act is defined in section 6B (1) of the Act dealing with the tax credit for additional medical expenses. According to section 6B (1) of the Act, a dependant means a spouse of a person, a biological child or the child of his or her spouse, member of the family in respect of whom a person is liable for their family care or support or any person who is recognised as a dependant of that person in terms of the provisions of a medical scheme or fund as considered in section 6A(2)(a)(i) or (ii).

#### **4.8 Conclusion**

The chapter contributes to the thesis by explaining the law on the tax treatment of support given to relatives by a taxpayer in South Africa. It gave a chronological account of the tax reforms that have been made on the amounts spent by a taxpayer supporting their relatives or dependants. Through this chronology, the thesis has also highlighted who benefited from such tax measures over the last 100 years. It is apparent that from the onset, there has not been agreement on the best tax system and method of including amounts spent by a taxpayer on supporting their dependants. The tax system has been characterised by a back and forth from the abatement system, concessional deductions, and the rebate system. Of the three systems, the rebate system has been criticised as offering little incentive to the taxpayer who supports their relative or dependant as defined by legislation at that time. A criticism made against the rebate system is that it favours higher income earners. A critical issue which comes from commentary of the rebate or deduction system for support given to dependants is the argument that ability-to-pay as I have defined it in chapter 4 is decreased by the number of children and dependants which one supports. It is therefore perplexing that inspite of a relationship between

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<sup>626</sup> *Ibid.*

one's ability-to-pay in income tax law and the number of dependants supported, the rebates for dependants were still abolished by the tax commissions in South Africa. It is for this reason that the Katz commissions approach to rebates for dependants using principles of equity has been presented as flawed. It has been argued that a proper application of the principles of equity including the ability-to-pay principle requires provision for necessities-of-life for the taxpayer and for those the taxpayer provides support to.

## CHAPTER 5 TAX EXPENDITURES FOR TAXPAYERS' CONTRIBUTIONS TO THE SUPPORT OF A DEPENDANT

### 5.1 Introduction

Building on several scholars on kin support and “black tax”, the thesis looked at the financial support a black middle-class taxpayer makes to their families and an argument is made here that there is need for tax expenditures which recognise this support. Black middle-class taxpayers belong to families which are extended, and which have wide and strong networks on kin support. The “black tax” involves income distribution. Rogan and Reynolds found that over a fifth of employed South Africans distribute their remuneration and other income sparsely across their households such that the income was not enough to provide for the basic needs of all household members.<sup>627</sup> Because “black tax” involves income distribution among family members both within and across households, it is necessary to look at the how income tax law can be designed to include deductions, credits, rebates, and exemptions for taxpayers supporting dependants. The quantitative data analysis showed that race and income are significant to whether an individual gives or receives support.

Several provisions in income tax law which provide tax relief to taxpayers who contribute towards the support of a dependant are referred to as tax expenditures. These provisions are subsidies available to a taxpayer which reduce a governments revenue. This provides an understanding of the use of different forms of tax expenditures such as credits and deductions given to taxpayers with dependants. The chapter also examines the “collision” of tax expenditures with direct government assistance programs. This chapter answers the second part of the research question which states: how should an income tax expenditure system (which considers support taxpayers give to a dependant) be designed?

First, the definition of the benchmark tax system and tax expenditures is necessary before outlining the use of tax expenditures for providing relief to taxpayers who support a dependant.

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<sup>627</sup> M Rogan & J Reynolds ‘Trends in the working poverty rate (WPR) in post-apartheid South Africa, 1997–2012 (2019) 36(5) *Development Southern Africa* 699, 711.

## 5.2 Tax expenditures as deviations from the benchmark tax system

A tax expenditure is a deviation from the benchmark tax system.<sup>628</sup> The benchmark tax system is grounded in the tax policy principles of neutrality, efficiency, and equity.<sup>629</sup> The benchmark is defined differently by countries based on the weight they attach on the principles of tax policy.<sup>630</sup> The benchmark in South Africa is characterised by a personal income tax which has progressive tax rates. The deviation from the benchmark in South Africa are through exemptions, allowances, credits, and rebate relief. The National Treasury defines tax expenditures as “estimates of the total revenue foregone as a result of this preferential tax treatment.”<sup>631</sup> Tax expenditures are measured as exceptions to the benchmark income tax.<sup>632</sup> In measuring the deviations from the benchmark income tax, “income” had to be defined. Surrey opted for the Haig-Simons definition of income which defines income as “the sum of a taxpayer's personal consumption plus his increase in net worth during the taxable year.”<sup>633</sup>

## 5.3 The tax expenditure concept

The tax expenditure concept was first introduced by the Assistant Secretary of the United States Treasury Stanley S. Surrey in 1968. It is a concept which Surrey and McDaniel’s describe as follows:

The tax expenditure concept posits that an income tax is composed of two distinct elements. The first element consists of structural provisions necessary to implement a normal income tax, such as the definition of net income, the specification of accounting rules, the determination of the entities subject to tax, the determination of the rate schedule and exemption levels, and the application of the tax to international transactions. These provisions compose the revenue-

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<sup>628</sup> A Stebbing & Spies-Butcher ‘Universal Welfare by ‘Other Means’? Social Tax Expenditures and the Australian Dual Welfare State’ (2010) 39(4) *Journal of Social Policy* 585, 589.

<sup>629</sup> *Ibid.*

<sup>630</sup> International Monetary Report on Tax Expenditure Reporting and Its Use in Fiscal Management A Guide for Developing Economies 2019 available at <https://www.imf.org/en/Publications/Fiscal-Affairs-Department-How-To-Notes/Issues/2019/03/27/Tax-Expenditure-Reporting-and-Its-Use-in-Fiscal-Management-A-Guide-for-Developing-Economies-46676> accessed on 11 May 2020

<sup>631</sup> National Treasury Tax Expenditure Statement 2020 available at <http://www.treasury.gov.za> accessed on 15 December 2020.

<sup>632</sup> E J Toder ‘Tax Expenditures and Tax Reform: Issues and Analysis’ (2005) 98 Proceedings. Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association 472-479.

<sup>633</sup> *Ibid.*

raising aspects of the tax. The second element consists of the special preferences found in every income tax. These provisions, often called tax incentives or tax subsidies, are departures from the normal tax structure and are designed to favor a particular industry, activity, or class of persons. They take many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates. Whatever their form, these departures from the normative tax structure represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other.<sup>634</sup>

Examining tax expenditures in South Africa, Heyns described a tax expenditure as a revenue loss due to the introduction of a special provision in tax law which is not part of the essential structure of a tax but is introduced to achieve non-tax, social and economic policy objectives.<sup>635</sup> Anderson and Minarik define tax expenditures as “provisions of tax law, regulations or practices that reduce or postpone revenue for a comparatively narrow populations of taxpayers relative to a benchmark tax.”<sup>636</sup> San Juan states that in income tax law, tax expenditures are a deviation from the proper measurement of the base which is income in the form of credits, deductions, exemptions and exclusions.<sup>637</sup> An expenditure is a subsidy to the taxpayer. The definitions by Surrey, McDaniel, Heyns and Anderson show that tax expenditures are designed to favour a certain class of taxpayers, the special provisions are a deviation from the benchmark tax law, and they result in revenue losses for the government.

Surrey considered tax expenditures to be a form of a government spending program that was administered through tax law.<sup>638</sup> Thuronyi states that Surrey envisioned two steps with such a program. The taxpayer pays the amount owed in terms of the tax legislation and the government pays a grant or subsidy to the taxpayer.<sup>639</sup> To make the process administratively simple, the government instead provides a subsidy to the taxpayer by reducing the taxpayers tax liability.<sup>640</sup>

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<sup>634</sup> *Ibid*

<sup>635</sup> J vdS Heyns Towards a tax expenditure Budget for South Africa, Occasional Paper No. 15 Economic Research Unit University of Natal, 5.

Also see A U Karzon ‘Tax Expenditures and Tax Reform’ (1985) 38 (5) *Vanderbilt Law Review* 1397, 1399.

<sup>636</sup> B Anderson & J J Minarik ‘Design Choices for Fiscal Policy Rules’ (2006) 5(4)*OECD Journal on Budgeting* 159, 162.

<sup>637</sup> San Juan (note 114 above) 678.

<sup>638</sup> V Thuronyi ‘Tax Expenditures: A Reassessment’ (1988) *Duke Law Journal* 1155, 1158.

<sup>639</sup> *Ibid*.

<sup>640</sup> Thuronyi (note 638 above) 1158.

As a result, the tax provisions providing relief to taxpayers in this way are a form of a government spending program administered through the tax laws. Thuronyi argues that tax expenditures look absurd if they are recharacterized as spending programs and analysed in that manner.<sup>641</sup> If analysed in this way, tax provisions cannot be justified in terms of tax policy considerations rather they are compared to other government subsidy programmes producing absurd results.<sup>642</sup> For example tax expenditures such as deduction in a progressive tax system has an upside-down effect when compared to direct government spending programs. Despite Thuronyi's viewpoint on tax expenditures, Branco and Costa state that deductions and other forms of tax relief are like social welfare.<sup>643</sup>

The goal of social policy has been defined as “providing income transfers to less-well-off citizens” and the goal of tax policy has been defined as “how to design an equitable and efficient system of raising the required revenues for governments.”<sup>644</sup> It is not disputed that the primary purpose of taxes has been ‘to fund government to meet various social and economic goals regarding national security, economic stability, income distribution, poverty alleviation, and the efficient allocation of resources.’<sup>645</sup> However, in addition to these means-tested programmes, tax expenditures have also been used to meet social and economic objectives with the lower-income earners benefitting from these programmes. Thus, the use of the tax system alongside social protection system in providing benefits to individuals with a legal or moral obligation to support dependent extended family members is essential to this thesis and is discussed in section 5.5 and 5.6 below. Before that, the objectives of tax expenditures are discussed.

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<sup>641</sup> *Ibid* 1159.

<sup>642</sup> Thuronyi (note 638 above) 1159.

<sup>643</sup> R Branco & E Costa ‘The Golden Age of Tax Expenditures: Fiscal Welfare and Inequality in Portugal (1989–2011)’ (2019) 24(6) *New Political Economy* 780, 781.

<sup>644</sup> C Vincent & F Woodley Taxing Canadian families: what’s fair, what’s not (2000) 6(5) *Family Policy* 1, 11-12

<sup>645</sup> T L Hungerford & R Thiess ‘The Earned Income Tax Credit and the Child Tax Credit: History Purpose Goals and Effectiveness’ (2013) 370 *Economic Policy Institute Brief* 1, 2.

## 5.4 Objective of tax expenditures

The main objective of a tax system is to raise revenue and achieve a fair distribution of the tax burden.<sup>646</sup> However, most Governments use the tax system to achieve non-tax policy objectives. In South Africa, income tax law has special provisions designed to deal with externalities and to realise non-tax, socio-economic objectives. These provisions in income tax law go beyond the objective of collecting revenue in terms of the tax policy canons of efficiency, simplicity, neutrality, and equity.<sup>647</sup> The special tax provisions designed to achieve socio-economic objectives are tax expenditures and they are in the form of deductions, credits, and rebates in personal income tax law.<sup>648</sup> The National Treasury 2021 budget reports data from the 2018/2019 year of assessment and the largest five expenditures for individuals in the Income Tax Act 58 of 1962 are vehicle manufacture incentives, value-added tax exemptions for basic food items, value-added tax exemptions for petrol fuel sales, deductions for pension contributions by employer, and medical tax credits on contributions to medical schemes.<sup>649</sup> Before 1995, the income tax laws had abatements and rebates for taxpayers who financially supported dependants within their family. Taxpayers in special circumstances are given preferential treatment through the special tax relief provisions. Tax liability for a certain group of taxpayers is reduced. However, not all deductions and credits are referred to as tax expenditures. Wolfman states that “an income tax must tax only net income if its taxable base is to have some relationship to a taxpayer’s ability-to-pay, a goal we idealize.”<sup>650</sup> In South Africa, the taxable income of an individual is calculated by deducting exempt income and allowable deductions from the gross income. Thus, a taxpayer’s income is calculated by subtracting from the gross income all amounts exempt from tax. Taxable income is calculated by deducting all amounts allowable as deductions or set off from income and adding all specified amounts. This is how the South African income tax arrives at a taxpayer’s ability-to-pay. But the allowable deductions and rebates are not available for taxpayers supporting

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<sup>646</sup> National Treasury, Republic of South Africa 2021 Budget Review Available at <http://www.treasury.gov.za/documents/national%20budget/2021/review/FullBR.pdf> accessed on 7 March 2021.

<sup>647</sup> vdS. Heyns (note 635 above) 1.

<sup>648</sup> National Treasury, Republic of South Africa 2021 Budget Review (note 637 above) 129.

<sup>649</sup> Ibid 129.

<sup>650</sup> B Wolfman ‘Tax Expenditures: From Idea to Ideology Reviewed Work(s): Tax Expenditures by Stanley S. Surrey and Paul R. McDaniel’ (1985) 99(2) *Harvard Law Review* 491, 493.

dependants meaning tax law does not consider dependants as a factor related to a taxpayer's ability-to-pay.

Knauer states that the critical lens should be enforced and implemented through policy changes which draw their influence from well-established institutional practices and procedures.<sup>651</sup> Tax expenditures are public policy instruments which the Government uses in addition to direct budgetary programs. In line with Knauer's statement, tax expenditures should draw their influence from traditional practices and principles of taxation to ensure the design of a good tax system. However, there are also objectives which are pursued by tax expenditures as a public policy tool. Villela *et al* state that tax expenditures should achieve one of four objectives. They state that tax expenditures should 'improve progressivity within the tax system, provide greater efficiency for the tax structure, stimulate the consumption of merit goods or encourage investment in certain sectors or regions.'<sup>652</sup> Heyns states that tax expenditures are designed to achieve similar objectives to direct government assistance programs and that tax expenditure programs can be replaced by direct expenditure programs.<sup>653</sup> Tax expenditures for taxpayers with dependants stands to improve progressivity within the tax system.

As far back as 1985, legal scholars noted the definitional problems of the tax expenditure concept. Karzon states that there are difficulties in determining whether certain expenses such as child-care costs incurred by working parents can be included in the normative income tax structure as expenses incurred in the production of income or whether such expenses are personal, non-deductible consumption items falling under tax expenditures.<sup>654</sup> According to Karzon, personal deductions and credits are not necessary in the production of income and thus are classic tax expenditures.<sup>655</sup> This brings up the reasoning on the court in *Symes v Canada*.<sup>656</sup> In the *Symes v Canada* case, the taxpayer sought to claim child-care expenses as a deduction arguing that the expenses were incurred in the production of income. The overlap between a taxpayer's business and personal activities cannot be ignored in determining the deductibility of expenses incurred in supporting and caring for dependants. Since then, other jurisdictions

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<sup>651</sup> Knauer (note 227 above) 213-214.

<sup>652</sup> L Villela, A Lemgruber & M Jorratt (2010) Tax expenditure budgets concepts and challenges for implementation, IDB Working Paper Series, No. IDBWP-131en, Inter-American Development Bank (IDB), Washington, DC available at <http://hdl.handle.net/11319/4302> Accessed on 10 July 2020.

<sup>653</sup> Vds Heyns (note 635 above) 8.

<sup>654</sup> Karzon (note 635 above) 1402.

<sup>655</sup> *Ibid.*

<sup>656</sup> *Ibid.*

have introduced deductions and credits for expenses incurred by a taxpayer in supporting and caring for a dependant who is either a child of the taxpayer or a relative such as the taxpayer's parents. Thus, a look at the deductions and credits for families which constitute tax expenditures will further assist in conceptualising tax expenditures and defining their role in supporting taxpayers with extended family and non-familial intergenerational networks to support.

## **5.5 Social welfare policy**

### **5.5.1 South Africa's social welfare policy**

A brief background of the exclusionary and discriminatory social welfare system during the apartheid was discussed in chapter 1 above. The discussion on social welfare was required to contextualise "black tax" and the need for tax relief for taxpayers who make contributions towards the support of their dependants.

The Margo commission was the first to recommend the abolishment of the dependant rebate on the grounds that tax law was not the correct vehicle for social objectives and that the rebate was subject to abuse by taxpayers seeking to reduce their tax liability. The recommendations by the Margo and Katz commissions eventually resulted in repeal of personal tax relief for taxpayers supporting dependants. This left South Africans relying on the social welfare system. The provision of social welfare was explicitly biased towards whites who supported dependants during apartheid. As stated in chapter 1, the social welfare system deliberately excluded blacks, coloureds, Indians leaving extended kin support networks as their support safety net. Post-apartheid, social security including social assistance flows from section 27(1)c) of the Constitution of 1996 which reads:

Everyone has the right to have access to...(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

In terms of the Constitution, the State has a responsibility to ensure the progressive realisation of these rights by enacting legislation and taking other measures within its available resources.

South Africa's policy response to families with dependants has been through the social policy system. The redistributive policies established in 1994 intended that the state would have a

significant role in several areas of policy that include fiscal, social and economic.<sup>657</sup> The end of apartheid saw the extensive implementation of social welfare policy in South Africa.<sup>658</sup> The Department of Social Development reported that there were 17.5 million recipients of the monthly social grants in 2018.<sup>659</sup> Older persons, people with disabilities and children are recipients of the social grants which are in the form of unconditional cash transfers. The South African social policy system is said to centre on the transformative and residual frameworks.<sup>660</sup> The transformative framework has a rights-based approach to transfers and the state plays a role in reversing structural inequalities and redistributing income.<sup>661</sup> In contrast, a minimalist form of social policy is accepted in the residual framework and the individual has a responsibility in the care for dependants and economic policies are more favourable.<sup>662</sup>

The framework of the social welfare programmes in South Africa can be divided into two main categories. In the first category, social assistance is given through cash transfers which ensure that there is adequate economic and social protection for people during life circumstances such as unemployment, old age, ill health, etc.<sup>663</sup> The second category is for example the disability grant which ensures the countries commitment to human and social rights for people with special needs.<sup>664</sup> South Africa relies on cash transfers which redistribute across the life cycle, that is cash transfers for children and the old-aged. The life-cycle perspective entails that the tax benefits and cash transfers are redistributed across periods of life with the system taking from individuals at one age to give back to the same individual at a later age.<sup>665</sup> Changes in family composition is considered a significant event in the life-cycle affecting the needs of the

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<sup>657</sup> S Plagerson et al 'Social Policy in South Africa: Navigating the Route to Social Development' (2019) 113 *World Development* 1, 2.

<sup>658</sup> R Potts 'Social Welfare in South Africa: Curing or Causing Poverty?' (2012) 1 (2) *Penn State Journal of International Affairs* 74, 74.

<sup>659</sup> Department of Social Development Annual Performance Plan 2019-2020 available at [Department of Social Development - Documents \(dsd.gov.za\)](http://Department of Social Development - Documents (dsd.gov.za)) Accessed on 10 June 2020.

<sup>660</sup> *Ibid* 2.

<sup>661</sup> Plagerson *et al* (note 657 above) 2.

<sup>662</sup> *Ibid*.

<sup>663</sup> Potts (note 658 above) 77.

<sup>664</sup> *Ibid*.

<sup>665</sup> Roantree, B., & Shaw, J. (2014). *The case for taking a life-cycle perspective: inequality, redistribution, and tax and benefit reforms* (No. R92). IFS Report. Available at <https://www.econstor.eu/bitstream/10419/119782/1/780557026.pdf> Accessed on 15 June 2020.

individual.<sup>666</sup> Supporting a sibling or siblings after the death of the parent is a change in family composition that affects the life-cycle as the income of the individual has to be shared with the sibling or siblings. This change in the family composition which affects the individual requires a corrective policy either in tax or direct government assistance for the individual who has been affected.

### 5.5.2 Social welfare policy in other jurisdictions in comparison to South Africa

In the United States, research shows that welfare policy is an area where the racial structure of inequality is linked to redistribution policies.<sup>667</sup> The income inequality between racial groups determines redistributive policies in the United States. An *et al* state that when scholars use the term racial “structure” they mean “the extent to which total disparities in income are a result of inequality among individuals *within* salient social groups or of inequality *between* members of different groups.”<sup>668</sup> Like the American system, South African welfare policy responds to the racial structure of inequalities and poverty with the White Paper on Social Welfare stating and responded to the fact that “extreme inequality in the distribution of income exists among racial groups and households,” a situation that still persists in 2020. But unlike the American system, Potts records that South Africa has a massive social welfare system which constitutes the highest expenditure on social welfare assistance in the world.<sup>669</sup> She states that the extensiveness of social welfare policies in South Africa is a result of the South African governments desire to correct discriminatory policies of apartheid.<sup>670</sup> These discriminatory policies were in education, labour, politics and welfare with a large demographic lacking access.<sup>671</sup> Of interest Potts looks at the capacity of the social welfare system in alleviating poverty and concludes that the child grant meets the objectives whilst the disability and old age grants encourage welfare dependency.<sup>672</sup> Her conclusion is that South Africa’s social welfare

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<sup>666</sup> *Ibid.*

<sup>667</sup> B An, M Levy & R Hero ‘It’s Not Just Welfare: Racial Inequality and the Local Provision of Public Goods in the United States’ (2018) 54(5) *Urban Affairs Review* 833.

R E Hero & M E Levy ‘The Racial Structure of Inequality: Consequences for Welfare Policy in the United States’ (2018) 99(2) *Social Science Quarterly* 459.

<sup>668</sup> An, Levy & Hero (note 667 above) 834.

<sup>669</sup> Potts (note 658 above) 75.

<sup>670</sup> *Ibid* 76.

<sup>671</sup> See discussion in section 1.1 on the discriminatory policies during apartheid and their effect on a large population in South Africa.

<sup>672</sup> Potts (note 658 above) 91.

system falls short of reaching the objectives of alleviating poverty.<sup>673</sup> This makes the argument for reforming the social welfare system stronger and to an extent the need for tax relief programmes for taxpayers with dependants could be part of that reform. If social welfare is not doing enough then other measures are needed for providing for those who are poor and depend on the financial support from kin especially their black-middle class kin, a precariat class.

Like in South Africa, the Mozambican social welfare system was introduced for many Mozambicans after independence in a process of social, economic and political transformation.<sup>674</sup> During the colonial period, most Mozambicans who were the black were denied access to social protection by the colonial government on the basis that they had traditional safety nets and that the extended black family structure conflicted with colonial social welfare policy.<sup>675</sup> As discussed in Chapter 1, this was also the reasoning of the apartheid government in South Africa. Black workers were pushed to rely on their families as a social and financial safety net. It is for this reason that apartheid and colonialism has been blamed for widening interdependency in black families during those periods and after independence “black tax” is still a conversation. In the black social welfare context, the link between redistribution, income inequality and race cannot be ignored. This link in social welfare is relevant in locales where a black person has faced segregation, discrimination, and disenfranchisement. This argument is valid in tax policy as well. Brown states that government assistance to taxpayers should be viewed with a race and class lens.<sup>676</sup> Thus, the racial structure of inequality is also linked to redistribution through tax policy. Tax reforms have been central to addressing inequality. It is impossible that the needs of the poor in society can be met without the reform in tax policies. Such reform in tax policies must happen after a deep analysis and understanding of the lived realities of those living in extreme poverty and vulnerability. Any policy seeking to address inequality, poverty and vulnerability must consider lived realities.

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<sup>673</sup> *Ibid.*

<sup>674</sup> R Castel Branco ‘Social Welfare, Unemployment and Public Works in Rural Southern Mozambique’ In V Xaxa, D Saha & R Singhal (eds) *Work, Institutions and Sustainable Livelihood Issues and Challenges of Transformation* (2017) 107.

<sup>675</sup> *Ibid* 107.

<sup>676</sup> D A Brown ‘Race and Class Matters in Tax Policy’ (2007) 107 *Columbia Law Review* 790, 816.

In most African countries, vulnerability to poverty is high. Mauritius is a welfare state which has a balance between the formal and informal social protection.<sup>677</sup> The informal social protection in the form of private transfers compliments the formal social protection system and helps in protecting the livelihoods of the vulnerable in families.<sup>678</sup> The informal social protection provided by families in the form of cash transfers or remittances in Mauritius, Mozambique or the United States of America should not be ignored by the social security system as well as the tax expenditure system. The tax system should encourage family support by relieving the burden on individuals by providing deductions, credits and rebates. In studying social protection in Africa, Oduro finds that family is important for providing social protection, but this informal social protection depends on the composition and size of the family, willingness to assist and the capacity to assist.<sup>679</sup> Informal security systems cannot be relied on because they are neither sustainable nor efficient as a form of social protection mechanism.<sup>680</sup> Relatives give whenever they can and this support may be inconsistent to sustain a dependant or for the reduction of poverty.

### 5.5.3 Who benefits from social welfare in South Africa

Seekings and Moore state that like other middle-income countries, South Africa's welfare system is for the poor than those who are better off such as the black middle-class individual.<sup>681</sup> The state provides assistance to the deserving few and the rest of the population has to depend on their extended families and kin networks.<sup>682</sup> Despite the state providing assistance to a deserving few and significant private family transfers, the bottom 60 percent of households still depend more on social grants and less on labour market income.<sup>683</sup> Although limited and

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<sup>677</sup> H Kasseeah & V Tandrayen-Ragoobur 'Assessing the formal social protection system in Mauritius' (2011) 1(6) *The International Journal's Research Journal of Social Sciences and Management* 82, 83.

<sup>678</sup> R Verpoorten & G Verschaegen Formal and Informal Social Protection in Sub-Saharan Africa: A Complex Welfare Mix to Reduce Poverty and Inequality" In C Suter (Eds) *Inequality Beyond Globalization: Economic Changes, Social Transformations and the Dynamics of Inequality* (2010) 97.

<sup>679</sup> Oduro (2010) Adverse Shocks and Social Protection in Africa: What Role for Formal and Informal Social Protection Financial Institutions", EUI Working Papers, RSCAS 2010/31.

<sup>680</sup> A F Bari Sayeed *et al* (2005) Conceptualizing a Social Protection Framework for Pakistan' (2005) Asian Development Bank, Islamabad Available at [http://www.researchcollective.org/Documents/Conceptualizing\\_Social\\_Protection.pdf](http://www.researchcollective.org/Documents/Conceptualizing_Social_Protection.pdf) Accessed on 2 January 2021.

<sup>681</sup> Seekings & Moore (2013 (note 56 above).

<sup>682</sup> Ssebagala (note 426) 1.

<sup>683</sup> Statssa.gov.za

targeted at low-income population groups, social grants have a redistributive impact and reduce overall income inequality in the country.<sup>684</sup> Ssebagala studies interfamily transfers and states that the fact that incomes derived from private transfers are more than double the incomes received from other sources demonstrates the deeply inadequate public programmes that assist vulnerable household members.<sup>685</sup>

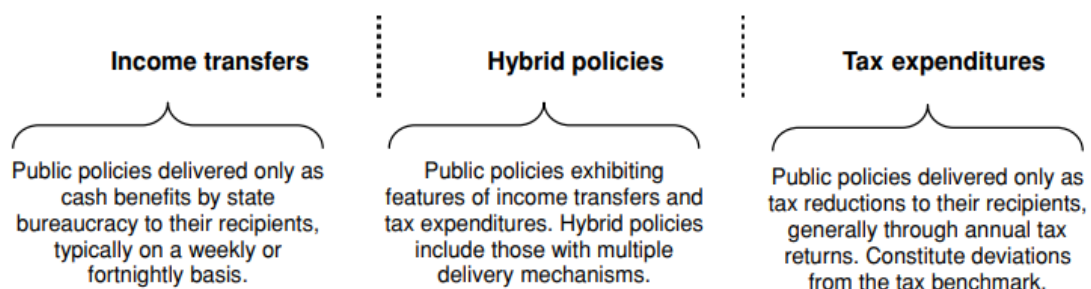
I shall move on to discuss tax expenditures as an alternative for providing relief to a black middle-class taxpayer who contributes towards the support of a dependant.

## 5.6 Operation of the tax expenditure system and the social protection structure for taxpayers with dependants

### 5.6.1 A dual welfare system to provide relief for taxpayers supporting dependants

In most jurisdictions tax expenditure programs for taxpayers who support dependants are combined with direct expenditure programs. This is the case in the countries discussed in chapter 7. Assistance given to taxpayers for the support of dependants should be designed to consider benefits from social welfare programs. Governments can deal with support to family through tax expenditures and direct government assistance. Stebbing and Spies-Butcher discuss a dual welfare system where those in the middle- and high-income groups access benefits through tax system and private welfare providers.<sup>686</sup> They provide an illustration of welfare policies at the disposal of governments.<sup>687</sup> This is illustrated in figure 5.

**Figure 5 Range of income transfers and tax expenditures**



*Source: Stebbing & Spies-Butcher (2010)*

<sup>684</sup> *Ibid.*

<sup>685</sup> Ssebagala (note 426 above) 13.

<sup>686</sup> Stebbing & Spies-Butcher (note 628 above) 588

<sup>687</sup> *Ibid.*

### 5.6.2 Social tax expenditures for families

The term social tax expenditures (STEs) is used in research to refer to tax expenditures which are classified as fiscal welfare. According to Titmuss, tax relief and cash transfers are “manifestations of social policies in favour of identified groups in the population” and constitute what he called “fiscal welfare.”<sup>688</sup> Titmuss wrote that there are three social welfare systems which make up the “social division of welfare.”<sup>689</sup> These are social welfare, occupational welfare and fiscal welfare which is through tax expenditures and other provisions of tax legislation.<sup>690</sup> The thesis draws from Stebbing and Spies-Butchers definition of tax expenditures as “fiscal welfare, and thus STEs, if they allocate resources in the key areas of welfare provision, including: social security, health, education, housing and family and community assistance.”<sup>691</sup> As stated above, the primary tax expenditures are exemptions, deductions, credits, allowances, and rebates.

Income tax legislation introduced deductions and credits to ensure equity among taxpayers and to recognise the difference in an individual taxpayers’ ability-to-pay. Tax deductions and tax credits are made to consider family differences in the ability-to-pay of taxpayers with dependant care and support expenses. There are competing views among scholars about which of these tax allowances for dependants under the income tax is superior on the grounds of equity and fairness.<sup>692</sup> Tax credits directly reduce a taxpayer’s income tax liability while a tax deduction reduces a taxpayer’s taxable income.<sup>693</sup> Arguments against tax deductions under the income tax are that they favour higher income earners. A case in point at the medical expenses deduction which were introduced prior to the medical tax credit in terms of Section 6A in the Income Tax Act 58 of 1962. The medical expenses deduction was meant to cushion taxpayers against out-of-pocket expenses and provide relief for medical aid contributions. The medical expenses deduction was considered highly inequitable with higher income earners benefitting

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<sup>688</sup> Titmuss, R., 1958. The social division of welfare: some reflections in search for equity. *In*: R. Titmuss, ed. *Essays on the ‘welfare state’*. London: Unwin University Press, 34–35.

<sup>689</sup> Titmuss (note 688 above) 42.

<sup>690</sup> *Ibid.*

<sup>691</sup> Stebbing & Spies-Butcher (note 628 above) 588.

<sup>692</sup> M Brannon & E R Morss ‘The Tax Allowance for Dependents: Deductions Versus Credits’ (1973) 26(4) *National Tax Journal* 599. Also see W D Andrews ‘Personal Deductions in an Ideal Income Tax’ (1972) 86(2) *Harvard Law Review* 309, 382.

<sup>693</sup> Hungerford & Thiess (note 645 above) 2.

because higher marginal rates translate to higher medical expense deductions.<sup>694</sup> This goes for the deduction for charitable contributions where the wealthier taxpayers would benefit. This is the upside-down effect of tax expenditure through deductions. Under a progressive tax system, tax expenditures which are deductions favour taxpayers with higher incomes because the higher an individual's income, the greater the tax benefit.<sup>695</sup> Unlike tax expenditures, direct government assistance benefits the poor. Despite the undesired effect of the two tax relief measures, both credits and deductions have been the common methods used to provide relief to taxpayers supporting dependants.<sup>696</sup>

### **5.7 Advantages and disadvantages of tax expenditures**

Once it has been decided that there is a need to have public policy instrument for the support of taxpayers with dependants, then that public policy instrument must be evaluated. This evaluation requires an investigation into the advantages and disadvantages of the public policy instrument. Professor Stanley S. Surrey listed several disadvantages of tax expenditures as a public policy instrument. Andrews is of the view that some of the disadvantages or limitations of tax expenditures have been overstated.<sup>697</sup> But, the disadvantages or limitations of tax expenditures as a tool to provide compensation to individual taxpayers who provide support to dependants must be understood in order to realise their potential.<sup>698</sup> Shaviro suggests that tax expenditure analysis can use measures which make clear the relationship they have to underlying distributional aims and which consider the differences in those aims.<sup>699</sup> This will improve its background influence on tax policy.<sup>700</sup>

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<sup>694</sup> S Nhamo & E Mudimu (2020) Shifting from deductions to credits No. Wp-2020-3- World Institute of development economic research (UNU-WIDER) available at [https://satiwed.wider.unu.edu/sites/default/files/images/SA-TIED\\_WP95\\_Nhamo\\_Mudimu.pdf](https://satiwed.wider.unu.edu/sites/default/files/images/SA-TIED_WP95_Nhamo_Mudimu.pdf) Accessed on 10 June 2020.

<sup>695</sup> Thuronyi (note 631 above) 1159.

<sup>696</sup> See the discussion in chapter 2 on the disparate impact of tax law. Those with higher incomes are the beneficiaries of most tax benefits. As a result, it would not be ideal to introduce deductions as they benefit higher income earners as opposed to middle and lower-income earners.

<sup>697</sup> Andrews (note 692 above) 311.

<sup>698</sup> L P Martinez 'A Critique of Critical Tax Policy Critiques (Or, You've Got to Speak Out Against the Madness)' (2017) 28 *Berkeley La Raza Law Journal* 49, 68.

<sup>699</sup> D Shaviro 'Rethinking Tax Expenditures and Fiscal Language' (2004) 57 *Tax Law Review* 187, 253.

<sup>700</sup> *Ibid.*

### 5.7.1 Complex tax system, uncertain costs, administrative difficulties of tax expenditures

The design and implementation of tax expenditures has been a subject of much criticism in legal scholarship. It has been argued that tax expenditures make tax laws complicated, affect progressivity in taxes, is an unjustifiable disproportionate treatment of taxpayers and affects decision-making in business.<sup>701</sup> Thuronyi states that tax expenditures complicate the tax system because of the strain they put on administrative resources of the tax system, the costs associated are unlimited and uncertain, they may be omitted in the budgetary review process and revenue agencies which administer tax expenditures have little familiarity with substantive issues which tax expenditures seek to address.<sup>702</sup> When it comes to dependency, it has been argued that social welfare legislation and social workers are best suited than income tax law and tax agencies in providing support to individuals with dependants.<sup>703</sup> Burns and Krever state :

It may be more difficult from an administrative perspective to define dependants in an income tax system than in a social welfare system, because the concept of collective needs is different from the concept of ability to pay, and social support authorities may have more expertise, and social support laws more flexibility, in identifying dependency.<sup>704</sup>

To evade this drawback, Zelinsky suggested that there could be joint administration between the tax and non-tax agencies in the enactment and implementation of tax relief programmes.<sup>705</sup> This way, the tax agency benefits from the expertise of the non-tax agency familiar with substantive matters. The substantive merits of the tax relief provision must be given regard to before opting for direct government assistance programs. Other limitations of tax expenditures are discussed below.

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<sup>701</sup> Thuronyi (note 641 above) 1157.

<sup>702</sup> *Ibid* 1161. Also see C Howard & E Howard *The hidden welfare state: Tax expenditures and social policy in the United States* (1997).

<sup>703</sup> Burns & Krever (note 111 above) 545.

<sup>704</sup> *Ibid*

<sup>705</sup> E A Zelinsky 'James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions' (1993) 102(5) *The Yale Law Journal* 1165, 1169.

### 5.7.2 Upside-down effect

Critical tax theorists have argued that in a progressive income tax system, high-income taxpayers take advantage of tax benefits more than low-income taxpayers.<sup>706</sup> This means that the higher-income earners who have a greater ability-to-pay receive more benefits from individual tax expenditures. In San Juan's study on tax expenditures, he finds that in 2015, higher-income taxpayers in the U.S received more than three fifths of the benefits from income tax expenditures.<sup>707</sup> Those with higher incomes are said to be in a better position to take advantage of tax-privileged activities which makes them disproportionately pay less tax.<sup>708</sup> According to earlier scholarship tax expenditure provisions in income tax law "reflect an upside-down idea of policy because the rate of reimbursement is the taxpayer's marginal tax rate; this results in relatively generous rates of reimbursement for the well-to-do, while it provides nothing at all for the very poor who presumably have the greatest need."<sup>709</sup> This is also expressed by Branco and Costa who state that "tax expenditures require an income high enough to pay income tax, which is not the case for a very significant share of poorer family households, unable to benefit from any tax deduction."<sup>710</sup>

Despite the possible regressive effects on income distribution of STEs, I make the argument that the introduction of STEs may provide relief to middle-class and particularly to black middle-class taxpayers who will be subsidised for private welfare spending on themselves and their dependants. Social protection through cash transfers is targeted at poorer citizens in the country. STEs should be targeted at those classified as middle-class or middle-income. South African STEs would apply when a taxpayer spent a specific amount to maintain a dependant during the year of assessment. This obviously would not help in avoiding the upside-down effect of STEs. STEs are argued to have a regressive impact on income redistribution with income distributed to higher income groups than middle- or low- income groups. To avoid this, STEs should be capped to prevent higher income earners from disproportionately benefitting.

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<sup>706</sup> Moran & Whitford (note 302 above) Also San Juan (note 114 above) 696, where he looks at the distribution of medical deductions in the U.S in 2016 and finds that the deductions significantly benefit those with higher incomes.

<sup>707</sup> San Juan (note 114 above) 679.

<sup>708</sup> A Sinfield Fiscal welfare. In: B. Greve, ed. *The Routledge handbook of the welfare state* (2013) 23.

<sup>709</sup> Andrews (note 692 above) 310.

<sup>710</sup> Branco and Costa (note 636 above) 784.

### 5.7.3 Unjustified tax loopholes

Despite the intention behind tax expenditures in income tax law, they have been criticised as special interest loopholes which need to be closed.<sup>711</sup> Tax expenditures are “hidden” spending programmes which Howard and Howard consider as part of the “hidden welfare state.”<sup>712</sup> Unlike direct spending programs, tax expenditures with social policy objectives are “hidden” and less likely to be subjected to extensive scrutiny and analysis.<sup>713</sup>

In addition, tax expenditures involving taxpayers giving kin support have been criticised by the Margo Commission and other tax commissions as being subject to abuse by taxpayers attempting to reduce their tax liability. This raises a tax avoidance issue and social justice concern due to shifting on the tax burden. It would be prudent to design the expenditure for the support given to kin with this loophole in mind.

### 5.7.4 Undermines the principles of equity, fairness, efficiency and simplicity

Tax expenditures are criticised as undermining principles of a good tax system. Geourjon and Rota-Graziosi state that tax expenditures result in a reduction of revenue for the government and departs from the benchmark tax system thereby potentially undermining principles of equity.<sup>714</sup> The second element of Surrey’s and McDaniel’s definition of tax expenditures suggests that the tax system is used in lieu of direct government programmes to provide assistance to taxpayers for the cost of supporting dependants. The government redirects revenue to a specific group or class of persons through the tax system to achieve social and economic objectives such as reducing poverty and income inequality. However, tax expenditures have been argued to have a negative effect on equity in that they regressively adjust taxpayers tax burdens vertically and horizontally.<sup>715</sup> According to Villela *et al* taxes should be designed to be horizontally and vertically equitable respectively meaning that

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<sup>711</sup> J L Buckley ‘Tax Expenditure Reform: Some Common Misconceptions’ (2012) *Tax Notes* 1122, 1123.

<sup>712</sup> Howard & Howard (note 702 above).

<sup>713</sup> H Polackova Bixi, Z Li Swift & C M A Velanduc ‘Tax Expenditures--shedding Light on Government Spending Through the Tax System’ available at <https://elibrary.worldbank.org/doi/abs/10.1596/0-8213-5601-1> Accessed on 20 June 2020.

<sup>714</sup> A Geourjon Grégoire & G Rota-Graziosi ‘The illusion of tax expenditures in Africa’ available at <https://ferdi.fr/dl/df-DbNd31khAbaHZmEacxpE4LJK/ferdi-b96-the-illusion-of-tax-expenditures-in-africa.pdf> Accessed on 22 June 2020.

<sup>715</sup> Polackova, Li Swift & Velanduc (note 713 above).

taxpayers with the same contribution capacity should be affected the same and taxpayers with greater contribution capacity should proportionately pay more.<sup>716</sup>

It may seem that non-refundable tax expenditures exclude individuals who are not taxpayers from receiving benefits even though they are among the poorest in the society. To counter this argument, the poorest groups in South Africa may qualify to receive benefits through the social welfare system. However, it is individuals such as the black middle class who are considered well-off and have an ability to bear the tax burden who need to be targeted via an alternative welfare programme such as tax expenditures. Equity would demand those individuals from this class of persons be targeted by the tax system because of the financial assistance they provide to their dependants alleviating the resource pressure which would otherwise fall on Government.

Tax expenditures have been further criticised as inefficient and ineffective. Polackova Bixi *et al* are of the view that some tax expenditures are implemented to appease certain various interest groups and are not based on actual needs.<sup>717</sup> This results in some sectors receiving undeserved favour.

#### **5.7.5 Distortion of decision-making, higher tax rates and unexpected gains**

Tax expenditures often are a favour of one sector or area of public policy over another. This results in the redirection of resources from one industry to another in favour of the one sector or area of public policy. Villela *et al* state that this would not constitute an influence on market decision-making is the tax expenditure seeks to correct a distortion.<sup>718</sup>

Also, tax expenditures are deemed disadvantageous because higher tax rates on one group will be needed to fund the transfers to another group in need. This would certainly be the case if tax expenditures are introduced to provide tax relief for taxpayers with dependants. Government would have to find other tax means to recover the lost revenue. To avoid the loss of revenue through tax expenditures for taxpayers with dependants, the Government could ensure that an individual's benefit either from the tax system or the direct expenditure programs. Tax relief measures should only apply to those individuals (taxpayer and dependant) who do not qualify

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<sup>716</sup> Villela *et al* (note 652 above) 4.

<sup>717</sup> Polackova Bixi *et al* (note 713 above).

<sup>718</sup> Villela *et al* (note 652 above) 10 citing Surrey who listed five disadvantages of tax expenditures.

for social grants. This would require a merging of the tax expenditures and direct assistance administrative systems.

Tax expenditures are also deemed to be disadvantageous because of the unexpected gains they raise. There is some inequity in providing tax relief to taxpayers for an activity they would have done anyway without the tax relief. The cost of encouraging one individual is then shared by all.<sup>719</sup> It is true that in the case of tax relief for taxpayers who support dependants, the cost would be shared by other taxpayers. The tax relief for taxpayers who support dependants serves to strengthen family ties and ensure that generational poverty does not persist in predominantly black families.

## **5.8 Conclusion**

This chapter discussed tax expenditures for dependants. These are called social tax expenditures and are meant to provide relief to families through deductions or credits. The chapter further discussed how social tax expenditures and direct social assistance would operate parallel to each other. Although tax expenditures are argued to have an upside-down effect or difficult to administer, they are cheaper to implement and administer in comparison to direct social assistance. The benefit of providing taxpayers who contribute towards the support of their kin could outweigh the disadvantages. Taxpayers may give more to their dependants and plug the social welfare gap in South Africa. This could contribute towards income and wealth redistribution.

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<sup>719</sup> *Ibid.*

## CHAPTER 6 COMPARATIVE DISCUSSION ON INCOME TAX RELIEF FOR TAXPAYERS WHO SUPPORT DEPENDANTS IN OTHER JURISDICTIONS

### 6.1 Introduction

This chapter discusses the tax treatment of dependants in Canada, the United States of America, Mozambique, and Mauritius. Tax assistance provided to families with dependants in these countries includes tax deductions, tax exemptions, refundable tax credits and income-tested non-refundable tax credits. The benefits to the taxpayer are usually not a reflection of the actual expenses spent by the taxpayer on supporting dependants but rather are calculated using income level or other requirements for dependants.<sup>720</sup> Further, an international comparison of the benefits to the taxpayer for supporting dependants should be understood within the political, economic, and social contexts in which the tax relief programmes are designed.

Canada is discussed because literature on the tax treatment of child-care expenses has focused on the case of *Symes v Canada*.<sup>721</sup> The Symes case has shaped debates in critical tax theory on the fair treatment of family relationships, domestic obligations, and family circumstances in the assessment of tax liabilities. The discussions around the Symes case have contributed to the understanding of tax policy/tax law and the family. The United States of America is chosen as a comparator because of the contribution American critical tax scholars have made to the debates on the intersection of the family and tax law. Mozambique and Mauritius are discussed in this chapter because they are examples of developing countries which provide personal tax relief for dependants. The United States of America was chosen because of historical disadvantages which black taxpayers still face even today. Critical tax theory was introduced in the United States of America because of racial inequality and disadvantages which black taxpayers face in present day. Further, there have been studies in the U.S. which examine the support given by one racial group over another. This makes the United States of America relevant to this study. Mozambique and the United States of America are countries whose history is marked by racial segregation, racial inequality, and racial tensions.

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<sup>720</sup> C Vincent & F Wooley 'Taxing Canadian Families: What's Fair, What's Not' (2000) 6(5) Family Policy 1, 11.

<sup>721</sup> (1993) 4 SCR 695

The international comparison of the tax treatment of dependants shows the different approaches of providing support to families with dependants through the tax system and to comprehend implications of introducing tax relief for taxpayers providing support to dependants as defined in each jurisdiction.

Comparative tax analysis provides an understanding of how other countries have dealt with a certain problem and locates the idiosyncrasies of the South African context in a wide global issue. Thuronyi writing on comparative tax analysis states that comparative law “identifies underlying patterns and analyses how different rules function in different countries to resolve similar problems.”<sup>722</sup> Zweigert and Kotz who are cited by Thuronyi state the “comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances.”<sup>723</sup> Often, comparative tax law uses legal families to develop a comparative analysis but this research study opts to do a comparative analysis of countries which offer a “typical and noteworthy solution to particular problems of tax law.”<sup>724</sup> One of the few scholars who have done comparative analysis of the tax treatment of the family, Pechman and Engelhardt, look at patterns among countries in the tax treatment of the family and they group the countries according to the methods used in differentiating tax liabilities.<sup>725</sup> This research study examines the tax problem of not having tax relief for taxpayers who support dependants and the problem of disregarding intergenerational responsibility and family obligations in measuring a taxpayer’s ability-to-pay. Thus, the comparative tax analysis in this chapter looks at family tax provisions in several jurisdictions to answer the interesting question on how the ability-to-pay and horizontal equity are affected by family sizes and family responsibilities.

## **6.2 Personal tax relief in other jurisdictions**

Personal income allowances and relief are a means of distributing the tax burden fairly among taxpayers. It has been stated that family relationships and domestic obligations have a major effect on an individual’s tax burden.<sup>726</sup> Government can differentiate individual taxpayer’s using family circumstances. Persons with family responsibilities can receive deductions and

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<sup>722</sup> V Thuronyi & K Brooks *Comparative Tax Law* (2016) 244.

<sup>723</sup> Zweigert & Kotz *Introduction to Comparative Law* 1998.

<sup>724</sup> Thuronyi & Brooks (note 722 above).

<sup>725</sup> Pechman & Engelhardt (note 111 above).

<sup>726</sup> McIntyre & Oldman (note 328 above) 1574.

credits through personal income taxation. These deductions and credits are without regard to the actual cash amount spent by the taxpayer. Cartter states that when the State reduces a taxpayer's liability because they have dependants, the State shares the responsibility to care for a taxpayer's family in the same way as direct government assistance.<sup>727</sup> While it has been argued by Branco, Costa and others that tax expenditures such as deductions and credits are essentially social welfare programs administered through the tax system, Infanti argues that the income tax is the most suitable for accommodating the economic nature of relationships entered into by taxpayers.<sup>728</sup> He argues this because he sees the income tax as being predominantly focused on the economic relationships between individuals.<sup>729</sup> But Infanti finds that although income tax laws support families in the U.S, the law needs to be more inclusive in defining who is family for income tax purposes as there are a diverse range of family economic arrangements not patterned after the nuclear family.<sup>730</sup> In the U.S, the income tax provides tax relief when a taxpayer has a dependant through the earned income tax credit and the dependant care credit. These credits require that the taxpayer and the dependant be related. From the definition of a dependant in the U.S. personal income tax discussed in chapter 3, classes of dependants include blood relatives, stepparents, and in-laws.<sup>731</sup> It also includes any person who has lived with the taxpayer during the tax year of assessment as a member of the taxpayer's household.<sup>732</sup> In Mozambique, deductions are available to a taxpayer with dependants who are either the taxpayer's ascendants or descendants. Both the U.S. and Mozambique personal income tax laws have a more inclusive approach in determining who is family. In South Africa, this inclusive approach is adopted in Road Accident Fund cases for claims of support. Individual taxpayer's family circumstances are not considered for tax purposes as it was determined that the tax system is not the appropriate vehicle to provide support to taxpayers with dependants.

Canada, United States of America, Mozambique, and Mauritius make allowance for personal deductions and credits where expenses are incurred in providing support to a dependant. Dependency deductions which consider family size are allowed and Thuronyi states that they

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<sup>727</sup> A M Cartter 'Income-tax allowances and the family in Great Britain' *Population Studies* (1953) 6(3) 218, 219.

<sup>728</sup> Infanti (note 328 above) 639.

<sup>729</sup> *Ibid.*

<sup>730</sup> Infanti (note 328 above) 639.

<sup>731</sup> S T Petra 'Tax Benefits Provided Taxpayers with Dependents' (2005) 83(4) *Taxes: The Tax Magazine* 63, 63.

<sup>732</sup> *Ibid* 63.

are motivated by equity considerations.<sup>733</sup> However, other jurisdictions such as South Africa have opted for direct assistance programmes rather than tax relief programmes as a means of providing support to low-income households and transferring or redistributing income. Gavin and Steyn have opined that individual personal income taxation differs from one country to the other because tax policy cannot “simultaneously achieve both horizontal equity across households and vertical equity in terms of individual taxation.”<sup>734</sup> In 1990, Penchman and Engelhardt did a comparative study on the techniques which are used to allow family responsibilities in the income tax and found little uniformity in Australia, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United State when compared. They state that even if there is little uniformity in the tax treatment of dependants in the jurisdictions they compared, general conclusions and suggestions can be drawn for the design of tax policy that reflects the fact that a taxpayers’ tax liability is reduced by giving support to dependants.<sup>735</sup> Thus, tax laws which assist taxpayers who incur expenses in supporting and caring for their dependants can be compared to arrive at general conclusions in this research.

The Canadian Income Tax Act came into effect in 1917 and it is the largest single tax which the average Canadian family pays.<sup>736</sup> The income tax in Canada is taxed at the Federal and Provincial Levels of government. Section 118(1) of the Canada Income Tax Act provides that during a year of assessment an amount will be deducted for an individual using the formula:

**A x B**

In the formula, **A** is the applicable percentage for the year of assessment and **B** is the total of the credits and deductions available to the taxpayer under section 118 (1). For this thesis, the relevant credits and deductions are the amount for an eligible dependant, the non-refundable Canada caregiver credit, the childcare credit, and the medical expenses for a family member.

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<sup>733</sup> Thuronyi (note 715 above) 244.

<sup>734</sup> Gavin & Steyn (note 521 above) 321.

<sup>735</sup> Penchman & Engelhardt (note 111 above) 1.

<sup>736</sup> N Veldhuis & M Walker *Tax Facts 14*. (2006) 25.

Individuals who are citizens or resident aliens<sup>737</sup> of the United States of America are taxed based on gross income, age, filing status and whether one is a dependant. The Federal Income Tax has five recognised filing statuses which are single, married filing jointly, married filing separately, head of household and qualifying widow or widower.<sup>738</sup> The filing status determines whether the taxpayer is eligible for any deductions or credits. The tax credits can either be refundable such as the Earned Income Tax Credit (EITC) or non-refundable such as deductions for childcare and dependant care expenses.<sup>739</sup> The non-refundable tax credits are the credit for certain dependants, and the child and dependant care credit. The refundable tax credit is the Earned Income Tax Credit and child tax credit.

The individuals Personal Income Tax Code (*Imposto sobre o Rendimento das Pessoas Individuais* IRPS 33/2007) of Mozambique allow for deductions for individuals with dependants. The deductions allowed are calculated according to the number of dependants that an individual has. The Mozambican approach to the income tax is like that of Mauritius where the deductions allowable are determined by the number of dependants the taxpayer has. Table 1 and Table 2 below show the 2019 personal income tax rates and the amount an individual would pay IRPS deduction depending on the individual’s income and the number of dependants they have.

**Table 1 Mozambican 2019 Personal Income Tax Rates<sup>740</sup>**

| Annual Chargeable Income<br>In Meticaís<br>(A) | Rates<br>(B) | Abatement (MT)<br>(C) |
|--|--------------|-----------------------|
| Up to 28.000.000                               | 10%          | .-.                   |
| From 28.000.001 to 112.000.000                 | 15%          | 1.400.000             |
| From 112.000.001 to 336.000.000                | 20%          | 7.000.000             |
| From 336.000.001 to 1.008.000.000              | 25%          | 23.800.000            |

<sup>737</sup> In the United States of America, a resident for the purposes of tax is a foreign national or US citizen who meets the requirements for the “green card” or “substantial presence” tests.

<sup>738</sup> Internal Revenue Service Publication 501 ‘Dependents, standard deduction, and filing information’ available at : <https://www.irs.gov/forms-pubs/about-publication-501> Accessed on 10 August 2019.

<sup>739</sup> M F Sherlock & D J Marples ‘Overview of the Federal Tax System in 2019’ Available at [purl.fdlp.gov](http://purl.fdlp.gov) Accessed on 9 February 2019

<sup>740</sup> Article 64 of IRPS 33/2007.

|                    |     |            |
|--------------------|-----|------------|
| Over 1.008.000.000 | 32% | 94.360.000 |
|--------------------|-----|------------|

One outstanding characteristic of the Mozambican income tax is the taxation of households. Households are taxed on the joint income of its household members under Chapter I Section II Article 17 of IRPS 33/2007. Individuals who oversee the household are deemed liable for the tax on the household. The Code defines the household as consisting of spouses and their dependants, each spouse and ex-spouse together with the dependants in their care, single parents and the dependants in their care, single adoptive parents and the dependants in their care.<sup>741</sup> For tax purposes, a person cannot belong to more than one household at a particular time and they are not taxable autonomously if they are a part of a household.<sup>742</sup> The personal and family situation of the person liable for tax is determined on the day of the year to which the tax is applicable. Thus, the Mozambican personal income tax code considers the joint income of the household but does not exclude dependants of a tax liable person from the tax calculation of the household.

In Mauritius, the Income Tax Act of 1995 ('ITA of 1995') regulates personal income taxation. In terms of the ITA 1995, residents pay income tax on non-exempt income derived from Mauritius less allowable deductions. In 2019, a flat tax rate of fifteen percent (15 %) applies to individuals earning an annual net income of up to MUR650 000.<sup>743</sup> A lower rate tax rate of ten percent (10%) applies to income exceeding MUR650 000.<sup>744</sup> In relation to families, there are deduction and allowances available and these are divided into six categories depending on the number of dependants. The income tax exemption threshold is determined by the number of dependants that an individual taxpayer has. In terms of section 27 (2) of the ITA of 1995, an individual is entitled to deduct the appropriate income exemption threshold from his net income to arrive at his chargeable income.<sup>745</sup> Section 27 (2A) of the ITA of 1995 further provides that where the person mentioned in section 27 (2) is either a retired person who has gross income other than specified income or is a person with a mental or physical disability they shall be

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<sup>741</sup> Section 3 of Article 17.

<sup>742</sup> Section 6 of Article 17 of IRPS 33/2007,

<sup>743</sup> Amount has increased to MUR700 000 for the 2019/2020 income tax year.

<sup>744</sup> *Ibid*

<sup>745</sup> Mauritius Revenue Authority GUIDE ON INCOME TAX Employees Taking Up Employment for the First Time February 2019 Accessed 7 March 2020.

entitled to a further deduction of from their net income. For the income tax year ending on 30 June 2019, the following categories and amounts were available for individual taxpayers:

**Table 2 Income Tax Exemption Thresholds for Individuals in Mauritius<sup>746</sup>**

| <b>INDIVIDUAL</b>   | <b>NUMBER OF DEPENDANTS</b> | <b>EXEMPTION AMOUNT FOR TAX YEAR ENDING 30 JUNE 2019 (Rs)</b> |
|---|-----------------------------|---|
| Category A- Employee                                      | None                        | 305 000   |
| Category B- Employee                                      | One                         | 415 000   |
| Category C- Employee                                      | Two                         | 480 000   |
| Category D -Employee                                      | Three                       | 525 000   |
| Category E- Employee                                      | Four or more                | 555 000   |
| Category F- retired or disabled person with no dependent  | None                        | 355 000   |
| Category G- retired or disabled person with one dependent | One                         | 465 000   |

The following section discusses the definition of a dependant in income tax legislation in other jurisdictions. This definition provides a guideline on which family members are considered for income tax purposes. The definition makes it easier to understand which dependants are covered by the deductions and credits discussed in section 7.5 below.

### **6.3 Definition of a dependant in Canada, United States of America, Mozambique, and Mauritius**

The Canadian income tax defines a dependant for the purposes of its caregiver credit allowed in terms of section 118(6) of their income tax act. It is not applicable for other deductions and credits. The definition is for the purposes of paragraph (d) in the description of **B** in subsection (1) of section 118(6). The relevant section is with respect to individuals who have attained the age of 18 years and who are dependants of the taxpayer due to mental or physical infirmity. Section 118(6) provides that during the year of assessment, a dependant is “a person who at any time in the year is dependent on the individual for support.” Such person in terms of section

<sup>746</sup> Third Schedule to the Income Tax Act of 1995.

118(6)(a) and 118(6)(b) should be “the child or grandchild of the individual or of the individual’s spouse or common-law partner; or the parent, grandparent, brother, sister, uncle, aunt, niece or nephew, if resident in Canada at any time in the year, of the individual or of the individual’s spouse or common-law partner.”

The United States of America’s income tax definition of a dependant also includes a wider network of a taxpayer’s relatives. A dependant in U.S. income tax law means either a *qualifying child* or a *qualifying relative*. First, there is no age restrictions for one to be a qualifying relative and be claimed as a dependant by a taxpayer unlike in the case of a qualifying child. For a child to be claimed as a dependant, they must be under the age of 19 at the end of the year of assessment or be a student under the age of 24 or regardless of age must be permanently and completely disabled during the year of assessment.<sup>747</sup> For the qualifying child credit, the child should also be younger than the taxpayer unless they are disabled as described. Secondly, there are four tests to determine whether a person is a qualifying relative and thus can be claimed as a dependent by a taxpayer. As summarised by the IRS, the four tests are: not a qualifying child test, gross income test, support test and the member of a household or relationship test.<sup>748</sup> The *not a qualifying child test* stipulates that a qualifying child cannot also be a qualifying relative for the purposes of the credit for a dependant. However, a child of a person not required to file an income tax return or of a person who files a return to claim income tax refund can be claimed as a qualifying relative by another taxpayer. But the support test must be met for the child who is a relative or is a child of a friend to be claimed by a taxpayer as a dependant. To meet the requirements of the support test, the taxpayer should have provided “more than half of the person’s total support during the calendar year.”<sup>749</sup> The taxpayer should determine the ratio of the support given to the person (prospective dependant) to the total amount of support received by the person (prospective dependant) from all sources including their own funds. The multiple support agreement covers situations where for example two or more siblings provide support to their parent or any qualifying relative. Only one of the siblings can claim the parent as a dependant for that tax year for a relative or for someone that lived with them as a member of the household excluding a maid or house help. This brings the discussion into the third test to be satisfied by a qualifying dependant which is the member of household test or the relationship test. A person can only be a qualifying relative if they lived with the taxpayer throughout the

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<sup>747</sup> Internal Revenue Service (note 728 above) 12.

<sup>748</sup> Internal Revenue Service (note 728 above) 17.

<sup>749</sup> *Ibid* 19.

year as a member of the taxpayers' household or is a relative be it a stepchild, child, brother sister, half-brother, half-sister, father, mother, grandparents, or any blood relative. The last test to be satisfied to be a qualifying relative is the gross income test. The gross income test requires that the person have a gross income of no more than US\$4 150 for the year.<sup>750</sup>

In Mozambique, households are taxed in terms of Article 17 of the Personal Income Tax Code (*Imposto sobre o Rendimento das Pessoas Individuais IRPS 33/2007*). In terms of Article 17, a dependant is a child below the age of 18 years who is non-emancipated, adopted children and stepchildren. Further, a dependant includes adopted and stepchildren not older than 25 years of age who earn less than the national minimum salary or are studying or are in compulsory military service or are unemployed. The definition further includes the ascendants (grandparents and parents of the taxpayer) who are in the care of the person liable for tax in the household.

In Mauritius, a dependant is defined in section 27(7) of the ITA of 1995 as a spouse, child under the age of eighteen (18), child over the age of eighteen (18) who is pursuing a full-time course at an educational institution or has a mental or physical disability preventing them from earning a living. A child as used in the ITA of 1995 means an unmarried child, adopted child, stepchild of the individual or an unmarried legal foster child of the individual or an unmarried child over whom the individual has legal guardianship or custody. Mauritius does not recognise intergenerational support for dependants other than children of the taxpayer.

#### **6.4 Methods of differentiating tax liabilities for taxpayers supporting a dependant**

Income tax law provides relief for the cost of supporting dependants through personal exemptions, tax credits, deductions, and head of household provisions in the developing and developed countries mentioned in this comparative analysis chapter. In all the countries discussed in this chapter, the relief given through the income tax system is complimented by direct grants or expenditure programmes. The level of benefits provided through the other government expenditure programmes for families is important when structuring the income tax relief for dependants or individuals who support dependants.

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<sup>750</sup> Internal Revenue Service (note 728 above) 18.

### **6.4.1 Deductions for the support of dependants**

Canada, Mozambique, and Mauritius allow taxpayers to deduct an amount for the cost they incurred in supporting dependants. In Canada, the relief is given for expenses incurred in providing care for a dependant child of the taxpayer. There are other deductions such as standard deductions and deductions for social security contributions which have not been discussed in this thesis but have been argued to have an impact on effective tax rates. Canada deducts an amount for expenses incurred in caring for dependant children. In other countries, Mozambique and Mauritius, the deductions are provided for children of the individual taxpayer. The amounts vary with the number of dependants of the individual taxpayer. Mozambique does not limit the support given to dependant children to expenses incurred in providing care for a child. The dependant child must be in the care of the individual taxpayer and no further definitions of 'support' or 'care' are given in the legislation. Mauritius' use of personal income tax relief is interesting in that the number of dependants determines the income exemption tax threshold. Mauritius' deductions for supporting dependants also extends to educational expenses for university education for the individual taxpayers' children. In the Mozambican case, the individual taxpayer also receives a deduction for children over the age of eighteen (18) who are studying and are in their care in the same household as the taxpayer. Thus, it seems Mauritius and Mozambique are more generous in providing personal tax relief through deductions for dependant children in the care of individual taxpayers than in Canada.

#### ***6.4.1.1 Canada's wholly dependent person/amount for an eligible dependant***

Section 118(1) of the Canadian Income Tax Act provides that where a taxpayer does not claim a deduction because of section 118(1)(a), they can claim for a deduction for a dependant under section 118(1)(b). This deduction is available where the individual is not married or in a common-law partnership. The individual can claim for a section 118(1)(b) deduction alone or jointly with one or more persons, if they live with and maintain in a self-contained domestic establishment, a person whom they provide support. That person who resides with the individual, except for a resident child of the individual, should be wholly dependent on the support of the individual and the other person or persons and related to the individual. This deduction is available when an individual supports their parents, grandparents or a relative who is under 18 years of age or a person who suffers from a mental or physical infirmity. The amount for deduction is given and the formula adds a specific amount (D) if at the end of the year of assessment the dependant was 18 years or older and was anytime during the year of

assessment dependent on the taxpayer because of mental or physical infirmity.<sup>751</sup> If that was not the case then the formula adds an amount (D) if the dependant was at the end of the year of assessment under the age of 18 years and because of mental or physical infirmity will be for a long, continuous and indefinite period dependent on the taxpayer for their need and care.<sup>752</sup> In any other circumstances, the amount added to the deduction will be nil. The dependant's income for the year is subtracted from the formula (D.1). Section 118 (1)(b)(iv) of the Canadian Income Tax provides the deduction formula as follows:

$$\text{\$10,527} + \text{D} - \text{D.1}$$

#### ***6.4.1.2 Canada's child-care expenses***

The Canada Income Tax Act provides support to families with children. Special treatment has always been given to families with children in Canada. A refundable child tax credit was introduced in 1978 to aid low-income families with children. In 1993, a non-refundable dependant credit for children under the age of 18 was introduced by the federal government called the Canada Child Tax Benefit.<sup>753</sup> This was a combination of the family allowances program under the Family Allowances Act of 1944 meant for support of families with children not covered by tax law, the refundable child tax credit and the non-refundable dependant tax credit.<sup>754</sup> In 2006, the Canada Child Benefit was introduced consolidating the previous Canada Child Tax Credit with others for a universal child benefit programme.<sup>755</sup> Thus, thereafter, there has always been income support to reduce the tax liability of parents with children in Canada.

Section 63 provides for the deduction for childcare expenses and section 118(1)(b) provides for the single parent tax credit equivalent to tax credits for spouses. The Income Tax Act also makes provision for the payment of cash to parents with no or low income such as the Canada Child Benefit (CCB) in section 122.6. The Canada Child Benefit and other similar benefit programmes are said to be "social security programs implemented through the tax system."<sup>756</sup> Li and Neborak call these child income-transfers. They state that these are different from Child

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<sup>751</sup> Section 118(1)(b)(ii) of the Canadian Income Tax Act.

<sup>752</sup> *Ibid.*

<sup>753</sup> J Li & J Neborak 'Tax, Race, and Child Poverty: The Case for Improving the Canada Child Benefit Program' (2018) 28(2) *Journal of Law and Social Policy* 67, 72.

<sup>754</sup> *Ibid.*

<sup>755</sup> Li & Neborak (note 753 above) 72.

<sup>756</sup> *Ibid.*

Tax Expenditure programmes which are tax relief measures. Tax expenditure programmes are equivalent to government grants or cash transfers, a system that the South African government uses to provide support for children in families. But tax expenditure programmes are only available to those people who pay taxes unlike government grants. Thus, Canada provides support to children through child income transfers and through child tax expenditures.

In the Canadian case of *Symes v Canada*<sup>757</sup> the issue of deductions for childcare expenses was before the court. The taxpayer had sought to claim as a deduction, childcare expenses incurred in caring for her children. The taxpayer claimed the costs of childcare as business expenses. The court had to decide whether the childcare expenses were deductible as business expenses and whether equality rights were violated should these deductions be disallowed. The court held that childcare expenses were not incurred in the production of income as required by legislation thus not deductible. In the court *a quo* Decary JA held that it is not the function of the court to substitute their policy on assisting the family for that made by Parliament.<sup>758</sup> From the above, the rigidity of the court and tax system is visible.

Childcare expenses are an example of the kind of familial and household differences which must be examined under personal income taxation. The law in Canada and South Africa does not allow for deductions or credits for childcare costs. Andrews who makes a case for various personal deductions including for childcare costs, argues that the tendency is to view the deduction for childcare costs as some special support whilst ignoring that these costs are connected to the employment of the mother.<sup>759</sup> As such the childcare costs are never appreciated as being connected to business activity. Andrews states that:

The reason for allowing the deduction has to do with the working mother's loss of time to devote to household tasks as compared with the nonworking mother, which is precisely the kind of household difference that ought to be taken into account in allocating personal tax burdens.<sup>760</sup>

Despite this seemingly clear argument by Andrews, the matter of deductions for dependants (children and relatives) is complex as there is often an overlap between taxpayer's business and personal activities.<sup>761</sup> The approach is that if the assumption is that tax is strongly

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<sup>757</sup> (1993) 4 SCR 695.

<sup>758</sup> *Canada v Symes* 1991 3 FC 507.

<sup>759</sup> Andrews (note 692 above) 382.

<sup>760</sup> *Ibid.*

<sup>761</sup> Andrews (note 692 above) 381.

connected to the business of the taxpayer then deductions can be allowed when a sufficient business connection is established. However, if the assumption is that the tax is strongly connected to consumption<sup>762</sup> then a deduction should be disallowed because of the personal benefit substantially connected to the expenditure.<sup>763</sup>

Croome states that taxpayers would like childcare costs to be deductible in tax because “such expenditure allows a parent to generate an income for the family and, but for such expense, would not generate income which is taxable.”<sup>764</sup> He states that section 23(b) of the South African Income Tax prohibits “private and domestic expenditure” from being deducted from a taxpayer’s income. This means that there is no tax relief for a taxpayer who support dependants. Croome further interrogates whether the denial of childcare costs would constitute a violation of the equality clause in Section 9 of the South African Constitution. Croome cites the Canadian case *Symes v Canada* to demonstrate the approach of the courts on the deductibility of childcare expenses. Although it can be argued that the deduction of childcare or dependant care costs is desirable, South Africa has not moved towards recognising the costs of supporting children and other dependants in tax law.

#### ***6.4.1.3 Mauritius’ deduction for a dependent child, handicapped dependent child, other handicapped person and educational expenses***

Section 41 and 42 of Sub-part C of Part III of the ITA of 1995 provides that a deduction for a dependent child, school fees for a dependent child, dependent handicapped child and other handicapped person shall be allowed from the net income of an individual in an income year as provided in the Third Schedule. The Third Schedule deals with income exemption thresholds categories provided above. Deductions for a dependent child are not allowed in the income year for more than 3 children in the aggregate, where the other spouse has claimed a deduction for the same child and where a child has enough income to support themselves. A child is deemed to have enough income to support themselves when the amount for the net income and exempt income they derived in the income year is more than the amount of the allowable deductions under section 41 and 41A (dealing with deductions for educational expenses). Section 41A, allows for deductions for school fees paid by a taxpayer to a recognised educational institution for a dependent child. To claim the deduction for educational expenses

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<sup>762</sup> *Ibid* The definition of income tax as consumption by Haigs Simon.

<sup>763</sup> Andrews (note 692 above) 381.

<sup>764</sup> B Croome *Taxpayers’ rights in South Africa* (2010) 95.

for a dependent child, a deduction should have been allowed for the individual under Section 41. Further, section 42 provides for a deduction in respect of a handicapped child. However, the deduction is not available if a deduction has been claimed under section 41 or when the spouse of the individual has claimed the deduction in the income year. Where the individual has made a claim for a handicapped person under sections 39, 41 and 42 of the ITA of 1995, they cannot claim a deduction for a handicapped person whom they maintained in the income year under section 42A. If a claim is made by two or more taxpayers for a deduction under section 42A, the deduction is apportioned between the taxpayers in proportion to their respective contributions towards maintaining the handicapped person.

#### ***6.4.1.4 Mauritius' contributions to medical schemes and for ambulance services***

Section 34 of the Mauritius ITA of 1995 provides for relief for contributions made by an individual to a medical scheme and for ambulance services. Section 34 provides the following:

every person shall, in an income year, be allowed a relief by way of deduction from his net income in respect of contributions made by him in that income year under a scheme approved by the Commissioner which has as its main object -

- (a) the refund of medical expenses incurred by him for himself and for his dependants; or
- (b) the provision of ambulance services to him and to his dependants.

#### **6.4.2 Credits for the support of dependants**

Personal tax relief for taxpayers with dependants is provided through tax credits in Canada and the United States of America. Both countries have a mix of several tax credits which a taxpayer may qualify for in income tax law. In the Canadian case, the tax credits are available for dependants who are either old, mentally or physically infirm. However, Canada subtracts the amount by which the dependant's income exceeded the income permissible for dependants from the tax credit amount given to the taxpayer. Unlike the Canadian tax credits for dependants, the U.S. tax credits are not only available to old, mentally or physically infirm relatives of the taxpayer. In the U.S. the dependant tax credit is available where one has satisfied the tests as a qualifying relative regardless of age or disability. The U.S. is thus more generous than Canada in providing tax credits as the Child and Dependant Care Tax Credit (CDCTC) is available to a wider number of dependants who can meet the tests for a qualifying relative set out in the Tax Code. This observation is further justifiable as the U.S. has the Earned Income Tax Credit (EITC) which can be used by low- and moderate-income families.

The U.S. has tax credits for dependant children whilst Canada, Mozambique and Mauritius provide personal tax relief for dependant children through deductions. Despite using different methods for providing personal tax relief for dependant children, all countries in this chapter demonstrate approaches South Africa can follow. The presumption is made that children restrict a family's ability-to-pay especially low-income families and households.<sup>765</sup> The Child Tax Credit is non-refundable in the U.S. However, the EITC is a refundable tax credit for families with children. The U.S. tax system provides more tax credits for dependant children than in Canada, Mozambique, and Mauritius. In addition to the Child Tax Credit, the U.S. taxpayer can claim the earned income tax credit (EITC) and the child and dependant care tax credit. In 2019 a family could claim an amount of US\$2 000 for each child who meets the requirements for CTC. The data available for 2015 shows that the EITC was US\$6, 242, US\$5 548 and US\$3 359 for families with three children, two children and one child respectively.<sup>766</sup> These amounts, according to Hoynes and Patel, could in 2015 reach forty-five percent (45% for a family of three) of a family's pre-tax income.<sup>767</sup> These amounts increase yearly and in 2018 the EITC was US\$6 431, US\$5 716 and US\$3 461 for families with three children, two children and one child respectively.<sup>768</sup> Thus, the U.S. provides wider support to families with children than Canada, Mozambique and Mauritius provide in their personal income tax.

#### ***6.4.2.1 Canada's caregiver credit***

The caregiver credit is made provision for in section 118(1) of the Canadian Income Tax Act when an individual provides care for an elderly or disabled family member. It replaced the Caregiver Amount, the Family Caregiver Amount and the Amount for Infirm Dependants. The section 118 (1)(d) credit can be claimed by a taxpayer for a dependant who during the year of assessment is dependent on the taxpayer because of mental or physical infirmity. Such person can either be the spouse or common-law partner of the taxpayer or a person who is 18 years of age and above who was dependent on the taxpayer during the year of assessment. The formula for the section 118(1)(d) deduction is:

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<sup>765</sup> Penchman & Engelhardt (note 111 above) 4 -5.

<sup>766</sup> H W Hoynes & A J Patel 'Effective Policy for Reducing Poverty and Inequality? The Earned Income Tax Credit and the Distribution of Income' NBER Working Paper No. 21340 Available at <https://nber.org/papers/w21340> Accessed on 30 March 2020.

<sup>767</sup> Ibid 863.

<sup>768</sup> Hoynes (note 766 above).

### **\$6,883 – E**

The formula deducts the amount (**E**) by which the dependant's income exceeded a specified limit during the year of assessment. Thus, the formula takes into consideration the dependant's income which is one of the considerations for designing an economically and administratively feasible tax system that provides dependency relief for individuals who support family members. They refer to this as the *income test* where the relief for dependency considers the dependants personal taxable income and no relief is given when a specific threshold is exceeded.<sup>769</sup>

#### **6.4.2.2 Canada's medical expenses for a family member**

The Canada Income Tax Act also has a credit for medical tax expenses incurred for a family member. Section 118.2 (1) provides that the following formula is to be used to calculate a deduction for medical expenses:

$$\mathbf{A \times [(B - C) + D]}$$

In the formula, **B** is the total amount of the taxpayer's medical expenses incurred during the year of assessment for either themselves, their spouse or common-law partner, child of the taxpayer which is under the age of 18 years. The formula includes the amount spent on medical expenses for a dependant as defined by section 118(6) above where a dependant includes 'the child or grandchild of the child or grandchild of the individual or of the individual's spouse or common-law partner; or the parent, grandparent, brother, sister, uncle, aunt, niece or nephew, if resident in Canada at any time in the year, of the individual or of the individual's spouse or common-law partner.' The total amount to be deducted for amounts spent on these dependants (**D**) is the total amount spent on the dependant by the taxpayer (**E**) minus the lesser of \$1 813 (Canadian dollars) and 3 % of the dependant's income for the year (**F**). In the formula **C** is the lesser of \$1,813 and 3% of the individual's income for the taxation year. The amounts of **(B-C) + D** are multiplied by A which is the percentage of the taxation year of assessment.

The above sections examined how Canadian income tax system deals with dependants and the costs incurred by taxpayers with dependants. In Canada, an unmarried individual may claim a deduction for a dependant if they live with and maintain a dependant. The deduction is available for dependants who are related to the taxpayer. A taxpayer may receive credits for the expenses

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<sup>769</sup> Burns & Krever (note 111 above) 546.

used towards childcare and medical expenses for a dependant. Canada has demonstrated that it is possible to provide tax relief for taxpayers who support dependants. The Canadian test on who qualifies as a dependant for the deduction is flexible and includes a wide range of relatives. The test for dependency is progressive in that it includes the extended family of a taxpayer. The United States of America provides similar tests as it considers the gross income of the dependant and whether the dependant is related to or resides with the taxpayer. The recognition of interdependency by both Canada and the United States of America is an admission to the theory that a taxpayer's ability-to-pay is reduced by the number of mouths they must support.

#### **6.4.2.3 United States of Americas' earned income tax credit (EITC)**

Similarities in kin support by the black-middle class have been found between South Africa and the U.S.<sup>770</sup> This makes the U.S an interesting case for this research and for analysing the use of the income tax to provide deductions and credits for families. In the United States, the middle-class African American families disproportionately provide financial support to their families in comparison to white middle-class.<sup>771</sup> The kin support given by African American middle-class individuals diverts resources away from wealth producing investments and from retirement savings.<sup>772</sup> In her study, Hill explores the reasons why the black middle-middle class in America provide financial support to their immediate and extended kin. Some of the reasons advanced for the stronger kin support networks between the black-middle class and their kin is the closer proximity of the black middle-class individual to needy networks, the responsibility to give back is tied to their racial identity and the intra-community support which goes back to slavery.<sup>773</sup> In her study, Hill finds that privileged individuals are not burdened by having to save family members from financial problems and that black middle-class have to consider giving support to kin at one point or another.<sup>774</sup> As in the South African case, the black middle-class in the U.S is disadvantaged and overburdened by the need to provide support to kin.

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<sup>770</sup> M Murphy 'Variations in Kinship Networks Across Geographic and Social Space' (2008) 34(1) *Population and development Policy* 19, 35.

<sup>771</sup> J D Hill 'Kin Support of the Black Middle Class: Negotiating Need, Norms, and Class Background' (2020) *Social Problems* 1, 1-2.

<sup>772</sup> R L O'Brien 'Depleting Capital? Race, Wealth and Informal Financial Assistance' (2012) 91(2) *Social Forces* 375, 378.

<sup>773</sup> J Aschenbrenner *Lifelines: Black Families in Chicago* (1975) 90. Sarkisian & Gerstel (note 234 above).

<sup>774</sup> *Ibid.*

The goal of the Earned Income Tax Credit (EITC) is to transfer income to low- and moderate-income families and to alleviate poverty.<sup>775</sup> It is only available to low-income taxpayers and is meant to provide them with a pathway into the middle-class. But, the EITC is a progressive means-tested programme that was designed to consider the family structure, family income and family earnings.<sup>776</sup> It is available for married individuals. It is a refundable tax credit and the taxpayer receives the difference between the credit they are eligible for and their federal income tax liability.<sup>777</sup> An individual taxpayer or the taxable filing unit is eligible for the EITC if they earned positive income during the year of assessment and they are below the threshold which varies according to the size of the family and filing status.<sup>778</sup> Another eligibility criterion is whether there is a qualifying child or children in the household who are below the age of nineteen, twenty-four for a student who studies full-time and any age if they are disabled.<sup>779</sup> A child who is a qualifying child for the purposes of the EITC is not a qualifying child for the purposes of a dependent exemption. Further to this, the credit is available for the individual filing a tax return for a child, grandchild, foster child, adopted child, sister, brother, half-sister, half-brother, stepsister, stepbrother, or a descendant of any of them.<sup>780</sup> Additionally, the qualifying child should have been resident in the household of the individual for at least half of the year of assessment. A parent who does not have custody over a child cannot claim the EITC but can make a claim for the dependent exemption if eligible.<sup>781</sup> From the above, the EITC is designed to provide relief to working families by refunding taxpayers incur in costs in caring for children living with them.

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<sup>775</sup> H W Hoynes 'The Earned Income Tax Credit' (2019) 686(1) *The ANNALS of the American Academy of Political and Social Science* 180, 182.

H W Hoynes & A J Patel 'Effective Policy for Reducing Poverty and Inequality? The Earned Income Tax Credit and the Distribution of Income' (2018) 53 (4).

<sup>776</sup> J G Gravelle 'Federal Income Tax Treatment of the Family' Washington, D.C.: Library of Congress, November 2016. Congressional Research Service, 2016.

A Nichols & J Rothstein 'The Earned Income Tax Credit' In Robert A Moffitt (eds) *Economics of Means-Tested Transfer Programs in The United States* 2015.

<sup>777</sup> *Ibid* 183.

<sup>778</sup> Nichols & Rothstein (note 776 above) 148. Also see Hoynes (note 765 above) 181-182.

<sup>779</sup> *Ibid*.

<sup>780</sup> Do I qualify for the credit? Available at <https://www.irs.gov/pub/irs-pdf/p5334.pdf> Accessed in August 2019

<sup>781</sup> Nichols and Rothstein (note 776 above).

Of interest is the goal of alleviating poverty behind the introduction of the Earned Income Tax Credit in the United States of America. Social justice goal is indeed a valid reason for the introduction of tax relief for taxpayers who support dependants in South Africa. South Africa is a country which has high interdependency in some families but more so in black families. Alongside the high interdependency is the limited welfare which is prevalent but not large in sum and the high levels of need characterised by levels of poverty and unemployment.

Although a middle-class taxpayer cannot benefit from the EITC, they can benefit the child tax credits and the dependant credit.

#### ***6.4.2.4 United States of Americas' child tax credit (CTC)/ child dependant credit (CDC)***

The Child Tax Credit (CTC) was introduced to offset costs incurred by working families when raising children. Primarily, it was designed to work with the EITC. The view of the Joint Committee on Taxation was that the personal exemptions for dependants 'did not reduce tax liability by enough to reflect a family's reduced ability-to-pay taxes as family size increases.'<sup>782</sup> The credit is available for children who are citizens and who are under the age of seventeen (17) at the end of the year of assessment. The CTC gives up to US\$2 000 for each child who qualifies for the credit. A credit of US\$500 is available for dependant children over the age of seventeen (17). Although, the CTC is a non-refundable credit, it is also partly refundable when the credit is more than the taxes owed and the earned income exceeds the income threshold. When the non-refundable tax credit (CTC) exceeds the tax liability and income threshold, then an amount limited to 15% of the excess earning is refunded.<sup>783</sup> For example a taxpayer with US\$100 tax liability and a refundable tax credit of US\$200 they would receive US\$100 as their tax refund.<sup>784</sup> This is limited to a maximum of US\$1 000 a child.<sup>785</sup> When the CTC is refundable, it is called the Additional Child Tax Credit (ACTC) or Refundable CTC. The EITC and the CTC are similar in that a taxpayer can only receive it when they have a qualifying children and earned income. Also, both the EITC and CTC are credits targeted at low-income individuals with children arguably have been effective in reducing poverty. Thus, it does not target the middle-class with kinship obligations. However, the structure of the credit is helpful

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<sup>782</sup> Joint Committee on Taxation 1997 General Explanation of Legislation enacted in 1997 page 6 Available at <https://www.jct.gov/publications> Accessed in January 2020.

<sup>783</sup> Hungerford & Thiess (note 645 above) 3-4.

<sup>784</sup> *Ibid* 2.

<sup>785</sup> Hungerford & Thiess (note 645 above) 2.

in designing a tax relief mechanism for taxpayers with children by figuring out how to target the middle-class who are burdened and avoid higher income taxpayers from getting the tax relief.

#### ***6.4.2.5 United States of Americas' child and dependant care tax credit (CDCTC)***

In the U.S., a non-refundable tax credit can be claimed for expenses incurred in caring for a child or a dependant. The taxpayer can be entitled to credit for dependants who is a child or relative. The term dependant as used in U.S Income Tax legislation means a *qualifying child* or a *qualifying relative*. The taxpayer cannot claim for a credit for a dependant who is not for the purposes of legislation a qualifying child or a qualifying relative.<sup>786</sup> There are tests that are used to determine whether one is a qualifying child or qualifying relative and this is explained in the section 6.3 above. Further, a taxpayer can only claim a dependant if the dependant taxpayer test, citizen or resident test and the joint return test requirements are met.<sup>787</sup> A taxpayer cannot claim the credit for a dependant who is being claimed by another taxpayer and this is the dependant taxpayer test.<sup>788</sup> The joint return test stipulates that a taxpayer cannot claim a dependent who has filed a joint tax return as a married person with the exception of married persons who file joint returns only to get an income tax refund.<sup>789</sup> The citizen or residency test requires that a person can be claimed as a dependant only if they are a U.S citizen. U.S alien resident, U.S national or Canadian or Mexican resident. Thus, whether one is a dependant influences their income tax filing status.

### **6.5 Conclusion**

This chapter was a comparative tax analysis of the methods used in some developed and developing countries to allow for family responsibilities through income taxation. In particular, the chapter looked at family tax provisions and the patterns in the tax treatment of the family in income tax legislation in other jurisdictions outside South Africa. The countries discussed all provide tax relief for taxpayers who support a dependant. What differs among these countries is the definition of a dependant for allowing tax relief for a taxpayer. Canada and the United States of America were found to have a wider definition of who is a dependant for

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<sup>786</sup> Internal Revenue Service (note 731 above) 11.

<sup>787</sup> *Ibid.*

<sup>788</sup> Internal Revenue Service (note 731 above) 11.

<sup>789</sup> *Ibid.*

income tax purposes. The definitions included any blood relative of the taxpayer who resides with the taxpayer during the year of assessment and is supported by the taxpayer mostly throughout the year of assessment. All the countries discussed in this chapter use a combination of deductions and credits to provide relief to taxpayers supporting dependants. The income level of the taxpayer, relationship between the taxpayer and the dependant, whether the taxpayer supported the dependant most of the year of assessment, and whether the dependant earned any income in the year of assessment are some considerations when giving the deduction or credit.

## CHAPTER 7 CONCLUSION AND RECOMMENDATIONS

*It is submitted that interfamily transfers in South Africa fill a welfare gap so fundamental that public policies that reconcile familial bonds in general and motivate benevolence in particular are recommended.<sup>790</sup>*

### 7.1 Introduction

The thesis examined the use of the tax system to provide tax relief to taxpayers who contribute towards the support of their immediate and extended family. An attempt was made to argue that a critical lens which is “informed, transparent and responsive to the needs and abilities of individual taxpayers” is necessary in the South African context.<sup>791</sup> The necessity for a critical lens on the needs and abilities of taxpayers is rationalised by the high interdependency amongst black South African families. The financial obligations of support (what has been referred to as “black tax” in the thesis) given to kin by the black middle-class provided an ideal case study to highlight the significance of the intersection of historical disadvantages, race, class, family circumstances with tax law. This chapter concludes the thesis by summarising the main issues arising in the six chapters preceding this one and by suggesting the social tax expenditure system which would work in the South African context. This is done keeping in mind that the main research question of the study was:

**Should South African income tax law provide relief to taxpayers for the costs they incur when they support a dependant, and if so, how should such an income tax expenditure system be designed?**

The next section of this chapter answers the first part of the research question.

### 7.2 Intersection of race, class, historical disadvantages, family circumstances and tax law

Chapter 1 of the thesis detailed how black South Africans were faced with a discriminatory social welfare and tax relief system during colonialism and apartheid and how this forced black South Africans to rely on their extended family networks for support. Although supporting extended family is considered a responsibility and a practice of *ubuntu*, one cannot deny that the historical and structural disadvantages bred and continues to breed greater interdependency among black South African families. Even after the end of apartheid, black South Africans continue to rely on their extended family networks for support more than other races do. The

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<sup>790</sup> Ssebagala (note 426 above) 14.

<sup>791</sup> Knauer (note 227 above) 207.

data analysis and discussion of the research has established that black and middle-class individuals are more likely to support their kin in comparison to individuals from other racial groups. As such, I agree with Nginga-Kanga's proposition that the "black middle-class do the real work of income redistribution" and that:

The real work of the black middle-class is thus not only earning an income at higher levels in society but addressing the continuous forms of socio-economic inequality in ways that are gendered and racialised in post-apartheid South Africa.<sup>792</sup>

Thus, the "black tax" reality of the black middle-class needs to be recognised because when a black middle-class taxpayer earns a net income of R30 000, and they support extended family their ability to bear the tax burden is affected. This is what has been discussed in the theoretical framework as the disparate impact of tax law.

The recognition of private family transfers and the racial differences in family support networks is required in tax law. Uy's research which has been extensively referred to throughout this thesis is one such research.<sup>793</sup> Uy recognises that Asian Americans have different kin support networks when compared to white taxpayers and she argues for tax law and policy to reflect this. Infanti who is also referred to extensively throughout this thesis calls for decentralization of the family to recognise other forms of family which are not just the nuclear family.<sup>794</sup> In income tax law, the U.S has recognised the difference in support networks by introducing income tax deductions and credits for families. In fact, the OECD found the U.S to be an outlier case because of the reliance on the income tax code to help taxpayers and their families.<sup>795</sup> For example, whilst the U.S relies on the EITC as the largest social program, other OECD countries rely heavily on cash transfers to provide social protection for families.<sup>796</sup> Murphy finds that Canada has low kin contact in comparison to South Africa and the United States. Despite this, Canada has deductions and credits available to taxpayers who contribute to the support of dependant. Murphy defines kin contact as "a range of interactions, ranging from 'just keeping in touch' to regular family events and provision of care."<sup>797</sup> Kin contact in South Africa goes

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<sup>792</sup> Ndinga-Kanga (note 88 above).

<sup>793</sup> Uy (note 251 above).

<sup>794</sup> Infanti (note 328 above).

<sup>795</sup> I Joumard, M Pisu & D Bloch 'Tackling income inequality: The role of taxes and transfers' (2013) 2012(1) *OECD Journal: Economic Studies* 1, 4.

<sup>796</sup> *Ibid.*

<sup>797</sup> *Ibid.*

beyond “just keeping in touch” to include paying tuition for a sibling or sending money home monthly for parental upkeep. Tax deductions claimed for the payments made to support kin could encourage taxpayers to continue making these payments which play a significant role in income redistribution and transformation.<sup>798</sup>

A black middle-class taxpayer is directly affected by poverty and inequality. Their precariousness is further affected by the links they have with their poorer kin which they must support resulting in the “black tax.” The welfare system in the country targets the poor population and this leaves the black middle-class taxpayer without a social safety net hence the vulnerability of the black middle-class. The precariousness and vulnerability of the black middle-class needs to be considered in tax law and policy. It is not enough to make assumptions on the ability-to-pay of a black middle-class taxpayer based on their income level, yet they are disparately impacted by tax provisions and their ability-to-pay is reduced by the number of mouths they must feed.

The ability-to-pay principle has been quantitatively measured through income and those with higher incomes are said to have higher ability to bear the burden of tax and thus should pay more. South Africa is affected by high levels of income and wealth inequality and yet a taxpayer’s ability-to-pay tax is limited to income. Tax law and policy in South Africa ignores individual taxpayers’ historical disadvantage, historical discriminatory social welfare and tax law, poverty, and inequality. It has been argued in this thesis that interdependency has been a result of apartheid policies of discrimination. Ignoring all the factors which have created and maintained “black tax” in post-apartheid South Africa is a harm the attempt to transform legislation and achieve social justice.

The discussion on the measurement of ability to bear tax burdens based on income levels and other criteria introduces the substantive equality versus formal equality perspective. Substantive equality advocates for transformative jurisprudence through the consideration of context and difference in cases of equality. In the South African constitution, substantive equality has been dominant. It is understood that substantive equality views inequalities as “rooted in political, social and economic cleavages between groups, rather than the result of

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<sup>798</sup> Ssebagala (note 426 above) 14.

arbitrary or irrational action.”<sup>799</sup> In this case, understanding these cleavages between groups provides detail into analysing the possibility of extending substantive equality into taxation through breaking down the circumstances of taxpayers within the same income bracket. Substantive equality would acknowledge that taxpayers are not a homogenous population when defining ability-to-pay in taxation. Allocating the tax burden is indirectly the allocation of the state burden to provide such services as child grants. If a taxpayer already incurs excessive social burdens such as distributing their income amongst a wider kin network, then, would overlooking such non- economic differences equal a fair distribution of tax burdens and would income be the best measure of ability-to-pay?

Johnson states that critical tax theorists need to consider four elements when analysing he intentional or unintentional discriminatory provisions of income tax legislation.<sup>800</sup> To recap, the process for critical tax theorists according to Johnson should be to:

- a) show that there is a discriminatory provision in the tax legislation
- b) no provisions are there to remedy this within the tax legislation
- c) changing that particular provision is possible in the legislation
- d) a reasonable solution exists

In the South African case under discussion in this thesis, there is no discriminatory provisions that directly discriminate against a black middle-class taxpayer. Rather, it is the failure of income tax law to have provisions for taxpayers who contribute towards the support of their dependants which creates a need to change provisions and find a “reasonable solution.”

There needs to be a shift of tax policies towards the middle-class to rebuild this demographic and for achieving social justice. In chapter 1, Taite defined social justice in tax law and policy to mean those with greater means should be responsible for a greater tax burden.<sup>801</sup> To achieve social justice in tax law and policy, there should be tax expenditures for the contributions made by taxpayers for the support of dependants. Tax law and policies should not continue to worsen income and wealth inequality which have affected the poor and middle-class taxpayers in the country. So, what are the tax relief measures available in the South African context for taxpayers who contribute to their dependants and how should these be designed?

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<sup>799</sup> C Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 S. Afr. J. on Hum. Rts. 253, 254.

<sup>800</sup> Johnson (note 260 above).

<sup>801</sup> Taite (note 127 above).

The following section goes on to answer the second part of the research question which focuses on the framework for tax relief measures for taxpayers who contribute towards the support of their kin.

### **7.3 Options for providing relief for taxpayers contributing to the support of kin**

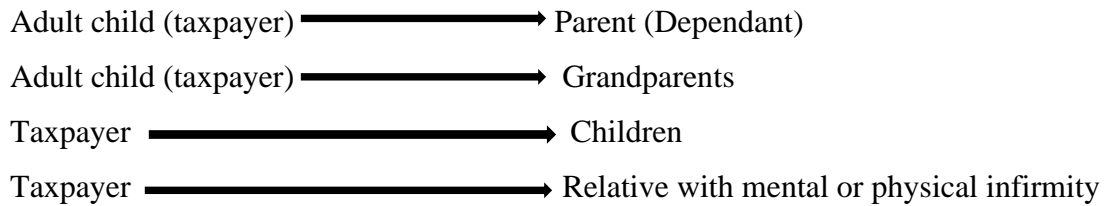
Options for the framework which South Africa could use to provide relief to taxpayers who make contributions towards the support of kin must consider historical disadvantages and racial inequalities prevailing in the country. Chapter 5 discussed the use of social tax expenditures to provide relief to taxpayers supporting family. In that chapter, it was discussed that there could be a direct expenditure system, hybrid system comprising of direct and tax expenditures or tax expenditures only to provide tax relief to families. Thereafter, chapter 6 then discussed the types of social tax expenditures used in other jurisdictions to provide relief to taxpayers supporting dependants. However, whatever option is chosen, there are questions which should be carefully considered. The discussions in the preceding chapters did bring out some of the questions which are factored into income tax legislation when a taxpayer wants to claim a deduction or a credit for a dependant. First, the tax system that provides relief for the support of dependants should be administratively simple, targeted and lessen the upside-down effect.<sup>802</sup> Second, the suggested questions which should be considered for the design of such a tax system are the following:

- i) The relationship of the dependant to the taxpayer should be defined;

As discussed in chapter 6 the dependency tax relief is predominantly available through deductions and credits. The income tax system should begin by defining a dependant. In Canada, a dependency deduction in tax law is available when an individual supports their parents, grandparents or a relative who is under 18 years of age or a person who suffers from a mental or physical infirmity. In the U.S, one must meet the qualifying relative or qualifying child tests to be claimed as a dependant. In Mozambique, the definition of a dependant includes children of a taxpayer who are not more than 25 years of age who earn less than a national minimum salary or are unemployed. Definitions in Canada, the U.S and Mozambique recognises intergenerational support networks. The tax system in these jurisdictions recognise that support can flow in the following ways:

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<sup>802</sup> Burns & Krever (note 111 above) 546.



Other criteria are:

- ii) Who gets the relief in a spousal relationship should be specified;
- iii) Whether relief is automatically available or there should be evidence of support should be decided;
- iv) The income of the dependant and the time period for which the deduction is to be allowed should be determined (income test);
- v) Whether the deduction is applicable monthly or annually.<sup>803</sup>

The first and second options are deductions and credits. The case for the use of deductions and credits regarding an allowance for dependants in income tax law has been made in older literature.<sup>804</sup> South African social tax expenditures can be through deductions and/or credits. These can be used to provide tax relief to taxpayers making contributions to a dependant and take account the differences in ability-to-pay. These two options were discussed above in chapter 5. Other jurisdictions discussed in chapter 6 use a combination of deductions and credits. The choice between using deductions and credits for dependency exemptions has been discussed in literature as early as 1973. Brannon and Morss concluded that deductions are superior to other relief alternatives on the grounds of equity and population policy.<sup>805</sup> Specifically, they were looking at the “appropriate differentiation between taxpayers having different size families at given income levels.”<sup>806</sup> This research looked at the family structure of black South Africans and argued that there is an assumption that black middle-class taxpayers have the same ability-to-pay despite the difference in family structures and networks of support. The choice between deductions and credits have been argued on the grounds of the impact on progressivity, equity issues, equality, population policy, redistributive effects,

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<sup>803</sup> *Ibid.*

<sup>804</sup> G R Brannon & E R Morss (note 692 above).

<sup>805</sup> *Ibid.*

<sup>806</sup> *Ibid.*

Deductions are said to intensify income inequality.<sup>807</sup> In a progressive income tax system, taxpayers with higher incomes pay more income tax. But deductions are regressive in that they have an upside-down effect because the higher an individual's income, the greater the amount of the relief. On this basis, a credit is asserted here as a more equitable means of providing tax relief to taxpayers making contributions to a dependant. For deductions to work in South Africa, the deduction should not be available for higher-income taxpayers. A threshold can be set for the deduction, or the deduction could decline as income level increases. This would ensure that low- and middle-income earners benefit most from the deduction. The deduction should assist those with the most need and not exacerbate poverty, income, and wealth inequality. Further, the income earned by a dependant should be subtracted from the amount of the deduction available to the taxpayer claiming it. A deduction in South Africa should be available to taxpayers who partially and wholly contribute towards the support of a dependant during the year of assessment. As in the case of Mozambique and Mauritius, the amount could vary with the number of dependants.

The hidden welfare state was discussed in chapter 6, specifically in section 5.6.2 and 5.7.3. In that section Titmuss' pioneering essay, *the social division of welfare*, which is on tax expenditures, argues that social tax expenditures make up what is called the "hidden welfare state."<sup>808</sup> Deductions are social tax expenditures and are part of the fiscal welfare state discussed in 5.6.2 above when they are used to pursue social policy by providing tax relief to specific groups. Deductions which will provide tax relief for personal circumstances such "black tax" are "hidden" in that they are not subject to public scrutiny unless a tax expenditure budget is introduced.

In comparison to deductions, a credit, rebate or offset is more visible, and it is further argued that the tax-saving value of a credit is both more visible and more easily calculated than that of a deduction. The implication is that the tax credit can be more easily subjected to periodic review and adjustment. A tax rebate or offset is a deduction from the amount of tax payable by an individual taxpayer. They state that unlike deductions, tax offsets have no upside-down effect but like deductions no support is given to those taxpayers who have low incomes which

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<sup>807</sup> O Hümbelin & R Farys 'Income redistribution through taxation – how deductions undermine the effect of taxes' (2017) 25(1) *Journal of Income Redistribution* 1, 3.

<sup>808</sup> Titmuss (note 688 above).

fall outside the tax threshold. The solution proposed by Burns and Krever rests in making the offsets refundable what the U.S did through the Earned Income Tax Credit, respectively.<sup>809</sup>

#### 7.4 Recommendations

At the start of this research in 2017, the COVID-19 pandemic had not begun. In relation to this research, the COVID-19 pandemic has presented an opportunity for the reform of social tax expenditures. Research conducted around COVID-19 crisis and the “stay-home” response suggest that the crisis in South Africa has had gender, class, disability, race, and age implications.<sup>810</sup> Although the South African government responded to the pandemic by introducing a COVID-19 social relief and economic support package of R500 billion, research studies have demonstrated the negative socio-economic effects of COVID-19.<sup>811</sup> Buheji *et al* state that relative poverty is greatly to be affected by COVID-19 and that the middle-class “would feel the punch of the deterioration of the socio-economic living standard compared to what they used to access freely” and income inequality will increase.<sup>812</sup> The United Nations Development Programme (UNDP) 2020 reports that 34 percent of those they categorise as middle-class<sup>813</sup> are likely to fall into vulnerability or poverty.<sup>814</sup> The black middle-class is a precariat class in South Africa and research has shown that between 2008 and 2017, the middle-class received 4.3 percent of its share of income from government grants.<sup>815</sup> It stands to reason that an opportunity presents itself to reform social tax expenditures to consider private family transfers made by the black middle-class which are not considered under direct cash transfers.

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<sup>809</sup> *Ibid*

<sup>810</sup> S Cantillon, E Moore & N Teasdale ‘COVID-19 and the Pivotal role of Grandparents: Childcare and income Support in the UK and South Africa’ (2021) *Feminist Economics* 1, 2.

<sup>811</sup> M Buheji, K da Costa et al The Extent of COVID-19 Pandemic Socio-Economic Impact on Global Poverty. A Global Integrative Multidisciplinary Review (2020) 10(4) *American Journal of Economics* 213, 216.

<sup>812</sup> *Ibid* 215.

<sup>813</sup> Socio-Economic Impact of COVID-19 in South Africa Report available at [https://www.za.undp.org/content/south\\_africa/en/home/library/socio-economic-impact-of-covid-19-on-south-africa.html](https://www.za.undp.org/content/south_africa/en/home/library/socio-economic-impact-of-covid-19-on-south-africa.html) accessed on 20 March 2021.

At page 40, the Report categorises the middle-class as ‘The middle class can be classified based on their vulnerability and shock resilience and how their welfare status can temporarily or permanently move them in or out of poverty.’

<sup>814</sup> *Ibid* 21.

<sup>815</sup> *Ibid* 44.

Tax expenditures remain one of the crucial instruments in the fight against poverty, income, and wealth inequality and are often explicitly designed to tackle poverty and mitigate inequality. South Africa needs social tax expenditures which will directly tackle poverty, income, and wealth inequality. Although they are criticised as being costly, inefficient, and ineffective, tax expenditures can have an impact on inequality if their fiscal cost is estimated and reported to enhance transparency and accountability. Tax expenditures can have a direct and indirect effect on inequality.<sup>816</sup> The Earned Income Tax Credit (EITC) is an example of an American tax credit aimed at increasing household income in disadvantaged families.<sup>817</sup> As mentioned in section 6.4.2.3, the EITC is a refundable tax credit which is means tested and considers the family structure, family income and family earnings. The EITC has reduced inequality by lifting 6 million people out of poverty.<sup>818</sup> It is important to consider who ultimately shall benefit from social tax expenditures when introduced in South Africa for individuals supporting dependants who are not on social welfare. The beneficiaries of social tax expenditures must be properly targeted if they are to have a significant effect on poverty and inequality. Such targeting would come with administrative costs as it could require the use of biometric smart cards such as those used by recipients of social grants in South Africa.

Studies have been done on the impact of taxes and cash transfers on redistribution. The Organisation for Economic Co-operation and Development (OECD) found that first, there is a positive link between tax and cash transfers and the reduction in income inequality and poverty, secondly that cash transfers made the most redistributive impact.<sup>819</sup> However, the U.S was an outlier case because of the reliance on the income tax code to assist taxpayers and their families.<sup>820</sup> Whilst the U.S relies on the EITC as the largest social program, other OECD countries rely heavily on cash transfers. Tax relief programmes can be combined with direct expenditure programmes to provide relief to taxpayers who support a dependant and who do not receive assistance from social welfare. In South Africa, cash transfers are not doing enough to reduce poverty, income, and wealth inequality. These three are racialised in South Africa and it is necessary to consider the intersection of race, class, and tax law. Huang and Taylor

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<sup>816</sup> A Rendoda 'Tax Expenditures and Inequality' In C Brokelind & S van Thiel (eds) *Tax Sustainability in an EU and International Context* (2020) 191, 201.

<sup>817</sup> *Ibid*

<sup>818</sup> *Ibid* 202.

<sup>819</sup> Joumard *et al* (note 795 above) 6.

<sup>820</sup> *Ibid*

state that systematically considering race when designing and evaluating tax policies may help policymakers to gradually craft policies which promote opportunity more broadly for races rather than maintain or amplify racial disparities.<sup>821</sup>

### **7.5 Comments about limitations of the research and future research**

The main limitation of this research was the lack of South African literature which uses a critical tax theory approach to investigate the intersection of race, class, and tax law. This shows that it is pertinent that future research considers adopting a critical tax theory approach. For this reason, the research had to rely on old South African literature and on U.S literature.

The other limitation of the research was that the NIDS data could measure inter-household transfers and not intra-household transfers. Although deductions could be made from the data on the support given by individuals to another individual in a different household, not much is known on the support given by individuals to another individual in the same household. However, the NIDS data was helpful to show that race and class matters when individuals give support. Throughout the thesis, the argument was restated that an individual taxpayer's ability-to-pay is affected by the number of mouths she or he must feed. A black middle-class taxpayer has a 'number of mouths to feed' and this intersects with their ability-to-pay in tax law. It is absurd to ignore this financial burden which the black taxpayer in South Africa has when discussing the ability-to-pay.

It is important to note here that some parts of the thesis rely on older literature. This is to provide a historical context of the research question. Additionally, the intersectionality of private transfers and tax law have not received academic attention from tax scholars in South Africa and that could mainly be because deductions, credits and rebates for dependants were repealed in South African income tax law. Another reason for the lack of current literature could be that tax scholars in South Africa rarely adopt a critical tax theory approach to tax law. Further, the intersectionality of private transfers and tax law has been settled in the jurisdictions discussed through providing deductions and credits for dependants. Few tax theorists are focused on the intersectionality of private transfers and tax law.

Further research could adopt critical tax theory as an approach. This research made an argument for social tax expenditures in South Africa by examining financial support networks in families

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<sup>821</sup> C Huang & R Taylor 'How the Federal Tax Code Can Better Advance Racial Equity: 2017 Tax Law Took Step Backward' available at [www.cbpp.org](http://www.cbpp.org) accessed on 10 March 2021.

who need these social tax expenditures. Future research could go further and study the different instruments to give the social tax expenditures to taxpayers with dependants.

## 7.6 Conclusion

The conclusion of the thesis is that the historical, social, and socio-economic context of black South Africans should inform tax policy and legislation.<sup>822</sup> Several of the contexts that should inform tax law as presented by Gutuza and Titus<sup>823</sup> has to do with who is being taxed, what deductions and allowances to make, what tax incentives to introduce and what amounts are exempt income. Taxing a black middle-class individual considering the systemic material disadvantages that this group has faced and the socio-economic and cultural complexities in the families they belong to, should inform questions of fairness and redistribution in taxation. Their ability to bear the tax burden equally as other “similarly situated” individual taxpayers who earn equal income in that year of assessment is interconnected with obligations of support imposed on them by culture or their socio-economic context. These obligations of support can be argued for on the basis that they comprise a taxpayers’ necessities-of-life. Thus, a favourable position would be that tax law allows deductions for amounts extended by the taxpayer in fulfilling their obligations of support as doing so would achieve equality in taxation. This viewpoint requires established rules and law on the issue of support in tax law and when the obligation to support arises in taxation. Intergenerational support networks differ in terms of racial, cultural, and socio-economic contexts between different groups of taxpayers in South Africa. Although there is precedent that has established that a child who is in an able financial position does have a duty to support an indigent parent, this position has not been extended beyond Road Accident matters into tax law. Therefore, the context should inform tax law which as mentioned in chapter 4 is a “living, breathing body of jurisprudence that can be truly understood only when one places it in the social context” and socio-economic context if I may add. However, this involves a complex process of identifying who is disadvantaged, in what way they are disadvantaged, how that disadvantage interconnects with tax law and the rights under the Constitution.<sup>824</sup>

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<sup>822</sup> T Gutuza & A Titus The Decolonization Movement in South Africa: Is Tax Law Decolonised?’ paper presented at of the Society of Law Teachers Association of South Africa, July 2018.

<sup>823</sup> *Ibid.*

<sup>824</sup> *Ibid.*

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Appendices **Appendix A Logistic regression for race, income level and contributions received**

|                     |          | Variables in the Equation |      |         |    |      | 95% C.I.for<br>EXP(B) |       |       |
|---------------------|----------|---------------------------|------|---------|----|------|-----------------------|-------|-------|
|                     |          | B                         | S.E. | Wald    | df | Sig. | Exp(B)                | Lower | Upper |
| Step 1 <sup>a</sup> | TI3      | .000                      | .000 | 19.398  | 1  | .000 | 1.000                 | 1.000 | 1.000 |
|                     | Race(1)  | .480                      | .108 | 19.906  | 1  | .000 | 1.616                 | 1.309 | 1.995 |
|                     | Constant | -2.623                    | .104 | 638.518 | 1  | .000 | .073                  |       |       |

a. Variable(s) entered on step 1: TI3, Race.

Appendix B **Logistic regression for race, income level and contributions given**

|                     |          | Variables in the Equation |      |         |    |      | 95% C.I.for<br>EXP(B) |       |       |
|---------------------|----------|---------------------------|------|---------|----|------|-----------------------|-------|-------|
|                     |          | B                         | S.E. | Wald    | df | Sig. | Exp(B)                | Lower | Upper |
| Step 1 <sup>a</sup> | TI3      | .000                      | .000 | .023    | 1  | .880 | 1.000                 | 1.000 | 1.000 |
|                     | Race(1)  | .979                      | .077 | 163.025 | 1  | .000 | 2.663                 | 2.291 | 3.095 |
|                     | Constant | -2.069                    | .070 | 861.825 | 1  | .000 | .126                  |       |       |

a. Variable(s) entered on step 1: TI3, Race.

**Appendix C Recoded net income dummy variable**

1

|       |       | Frequency | Percent | Valid Percent | Cumulative Percent |
|-------|-------|-----------|---------|---------------|--------------------|
| Valid | 1.00  | 435       | 1.4     | 1.4           | 1.4                |
|       | 2.00  | 323       | 1.1     | 1.1           | 2.5                |
|       | 3.00  | 335       | 1.1     | 1.1           | 3.6                |
|       | 4.00  | 420       | 1.4     | 1.4           | 5.0                |
|       | 5.00  | 481       | 1.6     | 1.6           | 6.6                |
|       | 6.00  | 380       | 1.3     | 1.3           | 7.9                |
|       | 7.00  | 522       | 1.7     | 1.7           | 9.6                |
|       | 8.00  | 369       | 1.2     | 1.2           | 10.8               |
|       | 9.00  | 328       | 1.1     | 1.1           | 11.9               |
|       | 10.00 | 210       | .7      | .7            | 12.6               |
|       | 11.00 | 257       | .9      | .9            | 13.5               |
|       | 12.00 | 110       | .4      | .4            | 13.8               |

|       |     |    |    |      |
|-------|-----|----|----|------|
| 13.00 | 94  | .3 | .3 | 14.2 |
| 14.00 | 143 | .5 | .5 | 14.6 |
| 15.00 | 100 | .3 | .3 | 15.0 |
| 16.00 | 105 | .3 | .3 | 15.3 |
| 17.00 | 72  | .2 | .2 | 15.6 |
| 18.00 | 52  | .2 | .2 | 15.7 |
| 19.00 | 100 | .3 | .3 | 16.1 |
| 20.00 | 54  | .2 | .2 | 16.2 |
| 21.00 | 59  | .2 | .2 | 16.4 |
| 22.00 | 54  | .2 | .2 | 16.6 |
| 23.00 | 86  | .3 | .3 | 16.9 |
| 24.00 | 39  | .1 | .1 | 17.0 |
| 25.00 | 49  | .2 | .2 | 17.2 |
| 26.00 | 36  | .1 | .1 | 17.3 |
| 27.00 | 37  | .1 | .1 | 17.4 |
| 28.00 | 58  | .2 | .2 | 17.6 |
| 29.00 | 32  | .1 | .1 | 17.7 |
| 30.00 | 34  | .1 | .1 | 17.8 |
| 31.00 | 47  | .2 | .2 | 18.0 |
| 32.00 | 24  | .1 | .1 | 18.1 |
| 33.00 | 62  | .2 | .2 | 18.3 |
| 34.00 | 30  | .1 | .1 | 18.4 |
| 35.00 | 61  | .2 | .2 | 18.6 |
| 36.00 | 32  | .1 | .1 | 18.7 |
| 37.00 | 39  | .1 | .1 | 18.8 |
| 38.00 | 50  | .2 | .2 | 19.0 |
| 39.00 | 20  | .1 | .1 | 19.1 |
| 40.00 | 32  | .1 | .1 | 19.2 |
| 41.00 | 32  | .1 | .1 | 19.3 |
| 42.00 | 14  | .0 | .0 | 19.3 |
| 43.00 | 33  | .1 | .1 | 19.4 |
| 44.00 | 27  | .1 | .1 | 19.5 |
| 45.00 | 19  | .1 | .1 | 19.6 |
| 46.00 | 33  | .1 | .1 | 19.7 |
| 47.00 | 33  | .1 | .1 | 19.8 |
| 48.00 | 11  | .0 | .0 | 19.8 |
| 49.00 | 21  | .1 | .1 | 19.9 |
| 50.00 | 22  | .1 | .1 | 20.0 |
| 51.00 | 17  | .1 | .1 | 20.0 |
| 52.00 | 27  | .1 | .1 | 20.1 |
| 53.00 | 17  | .1 | .1 | 20.2 |
| 54.00 | 12  | .0 | .0 | 20.2 |

|       |    |    |    |      |
|-------|----|----|----|------|
| 55.00 | 22 | .1 | .1 | 20.3 |
| 56.00 | 5  | .0 | .0 | 20.3 |
| 57.00 | 29 | .1 | .1 | 20.4 |
| 58.00 | 7  | .0 | .0 | 20.4 |
| 59.00 | 37 | .1 | .1 | 20.6 |
| 60.00 | 8  | .0 | .0 | 20.6 |
| 61.00 | 6  | .0 | .0 | 20.6 |
| 62.00 | 20 | .1 | .1 | 20.7 |
| 63.00 | 11 | .0 | .0 | 20.7 |
| 64.00 | 26 | .1 | .1 | 20.8 |
| 65.00 | 6  | .0 | .0 | 20.8 |
| 66.00 | 12 | .0 | .0 | 20.9 |
| 67.00 | 13 | .0 | .0 | 20.9 |
| 68.00 | 4  | .0 | .0 | 20.9 |
| 69.00 | 9  | .0 | .0 | 20.9 |
| 70.00 | 4  | .0 | .0 | 20.9 |
| 71.00 | 23 | .1 | .1 | 21.0 |
| 72.00 | 5  | .0 | .0 | 21.0 |
| 73.00 | 4  | .0 | .0 | 21.1 |
| 74.00 | 2  | .0 | .0 | 21.1 |
| 75.00 | 13 | .0 | .0 | 21.1 |
| 76.00 | 12 | .0 | .0 | 21.1 |
| 77.00 | 13 | .0 | .0 | 21.2 |
| 78.00 | 7  | .0 | .0 | 21.2 |
| 79.00 | 7  | .0 | .0 | 21.2 |
| 80.00 | 5  | .0 | .0 | 21.3 |
| 81.00 | 5  | .0 | .0 | 21.3 |
| 82.00 | 2  | .0 | .0 | 21.3 |
| 83.00 | 7  | .0 | .0 | 21.3 |
| 84.00 | 5  | .0 | .0 | 21.3 |
| 85.00 | 4  | .0 | .0 | 21.3 |
| 86.00 | 4  | .0 | .0 | 21.3 |
| 87.00 | 3  | .0 | .0 | 21.4 |
| 88.00 | 8  | .0 | .0 | 21.4 |
| 89.00 | 5  | .0 | .0 | 21.4 |
| 90.00 | 4  | .0 | .0 | 21.4 |
| 91.00 | 5  | .0 | .0 | 21.4 |
| 92.00 | 2  | .0 | .0 | 21.4 |
| 93.00 | 7  | .0 | .0 | 21.5 |
| 94.00 | 4  | .0 | .0 | 21.5 |
| 95.00 | 9  | .0 | .0 | 21.5 |
| 96.00 | 3  | .0 | .0 | 21.5 |

|        |       |       |       |       |
|--------|-------|-------|-------|-------|
| 97.00  | 3     | .0    | .0    | 21.5  |
| 98.00  | 6     | .0    | .0    | 21.5  |
| 99.00  | 2     | .0    | .0    | 21.5  |
| 100.00 | 4     | .0    | .0    | 21.6  |
| 101.00 | 5     | .0    | .0    | 21.6  |
| 102.00 | 2     | .0    | .0    | 21.6  |
| 103.00 | 10    | .0    | .0    | 21.6  |
| 104.00 | 1     | .0    | .0    | 21.6  |
| 105.00 | 2     | .0    | .0    | 21.6  |
| 106.00 | 1     | .0    | .0    | 21.6  |
| 107.00 | 6     | .0    | .0    | 21.6  |
| 108.00 | 3     | .0    | .0    | 21.7  |
| 109.00 | 5     | .0    | .0    | 21.7  |
| 110.00 | 2     | .0    | .0    | 21.7  |
| 111.00 | 3     | .0    | .0    | 21.7  |
| 112.00 | 1     | .0    | .0    | 21.7  |
| 113.00 | 1     | .0    | .0    | 21.7  |
| 114.00 | 1     | .0    | .0    | 21.7  |
| 115.00 | 3     | .0    | .0    | 21.7  |
| 116.00 | 5     | .0    | .0    | 21.7  |
| 117.00 | 1     | .0    | .0    | 21.7  |
| 119.00 | 7     | .0    | .0    | 21.8  |
| 120.00 | 23560 | 78.2  | 78.2  | 100.0 |
| Total  | 30110 | 100.0 | 100.0 |       |

## Appendix B Cross-tabulation of income and contributions received

### 1 \* f3\_1 - Contributions received from non-household residents? Crosstabulation

Count

|   |      | f3_1 - Contributions received from non-household residents? |     |       |
|---|------|---|-----|-------|
|   |      | 0   | Yes | Total |
| 1 | 1.00 | 379   | 55  | 434   |
|   | 2.00 | 300   | 22  | 322   |
|   | 3.00 | 308   | 27  | 335   |
|   | 4.00 | 368   | 50  | 418   |
|   | 5.00 | 441   | 40  | 481   |
|   | 6.00 | 355   | 25  | 380   |
|   | 7.00 | 475   | 46  | 521   |

|       |     |    |     |
|-------|-----|----|-----|
| 8.00  | 330 | 36 | 366 |
| 9.00  | 305 | 23 | 328 |
| 10.00 | 183 | 27 | 210 |
| 11.00 | 236 | 21 | 257 |
| 12.00 | 102 | 8  | 110 |
| 13.00 | 84  | 10 | 94  |
| 14.00 | 130 | 13 | 143 |
| 15.00 | 92  | 8  | 100 |
| 16.00 | 94  | 10 | 104 |
| 17.00 | 71  | 1  | 72  |
| 18.00 | 48  | 4  | 52  |
| 19.00 | 94  | 6  | 100 |
| 20.00 | 52  | 2  | 54  |
| 21.00 | 55  | 4  | 59  |
| 22.00 | 49  | 5  | 54  |
| 23.00 | 81  | 5  | 86  |
| 24.00 | 37  | 2  | 39  |
| 25.00 | 46  | 3  | 49  |
| 26.00 | 33  | 3  | 36  |
| 27.00 | 36  | 1  | 37  |
| 28.00 | 54  | 4  | 58  |
| 29.00 | 30  | 2  | 32  |
| 30.00 | 33  | 1  | 34  |
| 31.00 | 46  | 1  | 47  |
| 32.00 | 19  | 5  | 24  |
| 33.00 | 54  | 7  | 61  |
| 34.00 | 26  | 3  | 29  |
| 35.00 | 59  | 2  | 61  |
| 36.00 | 29  | 2  | 31  |
| 37.00 | 36  | 3  | 39  |
| 38.00 | 45  | 5  | 50  |
| 39.00 | 15  | 5  | 20  |
| 40.00 | 30  | 2  | 32  |
| 41.00 | 31  | 1  | 32  |
| 42.00 | 14  | 0  | 14  |
| 43.00 | 32  | 1  | 33  |
| 44.00 | 26  | 1  | 27  |
| 45.00 | 18  | 1  | 19  |
| 46.00 | 28  | 5  | 33  |
| 47.00 | 32  | 1  | 33  |
| 48.00 | 11  | 0  | 11  |
| 49.00 | 20  | 1  | 21  |

|       |    |   |    |
|-------|----|---|----|
| 50.00 | 16 | 5 | 21 |
| 51.00 | 16 | 1 | 17 |
| 52.00 | 25 | 2 | 27 |
| 53.00 | 17 | 0 | 17 |
| 54.00 | 11 | 1 | 12 |
| 55.00 | 22 | 0 | 22 |
| 56.00 | 5  | 0 | 5  |
| 57.00 | 28 | 1 | 29 |
| 58.00 | 7  | 0 | 7  |
| 59.00 | 34 | 2 | 36 |
| 60.00 | 8  | 0 | 8  |
| 61.00 | 5  | 1 | 6  |
| 62.00 | 17 | 3 | 20 |
| 63.00 | 9  | 2 | 11 |
| 64.00 | 26 | 0 | 26 |
| 65.00 | 6  | 0 | 6  |
| 66.00 | 12 | 0 | 12 |
| 67.00 | 13 | 0 | 13 |
| 68.00 | 4  | 0 | 4  |
| 69.00 | 9  | 0 | 9  |
| 70.00 | 4  | 0 | 4  |
| 71.00 | 22 | 1 | 23 |
| 72.00 | 5  | 0 | 5  |
| 73.00 | 4  | 0 | 4  |
| 74.00 | 2  | 0 | 2  |
| 75.00 | 13 | 0 | 13 |
| 76.00 | 12 | 0 | 12 |
| 77.00 | 13 | 0 | 13 |
| 78.00 | 7  | 0 | 7  |
| 79.00 | 7  | 0 | 7  |
| 80.00 | 5  | 0 | 5  |
| 81.00 | 5  | 0 | 5  |
| 82.00 | 2  | 0 | 2  |
| 83.00 | 7  | 0 | 7  |
| 84.00 | 5  | 0 | 5  |
| 85.00 | 3  | 1 | 4  |
| 86.00 | 4  | 0 | 4  |
| 87.00 | 3  | 0 | 3  |
| 88.00 | 7  | 1 | 8  |
| 89.00 | 5  | 0 | 5  |
| 90.00 | 4  | 0 | 4  |
| 91.00 | 5  | 0 | 5  |

|        |       |      |       |
|--------|-------|------|-------|
| 92.00  | 2     | 0    | 2     |
| 93.00  | 7     | 0    | 7     |
| 94.00  | 3     | 1    | 4     |
| 95.00  | 9     | 0    | 9     |
| 96.00  | 3     | 0    | 3     |
| 97.00  | 3     | 0    | 3     |
| 98.00  | 6     | 0    | 6     |
| 99.00  | 2     | 0    | 2     |
| 100.00 | 4     | 0    | 4     |
| 101.00 | 5     | 0    | 5     |
| 102.00 | 2     | 0    | 2     |
| 103.00 | 9     | 0    | 9     |
| 104.00 | 1     | 0    | 1     |
| 105.00 | 2     | 0    | 2     |
| 106.00 | 1     | 0    | 1     |
| 107.00 | 6     | 0    | 6     |
| 108.00 | 3     | 0    | 3     |
| 109.00 | 5     | 0    | 5     |
| 110.00 | 2     | 0    | 2     |
| 111.00 | 3     | 0    | 3     |
| 112.00 | 1     | 0    | 1     |
| 113.00 | 1     | 0    | 1     |
| 114.00 | 1     | 0    | 1     |
| 115.00 | 3     | 0    | 3     |
| 116.00 | 4     | 1    | 5     |
| 117.00 | 1     | 0    | 1     |
| 119.00 | 7     | 0    | 7     |
| 120.00 | 14936 | 2363 | 17299 |
| Total  | 20938 | 2896 | 23834 |

