

**SOCIAL ASSISTANCE: LEGAL REFORMS TO IMPROVE COVERAGE AND  
QUALITY OF LIFE FOR THE POOR PEOPLE IN SOUTH AFRICA**

by

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## Declaration

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I declare that '**Social assistance: Legal reforms to improve coverage and quality of life for the poor people in South Africa**' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Tshoose CI

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Date: 19 February 2016

## Summary

The South African Constitution in section 27(1)(c) obligates the state to develop a comprehensive social security system. It affirms the universal right to access to social security, including appropriate social assistance for those unable to support themselves and their dependants. It orders the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

The underlying normative commitment of social security is the improvement of the quality of life of the population by promoting economic or material equality. Social security ensures that all citizens have a stake in society and that each individual has an incentive to contribute to the development of the commonwealth. It plays a crucial role in the lives of communities and families viewed in the context of social transfers which provide broader development objectives and tackles income poverty transfers.

The objectives of this study are threefold. Firstly, it examines the extension of social assistance coverage to the indigents in South Africa. Secondly, it looks at the legal mechanisms employed by courts and government in order to improve the social security rights of the poor in South Africa. Thirdly, the research investigates the possible reform and trends in India and Brazil with the aim of improving South Africa's system of social security.

For the avoidance of doubt, the law evaluated in this work is at 15 September 2015.

**Key terms**

Social security, socio-economic rights, human rights, poverty, inequalities, unemployment, vulnerable people, constitution, courts, comprehensive social security, *bolsa família*, the right to life, public interest litigation, social protection floor, international social security law, Indian social security law, Brazilian social security law.

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### **List of abbreviations**

BRICS	Brazil, Russia, India, China and South Africa
CC	Constitutional Court
COIDA	Compensation for Occupational Injuries and Diseases Act
ESC	European Social Charter
FSC	Federal Supreme Court
ILO	International Labour Organisation
MGNREGA	Mahatma Gandhi National Rural Employment Guarantee Act
NDP	National Development Plan
OHSA	Occupational Health and Safety Act
PAJA	Promotion of Administrative Justice Act
PSNP	Primary School Nutrition Programme
UIF	Unemployment Insurance Fund
SASSA	South African Social Security Agency
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNDP	United Nations Development Programme

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## CHAPTER ONE

### INTRODUCTION AND CONCEPTUAL OVERVIEW OF THE STUDY

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#### 1.1 Introduction

In his citation of Mahatma Gandhi, Parekh explains:

Poverty dehumanises human beings, wastes the potential and deprives their lives of all sense of meaning and purpose. It is one of the worst forms of violence that human beings can commit against other human beings..., and that as long as even one person is starved, is malnourished or lacks decent housing, the social order stands indicted lacking legitimacy...<sup>1</sup>

In South Africa, the extension of social assistance coverage<sup>2</sup> to the poor presents one of the major challenges facing the system of social security.<sup>3</sup> This problem is compounded by the fact that a number of persons who needs social assistance find themselves battling against unemployment,<sup>4</sup> urbanisation, poverty,<sup>5</sup>

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<sup>1</sup> Paraekh B quoting Mahatma Gandhi in Mujumdar N *India's new development agenda – Building a value-based society* (New Delhi, India, Academic Foundation, 2011) 32.

<sup>2</sup> Brockerhoff conceptualises coverage as a “system of targeted social assistance towards vulnerable groups in society”. See Brockerhoff S ‘A review of the development of social security policy in South Africa’ (2013) Studies in Poverty and Inequality Institute (SPII) 20 available at [http://spii.org.za/wp-content/uploads/2014/01/Working-Paper-6\\_Social-Security-policy-review.pdf](http://spii.org.za/wp-content/uploads/2014/01/Working-Paper-6_Social-Security-policy-review.pdf) (date of use 26 November 2013).

<sup>3</sup> Cf Reynaud E ‘The extension of social security coverage: The approach of the International Labour Office’ (ESS-Paper no. 3, 2002)16-18 available at [http://www.ilo.org/secsoc/information-resources/publications-and-tools/Workingpapers/WCMS\\_207704/lang--en/index.htm](http://www.ilo.org/secsoc/information-resources/publications-and-tools/Workingpapers/WCMS_207704/lang--en/index.htm) (date of use 26 November 2013).

<sup>4</sup> The number of unemployed people increased by 237 000 (4,9%) between Q4: 2013 and Q1: 2014. This is largely attributed to an increase of 153 000 among unemployed men, see Statistics South Africa Quarterly Labour Force Survey, Quarter 1, 2014 available at [http://beta2.statssa.gov.za/publications/P0211/P02111st Quarter 2014.pdf](http://beta2.statssa.gov.za/publications/P0211/P02111st%20Quarter%202014.pdf) (date of use 20 May 2014); See also the National Development Plan Vision 2030, at 325-326 <http://www.npconline.co.za/medialib/downloads/home/NPCpercent20Nationalpercent20Developmentpercent20Planpercent20Visionpercent202030percent20-lo-res.pdf> (date of use 26 November 2013).

<sup>5</sup> Westaway A ‘Rural poverty in South Africa: Legacy of apartheid or consequences of contemporary segregationism?’ Paper presented at ‘Inequality and structural poverty in South Africa: Towards inclusive growth and development’, Johannesburg, 20 September 2010, 1-14 available at <http://www.plaas.org.za/sites/default/files/publications-pdf/Westaway.pdf> (date of use 26 November 2013); Martins J ‘Household budget as a social indicator of poverty and inequality in South Africa’ (2007) Vol.81 (2) *Social Indicators Research* 203-219; Neff D ‘Subjective well-being, poverty and ethnicity in South Africa: Insights from an exploratory analysis’ (2007) Vol.80 (2) *Social Indicators Research* 313-334.

economic liberalisation,<sup>6</sup> and HIV/AIDS.<sup>7</sup> Again, the means of expanding access to social assistance to the excluded and vulnerable group remains limited in terms of the scope of coverage.<sup>8</sup> The formal social security scheme covers only those in a formal employment, and those employed in the informal employment have no social protection benefits.<sup>9</sup>

This study relates to the methods or strategies for strengthening and expanding social assistance to poor households in South Africa and thereby advocates for a comprehensive social security protection for those that are marginalised and unable to support themselves.<sup>10</sup>

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<sup>6</sup> Mabugu R and Chitiga M 'South Africa trade liberalisation and poverty in a dynamic microsimulation CGE Model' (2007) University of Pretoria, Working Paper, 1-40 available at [http://web.up.ac.za/UserFiles/WP\\_2007\\_18.pdf](http://web.up.ac.za/UserFiles/WP_2007_18.pdf) (date of use 26 November 2013).

<sup>7</sup> Thomas K 'A Better life for some: The lovelife campaign and HIV/AIDS in South Africa' (2004) Vol.2 (62) *Empowering Women for Gender Equity African Feminisms: Sexuality in Africa* 29-35; Petros G *et al* 'HIV/AIDS and 'othering' in South Africa: The blame goes on' (2006) Vol.8 (1) *Culture & Sexuality* 67-74; London L 'Health and human: What can ten years of democracy in South Africa tell us?' (2004) Vol.8 (1) *Health and Human Rights* 8-13.

<sup>8</sup> Ferguson J 'Formalities of poverty: Thinking about social assistance in neoliberal South Africa' (2007) Vol.50 (2) *African Studies Review* 77-85; Okpaluba C 'Bureaucratic delays in processing social grants: An evaluation of contributions of the Eastern Cape judiciary to contemporary South African public law' (2011) 1 *Speculum Juris* 48-71. Not all the poor receive grants, this is caused by poor administration, communication, and lack of planning, and as a result lucky recipients receive their grants, see Sidimba L 'Not all the poor receive grants' *City Press* dated 29 March 2009, 5 available at <http://152.111.1.87/argief/berigte/citypress/2009/03/30/CP/5/IsDistress.html> (date of use 26 November 2013).

<sup>9</sup> Cf Olivier M *et al* *Introduction to social security* (Durban, LexisNexis, 2004) 5-6; Van Ginneken W *Extending social security coverage: Policies for developing countries*, (ESS-Paper no.13, 2003) 2.

<sup>10</sup> The report of the *Committee of Inquiry into a Comprehensive System of Social Security* (Taylor Committee Report) provides a comprehensive attempt to bring the different elements of a fragmented social security to address, in a coherent and phased way, the constitutional and economic challenges facing South Africa. To address this, the Committee took into consideration the case of *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) and recommended that social security policies and programmes must be reasonable both in their conception and their implementation. Therefore, vulnerable communities must be given priority by government, and their needs must be addressed effectively. See full citation of the report - Department of Social Development Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present - Protecting the Future Draft Consolidated Report Pretoria 2002,36 available at [www.welfare.gov.za/documents/2002/May/pdf](http://www.welfare.gov.za/documents/2002/May/pdf) (date of use 26 November 2013).

Twenty one (21) years has elapsed since South Africa parted ways with apartheid system. Nevertheless, poverty, inequality, and unemployment pose the greatest threat to human dignity and social cohesion.<sup>11</sup> Van der Berg eloquently described the impact of apartheid on the system of social security when he stated that:

The exclusion of blacks was predicated on the “civilised labour” view that people accustomed to modern lifestyles and consumption patterns had greater need of social protection than those in rural subsistence agriculture, who were not proletarianised and were thus presumed to be better placed to meet traditional subsistence needs.<sup>12</sup>

The social security system inherited from the apartheid era was modelled on the “welfarism” programmes developed for industrialised countries. These programmes assume close to full employment and are designed to address special contingencies and fluctuations in the economic cycle.<sup>13</sup>

The study gives an overview of the system of social security in South Africa, examining in particular measures aimed at providing social assistance to the vulnerable groups. Furthermore, the study proceeds with an analysis of how the problems experienced by the poor in social security terms, might be solved, and identify where the shortcomings of the current initiatives are, and how to overcome them. It also considers the adequacy and quality of social assistance coverage given to the indigents. Townsend conceptualises the poor as follows:

Individuals, families, and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in the activities and have the living conditions which are customary or at least widely encouraged or approved, in societies to which they belong. Their resources are so seriously below those commanded by the average family or individual that they are in effect excluded from ordinary living patterns, customs and activities.<sup>14</sup>

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<sup>11</sup> Blacksash ‘Breaking the poverty trap: Financing a basic income grant in South Africa’ BIG financing reference group, March 2004, 1 available at <http://www.blacksash.org.za/docs/financingbig.pdf> (date of use 26 November 2013).

<sup>12</sup> Van der Berg S ‘South African social security under apartheid and beyond’ (1997) Vol.14 (4) *Development Southern Africa* 486-487.

<sup>13</sup> Blacksash (note 11 above).

<sup>14</sup> Townsend P *Poverty in the United Kingdom: A survey of household resources and standard of living* (Harmondsworth Middlesex, Allen Lane and Penguin Books, 1979) 31.

It is important to note that South Africa still experiences extreme disparities in income and wealth distribution, evident in the gap between the rich and the poor.<sup>15</sup> The social security assistance programmes (for example the system of social grants) introduced by the government as the most significant pillar of the anti-poverty strategy has had a positive impact on the majority of the poor households.<sup>16</sup> Nevertheless, much still needs to be done in order to address the plight of the poor households in South Africa.

## 1.2 Background of the study

From time immemorial, societies have attempted in various ways to shelter people against social and economic adversities. These societies have looked to their families, clans, tribes, communities, religious groups and authorities, chiefs, and kings, to assist those who are disadvantaged, vulnerable and/or poor.<sup>17</sup>

The origins of the modern social security system dates back to the 1880s.<sup>18</sup> Germany was the first nation to adopt a statutory social insurance system.<sup>19</sup> The country established the notion of benefits as a right and making it applicable to the industrial workforce as a whole. Some years later, similar schemes were

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<sup>15</sup> Gouws A 'Obstacles for women in leadership positions: The case of South Africa' (2008) Vol.34 (1) *Signs* 25.

<sup>16</sup> Statistics South Africa I 'Social grants—In depth analysis of the general households survey data 2003-2007' GHS Series Volume 1-3 available at <http://www.statssa.gov.za/Publications2/P03181/P031812007.pdf> (date of use 26 November 2013); Social security and the social wage, 84-86 available at <http://www.treasury.gov.za/documents/nationalpercent20budget/2013/review/chapterpercent206.pdf> (date of use 26 November 2013); See also Hall A 'From fome zero to *bolsa familia*: Social policies and poverty alleviation under Lula' (2006) 38 *Journal of Latin American Studies* 689-709; Caminada K *et al* 'Social income transfers and poverty: A cross-country analysis for OECD countries' (2012) 21 *International Journal of Social Welfare* 118-120.

<sup>17</sup> Hölscher D 'The Emperor's new clothes: South Africa's attempted transition to developmental social welfare and social work' (2008) 17 *International Journal of Social Welfare* 114.

<sup>18</sup> Rimlinger G 'Social change and social security in Germany' (1968) Vol.3 (4) *Journal of Human Resources* 410-415.

<sup>19</sup> ILO *Social security for social justice and a fair Globalisation Report VI of the International Labour Conference*, 100<sup>th</sup> Session, 2011, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_152819.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_152819.pdf) (date of use 26 November 2013).

introduced in Latin America (Argentina, Brazil, Chile and Uruguay).<sup>20</sup> In the Nordic countries, not only the workers but all the inhabitants were protected.<sup>21</sup> Later, the worldwide economic crisis, which unfolded at the end of the 1920s and beginning of the 1930s, and the post-crisis recovery policies adopted subsequently, gave fresh impetus to the development of social security programmes.<sup>22</sup> In due course, existing insurance models were widened, new risks such as unemployment benefits were included, and the groups of persons covered were enlarged.<sup>23</sup> Though the system of social security was premised on the insurance model, tax-financed programmes were also introduced at an early stage.

During the 1930s, social security schemes extended further in Europe and America.<sup>24</sup> It was only in the three decades following the Second World War that it developed its characteristic features.<sup>25</sup> This system, which is prevalent in the industrial market economies, is referred to here as the classical model of social security.<sup>26</sup> The processes of industrialisation and urbanisation that have swept across the world over the past 200 years have profoundly affected social security arrangements everywhere.<sup>27</sup>

The concept of social security aims to meet urgent needs of people for subsistence and to provide against contingencies.<sup>28</sup> The definition of 'needs' and 'contingencies' and the exact nature of arrangements to address them have

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<sup>20</sup> ILO (note 19 above).

<sup>21</sup> ILO (note 19 above).

<sup>22</sup> ILO (note 19 above).

<sup>23</sup> ILO *Social security for social justice and a fair Globalisation idem.*

<sup>24</sup> ILO *ibid.*

<sup>25</sup> Pedersen S *Family dependence, and the origins of the welfare state: Britain and France* (UK, Cambridge, Cambridge University Press, 1993) 1914-1945; Leiby J *A history of social welfare and social work in the U.S.* (New York, Columbia University Press, 1978); Mishra R *The welfare state in capitalist society* (Toronto, University of Toronto Press, 1990).

<sup>26</sup> Ghai D 'Social security: Learning from global experiences to reach the poor' (2003) 4 *Journal of Human Development* 125-126.

<sup>27</sup> ILO 'Social security for social justice and a fair Globalisation' (2011) Report VI of the International Labour Conference, 100th Session 7-8.

<sup>28</sup> Patel L and Hochfeld T 'It buys food but does it change gender relations? Child support grants in Soweto, South Africa' (2011) Vol.19 (2) *Gender and Development* 229-240.



differed from one society to another and have evolved over time.<sup>29</sup> These arrangements reflect the values, beliefs, and customs of the people, but also their economic systems, social structures and political institutions. In other words, the arrangements a society makes to meet the essential subsistence needs and contingencies of its members constitute their social security system.

From the South African perspective, the key strategic objectives of a comprehensive system of social security must be informed by the constitutional imperative to create a society that has human dignity, the achievement of equality and the advancement of human rights as one of its founding values.<sup>30</sup> The essence of human dignity in the interpretation of socio-economic rights is aptly summarised by Judge Chaskalson in the Third Bram Fischer Memorial Lecture, when he stated:

...these rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance. In the light of our history the recognition and realisation of the evolving demands of human dignity in our society - a society under transformation - is of particular importance for the type of society we have in the future.<sup>31</sup>

The South African Constitution guarantees the right of access to a number of crucial socio-economic rights.<sup>32</sup> These include the right to have access to sufficient food, and the right to have access to social security or social assistance for those who are unable to support themselves and/or their dependants.<sup>33</sup> The jurisprudence of the constitutional court<sup>34</sup> brought out the meaning of the right to have access to social security, and that it must be distinguished from the

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<sup>29</sup> Patel L and Hochfeld T (note 28 above).

<sup>30</sup> Section 1(a) of the Constitution of Republic of South Africa, 1996 (Constitution).

<sup>31</sup> Chaskalson A 'Human dignity as a foundational value of our Constitutional order' (2000) *South African Journal of Human Rights* 204-205; See also Goolam N 'Human dignity-our supreme constitutional value' (2001) Vol.4 (1) *Potchefstroom Electronic Review (PER)* 52.

<sup>32</sup> For a detailed discussion on the socio-economic rights in the South African Constitution, see Brand D 'Introduction to socio-economic rights in the South African Constitution' in Heyns C and Brand D *Socio-economic rights in South Africa* (eds.) (Pretoria University Law Press, 2005)1-56.

<sup>33</sup> Malan N 'The performance of the right to have access to social security' (2009) Vol.13 (2) *Law, Democracy and Development* 84-85.

<sup>34</sup> *Government of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 2001 1 SA 46 (CC).

guarantee of a right to social security. The latter is an unqualified right and calls upon the state to act immediately to ensure that everyone has access to social security. The former does not oblige the state to provide social security immediately to everyone in the country. This is so because the obligation of the state in this regard is subject to both an internal and external constitutional qualifications.<sup>35</sup>

The problematic nature of giving effect to social security rights is addressed in this study. The constitutional obligation placed on the state is to give effect to these rights over a period of time and in programmatic fashion. This is evident from the provision requiring the state to take reasonable legislative and other measures to achieve the progressive realisation of the right to have access to social security.<sup>36</sup> Chapter three considers the case law dealing with the meaning, content and scope of the right to have access to social security in South Africa.

Within this context, it is important to properly conceptualise issues upon which a social security system is focused. For instance, an employment strategy that works clearly has merit, but it does not amount to social security, as no social security contingencies are being met. An important question to ask when reviewing policy options is whether any vulnerable group faces some contingency, such as poverty, ill-health, disability, and unemployment, which results in their effective exclusion from free participation in society.

Kaseke<sup>37</sup> asserts that social security was introduced in developing countries to address the problem of income insecurity. He defines income security as

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<sup>35</sup> For a detailed discussion on the limitation of rights entrenched in the Constitution, see Rautenbach I 'The limitation of rights and "reasonableness in the right to just administrative action and the rights to access to adequate housing, health services and social security law' (2005) 5 *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)* 627-654.

<sup>36</sup> Rautenbah (note 35 above) 644-645; See also Chenwi L 'Unpacking progressive realisation: Its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 742-769.

<sup>37</sup> Kaseke E 'Social security and older people: An African perspective' (2005) *International Social Work* 1-11; Cf Devereux S and Sabates-Wheeler R 'Transformative social protection' (2004) IDS, Working paper 232, Institute of Development Studies (IDS), Sussex, UK;

meaning income that is sufficient for the purposes of meeting subsistence needs. This is a concern of millions of people in South Africa who live in extreme poverty.<sup>38</sup>

In order to fight poverty, it is important to understand its foundations and the environment within which it operates. In South Africa, living standards are closely correlated with race. While poverty is not confined to any particular race, it is concentrated among blacks. According to Statistics South Africa, 93% of Black Africans live below the upper-bound of poverty, while the Coloureds, Indians and whites shared the remaining 6.2%, with coloureds contributing the largest share with 5.7%.<sup>39</sup> This means that Black South Africans living in abject poverty survive on R416 per person per month. This refers to the food poverty line of R305 per month plus the average amount derived from non-food items of households whose total expenditure is equal to the poverty line.

The food poverty line refers to the amount of money that an individual will need to consume the required energy intake. More recently, in terms of the study conducted by the University of Cape Town's Africa Food Security Unit Network, it was found that half of all South Africans live in absolute poverty.<sup>40</sup> The United

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Samson M *et al* 'The social and economic impact of South Africa's social security system' (2004) *Report Commissioned by the Economics and Finance Directorate, Department of Social Development*; World Bank 'World Development Report' 2000/2001: *Attacking Poverty*, The International Bank for Reconstruction and Development, the World Bank, Washington, D.C.

<sup>38</sup> South Africa's Department of Social Development, Green paper on families: Promoting family life and strengthening families in South Africa GN 756 in GG 346573 of October (2011) 6-10; Statistics South Africa Poverty Profile of South Africa, 2008/2009, 5-17; See also Sachs G 'Two decades of freedom – A 20\_year review of South Africa Johannesburg, South Africa, 4 November 2013 available at <http://us-edn.creamermedia.co.za/assets/articles/attachments/46826-pdf> (date of use 5 November 2013); Hall K 'Income and social grants – Children living in poverty' (2010) available at [http://www.childrencount.ci.org.za/uploads/factsheet\\_14.pdf](http://www.childrencount.ci.org.za/uploads/factsheet_14.pdf) (date of use 26 November 2013).

<sup>39</sup> Statistics South Africa 'Poverty Profile of South Africa' 2008/2009, 5-17; See also Sachs G 'Two decades of freedom a 20\_year review of South Africa' *ibid*; Hall K 'Income and social grants – Children living in poverty' (note 38 above).

<sup>40</sup> Frayne B *et al* Urban 'Food security in South Africa: Case study of Cape Town, Msunduzi and Johannesburg Development Planning Division' (2009) Working paper series no.15, DBSA: Midrand 7-10.

Nations Food and Agricultural Organisation (FAO) estimates that 870 million people worldwide are chronically undernourished, and 234 million of them live in sub-Saharan Africa.<sup>41</sup>

It is worth noting that the system of social security is the critical intervention that assists the South Africa government to eradicate poverty, promote social inclusion, and ensure social cohesion.<sup>42</sup> Poverty is typically a consequence of policy rather than a normal state for certain individuals or families. The system of social security puts a constraint on the permitted degree of inequality. Its principal objective is to ensure that inequality should not be tolerated where it results in the systematic social exclusion of any member of society.

Reaching this objective requires that interventions are sufficient to protect everyone against human damage and falling victim to social risks, and to permit everyone full participation in society without undermining any appropriate incentives to actively participate. The study argues that the social exclusions such as, poverty, unemployment and the HIV/AIDS pandemic are issues facing the realisation of the overall right to social security.<sup>43</sup>

It is in this context that the present study focuses on the problems that hamper access to social assistance and also the legal and policy responses adopted by the government to remedy the situation. This will be achieved by examining social security in post-apartheid South Africa. In particular, the study examines the current system of social security law; labour market profile and the socio-

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<sup>41</sup> Food and Agriculture Organisation of the United Nations (FAO) The state of food insecurity in the world (2012) 8-12 available at <http://www.fao.org/docrep/016/i3027e/i3027e00.htm> (date of use 20 January 2013).

<sup>42</sup> Department of Social Development, South Africa Strategic Plan 2007-2010 1-2 available at <http://www.pmg.org.za/docs/2007/070316socdevstrat.pdf> (date of use 20 January 2013); Cf Department of International Development (DFID) 'Social transfers and chronic poverty: Emerging evidence and the challenge ahead II' (2005) 6 London, DFID practice paper 6.

<sup>43</sup> Richter M 'The right to social security of people living with HIV/AIDS in the context of public sector provision of highly active antiretroviral therapy' (2006) *South African Journal on Human Rights* 197-220; Tshoose C 'The impact of HIV/AIDS on informal social security: Issues and perspectives from South African context' (2010) *PER* 410-441.

economic realities facing South Africa; and the constitutional landscape on the provisioning of social security rights. This current position is analysed in order to determine whether it is satisfactory.

### 1.3 Statement of the research problem

Brynard and Hanekom state that scientific investigation can only be effective with a well-defined problem statement that guides and focuses on the planning and implementation of the research.<sup>44</sup>

The main problem statement guiding this study relates to the modalities or methods of extending social assistance coverage to the vulnerable poor. It is argued that the current protection afforded the poor is not sufficient, let alone accessible to the millions of South Africans who find themselves destitute.<sup>45</sup> It also examines the strategies employed by the South African government in addressing the economic and social marginalisation of vast sectors of the population who are living in poverty.<sup>46</sup>

It is further argued that the exclusionary nature of the present formal social security dates back from the Western Europe influence imported through colonialism, as well as the apartheid government.<sup>47</sup> This was an era associated with political relations of domination, and of the economic system which excluded

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<sup>44</sup> Brynard P and Nanekom S *Introduction to research in public administration and related academic discipline* (Pretoria, Van Schaik, 1997) 15.

<sup>45</sup> See *City Press* dated 29 March 2009, 5, where it was reported that not all the poor people receive grants in South Africa. That this deficiency is primarily caused by poor administration, communication, and lack of planning, and as a result lucky recipients receive their grants. See also Olivier M 'Old age security in Asia and the Pacific: Reflections on a rights-based framework' (2008) Vol. 2 (2) *Indian Journal of Human Development* 386.

<sup>46</sup> Mpedi G 'Redesigning the South African unemployment protection system: A socio-legal inquiry' (2006) unpublished PHD Thesis, University of Johannesburg, 3.

<sup>47</sup> Mamdani M *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (Princeton, Princeton University Press, 1996) 218-264.

majority of the South African population from participating in the opportunities it offered.<sup>48</sup>

As such, apartheid legislation and institutions through which this ideology was implemented produced persistent poverty and extreme inequality.<sup>49</sup> In doing so, the system ensured that poverty, unemployment, and social exclusion became the order of the day, thus rendering most families destitute and vulnerable. To put the statement of the research problem in perspective, the study had identified the following key problems (below) which have exacerbated the plight of the poor households in accessing social security, in particular social assistance in South Africa.

#### 1.1.1 Specific problems identified in the study include the following key areas:

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<sup>48</sup> Hunter N and May J 'Third meeting of the african learning group on 'the poverty reduction strategy: Lessons for poverty reduction strategies in South Africa' Addis Ababa, Ethiopia, 3-5 December 2003, 3 available at [http://www.sarpn.org/documents/d0000672/P676-Africa\\_PRSP.pdf](http://www.sarpn.org/documents/d0000672/P676-Africa_PRSP.pdf) (date of use 20 January 2013).

<sup>49</sup> Mpedi G 'HIV/AIDS in South Africa: Towards comprehensive social protection? *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)* 18(3) (2004) 243-270; See also Helen S 'Disability and HIV/AIDS in Sub-Saharan Africa: Barriers to prevention' unpublished LLM Masters of Arts submitted at the York University, Toronto 1-63 available at <http://www.aidsfreeworld.org/our-issues/disability/~media/cff31cb895e5476884467f0848001ef1.pdf> (date of use 22 March 2014). Acquired Immunodeficiency Syndrome (AIDS) was first observed in South Africa during the 1980's and by 1983 the Human Immunodeficiency Virus (HIV) that was believed to cause AIDS was identified. Thus when HIV antibodies are detected in a person's body, it is said that a person is HIV positive. It, is however, more difficult to define and identify AIDS. CD4 counts and viral loads can be measured to indicate the level of health and fitness of a person. When the CD4 count falls below 200 and viral load increases, a person may be regarded as having AIDS. T-cells or Lymphocytes are white blood cells that play an important role in the immune system (sometimes known as the soldiers of the body, as they fight viruses on the person's body). There are two main types of T-cells. One type has molecules called CD4 on its surface. The other T-cells, which have a molecule called CD8, destroy cells that are infected and produce antiviral substances. HIV is able to attach itself to this CD4 molecule, allowing the virus to enter and infect these cells. The CD4 count is a reflection of how many T-cells are circulating in the blood available at <http://www.aidsabout.com> (date of use 26 November 2013). For further reading on the concept of persistent poverty, see Beckford G *Persistent poverty: Underdevelopment in plantation economies of the third world* (London, Oxford University Press, 1972).

- 1.1.1.1 Coverage: the issue of coverage is a significant determination of integration and inclusiveness in social protection. The South Africa situation reveals that coverage of social assistance to the vulnerable groups is limited.<sup>50</sup> As research studies have shown, the right to social security does not always translate into access for those most vulnerable.<sup>51</sup> Similarly, bureaucratic red-tape, maladministration, and corruption surrounding the administration of social security and welfare grants have been a perennial problem in South Africa since the advent of democracy in 1994.<sup>52</sup>
- 1.1.1.2 Unemployment: although millions of people in South Africa currently live in a state of extreme poverty,<sup>53</sup> social security has played a role in reducing poverty in this country.<sup>54</sup> The relationship between social security and employment creation is a close one as the shortage of labour demands inevitable results in too many social security beneficiaries

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<sup>50</sup> One of the reasons for this is that eligible beneficiaries find the grant difficult to access due to the proper implementation of the social assistance programmes. For example, in most cases rural villages are at a distinct disadvantage in respect of access to social welfare services and children in child-headed households, most of them are living on the street are generally not in a position to apply for grants as they do not have the assistance of an adult. See Van Rensburg J and Horsten D 'The inadequacy of the social grant system available to children in South Africa' (2004) *Journal for Juridical Science* 14-19; Motala S and Smith T 'Exposed to risk: Girls and boys living on the streets' (2003) *Agenda: Empowering Woman for Gender Equity* 62-71 available at <http://www.jstor.org/stable/pdfplus/10.2307/4066365.pdf> (date of use 20 March 2014).

<sup>51</sup> Smit N and Mpedi L 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy' (2010) Vol.14 *Law, Democracy and Development (LDD)* 19; Midgley J 'Social protection and social policy: Key issues and debates' (2012) Vol.11 *Journal of Policy Practice* 18-19.

<sup>52</sup> For a detailed discussion on the bureaucratic delays in processing social grants, see Okpaluba C 'Bureaucratic delays in processing social grants: an evaluation of contributions of the Eastern Cape judiciary to contemporary South African public law' (2011) Vol.1 *Speculum Juris* 48-71.

<sup>53</sup> Møller V 'Satisfied and dissatisfied South Africans: Results from the general household survey in international comparison' (2007) Vol.81 (1) *Social Indicators Research* 391-393.

<sup>54</sup> Noble M and Ntshongwana P 'No sign of a dependency culture in South Africa' Human Science and Research Council Policy Brief (HSRC) March 2008 (date of use 26 November 2013); Brockerhoff S 'A Review of the Development of Social Security Policy in South Africa' July 2013, 10-15 available at <http://www.spii.org.za> (date of use 26 November 2013).

and reduces the capacity of the system to diminish the incidence of poverty significantly. For this reason, the enduring and substantial unemployment experienced by some South Africans has been identified as being a constraint on the scope for prevention and reintegration policies. In addition, unemployment is viewed as constituting one of the greatest threats to the social security system.<sup>55</sup> In particular, the extent to which the state can be expected to bear the burden of social security with the increase in unemployment must be considered.<sup>56</sup>

1.1.1.3 The inadequacies of social grants for families and their children and lastly the impact of HIV/AIDS on social security system: The extended family has been the predominant social safety-net mechanism in South Africa, with children who lose their parents being absorbed into their relatives' families. It is worth noting that family networks are overwhelmed by the magnitude of the orphan's crisis and that these traditional coping mechanisms may not be adequate in the face of the ever-growing number of orphans.<sup>57</sup>

1.1.1.4 The exclusionary nature of social security and social assistance in South Africa.

## 1.3.2 Social assistance

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<sup>55</sup> Govindjee A 'Assisting the unemployed in the absence of a legal framework: The next frontier for the Eastern Cape bench' (2011) Vol.1 *Speculum Juris* 86-91.

<sup>56</sup> Olivier M *et al* 'Extending unemployment protection to the excluded and vulnerable: Perspectives and developments in South Africa' Paper presented at the Second Global Labour Forum, New Delhi, India, 13-14 December 2005.

<sup>57</sup> Ardington C and Leibbrandt M 'Orphanhood and schooling in South Africa: Trends in the vulnerability of orphans between 1993 and 2005' (2010) Vol.58 (3) *Economic Development and Cultural Change* 507-535.



- 1.3.2.1 Lack of access to social assistance.<sup>58</sup>
- 1.3.2.2 Categorical nature of the system.
- 1.3.2.3 Means-testing excludes majority of people who are equally destitute.<sup>59</sup> The other challenge is that the right to access social assistance is determined by the means-test. The latter is only focused on the immediate family structure, but does not extend to extended family. The categorical nature of the means-test effectively marginalises orphans who are in most cases parented by their extended families.
- 1.3.2.4 Service delivery problems.
- 1.3.2.5 Dispute resolution, system of adjudication is inadequate.
- 1.3.2.6 The overemphasis on compensation, at the expense of prevention and (re) integration into the formal labour market as well as rehabilitation.

### 1.3.3 Social insurance

- 1.3.3.1 Link with poverty alleviation, social security systems must be linked to poverty alleviation strategies. Thus, contributory social security schemes attempt only to prevent members from sliding into poverty.<sup>60</sup>
- 1.3.3.2 Covers only those defined as employees.<sup>61</sup>
- 1.3.3.3 Those who are unemployed are excluded from the system.
- 1.3.3.4 Adequacy of benefits.
- 1.3.3.5 Not properly aligned with social assistance.

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<sup>58</sup> Dekker A 'Mind the gap: Suggestions for bridging the divide between formal and informal social security' (2008) Vol.12 (1) *LDD* 117-129.

<sup>59</sup> Brockerhoff S 'A review of the development of social security policy in South Africa' July 2013, 34 available at <http://www.spii.org.za> (date of use 26 November 2013); Report by the Economic Policy Research Institute on behalf of the Department of Social Development, '*Review of targeting mechanisms, means-tests and values for South Africa's social grants*' 4 July, 2007, 14-15.

<sup>60</sup> Olivier M and Kalula E 'Social protection in SADC: Developing an integrated and inclusive framework' South Africa (2004) 8.

<sup>61</sup> As defined in section 200A of the Labour Relations Act 66 of 1995.

## 1.4 Aims and objectives of the study

The purpose of this study is to analyse the extension of social assistance coverage to the indigents in South Africa. It is difficult to identify the vulnerable, not only because tracking the well-being of a particular household over many years, or before and after a shock, requires reliable data that are seldom available. The study focuses on persons who are subjected to aggregate and idiosyncratic risks (crop, weather risks, illness, poverty and unemployment respectively).

Gaiha and Imai<sup>62</sup> note that vulnerability is distinguishable from 'poverty' in the sense that there are those who are non-poor but vulnerable and those who are non-vulnerable but poor. As a measure of deprivation, vulnerability is more appealing because it takes into account not just fluctuating levels of living but also the resilience of subsets of households against poverty, unemployment, landlessness and illness. Thus, this study argues that other methods of social protection coverage need to be introduced in order to protect the poor against poverty and unemployment.

In addressing this major problem, the study focuses on the gains that have been attained, and the outstanding gaps in the area of social assistance. In addition, policy options, consequences and recommendations are entertained.

It is argued that the current social security programmes have not adequately addressed the problems faced by the poor South Africans. This is because most of the poor live in households that receive no social security benefits at all, and the rest remain poor in spite of the benefits they receive.<sup>63</sup> The study further

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<sup>62</sup> Gaiha R and Imai K 'Measuring vulnerability and poverty: Estimates for rural India' in McGillivray M *et al Vulnerability in developing countries* (New York, United Nations University Press, 2009)13-54.

<sup>63</sup> *City Press* dated 29 March 2009, 5.

examines the skewed nature of social security system, which is based on employment, thus excluding a large number of people who are unemployed.

In order to address these broad concerns facing the South African government, the study contends that there should be a redressing of the social and economic imbalances of the past, unemployment, poverty, and provision of comprehensive social protection to the poor. In order for the government to win this battle, its social security programmes must be targeted to deliver maximum benefit to the underprivileged members of the society.

In defining the problem identified, the labour market is examined in the light of the disappointing employment growth and considerable wage inequality. Its main empirical conclusions are that rising unemployment can only be partly explained by rising wages because labour markets for skilled workers operate much better than for the unskilled. A broad policy framework that goes far beyond labour market interventions is needed to improve employment growth and reduce inequality.

Lastly, it is contended that in order to strengthen the social assistance coverage, the first step must be to assist the poor out of poverty,<sup>64</sup> by enhancing general

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<sup>64</sup> For further reading on the notion of exiting poverty, see Ravallion M 'How long will it take to lift one billion people out of poverty?' (2013) Vol.28 (2) *World Bank Research Observer* 51-155; Machado A and Ribas R 'Do changes in the labour market take families out of poverty? Determinants of exiting poverty in Brazilian metropolitan regions' (2010) Vol.46 (9) *Journal of Development Studies* 1503-1519; Carr S *et al* 'Psychology and poverty reduction: A global special issue' (2014) Vol.3 (4) *International perspectives in psychology: Research, practice, consultation* 215-233; Brasington D *et al* 'Transitioning out of poverty' (2010) Vol.61 (1) *Metroeconomica* 68-92; Valletta R 'The ins and outs of poverty in advanced economies: Government policy and poverty dynamics in Canada, Germany, Great Britain, and the United States' (2006) Vol. 52 (2) *Review of Income and Wealth* 261-283; Tetreault D 'Alternative pathways out of rural poverty in Mexico' (2010) 88 *European Review of Latin American and Caribbean Studies* 77-90.

living standards (for example, by encouraging people to engage in farming)<sup>65</sup> and expanding their basic human capabilities.<sup>66</sup>

## 1.5 Rationale and justification of the study

The aims and objectives of the study is to analyse the possible reforms and trends with a view to improving South African system of social security, in particular social assistance coverage. Accordingly, the recommendations focus on how to remedy the gaps in the entire system of social assistance in South Africa.

In addition to addressing the above-mentioned issues, the system of social security in South Africa, must be measured in tandem with the following yardsticks. The first being the protracted unemployment rate which remains on top of the most serious problems.<sup>67</sup> The second relates to the fact that traditional social insurance systems are employment-based, as they do not only exclude persons without employment, but also those who work in the so-called informal sector. The study also seeks to address the inequalities that are prevalent in South Africa. The inequalities are demonstrated through lack of access to natural resources, a two-tiered educational system, a dual health system, and other socio-economic dimensions.

In examining the abovementioned issues the study attempts to reflect on the constitutional commitment to social security and other related fundamental rights entrenched in the Constitution. The work contributes to the body of a growing literature that translates qualitative information from legal documents or other

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<sup>65</sup> See De Weerd J 'Moving out of poverty in Tanzania: Evidence from Kagera' (2010) Vol.46 (2) *Journal of Development Studies* 331-346.

<sup>66</sup> Cf Gunasinghe C 'The significance of capital assets in moving out of poverty: A case study of Sri Lanka' (2010) Vol.11 (2) *South Asian Economic Journal* 249-250.

<sup>67</sup> In terms of Statistics South Africa Labour Survey of 2009, the current unemployment rate stood at 23,5%, while the broader definition of unemployment including discouraged workers stood at 32.2%.

sources in order to explore the effects of different institutions (such as political system) on policy outcomes and policy performance.

In addressing policy options for extending social protection coverage to the poor, chapters 6 and 7 examine the social security systems of India and Brazil, with the aim of drawing valuable lessons from these countries. Despite significant differences, South Africa, India, and Brazil face similar challenges. For instance, they are striving to reduce poverty, improve education and health care. All three are among the biggest countries in the world in terms of landmass and total Gross National Products (GNP) and they also belong to Brazil, Russia, India China and South Africa (BRICS).<sup>68</sup>

Although South Africa has experienced improved growth rate since its independence in 1994,<sup>69</sup> both India and Brazil are also considered to be

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<sup>68</sup> GNP is a measure of a country's economic performance, or what its citizens produced (for example, goods and services) and whether they produced these items within its borders. See Business Dictionary.com available at <http://www.businessdictionary.com/definition/gross-national-product-GNP.html> (date of use 22 March 2014); Cf Broadberry S 'The BRICS: What does economic history say about their growth prospects' available at [http://www2.warwick.ac.uk/fac/soc/economics/research/centers/cage/events/publiclectures/policymay2013/4.chapter\\_four.pdf](http://www2.warwick.ac.uk/fac/soc/economics/research/centers/cage/events/publiclectures/policymay2013/4.chapter_four.pdf) (date of use 22 March 2014); International Social Security Association (ISSA) 'Social security coverage extension in the BRICS: A Comparative study on the extension of coverage in Brazil, the Russian Federation, India, China and South Africa' (2013) 18-40 available at <http://apsredes.org/site2013/wp-content/uploads/2014/03/2-BRICS-report-final.pdf> (date of use 22 March 2015).

<sup>69</sup> Du Plessis S and Smit B 'Economic growth in South Africa since 1994' (2005) Working paper no.1 University of Stellenbosch, South Africa 3-29 available at [http://www.ber.ac.za/downloads/2006/working\\_papers/wp-01-2006.pdf](http://www.ber.ac.za/downloads/2006/working_papers/wp-01-2006.pdf) (date of use 22 March 2014); See also, Industrial Development Corporation 'South African economy: An overview of key trends since 1994' (2013) 1-28 available at <http://www.idc.co.za/reports/IDC%20R&I%20publication%20-%20Overview%20of%20key%20trends%20in%20SA%20economy%20since%201994.pdf> (date of use 22 March 2014); For a critical analysis of South Africa's economic policy since its independence in 1994, see Mellet A 'A critical analysis of South African economic policy' (2012) unpublished Ph.D. Thesis in macroeconomics, school of Economics and Sciences, North West University (Vaal triangle Campus), South Africa, 15-207 available at [http://dspace.nwu.ac.za/bitstream/handle/10394/10152/Mellet\\_Andre.pdf?sequence=1](http://dspace.nwu.ac.za/bitstream/handle/10394/10152/Mellet_Andre.pdf?sequence=1) (date of use 22 March 2014); Chili N 'Economic growth and employment in South Africa: A critical policy analysis' (2000) Master's Dissertation of Arts in Economics, submitted in the Faculty of Economics and Management Sciences, University of Johannesburg, South Africa, 7-71 available at

emerging economies that boosted their historically growth rates to new highs in the most recent decade.<sup>70</sup>

## 1.6 Research design and methodology

Because of the diversity and nature of the topic, the research has heavily relied on library resources such as Articles, books, decided cases and statutes. Chapter three of this study discusses case law and statutes on social security law in South Africa. In addition, the research includes identifying the yardsticks set at the regional and international level. For instance, the International Labour Organisation (ILO) establishes norms and standards on social security to which countries including South Africa must comply.

A case study approach is adopted to these questions, while recognising that answers must be country-specific. It explores the state of, and prospects for strengthening social protection as key component of social assistance in South Africa. It does this by comparing the approaches adopted in Brazil and India. Alan Watson analysed the importance of considering comparative perspectives, when he said:

Law shows us many paradoxes. Perhaps the strangest of all is that, on the one hand, a people's law, can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be; on the other hand, legal transplants –

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[https://ujdigispace.uj.ac.za/bitstream/handle/10210/6264/N.A.percent20CHILI\\_2000\\_MA.pdf?sequence=1&isAllowed=y](https://ujdigispace.uj.ac.za/bitstream/handle/10210/6264/N.A.percent20CHILI_2000_MA.pdf?sequence=1&isAllowed=y) ( date of use 22 March 2014).

<sup>70</sup> Verma A and Gomes A 'Labour market flexibility and trajectories of development: Lessons from Brazil, India, and China' (2014) Vol.50 (1) *The Indian Journal of Industrial Relations* 52; See also Hidalgo J 'The rise of emerging economies:Challenges and liberal perspectives' (2013) Berlin, *Liberal Institute Friedrich-Naumann-Stiftung Für Die Freiheit* 5-16 available at <http://object.cato.org/sites/cato.org/files/articles/the-rise-of-emerging-economies-challenges-and-liberal-perspectives.pdf>(date of use 22 March 2014); O'Neill J 'Building better global economic BRICs' (2001) Goldman Sachs - Global economics paper no.66 4-13 available at <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf> (date of use 22 March 2014); Narayanaswami K 'BRIC economies and foreign policy: An analytical study' Harvard University available at <http://blogs.law.harvard.edu/karthik/files/2013/01/BRIC-Economies-and-American-Foreign-Policy-E1897-KNarayanaswami.pdf> (date of use 22 March 2014).

the moving of a rule or a system of law from one country to another, or from one people to another – have been common since the earliest recorded history.<sup>71</sup>

In light of the above assertion, the study is mindful of the fact that the Constitutions of these countries differ from that of the South African Constitution in many respects. However, they do share some common features with regard to their constitutional provisions for social security.

### **1.7 Scope and limitation of the study**

The study is limited to the modalities of strengthening and extending access to social assistance in South Africa and other jurisdictions. It pays particular attention to challenges facing the social security system and considers the impact of the Constitution thereof.<sup>72</sup> The study argues that the current social protection framework provides inadequate protection for poor people. It concludes by submitting that while recent policy developments are to be welcomed, more remains to be done in order to provide a comprehensive social security to the poor.<sup>73</sup>

The study is only confined to the system of social security in South Africa, in particular the right to have access to social assistance for the indigents.

### **1.8 Literature review**

The *modus operandi* of the study involves accessing the following sources; Articles in law journals, relevant legislation, textbooks, policy documents, and position papers by different sectors as well as ILO documents of social security in

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<sup>71</sup> Alan W *Legal transplants: An approach to comparative law* (Charlottesville University, Virginia Press, 1974) 3-4.

<sup>72</sup> Constitution of the Republic of South Africa.

<sup>73</sup> Olivier M and Mpedi G 'Extending social protection to families in the African context: The complementary role of formal and informal social security' Paper presented at the 4<sup>th</sup> ISSA International Research Conference on Social Security, Antwerp, 5-7 May 2003.

developing countries, conference proceedings, newspaper Articles, and research projects.

It is important to note that several studies have been undertaken on the extension of social protection to the vulnerable group in South Africa. To mention but few recent examples, Olivier acknowledges the fact that extending means-tested social assistance benefits can play a crucial role in aiding certain individuals as well as their families to cope with unemployment.<sup>74</sup> That the progressive extension of social assistance grants, in terms of value as well as the scope of coverage has a potential of alleviating poverty which is one of the direct consequences of unemployment.<sup>75</sup>

He<sup>76</sup> further notes that labour laws in the region (including South Africa) are concerned with the protection or regulation of formal labour markets to the exclusion of 'irregular' workers, particularly those in the informal sector. The future of labour laws in Southern Africa, he argues, depends upon its capacity to embrace the realities of deprivation and social needs, and to treat social protection as a central objective.<sup>77</sup>

In addition, Jansen van Rensburg and Horsten<sup>78</sup> examined the current social assistance system available in South Africa, indicating its shortcomings. The authors argue that the exclusion of children of the ages 11-18 from the child

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<sup>74</sup> Olivier M *et al* 'Extending unemployment protection to the excluded and vulnerable: Perspectives and developments in South Africa' Paper presented at the Second Global Labour Forum, New Delhi, India, 13-14 December 2005, 15-16.

<sup>75</sup> See for example, Streak J and Van der Westhuizen C 'Fitting the pieces together: A composite view of Government's strategy to assist the unemployed in South Africa 1994-2004' IDASA (2004) 32-33.

<sup>76</sup> Oliver M and Kalula E 'Legal framework and scope of coverage' in Olivier M *et al* (eds) *Introduction to social security* (Durban, Butterworths, 2004) 34.

<sup>77</sup> Kalula E 'Beyond borrowing and bending: Labour market regulation and labour law in Southern Africa' in Barnard C *et al* *The future of labour law: Liber Amicorum Sir Bob Hepple QC* (Hart, Oxford and Portland, 2004) 275-287.

<sup>78</sup> Van Rensburg J and Horsten D 'The inadequacy of the social grant system available to children in South Africa' (2004) 29 *Journal for Juridical Science* 52-73.



support grant infringes on their constitutional rights to social assistance.<sup>79</sup> Other prominent writers include, *inter alia*, Mpedi,<sup>80</sup> and Mbazira,<sup>81</sup> who have addressed the non-implementation of court orders in socio-economic rights litigation in South Africa, as a problem that affects the realisation of socio-economic rights for the poor.

Other scholars have argued that not all is lost and that informal social security can be used as a tool of extending protection of social assistance coverage to the excluded and marginalised.<sup>82</sup> The informal social security coverage provides safety-net to non-working class in times of distress. Similarly, there are also a number of ILO and national guidelines on social security that are aimed at exploring the issues of extending social security coverage to the indigents.

## **1.9 Definition of major concepts**

It is important to define major concepts used in this study:

### *1.9.1 The concept of social security*

It is instructive to start by defining the concept of social security. Determining the ambit of the concept of social security is extremely important not only for the purpose of understanding the constitutional right of access to social security, but also for the purpose of obtaining a broader understanding of what social security system in the South African context entails. The traditional western oriented

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<sup>79</sup> Van Rensburg J and Horsten D (note 78 above).

<sup>80</sup> See Olivier M and Mpedi G 'Extending social protection to families in the African context: The complementary role of formal and informal social security' Paper presented at the 4<sup>th</sup> ISSA International Research Conference on Social Security, Antwerp, 5-7 May 2003.

<sup>81</sup> Mbazira C 'Non-implementation of court orders in socio-economic rights litigation in South Africa' (2008) Vol.9 (4) *Economic and Social Rights Review (ESR Review)* 2-7.

<sup>82</sup> Kaseke E 'Informal social security in Eastern and Southern Africa - Towards the development of social protection in the SADC Region' (Proceedings and outcomes of the conference held at the Helderfontein Conference Center, Johannesburg South Africa, 17-19 October 2001, 245.

concept of social security may also not be able to capture the characteristics of the African context sufficiently.<sup>83</sup>

That social security is not a fixed concept is well accepted.<sup>84</sup> To define social security with regard to the content of intended scheme may leave insufficient room for the development of social security, and to provide for new answers to any new social problems that may arise. Within the South African context, the concept of social security is viewed as an umbrella concept, encapsulating among other aspects, the notion of social assistance, social insurance, and a wide variety of private and public measures that provide cash or in kind benefits or both, in the event of an individual's earning power permanently ceasing or being interrupted.<sup>85</sup>

The glossary in the Social Welfare White Paper<sup>86</sup> defines social security as the policies, which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, disability and old age, by means of contributory and non-contributory schemes providing for their basic needs.<sup>87</sup>

From a constitutional rights' perspective, there is a close correlation between social security and other related concepts that constitute the basis of specific fundamental rights. These include the rights to have access to land,<sup>88</sup> housing,<sup>89</sup> health care services, to food and water.<sup>90</sup> In a nutshell, social security is thus defined as "any kind of collective measures or activities designed to ensure that

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<sup>83</sup> Olivier M *et al* *Social security: A legal analysis* 1<sup>st</sup> edition (Durban, Butterworths, 2003) 24.

<sup>84</sup> Olivier M *et al* *The extension of social security protection in South Africa: A legal inquiry* (Cape Town, Zebra publications, 2001) 23.

<sup>85</sup> Olivier M *et al* *Social security: A legal analysis* (note 83 above) 23-24.

<sup>86</sup> White Paper for Social Welfare GN 1108 in Government Gazette 18166 August 1997 available at [www.gov.za](http://www.gov.za) (date of use 26 November 2013).

<sup>87</sup> Chapter 7, White Paper for Social Welfare (note 86 above).

<sup>88</sup> Section 25(5) of the Constitution. In terms of this section the State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

<sup>89</sup> Section 26 of the Constitution.

<sup>90</sup> Section 27 of the Constitution.

members of society meet their basic needs, such as adequate nutrition, shelter, health care and clean water supply, as well as being protected from contingencies – such as illness, disability, death, unemployment and old age, and to enable them to maintain a standard of living consistent with social norms”.<sup>91</sup> In South Africa, social security is built by pillars such as social assistance, social insurance, private savings, social relief, and social allowance.<sup>92</sup>

### 1.9.2 Social assistance

The concept of social assistance is defined as state-provided basic minimum protection to relieve poverty, subject to qualifying criteria of a non-contributory basis.<sup>93</sup> Social assistance comprises means-tested grants,<sup>94</sup> payable to certain needy members of the community who comply with a predetermined set of requirements. Social assistance has proved to be the main source of survival for the poorest of the poor in South Africa.<sup>95</sup>

Similarly, social assistance also entails government aid either in cash or in kind to persons who lack the means to support themselves and their dependants. Several types of grants aimed at needy children, ranging from the Child Support

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<sup>91</sup> Getubig I and Schmidt S (eds.) *Rethinking social security: Reaching out to the poor* (UN Asia and Pacific Development Center Kuala Lumpur, 1992) Chapter 1; Schmidt S ‘Social security in developing countries: Basic tenets and fields of state intervention’ (1995) 38 *International Social Work* 38.

<sup>92</sup> South African Human Rights Commission 3<sup>rd</sup> *economic and social rights* report 1999/2000, at 13 available at [www.gov.za/documents/download.php?f=94653](http://www.gov.za/documents/download.php?f=94653) (date of use 26 November 2013).

<sup>93</sup> Taylor Committee Report (note 10 above) at 36.

<sup>94</sup> To get the Child Support grant, you have to pass a means-test. If you live in a rural area, then the combined income of you and your spouse must not be more than R 9600 a year (R 800 a month). On the other hand, if you live in urban area or informal settlement, then the combined income for you and your spouse must not be more than R 13 200 a year (R 1100 a month). You should also not receive any other payment for taking care of the child available at <http://www.alp.org.za/> (date of use 26 November 2013).

<sup>95</sup> Samson M *et al* ‘The social and economic impact of South Africa’s social security system’ Department of Social Development, 30 September 2004, 30 available at [http://www.sarpn.org.za/documents/d0001041/Full\\_Report.pdf](http://www.sarpn.org.za/documents/d0001041/Full_Report.pdf) (date of use 26 November 2013).

Grant,<sup>96</sup> Care Dependency Grant,<sup>97</sup> and Foster Care Grant,<sup>98</sup> to people with disabilities (Disability Grant<sup>99</sup>) and the Elderly (Elderly Aged Grant and War Veterans Grant)<sup>100</sup> are available.<sup>101</sup> Based on the numbers of beneficiaries, the Elderly Aged Grant, the Disability Grant and the Child Support Grant are reported to be the largest social assistance programmes within the government-funded social security system.<sup>102</sup> Social assistance in South Africa is mainly concerned with the payment of grants and is regulated by the Social Assistance Act.<sup>103</sup>

### 1.9.3 Social insurance

Social insurance is defined as a mandatory contributory system of one kind or another, regulated by private sector provision, concerned with the spreading of income over the life cycle or the pooling of risks.<sup>104</sup> Social insurance is thus a form of social security designed to protect income-earners and their families against a reduction or loss of income because of exposure to risks. The contributions to social insurance are made by employers, employees, self-

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<sup>96</sup> Section 6 (a) of the Social Assistance Act 13 of 2004 (SAA), the qualifying conditions for the Child Support Grant are as follows: (a) primary caregiver who cares for a child or children, children under the age of 18 who comply with other qualifying criteria), (c) the caregiver must not be in receipt of income in respect of the child or children, (d) residence in South Africa at the time of application (both the primary caregiver and the child).

<sup>97</sup> Section 9 of the SAA Disability Grant is payable subject to the following conditions: (a) residence in South Africa at the time of application (both the foster parent and the child), (b) South Africa Citizenship (in the case of the parent and his or her child and (c) if a person has attained the prescribed age, (d) is owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

<sup>98</sup> Section 8 of the SAA. The qualifying conditions for a Foster Care Grant are residence in South Africa at the time of application (both foster parent and the child), if the foster child is in need of care, and he or she satisfies the requirements of the Child Care Act 74 of 1983.

<sup>99</sup> Section 9 of the SAA. For further reading on disability grant, see Kelly G 'Regulating access to the disability grant in South Africa, 1990-2013' (2013) University of Cape Town Center for Social Science Research Working paper no..330 1-43 available at <https://open.uct.ac.za/bitstream/item/8622/WPpercent20330.pdf?sequence=1> (date of use 26 November 2013).

<sup>100</sup> Section 11 of the SAA. War Veterans grant is a grant payable to an aged person, (a) Which is 60 years of age or older, (b) is unable to provide for himself due to a physical or mental disability, (c) once served in the South African. Defence force during certain wars, (d) can provide proof that he/she was in the defence force during one of the specified wars.

<sup>101</sup> SAA.

<sup>102</sup> Taylor Committee Report (note 10 above) 58.

<sup>103</sup> SAA.

<sup>104</sup> Taylor Committee Report (note 10 above) 36.

employed persons, and sometimes by the state. It is aimed at achieving a reasonable level of income maintenance. Based on insurance principles, the insurance is obligatory, with the main aim of achieving social solidarity.

Other social insurance schemes, such as the unemployment insurance scheme, retirement schemes and the compensation for occupational injuries and diseases scheme, play a crucial role through survivors' benefits upon the death of the breadwinner.<sup>105</sup> However, the problem with social insurance is that it is based on full employment, which implies that people who are unemployed cannot benefit under such schemes.

#### *1.9.4 Social protection*

Social protection includes society's responses to certain levels of either risk or deprivation. These include secure access to income, livelihood, employment, health, education, social services, nutrition and shelter.<sup>106</sup> According to the Asian Development Bank, social protection consists of policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, enhancing their capacity to protect themselves against hazards and interruptions or loss of income.<sup>107</sup> The aim of social protection is to minimize social risk, in that way preventing human damage, by increasing capabilities and opportunities.<sup>108</sup>

#### *1.9.5 Comprehensive social protection*

The Taylor Committee Report<sup>109</sup> states that comprehensive social protection seeks to provide the basic means for all people living in South Africa to effectively participate and advance in social and economic life, and in turn,

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<sup>105</sup> Mpedi G *Zeitschrift Für ausländisches und internationales Arbeits - und Sozialrecht (ZIAS)*, 2003/2004, C.F. Muller.

<sup>106</sup> Taylor Committee Report (note 10 above) 40.

<sup>107</sup> Asian Development Bank 'Social protection: Reducing risks, increasing opportunities' available at <http://www.adb.org/Social Protection/default.asp> (date of use 26 November 2013).

<sup>108</sup> Mpedi G and Olivier M 'Extending social protection to families in the African context: The complementary role of Formal and Informal Social Security, South Africa' Paper presented at the 4<sup>th</sup> International Conference on Social Security, 5 - 7 May 2003, 3.

<sup>109</sup> Taylor Committee Report (note 10 above).

contribute to socio-economic development. The Taylor Committee Report further defines the concept of comprehensive social protection in these terms:

Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through integrated policy-approach, including many of the developmental initiatives undertaken by the State.<sup>110</sup>

Comprehensive social protection is a system geared towards the provision of a national integrated and sustainable social security system, with universal access, the ultimate goal being to ensure that all South Africans have a minimum income, sufficient to meet basic subsistence needs and should not have to live below minimum acceptable standards.<sup>111</sup>

Comprehensive social protection consists of certain core elements such as measures to address *income poverty*, *measures to address capability* and *asset poverty* as well as *measures to address specific needs*.<sup>112</sup> The term ‘social security’ and ‘social protection’ have been used interchangeably within the present study.

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<sup>110</sup> Taylor Committee Report (note 10 above) 41.

<sup>111</sup> White Paper on Social Welfare, Chapter 7 at para 27.

<sup>112</sup> Taylor Committee Report (note 10 above) at 42. Measures to address income poverty are measures that ensure people have adequate incomes throughout their life cycle, from childhood through working age to old age. The Committee of Inquiry proposes that although income poverty can be addressed through a range of measures, a comprehensive social protection package should comprise at least one primary income transfer which ensures that all South Africans have some income to mitigate or eradicate destitution and starvation; measures to address, capability poverty are measures providing certain basic services deemed crucial to enable a person to live and function in society. This includes the provision of basic water and electricity, free and adequate healthcare, free education, food security, and affordable housing and transport; measures to address asset poverty shall consist of income-generating assets, such as land, and social capital such as community infrastructure. This addresses the key underlying structural basis of poverty and inequality in South Africa; measures to address special needs are measures that address special needs such as disability or child support.

### 1.9.6 Informal social security

Informal social security refers to those self-organised family, community or informal sector coping mechanisms.<sup>113</sup> It represents a way of life within communities, and it incorporates values that promote togetherness and a deep sense of belonging.<sup>114</sup>

Within communities, usually informal social security is distinguished by informal social arrangements, which can be divided into, traditional support systems, and self-organised systems.<sup>115</sup> Normally, the self-organised informal social security comprises a particular group of people within the community, including families, even neighbours. Example of such organised informal social security include: *stokvels*, societies and rotation money schemes.<sup>116</sup> On the other hand, traditional support system is based on the principle of solidarity and reciprocity. Under the traditional support system, the family serves as the line of defence to members who are unable to provide for themselves. Support provided may be in the form of cash or kind.

The role played by family is the most effective community response to the HIV/AIDS crisis in South Africa as affected households in need of food send their children to live with relatives. Relatives are then responsible for meeting the children's food and other requirements.<sup>117</sup>

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<sup>113</sup> Kaseke E 'Informal social security in Eastern and Southern Africa - Towards the development of social protection in the SADC Region' proceedings and outcomes of the conference held at the Helderfontein Conference Center, Johannesburg South Africa, 17-19 October 2001, 245.

<sup>114</sup> Cf Tungaraza F *et al* 'Social security systems in Tanzania' (2002) Vol.17 (2) *Journal of Social Development in Africa* 20-21; See also Dekker A 'Informal social security: A legal analysis' (2005) unpublished LLD Thesis, University of South Africa; See also Kaseke E (note 113 above).

<sup>115</sup> Tshoose C 'The impact of HIV/AIDS in the context of informal social security: Issues and trends from South African experience' (2010) 13 (3) *PER Journal* 411.

<sup>116</sup> Olivier M and Kaseke E 'Informal social security and formal social security: Developing an integrative approach' Paper presented at the SADC core group of social security specialists, regional conference on 'Social security in the making: Developments in the informal economy and informal social security' September 2004, 3-6.

<sup>117</sup> International Labour Office 'HIV/AIDS: A threat to decent work, productivity and development' (2000) International Labour Office 9.

The problems experienced by extended families in taking care of the children relate to, lack of knowledge about the available social grants, in other cases children become caregivers themselves or even heads of households. In many cases, such children become increasingly exposed to malnutrition, ill-health, abuse and exploitation.<sup>118</sup> Where older persons are caregivers of young children, sometimes they are not aware of the availability of other grants such as the Child Support Grant, the Care Dependency Grant for Disabled Children and the Foster Care Grant.<sup>119</sup>

It is clear that the role of informal social security cannot be dismissed as inappropriate. Nonetheless, its effect diminishes as the impact of HIV/AIDS intensifies. The rising numbers of child-headed households clearly indicate the extent to which informal social security has been stretched. When parents die or are too weak to do anything due to AIDS, the trend in most poor families is that relatives take care of the orphans.<sup>120</sup> Grandparents with their meagre social assistance grants, play an important role in looking after their grandchildren.<sup>121</sup> In the event that there are no relatives, the eldest child often assumes the role of a caregiver for her/his parents (if they are still alive) as well as its younger siblings.

From the above discussion, it follows that informal social security in South Africa has developed to such an extent that poor families are able to earn a living, in particular those people who are excluded by the formal social security scheme.

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<sup>118</sup> Gillespie S 'Child vulnerability and HIV/AIDS in Sub-Saharan Africa: What we know and what can be done' International Food Policy Research Institute, 17 October 2005, 2-6 available at <http://www.ifpri.org.pdf> (date of use 26 November 2013).

<sup>119</sup> National Report on the status of Older Persons, Report to the Second World Assembly on ageing: South Africa' Spain, April 2002, 23.

<sup>120</sup> Foster G 'Safety nets for children affected by HIV/AIDS in Southern Africa: A generation at Risk' Monograph No 109, December 2004 available at <http://www.iss.co.za/pubs/Monographs/No109/Chap4.htm> (date of use 26 November 2013); Gillespie (note 118 above) 5.

<sup>121</sup> Quigley H 'The South African old age pension: Exploring the role on poverty alleviation in households affected by HIV/AIDS' Paper presented at the 4<sup>th</sup> International Research Conference on Social Security, 5-7 May 2003.



Informal social security cannot, conceptually be separated from the formal social security. Dekker<sup>122</sup> notes that “the Taylor Committee Report seems to support the proposition that the definition of social security should include a move away from a risk-based approach towards a broader concept of providing everyone with a minimum standard of living”.

#### *1.9.7 The role of solidarity in the social security system*

Solidarity is necessary for the effective functioning of every social security system.<sup>123</sup> That system cannot function properly without a consciousness of national solidarity. The effort of developing social security must therefore be accompanied by efforts to promote this crucial sense of solidarity.<sup>124</sup>

Solidarity recognises that each of us, as human beings, have the same human dignity which must be equally protected. Each of us is seen as an individual within a society of other individuals, linked together by the bonding of our humanity.<sup>125</sup> The philosophy of solidarity requires that all social structures established in the community be inclusive rather than exclusive.<sup>126</sup> They should offer every person proper access to essential services such as health care, education and welfare as of right.<sup>127</sup>

Solidarity is one of the ultimate aims of social security, and enables the development of a sense of shared responsibility and the adoption of redistributive

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<sup>122</sup> Dekker A ‘Informal social security: A legal analysis’ (2005) unpublished LLD Thesis, University of South Africa, 143.

<sup>123</sup> Diop A ‘The need for solidarity: Social security systems in times of crises’ International Labour Office, Geneva available at <http://www.issa.int> (date of use 26 November 2013).

<sup>124</sup> ILO ‘Into the 21<sup>st</sup> century: The development of social security’ (Geneva, 1984) 115.

<sup>125</sup> *Sollicitudo rei socialis*, encyclical letter from Pope John Paul II, 1988, St. Paul Publications, Homebush para 38.

<sup>126</sup> Tshoose C ‘The emerging role of the constitutional value of *Ubuntu* for informal social security in South Africa’ (2009) Vol.4 *African Journal of Legal Studies* 14-18.

<sup>127</sup> O’Connor T and Sacco M ‘Market principles and welfare’ <http://www.aifs.gov.au/institute/pubs/fm1/fm36to.html>; See also Tshoose *ibid*.

policies.<sup>128</sup> Solidarity is especially relevant in the South African context considering the huge disparities in the social security system.<sup>129</sup>

The ideology of social security is that society is responsible for the welfare of the needy.<sup>130</sup> Solidarity is important as social security needs to be seen not simply as a charity, but as a form of mutual co-operation. It is a principle that must be promoted in every welfare state.<sup>131</sup> Solidarity then assists in diminishing social and economic discrimination and inequality.<sup>132</sup> Taylor-Gooby<sup>133</sup> posits that the emphasis on solidarity, understood as collective interest furnishes a basis for support for state welfare interventions.

It is argued in this study that solidarity enables the provision of a minimum level of protection to the socially deprived. This can be achieved through the careful construction of the contribution and benefit structure of public insurance funds or by employing tax and budget mechanisms. Example in the South African context is the inclusion of high-income earners as contributors to the Unemployment Insurance Fund.

The Unemployment Insurance Act<sup>134</sup> also introduces a graduated or sliding scale of benefits. This implies that the percentage of benefits differs according to the rate of income of the contributor. Lower income earners receive a higher rate of

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<sup>128</sup> Diop A 'The need for solidarity: Social security systems in times of crises' International Labour Office, Geneva available at <http://www.issa.int> (date of use 26 November 2013).

<sup>129</sup> Olivier M 'The concept of social security' in Olivier M *et al Social security: A legal analysis* (Durban, Butterworths, 2003) 38.

<sup>130</sup> Cf Tostensen A 'Feasible social security in Africa' (2008) Vol.10 (2) *Development Issues* 5-6 available at [http://www.iss.nl/fileadmin/ASSETS/iss/Documents/DevISSues/DevISSues\\_Volume\\_10\\_\\_number\\_2\\_\\_November\\_2008\\_01.pdf](http://www.iss.nl/fileadmin/ASSETS/iss/Documents/DevISSues/DevISSues_Volume_10__number_2__November_2008_01.pdf) (date of use 26 November 2013).

<sup>131</sup> The principle of solidarity in social welfare available at <http://www2.rgu.ac.uk/publicpolicy/introduction/socialsecurity.htm> (date of use 26 November 2013).

<sup>132</sup> Cf Adesina J 'Beyond the social protection paradigm: Social policy in Africa's development' (2011) Vol.32 (4) *Canadian Journal of Development Studies* 464-466.

<sup>133</sup> Cf Taylor-Gooby P 'Opportunity and solidarity' (2011) Vol.40 (3) *Journal of Social Policy* 458.

<sup>134</sup> Unemployment Insurance Act 63 of 2001.

benefits than higher income earners. The provision of social assistance grants further illustrates an example of solidarity in the South African system.

### 1.9.8 *The right to health care*

The intention here is to discuss the right to health care in tandem to HIV/AIDS pandemic. The right to have access to health care is entrenched in South Africa's Constitution,<sup>135</sup> as one of the fundamental rights. The Constitution provides that the state must take reasonable legislative and other measures, within the available resources, to achieve the progressive realisation of the right to health care.<sup>136</sup> The right to health and medical care can be included as the components of the right to adequate standard of living, including food, clothing, housing, medical care, and necessary social services.<sup>137</sup>

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to health is extended to the underlying conditions for health such as nutrition, and access to water.<sup>138</sup> This is important bearing in mind that access to medicine alone may not be sufficient to ensure good health. As the HIV/AIDS pandemic has shown, for example, access to adequate nutrition is critical to prolonging the lives of infected people living with HIV/AIDS.

### 1.9.9 *Vulnerability and safety-nets*

The concept of vulnerability can be defined as the inability of an individual to exploit opportunities presented by society for their self-betterment.<sup>139</sup> Conversely, safety-nets can be defined as measure adopted to mitigate short-

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<sup>135</sup> Constitution of the Republic of South Africa. In this regard, sections 27(1)(a), 27(2) are relevant. Section 27(1), states that everyone has the right to have access to health care services, including reproductive health care.

<sup>136</sup> Section 27(2) of the Constitution.

<sup>137</sup> See Craven M *The international convention on economic and cultural rights: A perspective on its development* (Clarendon Press, 1995) 415.

<sup>138</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; For further reading in this regard, see International Covenant on Economic, Social and Cultural Rights (CESCR) General Comment 14, the right to the highest attainable standard of health (Art 12 of the ICESCR) (22<sup>nd</sup> Session, 2000) para 4.

<sup>139</sup> Ghai D 'Social Security: Learning from global experiences to reach the poor' (2003) 4 *Journal of Human Development* 125-126.

term adverse effects of economic reforms on the poor. More broadly, safety-nets are linked to the quest for social security, understood as the reduction of vulnerability or poverty by social means.<sup>140</sup>

#### 1.9.10 Disability

There is no general statutory definition of the concept of disability and much depends on the context within which it is used.<sup>141</sup> In its Code of Practice on Managing Disability in the Workplace, the ILO defines a disabled person as “an individual whose prospects of securing, returning to, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual or mental impairment”.<sup>142</sup>

What follows from this definition is that disability is dependent upon the theoretical construct that one uses to understand disability.<sup>143</sup> It can be viewed within the medical model, which looks purely at the physical or mental impairment and measures the degree of severity as the extent to which certain activities of daily living cannot be undertaken.<sup>144</sup>

This raises numerous practical and administrative problems. Currently, within the South African social assistance system, disability is measured and defined entirely and only by the medical profession.<sup>145</sup> Their interpretation determines whether a person should qualify for a grant or not. Hence, South Africa seems to

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<sup>140</sup> Ghai *ibid.*

<sup>141</sup> Olivier *et al* ‘Social insurance and social assistance: Towards a coherent approach’ A report to the Department of Welfare, South Africa (1999) 80.

<sup>142</sup> ILO, Managing disability in the workplace, ILO code of practice (2002) 4 available [http://ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_103324.pdf](http://ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_103324.pdf) (date of use 26 November 2013).

<sup>143</sup> Hardy C and Hlaba M ‘Choosing anti-retroviral or choosing grants: Preliminary research on HIV and social security’ October 2004 - January 2005, 8.

<sup>144</sup> See Olivier M *et al* *Social security: A legal analysis* (note 83 above) 312-318.

<sup>145</sup> Section 9 of the SAA. A person is, subject to the provisions of section 5, eligible for a disability grant, if he or she (a) has attained the prescribed age: and (b) is owing to a physical or mental disabilities, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

have opted to integrate HIV/AIDS in existing safety nets, instead of creating new ones.

The South African social assistance legislation is sometimes vague and characterised by inconsistent definitions. This is evident from its definition of disability,<sup>146</sup> as it is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such impairment.<sup>147</sup>

It is clear that a person suffering from HIV/AIDS cannot be classified as a handicapped person. A handicapped person is defined as including a blind person, a permanently disabled person, a person with artificial limb and a person suffering from mental illness.<sup>148</sup> The only status that might include a person suffering from HIV/AIDS will be permanently disabled.

#### *1.9.11 Social protection floor*

The term social protection floor is used to describe a basic set of social rights, services and facilities that every person should enjoy.<sup>149</sup> It corresponds in many ways to the existing notion of core obligations, to ensure the realisation of minimum essential levels of rights embodied in human rights treaties.

According to the ILO,<sup>150</sup> social protection floor consists of the following two main elements that help to realise human rights:

- Services, geographical and financial access to essential services such as water and sanitation, health, and education;

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<sup>146</sup> *Ibid.*

<sup>147</sup> Section 9(b) of the SAA.

<sup>148</sup> Joyce M *The South African Oxford School Dictionary* (1996) 203.

<sup>149</sup> ILO *A Social protection floor for all* (2010) No.12 available at [www.ilo.org/paradev](http://www.ilo.org/paradev) (date of use 26 November 2013); See also ILO 'Extending social security to all: A guide through challenges and options' (2010) Geneva, 58.

<sup>150</sup> ILO *Social Protection Floors Recommendation 2012* (No. 202) *Recommendation concerning National Floors of Social Protection*.

- Transfers, a basic set of essential social transfers, in cash or in kind, to provide minimum income security and access to essential services, including health care.

The ILO uses the concept of social protection floor to cover a wide range of programmes, which includes among others, issues relating to safety at work, labour migration, and other aspects of working conditions such as hours of work and wages.<sup>151</sup>

### 1.9.12 Extending coverage

In the field of social protection, coverage is usually defined in terms of two broad approaches. The first approach defines coverage as the legal entitlement that citizens, workers, and their households have to specific public benefits or services.<sup>152</sup> The second approach is to measure the actual number of recipients of such benefits or services.<sup>153</sup>

To measure coverage, different methods may be used. For instance, contributory programmes generally measures the number of contributors as a percentage of the labour force, while tax-financed programmes may measure coverage as a percentage of the national population or as a percentage of the target population receiving support; for example, access to social assistance for the poor households, in which eligibility test will be used to ensure access.

## 10 Organisation of the study

This study consists of eight chapters, divided as follows:

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<sup>151</sup> International Labour Organisation *Extending social security to all: A guide through challenges and options* (Geneva, 2010) 125-128.

<sup>152</sup> Rofman R and Carranza E 'Social security coverage in Latin America' (2005) World Bank available at [http://siteresources.worldbank.org/SOCIAL\\_PROTECTION/Resources/0523.pdf](http://siteresources.worldbank.org/SOCIAL_PROTECTION/Resources/0523.pdf) (date of use 02 January 2013) 3-42.

<sup>153</sup> Rofman R and Carranza E *ibid.*

### **Chapter One: Introduction and conceptual overview of the study**

This chapter provides a synopsis of the study by setting out the introduction and background to the thesis.

### **Chapter Two: Historical background of the system of social security in South Africa**

This chapter examines the history of social security, socio-economic legacy, demographic structure and trends, demographic composition of the South African population, and the socio-economic realities faced by households in South Africa. This includes education levels, labour market trends, unemployment, employment, income inequality, expenditures, access to assets, and access to social services, poverty, and gender inequalities. In its conclusion, the chapter adopts a multi-faceted approach, by acknowledging the past and the present, and presents a way forward for social security reform in South Africa.

### **Chapter Three: Constitutional analysis of the current system of social security**

Here, one investigates the constitutional framework of the right to have access to social security in South Africa.

### **Chapter Four: The administration and enforcement of social security in South Africa: A discussion of selected case law**

In this chapter, one discusses the administration of social security. In addition, it examines judgements decided by the courts in the area of social security. The aim is to scrutinise how the courts have interpreted and enforced the right to have access to social security in South Africa.

### **Chapter Five: International and regional context of social security**

There has been a number of international, regional and national political and policy directives aimed at reducing poverty, improving coverage and quality of life for the poor. This chapter considers international law perspectives, the standards

and norms that are set by the ILO to which member states must comply. It further reviews generic options for strengthening social protection, social assistance coverage, based on internationally accepted norms and standards.

### **Chapter Six: The system of social security in India**

This chapter looks at how the Indian Courts have interpreted, protected, and promoted the economic and social rights entrenched in the Indian Constitution is subject matter of this chapter. It also examines the background and developmental context of social security law in India and sets out India's economic and social situation, and the key features of social security protection in India. Furthermore, it discusses the historical background of the social and economic life of the Indian people, the composition of the Indian population in terms of its general profile, income level, occupational structure and its social characteristics.

### **Chapter Seven: The system of social security in Brazil**

This chapter evaluates the impact of cash transfers in Brazil, and it also looks at the role of *bolsa família*, that is the largest conditional cash transfer programme in the world in as far as poverty alleviation and the improvement of the lives of the poor people in Brazil are concerned. It also examines other programmes aimed at poverty alleviation in Brazil.

### **Chapter Eight: Conclusion and recommendations**

In summing up the conclusions and recommendations on possible methods of expanding and strengthening social assistance coverage to the poor households in South Africa, attention has been drawn to some valuable lessons from India and Brazil bearing in mind the policy response to the empowerment of the poor. This chapter further attempted to critically examine the modalities of strengthening and expanding social assistance coverage to the poor in South Africa in order to include those who were marginalised. It equally acknowledges the role of the labour market in social security, and the challenges posed by the



fact that a few number of South Africans are adequately equipped to participate effectively in the labour market to secure their social needs.<sup>154</sup> In effect, the study argues that until the structural causes of poverty and inequalities in South Africa are addressed, social assistance will remain a far more crucial mechanism for poverty alleviation than social insurance.

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<sup>154</sup> Benjamin P 'A review of labour markets in South Africa, labour market regulation: International and South African perspective' October (2005) 40-45 available at [www.hsrc.ac.za](http://www.hsrc.ac.za) (date of use 26 November 2013).

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## CHAPTER TWO

### A HISTORICAL PERSPECTIVE ON THE SOCIO-ECONOMIC CONTEXT OF SOCIAL SECURITY IN SOUTH AFRICA

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#### 2.1 Introduction

The legacy of our past is not only that of difficulty and despair, but we can also build on this past to get things done today.<sup>155</sup> By understanding the historical development of social security, and by re-evaluating certain assumptions about it, a better perspective on the future of the subject is provided. Social security, as it is currently understood, is a relatively new concept.<sup>156</sup> It is important that this reality must be known when discussing contemporary developments in that field. In that context, this chapter begins by discussing social security during the colonial and apartheid eras by examining the historical background of social security in South Africa.

Triegaardt<sup>157</sup> notes that European and British social security systems influenced social security systems in developing countries.<sup>158</sup> For this purpose, the following periods in the South African history (discussed later) are notable, namely; the period of colonialism, the period of apartheid, and the period of democracy. In her article entitled: 'Memory, history and guilt' in Bernhard Schlink's *Slabbert*<sup>159</sup>

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<sup>155</sup> Gordhan P Budget Speech by the Minister of Finance of the Republic of South Africa, Cape Town, 22 February 2012 available at <http://www.info.gov.za/speeches/2010/10021715051004.htm> (date of use 25 February 2012).

<sup>156</sup> Midgley J 'Social development and social protection: New opportunities and challenges' (2013) Vol.30 (1) *Development Southern Africa* 3.

<sup>157</sup> Triegaardt J 'Transformation of social security in South Africa: Accomplishments and challenges for partnerships in development' (2007) Development Bank of South Africa available at <http://www.dbsa.org/Research/Documents> (date of use 25 February 2013); See also Ahmad E *et al* 'Social security in developing countries' (1992) Vol. 102 (413) *The Economic Journal* 994-995; Argyle J and Preston-Whyte E (eds) *Social system and tradition in Southern Africa: Essays in honour of Eileen Krige* (Cape Town, Oxford University Press, 1978).

<sup>158</sup> See also Devereux S 'Trajectories of social protection in Africa' (2013) Vol.30 (1) *Development Southern Africa* 13-18.

<sup>159</sup> Slabbert M 'Memory, history and guilt in Bernhard Schlink's *Der Vorleser*' (2009) 15-2 *Fundamina* 154-155; Slabbert F *The other side of history - An anecdotal reflection on*

referring to the work of Nietzsche, notes that history conveys important lessons for the present, and provides at most a small measure of comfort for those who wish to escape the present in the past. She further acknowledges that doing history means building bridges between the past and the present.<sup>160</sup>

Rossouw<sup>161</sup> argues that wisdom sometimes looks to the past for guidance in the future. There are a number of studies showing the history of social security in South Africa.<sup>162</sup> For instance, Davis<sup>163</sup> contends that any set of provisions, including socio-economic rights, cannot be analysed outside the context of the document of which they form a part and outside the particular history in which that document is located. Recently, Dekker<sup>164</sup> examined the history of social security in South Africa and argued that the traditional Western European social security model led to the development of a welfare state, which was intended to benefit only the minority population. According to her, the past illustrates how the expansion of the present social security system had a very specific racial element in that it excluded Africans from the scope of its protection.<sup>165</sup>

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*political transition in South Africa* (Johannesburg & Cape Town, Jonathan Ball Publishers, 2006) 1-175.

<sup>160</sup> Slabbert *ibid*.

<sup>161</sup> Rossouw G and Carabine D *Introduction in fraud and the African renaissance* (Uganda, Martyrs University Press, 1999).

<sup>162</sup> Van der Berg S 'South African social security under apartheid and beyond' (1997) Vol.14 (4) *Development Southern Africa* 481-503; Johnstone F *Class, race and gold: A study of class relations, discrimination in South Africa* (London, Routledge,1976);Keegan T *Colonial South Africa and the origins of the racial order* (1996);Cf Williams C and Johnson M *Race and ethnicity in a welfare society* (Open University Press McGraw-Hill Education, 2010)1-13;Mooney G and Lavalette M *Class struggle and social welfare* (RoutledgeTaylor & Francis Group, 2000) 1-12.

<sup>163</sup> Davis D 'Socio-economic rights: Do they deliver the goods' (2008) Vol.6 *International Journal of Constitutional Law* 690-691.

<sup>164</sup> Dekker A 'Informal social security: A legal analysis' (2005) unpublished LLD Thesis, University of South Africa 20; Pauw K and Mncube L 'Expanding the social security net in South Africa: Opportunities, challenges and constraints' Development Policy Research Unit, University of Cape Town, 2007, 12 available at <http://www.commerce.uct.ac.za> (date of use 11 June 2011); Van der Berg S 'South African social security under apartheid and beyond' (1997) Vol.14 (4) *Development Southern Africa* 481-503.

<sup>165</sup> Liffman R *et al* 'Those who have and those who don't: An investigation into the limited scope of application of social security in South Africa' (2002) 15 *Law, Democracy and Development (LDD)* 15-20.

Accordingly, this laid the foundation for the exclusionary nature of the present system.<sup>166</sup>

Furthermore, the chapter examines the objectives of social security, the socio-economic data, poverty, unemployment and employment, income inequalities, labour market status. This underlying condition contributes to the exclusionary nature of the system of social security in South Africa. Lastly, the investigation in this chapter concludes by looking at the role of the state in providing social security.

## **2.2 Events and periods shaping the system of social security in South Africa**

### *2.2.1 Overview*

South Africa achieved its freedom in 1994 after more than three centuries of colonialism and apartheid.<sup>167</sup> Apartheid brought a devastating impact on the lives of Africans.<sup>168</sup> The Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,<sup>169</sup> described the impact of apartheid as follows:

Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.<sup>170</sup>

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<sup>166</sup> Liffman R 'Social security as a constitutional Imperative: An analysis and Comparative perspective with emphasis on the effect of Globalisation on marginalisation' in Olivier M *et al The extension of social security protection in South Africa: A legal inquiry* 1<sup>st</sup> ed (Siber Ink, 2001) 29-31.

<sup>167</sup> Dugard J *Human rights and the South African legal order* (Princeton, Princeton University Press, 1978) 73.

<sup>168</sup> Friedman S 'Apartheid still shapes us – But it is not an excuse' *Business Day* (17 April 2013); Alexander N *An ordinary country: Issues in the transition from apartheid to democracy* (Pietermaritzburg, University of Natal Press, 2002); Alden C *Apartheid's last stand: The rise and fall of the South African security state* (New York, Martin's Press, 1996).

<sup>169</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

<sup>170</sup> *Ex Parte Chairperson of the Constitutional Assembly* (note 169 above) para 7; Cf Johnson R 'Education: Keystone of apartheid' (1982) Vol.13 (3) *Anthropology & Education Quarterly, African Education and Social Stratification* 214-233.

The democratically elected government inherited a racially divided society with vast majority of the Black population defined as poor.<sup>171</sup>

#### 2.2.1.1 *The system of social security under colonialism*

Chaskalson<sup>172</sup> notes that what is known today as the Republic of South Africa was not a virgin territory when the first settlers from Europe arrived at the tip of the continent in the 17<sup>th</sup> century. In his observation, it was the home of various African tribes, each with their own legal systems. Consequently, the history of the South African social security system dates back beyond the era of colonialism and apartheid.<sup>173</sup>

The impact of colonisation on the system of social security in South Africa is crucial in the following respects. It provides a platform within which the present conditions prevailing in South Africa can be measured, simply put, the achievements made since the advent of democracy. Consequently, a scrutiny of the phenomenon of colonialism is necessary to appreciate the degree to which it influenced not only the economic and political development of South Africa but also the system of social security in South Africa.

Before dealing with the nature of colonialism in South Africa, it is important to deal with the following question: Why was Europe interested in Africa in the first place? Scholars suggest that the first reason has to do with the need to gather scientific knowledge about the unknown.<sup>174</sup> Africa, then referred to as the “Dark

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<sup>171</sup> May J *et al* 'Poverty and inequality in South Africa, 1998' available at <http://www.info.gov.za/otherdocs/1998/poverty/report.pdf> (date of use 14 August 2013); London L and De Gruchy J 'Learning from our Apartheid past: Human rights challenges for health professionals in contemporary South Africa' (2000) 5 *Ethn Health* 227-241.

<sup>172</sup> Chaskalson A in Cooper L Dickson B and Drewry G *The Judicial House of Lords – 1876 - 2009* (Oxford University Press, 2009) 360-366.

<sup>173</sup> Woolard I *et al* 'The history and impact of social security in South Africa: Experiences and lessons' (2011) Vol.32 (4) *Canadian Journal of Development Studies* 360-361.

<sup>174</sup> Mazrui A 'European exploration and Africa's self-discovery' Vol.7 (4) (1969) *The Journal of Modern African Studies* 661 - 666; Hochschild A *King leopold's ghost: A story of greed, terror, and heroism in colonial Africa* (New York: Mariner Books, 1999) chapter 8; Ranger T 'Europeans in Black Africa' (1998) Vol.9 (2) *Journal of World History* 255-268.

Continent”,<sup>175</sup> provided just the right kind of challenge. It held a plethora of mystery for European explorers who travelled, observed and recorded what they saw.<sup>176</sup> Jan van Riebeeck established the first permanent European settlement on 06 April 1652.<sup>177</sup> Upon his arrival, he established his supply station at the Cape.<sup>178</sup> Jan van Riebeeck together with other settlers engaged in farming to supply the Cape and the many passing ships with fresh water, vegetables, meat and medical assistance.<sup>179</sup>

He brought in slaves from places such as Java, Madagascar and Angola to work on the farms in South Africa. The Cape Coloured people started emerging inevitably due to mixed marriages between Europeans, Asians and the indigenous peoples.<sup>180</sup> The Dutch, through the Dutch East India Company, governed the expanding Cape Colony from 1652 to 1795. In 1652, they established a refreshment station at the Cape to supply their ships navigating the trade route to Batavia, and, as the settlement grew and became more permanent, courts were established to enforce local statutes and colonial legislation.<sup>181</sup>

During 1657, the Dutch Reformed Church and the Dutch East India Company were involved in the provision of social welfare to White farmers who

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<sup>175</sup> Brantlinger P ‘Victorians and Africans: The genealogy of the myth of the Dark Continent’ (1985) Vol.12 (1) *Critical Inquiry* 166-199.

<sup>176</sup> Fritsch K ‘You have everything confused and mixed up...! Georg Schweinfurth, knowledge and cartography of Africa in the 19<sup>th</sup> century’ (2009) Vol.36 *History in Africa* 88-99.

<sup>177</sup> For a detailed reading on the history of South Africa see Rassool C and Witz L ‘The 1952 Jan Van Riebeeck tercentenary festival: Constructing and contesting public national history in South Africa’ (1993) Vol.34 (3) *The Journal of African History* 447-468; Petzold J ‘In search of a new national history: Debunking old heroes in Robert Kirby’s the secret letters of Jan van Riebeeck’ (2001) Vol.32 (3) *Research in African Literature* 143-151; Bank A ‘The great debate and the origins of South African historiography’ (1997) Vol.38 (2) *The Journal of African History* 261-281.

<sup>178</sup> Weisbord R ‘Who got there first’ (1966) Vol.13 (2) *Africa Today* 10.

<sup>179</sup> South African history online ‘The arrival of Jan Van Riebeeck in the Cape-6 April 1652’ available at <http://www.sahistory.org.za/topic/arrival-jan-van-riebeeck-cape-6-april-1652> (date of use 20 July 2014).

<sup>180</sup> Buchanan K and Hurwitz N ‘The Coloured community in the Union of South Africa’ (1950) Vol.40 (3) *Geographical Review* 397-414.

<sup>181</sup> Chaskalson A (note 172 above).

experienced drought.<sup>182</sup> The racial attitudes influenced the distribution of poverty relief and these attitudes were linked to a Calvinist belief in predestination and the superiority of White people.<sup>183</sup> During the industrialisation process and the establishment of the mining industry, the churches and voluntary initiatives were responsible for welfare distribution, leading to the development of a national welfare plan.<sup>184</sup>

At the same time, people were excluded from welfare provision, such as Black Africans, and as such started their own self-help and voluntary organisations such as *stokvels*,<sup>185</sup> burial societies, church groups and professional teachers associations. Social assistance was already inscribed as state responsibility, but in a racially discriminatory form, prior to the creation of apartheid.<sup>186</sup> Govender confirms that in the pre-colonial period, there were no formal social security arrangements and social security was based on informal social arrangements.<sup>187</sup> The state played a limited role towards the provisioning of social security and the church was the main establishment which cared for the poor and the destitute.<sup>188</sup>

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<sup>182</sup> Brown M and Neku J 'A historical review of the South African social welfare system and social work practitioners' views on its current status' (2005) Vol.48 (3) *International Social Work* 301.

<sup>183</sup> Brown *ibid.*

<sup>184</sup> Swart I *et al Welfare, religion and gender in post-apartheid South Africa, constructing a South - North dialogue* (Stellenbosch, Sun Press, 2012) 145-205; Cf Robbins D 'Voluntary organisations and the social state in the European community' (1990) Vol.1 (2) *International Journal of Voluntary and Non-profit Organisations* 98-127.

<sup>185</sup> A "stokvel" is a savings society in which every member contributes a certain amount per month and one person gets the total amount in a month, so that eventually everyone will have a chance to get the total amount when the risk (death of a member or family) befall any member or a family member or any person registered by the main member.

<sup>186</sup> Hassim S 'Gender equality and developmental social welfare in South Africa' in Razavi S and Hassim S (eds.), *Gender and social policy in a global context: Uncovering the gendered structure of the Social* (Palgrave Macmillan, Basingstoke, 2006) 109 -129.

<sup>187</sup> Govender M 'Conditional cash transfers as a means of addressing poverty in South Africa' (2011) Unpublished Doctor of Commerce Thesis, University of South Africa, 79-81.

<sup>188</sup> Van der Berg S 'South African social security under Apartheid and beyond' (1997) Vol. 14 (4) *Development Southern Africa* 481-503. For further reading on the role of religious groups in extending social protection, see Mpedi G 'The role of religious values in extending social protection: A South African perspective' (2008) 1 *Acta Theologica* 105-120.

In addition, the system of social security was also influenced by the first British occupation of the Cape Colony from 1795 to 1803.<sup>189</sup> Between 1803 and 1806, the Batavian Republic ruled the colony.<sup>190</sup> The British ruled the Cape again from 1806 to 1823. During this period, the missionaries started arriving, at first only from the Monrovia Brethren and the London Missionary Society, but later German, Dutch, Danish, and Flemish missionaries joined them.<sup>191</sup> From 1820 to 1824, about 4 500 immigrants arrived from Ireland, England and Scotland. These immigrants are referred to as the 1820 British Settlers.<sup>192</sup>

In 1836, a group of Dutch settlers and their families started migrating into the interior of the country.<sup>193</sup> This migration is commonly referred to as the Great Trek and it led to the formation of the two Boer republics, the Orange Free State and the Transvaal.<sup>194</sup> The diamond fields in Kimberley were discovered in 1869.<sup>195</sup> The gold fields in the Transvaal were discovered in 1886. These discoveries brought an influx of fortune seekers.

The Dutch system of poverty relief was transferred to the Cape Colony but soon took on a racial dimension in terms of the social services that were provided to the needy.<sup>196</sup> Visser argues that the foundations of racial discrimination, the

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<sup>189</sup> Van Der Merwe T 'Events, views and ideologies which shaped social security in South Africa' (1997) Vol.12 *South African Journal of Economic History* 80-85; For further reading on the system of social security on colonial governments, see Eckert A 'Regulating the social: Social security, social welfare and the state in late colonial Tanzania' (2004) Vol.45 (3) *Journal of African History* 472-483.

<sup>190</sup> Beck R *The history of South Africa 2<sup>nd</sup> ed* (United States of America, Greenwood, 2014) 55.

<sup>191</sup> Villa-Vicencio C *Christianity and the Colonisation of South Africa, 1487-1883: A documentary History* (Pretoria, Unisa Press, 2009) 1-24; See also Comaroff J *Revelation and revolution: Christianity, colonialism and consciousness in South Africa* (Chicago: Univ. of Chicago Press, 1991) 1775-1851.

<sup>192</sup> Campbell C 'British South Africa: A history of the colony of the Cape of Good Hope from its conquest 1975 to the settlement of Albany by the British Emigration of 1819 [A.D. 1795 – A.D. 1825]' 4-50 available at <http://www.cdbooks-r-us/pdf> (date of use 1 June 2013).

<sup>193</sup> Guelke L 'Frontier settlement in early Dutch South Africa' (1976) Vol.66 (1) *Association of American Geographers* 25-42.

<sup>194</sup> Daniels R 'The agrarian land question in South Africa in its historical context, 1652-1988' (1989) Vol.48 (3) *American Journal of Economics and Sociology* 328-329.

<sup>195</sup> Daniels R *ibid.*

<sup>196</sup> Visser W 'Shifting RDP into GEAR-The government's dilemma in providing an equitable system of social security for the 'new' South Africa' University of Stellenbosch, South



denigration of indigenous ways, paternalism in the social services and the distorted nature of social welfare policies favouring Whites population was established during colonial times.<sup>197</sup> The pre-colonial society (in particular Africans) in South Africa relied mainly on the kinship group, women, communalism and mutual aid to meet human needs.<sup>198</sup> Moreover, male dominance marked patriarchal and patrilineal kinship group relations and authority over land, headship of households and the welfare of children.<sup>199</sup> Conversely, women occupied inferior position in a patriarchic society accompanied by the sex-based division of labour, which preceded colonialism, apartheid and a class-based system.<sup>200</sup>

South Africa was first a Dutch colony from the mid-17th century to the late 18th century, when the British acquired sovereignty over the Cape Colony in 1795.<sup>201</sup> British imperial rule ended with the formation of the Union of South Africa in 1910,<sup>202</sup> under the influence of the imperial Government, a union of the four colonies (the Cape Colony, Natal, the Transvaal, and the Orange Free State Colony), the Union of South Africa, was established, as a British Dominion.<sup>203</sup>

Midgley asserts that British colonialism was achieved through conquest, conflict, violence and wars between the indigenous people and the settlers, and between the Dutch and British settlers in a struggle for power and control over land and

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Africa, Paper presented at the 40th ITH Linzer Konferenz, 17 September 2004 available at [http://sun025.sun.ac.za/portal/page/portal/Arts/Departemente1/geskiedenis/docs/rdp\\_into\\_gear.pdf](http://sun025.sun.ac.za/portal/page/portal/Arts/Departemente1/geskiedenis/docs/rdp_into_gear.pdf) (date of use 25 November 2013).

<sup>197</sup> Visser *ibid.*

<sup>198</sup> McKendrick B *Introduction to social work* ed (Pretoria, Haum Tertiary, 1990) 30-43

<sup>199</sup> Cf Venter M 'Community culture and tradition: Maintaining male dominance in conservative institutions' (1995-1996) Vol.12 (1) *Journal of Law and Religion* 61-84.

<sup>200</sup> Unterhalter E 'Women in struggle: South Africa' (1983) Vol.5 (4) *Third World Quarterly* 887-889.

<sup>201</sup> Elphick R and Malherbe V 'The Khoisan to 1828' in Elphick R and Giliomee H (eds) *The shaping of South African society 1652-1840* (Cape Town, Maskew Miller Longman, 1989) 7-11.

<sup>202</sup> Frederick C 'Making empire: Colonial encounters and the creation of imperial rule in nineteenth-century Africa (review)' (2010) 40 (4) *Journal of Interdisciplinary History* 639-640.

<sup>203</sup> Leacock S 'The Union of South Africa' (1910) Vol.4 (4) *The American Political Science Review* 498-507.

labour.<sup>204</sup> At the end of the Anglo-Boer War in 1902, the National Convention of 1909 was established to forge peace between British and Afrikaners.<sup>205</sup> The outcome of the Convention was the drafting of the Union Constitution that codified White supremacy.<sup>206</sup> Blacks were denied the right to vote and racial discrimination was legitimised by the legal order, and Whites used their political and economic powers to entrench and further their dominant social, economic, and political position over Africans.<sup>207</sup>

During this era, the Afrikaaner nationalist movement focused on the needs of White Afrikaners and started a State Welfare Department in 1937 based on the recommendations of the Carnegie Commission of 1929.<sup>208</sup> The National Convention promised peace and reconciliation between English and Afrikaaners and self-government within the Empire. Nevertheless, the National Convention failed to take account of Black aspirations and which eventually overshadowed the 20th century.<sup>209</sup>

### 2.2.1.2 System of social security under apartheid

From the above discussion, it becomes clear that the foundations of apartheid in South Africa were established before the Nationalist Party came into power in 1948.<sup>210</sup> It was during the 17th century when the Dutch settlers followed by the

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<sup>204</sup> Midgley J and Piachaud D *Colonialism and welfare: Social policy and the British imperial legacy* (Edward Elgar Publishing Limited, 2011) 72-73.

<sup>205</sup> Ramutsindela M 'National identity in South Africa: The search for harmony' (1997) Vol.43 (1) *GeoJournal* 100-108.

<sup>206</sup> Carter M 'The black experience in South Africa' (1976) Vol.1 (3) *The Wilson Quarterly* 51-63.

<sup>207</sup> Farrah S 'Not black, not white: The politics of apartheid in South Africa (2007) *New World African Press* 6-89.

<sup>208</sup> Hassim S 'Gender equality and developmental social welfare in South Africa' in Razavi S and Hassim S (eds.) *Gender and Social Policy in a Global Context: Uncovering the Gendered Structure of the Social* (Palgrave Macmillan, Basingstoke, 2006) 111.

<sup>209</sup> Cf Holliday N 'South Africa must federate or fail' (1991) Vol.8 (3) *International Journal of World Peace* 37-41.

<sup>210</sup> Yudelman D *The emergence of modern South Africa: State, capital, and the incorporation of organised labour on the South African gold fields, 1902-1939* (Greenwood Press, 1983)1-42.

British conquered the indigenous and African immigrant people.<sup>211</sup> By the close of the 19th century, labour policies had been developed that established the formal policy of apartheid that was to follow.<sup>212</sup>

Lund observes that when the National Party came to power in 1948 social welfare was reserved for Whites.<sup>213</sup> He further argues that this model was built on two-generational nuclear family, with a father in formal employment, and a mother undertaking the reproductive work at home. According to Lund, Africans, Coloureds, and Indians population groups were expected to take care of themselves, according to their own 'cultural norms and values'. Activity in child welfare between 1905 and 1910 resulted in the Children's Protection Act of 1913, which provided maintenance grants for children.<sup>214</sup> Very few of these grants reached African parents and none were given to rural Africans whose children<sup>215</sup> were expected to be cared for in the reserves by chiefs.<sup>216</sup> The implementation of social welfare during apartheid was based on racial lines.<sup>217</sup>

The government created the *Bantustans*, mainly underdeveloped rural areas that had been traditionally settled by Africans, into which millions of additional

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<sup>211</sup> Cf Bleich E 'The legacies of history? Colonisation and immigrant integration in Britain and France' (2005) (34) *Theory and Society* 171-195.

<sup>212</sup> Mariotti M 'Labour markets during apartheid in South Africa' (2012) Vol.65 (3) *The Economic History Review* 1102-1105; See also Seeking J 'Not a single White person should be allowed to go under: Swartgevaar and the origins of South Africa's welfare state' (2007) Vol.48 (3) *The Journal of African History* 375-394.

<sup>213</sup> Lund F 'South Africa: Transition under pressure' in Graig G and Alcock P *International social policy: Welfare regimes in the developed world 2<sup>nd</sup> ed* (Palgrave Macmillan, 2009) 268-270; Devereux S 'Social pensions in Southern Africa in the twentieth century' (2007) Vol.33 (3) *Journal of Southern African Studies (JSAS)* 539-560; Seekings J *et al* 'Hopes and views about the future: The radical moment of South African welfare reform' in Dubow S and Jeeves A (eds) *South Africa's 1940s: Worlds of possibilities* (Cape Town, Double Storey, 2005) 44-63; Michael R *et al* 'One kind of freedom: Poverty dynamics in post-apartheid South Africa' (2001) Vol.19 (3) *World Development* 1988.

<sup>214</sup> Borat H 'The South African social safety net: Past, present and future' (1995) 12 (4) *Development Southern Africa* 595-596.

<sup>215</sup> Schreiber L 'Institutions and policy change: The development of the child support grant in South Africa' (2014) Vol.41 (2) *South African Journal of Political Studies* 271-274.

<sup>216</sup> Borat (note 214 above).

<sup>217</sup> Brown M and Neku J 'A historical review of the South African social welfare system and social work practitioners' views on its current status' (2005) 48 (3) *International Social Work* 301-306.

Africans were forcibly removed and given token forms of 'self-government.'<sup>218</sup> Liebenberg posits that apartheid represented not only the disenfranchisement of the black population of South Africa, but also depicted an institutionalised system which maintained White domination and privilege in the political, economic, social and cultural spheres.<sup>219</sup>

In expounding on the legacy of apartheid in South Africa, the Constitutional Court in *Brink v Kitshoff* pointed out that:

Apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'White' which constituted nearly 90% of the landmass of South Africa, senior jobs and access to established schools and universities were denied to them, civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.<sup>220</sup>

During 1948 when the National Party came to power, public welfare policies for Whites became more expansive, whereas welfare policies for Blacks were non-existent.<sup>221</sup> Although formally urban Africans were included in the maintenance system, Bhorat<sup>222</sup> points out that very few of these grants reached African parents and none were given to people living in rural areas.

It is within this context that the violation of human rights by the National Party took the form of the unequal distribution of economic opportunities in favour of

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<sup>218</sup> For a detailed discussion on this topic see Anthony A and Amato A 'The *Bantustan* proposals for South-West Africa' (1966) *The Journal of Modern African Studies* (4) 177-192; Lipton M 'Independent *bantustans*' (1972) *International Affairs* (48) 1-19; Cf The White Paper on Local Government (1998) 1.

<sup>219</sup> Liebenberg S *Socio-economic rights adjudication under a transformative Constitution* (Juta & Co. Ltd, 2010) 2-3; Rotberg R *Ending autocracy enabling democracy: The tribulations of Southern Africa 1960-2000* (World Peace Foundation Cambridge, Brookings Institution Press Washington D.C, 2002) 281-298; For a detailed analysis on the impact of colonialism in South Africa, see Derek H *et al* 'Psychopolitics' and critical psychology' (2004) London: LSE Research online 84-114 available at: <http://eprints.lse.ac.uk/961> (date of use 30 December 2013).

<sup>220</sup> *Brink v Kitshoff* No (1996) (4) SA 197 (CC) at 217 A-C.

<sup>221</sup> Patel L *Social welfare and social development in South Africa* (Cape Town, Oxford University Press Southern Africa, 2005).

<sup>222</sup> Bhorat H 'The South African social safety net: Past, present and future' (1995) Vol.12 (4) *Development Southern Africa* 595-600.

the minority group.<sup>223</sup> An important consequence of this was that the enforcement of apartheid was implemented through a wide range of legislation; for example, pass laws were introduced during the 19<sup>th</sup> century in the Cape Colony, Natal Colony, and the Black Land Act<sup>224</sup> prohibited Africans from owning or renting land outside the designated reserves.<sup>225</sup> The reserves formed the basis of the *Bantustans* and independent homelands during the era of apartheid under the National Party rule.<sup>226</sup>

The Black Land Act and the Development Trust and Land Act<sup>227</sup> restricted the African population to 13% of the total land area of South Africa.<sup>228</sup> Liebenberg argues that Africans who remained on the farms in White areas were reduced to the status of labour tenants or squatters.<sup>229</sup> She further notes that the Black Urban Areas Act<sup>230</sup> extended segregation to urban areas.<sup>231</sup> She maintains that this laid the groundwork for the establishment of 'locations' on the peripheries of White towns and cities for the accommodation of Black people who were

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<sup>223</sup> For further reading on the impact of apartheid policies, see Seekings J and Natrass N *Class race and inequality in South Africa* (New Haven and London: Yale University Press, 2005) 1-236; Terreblanche S *A history of inequality in South Africa* (University of Natal Press and KMM Review Press, 2002) 3-151; Rabede SB 'The challenges of reconciliation in South Africa and the poverty connection' (2011) 26 *South African Public Law Journal* 360-377.

<sup>224</sup> Black Land Act 27 of 1913.

<sup>225</sup> For further reading on the Native Land Act of 1913; See also Feinberg H and Horn A 'South African territorial segregation: New data on African farm purchases, 1913-1936' (2009) 50 *Journal of African History* 41-60; See also Daniels (n 194 above) 335-336.

<sup>226</sup> Cf Duncan D *The mills of God: The state and African labour in South Africa* (Witwatersrand University Press, 1918-1948) 91-120.

<sup>227</sup> Development Trust and Land Act 18 of 1936.

<sup>228</sup> Robertson *Dividing the land: An introduction to apartheid land law* in Murray C and O'Regan C (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 122-136.

<sup>229</sup> Liebenberg (note 219 above).

<sup>230</sup> Black Urban Areas Act 21 of 1923.

<sup>231</sup> Cf Group Areas Act 41 of 1950. This was the Act that started physical separation between races, especially in urban areas. The Act also called for the removal of some groups of people into areas set aside for their racial group. Well known removals were those in District Six, Sophiatown and Lady Selborne (also see Cato Manor, Fietas and Curries Fountain (Grey Street area). People from these areas were then placed in townships outside of the town. They could not own property here, only rent it, as land could only be white owned.

functional to the labour needs of the White,<sup>232</sup> dominant economy, and enabled local authorities to administer stricter pass laws and control of Black urban dwellers.<sup>233</sup>

Blacks, Whites, Coloureds and Indians were segregated in the labour market, with Blacks relegated to the lowest skilled and lowest paid occupations while the job reservation system protected poor Whites from labour market competition from other races.<sup>234</sup> The government created separate educational facilities, providing resources into White schools while neglecting those of the other groups.<sup>235</sup>

In other sectors of the economy, the Mines and the Works Act<sup>236</sup> legislated job reservation policies which excluded Blacks from a range of skilled jobs on the mines and railways.<sup>237</sup> In 1951, Parliament enacted the Native Building Workers' Act,<sup>238</sup> making it an offence for Africans to perform skilled building work in White areas.<sup>239</sup> These were the towns, cities and industrial areas where most building work was done. During the 1950s, discrimination in terms of colour was extended further, when class of work was reserved for workers of a specified race.<sup>240</sup>

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<sup>232</sup> Cf Gardner J *Politicians and apartheid trailing in the people's wake* (South Africa, Human Science Research Council, 1997)1-30.

<sup>233</sup> See also Andrews P and Karchimar I 'The legal death of the black worker' (1987) Vol.14 (2) *Human Rights* 50-51.

<sup>234</sup> Mariotti M (note 212 above) 1106-1110.

<sup>235</sup> Fedderke J *et al* 'Undercoating South Africa: The failure to address the 1910-1993 Legacy' (2000) *International Review of Education* 257-281; McGrath M *et al* 'An analysis of racial wage discrimination in South Africa' (1977) Vol.39 (4) *Oxford Bulletin of Economics and Statistics* 245-271.

<sup>236</sup> Mines and the Works Act 12 of 1911.

<sup>237</sup> Cf Lucas R 'Mines and migrants in South Africa' (1985) Vol.75 (5) *The American Economic Review* 1094-1107.

<sup>238</sup> Native Building Workers' Act 27 of 1951.

<sup>239</sup> Holzer H 'Black employment problems: New evidence, old questions' (1994) Vol.13 (4) *Journal of Policy Analysis and Management*, 699-718; Collins C and Christie P 'Bantu education: Apartheid ideology or labour reproduction' (1982) Vol.18 (1) *Comparative Education* 61-62.

<sup>240</sup> Hepple A 'Job reservation, cruel, harmful and unjust' (1963) *The Black Sash* 6-8 available at <http://www.disa.ukzn.ac.za/webpages/DC/BSJul63.0036.4843.007.002.Julpercent201963.7/BSJul63.0036.4843.007.002.Julpercent201963.7.pdf> (date of use 20 May 2014).

These laws applied to all races, but the courts held that the laws were applicable only to unskilled work, which was performed mostly by Black people.<sup>241</sup>

To add salt to the injury, government enacted the Population Registration Act.<sup>242</sup> This Act classified the population into four racial categories, which structured differential access to social welfare resources.<sup>243</sup> Consequently, race became a primary factor in access to services and in the allocation of social security benefit.<sup>244</sup> Liebenberg posits that the apartheid legal system provided limited legal tools which could be used to resist these large scale violations of a range of internationally recognised civil and political rights, as well as economic, social and cultural rights.<sup>245</sup> She notes that the system of parliamentary sovereignty under the apartheid era Constitution did not allow for judicial review of legislation for consistency with human rights norms.<sup>246</sup>

There was also limited scope for challenging the systematic injustices of the apartheid era through the common law.<sup>247</sup> In terms of the common law, there is no entitlement to social and economic resources and services on the basis of

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<sup>241</sup> Dugard J *Human rights and the South African legal order* (Princeton, Princeton University Press, 1978) 85; Horrell M 'Muriel laws affecting race relations in South Africa 1948-1976' (1978) South African Institute of Race Relations, Johannesburg 6.

<sup>242</sup> Population Registration Act 30 of 1950. The Population Registration Act specifically regulated the movement of black Africans outside designated "homelands", thus meaning that black South Africans had to carry passbooks at all times. Popularly referred to as a Dom pass, simply because people of African descent felt that it was merely a stupid (Dom) book (Pass) that really undermined their intelligence. This documentation was used to provide information that proved that a person had been authorised to live, move or even work in a certain area that were specified for White South Africans. This act was also amended in 1962 as well as in 1969.

<sup>243</sup> On the racialised basis of social security provisioning in South Africa, see Woolard *et al* 'The history and impact of social security in South Africa: Experiences and lessons' (2011) 4 *Canadian Journal of Development Studies* 360-361; Bhorat H 'The South African social safety net: Past, present, and future' (1995) 12 *Development Southern Africa* 595-604; Van der Berg S 'South African social security under apartheid and beyond' (1997) 14 *Development Southern Africa* 485-503; Neku R and Brown M 'A Historical review of the South African social welfare system and social work practitioners' views on its current status' (2005) 48 *International Social Work* 301-303.

<sup>244</sup> Department of Constitutional Development and Planning, 1985.

<sup>245</sup> Liebenberg (note 219 above).

<sup>246</sup> See for example the decision of the court in *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *R v Detody* 1926 AD 168.

<sup>247</sup> Liebenberg (note 219 above) 4.

need.<sup>248</sup> However, the common law protected people's access to social benefits and resources within the context of administrative law.<sup>249</sup> According to Liebenberg, this could arise, for example, when people are deprived of access or denied access to a social benefit through procedurally unfair administrative action.<sup>250</sup>

Under the common law, all socio-economic benefits such as social security, education and health care were regulated by statute on a racially discriminatory basis.<sup>251</sup> As stated by Midgley,<sup>252</sup> the fruit of economic growth benefited Whites disproportionately relative to other population groups and by the mid-1960s substantial improvements in the material conditions of Whites were noted. It was during the 1980s when the political challenges increased, combined with a deepening economic crisis and the loss of international support that the government considered to transform.<sup>253</sup> Welfare demands focused on the achievement of a just society that would promote human dignity and the well-being of all citizens in areas such as health care, education and social security.<sup>254</sup>

These promises were contained in the Freedom Charter adopted by the Congress of the People in 1955.<sup>255</sup> These included, among others, non-racial

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<sup>248</sup> Cf Van der Walt A 'A South African reading of Frank Michelman's theory of social justice' in Botha H, Van der Walt A, and Van der Walt J (eds) *Rights and democracy in a transformative Constitution* (2004) 163-211; 71; Hoexter C *Administrative Law in South Africa* 4<sup>th</sup> ed (Juta & Co. Ltd, 2013) 350-357.

<sup>249</sup> Liebenberg (note 219 above).

<sup>250</sup> Liebenberg *ibid.*

<sup>251</sup> Liebenberg *ibid.*

<sup>252</sup> Midgley J and Piachaud D (note 204 above).

<sup>253</sup> Meintjes S 'The women's struggle for equality during South Africa's transition to democracy' (2011) *Transformation* 107-114; Jenkins J 'After the dry white season: The dilemmas of repatriation and reconstruction in South Africa' (2000) *South African Journal on Human Rights* 415-485.

<sup>254</sup> Michie J and Padayachee V 'South Africa's transition: The policy agenda' in Michie J and Padayachee V (eds) *The political economy of South Africa's transition* (London, Dryden Press, 1997) 9-25; Adler G and Webster E 'Towards a class compromise in South Africa's double transition: Bargained liberalisation and the consolidation of democracy' (1999) 27(3) *Politics and Society* 347-385.

<sup>255</sup> Cf Suttner R 'The Freedom Charter: The people's Charter in the 1980s' (1985) 24 *Crime and Social Justice* 78-93.



and unitary welfare system with a democratic model of social service delivery and decision making in the allocation of resources, state intervention in the economy and the provision of social security.<sup>256</sup> Social welfare was conceived of as a redistributive mechanism and as an instrument in the building of a national identity.<sup>257</sup>

The period between 1972 until 1990 is often described as a trend towards re-incorporation and the transformation of South Africa.<sup>258</sup> It is worth noting that South Africa was the object of a concerted international campaign of diplomatic isolation against the policy of apartheid during the era of the National Party rule between 1948 and 1994.<sup>259</sup> Sooner, the National Party realised the economic imperative to integrate Blacks into the economy and this entailed changes to the social security system. Job reservation laws were abandoned.<sup>260</sup> In 1977, the racial differentiation of benefits from the Unemployment Fund was removed, but the income restriction remained in place.<sup>261</sup>

The pensions and social grants, which had been set up to protect the White population, gradually expanded their eligibility rules to include Africans.<sup>262</sup> However, the system retained the discrimination in the administration of these grants which continued excluding most Africans by way of inefficiency and inequitable in delivery.<sup>263</sup>

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<sup>256</sup> Faulkner D and Loewald C Policy change and economic growth: A case study of South Africa (2008) Commission on Growth and Development, Working paper no. 41 available at <http://www.growthcommission.org/storage/cgdev/documents/gcwp041web.pdf> (date of use 22 January 2013).

<sup>257</sup> Cf White Paper on Social Welfare GN 1108 in GG 18166 of August 1997.

<sup>258</sup> Van der Berg S 'Trends in racial fiscal incidence in South Africa' (2001) Vol.69 (2) *South African Journal of Economics* 243-28.

<sup>259</sup> Christopher J 'The pattern of diplomatic sanctions against South Africa' (1994) Vol.34 (4) *GeoJournal* 439-446.

<sup>260</sup> Borat H 'The South African social safety net: Past, present and future' (1995) (12) 4 *Development Southern Africa* 595-604.

<sup>261</sup> Haarmann C 'Social assistance in South Africa its potential impact on poverty' (2000) unpublished LLD in Development Studies, University of the Western Cape, South Africa,13.

<sup>262</sup> Devereux S 'Social pensions in Southern Africa in the twentieth century' (2007) Vol.33 (3) *Journal of Southern African Studies* 539-560.

<sup>263</sup> Report of the Lund Committee on Child and Family Support, 1996 at 10 available at <http://www.polity.org.za/polity/govdocs/reports/lund.html> (date of use 22 March 2015).

### 2.2.1.3 Social assistance under democracy

The new government was faced with the task of developing an approach that transformed the existing system in two ways. First, it had to be able to use and build on the positive aspect of the current system. Second, it had to change current programmes and develop new features and benefits in such a way that they serve the population as a whole and are based on the circumstances and needs in South Africa. The next section outlines the approach adopted by the first democratically elected government with regard to the provision of social security.

Michael<sup>264</sup> postulates that people can be poor at any point in time because they possess few assets. They can also be poor because of financial and other constraints that limit their ability to use the assets they have. He argues that time gives people an additional degree of freedom to build up the additional assets they need. According to him, time also offers the space in which negative shocks that push people further behind occur. In South Africa, after transition to democracy in 1994, a transformation of the social welfare system took place.<sup>265</sup> Consensus, reconciliation, the achievement of equality, and transformation were all part of the agreement in favour of a democratic state.<sup>266</sup>

The main concern was the elimination of racial discrimination and providing policies, programmes and delivery of services for all citizens.<sup>267</sup> The social policy for development included redress of past imbalances through affirmative action.<sup>268</sup> A legislative framework for a social welfare system based on the

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<sup>264</sup> Michael R *et al* 'One kind of freedom: Poverty dynamics in post-apartheid South Africa' (2001) Vol.19 (3) *World Development* 1988-1989.

<sup>265</sup> Ferguson J 'Formalities of poverty: Thinking about social assistance in neoliberal South Africa' (2007) Vol.50 (2) *African Studies Review* 77.

<sup>266</sup> McGregor M 'Blowing the whistle? The future of affirmative action in South Africa (Part 1)' (2014) Vol.26 (1) *South African Mercantile Law Journal* 61.

<sup>267</sup> Schneider G 'Neoliberalism and economic justice in South Africa: Revisiting the debate on economic apartheid' (2003) Vol.61 (1) *Review of Social Economy* 24.

<sup>268</sup> Cf McGregor (note 266 above) 60-92.

principles of equality, equity, access and empowerment was established.<sup>269</sup> The aim was to ensure coverage for the poorest through a restructured, integrated social welfare delivery system at national, provincial, and local levels of government.

Notwithstanding the democratic transformation, the biggest challenge faced by the post-apartheid government includes, *inter alia*, the eradication of poverty and inequalities. Langa DP<sup>270</sup> (as he then was) posits that how we respond to poverty is critical to democracy, development and the stability of our constitutional state. It is worth noting that the government has introduced a number of programmes aimed at addressing the scourge of poverty. Chiefly among others, the social assistance programme was introduced. Barrientos<sup>271</sup> argues social assistance aims to ensure minimum levels of consumption that protect poor households from the worst effects of deprivation.<sup>272</sup>

The transition to constitutional democracy, guided by the negotiated Interim Constitution,<sup>273</sup> led to the passing and ultimate certification of the Constitution of the Republic of South Africa, 1996.<sup>274</sup> The Final Constitution, like the Interim Constitution, secures equal protection and benefit of the law and equality before the law for everyone, and it provides the right to have access to social security to everyone.<sup>275</sup> John Allen quoting Desmond Tutu wrote:<sup>276</sup>

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<sup>269</sup> Cf Natrass N and Seekings J 'Citizenship and welfare in South Africa: Deracialisation and inequality in a labour-surplus economy' (1997) Vol.31 (3) *Canadian Journal of African Studies* 452-464.

<sup>270</sup> See Langa P *The role of the Constitution in the struggle against poverty* in Liebenberg S and Quinot G *Law and poverty: Perspectives from South Africa and beyond* 1<sup>st</sup> ed (Juta & Co. Ltd, 2012) 4.

<sup>271</sup> Barrientos A 'Social protection and poverty' (2011) 3 *International Journal of Social Welfare* 243.

<sup>272</sup> Barrientos *ibid*.

<sup>273</sup> The Constitution of the Republic of South Africa, 1996.

<sup>274</sup> *Chairperson of the Constitutional Assembly, 1996, In re: Ex Parte Certification of the Constitution of the RSA, 1996* (4) SA 744 (CC); *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Amended Text of the Constitution of the RSA, 1996* 1997 (2) SA 97 (CC).

<sup>275</sup> See section 27(1)(c) of the Constitution.

We have all left the house of apartheid's bondage. Some, an elite few, have actually crossed the Jordan into 'the promised land'. Others, too many, still wallow in the wilderness of degrading, dehumanising poverty... Much has been done. People have clean water and electricity who never had these before but we are sitting on a powder keg because the gap between rich and poor is widening and some of the very rich are now Black.

Langa<sup>277</sup> points out that unless we redress the gap between the poorest of the poor and the most affluent in our country, the reconciliation that will facilitate our development as a nation will remain a pipe dream. One of the ideals of the Final Constitution was to achieve and build a society based on democratic values of social justice, and to improve the quality of life of all the citizens.<sup>278</sup> Barnard-Naude *et al* citing the work of Justice Ackerman remarked that:

...a transforming Constitution such as ours will only succeed if everyone, in government as well as in civil society at all levels, embraces and lives out its values and its demands. It will only succeed if restitutorial equality becomes a reality and basic material needs are met because it borders on the obscene to preach human dignity to the homeless and the starving.<sup>279</sup>

The negotiated settlement that was reached in 1994 paved the way for democratic elections, and this led to the dismantling of the old colonial and apartheid order, and the creation of a constitutional democracy. The Constitution of the Republic of South Africa protected this negotiated settlement by guaranteeing civil, political and social rights to all who live in South Africa. Furthermore, the Constitution sought to bring about political transformation aimed at achieving the social and economic transformation of the society.

It is within this context that the Constitution entrenches a range of socio-economic rights, including, among others, environmental rights, rights to land, health care, housing, food, water, education and the right to social assistance. Brand notes that these rights indicate that the South African Constitution differs

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<sup>276</sup> Allen Rabble J *Rouster for peace: The authorized biography of Desmond Tutu* (London, Rider Books, Random House, 2006).

<sup>277</sup> Langa P (note 270 above) 7.

<sup>278</sup> Preamble of the South African Constitution, 1996.

<sup>279</sup> Barnard-Naude A *et al Dignity freedom and the post-apartheid legal order: The critical jurisprudence of Lauri Ackerman* (2008) 18; Ackermann L 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Review* 678-679.

from a traditional liberal model in that it is transformative, as it does not simply place limits on the exercise of collective power, but requires collective power to be used to advance ideals of freedom, equality, and social justice.<sup>280</sup>

Despite the entrenchment of socio-economic rights in the Constitution, the South African society is still facing serious political, social and economic problems.<sup>281</sup> After 21 years of democracy in South Africa, there remain numerous obstacles to service delivery.<sup>282</sup> These include access to social assistance, inappropriate policies or lack of implementation of policies, lack of capacity, and mismanagement and corruption. Midgley argues that the post-apartheid social policy is also infused with developmental thinking and priorities such as the reduction of poverty, inequality, employment creation, the promotion of economic growth<sup>283</sup> and social redress as features of the democratic government approach to transformation.<sup>284</sup>

The aim of the democratic society is captured clearly in the preamble to the Final Constitution which illuminates the objects of the framers of the Constitution.

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<sup>280</sup> Brand D 'Introduction to socio-economic rights in the South African Constitution' in Heyns C and Brand D *Socio-economic rights in South Africa* (Pretoria University Law Press, 2005) 1-6.

<sup>281</sup> Green S 'Towards a developmental approach to social welfare: Social welfare policy in post-apartheid' in Swart *et al Welfare, religion and gender in post-apartheid South Africa: Constructing a South – North Dialogue* 1<sup>st</sup> ed (Sun Media Stellenbosch, 2012) 27.

<sup>282</sup> Goebel A 'Our struggle is for the full loaf: Protests, social welfare and gendered citizenship in South Africa' (2011) Vol.37 (2) *Journal of Southern African Studies* 369-375; Alexander P 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) Vol.37 (123) *Review of African Political Economy* 25-37; Schwella E 'Public sector in the new South Africa: A critical review' (2001) Vol.24 (4) *Public Performance and Management Review* 367-387; Naidoo P 'Struggles around the commodification of daily life in South Africa' (2007) Vol.34 (111) *Review of African Political Economy* 57-65; See also Abrahams 'Discrimination on a mass scale; discrimination of the poor, proudly brought to you by the state system' Politicsweb (28 January 2014) 1-2 available at <http://www.politicsweb.co.za/politicsweb/view...> (date of use 29 January 2014).

<sup>283</sup> According to the World Bank economic growth is the driver of poverty reduction in developing countries, it recognises that "if a growth strategy brings all classes... of society [together], no group will seek to derail it", see World Bank Group Global Monitoring Report 2014/2015: Ending poverty and sharing prosperity Conference Edition Washington, DC: World Bank. License: Creative Commons Attribution CC BY 3.0 IGO35-36 available at [http://www.worldbank.org/content/dam/Worldbank/gmr/gmr2014/GMR\\_2014\\_Full\\_Report.pdf](http://www.worldbank.org/content/dam/Worldbank/gmr/gmr2014/GMR_2014_Full_Report.pdf) (date of use 10 October 2014).

<sup>284</sup> Midgley J and Piachaud D (note 204 above).

Devenish notes that the preamble provides the motives and objects of framing the Constitution, and that it also affords the best key to the interpretation thereof.<sup>285</sup> To this end, the preamble to the Constitution, in its relevant parts provides:

We, the people of South Africa;  
Recognise the injustices of our past;  
Honour those who suffered for justice and freedom in our land;  
Respect those who have worked to build and develop our country;  
Believe that South Africa belongs to all who live in it, united in our diversity.

The preamble is concerned with the following issues. Firstly, it recognises the divisions of the past, healing those divisions and establishing a new society based on democratic values, social justice, and fundamental rights.<sup>286</sup> Secondly, the preamble is concerned with the creation of a new order based on democracy and open society in South Africa. Thirdly, it is concerned with improving the quality of life of all citizens. Lastly, the preamble embraces a commitment to building a united and democratic South Africa. Davis<sup>287</sup> notes that the South African Constitution, both in its Interim and final forms, was grounded on the desire to change from a society in which racism and sexism divided and ruptured any possibility of a South African community to one where the humanity of each member of the society would be recognised.

In the area of social security, Olivier argues that the fundamental reform of South Africa's social security system aims to redress past injustices, particularly the country's legacy of poverty and inequality.<sup>288</sup> According to him, this approach is in accordance with the provisions of the Constitution. He further asserts that for

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<sup>285</sup> Devenish G *Commentary on the South African Constitution* (Durban, Butterworths, 1998) 27.

<sup>286</sup> See also Baxi U 'Preliminary notes on transformative constitutionalism' in Vilhena O *et al Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013) 19-26.

<sup>287</sup> Davis D 'Elegy to transformative constitutionalism' in Botha H *et al Rights and democracy* 1<sup>st</sup> ed (Sun Press, South Africa, 2003) 57.

<sup>288</sup> Olivier M 'Access to justice in welfare law and litigation: Judicial reform in South Africa' (2006) *OBITER* 471-472.

the first time in South Africa's history, the Constitution compels the state to ensure the progressive realisation of social security.<sup>289</sup>

Section 27 of the Constitution (discussed in chapter three) obliges the state to develop a comprehensive social security system. It affirms the universal right to access to social security, including appropriate social assistance for those unable to support themselves and their dependants, and orders the state to take reasonable legislative and other measures – within its available resources - to achieve the progressive realisation of these rights.<sup>290</sup>

The provision of social assistance was marked by a progressively transformative experience. Following the 1994 elections, the government committed itself to a number of specific goals in the area of social policy, such as:

- The elimination of poverty and the establishment of a reasonable, and widely acceptable, distribution of income;
- The provision of a reasonable income in old age;
- The provision of affordable, decent and effective health care for all; and
- Full employment, or if this proves not possible, an adequate mechanism to deal with poverty.

The above goals are reflected in the Constitution, most notably in its section 27 (1)(c) which affords everyone the right to have access to social security, including appropriate social assistance, which is part of a publicly funded social security system. These commitments have also been taken forward in a number of policy documents including the Reconstruction and Development Programme (RDP), National Development Plan (NDP), and the National Planning Commission (NPC) Report.

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<sup>289</sup> Olivier *ibid.*

<sup>290</sup> See section 27(1)(c) of the Constitution.

The essence of these policy objectives is also included in the Growth, Employment and Redistribution (GEAR) framework. A major achievement in the post-1994 period has been in securing constitutional safeguards for the right to social security and social assistance for people who are in need. Another accomplishment was the amalgamation of 14 different administrative systems inherited from the apartheid era and in the expansion of benefits to children.<sup>291</sup>

### 2.3 The objectives of social security

According to Gerdes, throughout Africa men have long shared the security of belonging to family units and tribal organisations.<sup>292</sup> Within each arrangement, there was protection for the aged, the handicapped, the sick and other members of the tribe, regardless of health or physical infirmity, age or ability, economic contributions or behavioural propensities, marital status or family size.<sup>293</sup>

The underlying normative commitment of social security is the improvement of the quality of life of the population by promoting economic or material equality.<sup>294</sup> Social security ensures that all citizens have a stake in society and that each individual has an incentive to contribute to the community at large.<sup>295</sup> It plays a

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<sup>291</sup> Triegaardt J and Patel L 'Social security' in Patel L (ed.) *Social welfare and social development in South Africa* (Cape Town, Oxford University Press, 2005) 140.

<sup>292</sup> Gerdes V 'Social security in developing African nations' (1965) Vol. 32 (3) *The Journal of Risk and Insurance* 455-463.

<sup>293</sup> Gerdes *ibid.*

<sup>294</sup> Fernandes G *et al Welfare state and the future* (Palgrave Macmillan, 2005) 297-298; Cf Jones N and Samuels F 'Cash transfers for maternal health: Design opportunities and challenges in low-resources settings' (2011) Overseas Development Institute, 1-4, available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7521.pdf> (date of use 30 December 2013); Holmes R and Barrientos A 'Child poverty: A role for cash transfers? West and Central Africa' (2009) Overseas Development Institute, Briefing Paper, 1-6, available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7521.pdf> (date of use 30 December 2013).

<sup>295</sup> Zhang J and Zhang J 'How does social security affect economic growth? Evidence from cross-country data' (2004) Vol.17 (3) *Journal of Population Economics* 473-490; Cigno A *et al* 'The impact of social security on saving and fertility in Germany' (2002/2003) Vol.59 (2) *Public Finance Analysis* 189-207; Cf Osawa M and Kim T 'Distributive effects of social security and pension benefits' (1989) Vol.63 (3) *The University of Chicago Press* 335-357. For further reading on the Liberal and Marxism theories of social welfare, see Penna S and O'Brien M *Theorising welfare* (London, Sage Publications, 1998) 1-184. For further reading



crucial role in the lives of communities and families, viewed in the context of social transfers. It does not only tackle income poverty and social transfers, but also provides effective support for broader developmental objectives.<sup>296</sup> Social grants improve the living standards of households, facilitate education, and improve health outcomes, particularly for women and children.<sup>297</sup> Social transfers also play a crucial role in the protection strategy for those afflicted by HIV/AIDS.<sup>298</sup>

The fact that the social security touches the lives of many people in society<sup>299</sup> and has the potential to affect all citizens underlines the extent of its overall social impact. Kaseke asserts that South Africa uses social assistance to reduce poverty among vulnerable groups who are needy and without the means to support themselves.<sup>300</sup> He observes that although social assistance raises the floor for those living below the poverty line, some of the grants provide income that is below the poverty line. He concludes that there seems to be an inherent

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on the foundational values of social welfare, see Burch H *Social welfare policy analysis and choices* (London, Haworth Press, 1998) 63-88; See also Fives A *Political philosophical debates in welfare* (Palgrave Macmillan, 2008) 1-218; Hugman R *Social Welfare and Social Value* (London, Macmillan Press, 1998) 3-54.

<sup>296</sup> Asian Development Bank (2003) 50; Goda S *et al* 'How well are social security recipients' protected from inflation' (2011) Vol. 64 (2) *National Tax Journal* 429-432; Ulriksen M 'How social security policies and economic transformation affect poverty and inequality: Lessons for South Africa' (2012) Vol.29 (1) *Development Southern Africa* 4-9.

<sup>297</sup> Ahmad E 'Social security and the poor: Choices for developing countries' (1991) Vol. 6 (1) *The World Bank Research Observer* 105-127.

<sup>298</sup> Tshoose C 'The impact of HIV/AIDS regarding informal social security: Issues and perspectives from a South African context' (2010) 13 *PER* 408-422.

<sup>299</sup> The number of people who are the beneficiaries of social assistance grants has improved tremendously in South Africa, see South African Social Security Agency *First quarter statistical report on social grants* 01 April – 30 June 2014, 10-25 available at <http://www.sassa.gov.za/index.php/knowledge-center/statistical-reports> (date of use 21 November 2012).

<sup>300</sup> Kaseke E 'The role of social security in South Africa' (2010) *International Social Work* 163-165; See also Aliber M 'An overview study of the incidence and nature of chronic poverty in South Africa' (2001) background paper 3, Chronic Poverty Research Center, Institute for Development Policy and Management, University of Manchester, PLAAS/Programmeme for Land and Agrarian Studies, School of Government, University of the Western Cape available at <http://www.chronicpoverty.org/pdfs/sa.pdf> (date of use 21 November 2012); Bhorat H 'Public expenditure and poverty alleviation in the South African labour market' (1999) DPRU Working paper no.. 99/26 Development Policy Research Unit, University of Cape Town available at <http://www.uct.ac.za/depts/dpru/wp26.pdf> (date of use 21 November 2012).

assumption that caregivers can supplement the grant with other sources of income. However, many of the beneficiaries are so poor that the grant is their only source of income.

One of the practical examples of the impact of social security in the society lies in the determination of benefit levels, and particularly the unofficial poverty line that is traditionally represented by the minimum level of entitlement provided by the basic means-tested social security benefit.<sup>301</sup> This basic assistance is available, subject to conditions and certain exceptions, to those whose income and capital fall below a prescribed amount.

Research has shown that the social grants do not only provide households with income, but also support second-order effects that further reduce poverty.<sup>302</sup>

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<sup>301</sup> Barrientos A 'What is the role of social pensions in Asia' (2012) *Asian Development Bank Institute* 12-15.

<sup>302</sup> For further reading on the impact of conditional cash transfers on households, see Dubbeld B 'How social security becomes social insecurity: Unsettled households, crisis talk and the value of grants in a KwaZulu-Natal village' (2013) *Acta Juridica* 198-202; Liziwe J and Kongolo M 'The impact and effectiveness of the child support grant in Gugulethu, South Africa' (2011) Vol.27 (1) *Eastern Africa Social Science Research Review* 49-65; Patel L 'Poverty, gender and social protection: Child support grants in Soweto, South Africa' (2012) Vol.11 (1/2) *Journal of Policy Practice* 106-119; Mturi A *et al* 'Understanding the experiences and challenges of child-headed households and the role of social grants in South Africa' (2012) Vol.27 (2) *Journal of Social Development in Africa* 9-31; Coetzee M 'Finding the benefits: Estimating the impact of the South African child support grant' (2013) Vol.81 (3) *South African Journal of Economics* 427-448; Sekhampu T and Grobler W 'The expenditure patterns of households receiving the State's Old- Age Pension (SOAP) grant in Kwakwatsi Township' (2011) Vol.27 (1) *The Journal for Transdisciplinary Research in Southern Africa* 41-51; Samson M *et al* 'Designing and implementing social transfer programmes' EPRI Press (Economic Policy Research Institute) (2006) Cape Town, South Africa 1-4 available at [http://www.unicef.org/socialpolicy/files/designing\\_and\\_implementing\\_social\\_transfer\\_programmes.pdf](http://www.unicef.org/socialpolicy/files/designing_and_implementing_social_transfer_programmes.pdf); Woolard *et al* *The evolution and impact of social security in South Africa* paper prepared for the Conference on 'Promoting resilience through social protection in Sub-Saharan Africa' organised by the European Report of Development in Dakar, Senegal, 28-30 June, 2010, 19-21 available at <http://erd.eui.eu/media/BackgroundPapers/Woolard-Harttgen-Klasen.pdf> (date of use 19 March 2013); Cf Social protection, poverty reduction and pro-poor growth 2009 available at <http://www.oecd.org/development/povertyreduction/43573310.pdf> (date of use 19 March 2013); Cf Bekink M 'Social assistance as a means to enhance family life: A South African perspective' (2009) 72 (3) *THRHR* 430-455; Cf Sinclair J 'Poverty: Giving meaning to the right to social assistance' (2012) *Stellenbosch Law Review* 191-223; Smit N and Mpedi G 'Social protection for developing countries: Can social insurance be more relevant for those working in the Informal Economy' (2010) *LLD* 12-15; Tabellini G 'A Positive theory of social

Kaseke notes that social security was introduced in developing countries to address the problem of income insecurity.<sup>303</sup> He defines income security as meaning income that is sufficient for the purposes of meeting subsistence needs. This is a concern for millions of people in South Africa who live in extremely perilous conditions.<sup>304</sup>

It is within this context that social security system provides social transfers which form the key instruments offering a vehicle for the abolition and prevention of poverty, which is direct and fast in a way that the putative benefits of trickle down effects of economic growth cannot match. In short, the role of social transfers is threefold. Firstly, social transfers provide cash income to enable households to address the worst consequences of poverty; for example, short-term public works projects or temporary transfers provide important protective value, enabling households to cope (at least temporarily) with the circumstances of poverty.<sup>305</sup>

Secondly, social transfers can prevent poverty shocks from devastating households, mitigating the adverse consequences; for example, employment guarantee schemes and targeted programmes include many elements of risk insurance, helping to keep households from sinking deeper into poverty.<sup>306</sup> Thirdly, social transfers strengthen the economic power of households, potentially enabling workers to negotiate higher wages. Transfers support accumulation of assets, particularly human capital. Public works programmes

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security' (2000) *Scandinavian Journal of Economics* 523-545; Van Der Merwe T 'Events, views and ideologies which shaped social security in South Africa' (1997) *South African Journal of Economic History* 77-80; McGregor *et al Labour law rules* 1<sup>st</sup> ed (Siber Ink, 2012) chapter 7; Levine S *et al* 'The impact of cash transfers on households welfare in Namibia' (2011) Vol.28 (1) *Development Southern Africa* 39-58.

<sup>303</sup> Kaseke E 'Social security and older people: An African perspective' (2005) *International Social Work* 1-11.

<sup>304</sup> South Africa's Department of Social Development, Green Paper on Families: Promoting family life and strengthening families in South Africa GN 756 in GG 346573 of October (2011) 6-10.

<sup>305</sup> McCord A 'Win-win or lose? An examination of the use of public works as a social protection instrument in situations of chronic poverty' (2005) Paper presented at the conference on social protection for chronic poverty. Institute for Development Policy and Management, University of Manchester, 23-24 February.

<sup>306</sup> Slater R 'Cash transfers, social protection and poverty reduction' (2011) 20 *International Journal of Social Welfare* 250-258.

create productive infrastructure. The macroeconomic stabilisation effects of transfer programmes reduce the intensity of poverty shocks.<sup>307</sup>

Viewed from the context of the welfare state, social security has at least two strategic aims. First, it provides poverty relief, with the purpose of ensuring that no individual or household should live below a minimum standard of living.<sup>308</sup> As it is shown in this chapter, there is no analytically acceptable way of defining poverty line. Therefore, the definition of minimum standard is a normative one.

Once the poverty line has been decided, the effectiveness of the system is measured by statistics relating to how many people are below the poverty line (headcount measures), by how much (poverty gap measures), and for how long (life-cycle and intergenerational matters). Second, social security provides a social insurance component. The rationale for this is that no one should face an unexpected and unacceptably large drop in his/her living standard. This is a major objective of the unemployment benefits and most health related benefits.

## **2.4 The socio-economic realities facing post-apartheid South Africa**

### *2.4.1 Overview of the demographic structure of the South African society*

Welfare services are constructed to meet the needs of populations.<sup>309</sup> Therefore, they are determined to some extent by the shape and structure of these populations. The Republic of South Africa is a comparatively large country, covering approximately 1,221,042 square kilometres and with an estimated population of about 52,98 million.<sup>310</sup> In terms of the South African Social Security

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<sup>307</sup> Devereux S and Sabates-Wheeler R 'Transformative social protection' IDS working paper (2004). 232, Institute of Development Studies (IDS); Samson, *M et al* 'The Social and economic impact of South Africa's Social Security System' (2001) Final Report Executive Summary, Commissioned by the Economics and Finance Directorate, Department of Social Development; World Bank "World Development Report 2000/2001.

<sup>308</sup> Barrientos A 'Social protection and poverty' (2011) 20 *International Journal of Social Welfare* 240-248.

<sup>309</sup> Castles F *The future of welfare of the welfare state*, (Oxford University Press, 2004).

<sup>310</sup> Statistics South Africa 2013, mid-year population estimates available at <http://beta2.statssa.gov.za...> (date of use 05 December 2013).

Agency Annual Report,<sup>311</sup> the system of social assistance managed to reach 10 723 400 beneficiaries, extending its social assistance coverage to the previously excluded and marginalised groups as required by the Constitution.

The persistently high rate of unemployment in South Africa is one of the most pressing socio-economic tests facing government. Only two in five working age adults in South Africa have a job and more than 4 million people (24%) of the workforce – are currently unemployed.<sup>312</sup> In terms of the discussion paper of the National Treasury in order to address the scourge of unemployment, many more people need to be provided with the opportunity to work and make a productive contribution to the economy and society.<sup>313</sup>

Mlatsheni and Leibbrandt note that the development of youth depends very much on employment.<sup>314</sup> They argue that unemployment among the youth forms part of the social exclusion. In addition, they clarify the features that hinder a successful transition of youth into the labour market. According to them, this includes both the human capital processes that prepare youth for entry into the labour market and the labour market environment that confronts the youth. An important cause of high youth unemployment that extends even to relatively better educated youth is that the economy does not generate enough formal sector jobs to absorb new labour market entrants.<sup>315</sup> It is submitted that this highlights the need to develop policies which will address the plight of the youth in South Africa.

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<sup>311</sup> South African Social Security Agency (SASSA) Annual Report 2012/13 Analysis (14 October 2013) available at <http://www.pmg.org.za/report/20131022-south-african-social-security-agency-its-201213-annual-report> (date of use 05 December 2013).

<sup>312</sup> National Treasury confronting youth unemployment: policy options for South Africa February 2011, 9

<sup>313</sup> National Treasury *ibid.*

<sup>314</sup> Mlatsheni C and Leibbrandt M 'Youth unemployment in South Africa: Challenges, concepts and opportunities' (2011) Vol.14 (1) *Journal of International Relations and Development* 118-120.

<sup>315</sup> See Mlatsheni C and Leibbrandt M *ibid.*; Banik D *The legal empowerment agenda: Poverty, labour, and the informal economy in Africa* (University of Oslo, Norway, Ashgate Publishing Limited, 2011) 43-53; Poswell L 'The post-apartheid South African labour market: A status report (University of Cape Town, Development Policy Research Unit, 2002) 11-18.

According to the Goldman Sachs Report,<sup>316</sup> South Africa's economy has witnessed tremendous growth, and has performed well over the last two decades since the end of apartheid. The report identified key structural advances since 1994. Notwithstanding this, a decisive improvement is needed in the following key areas, unemployment and inequality, labour instability and wage inflation.

Within the context of increased demand for skilled workers and reported skills shortages, the phenomenon of rising youth unemployment is worrying. Therefore, to achieve a comprehensive system of social security in South Africa, we have to consider a number of factors. Moreover, this process may challenge the aspirations that we might wish to have, of where our country and our people should have been economically and socially 21 years into our democracy. It is argued that the introduction of Employment Tax Incentive Act<sup>317</sup> might *signal* a new era where the youth will be absorbed into the labour market.

On a practical side of it, the Employment Tax Incentive is essentially a cost-sharing mechanism between the private sector and government, which operates by reducing the amount of tax that is owed by an employer through the Pay-As-You-Earn (PAYE) system.<sup>318</sup> Paulsen notes that it is proposed that where the employer hires a qualifying employee, the employer is entitled to deduct the amount of the incentive from the amount of PAYE, which the employer is required to remit to the South African Revenue Service (SARS).<sup>319</sup> What is important to note is that the qualifying employee will not receive an additional monetary benefit relating to PAYE (for example, the PAYE credit of the employee remains unaffected). It should further be noted that the employer's deduction is

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<sup>316</sup> Sachs G Two decades of freedom – A 20\_year review of South Africa Johannesburg, South Africa, 4 November 2013 available at <http://us-edn.creamermedia.co.za/assets/articles/attachments/46826-pdf> (date of use 5 November 2013).

<sup>317</sup> Employment Tax Incentive Act No.26 of 2013 (Employment Tax Incentive Act).

<sup>318</sup> Paulsen N 'The Employment tax incentive Bill- Who stands to gain here?' 14 November 2013 available at <http://www.thesait.org.za/news/146083/The-Employment-Tax-Incentive-Bill---Who-Stands-To-Gain-Here.htm> (date of use 25 November 2013).

<sup>319</sup> Paulsen *ibid*.

limited and may not exceed the total amount of tax that is owed to SARS through the PAYE system.<sup>320</sup>

In addition, the incentive is available to all private sector employers in all sectors of the economy who are registered with SARS for PAYE. Employers can claim the incentive on a sliding scale for any employee between the ages of 18 and 29 who has been hired on or after 1 October 2013,<sup>321</sup> who possesses a South African ID and is receiving a monthly salary that is above the relevant minimum wage and less than R6000.00 per month.<sup>322</sup> If there is no legal minimum wage applicable in a particular sector, the monthly salary must be greater than R2 000.00<sup>323</sup>

Accordingly, where an employer has a legal obligation to withhold and pay tax on behalf of their employees, through the PAYE system, the employer will be eligible for the tax incentive. If an employer receives the employment tax incentive in respect of an employee despite not being eligible, that employer must pay a penalty to the SARS in an amount equal to 100% of the employment tax incentive of that employee for each month that the employer received the employment tax incentive.<sup>324</sup>

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<sup>320</sup> Paulsen (note 318 above).

<sup>321</sup> Section 6 of the Tax Incentive Act.

<sup>322</sup> SARS Media release statement 19 December 2013 available at <http://www.sars.gov.za/Media/MediaReleases/Pages/19-December-2013---President-Jacob-Zuma-signs-the-Employment-Tax-Incentive-Bill-into-law.aspx> (date of use 25 January 2014).

<sup>323</sup> Section 4 (1)(b)(i)(ii) of the Employment Tax Incentive Act. There are discussions to introduce minimum wage of R3 500 for domestic workers. It is argue that the proposed national minimum wage is the appropriate instrument to correct some of the major shortfalls of the current South African labour market. See National Minimum Wage Expert Panel Report 'Recommendions on Policy and Implimentation of the National Minimum Wage' (2016) available at <http://www.groundup.org.za/media/uploads/documents/NMWExpertPanelReport.pdf> (date of use 25 November 2016).

<sup>324</sup> Section 2 of the Employment Tax Incentive Act.

There is a twofold exclusion associated with the Tax Incentive Act.<sup>325</sup> Firstly, an employer who is bound to a sectoral determination or a bargaining council agreement will not be eligible to receive the employment tax incentive if that employer does not remunerate that employee in accordance with the minimum wage. Where an employer is not bound by a sectoral determination, it is proposed that a minimum wage of R2000.00 per month is applied. Secondly, an employer will be disqualified from receiving the incentive where a finding is made by a competent court, the Commission for Conciliation, Mediation and Arbitration (CCMA) or a counsel or private agency that the employer unfairly dismissed an old employee in order to hire a new qualifying employee and thereby take advantage of the tax benefit.<sup>326</sup>

In cases of penalty and disqualification in respect of displacement, the Employment Incentive Act provides a penalty of R30.000 payable by the employer who has displaced an employee, in particular, in cases where the employer has unfairly dismissed such an employee.<sup>327</sup>

The eradication of poverty, unemployment, and other socio-economic disparities represents a daunting test for the system of social security in South Africa. In order to appreciate the implications of the foregoing it is necessary to first attempt to outline the potential beneficiaries of economic and social policy. This can be achieved, in part, by viewing socio-economic data.

#### *2.4.2 Poverty and inequalities in South Africa*

One of the most pressing social and economic problems facing our post-apartheid state is the issue of poverty and inequalities.<sup>328</sup> South Africa is one of

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<sup>325</sup> Paulsen (note 318 above).

<sup>326</sup> Paulsen (note 318 above).

<sup>327</sup> Section 5 of the Employment Tax Incentive Act [emphasis added].

<sup>328</sup> Natrass N and Jeremy Seekings J 'Two nations? Race and economic inequality in South Africa today' (2001) Vol.130 (1) *Daedalus* 45-63.



the most unequal societies in the world with the highest Gini coefficient.<sup>329</sup> Poverty, inequality and high unemployment remain the greatest challenges facing South Africa and most analysts using the \$1 a day poverty measure place the figure of South Africans living in poverty at approximately 40% of the country's population.<sup>330</sup>

Teffo<sup>331</sup> states that the poor experience poverty in their everyday lives, lack the basic resources to meet their basic needs such as clothing and shelter, and most importantly, have lost their self-esteem. He argues that poverty has three closely interrelated aspects: poverty of money, poverty of access and poverty of power. In addition, these factors make the working, living and social environment of the poor extremely insecure and severely limits the options available to improve their lives. According to him, without choices and security, breaking the cycle of poverty becomes virtually impossible and leads to the marginalisation and alienation of the poor from society.

An alternative school of thought has adopted a broader view of the concept of poverty. Accordingly, poverty encompasses not only material deprivation (measured in terms of income and consumption) but also low levels of education and health.<sup>332</sup> For example, Larson<sup>333</sup> describes absolute poverty as characterised by malnutrition, illiteracy, disease, squalid surroundings, high infant mortality rate and low life expectancy. The Nepal Human Development Report defines poverty as state of economic, social and psychological deprivation

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<sup>329</sup> Gumede V 'Poverty, inequality and human development in a post-apartheid South Africa' Paper presented at 'Overcoming inequality and structural poverty in South Africa: Towards inclusive growth and development' Johannesburg, 20–22 September 2010, at 2.

<sup>330</sup> Nojekwa L 'Can government policies be said to be pro-poor?' (2009) Studies in Poverty and Inequality Institute, Working paper no.. 4, at 5.

<sup>331</sup> Teffo J 'Education for poverty alleviation: Myth or reality?' proceedings of the colloquium on 'Education and poverty reduction strategies: Issues of policy coherence' 21-23 February 2007 organised by the Policy Analysis Unit of the Human Science Research Council (HSRC) 69.

<sup>332</sup> World Bank World Development Report 2000/2001 Attacking Poverty (Oxford University Press, 2001)15-29.

<sup>333</sup> Larsen J 'Who cares about and for marginal people' (2002) Danish Social Science Research Council, Copenhagen available at [www.ihis.aau.dk/gep/publicationer/nr3.pdf](http://www.ihis.aau.dk/gep/publicationer/nr3.pdf), November 23, 2004 (date of use 15 December 2013).

occurring among people or countries lacking sufficient ownership, control or access to resources to maintain acceptable living standards.<sup>334</sup>

Brand adopts a comprehensive outlook of poverty. According to him, the notion of poverty must encompass the ideal of justice. He asserts that any engagement with the role of law in the context of poverty must in the first place take account of the ways in which law creates and maintains poverty.

Similarly, Statistics South Africa advocates for a broader perspective of poverty, than merely the extent of low-income, low-expenditure in a country. It is rather the denial of opportunities and choices most basic to human development to lead a long, healthy, creative life, and enjoy a decent standard of living, freedom, dignity, self-esteem, and respect from others. To overcome debates whether to use absolute or relative models<sup>335</sup> of poverty, the study used an approach based on the concept proposed by Frye and Farred which combines the two, relative poverty with an absolute core.<sup>336</sup>

Such a model is consistent with the vision for South African society expressed in the preamble to the White Paper on Social Welfare.<sup>337</sup> The latter White Paper aims to uphold welfare rights, facilitate the meeting of basic human needs, release people's creative energies, help them achieve their aspirations, build human capacity and self-reliance, and participate fully in all spheres of social, economic and political life'.<sup>338</sup>

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<sup>334</sup> Nepal Human Development Report 2001 on Poverty reduction and governance, United Nations Development Programme 1-64 available at [http://hdr.undp.org/sites/default/files/nepal\\_2001\\_en.pdf](http://hdr.undp.org/sites/default/files/nepal_2001_en.pdf) (date of use 15 December 2013).

<sup>335</sup> Darimont B 'Poverty: Introduction' in Becker U *et al International standard – Setting and innovation in social security* (Kluwer Law International, 2013)136. Darimont argues that the absolute concept is problematic since someone who has a little as 1 USD per day is still very poor.

<sup>336</sup> Frye I and Farred G *The measurement of poverty in South Africa Project: Key issues, Studies in Poverty and Inequality Institute* ed (2007).

<sup>337</sup> White Paper on Social Welfare GN 1108 in GG 18166 of August 1997.

<sup>338</sup> See the Preamble of the White Paper for Social Welfare 1997.

It is evident from the above discussion that there is no accepted official definition of poverty in South Africa, and a range of commentators outline the complex interaction of methodological and ideological factors in disagreements about the nature and scale of poverty.<sup>339</sup> Regarding the various definitions and methodologies, it is accepted that between 45% and 55% of the South African population are poor, and between 20% and 25% live in extreme poverty.<sup>340</sup> Kaseke notes that poverty in South Africa has a racial dimension as it is more pronounced among the Black population, given the legacy of colonialism and apartheid.<sup>341</sup>

In sum, the challenge of poverty reduction is both difficult and urgent with respect to those who appear trapped indeterminately in a deplorable standard of living. The study also adopts the model of poverty reduction suggested by Barrett.<sup>342</sup> Specifically, he proposes two broad classes of policy to address the problem of persistent poverty. The first is safety-net policies that directly reduce the risks that may drive poverty – perpetuating survival strategies or that provide protection against loss of key assets to insure vulnerable people effectively against potentially catastrophic downside risk. The second class might be termed ‘cargo net’ policies that help persistent poverty, and includes the following:

- (a) Build up their base of productive assets through education, land reform or other means, so that they can reach a minimum threshold of wealth necessary to self-finance in ways that do not replicate their initial poverty;

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<sup>339</sup> For a detailed discussion on how to measure poverty, see Niemietz K *A new understanding of poverty: Poverty measurement and policy implications* (The Institute of Economic Affairs, Great Britain, 2011) 35-115.

<sup>340</sup> Tshoose C ‘The Impact of HIV/AIDS in the context of Informal social security: Issues and trends from South African Experience’ (2010) 13 (3) *PER Journal* 419.

<sup>341</sup> Kaseke E ‘Poverty reduction in South Africa: The old-age pension’ in Becker U *et al International standard – setting and innovation in social security* (Kluwer Law International, 2013) 159; Neves D and Du Toit A ‘Rural livelihoods in South Africa: Complexity, vulnerability and differentiation’ (2013) Vol.13 (1) *Journal of Agrarian Change* 94-96.

<sup>342</sup> Barrett C *et al Understanding and reducing persistent poverty in Africa* 1<sup>st</sup> ed (United Kingdom, Routledge, 2008) 8.

- (b) Improve the productivity of the assets held by the persistently poor through improved technologies or markets access, thereby increasing their capacity to generate investible surpluses and to self-finance;
- (c) Access the finance (insurance and capital) necessary to protect and invest in assets and thereby to relax the constraints that often drive persistent poverty.<sup>343</sup>

### 2.4.3 Unemployment

The deep poverty levels and inequitable distribution of income are partly due to low levels of formal employment that exclude a large section of the population from actively taking part in the economy.<sup>344</sup> As discussed above, apartheid constrained the development of education, skills and labour market participation for the majority of the population and kept them trapped in poverty.

Despite the transition that began in the 1990s was largely a political process, the socio-economic structures remains almost untouched. Although the transition in South Africa was initiated 21 years ago, the socio-economic structures remain deeply affected by the legacy of the apartheid regime.<sup>345</sup> Stanwix<sup>346</sup> notes that the limited increases in income that have been observed for those at the bottom of the distribution are largely as a result of an expanding government grant system that targets economically vulnerable individuals, that is, the elderly, the disabled, and children, with significant positive impact.

In fact, social disparities are growing, majority of people remain marginalised and impoverished, living in townships where education is poor, and unemployment

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<sup>343</sup> Barrett *ibid.*

<sup>344</sup> National Development Plan - 2030, 354-356.

<sup>345</sup> Moller V 'Quality of Life in South Africa – The first ten years of democracy' (2007) Vol.81 (2) *Social Indicators Research* 188-189.

<sup>346</sup> Stanwix B and Van Der Westhuizen C 'Predicted poverty impacts of expanding the community work programmeme in South Africa' (2012) Development Policy Unit, University of Cape Town 3 available at [http://www.tips.org.za/files/dpru\\_uct\\_predicted\\_poverty\\_impacts\\_of\\_expanding\\_the\\_cwp\\_in\\_sa.pdf](http://www.tips.org.za/files/dpru_uct_predicted_poverty_impacts_of_expanding_the_cwp_in_sa.pdf) (date of use 9 October 2013).

rates are high.<sup>347</sup> In determining the level of unemployment in the country, Statistics South Africa adopts a strict measure of unemployment as the official measure for South Africa. For example, to be counted, an unemployed person must have taken active steps to look for work or to start some form of self-employment.<sup>348</sup> Thus, the official rate of unemployment excludes all individuals who report that they do want to work but have not taken active steps to search for work in the previous month.<sup>349</sup> Statistics South Africa follows the guidelines set out by the ILO in 1982.<sup>350</sup> These guidelines have been adopted in many countries.

The reasoning is that, by not searching for work, an unemployed person signals a lack of commitment to finding work. Statistics South Africa explains the meaning of the official definition of the 'unemployed' as follows: "The unemployed are those people (aged 15-64 years) who: (a) were not employed in the reference week and; (b) Actively looked for work or tried to start a business in the four weeks preceding the survey interview and; (c) were available for work, for example, would have been able to start work or a business in the reference week or; (d) had not actively looked for work in the past four weeks but had a job or business to start at a definite date in the future and were available".<sup>351</sup> The unemployment population is reflected clearly in the table below:

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<sup>347</sup> See Statistics South Africa *Quarterly Labour Force Survey* Quarter 4, 2014; See also Stewart L 'Rights discourse and practices, everyday violence and social protests: Who counts as subject and whose lives are real in the Neo-Colonial South African Nation State' (2014) Vol.18 *LDD* 5-6.

<sup>348</sup> Statistics South Africa 1998.

<sup>349</sup> Statistics South Africa 1998, 1.

<sup>350</sup> ILO *Resolution concerning statistics of the economically active population, employment, unemployment and underemployment, adopted by the 13<sup>th</sup> International Conference of Labour Statisticians* (1982) available at <http://www.ilo.org/public/english/bureau/stat/download/res/ecacpop.pdf> (date of use 9 October 2013); See also Hussmanns R *et al Surveys of economically active population, employment, unemployment and underemployment: An ILO manual on concepts and methods* (1990) Geneva International Labour Organisation.

<sup>351</sup> Statistics South Africa, *Labour Force Survey* Quarter 4 (Q4) 2012.

**Table A: Key labour market indicators**

	Jan-Mar 2012	Oct-Dec 2012	Jan-Mar 2013	Qrt-to- Qrt change	Year-on- year change	Qrt-to- Qrt change	Year-on- year change
	Thousand					Per cent	
<b>Population 15–64 yrs</b>	32786	33128	33240	112	454	0,3	1,4
<b>Labour force</b>	17948	18078	18222	144	274	0,8	1,5
<b>Employed</b>	13422	13577	13621	44	199	0,3	1,5
Formal sector (non-agricultural)	9509	9611	9586	-25	77	-0,3	0,8
Informal sector (non-agricultural)	2106	2205	2192	-13	86	-0,6	4,1
Agriculture	656	685	739	54	83	7,9	12,7
Private households	1151	1076	1105	29	-46	2,7	-4,0
<b>Unemployed</b>	4526	4501	4601	100	75	2,2	1,7
<b>Not economically active</b>	14838	15050	15017	-33	179	-0,2	1,2
Discouraged work-seekers	2335	2257	2330	73	-5	3,2	-0,2
Other (not economically active)	12503	12794	12688	-106	185	-0,8	1,5
<b>Rates (%)</b>							
Unemployment rate	25,2	24,9	25,2	0,3	0,0		
Employed/population ratio (absorption)	40,9	41,0	41,0	0,0	0,1		
Labour force participation rate	54,7	54,6	54,8	0,2	0,1		

Due to rounding, numbers do not necessarily add up to totals.

The expanded definition of unemployment includes the discouraged work-seekers. The ‘discouraged work-seekers’ are, according to Statistics South Africa,<sup>352</sup> those persons who “did not take active steps to find employment in the month prior to the survey interview”.<sup>353</sup> In terms of the key labour market indicators identified above (see key labour market indicators table above), the official unemployment rate (the number of unemployed people expressed as a percentage of the labour force) in 2013 stood at 25.2%.

Statistics South Africa Quarterly Labour Force Survey revealed that the number of unemployed persons increased by 100 000 people to 4.6 million between the fourth quarter of 2012 and the first quarter of 2013. This took the country's official unemployment rate to 25.2% and from 24.9% in the fourth quarter of 2012 (see table above). In terms of the expanded definition of unemployment, which includes people who have stopped looking for work, unemployment has

<sup>352</sup> Statistics South Africa Labour Force Survey: September 2005 xxiv).

<sup>353</sup> Statistics South Africa *Labour Force Survey*: March 2005 xxi.

increased to 36,7% in the first quarter of 2013, recording the highest unemployment rate since 2008.<sup>354</sup> According to Statistics South Africa, discouraged work seekers increased by 73 000 to 2.3 million between the fourth quarter of 2012 and the first quarter of 2013 and young people (between 15-34 years old) accounted for 70,7% of the unemployed persons.

In terms of the recent data released by Statistics South Africa, the jobless rate in South Africa increased to 25,5% in the third quarter of 2015 from 25% in the previous period.<sup>355</sup> The number of unemployed rose 3,6% while employment went up at a slower 1.1% and more people joined the labour force. Unemployment rate in South Africa averaged 25,27% from 2000 until 2015, reaching an all-time high of 31,20% in the first quarter of 2003 and a record low of 21,50% in the fourth quarter of 2008.

Stanwix<sup>356</sup> notes that approximately one in four working age South Africans are unable to find work (when the narrow definition of unemployment is used) and the majority of the jobless have no access to any income support, apart from those with access to the Unemployment Insurance Fund for a limited period or some indirect spill over effects from social grants. He further asserts that there is no meaningful safety-net for the unemployed, which is a crucial social protection gap.

In light of above discussion, it becomes clear that there is urgent need for interventions aimed at creating a safety-net for the unemployed poor that provides both work and income. Evidently the rate of unemployment in South Africa is very high and the reasons for such are twofold. Firstly, economic growth pattern has been too low to absorb the ever-rising number of young men and women entering the labour market, due to demographic growth and rising

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<sup>354</sup> Statistics South Africa, Labour Force Survey Quarter 4 (Q4) 2012.

<sup>355</sup> Statistics South Africa Labour Force Survey Q 3 2015 available at Statistics South Africa Labour Force Survey Q 3 2015 (date of use 25 October 2015).

<sup>356</sup> Stanwix (note 346 above) 182.

participation rates.<sup>357</sup> Secondly, the policies and actions of government, organised labour and business have together resulted in a growth path that has been skewed in favour of joblessness,<sup>358</sup> in that employment has fallen despite economic growth. Crucially, the growth path has entailed rising productivity and rising wages for an ever-smaller pool of workers, with rapid shrinkage in, especially, unskilled employment opportunities.<sup>359</sup>

#### *2.4.4 Inequalities in South Africa*

Inequality is measured by the Gini coefficient, which can vary between 0 and 1. The closer to 1, the more unequal a society, and the closer to 0 the more equal a society. The Gini coefficient measures the distribution of the national income.<sup>360</sup> In a perfectly equal society, 10% of the population will receive 10% of the income; 20% of the population will receive 20% of income and so on. For such a society, the Gini coefficient will be zero. If, say, 10 % of society receives 30% of the income, or 20% receives 50% of the income, the distribution is more unequal and the Gini coefficient higher. At 1, being the highest possible score, 1% of the population would receive 100% of the income.

The Gini score for South Africa is about 0,63.<sup>361</sup> With Brazil, South Africa has one of the most unequal income distributions in the world. Borhat notes that this overall figure hides a particular aspect, that is, Gini is higher among African households than among non-African households.<sup>362</sup> This is the result of some

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<sup>357</sup> Seekings J 'Do South Africa's unemployed constitute an underclass' Center for Social Science Research, (2003) Working paper no..32, University of Cape Town, 8.

<sup>358</sup> Cf Jahed M and Brey Z 'Structural transformation of economies: Lessons from the South' Development Bank of Southern Africa 3-16 available at [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Sessionpercent20I.1.4\\_1.Structuralpercent20Transformationpercent20ofpercent20Economies.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Sessionpercent20I.1.4_1.Structuralpercent20Transformationpercent20ofpercent20Economies.pdf) (date of use 25 October 2015).

<sup>359</sup> Seekings (note 357 above) 9-10.

<sup>360</sup> Gini coefficient available at <http://data.worldbank.org/indicator/SI.POV.GINI> (date of use 26 November 2013).

<sup>361</sup> See Human Science Research Council 'Income inequality and limitations of the gini index: the case of South Africa' available at <http://www.hsrc.ac.za/en/review/hsrc-review-november-2014/limitations-of-gini-index#sthash.Psw4biVb.dpuf> (date of use 25 October 2015).

<sup>362</sup> Borhat (note 222 above).



African households improving their position – a process that started in the 1990s, but accelerated after 1994.

A recent research report, by the South African Institute of Race Relations<sup>363</sup> found glaring racial inequalities between the earnings of Black and White workers. The report revealed that the average individual monthly earnings of White people are four times higher than that of Black people. The report shows that the level of relative poverty for Black Africans sits at 42% while for Whites it is just one percent. Furthermore, 77% of White people have a matric or more, but only 35% of Black people have a matric or more.

The main driver of inequality currently in South Africa is no longer the Black or White divide, but rather the intra-group divide between rich Blacks and poor Blacks.<sup>364</sup> The national Gini figure of 0,63,<sup>365</sup> amongst Black households has moved decisively up from 0,49 in 1970 to 0,59 in 2000. Among Whites, it moved from 0,43 to 0,49; Indians from 0,42 to 0,51 and Coloureds from 0,53 to 0,55.

In a nutshell, the quest to roll back poverty and inequality requires multi-dimensional analysis and thinking from all stakeholders. Demography is important, but so is growth, sustainable redistribution, a leverage of private and public resources of each other, and improved efficiencies in spending by both sectors. All these elements need to be integrated into a holistic approach that will grow the economy sustainably, create jobs and ensure a safety-net for the poor.

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<sup>363</sup> South African Institute of Race Relations, 12 September 2013 available at <http://www.sairr.org.za> (date of use 26 November 2013); See also Mpedi G 'Pertinent social security issues in South Africa' (2008) Socio-Economic Rights Project Community Law Center University of the Western Cape, 2; See also Leibbrandt M *et al* 'Post-apartheid changes in South African inequality' in Janet C *et al* *Income inequality – Economic disparities and the middle class in affluent countries* (Stanford University Press, Stanford, California 2013) 459-482; Natrass N and Seekings J 'Two nations? Race and economic inequality in South Africa today' (2001) Vol.130 (1) *Daedalus* 45-66.

<sup>364</sup> Özler B 'Not separate, not equal: Poverty and inequality in post-apartheid South Africa' (2007) Vol.55 (3) *Economic Development and Cultural Change* 487-491.

<sup>365</sup> Borat (note 222 above) 4.

It is submitted that this will still be a colossal task. However, at the same time, progress with poverty relief might not decrease inequality. As growth improves and more people are absorbed into the economy and living standards for many are improving, the poor will still be with us, resulting in inequality. An effective safety-net is needed to protect the poor. This requires a more efficient application of all existing resources. The time has come to replace the adversarial debate around economic and redistributionist policy options with a common approach to progress over to 2030.

In order to address the level of income inequalities in developing countries, Beckford<sup>366</sup> argues that what is required “are more equitable patterns of income distribution and the emergence of genuinely independent societies”. He asserts that this independence must reach the point where the people of individual Third World Countries at least have full control over their resources and the whole environment in which they live. According to him “this is a basic precondition for the achievement of full human dignity which is of crucial and ultimate importance to all people”.<sup>367</sup>

#### *2.4.5 Labour market profile*

South Africa’s labour market is highly segmented, with a core, in particular public servants and well-organised sectors, a larger periphery of vulnerable unorganised and low-paid workers in the formal and informal sectors, and a marginalised group of unemployed.<sup>368</sup>

The labour market represents a key arena for socio-economic empowerment. In this respect the labour force participation rate, which measures the percentage of those between the ages of 15 years and 65 years who are available for and seek

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<sup>366</sup> Beckford G *Persistent poverty: Underdevelopment in plantation economies of the Third World* (London, Oxford University Press, 1972) xx; See also, Lindahl C *Wealth of the poor: Eliminating poverty through market and private sector development* SidaStudies Stockholm (2005) 44-61.

<sup>367</sup> Beckford *ibid.*

<sup>368</sup> National Planning Commission 2011.

to be employed, gives an indication of those that are able to earn income in the labour market. Women are in many respects the most vulnerable citizens in South Africa. Statistics South Africa Labour Force study of 2003, showed that women had lower income, and less access to assets than men. Appallingly, women who are employed find themselves in the worst paid sectors of the labour market, notably in domestic and retail work. In 2003, 96% of domestic workers were Black (for example African, Indian and Coloured) women and 93% of these workers earned under R1000.00.<sup>369</sup>

The rate of employment of women in the formal economy is generally lower than that of men. This is evident from the participation of women in the informal sector that employment in this sector has proved to be larger source of employment for women than for men.<sup>370</sup> Because of that, they are more likely to lose employment in the formal sector (in fact, self-employment can have positive advantages in resilience for women who become infected by HIV/AIDS) and to suffer social ostracism and expulsion from their homes.

In South Africa, the social grants target people who are not expected to be economically active, that are children, the elderly, and those with disabilities. For those who are willing and able to work, but who are locked out of the economy, there is no meaningful level of social protection. Klasen<sup>371</sup> asserts that only 3% of the unemployed have access to unemployment benefits. This means that able-bodied unemployed people in South Africa have little choice but to depend on 'goodwill transfers' from those with access to income through employment or some form of social grants.

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<sup>369</sup> Hassim S *gender welfare and the developmental state in South Africa* School of Social Sciences, University of Witwatersrand, May 2005, 4.

<sup>370</sup> Matlin S and Spence N 'The gender aspects of the HIV/AIDS pandemic' London, United Kingdom, 16 October 2000 available at [www.un.org/womenwatch/html](http://www.un.org/womenwatch/html) (date of use 9 November 2013). At present, there are about 2, 3 million workers in the South African informal economy; Robinson V Cosatu to Launch New Union, *Mail and Guardian* 15 July 2005.

<sup>371</sup> Klasen S and Woolard I 'Surviving unemployment without state support: Unemployment and household formation in South Africa' (2008) 18 (1) *Journal of African Economics* 1-50.

Simply put, the massive economic burden of unemployment in South Africa is being borne primarily by workers and those who have access to social grants meant for other purposes. Having said this, it becomes clear that this challenge requires the assessment of alternative methods of poverty alleviation and social security coverage.

#### *2.4.6 The impact of HIV/AIDS on households*

HIV/AIDS pandemic has a profound impact on the level of poverty and vulnerability of most South Africans. HIV/AIDS contributes to a rise in poverty, while poverty reduces the ability of the poor living with HIV/AIDS to cope with the disease.<sup>372</sup> AIDS generates new poverty as people lose employment and housing tenure. Household incomes fall due to the loss of wage earners and the high spending, particularly on medical care and funerals.<sup>373</sup> The estimated overall HIV prevalence rate is approximately 10%.<sup>374</sup> Analysts predict that about 6 million people in South Africa were living with HIV in 2013.<sup>375</sup> For adults aged 15-49 years, an estimated 15,9% of the population is HIV positive.<sup>376</sup>

HIV/AIDS has a disproportionate impact on poor communities, permanently locking many of its sufferers in poverty. The Human Development Report quotes a study which indicates that of the 700 HIV/AIDS-affected households sampled, more than half of the affected families did not have enough food to stave off starvation. Two-thirds of them reported a loss of income because of the disease and larger proportions of household income being spent on health care and funeral costs.<sup>377</sup>

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<sup>372</sup> For a detailed discussion on the impact of HIV/AIDS on traditional coping strategies of households, see Tshoose C (note 340 above).

<sup>373</sup> South African Human Development Report 2003, 7.

<sup>374</sup> Statistics South Africa 2013, mid-year population estimates available at <http://beta2.statssa.gov.za...> (date of use 05 December 2013).

<sup>375</sup> Gonzalez L 'How South Africa's fight against HIV stacks up' available at <http://www.health-e.org.za/2013/09/23/south-africas-fight-hiv-stacks> (date of use 5 December 2013).

<sup>376</sup> *Statistics South Africa 2013* (note 374 above).

<sup>377</sup> South African Human Development Report 2003, 84.

In the absence of direct state intervention, the socio-economic situation in the country will deteriorate due to the impact of HIV/AIDS. Globally, an estimated 35.3 million people were living with HIV in 2012.<sup>378</sup> It is evident that people living with HIV/AIDS will be faced with destitution, if not assisted by the state. As it stands, only 30% of the poor were eligible to receive state social assistance grants. This indicates that more than 16 million poor people fall out of the social security support system. This is so despite the contention that an appropriate social security system is expected to prioritise the needs of people without any, or with insufficient income and must encompass those engaged in the informal sector.

Similarly, the pandemic will lead to a situation where many households that would otherwise live close to, but above, the poverty line will be pushed under the basic subsistence level. The gravity of this epidemic is linked directly to social and sexual inequality, including the disempowerment of women, labour and refugee migration within South and Southern Africa. Ultimately, the pricing and impact of patents of several essential medicines for HIV-related opportunistic infections must be examined,<sup>379</sup> so that the life-saving drugs will reach those who need them.

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<sup>378</sup> UNAIDS 'Report on the global AIDS epidemic 2013' available at <http://www.unaids.org...> (date of use 5 December 2013).

<sup>379</sup> For further reading, see Reich M and Bery P 'Expanding global access to ARVs: The challenges of prices and Patents' in Kenneth H *et al*, eds, *The AIDS pandemic: Impact on science and society* (New York, Academic Press, 2005) 324-347; Boelaert M *et al* 'Do patents prevent access to drugs for HIV in developing countries? Letter' (2002) 287 *Journal of American Medical Association (JAMA)* 840-1; Attaran A Gillespie-White L 'Do patents constrain access to AIDS treatment in poor countries Antiretroviral drugs in Africa' (2001) 286 *JAMA* 1886-92; see also Hassim A 'The five star prison hotel: The right of access to ARV treatment for HIV positive prisoners in South Africa' (2006) (3) *International Journal on Prisoner Health* 2; Heywood M 'How the poor die: HIV/AIDS and poverty in South Africa' (2000) 153 *The African Communist, Journal of the South African Communist Party* 14-21.

Indeed South Africa is falling behind in as far as the target of reaching the MDG target of universal access to antiretroviral therapy for all who needs it.<sup>380</sup> The ultimate goal is preventing the spread of HIV, but knowledge of the virus and how to avoid transmission remain unacceptably low.

The SASSA<sup>381</sup> and the Department of Social Development<sup>382</sup> seem to appreciate the urgency of the situation. Among its priorities envisaged in the Strategic Plan for the Fiscal Years 2012/13/16/17, is the development and implementation of an integrated poverty eradication strategy that provides direct benefits to those who are in need, as well as developing a comprehensive social security system that links contributory and non-contributory schemes, prioritising the most vulnerable households.<sup>383</sup>

#### 2.4.7 Education level

Education plays a vital role in addressing the plight of poverty, unemployment in South Africa. According to the Research Survey conducted in 2006,<sup>384</sup> it was estimated that one adult in seven, had no formal education, and that, 1 in 10 had completed primary school, with no higher education or tertiary education. Almost 4 in 10 have had some high school education, while 30% had matriculated but did not study further. One in 10 adults had gone beyond matric, while 2% had completed university and 6% had other post-matric qualifications.<sup>385</sup>

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<sup>380</sup> The *Millennium Development Goals Report* 2013, 4-5 available at <http://www.un.org/millennium-goals/p...> (date of use 4 December 2013).

<sup>381</sup> South African Social Security Agency (SASSA) Strategic Plan for the Fiscal Years 2012/13/16/17 available at <http://www.pmg.org.za/report/20120522-south-african-social-security-agency-its-2012-strategic-plan-filling> (date of use 8 October 2013).

<sup>382</sup> Select Committee on Social Services Meeting 22 May 2012 available at [http://www.pmg.org.za/report/20120522-south-african-social-security-agency-its-2012-strategic-plan-filling-\(date-of-use-8-October-2013\)](http://www.pmg.org.za/report/20120522-south-african-social-security-agency-its-2012-strategic-plan-filling-(date-of-use-8-October-2013)).

<sup>383</sup> *South Africa Yearbook* 2003/04, 549.

<sup>384</sup> South Africa's state of mind as we enter 2006 available at [www.bizcommunity.com](http://www.bizcommunity.com) (date of use 2 November 2013).

<sup>385</sup> South Africa's state of mind... *ibid.*

This figure clearly indicates that, great discrepancies still exist within the South African education system, as reminders of the bygone apartheid era.<sup>386</sup> Although schools have been desegregated since 1994, large differences in the quality and level of facilities between schools still exist. Large portions of the budget are spent on upgrading educational facilities, but according to the political risk yearbook,<sup>387</sup> it would require one third of the budget for the next decade to upgrade Black education to White levels. The challenge is to create a single, non-discriminatory system that offers the same level of education to all pupils.

Since the apartheid era, many policy changes have occurred within education to try to address educational inequalities.<sup>388</sup> Integration has occurred in the school system, and schooling is compulsory for 9 years for all races. Although Bantu education ideology has been officially left behind, schools are still under *de facto* segregation. Whites have moved to private schools, and suburban schools have a majority of Coloured students, while township schools are overwhelmingly Black, and rural schools tend to have Black and Coloured students.<sup>389</sup> It is evident that the backlogs from so many years of apartheid education are immense. Illiteracy rates are high at around 30% of adults over 15 years old, it is estimated that about 6-8 million adults are not functionally literate.<sup>390</sup>

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<sup>386</sup> See for example Dieltiens V and Meny-Gibert S 'In class? Poverty, social exclusion and school access in South Africa' (2012) Vol.55 *Journal of Education* 129-141.

<sup>387</sup> *South Africa Yearbook 2003/04*, 540-552.

<sup>388</sup> Cf Odhav K 'South African post-Apartheid higher education policy and its marginalisation: 1994-2002' (2009) Vol.6 (1) *SA-eDUC Journal* 33-54; See also keswell M 'Education and racial inequality in Post-Apartheid South Africa' available at <http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/NationBuilding2/Educationpercent20andpercent20Racialpercent20Inequalitypercent20inpercent20Postpercent20Apartheidpercent20Southpercent20Africa.pdf> (date of use 2 November 2013).

<sup>389</sup> Ocampo M L 'A brief history of educational inequality from Apartheid to the present' 19 September 2004 available at [www.stanford.edu/Inequity.html](http://www.stanford.edu/Inequity.html) (date of use 3 October 2013); See also *Mail & Guardian* dated 15 November 2006, 'Apartheid legacy haunts SA's schools' available at [www.mg.co.za](http://www.mg.co.za) (date of use 3 October 2013).

<sup>390</sup> Garson P 'Education in South Africa' 16 May 2006 available at [www.southafrica.info/education](http://www.southafrica.info/education) (date of use 3 October 2013).

Insecurity, caused by poverty and circumstances such as sickness and unemployment, is one of the important social issues that all communities need to address.

Many of the poor in South Africa live in rural areas, where there is an acute lack of basic social services and the infrastructure necessary to sustain basic human capabilities.<sup>391</sup> The provision of basic services will go a long way in fulfilling the state's obligation to realise the right of access to appropriate social assistance. A lack of access to basic services aggravates human poverty, and condemns the poor to a life without equality, human dignity and freedom.<sup>392</sup> Inequality of access to social services leads to a further widening of the gap between the capabilities and opportunities of social groups.<sup>393</sup>

## **2.5 Policy framework for social welfare in South Africa**

### *2.5.1 The White Paper for Social Welfare*

The move to developmental social welfare, as indicated in the White Paper for Social Welfare, relies on the model of the 'developmental welfare state' that is based on the formal labour market model. The White Paper introduced a social developmental model based on a delivery approach that engages communities in finding solutions to needs and problems through local initiatives.<sup>394</sup> Social development programmes such as universal literacy, preventative health services and population planning would be developed. The aim was greater redistribution to poorer rural and urban dwellers.

The White Paper is an overarching guideline for the creation of greater self-reliance. The vision and mission statement in the White Paper is as follows:

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<sup>391</sup> *South Africa's state of mind as we enter 2006 supra.*

<sup>392</sup> Alexander P 'Rebellion of the poor: South Africa's service delivery protests – A preliminary remarks' (2010) 37 *Review of African Political Economy* 25-28.

<sup>393</sup> South African Human Development Report 2003, 8 available at [www.undp.org.za](http://www.undp.org.za) (date of use 3 October 2013).

<sup>394</sup> Swart I *et al Welfare, religion and gender in post-Apartheid South Africa* (Stellenbosch, Sun Media, 2012) 4.



[Vision:] A welfare system which facilitates the development of human capacity and self-reliance within a caring and enabling socio-economic environment.  
[Mission:] To serve and build self-reliant nation in partnership with all stakeholders through an integrated welfare system which maximizes its existing potential and which is equitable, sustainable, people-Centered and developmental.<sup>395</sup>

Government policies envisioned a two-tiered welfare system, namely; a system of cash transfers, social relief and developmental services that will provide protection during times of unemployment and ill health, but at the same time also a system based on human and social rights of vulnerable groups of people with special needs.<sup>396</sup> According to Swart,<sup>397</sup> the White Paper is characterised by its normative framework, such as a neo-liberal framework with the emphasis on self-reliance and human rights. It also includes a communitarian tendency of emphasising the family in the community (mostly with reference to women) as the location of care.

Notwithstanding the provision of social assistance grants by the state, many households report lack of access to basic services.<sup>398</sup> In addition, there is a glare disparity in terms of the standard of living between households in urban areas compared to those in rural areas.<sup>399</sup> Despite this, the government foresees partnerships with non-state welfare providers in facilitating relationships around social welfare;<sup>400</sup> this might signal the better life for poor households in South Africa.

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<sup>395</sup> Ministry for Welfare and Population Development 1997, White Paper for Social Welfare Notice 1108 of 1997 Government Gazette 386(18166) Pretoria, Government Printers at 10.

<sup>396</sup> Sevenhuijsen S *et al* 'South African social welfare policy: An analysis using the ethic of care' 23 (3) (2003) *Critical Social Policy* 299-321.

<sup>397</sup> Swart I *et al* (note 394 above).

<sup>398</sup> Nnadozie R 'Access to basic services in post-Apartheid South Africa: What has changed? Measuring on a relative basis' (2013) Vol.16 *The African Statistical Journal* 84-100.

<sup>399</sup> Lehohla P 'Changes in standard of living among population groups in South Africa, 1998–2006' (2009) *Statistics South Africa* 53-62 available at <http://www.statssa.gov.za/publications/Report-03-03-02/Report-03-03-02.pdf> (date of use 3 October 2013).

<sup>400</sup> Tshoose C 'The pros and cons of the national health insurance in South Africa' (2013) Vol. 6 (4) *International Journal of Private Law* 363-364.

### 2.5.2 Taylor Report – Comprehensive social protection framework

In 2001, the government set up a Committee of Inquiry into a Comprehensive System of Social Security for South Africa, chaired by Professor Vivienne Taylor. The Committee was mandated to conduct research and to advise government on a social security policy reform process. This involved, among other things, examining the poverty problem in South Africa, looking at the current social security system, including existing social grants, and making recommendations for reform. In May 2002, the Committee released its consolidated report, in which the critical role of the right of access to social security and assistance for reducing poverty was highlighted.<sup>401</sup>

The Taylor Committee Report recommended that South Africa should have a package of programmes to protect those most vulnerable to poverty and its effects. These include free and adequate public health care, free primary and secondary school, free basic water and sanitation, free basic electricity, accessible and affordable public transport, access to affordable and adequate housing, and access to jobs and skills training. The Committee found that most poor people, whose number is around 22 million in South Africa, depend largely on the social grants that they receive from the government. However, social grants inherited from the apartheid era are inadequate to meet the challenge of rooting out poverty. In addition, not all poor people qualify for these grants.

The Committee concluded that the current South African social security programmes failed to satisfy the constitutional imperatives and thus make the state vulnerable to Constitutional Court challenges, and are clearly inadequate. It recommended the Basic Income Grant (BIG)<sup>402</sup> as one of the most effective and appropriate means of reducing destitution and poverty, and one which has the potential to promote human development and sustainable livelihoods. The Taylor

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<sup>401</sup> Chapter 3 of the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa 2002 (Taylor Committee Report).

<sup>402</sup> Ferguson J 'Formalities of poverty: Thinking about social assistance in neoliberal South Africa' (2008) Vol.50 (2) *African Studies Review* 77-83.

Committee proposed that a basic package of social services ought to be provided to everyone.

The Committee's support for the BIG has made very limited inroads in subsequent policy debates. The resolutions of the ruling party (ANC's 2002 National Policy Conference) supported the implementation of the Taylor Committee's comprehensive social protection framework, but were silent on the implementation of the BIG. Instead, the National Conference placed emphasis on the creation of short-term employment in the public works programme.<sup>403</sup>

In line with the Taylor Committee Report, the ILO recommends that minimum floor<sup>404</sup> approach as a strategy of addressing poverty and the inequalities in society. Mpedi<sup>405</sup> asserts that this concept consists of set of social security entitlements that are provided in addition to social insurance schemes.

Furthermore, in April 2010, the president of South Africa appointed the National Planning Commission (NPC). The mandate of the commission was twofold. Firstly, to consult the relevant stakeholders and to help the government to shape consensus on what to do about the key challenges facing South Africa. Secondly, to build a state that will grow the economy, reduce poverty and improve the quality of life of the South African citizens. The commission is an advisory body tasked with preparing recommendations for the cabinet in variety of issues affecting South Africa. The commission is expected to draft a vision statement for 2030, and produce a development plan, setting out how this vision

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<sup>403</sup> Barchiesi F 'South African debates on the basic income grant: Wage labour and the post-Apartheid social policy' (2007) 33 *Journal of Southern African Studies* 561-575.

<sup>404</sup> See ILO *Social protection floor for a fair and inclusive globalisation Report of the Advisory Group convened by the ILO in collaboration with the WHO* (2011) 1-97 available at [http://www.ilo.org/public/english/protection/spfag/download/background/bachrep\\_en.pdf](http://www.ilo.org/public/english/protection/spfag/download/background/bachrep_en.pdf) (date of use 3 October 2014).

<sup>405</sup> Mpedi G and Nyenti M 'The impact of SADC social protection instruments on setting up of a minimum social protection floor in Southern African countries' (2012) 15 (1) *PER* 244-248.

can be achieved, present reports on issues affecting long-term development, such as infrastructure investment, water resources, and inequality.<sup>406</sup>

According to the NPC diagnostic report,<sup>407</sup> the social and economic exclusion of millions of South Africans as reflected in the high levels of poverty and inequality is the biggest challenge facing South Africa. These high levels of poverty and inequality have a historical basis in apartheid and are driven principally by the fact that too few people are employed and that the quality of education for many Black people remains poor. Central to addressing these challenges, the study argues other elements could contribute to sustainable equitable services and social assistance grants. The most critical elements are financial planning, systems and information access and community's willingness to participate.<sup>408</sup> Moatshe and Mbecke note that these elements combined, will contribute to the sustainable 'Indigent Grant' system.<sup>409</sup>

The study proposes that instead of focusing on the impact that apartheid has had on the livelihoods of South Africans in the area of social security, we should examine the progress made. This means that we should examine the role of the government in making South Africa a better place for all, examine the policies that the government has introduced in the area of social security, in particular social protection for the poor, and strategies that we should adopt in making these policies to live up to their intended outcomes.<sup>410</sup>

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<sup>406</sup> See *National Development Plan Diagnostic Report* available at <http://www.npconline.co.za/MediaLib/Downloads/Home/Publications/Diagnosticpercent20Overview.pdf> (date of use 3 October 2014).

<sup>407</sup> One of the strategic objectives of the NPC was to develop the diagnostic document which aims to identify the main challenges confronting the country and to examine their underlying causes.

<sup>408</sup> Moatshe B and Mbecke Z 'The provision of basic services through indigent grants, is it equitable and sustainable in South Africa?' (2012) Vol.5 (10) *OIDA International Journal of Sustainable Development* 65.

<sup>409</sup> Moatshe B and Mbecke *ibid*.

<sup>410</sup> *Own emphasis*.

### 2.5.3 Policy implementation of the social assistance grants in South Africa

The implementation of South Africa's social assistance programme has been largely a process of reforming an apartheid-era system of racially distorted grants into a safety-net that gives meaning to the South African Constitution's mandate:

Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.<sup>411</sup>

The first phase of implementation involved deracialising existing social grants. The government's initial strategy tasked provinces with the challenge of managing implementation, administering grant applications and making payments.<sup>412</sup> This exercise proved to be futile because the administration of social assistance in most provinces was fraught with problems relating to corruption, fraud, and inefficiency.<sup>413</sup> These issues prompted the government of South Africa to establish the SASSA under South African SASSA Act (hereinafter the "Agency"),<sup>414</sup> established a national government agency to implement the system of social grants. This agency has begun operating by April 2006. The agency currently has a national office, nine regional offices,<sup>415</sup> 54 District and 540 local service offices. While the National Department for Social Development remains accountable for social security, the agency becomes the implementing provider, managing and administering grant delivery,<sup>416</sup> while the department has political oversight. The Department of Social Development main focus is to develop and monitor the implementation of social policy,<sup>417</sup> and also to ensure

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<sup>411</sup> Section 27(1)(c) of the Constitution.

<sup>412</sup> Mpedi G 'Pertinent social security issues in South Africa' (2008) Socio-Economic Rights Project Community Law Center University of the Western Cape 16-17.

<sup>413</sup> Mpedi G *ibid.*

<sup>414</sup> Mpedi (note 412 above) 17-18.

<sup>415</sup> See South African Social Security Agency A statistical summary of social grants in South Africa Statistical Report 1 of 2013 available at <http://www.sassa.gov.za/index.php/knowledge-center/statistical-reports> (date of use 05 November 2014).

<sup>416</sup> See the Social Assistance Act, 2004.

<sup>417</sup> For further reading on the monitoring of socio-economic rights in South Africa, see Studies in Poverty and Inequality Institute 'Monitoring the progressive realisation of socio-economic rights in South Africa' (2011) 22-25 available at <http://spii.org.za/wp-content/uploads/2013/12/a-monitoring-tool-for-socio-economic-rights-in-south-africa.pdf>(date of use 05 November 2014).

the provision of social protection and social welfare services to all people in South Africa.<sup>418</sup>

It is important to note that key improvements to service delivery have already been registered since SASSA became operational.<sup>419</sup> For example, the agency has recently introduced a mobile service that reaches South Africa's deep rural areas. In addition, the time to process an application has been considerably shortened through the Improved Grants Application Process (IGAP). SASSA has invested in a new Management Information System (MIS) aimed at enhancing the integrity of the grant process. Most importantly, systems have been put in place to improve the prevention and detection of fraud and corruption.

This is despite the fact that during the 2012/13 financial year, 7,734 fraud/corruption cases were registered.<sup>420</sup> Of these, 2,747 cases were finalised with a monetary value of R59 million. Successes included the arrest of 50 individuals in the Mahlabathini area (KZN), who were found to be in possession of 127 unregistered SASSA cards, three Cash Paymaster Services (CPS) registration machines and R47 000.00 in cash.<sup>421</sup> The total amount of litigation costs was just over R10 million. The amount included costs incurred in respect of the matters which were dealt with in the previous financial years.

Notwithstanding these scams, a fraud hotline system has been set-up and a partnership Special Investigations Unit (SIU) has been established. In addition, the process of appeal and review is being standardised across the nine regions.

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<sup>418</sup> Department of Social Development *Why are we called the Department of Social Development* available at [http://www.dsd.gov.za/index.php?option=com\\_content&task=view&id=28&Itemid=49](http://www.dsd.gov.za/index.php?option=com_content&task=view&id=28&Itemid=49) (date of use 05 November 2014).

<sup>419</sup> South African Social Security Agency Annual Performance Plan 2013/14-2015/16, 11-12 available at <http://www.sassa.gov.za/index.php/knowledge-center/annual-performance-plans> (date of use 05 December 2013).

<sup>420</sup> *South African Social Security Agency Annual Report 2012/13 Analysis* (14 October 2013) available at <http://www.pmg.org.za/report/20131022-south-african-social-security-agency-its-201213-annual-report> (date of use 05 December 2013).

<sup>421</sup> South African Social Security Annual Report 2012/13 *ibid.*

Mpedi notes that despite its (SASSA) momentous achievements corruption, fraud, and poor service delivery continue to plague this institution.<sup>422</sup>

In addition, over the past years the means-test has been used as criteria for targeting those in need.<sup>423</sup> Conditionalities for the Child Support Grant have been a subject of debate. For example, Budlender *et al* note that the cost to applicants of the means-test for the Child Support Grant in the Eastern Cape and Western Cape provinces are immense.<sup>424</sup> They found that visits related to the means-test part of an application require close to eight hours of time and cost approximately R25. This is for transport to social services offices, police stations and Home Affairs offices, photocopying costs and a small opportunity cost for those foregoing income.<sup>425</sup>

In summary, the enactment of the Final Constitution of the Republic of South Africa containing justiciable Bill of Rights marked a tremendous change in the area of social security law. It is submitted that the economic realities faced by the poor must be addressed in a holistic approach that will grow the economy sustainably, create jobs and ensure a safety-net for the poor. The next chapter examines the constitutional framework of the right to have access to social security in South Africa.

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<sup>422</sup> Mpedi G (note 412 above) 18-19.

<sup>423</sup> Ellis F 'We are all poor here: Economic difference, social divisiveness and targeting cash transfers in Sub-Saharan Africa' (2012) Vol.48 (2) *Journal of Development Studies* 203.

<sup>424</sup> Budlender D *et al* 'At all costs: Applying the means for the child support grant' Children's Institute and Center for Actuarial Research, University of Cape Town, September 2005, 3-7.

<sup>425</sup> Budlender (note 424 above).

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## CHAPTER THREE

### THE CONSTITUTIONAL RIGHT TO HAVE ACCESS TO SOCIAL SECURITY: A SOUTH AFRICAN PERSPECTIVE

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#### 3.1 Introduction

A study of social security in South Africa begins with examining a constitutional framework in which the content and nature of social security has been provided. Accordingly, this aspect is examined in this chapter which also scrutinises the administration and adjudication of social security in South Africa.

#### 3.2 A critical analysis of the concept of social security

In the previous chapters, it was revealed that one of the mechanisms that enable people to escape destitution is social security. It meets peoples' basic needs when their income has stopped, been disrupted or has never adequately developed.<sup>426</sup> Social security comprises both social insurance and social assistance. Social insurance, which is contributory-based, usually protects the income of those who are vulnerable due to certain contingencies which threaten their income-earning capacity. These include pregnancy, illness, old age, unemployment, and disability. On the other hand, social assistance aims at

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<sup>426</sup> Liebenberg S 'Poverty and inequality hearings: Social security, background paper for South African National Non-Governmental Organisation' South African Human Rights Commission, and the Commission for Gender Equality, 28 April 1998, 1. Social security can be defined as the use of social means to prevent deprivation (promote living standards) and vulnerability to deprivation (protection against falling living standards). The focus of social security is to enhance and protect people's capabilities to be adequately nourished, to be comfortably clothed, to avoid escapable morbidity and preventable mortality. The concentration on income derives from the fact that a shortage of income is one of the most visible and crucial factors restricting the capability of many people, See Dreze J and Sen A *Public action for social security: Social security in developing countries* (Clarendon Press Oxford, 1991).



ensuring that those who are poor gain access to a minimum income in order to satisfy their basic needs.<sup>427</sup>

The concept of social security in South Africa is based on the traditional western-oriented approach.<sup>428</sup> This traditional approach is characterised by its risk-based methodology as well as by the clear distinction between social assistance and social insurance. Thus, social security is either defined with reference to the risks covered, in terms of the involvement or non-involvement of the state, or in terms of the overall aims served by social security.<sup>429</sup>

The ILO views social security as the protection that society provides for its members. This is accomplished through a series of public measures, against the economic and social distress that will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, and death, the provision of medical care, and the provision of subsidies for families and children.<sup>430</sup>

The South African White Paper on Social Welfare<sup>431</sup> considers social security to be policies that ensure adequate economic and social protection during unemployment, ill health, maternity, child bearing, widowhood, disability, old age; social assistance in relation to old age, disability, child and family care and

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<sup>427</sup> Mpedi G 'Charity begins-but does not end-at home: *Khosa v Minister of Social Development...*' (2005) *OBITER* 173-174.

<sup>428</sup> The roots of exclusion in social security can be traced to the introduction of social security in Europe and North America, it was orientated towards protecting workers in formal employment, See Olivier M and Kalula E *Social protection in SADC: Developing an integrated and inclusive framework* 2004. In South Africa the history of racial discrimination in the provision of welfare dates back from the origins of social assistance soon after the Union in 1910. Under Apartheid, welfare state was erected to protect specific race group against various contingencies, as a results Africans were excluded from the state welfare system, See Okpaluba C *Law and contemporary South African society* 1<sup>st</sup> ed (South Africa, New Africa Books (Pty) Ltd, 2004) 180-185.

<sup>429</sup> Olivier M *et al Social security: A legal analysis* 1<sup>st</sup> ed (Durban, Butterworths, 2003) 25.

<sup>430</sup> *ILO Social Security (Minimum Standards) Convention* 102 of 1952.

<sup>431</sup> *White Paper on Social Welfare 1997* available at [www.gov.za/whitepaper/97/htm](http://www.gov.za/whitepaper/97/htm) (date of use 27 November 2013).

poverty relief.<sup>432</sup> Social insurance and assistance cover a variety of an individual's earning capacity permanently ceasing, being interrupted, never developing, public and private measures that provide cash and in-kind benefits or both, first, in the event of being exercised only at unacceptable social cost and such a person being unable to avoid poverty, and, secondly, in order to maintain children.<sup>433</sup>

The traditional definitions proposed by the ILO, based on employment-related social insurance and targeted means-tested social assistance, has come under severe criticism from scholars as being too restrictive and narrow for the problems faced by developing countries like South Africa.<sup>434</sup>

The ILO definition fails to capture the characteristics of a developing country for a number of reasons. Some of these include the level of poverty and deprivation in developing countries and the lack of social security coverage, increasing informal sector employment and the exclusion of the informally employed.<sup>435</sup> Thus, the ILO universal definition of social security fails to look at each country's specific socio-economic, political, and cultural factors, which play a key role in moulding the umbrella concept of social security.

This conceptualisation of social security fails to portray the fact that in Africa, it merely covers a small proportion of the population mainly those in formal employment and reflects the traditional male-breadwinner and female-dependent

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<sup>432</sup> White Paper on Social Welfare, Government Gazette 18166 GN 1108 of August 1997, chapter 7.

<sup>433</sup> White Paper on Social Welfare (note 432 above), Chapter 5.

<sup>434</sup> Olivier M 'The concept of social security' in Olivier M *et al Social security: A legal analysis* (Durban, LexisNexis, Butterworths, 2003)13-32; Dreze J and Sen A *Social security in developing countries* (Clarendon Press, 1991); See also Olivier M 'International labour and social security standards: A developing country critique' (2013) Vol.29 (1) *The International Journal of Comparative and Industrial Relations* 23-29.

<sup>435</sup> Smit N and Mpedi G 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy' (2010) Vol.14 *Law, Democracy and Development* 19-20; Ginneken W *Social security for the excluded majority: Case studies of developing countries* Genève: International Labour Office, (1999) 29-30.

and nuclear family model.<sup>436</sup> However, the reality on the continent is the situation where the breadwinner is not necessarily the man, where the extended family is prominent and influential, and where there is a recent trend of women-headed and even child-headed households. Therefore, any definitional approach to social security in Africa must seek to address some of these issues.<sup>437</sup>

It can further be contended that, even though similarities exist with regard to the list of social contingencies, the concept of social security has to be determined not purely in terms of the existing schemes covering the said contingencies, but essentially in terms of the aims for which these schemes are intended.

While the traditional risk categories may be helpful in identifying more common life experiences and situations to which human beings are generally exposed, they may not reflect the particular risk-creating conditions which people on the African continent, for example, may be exposed to, such as natural disasters and the impact of HIV/AIDS.<sup>438</sup>

It is difficult to formulate a standard universally acceptable definition of social security, as social security often reflect different history, traditions, level of development, structural, cultural factors,<sup>439</sup> and ideological orientations of a specific country.<sup>440</sup> It is also inadequate to describe social security merely with reference to the contingencies covered by the concept.

It is considered that, an overall aim, which directs and informs the social security concept and the areas it cover must serve as a point of departure. It is only within

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<sup>436</sup> Kasente D 'Gender and social security reform in Africa' (1996) *International Social Security Review (ISSR)* 30.

<sup>437</sup> Folbre N 'Women and Social Security in Latin America, the Caribbean and Sub-Saharan Africa' (1993) ILO, Geneva.

<sup>438</sup> Tshoose C 'The Impact of HIV/AIDS regarding informal social security: Issues and perspectives from a South African context' (2010) 13 *PER* 408-422.

<sup>439</sup> Berghman J 'Basic concepts of social security in social security in Europe' Bruylant/Maklu, Brussel/Antwerp 1991, 10.

<sup>440</sup> Kaseke E 'Rural social security needs' the case of Zimbabwe Harare: School of Social Work (Unpublished paper) 1993.

the context of such an overall aim that a distinct social security paradigm can be developed without being restricted to a mere contingency or risk-based approach.<sup>441</sup>

The social security concept has therefore increasingly been broadened from the income situation to include basic needs in general and also widened the range of contingencies.<sup>442</sup> This is in the belief that it is necessary to link traditional social security with socio-economic mechanisms. Social security is thus defined as any kind of collective measures or activities designed to ensure that members of society meet their basic needs; for example, adequate nutrition, shelter, health care and clean water supply, as well as being protected from contingencies.<sup>443</sup>

Van Ginneken regards social security as the provision of benefits to households and individuals, through public or collective arrangements, to protect against low or declining living standards arising from a number of basic risks and needs.<sup>444</sup> This definition consists of four elements. The first element is that people derive individual rights from social security. The second outlines the social aspect of social security which is provided through public or collective mechanisms. The third is that it is not for promotional purposes, but only for protection and does not only consist of cash benefits and medical care; it also concerns benefits in kind and other basic need areas such as housing. The fourth element stresses that contingencies are not to be considered narrowly as they should include some basic risks.

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<sup>441</sup> Olivier M 'The concept of social security' (note 434 above) 35.

<sup>442</sup> CF Van Ginneken W 'Extending social security: Policies for developing countries' ILO (2003) available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/kd00061.pdf> (date of use 27 November 2013).

<sup>443</sup> Getubig IP and Schmidt S (eds) *Rethinking social security: Reaching out to the poor* (UN Asia and Pacific Development Center Kuala Lumpur, 1992) Chapter 1.

<sup>444</sup> Van Ginneken W 'Social security for the informal sector: Issues, options and tasks ahead' ILO: Geneva (1996) – available at [www.ilo.org/public/english/protection/socsec/publ/wouter2/htm](http://www.ilo.org/public/english/protection/socsec/publ/wouter2/htm) (date of use 27 November 2013).

Social security is also defined as the sum of all regulations within a society that aims to guarantee the individual or group, not only physical survival but also general protection against unforeseen risks which would entail a deterioration of the situation and consequences that could be borne by the individual or group without external assistance.<sup>445</sup> In Africa, apart from the formal state or private sector mechanisms, there are also non-formal social security instruments such as traditional and informal systems.<sup>446</sup> Traditional social security refers to the form of security with close links to social traditions that is binding on members of the community based on custom. Informal systems are those that develop independently from tradition and are based on principles of reciprocity and solidarity arising from socio-economic circumstances.<sup>447</sup>

### **3.3 The system of social security in South Africa**

According to the Department of Social Development, South Africa's social security comprises of four pillars,<sup>448</sup> namely; social assistance, social insurance, social relief, and private savings. Social assistance in its current form is not aimed at meeting the total needs of the recipients but to enable them to have a minimum standard of living. The Social Assistance Act<sup>449</sup> makes provision for the payment of social assistance grants to people who are unable to care for themselves.

These grants are usually subject to a means-test and are allocated on a strictly categorical basis. The White Paper on Social Welfare<sup>450</sup> defines social

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<sup>445</sup> Schmidt S 'Social security in developing countries: Basic tenets and fields of state intervention' (1995) 38 *International Social Work* 38.

<sup>446</sup> For further reading on informal and formal social protection system in Sub-Saharan Africa, see Getu M and Devereux S *Informal and formal social protection systems in Sub-Saharan Africa* (Addis Ababa, Ethiopia, Organisation for Social Science Research in Eastern and Southern Africa, Kampala Fountain Publishers, 2013) 1-259.

<sup>447</sup> Fuchs M 'Social security in third world countries' in Von Benda-Beckman K *et al Between kinship and the state* (Dordrecht Providence RI USA, 1988).

<sup>448</sup> Chapter 2 of 1999/2000 Annual Report.

<sup>449</sup> Social Assistance Act 13 of 2004.

<sup>450</sup> GNR1108 of 8 August 1997 at 15.

assistance as an integrated and comprehensive system of social services, facilities, programmes and social security to promote social development, social justice and the social functioning of people.

The current South African social assistance framework comprises the following social assistance grants. Firstly, we have social assistance grants for children, namely; Care-Dependency Grant, Foster Child Grant, and Child Support Grant. Secondly, social grants for the elderly and special pensions for military personnel, gratuities and financial reparation for individuals who have suffered because of political conflict (this include among others, War Veterans Grant, Grant-in-aid, and supplementary grants, grants to people with disabilities (Disability Grant).<sup>451</sup> A detailed discussion of these grants is given below.

### **3.3.1 Social assistance grants**

Currently, South Africa's social security programme offers the following social assistance grants -

#### *3.3.1.1 Child Support Grant*

The Child Support Grant has been commended as crucial in reducing poverty, less hunger and better nutrition. However, scholars argue that the low value of the child support programme cannot lift the majority of children out of income poverty.<sup>452</sup> Nevertheless, it is important to note that a person is eligible for child support if he/she is the primary caregiver<sup>453</sup> of that child.<sup>454</sup>

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<sup>451</sup> Olivier M *et al Introduction to social security* (Durban, LexisNexis, Butterworths, 2004) 229.

<sup>452</sup> Mathews S 'Social protection and the National Development Plan: Closing the gap for children – opportunities and challenges' (2013) Vol.39 (1) *Social Dynamics* 139.

<sup>453</sup> In terms of section 1 of the Children's Act 38 of 2005 (as amended) '**care-giver**' means any person other than a parent or guardian, who factually cares for a child and includes:

- (a) a foster parent;
- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care center where a child has been placed;

The primary caregiver must comply with the following conditions. He/she should continue to be the primary care-giver of the child. The child should have accommodation, be fed and clothed. Designated officers should have access to the child and dwelling where the child resides. Lastly, the primary care-giver must ensure that the child receives immunisation and other health services.<sup>455</sup> In terms of the Social Assistance Act, a person has to comply with residency and citizenship requirements.<sup>456</sup>

By virtue of the Constitutional Court judgements, permanent residents could also apply for this grant.<sup>457</sup> The amount payable to the beneficiaries of the Child Support Grant is three hundred and ten rand (R310.00) per month which increases every year in line with inflation.<sup>458</sup> The purpose of the grant is to target children in poor households.<sup>459</sup> It is also intended to form an integral part of the broader social protection programme, which includes free subsidised health care, water, sanitation and education.<sup>460</sup> This grant is available to children under the age of 18.<sup>461</sup> It is within this context that the government must be commended for extending the age of children eligible for the Child Support Grant to 18.<sup>462</sup>

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- (e) the person at the head of a shelter;
  - (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
  - (g) the child at the head of a child-headed household.

<sup>454</sup> Section 6 of Social Assistance Act 13 of 2004.

<sup>455</sup> Social Assistance Act regulation 20.

<sup>456</sup> Social Assistance Act section (b) and (c).

<sup>457</sup> *Khosa and Others v the Minister of Social Development and Others; Mahlaule and Others v the Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (*Khosa case*).

<sup>458</sup> Children's Institute Current statistics on grants for children available at [http://www.childrencount.ci.org.za/social\\_grants.php](http://www.childrencount.ci.org.za/social_grants.php) (date of use 2 October 2014).

<sup>459</sup> Lim Hye Y 'Alleviating child poverty in South Africa: The role of social assistance grants' (2006) *Economic and Social Rights Review (ESR Review)* 3.

<sup>460</sup> Martin P 'Children's rights to social assistance: A review of South Africa's Child support grant' in Proudlock P (ed) *South Africa's progress in realising children's rights: A law review* (Cape Town, Children's Institute, University of Cape Town & Save the children South Africa, 2014) 59.

<sup>461</sup> In terms of the Children's Act 38 of 2005 a "child" means a person under the age of 18 years. The government is planning to extend to child support grant to young people between 19 – 23 years of age. According to the Minister of Social Development this initiative aims at providing young adults who are committed to furthering their studies, see Dlamini B 'Child support grant to be expanded to age 23' available at

### 3.3.1.2 Care Dependency Grant

A parent, primary caregiver or foster parent of a child who requires and receives permanent care or support due to a physical or mental disability will be eligible, if the criteria mentioned in the Act is met.<sup>463</sup> The grant of R1,350.00 per month is available to a parent,<sup>464</sup> primary caregiver or foster parent of a child who requires and receives permanent care due to his/her physical or mental disability.<sup>465</sup> This grant is also subject to a means-test and will be given to the applicant in cases of a single caregiver with monthly income threshold of R13,150.00 and in cases of married caregiver with joint income the permissible threshold is R26,300.00<sup>466</sup> or such higher amount as the Minister may determine from time to time.<sup>467</sup> Moreover, eligibility of this grant is dependent on a medical report from a medical officer confirming that the child complies with the definition of a care dependant child.<sup>468</sup>

### 3.3.1.3 Foster Child Grant

A foster parent is, subject to the provisions of section 5 of the Social Assistance Act,<sup>469</sup> eligible if the foster child is in need of care and he/she satisfies the

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<http://www.sabc.co.za/news/a/97eaaf80445387868c22aefc6ab42bce/Child-support-grant-to-be-expanded-to-age-23-20141106> (date of use 25 March 2015).

<sup>462</sup> National Treasury *Budget 2014: Estimates of national expenditure* 26 February 2014 available

<http://www.treasury.gov.za/documents/nationalpercent20budget/2014/enebooklets/Votepercent2019percent20Socialpercent20Development.pdf> (date of use 2 October 2014).

<sup>463</sup> Section 5 of Social Assistance Act 13 of 2004. This includes amongst others, citizenship and residency). By virtue of recent constitutional judgement, permanent could also apply for this grant.

<sup>464</sup> Children's Institute Current statistics on grants for children available at [http://www.childrencount.ci.org.za/social\\_grants.php](http://www.childrencount.ci.org.za/social_grants.php) (date of use 2 October 2014).

<sup>465</sup> Section 7 of the Social Assistance Act.

<sup>466</sup> Children's Institute Current statistics on grants for children available at [http://www.childrencount.ci.org.za/social\\_grants.php](http://www.childrencount.ci.org.za/social_grants.php) (date of use 2 October 2014).

<sup>467</sup> Regulation 5 (1) of the Social Assistance Act.

<sup>468</sup> According to the Social Assistance Act and its regulations a parent or foster parent receiving this grant must comply with the following requirements: the child must remain in the care of the parent or foster parent who applied for the grant; the child must have accommodation and be properly cared for and receive the necessary care, and medical care.

<sup>469</sup> Social Assistance Act 13 of 2004.



requirements of the Child Care Act.<sup>470</sup> The Social Assistance Act requires the foster parent to be a South African citizen. The grant of R 830.00<sup>471</sup> is available to a foster parent of a child who is under 18 years of age and if the child is in need of care.<sup>472</sup> This grant is important in the context of increasing number of challenges faced by orphans and child-headed households caused by the HIV/AIDS pandemic, as relatives often take care of orphans who have lost their parents.<sup>473</sup> This appears to be the position under the Old Social Assistance Act.<sup>474</sup> Nevertheless, according to the judgement of the Constitutional Court in *Khosa*, one should assume that this grant is also available to permanent residents.

#### 3.3.1.4 Older Persons Grant

This grant is available to older persons who meet the eligibility criterion of the Social Assistance Act. Accordingly, both women and men who have attained the age of 65 are eligible for this grant,<sup>475</sup> contrary to the previous situation where eligibility was determined in the case of a woman, if she has attained the age of 60 and in the case of a man, if he has attained the age of 65.

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<sup>470</sup> Children's Act 38 of 2007 (as amended).

<sup>471</sup> Children's Institute Current statistics on grants for children available at [http://www.childrencount.ci.org.za/social\\_grants.php](http://www.childrencount.ci.org.za/social_grants.php) (date of use 2 October 2014).

<sup>472</sup> Section 8 of Social Assistance Act.

<sup>473</sup> For a detailed discussion on the challenges experienced by child-headed households in South Africa, see Mturi A *et al* 'Understanding the experiences and challenges of child-headed households and the role of social grants in South Africa' (2012) Vol.27 (2) *Journal of Social Development in Africa* 9-31; Pieterse-Spies A 'HIV/AIDS, vulnerability and the constitution: Can access to social assistance protect the most vulnerable' (2009) Vol.24 *South African Public Law Journal* 568-587.

<sup>474</sup> Section 4 (A) which required residency only was inserted into the Social Assistance Act 59 of 1992 by the provisions of the Welfare Laws Amendment Act 106 of 1997.

<sup>475</sup> See section 10 (b) of the Social Assistance Amendment Act 6 of 2008. Section 10 of the Social Assistance Act, 2004 is amended by the substitution for paragraph (b) which reads as follows:

- (b) in the case of a man, he has attained the age of 65 years;
  - (i) After 1 April 2008, attained the age of 63 years;
  - (ii) After 1 April 2009, attained the age of 61 years; or
  - (iii) After 1 April 2010, attained the age of 60 years.

The government has proposed that older person's grant means-test should be phased out by 2016.<sup>476</sup> According to the National Treasury, the phasing out of the means-test will streamline administration, prevent the exclusion of vulnerable individuals and eliminate the disincentive to preserve retirement savings arising from the present means-test.<sup>477</sup>

Residency and citizenship are qualifying conditions.<sup>478</sup> The beneficiaries will also include permanent residents, subject to the criteria outlined in the Social Assistance Act.<sup>479</sup> According to the SASSA, the means-test determines whether the person qualifies to receive a grant, as social assistance is meant for those who have insufficient means to support themselves.<sup>480</sup>

Despite the financial assistance and the introduction of the Older Persons Act<sup>481</sup> in South Africa, Older Persons in South Africa are faced with myriad of challenges. For example, chronically poor households tend to have more members, and are more likely to be female-headed, and on average have older persons as heads.<sup>482</sup> Furthermore, Older Persons often find themselves in a

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<sup>476</sup> Business Report 'Budget: Pension means-test to be phased out' 27 February 2013 available at <http://www.iol.co.za/business/budget/budget-pension-means-test-to-be-phased-out-1.1477956> (date of use 2 October 2014).

<sup>477</sup> National Treasury available, 85 available at <http://www.treasury.gov.za/documents/nationalpercent20budget/2013/review/chapterpercent206.pdf> (date of use 22 March 2015).

<sup>478</sup> Sections 5 (b) and 5 (c) of the Social Assistance Act 13 of 2004.

<sup>479</sup> Section 5 of the Social Assistance Act.

<sup>480</sup> South African Social Security Agency 'Old Age Grant' at 6 available at [www.sassa.gov.za/index.php/social-grants/grants-for-older-persons](http://www.sassa.gov.za/index.php/social-grants/grants-for-older-persons) (date of use 2 October 2014).

<sup>481</sup> Older Persons Act 13 of 2006.

<sup>482</sup> May J 'Chronic poverty and Older People in South Africa' February 2003 School of Development Studies University of Natal South Africa report commissioned by HelpAge International 1-36 available at [http://www.chronicpoverty.org/uploads/publication\\_files/WP25\\_May.pdf](http://www.chronicpoverty.org/uploads/publication_files/WP25_May.pdf) (date of use 2 October 2014); See also Ramashala M 'Living arrangements, poverty and the health of Older Persons in Africa' 1-16 available at [http://www.un.org/esa/population/publications/bulletin42\\_43/ramashala.pdf](http://www.un.org/esa/population/publications/bulletin42_43/ramashala.pdf) (date of use 2 October 2014); HelpAge International 'Older people in Africa: A forgotten generation' available at <http://eng.zivot90.cz/uploads/document/205.pdf> (date of use 2 October 2014); Cf Ogwumike F and Aboderin I 'Exploring the links between old age and poverty in anglophone West Africa: Evidence from Nigeria and Ghana' (2005) Vol.15 (2) *Generations Review* 7-13.

situation where they have to fend for themselves and their dependants.<sup>483</sup> Other challenges faced by the Older Persons relate to the impact of HIV/AIDS, access to health care facilities, access to transport in rural areas, and limited financial resources.<sup>484</sup>

#### 3.3.1.5 War Veterans Grant

This grant is payable to citizens and residents of the Republic of South Africa only if they meet the criteria mentioned in the Social Assistance Act.<sup>485</sup>

#### 3.3.1.6 Grant in Aid

This grant is payable in respect of a person who is in such a physical or mental condition that he/she requires regular attendance by another person. Most importantly, this grant requires a beneficiary to be a South African citizen and resident in the Republic. However, permanent residents could also apply for this grant (*Khosa case*).

#### 3.3.1.7 Social Relief of Distress

Social relief is defined in the Fund-Raising Act,<sup>486</sup> as the alleviation of need of persons by means of the temporary rendering of material assistance to them. It also entails short-term measures undertaken by the state and other private organisations to assist persons during individual or community crises that have caused the affected persons or communities to be unable to meet their most

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<sup>483</sup> Mathiso S 'Realising the rights of older persons in South Africa' (2011) Vol.12 (1) *ESR Review* 5.

<sup>484</sup> Kay R 'The status of older persons in relation to the implementation of policies and legislation and challenges relating to social security' (2011) Vol.12 (1) *ESR Review* 19-20; Law L 'Challenges facing older persons' (2012) Briefing Paper presented at the South African Catholic Bishops Conference, Parliamentary Liaison Office at 1-2 available at [www.cplo.org.za/?wpdmdl=2&&ind=22](http://www.cplo.org.za/?wpdmdl=2&&ind=22) (date of use 22 March 2015).

<sup>485</sup> Section 11 of the Social Assistance Act. For further reading on the War Veterans Grant, see Tshoose C and Nevondwe L 'A legal analysis of the distribution and payment of special pensions' (2011) 16 (4) *International Pension Law Journal* 224-234.

<sup>486</sup> Fund-Raising Act Act 107 of 1978.

basic needs.<sup>487</sup> The Social Assistance Act, which is financed through taxation, regulates this programme.

### 3.3.1.8 Disability Grant

According to the Social Assistance Act, individuals are eligible for a Disability Grant if they pass a means-test, and if as a result of mental or physical disability, they are unable to provide for themselves through employment.<sup>488</sup> Given South Africa's high unemployment rate and relatively generous disability grants,<sup>489</sup> illness has itself become an important source of income.<sup>490</sup> The South African Disability Grant is a non-contributory, means-tested cash transfer of R 1,290.00 (as of October 2013).

Section 9 of the Social Assistance Act defines disability with reference to the following set of criteria. Firstly, a person is eligible for a disability grant if he/she has:

- (a) attained the prescribed age.
- (b) owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him/her to provide for his/her maintenance.

The revised definition provided by the Social Assistance Amendment Bill<sup>491</sup> reads as follows: 'disability in respect of an applicant, means a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him/her to provide for his/her maintenance.

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<sup>487</sup> Olivier M *et al* *Introduction to social security* (2004) 224.

<sup>488</sup> Section 9 of Social Assistance Act 13 of 2004.

<sup>489</sup> Trevor M Former Minister of Finance, budget speech, 15 February 2006 available at [www.sarpn.org.za/documents/SA](http://www.sarpn.org.za/documents/SA) budget- speech 2006 (date of use 2 September 2014).

<sup>490</sup> Kagee A 'Do disability grants influence adherence to antiretroviral therapy' (2014) Vol.3 (1) *African Journal of Disability* 1-6; See also Nattrass N 'Disability and welfare in South Africa's era of unemployment and AIDS' Center for Social Science Research Working paper no. 147, University of Cape Town, 2006, 7.

<sup>491</sup> Section 1 of the Social Assistance Act 13 of 2004 as amended by the Social Assistance Amendment Bill, 2010 GG 32986.

In light of the above, it is important to note that people living with HIV/ AIDS are eligible to Disability Grant (DG) subject to the following criteria. Eligibility to the disability grant is defined by the SASSA's guidelines.<sup>492</sup> Criteria for qualification include applicant's status (that is, citizenship, permanent residency or refugee status); being of working age (18 years and older); passing a means-test and having received a medical assessment report. The state-appointed medical doctor assesses and confirms the disability. The DG can be either permanent (for disabilities lasting longer than 12 months) or temporary (for disabilities between 6 and 12 months) and HIV patients are eligible for the temporary DG. The DG is re-assessed and the person is re-examined by a doctor every six-months to confirm whether they still qualify.<sup>493</sup>

Consequently, Govender notes that people living with HIV/AIDS qualify for and receive a temporary DG, based on an assessment of the disability by a state-doctor.<sup>494</sup> The assessment of disability rests with the doctor who is usually guided by the person's CD4 count (less than 200) and/or TB/pneumonia related illness. People with a CD4 count of below 200 will usually qualify for the DG. At the same time, some people with CD4 count of less than 200 may still be assessed as fit enough to work. Equally, some people with CD4 count above 200 who are very sick with TB or may qualify for the grant.<sup>495</sup>

Notwithstanding the availability of the foregoing grants, South Africa has a challenge of ensuring that the beneficiaries of these grants use them for their intended purpose.<sup>496</sup>

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<sup>492</sup> South African Social Security Agency available at <http://www.sassa.gov.za/index.php/social-grants/disability-grant> (date of use 22 March 2015).

<sup>493</sup> Govender V *et al* 'Disability grant: A precarious lifeline for HIV/AIDS patients in South Africa' (2015) Vol.15 *BMC Health Services Research* 9-10.

<sup>494</sup> Govender *ibid*.

<sup>495</sup> Govender *ibid*.

<sup>496</sup> Cf Midgley J 'Poverty policy, development and the State: Toward a typology of strategic approaches' in Becker U *et al International standard-setting and innovations in social security* (Kluwer Law International, 2013)140.

### 3.3.2 System of social insurance in South Africa

Social insurance usually refers to earned benefits of workers and their families. It is most often linked to formal employment.<sup>497</sup> There is a direct connection between the amount paid and the benefit received. On the contrary, earnings-related benefits often also have non-contributory elements (for example the state may supplement the contributions). There is an overlap between these benefits and needs-based social assistance.<sup>498</sup> Liebenberg posits that social insurance is intended to enhance economic security.<sup>499</sup>

According to O'Connell, during the past century, these economic security devices have proliferated rapidly, and both private employers and legislatures have created multiple sets and complex roles to govern their distribution.<sup>500</sup> O'Connell suggests that for most Americans, access to economic security is closely linked to participation in the paid labour force. In South Africa, those who do not have access to work and work-related benefits rely in most cases, on the system of social security, in particular the conditional cash transfers. Even when beneficiaries are able to access social insurance, there are frequently many limitations and they are inappropriately targeted.

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<sup>497</sup> Smit N and Mpedi G 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy' (2010) Vol.14 *Law, Democracy and Development* 19-20.

<sup>498</sup> Krause C 'Lowering of social security standards under International human rights law' (1994) unpublished LLM dissertation, University of Essex, 3-4.

<sup>499</sup> Liebenberg S *et al Poverty and inequality hearings – Social security themes* paper compiled for South African National Non-Governmental Organisation (SANGOCO), South African Human Rights Commission, and the Commission for Gender Equality, 28 April 2008, 15 available at [www.communitylawcenter.org.za/.../socio-economic.../Socialpercent20Security%20Security%20Security](http://www.communitylawcenter.org.za/.../socio-economic.../Socialpercent20Security%20Security%20Security) (date of use 2 September 2014).

<sup>500</sup> O'Connell ME 'On the fringe: Rethinking the link between wages and benefits' (1993) 67 *Tulane Law Review* 1422-1431.

### 3.3.2.1 The main types of social insurance available

#### 3.3.2.1.1 Unemployment insurance

The main form of social insurance in South Africa is provided for under the Unemployment Insurance Act.<sup>501</sup> It is a fairly typical example of social insurance legislation found in countries in which the labour force has not been fully absorbed into wage-earning employment.<sup>502</sup>

The main features of such social insurance schemes are as follows:

- Costs that are met by contributions shared between employers and employees, with sometimes the supplementary contribution from the state out of general revenue;
- Participation is compulsory for prescribed areas of employment; contributions are accumulated in a special fund from which benefits are paid;
- Surplus contributions that are not required for the payment of benefits are invested to earn supplementary income for the fund; and
- The contributor's right to benefits is related to his/her contribution record; contribution and benefit rates are usually earnings-related.<sup>503</sup>

The Unemployment Insurance Fund which was established in 1946 provided a limited number of categories of benefit. In 1946, the state's concern was limited to alleviating poverty among Whites. A major part of the workforce including agricultural workers, African gold and coal mining workers and domestic workers were excluded.<sup>504</sup>

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<sup>501</sup> Unemployment Insurance Act 30 of 1996 (as amended).

<sup>502</sup> John Limbrick and Associates 'Extended the Provisions of the Workman's Compensation Act and the Unemployment Insurance Act to Domestic workers' A Report to the Department of Manpower July 1993.

<sup>503</sup> Limbrick and Associates *ibid*.

<sup>504</sup> Meth C and Naidoo R 'Unemployment insurance and related coverage issues' Interim Report of the Task Team, October 1996; Dekker A 'Informal social security: A legal analysis' (2005) unpublished LLD Thesis, University of South Africa, 22-25.

The five categories of benefits provided for under the UIF Act are, *Unemployment benefits, Maternity benefits, Illness benefits, Adoption benefits, and dependant's benefits*. It is important to note that Schedule 3 of the UIF Act provides the scale of benefits to which a contributor is entitled.<sup>505</sup> The Act also entitles the Minister to amend the scale of benefits contained in schedule 3 in accordance with a maximum monthly rate of remuneration of a skilled manual labourer as determined by the Social Security (Minimum Standards) Convention.<sup>506</sup>

#### 3.3.2.1.2 Occupational injuries and diseases

The Compensation for Occupational Injuries and Diseases Act<sup>507</sup> is also a typical example of social insurance legislation found in many countries. The Act requires all employers and workmen as defined to pay annual premiums related to the amount of wages paid, and the assessed risk of accidents in the particular sector of industry in which the employer carries on a business.

Workmen (as defined in the legislation) are entitled to benefits under the Act regardless of whether their employers have paid the necessary premiums. The COIDA provides that if workers are injured at work or contract a disease caused by their work (occupational disease), they get benefits from the Compensation Fund.<sup>508</sup>

The COIDA benefit structure covers five contingencies:

- Medical and hospital costs arising from occupational injuries and diseases;

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<sup>505</sup> See Chapter three of the Unemployment Insurance Act No. 30 of 1996 (as amended).

<sup>506</sup> Unemployment Insurance Act *ibid*; See also the Minimum Standards Convention 102 of 1953.

<sup>507</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

<sup>508</sup> Industrial Health Research Group, 'Guide to the Compensation for Occupational Injuries and Diseases Act' (1996).



- Temporary incapacity which may be either total or partial, compensation is 75% of the worker's monthly wage;
- Permanent total incapacity, compensation is a monthly pension;
- Permanent partial incapacity, compensation is a proportional monthly pension or a lump sum, depending on the extent of the disability; and
- Compensation is paid to the worker's dependants.<sup>509</sup>

When a fatal injury happens, and the worker is killed or dies because of the injury, his/her dependants (widow or widower, children or perhaps mother) will get a pension. The dependant widow or widower will get a pension for life. Children (up to 3 children) under 18 years of age will get a pension (included as part of the parent/guardian's pension) which will stop when they reach 18 years, unless they are still studying at school or university.

Other legislations include the Occupational Diseases in Mines and Works Act,<sup>510</sup> which provides for mandatory reporting and the payment of certain benefits to mine workers who develop certain occupational lung diseases, and the payment of certain benefits for dependants of workers who die from such diseases.

In as far as the enforcement of the Mine Health and Safety Act<sup>511</sup> is concerned, an inspector who has reason to believe that any occurrence, practice or condition at a mine endangers or may endanger the health or safety of any person at the mine. Therefore, an instructor may issue an instruction that is necessary to protect the health or safety of any persons at the mine.<sup>512</sup> This includes an instruction that the operations at the mine or a part of the mine be halted.<sup>513</sup> According to Coles,<sup>514</sup> it is important that the inspector's power is not exercised in

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<sup>509</sup> Industrial Health Research Group *ibid*.

<sup>510</sup> Occupational Diseases in Mines and Works Act 78 of 1973.

<sup>511</sup> Mine Health and Safety Act 29 of 1996 (MHSA).

<sup>512</sup> Le Roux W 'Powers of the inspectorate to close a working place' (2011) 11 *The Journal of the Southern African Institute of Mining and Metallurgy* 542-544.

<sup>513</sup> See section 54 (a) of the Mine Health and Safety Act 29 of 1996 (as amended).

<sup>514</sup> Coles C 'Closure orders in terms of the Mine Health and Safety Act' available at <http://www.polity.org.za> (date of use 23 August 2013).

an arbitrary manner. She asserts that there must be objective facts which justify the exercise of these powers.

The MHS Act applies to mines and works while the Occupational Health and Safety Act<sup>515</sup> applies to other industries but does not apply to employers and workplaces to which the MHS Act and certain matters covered by the Merchant Shipping Act apply. The COIDA<sup>516</sup> came into effect on 1 March 1994. The purpose of the Act is to provide compensation for losses due to occupational injuries and diseases at the workplace. The Act applies to all employers and casual and full-time employees who become ill or who are injured, disabled or killed as a result of a workplace accident or workplace-related disease.

The COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment, or who contract occupational diseases.<sup>517</sup> This means that employees or their dependants are compensated, regardless of whether their injury or illness was caused by their own negligence, their employer's negligence or that of any other person.

The COIDA lists the more common diseases. If an employee contracts a disease that is not listed, he/she must prove that the disease is related to his work in order to receive compensation. Furthermore, the Act provides for the payment of medical aid received by disabled employees from the private medical profession at tariff rates. Employers are required to pay employees' compensation for the

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<sup>515</sup> Occupational Health and Safety Act 85 of 1993 (OHSA).

<sup>516</sup> COIDA.

<sup>517</sup> The Compensation Fund Preliminary Report 2<sup>nd</sup> draft at 3 available at <http://www.treasury.gov.za/publications/other/ssrr/Sessionpercent20Onepercent20Papers/Compensationpercent20Fundpercent20Projectpercent202ndpercent20draft.pdf> (date of use 23 March 2015); See also Kakob O 'Perspectives on determining permanent disablement in South African occupational injury law' (2012) unpublished LLM Short Dissertation, North West University (Potchefstroom campus), 1 available at [http://dspace.nwu.ac.za/bitstream/handle/10394/9068/Jakob\\_O.pdf?sequence](http://dspace.nwu.ac.za/bitstream/handle/10394/9068/Jakob_O.pdf?sequence) (date of use 23 March 2015).1 available at [http://dspace.nwu.ac.za/bitstream/handle/10394/9068/Jakob\\_O.pdf?sequence](http://dspace.nwu.ac.za/bitstream/handle/10394/9068/Jakob_O.pdf?sequence) (date of use 23 March 2015).

first three months of absence from work to employees who are temporarily disabled.

The employer must report the accident to the commissioner within seven days after having received notice of an accident or having learned in some other way that an employee has encountered an accident.<sup>518</sup> It is important to note that any person who is convicted of an offence in terms of this Act shall be liable to a fine, or to imprisonment for a period not exceeding one year.<sup>519</sup>

### 3.3.2.1.3 Occupational retirement insurance

Many governments are concerned with the ageing of their populations.<sup>520</sup> There is much emphasis worldwide on looking at how people can be encouraged to start making personal provisions for their retirement.<sup>521</sup> Governments hope that by introducing tax benefits and other incentives,<sup>522</sup> personal provision will increase and reduce the financial strain placed on government in the area of old age social assistance. Private insurance companies find that the challenge that faces them is to devise new and innovative schemes to extend coverage to people who are not in permanent formal employment. The large insurance industry in South Africa plays a crucial role in mobilising contractual savings for investment. Much of it is occupational retirement insurance.

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<sup>518</sup> See section 39 (1) of COIDA.

<sup>519</sup> Section 99 of COIDA.

<sup>520</sup> Beard J *et al* (eds) *Global Population Ageing: Peril or promise*, Geneva, *World Economic Forum* (2011) 4-137; Dobriansky P *et al* 'Why population aging matters: A global perspective' 6-24 available at <http://www.nia.nih.gov/sites/default/files/WPAM.pdf> (date of use 23 August 2013); United Nations 'World population ageing' (2013) Department of Economics and Social Affairs, Population Division, 3-75.

<sup>521</sup> Welson J 'South Africans not saving enough for retirement' available at <https://www.sanlam.co.za/wps/wcm/connect/3c9b558048037e198ad39ab03d1325f5/But+there+is+still+hope+for+the+future.pdf?MOD=AJPERES> (date of use 23 August 2014); Cf Samwick A 'Saving for retirement: Understanding the importance of heterogeneity...' (2006) Vol.41 (1) *Business Economics* 21-26.

<sup>522</sup> Cf Blom N 'Tax incentives will help to boost culture of saving' *Business Day*, Johannesburg South Africa 24 July 2014, 2.

Assets of retirement funds alone amounted to 73% of GDP in 1993.<sup>523</sup> Occupational retirement insurance has expanded its coverage to most industries, and it is usually mandatory for employees in such industries to join their pension or provident fund. Organised labour's involvement in this sector is a healthy challenge to management's power in this area. Workers and employers typically contribute 7.5% of the monthly wage to a retirement fund, and workers can then claim benefits upon retirement. The retirement funds are regulated through the Pensions Funds Act of 1956 (as amended) with the aim of safeguarding members' interests.

Van der Berg notes that:

Coverage is still low in agriculture, trade, catering and accommodation (mainly employees of small traders and shopkeepers), and domestic service. Coverage amongst men is probably much higher than among women, who are disproportionately present in services, including both trade and domestic service.<sup>524</sup> Although coverage of those in formal employment is high (about 73%) the large extent of unemployment means that only 40% of the labour force is covered.<sup>525</sup>

#### 3.3.2.1.4 *Private insurance*

People also make provision against certain contingencies such as retirement, ill health, death and unemployment through private insurance schemes. The proper regulation of the private insurance industry to prevent abuses and forms of unfair discrimination is clearly warranted - for example, the exclusion of persons with HIV/AIDS from many medical aid schemes.<sup>526</sup> The Bill of Rights specifically prohibits private individuals and institutions from discriminating unfairly on grounds of race, gender, sexual orientation, disability, religion, conscience, belief, culture, language and birth.<sup>527</sup>

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<sup>523</sup> Smith Committee, 1995: D2.16.

<sup>524</sup> Van der Berg S 'South African social security under apartheid and beyond' (1997) Vol.14 (4) *Development Southern Africa* 489.

<sup>525</sup> Promotion of Equality and Prevention of Discrimination Act 4 of 2000.

<sup>526</sup> 'AIDS patients' rights may be tested in court' *Business Day*, 4 May 1998.

<sup>527</sup> Section 9(4) of the Constitution.

It is evident that the concept of social insurance has been defined as a mandatory contributory system of one kind or another or regulated private sector provision, concerned with the spreading of income over the life cycle or the pooling of risks regulated by private sector provision.<sup>528</sup>

Nevertheless, the South African social security system has no specific social insurance schemes for HIV/AIDS related risks that may befall individuals as well as their families. However, there are schemes which (directly or indirectly) play a significant role in assisting individuals and their dependants in coping with HIV/AIDS and its effects. Most of them are contributory based. Employees and employers often carry the burden of contributing to these schemes. Medical aid schemes are the most notable due to their significance in the area of health care for those living with HIV/AIDS.

Other social insurance arrangements, such as the employment insurance, retirement schemes and the compensation for occupational injuries and diseases, play a pivotal role through survivor's benefits upon the death of the breadwinner. It is clear that several points of criticism may be advanced against the South African social insurance. For instance, that it is closely tied to formal employment.<sup>529</sup> As a result, many people are excluded from participating in social insurance such as retirement schemes which offer survivors benefits upon the death of the breadwinner. Consequently, employees often neglect to contribute to health insurance.

This makes it difficult for them to afford life-prolonging treatment in the event of HIV/AIDS related sickness. Eventually, it means that they will require social

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<sup>528</sup> Mpedi G *Zeitschrift Für ausländisches und internationales Arbeit - und Sozialrecht (ZIAS)*; 3/2004; 18 Jahrgang, Seiten 201-204, C.F. Muller, 256; Olivier M *et al Social security: A legal analysis* 1<sup>st</sup> ed (Durban, Butterworths, 2003) 597-598; Taylor Committee Report 2002, 36.

<sup>529</sup> Mpedi G and Millard D 'Bridging the gap: The role of micro-insurance in a comprehensive social protection system in South Africa' (2010) *OBITER* 499.

assistance.<sup>530</sup> To remedy this situation, it is argued that the state should step in and compel people to protect themselves.<sup>531</sup> Participation in these schemes often depends on whether one fits within the limited definition of ‘employee’. The outcome is exclusion and marginalisation of those who are not involved in formal employment or those who do not fall within the notion of ‘employee’ as defined in various social insurance statutes.

### 3.4 Informal social security

As discussed in Chapter One, the importance attached to informal social security is that it provides a safety-net for those who are excluded from the formal social security (which is based on formal employment).<sup>532</sup> Devereux<sup>533</sup> defines informal social security as a “subset of coping strategies that involve drawing support from other households, individuals and associations particularly during periods of livelihood hardship”.

In the South African context, the most telling example of the informal social security is the *stokvel* systems (often known as voluntary savings organisation).<sup>534</sup> This is usually a savings arrangement whereby a group of

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<sup>530</sup> Olivier M *et al* *Social security: A legal analysis* (2003) 123-135.

<sup>531</sup> Mpedi G *Zeitschrift Für ausländisches und internationales Arbeit und Sozialrecht* (ZIAS) C.F. Muller, 3/2004, 18, Jahrgang, Seiten 201-334,259; Taylor Committee Report 46.

<sup>532</sup> Chitonge H ‘Social protection challenges in sub-Saharan Africa: Rethinking regimes and commitments’ (2012) Vol.71 (3) *African Studies* 337-339.

<sup>533</sup> Devereux S ‘Making less last longer: Informal safety-nets in Malawi’ (1999) Discussion paper no. 373. Sussex: Institute of Development Studies, at 13 available at <https://www.ids.ac.uk/files/Dp373.pdf> (date of use 20 October 2013).

<sup>534</sup> Verhoef G ‘Social capital in voluntary savings organisations in South Africa in historical perspectives’ (2008) 56 *New Contree* 51-79. For a detailed discussion on other forms of informal safety nets, see Mberu B *et al* ‘Family ties and urban – Rural linkages among older migrants in Nairobi Informal settlements’ (2013) Vol.19 (3) *Population Space and Place* 276-290; Tevera D and Simelane N ‘Food for the urban poor: Safety-nets and food-based social protection in Manzini, Swaziland’ (2014) 25 *Urban Forum* 248-249; MacLean L ‘Exhaustion and exclusion in the African Village: The non-state social welfare of informal reciprocity in rural Ghana and Cote d’Ivoire’ (2011) Vol.46 (1) *Studies in Comparative International Development* 124-134; Mupedziswa R and Ntseane D ‘The contribution of non-formal social protection to social development in Botswana’ (2013) Vol.30 (1) *Development Southern Africa* 88-91; Ruysenaar S ‘Reconsidering the ‘*letsema* principle’ and the role of

people contributes an amount of money each month, say R500.00 In a *stokvel* comprising 12 friends, each person gets one chance a year to take home the month's collected cash.

Therefore, once a year, each person in the group gets a lump sum of R 6000.00 in this case. These systems are fairly widespread throughout the country and provide safety-nets for people who fall outside the ambit of formal social insurance systems. There are indications that certain financial institutions are beginning to recognise the existence of *stokvels* and are accommodating these associations.<sup>535</sup> Informal safety-nets have been the major form of social protection available for poor households with children in developing countries.<sup>536</sup> For example, in Lesotho *mafisa* system of traditional support plays a crucial role towards the survival of the indigents in the community. Mosito succinctly analyses *mafisa* below.

According to him in this system, cattle, sheep, goats, horses, are loaned to a poorer family to look after them so that they can plough, obtain milk and use them for various activities.<sup>537</sup> He observes that under the system, once cattle have been loaned to a person, such a person is permitted to earmark the first progeny of such animals for the original owner and the next for himself/herself. He further asserts that the borrower is permitted to do this continually for as long as the animals continue to be in his/her possession.<sup>538</sup>

In his view when the progeny grows up and produces more progeny, the same practice continues with respect to the progeny. In addition, the person to whom

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community gardens in food security: Evidence from Gauteng, South Africa' (2013) Vol.24 (2) *Urban Forum* 220-248.

<sup>535</sup> Available at <<http://free.financialmail.co.za/04/0507/companies...> (date of use 20 November 2013).

<sup>536</sup> Barrientos A *Social protection and poverty* (2010) Geneva: UNRISD, Paper no. 42, at 13 available at <http://hdrnet.org/515/1/UNRISD.pdf> (date of use 20 November 2013).

<sup>537</sup> Mosito K 'A panoramic view of the social security and social protection provisioning in Lesotho' (2014) Vol.17 (4) *Potchefstroom Electronic Journal* 1599-1600.

<sup>538</sup> Mosito K *ibid.*

the domestic animals are loaned continues to enjoy all the benefits associated with such an animal, including eating its meat when it dies, as if he/she were the owner of the animal.<sup>539</sup> However, the original animals and the progeny earmarked for the original owner can be recalled at any time the owner so wishes. The philosophy behind this custom is to ensure that the poor acquire animals for themselves to be able to survive with their families.<sup>540</sup>

#### 3.4.1 Role of informal social security

The concept itself encompasses informal forms of social security, for example, support granted by family<sup>541</sup> and community members.<sup>542</sup> The development of informal social protection is largely linked to the problem of poverty and the vast number of people excluded in terms of the present formal social security framework.<sup>543</sup> It originated from the family context, where support was given to family members.<sup>544</sup> Eventually, it expanded owing to the increased need in cultural communities. The family acted as the first line of defence against basic risks and contingencies.<sup>545</sup> In African societies, it is the family which cares for people living with HIV/AIDS.

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<sup>539</sup> Mosito K *ibid.*

<sup>540</sup> Mosito K (note 537 above).

<sup>541</sup> Mokomane Z 'Social protection as a mechanism for family protection in Sub-Saharan Africa' (2013) Vol.22 *International Journal of Social Welfare* 248-249.

<sup>542</sup> See Hebo M 'Giving is saving: The essence of reciprocity as an informal social protection system among the Arsii Oromo, Southern Ethiopia' in Devereux S and Getu M *Informal and formal social protection systems in Sub-Saharan Africa* (Organisation for Social Science Research and Southern Africa, Fountain Publishers 2013) 13-17; Kaseke 'Social security in Eastern and Southern Africa' Paper presented at the SADC Social Security Conference 2000.

<sup>543</sup> Cf Ghazali S 'Kut (Informal rotating credit) in the livelihood strategies of urban households in Penang, Malaysia' (2003) Vol.35 (2) *Area* 183-193; Sheona E *et al* 'The traditional broom trade in Bushbuckridge, South Africa: Helping poor women cope with adversity' (2007) Vol.61 (3) *Economic Botany* 259 – 261; Olivier M *et al* *Social security: A legal analysis* 1<sup>st</sup> ed (Durban, Butterworths, 2003) 560; Lindell I 'Informality and collective organising: Identities, alliances and transnational activism in Africa' (2010) Vol.31 (2) *Third World Quarterly* 207-219.

<sup>544</sup> Patel L *et al* 'Indigenous welfare and community-based social development: Lessons from African innovations' (2012) Vol.20 (12) *Journal of Community Practice* 13-14.

<sup>545</sup> Cf Dercon S 'Income risk, coping strategies, and safety nets' (2002) Vol.17 (2) *The World Bank Research Observer* 141-146.



The role of informal social security cannot be ignored as it covers a large sector of our population who are excluded from the formal social security. Studies estimate that nearly half (45%) of South Africa's population is considered to be poor and living below the poverty line.<sup>546</sup> Almost half of the people are classified as living in absolute poverty. The majority of the people, almost 70% live in rural areas, and African people constitute the majority of them in the country, though poverty is not confined to any particular race group.<sup>547</sup> It is clear that the traditional or informal social security mechanisms based on solidarity cannot offer complete protection against poverty and other contingencies, since they are facing tremendous problems, relating to poverty and HIV/AIDS.

Therefore, it would be extremely inappropriate to implement social security system without having proper regard to existing informal social security mechanisms present in traditional communities and informal employment context. In the process of transforming the South African social security system, the challenge would be to develop, transform and strengthen existing informal social security system.<sup>548</sup>

It is evident that for the continual existence of informal social security in South Africa, firstly, effort must be made towards providing training to members of mutual support schemes (e.g. Burial Societies, *Stokvel*), and to improve the management of these schemes. Secondly, provision of financial assistance by governments and non-governmental organisations in order to improve their financial base and thereby enhance their capacity to provide better social

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<sup>546</sup> May J and Woolard I 'The nature and measurement of poverty and inequalities' in May J (ed) *Poverty and inequality in South Africa meeting the challenge, 1998/UNDP transformation for Human Development* (South Africa, 2000) chapter 2. According to the World Bank 45% of the population live on less than \$ 2 a day.

<sup>547</sup> Van der Waal K and Malan M 'A developmental perspective on social security for the urban and rural poor and the informally employed in South Africa' Paper presented at SANPAD Seminar (Pretoria, 20 November 2000) 8.

<sup>548</sup> Kaseke E 'The challenges of extending social security to the poor in Africa perspective' Paper presented at International Council on Social Welfare Biennial Conference Cape Town 23-27 October 2000; Olivier M *et al* (note 543 above) 588.

protection. Midgely<sup>549</sup> proposes that policies should be adopted to strengthen community-based social security institutions. This would make it possible for non-formal social security schemes to incorporate the social insurance principle of risk sharing.<sup>550</sup>

### 3.5 Indirect social security

The indirect social security refers to certain forms of social security, which are generally not listed as part of direct social security measures. Nevertheless, it follows that indirect social security and direct social security are closely interrelated. Indirect social security refers to those services that do not form part of direct or traditional social security, but are nonetheless crucial in preventing human damage, in the prevention of social exclusion, and in aiding human beings to be able to live dignified lives.<sup>551</sup>

The Primary School Nutrition Programme (PSNP) is a good example of indirect social security measure aimed at ensuring access to food and nutrition, as the Constitution endows every child in South Africa with the right to basic nutrition.<sup>552</sup> The PSNP, which is a school feeding programme, was first introduced throughout South Africa on 01 September 1994, with the Department of Health acting as a primary implementation agency on a national level. It is estimated that approximately 15 000 schools and 4.9 million learners are benefiting from this scheme.<sup>553</sup>

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<sup>549</sup> Midgely J and Sirojudin 'Social protection and community-based social security in Indonesia' (2011) Vol.33 (1) *Social Development Issues* 14.

<sup>550</sup> Kaseke E 'Social security in Eastern and Southern Africa' Paper presented at the SADC Social Security Conference 2000.

<sup>551</sup> Olivier *et al Social security: A legal analysis* (note 543 above) 537.

<sup>552</sup> Section 28(1)(c) provides that every child has the right to basic nutrition, shelter, health care services and social services. Sub-section 3 provides that a child means a person under the age of 18 years. This definition is in line with the UN Convention on the Rights of the Child 1998.

<sup>553</sup> Kallman K 'Food for thought: A review of national school nutrition programmeme' (2005) Children's Institute, University of Cape Town 1-23 available at <http://www.ci.org.za/depts/ci/pubs/pdf/poverty/facts/Foodforthought.pdf> (date of use 22 March 2015).

In summary, South African safety-nets are likely to play an important role in mitigating the impact of poverty. However, this is possible given the fact that eligibility for these grants are driven largely by their categorical nature, the increasing burden of chronic illness, the mounting orphan crisis and the impoverishment of households associated with HIV/AIDS.<sup>554</sup>

The Taylor Committee defines Comprehensive Social Protection as follows:

Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state.<sup>555</sup>

The Comprehensive Social Protection concept operates through a built-in package of social protection interventions, namely; 'income poverty' (provision of minimum income) and 'capability poverty' (provision of certain basic services).<sup>556</sup> The advantage of this 'package' approach is that it enables one to achieve a degree of balance between measures focused on reducing income, services (capability) and asset poverty. Confining government's efforts to formal social security will only serve to exacerbate existing inequalities between the rich and the poor. It is clear that the system of social assistance in South Africa is compensatory in nature. However, we need to see more integration and preventative measures being introduced. It is argued that these programmes need to be structured in a way that they are accessible to those who are poor, as administrative obstacles and corruption on the part of the officials administering these programmes, makes it difficult for beneficiaries to access them.

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<sup>554</sup> Mpedi G 'HIV/AIDS in South Africa: Towards comprehensive social protection? *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)*' 18(3) (2004).

<sup>555</sup> Taylor Committee Report (note 10 above), 41.

<sup>556</sup> Taylor Committee Report *ibid*.

### 3.6 The Constitutional right of access to social security

As it has already been discussed in Chapter Two, the Constitution of South Africa recognises the injustices of the past and aims to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”<sup>557</sup> It appeals to the improvement of the quality of life of all and equal protection under the law. Scholars agree that the inclusion of a range of socio-economic rights<sup>558</sup> in the Bill of Rights is central to the achievement of this fundamental constitutional purpose.

This part focuses on the Constitutional framework regarding the right to social assistance in South Africa. It also explores the normative importance of social security rights and some of the important constitutional provisions which have a direct impact on the system of social assistance. It examines important Constitutional Court and other courts’ judgements which have played a crucial role in giving content to the constitutional right to access to social security.

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<sup>557</sup> Preamble to the Constitution.

<sup>558</sup> For a detailed discussion on socio-economic rights in the South African Constitution, see Bruhn N ‘Litigating against an epidemic: HIV/AIDS and the promise of socio-economic rights in South Africa’ (2011) Vol.17 *Michigan Journal of Race and Law* 182-215; Ingle M ‘Socio-economic rights and women in South Africa: Nothing but a handful of feathers?’ (2011) Vol.7 (1) *The Journal for Transdisciplinary Research in Southern Africa* 95-102; Grant E ‘Human Dignity and socio-economic rights’ (2012) Vol.33 *Liverpool Law Review* 242-259; Germain S ‘Taking ‘health’ as a socio-economic right seriously: Is the South African Constitutional dialogue a remedy for the American healthcare system’ (2013) Vol.21 (2) *African Journal of International and Comparative Law* 145-171; Desierto D ‘Justiciability of socio-economic rights: Comparative powers, roles, and practices in the Philippines and South Africa’ (2009) Vol.11 (1) *Asian-Pacific Law and Policy Journal* 114-160; Chenwi L and Hardowar R ‘Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol’ (2010) Vol.11 (1) *Economic and Social Rights Review* 3-6; Davis D ‘The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about the separation of powers?’ (2012) Vol.15 (5) *Potchefstroom Electronic Law Journal* 2-12; Christiansen E ‘Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court’ (2007) Vol.38 *Columbia Human Rights Law Review* 321-386; Mubangizi J and Mubangizi B ‘Poverty, human rights law and socio-economic realities in South Africa’ (2005) Vol.22 (2) *Development Southern Africa* 277-289; Moatshe B and Mbecke Z ‘The provision of basic services through indigent grants, is it equitable and sustainable in South Africa’ (2012) Vol.5. (9) *OIDA International Journal of Sustainable Development* 55-62.

### 3.7 Protecting social security rights: Why does it matter?

Social rights are associated with the normative theory of dignity,<sup>559</sup> human rights,<sup>560</sup> and freedom.<sup>561</sup> Dignity is offered as a key normative justification in the first article of the Universal Declaration on Human Rights, 1948. It provides as follows:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Another justification for social rights as human rights is found in the idea of freedom.<sup>562</sup> The idea here is that freedom lies in being able to make meaningful choices about the lives we want to lead, of not being subjected to another person's arbitrary control, about having the capacity to understand political complexities and run for office, and about having the health and income security that allow one to frame and act out of a life plan.<sup>563</sup> Rawls argues that a social minimum ought to be guaranteed and legally enforceable as a constitutional essential.<sup>564</sup>

Additional strategy for defending social human rights is found in the related ideas of social citizenship, civic republicanism, and deliberative democracy.<sup>565</sup> These

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<sup>559</sup> Nickel J *Making sense of human rights* 2<sup>nd</sup> ed (Oxford, Blackwell Press, 2007) 9 -10.

<sup>560</sup> King J *Judging social rights* (Cambridge University Press, 2012) 17-20.

<sup>561</sup> Cf Grant E 'Human dignity and socio-economic rights' (2012) Vol.33 *Liverpool Law Rev* 235-242; See also, Yamin A 'Shades of dignity: Exploring the demands of equality in applying human rights frameworks to health' (2009) Vol.11 (2) *Health and Human Rights* 1-3; Fordham M 'Social rights' (2013) Vol.18 (4) *Judicial Review* 379-387.

<sup>562</sup> Raz 'Ethics in the public domain: Essays' in *The morality of law and politics* (Oxford University Press, 1994), chapter 1; Fabre C *Social rights under the Constitution: Government and the decent life* (Oxford University Press, 2001); Bilchitz D *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (Oxford University Press, 2007) 26-27.

<sup>563</sup> For a detailed discussion on the notion of freedom, see McMahon F and Dowd A 'Human freedom from pericles to measurement' (2014) Vol.19 (1) *The Independent Review* 65-82.

<sup>564</sup> Rawls J *Theory of justice* (Cambridge, MA: Harvard University Press, 1971; rev.edn 1990); Rawls *Justice as fairness: A restatement* (Cambridge, MA: Harvard University Press, 2001).

<sup>565</sup> Mor A in Bassiouni C *et al* 'Democracy: Its principles and achievement Inter- Parliamentary Union Geneva, IV' (1998) 47-48; See also Article 213 of the Universal Declaration of Human Rights, which states that the will of the people shall be the basis of the authority of

justifications consider social rights as instrumental in support of meaningful participation in political decision-making. It is crucial because these approaches facilitate the process of decision-making that legitimize political outcomes. This participation in self-governance is viewed either as an end in itself, or as an instrument towards securing greater freedom and equality.<sup>566</sup>

Commentators on public participation hold the view that meaningful participation in the political processes, whether by running for office, influencing outcomes through debate, or simply comprehending the range of options, requires a guaranteed social minimum.<sup>567</sup> One notable value of citizenship theory<sup>568</sup> is that it accounts for a particular sociological phenomenon that is relevant to the public perception about rights in the social rights context. These include the fact that in wealthier liberal democracies, the people contribute substantially over the course of their lives to the funding of the system, which generates a new property type claim that the state owes as a reciprocity obligation to provide promised or implied benefits.<sup>569</sup>

Reciprocity is a key theme in Stuart White's discussion of social rights and economic citizenship.<sup>570</sup> All these different justifications for social human rights

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government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Cf Lister M 'There is no human right to democracy: But may we promote it anyway' (2012) *Stanford Journal of International Law* 257-276; Bellamy R 'Rights as democracy' (2012)15 *Critical Review of Social and Political Philosophy* 1-23.

<sup>566</sup> Cf Donnelly J 'Human rights, democracy, and development' (1999) 21 *Human Rights Quarterly* 608-632; Arat Z 'Human rights and democracy: Expanding or contracting' (1999) 32 *Polity* 119-144.

<sup>567</sup> For further reading on social citizenship and social security, see Leisering L and Barrientos A 'Social citizenship for the global poor? The worldwide spread of social assistance' (2013) Vol.22 *International Journal of Social Welfare* 50-65; Forbath W 'Not simple justice: Frank Michelman on social rights, 1969-present' (2004) 39 *Tulsa Law Review* 597-630; Michelman F 'Welfare Rights in a constitutional democracy' (1979) *Washington University Law Quarterly* 659; Cf Tshoose C 'Dynamics of public participation in local government: A South Africa perspective' (2015) Vol.8 (2) *African Journal of Public Affairs* 1-18.

<sup>568</sup> Cf King D and Waldron J 'Citizenship, social citizenship and the deference of welfare provision' (1988) Vol.18 (4) *British Journal of Political Science* 415-443.

<sup>569</sup> Reich C 'The new property' (1964) 73 *Yale Law Journal* 732.

<sup>570</sup> White S *The civic minimum: On the rights and obligations of economic citizenship* (Oxford University Press, 2003).

are insightful and provide important normative theory of the relevance of social rights as human rights. In summary, the justifications of human rights examined above converge upon the following three core human interests. Firstly, the absence of physical suffering forms the basis of self-respect. Secondly, people should be afforded an opportunity to control their own destiny.<sup>571</sup> Thirdly, the meaningful participation of people in social and communal life forms the critical aspect of modern democracies. In the case of public participation, scholars in the field agree that in order for public participation to be achieved, we need meaningful engagement.

For example, in the context of eviction applications, the courts have frequently made mandatory orders requiring the parties to engage with each other with a view to exploring mutually acceptable solutions to the dispute, including the possibility of securing suitable alternative accommodation for the occupants. Liebenberg<sup>572</sup> notes that such orders may be accompanied by a reporting order through which judicial supervision over the engagement process is maintained.

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<sup>571</sup> Weiner D *et al* 'Apartheid representations in a digital landscape: GIS, remote sensing, and local knowledge in Kiepersol, South Africa' (1995) 22 *Cartography and Geographic Information Systems* 30-44; See also White S 'Depoliticising development: The uses and houses of participation' (1996)16 *Development in Practice* 6-17; Forester J 'Making participation work when interest conflict' (2006) 72 *Journal of the American Planning Association* 447-456; Gbaffou C 'Introduction: The place of participation in South Africa' (2008) 66 *Transformation* 1-7; Arnstein S 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of Planners* 216-224; Lijphart A 'Unequal participation: democracy's unresolved dilemma' (1997) 91 *American Political Science Review*, University of California 2-9; Cf Schwartzman K and Taylor K 'What caused the collapse of Apartheid' (1999) 27 *Journal of Political and Military Sociology* 108-133; Lawson G 'Negotiated revolutions: The prospects for radical change in contemporary world politics' (2005) 31 *Review of International Studies* 473-493; Adam H and Moodley K 'Race and nation in post-Apartheid South Africa' (2000) 48 *Current Sociology* 51- 68; Gumede V 'Public policy making in a post-apartheid South Africa: A preliminary perspective' (2008) 38 *Africanus* 7; Mathekga R 'Participatory government and the challenge of inclusion: The case of structures in post-apartheid South Africa' (2006) 63 *Colombia International* 89-91.

<sup>572</sup> Liebenberg S *Socio-economic rights: Adjudication under a transformative Constitution* (Juta and Co. Ltd, 2010) 16-22; Devenish G *A commentary on the South African Constitution* (Durban, Butterworths, 1998); Mubangizi C 'A South African perspective on the class between culture and human rights ...' (2012) 13 *Journal of International Woman's Studies* 35.

In the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*,<sup>573</sup> the Constitutional Court held that meaningful engagement is 'a two-way process in which communities and government talk and listen to each other, and try to understand each other's perspectives so that they can achieve a particular goal. It is a 'neutral' space where people and the state can discuss and shape options and solutions to difficult issues. This would imply that if the government is developing a strategy to meet its constitutional obligations of realising a specific socio-economic right, it must engage with the community during the decision-making, planning, implementation and evaluation processes.

### **3.8 Social security rights in the South African Constitution**

The South African Constitution<sup>574</sup> entrenches a range of social security rights. These rights relate, *inter alia*, to health care, food and water.<sup>575</sup> Section 27(1)(c) of the Constitution guarantees the right to access to social security.<sup>576</sup> The State is obliged to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights. The Constitution places an obligation on the State to ensure universal access to social security. It simultaneously allows a certain degree of latitude in relation to these aspects: the progressive realisation of the right, the taking of reasonable measures and the availability of resources.<sup>577</sup>

The Constitution is the supreme law of the Republic, any law or conduct which is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>578</sup> Constitutional supremacy has replaced the notion of parliamentary sovereignty,

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<sup>573</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) (3) SA 208 (CC).

<sup>574</sup> The Constitution.

<sup>575</sup> Section 27(1)(a)(b) of the Constitution.

<sup>576</sup> The Constitution grants everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

<sup>577</sup> Section 27(2) of the Constitution.

<sup>578</sup> Section 2 of the Constitution.



in terms of which Parliament could enact laws that discriminated against people and allowed for severe human rights abuses.<sup>579</sup>

Alongside this, the Bill of Rights has been enacted as part of the Constitution and specially entrenched.<sup>580</sup> It has been made applicable to all laws, and binds the executive, the judiciary and all organs of State,<sup>581</sup> as well as natural or juristic persons, provided certain conditions have been met.<sup>582</sup> The Constitution enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law.<sup>583</sup> Furthermore, section 27(1)(c) of the Constitution guarantees the right to access to social security, while numerous other provisions contain fundamental rights related to social security (such as the right to access to housing).<sup>584</sup> These rights provide a court, tribunal or forum with the basis for interpreting legislation in the social security sphere.

### 3.9 The role and importance of Constitutional values

The Constitution provides that some of South Africa's foundational values are human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>585</sup> The Constitution aims to heal the divisions of the past

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<sup>579</sup> *Coetzee v Government of the Republic of South Africa and others* 1995 (10) BCLR 1382, 12; *Matiso v Commanding Officer, Port Elizabeth Prison* (1995) 10 BCLR 1382 (CC). The difference between the past and the present is that individual freedom and security no longer fall to be protected solely through the vehicle of common law maxims and presumptions which neither the legislature nor the executive may abridge.

<sup>580</sup> Section 74(2) signifies enhanced protection accorded to the Bill by requiring comprehensive support for its amendment. The amending of a Bill must be passed by the National Assembly, with a supporting vote of at least two thirds of its members, while at least six provinces in the National Council of Provinces must cast a supporting vote.

<sup>581</sup> Section 8(1) of the Constitution.

<sup>582</sup> Section 8(2) states that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

<sup>583</sup> Section 39(2) of the Constitution.

<sup>584</sup> Section 26(1). This section provides that "everyone has the right to have access to adequate housing". However the right to have access to adequate housing is further qualified by section 26(2), which provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

<sup>585</sup> Section 1(a).

and establish a society based on *democratic values*, social justice and fundamental human rights and to improve the quality of life of all citizens.<sup>586</sup> Constitutional values are important in the interpretation and enforcement of the rights entrenched in the Bill of Rights.

When interpreting the right to have access to social assistance, section 39 of the Constitution enjoins every court, tribunal or forum to promote the *values* that underlie an open and democratic society based on human dignity, equality and freedom.<sup>587</sup> Human dignity informs constitutional interpretation at a range of levels. It is a value that informs the interpretation of many; possibly all rights. It is not only a value but also a justiciable<sup>588</sup> and enforceable human right that must be respected and protected.<sup>589</sup>

Equality is another foundational value that informs constitutional interpretation.<sup>590</sup> Furthermore, equality in respect of social assistance is implicit in the reference to everyone being entitled to have access to the rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.<sup>591</sup> Considering that social assistance serves the fundamental purpose of enabling all persons in need of support to enjoy a

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<sup>586</sup> Preamble of the Constitution.

<sup>587</sup> Section 39 (a) of the Constitution.

<sup>588</sup> The term 'justiciability' refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognised rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty bearer does not comply with his or her duties. The existence of a legal remedy—understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim, see Curtis C 'Courts and the legal enforcement of economic, social and cultural rights: Comparative experiences of justiciability' (2008) *International Commission of Jurists* Geneva Switzerland 6-7.

<sup>589</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 15.

<sup>590</sup> See Chaskalson A 'Dignity as a Constitutional value: A South African perspective' (2011) Vol.26 (5) *American University International Law Review* 1377-1407; O' Regan K 'The right to equality in the South African Constitution' (2013) Vol.25 (1) *Columbia Journal of Gender and Law* 110-115.

<sup>591</sup> *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) BCLR 569 (CC) para 41.

dignified existence as free and equal citizens, this sanctions the adoption of an interpretation that proceeds from an assumption in favour of every indigent person.<sup>592</sup>

The right of access to social security and social assistance for those unable to support themselves and their dependants is entrenched because contemporary South Africa is a society that values human beings and wants to ensure that people are afforded their basic needs. It is important that society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.<sup>593</sup>

Within the social protection context, *Ubuntu* as a constitutional value plays a crucial role in supporting the existence of social assistance in South Africa.<sup>594</sup> *Ubuntu* in its simplest form is defined as the art of being human and a way of life associated with many African societies.<sup>595</sup> With origins in South Africa, *Ubuntu* is an all-encompassing view of humaneness, caring, sharing, respect, and compassion.<sup>596</sup> Shutte defines the notion *Ubuntu* as follows:

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<sup>592</sup> Van der Merwe D *Social Welfare Law in the South African social security system* Center for International and Comparative Labour Law (CICLASS) Publication Series 1/99, 5.

<sup>593</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) para 44, as quoted in *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para 52.

<sup>594</sup> Whitworth A and Wilkinson K 'Tackling child poverty in South Africa: Implications of *Ubuntu* for the system of social grants' (2013) Vol.30 (1) *Development Southern Africa* 125-126; Thomas C '*Ubuntu*: The missing link in the rights discourse in post-Apartheid transformation in south Africa' (2008) Vol.3 (2) *International Journal of African Renaissance Studies* 39-48.

<sup>595</sup> Nkondo G '*Ubuntu* as public policy in South Africa: A conceptual framework' (2007) Vol.2 (1) *International Journal of African Renaissance Studies* 89-92; Gade C 'What is *Ubuntu*? Different interpretations among South Africans of African descent' (2012) Vol.31 (3) *South African Journal of Philosophy* 485-501; See also Letseka M 'In defence of *Ubuntu*' (2012) 31 *Studies in Philosophy and Education* 47-57. For further reading on *Ubuntu* see, Metz T '*Ubuntu* as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532-559; Sloth-Nielsen J and Gallinetti J 'Just say sorry? *Ubuntu*, africanisation and the child justice system in the Child Justice Act 75 of 2008' (2011) Vol.14 (4) *PER* 63-85; Himonga C *et al* 'Reflections on judicial views of *Ubuntu*' (2013) Vol.16 (5) *PER* 372-424.

<sup>596</sup> Matolino B and Kwindingwi W 'The end of *Ubuntu*' (2013) Vol.32 (2) *South African Journal of Philosophy* 199; See also Letseka M 'In defence of *Ubuntu*' (2012) Vol.31 (1) *Studies in Philosophy and Education* 47-57. For further reading in this regard, see *S v Makwanyane*

The concept of *Ubuntu* embodies an understanding of what it is to be human and what is necessary for human beings to grow and find fulfilment. It is an ethical concept and expresses a vision of what is valuable and worthwhile in life. This vision is rooted in the history of Africa and it is at the center of the culture of most South Africans.<sup>597</sup>

The word itself is *Zulu* and inspires us to learn from others as we learn from ourselves. *Ubuntu* is the humanistic experience of treating all people with respect and granting them their human dignity.<sup>598</sup> This apt description of *Ubuntu* was quoted by Chuwa<sup>599</sup> citing Nkrumah, when he stated that “from the African perspective everything that exists is in a complex web of dynamic forces in tension but with necessary interconnection and complementarity”.

Van der Walt<sup>600</sup> notes that “*Ubuntu* rejects this modernistic and atomistic individualism since it overemphasises the seemingly solitary aspects of human existence at the expense of the communal aspects and interests. It also rejects Western-style collectivism which views society as a collection of separately existing and detached individuals or small groups”. He further asserts that *Ubuntu* views the individual in terms of his/her relationship with others; that

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1995 3 SA 391 (CC); In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 3 SA 238 (SCA) para 38 per Harms JA, *Ubuntu* was described as a relationship of mutual respect. In similar vein the court in *Koyabe and Others v Minister for Home Affairs and Others* (Lawyers for Human Rights as Amicus Curiae) 2010 4 SA 327 (CC) per Mokgoro J, associated *Ubuntu* with a general obligation to treat people with respect and dignity, to avoid undue confrontation and, to give reasons for administrative decisions. See also Gade C ‘What is *Ubuntu*? Different interpretations among South Africans of African descent’ (2012) Vol.31 (3) *South African Journal of Philosophy* 484-493; Keevy I ‘*Ubuntu* versus the core values of the South African Constitution’ (2009) Vol.34 (2) *Journal of Juridical Science* 20-22; Bennett T ‘*Ubuntu*: An Africa equity’ (2011) Vol.14 (4) *PER* 30-53.

<sup>597</sup> Shutte A *Ubuntu: An ethic for a new South Africa* (Pietermaritzburg, Cluster Publications, 2001) 2.

<sup>598</sup> See *Masala v President of the RSA and Another* 2008 1 SA 566 (CC) para 81. In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 3 SA 238 (SCA) para 38, Harms JA, described *Ubuntu* as a relationship of mutual respect.

<sup>599</sup> Chuwa L *African indigenous ethics in global bioethics: Interpreting Ubuntu* (New York, Springer 2014) 34.

<sup>600</sup> Van der Walt J ‘*Ubuntu*gogy for the 21<sup>st</sup> century’ (2010) Vol.27 (2) *Journal of Third World Studies* 254.

individuals only exist only in and through their relationships and bonds with others.

The notion of *Ubuntu* has been included in government policy documents to mean that every member of society has a duty to care for others in society.<sup>601</sup> It is submitted that this duty to act humanely is particularly important when drafting legislative and other measures to put in place systems that will provide comprehensive social safety.

The concept of *Ubuntu* is also found in other African countries and there is reference to a similar notion in the African Charter.<sup>602</sup> There is considerable debate whether this renewed emphasis on a uniquely African identity is real, a myth or a clever mobilisation tool,<sup>603</sup> but this debate seems to have only academic value at this stage. African nations<sup>604</sup> have largely accepted the existence of this notion through renewed emphasis on the African Renaissance and the obligations assumed upon membership of the African Union, the Pan African Parliament and NEPAD.<sup>605</sup> The challenge is now to translate this notion into a system of effective social protection and economic development.

The transition from the Organisation for African Unity (OAU) to the African Union (AU) has been relatively well received by African nations. Its purpose includes, *inter alia*, coordinating and intensifying their cooperation and efforts to achieve a

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<sup>601</sup> Available at <<http://www.gpg.gov.za/docs/reports/annual/2002> (date of use 20 November 2013).

<sup>602</sup> The African Charter on Human and People's Rights (Banjul Charter) of 1981 in article 23 specifically provides that "All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States". See also Winks B 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) Vol.11 (2) *African Human Rights Law Journal* 450.

<sup>603</sup> Liebenberg I 'The African renaissance: Myth, vital lie, or mobilising tool?' (1998) 7 (3) *African Security Review* 42-48.

<sup>604</sup> Sulamoyo D 'I am because we are: *Ubuntu* as a cultural strategy for OD and change in Sub-Saharan Africa' (2010) Vol.28 (4) *Organisational Development Journal* 41-50.

<sup>605</sup> Cf Swanson D '*Ubuntu*: An African contribution to (re) search for/with a 'humble togetherness' (2007) Vol.2 (2) *Journal of Contemporary Issues in Education* 57.

better life for the peoples of Africa.<sup>606</sup> This objective puts extensive obligations on the member states to ensure that they put in place systems of social protection that give effect to the obligations so incurred. The extent to which members of the AU give effect to these incurred obligations are tested in terms of the African Peer Review Mechanism (APRM).<sup>607</sup> For example, South Africa is currently in the final stages of this process.

It is through the shared characteristics of *Ubuntu* that informal social security exists,<sup>608</sup> because people are able to pool together a sum of money, particularly in the African context, whenever a member of their community has passed.<sup>609</sup>

### 3.10 Entrenching socio-economic rights

The Constitution favours a human-rights friendly approach by giving special protection to certain fundamental rights. It recognises the interdependence and interrelation of these rights.<sup>610</sup> The Bill of Rights not only entrenches first-generation rights (civil and political rights) but also second and third-generation rights (socio-economic and environmental rights). Furthermore, it places a specific duty on the state to take positive measures in order to give effect to certain constitutional rights, particularly the second and third-generation rights. The Constitutional Court in the *Grootboom case*,<sup>611</sup> has made it clear that realising a particular socio-economic right, such as the right to access to housing, would require other elements, which form the basis of other socio-economic rights, such as access to land, clean water, and basic services.

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<sup>606</sup> See article II of the OAU Charter.

<sup>607</sup> The African Peer Review Mechanism is a system provided by the African Union's development programme, NEPAD, to assist countries in improving their governance. The Mechanism entails the completion of a self-assessment report and a programme of action by each participating country available at [http://www.aprm.org.za/docs/Country\\_Support\\_Mission\\_ReportNov2005.pdf](http://www.aprm.org.za/docs/Country_Support_Mission_ReportNov2005.pdf) (date of use 20 November 2013).

<sup>608</sup> Tshoose C 'The emerging role of the constitutional value of *Ubuntu* for informal social security in South Africa' (2009) (4) *African Journal of Legal Studies* 12-19.

<sup>609</sup> Diedrich F (ed) *Ubuntu, good faith and equity: Flexible legal principles in developing a contemporary jurisprudence* (Juta Co. Ltd, 2011) 1-151.

<sup>610</sup> Olivier M *et al* *Introduction to social security* (Durban, Butterworths, 2004) 123-124.

<sup>611</sup> *Government of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

The constitutional entrenchment of social security rights has significantly strengthened the mandate of the state to provide comprehensive social protection. In the Bill of Rights, the Constitution introduces a constitutional imperative in terms of which the government is compelled to ensure the “progressive realisation” of the right to social security. It also obliges the state to implement appropriate measures in this regard as follows: "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".<sup>612</sup>

This constitutes a clear undertaking by the drafters of the Constitution to develop a comprehensive social security system, based on *inter alia*, the right of access to social security for everyone, subject to financial viability. In this regard, the Constitution imposes an obligation on the state to ensure universal access to social security. Simultaneously, the state is granted a certain degree of latitude in relation to three aspects: the *progressive realisation of the right*, the taking of *reasonable measures* and the *availability of resources*.

### **3.11 Constitutional scope of the right to social security**

In interpreting the right to access to social security, a purposive approach is required. This would entail that the underlying rationale and purpose of the right to access to social security as entrenched in the Constitution has to be followed. This would include providing adequate standard of living to those who are unable to support themselves and their dependants.

The Constitution refers to the right to have access to social security, and not purely to the right to social security.<sup>613</sup> Therefore, the question must therefore be

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<sup>612</sup> Section 27(2) of the Constitution.

<sup>613</sup> Section 27(1)(c) provides that “everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”.

asked whether the term “access to” can be interpreted as qualifying or limiting the right to social security.

In *Grootboom*, the court remarked that the right delineated in section 26(1) is a right of ‘access to adequate housing’ as distinct from the right to adequate housing encapsulated in the Covenant.<sup>614</sup> This difference is significant because the right to adequate housing entails more than bricks and mortar. The court further remarked that it requires available land, appropriate services, such as the provision of water, the removal of sewage, and the financing of all of these, including the building of the house itself.

The court *in casu* reached a different conclusion, holding that the right to have access to housing can be interpreted broader than the right to housing. Within social security context, the interpretation of the judgement would entail that the right to access to imply more than a pure right to. This approach of the court places a heavier burden on the resources of the state. It implies that the state must implement effective policies in order to achieve the maximum output. It suggests that the state will also have to provide, by way of legislative and other measures, that everyone has access to a range of measures aimed at the realisation of social security.

Similarly, the right of access to social assistance cannot be interpreted in isolation as there is a close correlation between it and the other socio-economic rights. These rights are interrelated, interdependent and mutually supporting. As pointed out in *Grootboom*,<sup>615</sup> socio-economic rights must all be read together in the setting of the Constitution as a whole. Moreover, their interconnectedness needs to be taken into account in interpreting socio-economic rights, and in determining whether the state has met its obligations in terms of one of them. In the court’s opinion:

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<sup>614</sup> The International Covenant on Economic, Social, and Cultural Rights of 1976.

<sup>615</sup> *Grootboom* para 24.



There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.<sup>616</sup>

It is clear that fulfilling the right to access to social assistance could have an impact on the extent to which the other rights have to be fulfilled. The Constitutional Court further remarked that:

The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants that would be relevant to the state's obligations in respect of other socio-economic rights.<sup>617</sup>

For that reason, the provision of social assistance may enable the poor and destitute to have access to other socio-economic rights, such as land, adequate housing,<sup>618</sup> healthcare, food and water. It will also assist in realising their rights to human dignity, equality and freedom. As social security serves to protect human beings from the life-threatening and degrading conditions of poverty and material insecurity.<sup>619</sup>

### **3.12 Justiciability and enforcement of socio-economic rights**

As it has already been observed, social security rights are a second generation right which places a duty upon the state to act in a positive manner. They have to be contrasted with rights that protect an individual against undue interference by the state, for example, the right to life, which is seen as the so-called first generation right. Due to the nature of social security rights as socio-economic rights, it is said that they cannot be enforced by the courts without intruding upon

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<sup>616</sup> *Grootboom* para 23.

<sup>617</sup> *Grootboom* para 36.

<sup>618</sup> Tshoose C 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post *Grootboom*' (2015) Vol.30 (1) *SA Public Law Journal* 94-111.

<sup>619</sup> Social security as a human right' available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle> (date of use 20 November 2013).

the terrain of the legislature and/or the executive branch of government.<sup>620</sup>

These rights are capable of enforcement,<sup>621</sup> if only the legislature or executive is ordered to take action (without prescribing the details of the action) or is sent back to the drawing board to arrange for a more equal distribution.<sup>622</sup> The Constitution places a specific duty on the state to take positive measures in order to give effect to some of the rights, in particular the second and third generation rights.<sup>623</sup>

The extent of the enforcement and protection of socio-economic rights has been, and is a source of controversy and debate.<sup>624</sup> Some legal academics objected to the inclusion of socio-economic rights in the Bill of Rights on the basis that they were not universally accepted fundamental rights.<sup>625</sup> It is argued that they are inconsistent with the separation of powers doctrine because in enforcing them, the judiciary would encroach upon the terrain of the legislature and the

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<sup>620</sup> This was evident in the case of *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA (CC) where the Court ordered the Government to provide people who have been evicted from their informal homes, with adequate basic shelter until they obtained permanent accommodation. Cf Hershkoff H and Loffredo S 'State courts and constitutional socio-economic rights: Exploring the underutilisation thesis' (2011) Vol.115 (4) *Penn State Law Review* 935-937; Yusuf S 'A changing role in changing context: Rethinking the judicial enforcement of economic, social and cultural rights' (2010) Vol.22 (2) *Sri Lanka JIL* 42-43.

<sup>621</sup> Landau D 'The reality of social rights enforcement' (2012) Vol.53 (1) *Harvard International Law Journal* 408-413.

<sup>622</sup> Beatty D 'Constitutional labour rights: Pros and cons' 1993 (1) *ILJ* 8-11.

<sup>623</sup> See in this regard section 2 (obligation to perform constitutional duties); section 6(2) (status and use of indigenous languages); section 7(2) (promotion of the Bill of Rights generally); section 9(4) (equal opportunities legislation); section 25(5) (access to land); section 25(6) and (9) (title to land); section 25(7) (restitution of property/equitable remedies); section 26(2) (access to adequate housing); section 27(2) (health care, food, water, and social security); section 29(1)(b) (right to further education); section 32(2) (access to information held by the State); and section 33(3) (just administrative action).

<sup>624</sup> Bilchitz D *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (Oxford University Press, 2007) 6-46; Tushnet M 'Enforcing socio-economic rights: Lessons from South Africa' (2005) Vol.6 (3) *Economic and Social Rights Review* 2-5; Mbazira C 'Non-implementation of court orders in socio-economic rights litigation in South Africa' (2008) Vol.9 (4) *ESR Review* 2-7; De Beer and Vettori S 'The enforcement of socio-economic rights' (2007) 3 *PER* 2-9.

<sup>625</sup> Mubangizi J 'The protection and enforcement of socio-economic rights in Africa: Lessons from the South African experience' (2008) *African Yearbook of International Law* 88-89; Cf Wesson M 'Disagreement and the constitutionalisation of social rights' (2012) Vol.12 (2) *Human Rights Law Review* 225-232.

executive.<sup>626</sup> Being positive rights, socio-economic rights were not justiciable, in particular, because of the budgetary implications involved in enforcing them.<sup>627</sup> In South Africa, the position is that the socio-economic rights are enforceable, and they place a positive obligation on the state towards their realisation.<sup>628</sup>

The courts, in particular the Constitutional Court, play a crucial role in the enforcement and adjudication of fundamental rights. Section 167(3) of the Constitution stipulates that the Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters. In *Glenister v President of the Republic of South Africa*,<sup>629</sup> Moseneke DCJ and Cameron J noted that implicit in section 7(2):

Is the requirement that the steps the state takes to respect, protect, promote and fulfil the constitutional obligations must be reasonable and effective.

It has been submitted,<sup>630</sup> that our courts are empowered, whenever they decide on any issue involving the interpretation, protection and enforcement of a fundamental right contained in the Constitution, to make any order that is just and equitable<sup>631</sup> and may grant appropriate relief.<sup>632</sup> In *Fose v Minister of Safety and Security*<sup>633</sup> appropriate relief is described as follows:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.<sup>634</sup>

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<sup>626</sup> Mubangizi *ibid*.

<sup>627</sup> *In Re: Certification of the Republic of South Africa of 1996* 1996 (4) SA 765 (CC).

<sup>628</sup> *Grootboom case* of 2000 11 BCLR 1169 (CC).

<sup>629</sup> *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC) para 191.

<sup>630</sup> Trengove W 'Judicial remedies for violations of socio-economic rights' 1999 1 (4) *ESR Review* 8 -11.

<sup>631</sup> Section 172(b) and 167(7) of the Constitution. For further reading on appropriate, just and equitable relief, see Mbazira C 'Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) Vol.125 (1) *The South African Law Journal* 71-94.

<sup>632</sup> Section 38 of the Constitution.

<sup>633</sup> 1997 3 SA 786 (CC) para 19.

<sup>634</sup> *Grootboom and Others v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C).

Specific constitutional remedies include orders of invalidity,<sup>635</sup> the development of the common law to give effect to the constitutional rights,<sup>636</sup> the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights,<sup>637</sup> and procedural remedies derived from some of the substantive rights.<sup>638</sup>

Where Parliament or the provincial legislature failed to comply with a constitutional obligation that requires positive state action, the Constitutional Court<sup>639</sup> or the High Court<sup>640</sup> may grant appropriate relief. Specific constitutional remedies include orders of invalidity,<sup>641</sup> the development of the common law to give effect to the constitutional rights,<sup>642</sup> and procedural remedies derived from some of the substantive rights.<sup>643</sup> *Davis et al*<sup>644</sup> emphasise the importance of a declaratory order as follows:

It could rule that the legislature's failure to act positively in the particular circumstances of the case was unreasonable and provide broad guidelines on what is required to fulfil the constitutional obligations. The effect of a declaration that Parliament has not complied with its constitutional duties should not be underestimated. An order of this nature is in the public interest by promoting accountability, responsiveness and openness in decision-making affecting fundamental social and economic rights.

Supervisory jurisdiction is a new way of addressing the problem of enforcing social security rights.<sup>645</sup> This entails that the courts would give orders directing the legislative and executive branches of government to bring about reforms defined in terms of their objective and then to retain such supervisory jurisdiction

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<sup>635</sup> Section 172 (1)(a) of the Constitution.

<sup>636</sup> Sections 173 and 8(3) of the Constitution.

<sup>637</sup> Section 173 of the Constitution.

<sup>638</sup> Sections 32 (10), 33 (2) and 34 of the Constitution.

<sup>639</sup> If it is non-compliance by Parliament.

<sup>640</sup> If it is non-compliance by the Provincial Legislature.

<sup>641</sup> Section 172 (1)(a) of the Constitution.

<sup>642</sup> Sections 173 and 8(3) of the Constitution.

<sup>643</sup> Sections 32 (10), 33(2), and 34 of the Constitution.

<sup>644</sup> *Davis D et al Fundamental rights in the Constitution – Commentary and cases* 1<sup>st</sup> ed (Juta & Co. Ltd, 1997) 352. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 96-99.

<sup>645</sup> Trengove (note 630 above); See also Scott C 'Social Rights: Towards a principled, pragmatic judicial role' 1999 (1) 4 *ESR Review* 7-9. The remedy of supervisory jurisdiction is used in Canadian and Indian Courts.

as to the implementation of those reforms. This is largely the impact of the order given by the Constitutional Court in the *Grootboom* case. The court ordered (national and provincial) government to redraft its housing policy and programme in such a way as to make provision for those without any form of temporary housing. The Human Rights Commission was given the task of monitoring compliance with the court's order.

The question may be asked whether the court may compel the legislature to enact this legislation against its will. It has been suggested<sup>646</sup> that the court must simply declare that the legislature is compelled under the Constitution to enact this legislation.

Liebenberg<sup>647</sup> notes that a critical debate in the enforcement of socio-economic rights is whether and to what extent the court should exercise a supervisory jurisdiction over their implementation. She asserts that in order to exercise this jurisdiction, the State will usually be ordered to devise and present to court a plan of action to remedy the violation, and to report back to the court on its implementation at regular intervals.

At both stages of the approval and implementation of the plan, the applicant and other interested parties (including a possible independent 'court monitor') will be given an opportunity to comment. Pieterse<sup>648</sup> argues that several factors complicate the judicial assertion of socio-economic rights. These include judges' lack of economic expertise in deciding matters with budgetary consequences and/or specific specialist expertise in cases where the realisation of a social right involves a specific technical or specialised field, and most importantly, the fact that the judiciary is unable to execute its findings itself; it is therefore dependent

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<sup>646</sup> Trengove (note 630 above) 10-11.

<sup>647</sup> Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights' (2002) Socio-economic rights project, CLC, University of Western Cape available at [www.communitylawcenter.org.za/.../socio-economic-rights/.../Socio-Economicpercent20Rightspercent20Jurisprudence](http://www.communitylawcenter.org.za/.../socio-economic-rights/.../Socio-Economicpercent20Rightspercent20Jurisprudence) (date of use 28 August 2014).

<sup>648</sup> Pieterse M 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 394.

on executive co-operation for its judgements to have any credibility or impact in reality. All is not lost, the courts should be complemented on their role in giving content and providing innovative remedies to aggrieved claimants in cases concerning the implementation of socio-economic rights.<sup>649</sup>

A series of judgements discussed below illustrates clearly that the courts in South Africa have not hesitated to enforce the supremacy of the Constitution, in the area of social security and in circumstances where its prerequisites have not been adhered to. The court may include mandatory order when granting appropriate relief. This was evident in *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>650</sup> where the court ordered government to devise and implement appropriate policies, to ensure that government policy of mother-to-child transmission of HIV/AIDS is accessible to all mothers. However, the court however made it clear that such requirement imposed on government, implies that the programme must be realised progressively within the available resources.<sup>651</sup>

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<sup>649</sup> In *Madzodzo* the court rejected the government's interpretation of the right to basic education as described in various policy documents as a right to be progressively realised over time. Instead, the court reaffirmed the developing jurisprudence on the right to basic education by saying that the state must take all reasonable measures with immediate effect to realise the right. See *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM). There are exceptional cases where the government has shown some degree of compliance with court orders, this is evident in the following cases, *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Abahlali baseMjondolo Movement SA and Another v Premier, KwaZulu-Natal and Others* 2009 (3) SA 245(D); *Lindiwe Mazibuko and Others v City of Johannesburg and Others* Case CCT 39/09 [2009] ZACC 28; *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC); *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC). For a detailed discussion on the innovative remedies introduced by the Courts in the enforcement of socio-economic rights, see Liebenberg S 'Forging new tools for vindicating the rights of the poor in the crucible of the Eastern Cape' Public lecture delivered at Rhodes University, Law Faculty, 28 July 2014, 8-15 available at [blogs.sun.ac.za/seraj/files/2014/.../Public-Lecture\\_Rhodes\\_FINAL.pdf](http://blogs.sun.ac.za/seraj/files/2014/.../Public-Lecture_Rhodes_FINAL.pdf) Cached (date of use 28 August 2014). Germain S 'Taking 'health' as socio-economic right seriously: Is the South African constitutional dialogue a remedy for the American healthcare system' (2013) Vol.21 (2) *Journal of International and Comparative Law* 150-163.

<sup>650</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No.2) 2002 (5) SA 721 (CC) (*Treatment Action Campaign*).

<sup>651</sup> This clearly indicates that the Courts will more readily come to the assistance of historically deprived and disadvantaged groups than will be the case in respect of an individual seeking judicial intervention, see *Grootboom* case.

In the most comprehensive judgement on social security-related rights, *Government of RSA v Grootboom and others*,<sup>652</sup> this concerned the forcible removal of a large number of children and their families occupying land illegally without making available to them alternative facilities. The Constitutional Court provided explicit guidance on the principles applicable to the interpretation of the socio-economic right of access to adequate housing in section 26. In particular, the court commented on the state's obligations under section 26 which gives everyone the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter.

The court commented on the indivisibility and interrelation of fundamental rights and held that socio-economic rights are mutually supportive. In addition, the court held that the right to access to housing cannot be in isolation to other fundamental rights such as, health care, sufficient food and water, and electricity.<sup>653</sup> It is clear that the courts have the power to interfere whenever fundamental rights (social security rights) have been infringed because they are empowered to prescribe remedies in the event of such infringement. Wide-ranging remedies are at the disposal of the courts in this regard.

In *Port Elizabeth Municipality v Various Occupiers*,<sup>654</sup> the Supreme Court of Appeal set aside the order of eviction granted by the High Court,<sup>655</sup> and agreed with the Respondents that the Applicant (Port Elizabeth Local Municipality) was under obligation to provide alternative accommodation to unlawful occupiers.<sup>656</sup> The municipality applied to the Constitutional Court for leave to appeal against the decision of the SCA and to have the eviction order restored. In addition, the municipality sought a ruling that it was not constitutionally obliged to find alternative accommodation to unlawful occupiers. Justice Sachs (as he then was)

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<sup>652</sup> 2000 (11) BCLR 1169 (CC).

<sup>653</sup> For further reading on the *Grootboom* judgement, see Tshoose C (note 618 above).

<sup>654</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

<sup>655</sup> *Port Elizabeth Municipality* (note 654 above) para 4.

<sup>656</sup> *Port Elizabeth Municipality* (note 654 above) para 5.

held that in cases where there is a conflict between section 25 (dealing with property rights) and section 26 (concerned with housing rights) of the Constitution, these sections must be read together in order to find a fair, and equitable outcome.

The *Grootboom* decision gained international recognition as it placed emphasis on the justiciability of socio-economic rights, which brought a glimmer of hope for those who are destitute. Notwithstanding this, little has changed for millions of poor South Africans. It is estimated that the housing backlog is at 2.1 million housing units, affecting 12 million people living in informal settlements.<sup>657</sup> There is an extreme shortage of affordable housing for the poor in South Africa. About 1,8 million South African households in the middle to lower income groups live in rented accommodation, as opposed to about 5.2 million households that own property.<sup>658</sup>

In addition to the courts, there are also other institutions which are constitutionally entrusted with the task of monitoring compliance with, and the enforcement of the fundamental rights. The Constitution grants a particularly important role to the South African Human Rights Commission (HRC) in the area of fundamental rights advocacy, promotion, and monitoring.<sup>659</sup> This constitutional role was specifically noted by the Constitutional Court in the *Grootboom* judgement,<sup>660</sup> that

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<sup>657</sup> Cf South Africa Yearbook 2009/10 (Department of Human Settlement), 311; Royston L and Tissington K 'Creating a better life for all through informal settlement upgrading' available at <http://www.afesis.org.za/Sustainable-Settlements - Articles/creating-a-better-life-for-all> (date of use 28 August 2014); Nombebe P 'Shack Dwellers Mourn Freedom' *The Times*, Thursday April 28 2011, 5. The South African government has come a long way in responding to the issue of the realisation of socio-economic rights, but is still falling short of what is possible, and lacks the progress that has been made by its neighbours and other countries in a similar standing.

<sup>658</sup> Available at <http://www.ngonewsafrika.org> (date of use 28 August 2014).

<sup>659</sup> Section 184 (1) of the Constitution. The Commission fulfils its constitutional mandate by undertaking research in order to produce protocols to organs of state; by submitting reports to Parliament and making them available to organs of state; by receiving individual complaints and involving itself in particular meritorious court actions (it intervened in the *Grootboom*, as *amicus curiae*); and by monitoring compliance with the order of a Constitutional Court, for example when requested to do so by the Court (as has been the case in the *Grootboom* matter).

<sup>660</sup> *Grootboom* at para 97.



it entails the monitoring, assessment and observance of human rights,<sup>661</sup> as well as the power to (a) investigate and to report on the observance of human rights, and (b) take steps to secure appropriate redress where human rights have been violated.<sup>662</sup>

One of the most significant functions of the HRC is the evaluation of annual reports from organs of state. This function seeks to determine to what extent these organs of state have taken measures to realise the socio-economic rights enshrined in the Constitution, in particular the rights relating to housing, health care, food, water, social security, education and the environment.<sup>663</sup> Organs of state are compelled to submit annual reports to the Commission.<sup>664</sup>

### **3.13 The nature and scope of the state's obligations**

Section 7(2) places positive duty on the state to protect, promote and fulfil the rights enshrined in the Bill of Rights. The obligation to respect requires the state and other relevant actors, on a primary level, to refrain from infringing the right. Section 27(1)(c) accords every person the right not to have his/her access to social assistance subjected to undue and unjustified interference and/or restriction. There is an obligation on the state and other non-state actors to desist from preventing or impairing access to the right.<sup>665</sup>

The obligation to protect, promote and fulfil requires the state to set up legislative and institutional mechanisms whereby all persons can realise their rights. Social assistance legislation and other measures must be formulated in a way that ensures equal and non-discriminatory access to all persons, especially the needy and vulnerable people. The state is expected to set up the administrative and

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<sup>661</sup> Section 184(1)(c) of the Constitution. See also the Human Rights Commission Act 1994.

<sup>662</sup> Section 184(2)(a) & (b) of the Constitution.

<sup>663</sup> Section 184(3) of the Constitution.

<sup>664</sup> Section 184(3) of the Constitution stipulates that each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, *social security*, education and the environment.

<sup>665</sup> *Grootboom* at para 34.

regulatory framework necessary for the realisation of this right and to create opportunities for its attainment.

In relation to the right of access to adequate housing, the Constitutional Court indicated in *Grootboom* that the Constitution requires the state to devise and implement a comprehensive and co-ordinated programmes and policies to give effect to these rights.<sup>666</sup> Mere legislative measures are not enough as the state has to act in such a way as to achieve the intended result. Appropriate and well-directed policies and programmes will invariably support legislative measures.<sup>667</sup> Such programmes and policies must be reasonable in their conception and implementation. The programmes must give effect to, and promote all related constitutional rights and values, such as human dignity, equality, freedom and social justice and must eliminate the large areas of severe deprivation that afflict communities.<sup>668</sup>

In terms of the obligations under the ICESCR, states are expected to adopt legislative measures in conjunction with financial, administrative, educational and social measures with a view to achieving progressively the full realisation of the right to social security. The adopted measures must be deliberate, concrete and targeted as clearly as possible towards ensuring that everyone within the state's jurisdiction has access to social security.<sup>669</sup>

### 3.14 Limitation of fundamental rights

Fundamental rights, including the rights to social security are not absolute. They may be subject to limitations of a reasonable nature. Section 7(3) of the Constitution confirms this by stating that the rights in the Bill of Rights are subject to the limitations contained in section 36. It is important to establish the extent of

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<sup>666</sup> *Grootboom* at para 99.

<sup>667</sup> *Grootboom* at para 42.

<sup>668</sup> *Minister of Health & Others v Treatment Action Campaign & Others* (2002) 10 BCLR 1033 (CC); (2002) 5 SA 713 (CC) at para 36.

<sup>669</sup> *Social security as a human right available at [www.umn.edu/humanrts](http://www.umn.edu/humanrts)* (date of use 28 August 2014).

the possible limitations on the right to access to social security. Two forms of limitation must be considered. First, the limitation must comply with the requirements contained in the general limitation clause (sometimes referred to as external limitation),<sup>670</sup> bearing in mind all relevant factors, some of which are mentioned explicitly in the Constitution.<sup>671</sup>

Second, the limitation can also be justified based on specific qualifications pertaining to a specific right (sometimes referred to as internal limitation or qualifiers). For instance, in the case of the right to access to adequate housing or social security, the state is required to take reasonable measures, bearing in mind its available resources, to achieve the progressive realisation of the said right.<sup>672</sup>

With regard to the external limitation the Constitutional Court in *S v Zuma*,<sup>673</sup> stated that constitutional analysis contains two phases. Firstly, the applicant must show that there was an infringement of the duty to respect, protect, promote and fulfil the right in the Bill of Rights. Secondly, the respondent must show that the infringement was justifiable and that the right was legitimately restricted in accordance with the general limitation clause contained in section 36 of the Bill of Rights. At this stage, it is appropriate to discuss the internal limitations below.

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<sup>670</sup> Section 36 entails a three-fold test, in terms of which the limitation of a fundamental right must be; (a) in terms of a law of general application; (b) reasonable; and (c) justifiable in an open and democratic society based on human dignity, equality and freedom.

<sup>671</sup> The relevant factors referred to in section 36(1)(a)-(e) are: (a) the nature of the right;(b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.

<sup>672</sup> Section 27(2); *In Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1SA 765 (CC) para 11, Chaskalson P pronounced that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources.

<sup>673</sup> 1995 4 BCLR 401 (CC) 414.

### 3.14.1 *Progressive realisation*

The Constitutional Court in *Grootboom* had interpreted the phrase “progressive realisation” with regard to the interpretation set by the United Nations Committee on Economic, Social and Cultural Rights. The court interpreted the phrase to mean that socio-economic rights could not be realised immediately, but the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal.<sup>674</sup> The court stated:<sup>675</sup>

It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

### 3.14.2 *Reasonable legislative and other measures*

The South Africa courts, particularly the Constitutional Court in *Grootboom*, stated that the real question in terms of the Constitution is whether the measures taken by the state to realise social rights are reasonable. The court *in casu* went further and interpreted the relevant limitation by considering reasonableness. Firstly, the court stated that the question is always whether the measures adopted to realise social rights are reasonable. The court remarked that:

...Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored by the measures aimed at achieving realisation of the right.<sup>676</sup>

The Constitutional Court held that a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.<sup>677</sup> The question would be whether the measures that have been adopted are reasonable. A wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown

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<sup>674</sup> Olivier M ‘Constitutional perspective on the enforcement of socio-economic rights: Recent South African experiences’ (2002) 33 *VULWR* 117-151.

<sup>675</sup> *Grootboom* at para 45.

<sup>676</sup> *Grootboom* at para 44.

<sup>677</sup> *Grootboom* at para 41.

that the measures so comply, this requirement is met.<sup>678</sup> The court also stressed that the policies and programmes must be reasonable both in their conception and in their implementation.<sup>679</sup>

The Court further remarked:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. The court further remarked that, if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test of reasonableness.<sup>680</sup>

### 3.14.3 *Within available resources*

The meaning of the phrase 'available resources' was interpreted in *Soobramoney v Minister of Health (Kwazulu-Natal)*,<sup>681</sup> to mean that provisions of section 27 in regard to access to social security impose an obligation on the state to realise these rights. However, this is subject to the availability of resources, and that the corresponding rights themselves are limited because of the lack of resources.

The court remarked further, that given this lack of resources and the significant demands on them, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. In *Grootboom*, the court emphasised that there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.<sup>682</sup>

Finally, it becomes clear that in the modern democracy groups that find themselves unable to achieve their objectives through the ballot frequently turn to the courts and under the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of

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<sup>678</sup> *Grootboom* *ibid.*

<sup>679</sup> *Grootboom* at para 42.

<sup>680</sup> *Grootboom* at para 44.

<sup>681</sup> 1997 12 BCLR 1696 (CC) at para 11.

<sup>682</sup> *Grootboom* at para 46.

grievances.<sup>683</sup> It is submitted that this may work only if the rights are already acknowledged and enforceable by some, but not if they are merely rhetorical.

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<sup>683</sup> Mameli A 'Judicial review, social antagonism and the use of litigation as a tool for combating poverty' in Williams *et al* (eds) *Law and poverty* (London, Zed Books, 2005); Pieterse M 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) Vol.29 (3) *Human Rights Quarterly* 800-804; See also Davy B and Pellissery S 'The citizenship promise (un)fulfilled: The right to housing in informal setting' (2013) Vol.22 *International Journal of Social Welfare* 77-80.

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## CHAPTER FOUR

### THE ENFORCEMENT AND ADMINISTRATION OF SOCIAL SECURITY IN SOUTH AFRICA

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#### 4.1 Introduction

Baghai asserts that fundamental rights conferred to individuals are hallmarks of the transition to modernity.<sup>684</sup> According to him, these rights promise to protect the more vulnerable individual in the context of increasingly precarious conditions of modern life. Therefore, any person or group persons who have experienced violation of their right to social security should have access to effective judicial or other appropriate remedies at national and international levels.<sup>685</sup> In this context, the courts play a crucial role in the enforcement and protection of social security rights entrenched in the Constitution.<sup>686</sup> As discussed in chapter three, the Constitution obliges the state to ensure the progressive realisation of social security. It also obliges the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.

The institutions entrusted with the administration of social security play a vital role of ascertaining whether an individual should access social security benefits.<sup>687</sup> In discharging their duties, social security institutions are guided by the Constitution, social security laws, and other pieces of legislations as well as rules and regulations. Despite efforts by the judiciary to make social security

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<sup>684</sup> Baghai K *Social systems, theory and judicial review: Taking jurisprudence seriously* (Burlington, Ashgate Publishing, 2015) 28.

<sup>685</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 19 on the right to social security Rights (2007) para 77.

<sup>686</sup> Liebenberg S 'Toward an equality - Promoting interpretation of socio-economic rights in South Africa: Insights from the egalitarian liberal tradition' (2015) Vol.132 (2) *The South African Law Journal* 416.

<sup>687</sup> Mpedi G 'Social security disputes resolution and the need for a coherent adjudication system' in Tokiso Dispute Settlement *The dispute resolution digest 2013 - The report on the state of labour dispute resolution in* (South Africa, Juta & Co Ltd, 2013) 76.

accessible, administrative dysfunction, corruption,<sup>688</sup> coupled with disregard of court orders,<sup>689</sup> tends to derail efforts aimed at advancing social security rights of the poor. Okpaluba observes that issues relating to the maladministration, corruption, bureaucratic red-tape regarding the administration of social grants is a problem which has plagued the Department of Social Development in South Africa's post-democracy.<sup>690</sup>

This chapter examines the following issues:

- The administration of social security and government's failure to fulfil its constitutional obligation;
- The role of the courts in affording the beneficiaries of social assistance access to justice;
- The role of the courts in the enforcement of social security rights;
- The interplay between administrative law principles and social assistance; and
- Lastly, the challenges associated with the adjudication and enforcement of social security.

#### **4.2 Administration of social security and government's failure to fulfill its constitutional obligations**

The government and non-state actors are accountable for the constitutional protection of economic, social, and cultural rights.<sup>691</sup> Public institutions, which

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<sup>688</sup> Reddy T and Sokomani A 'Corruption and social grants in South Africa' (2008) Monograph 154 *Institute for Security Studies* 1-79 available at [mercury.ethz.ch/service/engine/Files/.../MONO154FULL.PDF](http://mercury.ethz.ch/service/engine/Files/.../MONO154FULL.PDF) Cached (date of use 22 March 2015).; Corruption watch 'No consciences in social grant fraud' 20 November 2014 available at <http://www.corruptionwatch.org.za/no-consciences-in-social-grant-fraud/> (accessed 25 May 2015).

<sup>689</sup> De Beer R and Vettori S 'The enforcement of socio-economic rights' (2007) Vol.10 (3) *PER* 2-3.

<sup>690</sup> Okpaluba C 'Bureaucratic delays in processing social grants: An evaluation of the contributions of the Eastern Cape judiciary to contemporary South African public law' (2011) Vol.25 (1) *Speculum Juris* 48-52.

<sup>691</sup> Nolan A 'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) Vol.12 (1) *International Journal of Constitutional Law* 64-67.



operate under the auspices of government departments, administer several social insurance schemes, namely; the Road Accident Fund, the Compensation Fund, and the Unemployment Insurance Fund.

The SASSA manages and administers social assistance grants under the auspices of the Department of Social Development with policy oversight vested in the Minister of Social Development. The Department of Labour plays a policy-making and supervisory role with regard to the different social insurance schemes. Private institutions administer private social insurance schemes (for example medical insurance and retirement schemes), within the broad policy and regulatory framework set by government and, to a large extent, industry-funded supervisory bodies sanctioned by statute (such as the Council for Medical Schemes and the Financial Services Board). Therefore, there is fragmentation and little consistency and co-ordination at the policy and institutional levels.

Policy-making in social security lies with the Cabinet and the relevant ministries. The government also regulates the operation of private service providers (such as the medical insurance schemes and retirements funds) through laws, rules, regulations, norms and standards.

The three major public social insurance schemes in South Africa are all regulated by their own scheme-specific legislation. They are as follows:

- Unemployment Insurance Fund (UIF), regulated mainly by the Unemployment Insurance Act;<sup>692</sup>
- Compensation Fund, regulated mainly by the Compensation for Occupational Injuries and Diseases Act;<sup>693</sup> and
- Road Accident Fund (RAF), regulated by the Road Accident Fund Act.<sup>694</sup>

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<sup>692</sup> Unemployment Insurance Act 63 of 2001.

<sup>693</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>694</sup> Road Accident Fund Act 56 of 1996.

Due to the absence of public medical and retirement schemes in South Africa, there are numerous private (occupational-based) medical aid/insurance schemes and retirement funds. The Medical Schemes Act<sup>695</sup> and the Pension Funds Act regulate them respectively.<sup>696</sup>

The 1996 Constitution regards welfare services as a concurrent function of the national and provincial spheres of competency.<sup>697</sup> The Constitution also grants the National Assembly the power to assign any of its legislative powers to any legislative body in another sphere of government. Existing legislation, which is currently administered nationally, can also be assigned to the provinces.

If so assigned, the province concerned may repeal, amend or even substitute the assigned legislation. However, national legislation will prevail if, *inter alia*, uniform norms and standards that apply across the country are required. Based on similarly formulated provisions in the Interim Constitution, the Constitutional Court, in the *Mashavha* case,<sup>698</sup> declared the presidential assignment of administration of social assistance to provinces unconstitutional.

Against this background, SASSA was established. SASSA was created to administer the application, approval and payment of social grants in South Africa.<sup>699</sup> It was also designed to reallocate the function of social security from South Africa's provinces to the national sphere of government and report to the Ministry of Social Development. Furthermore, the establishment of SASSA as the sole agent responsible for the administration of social security was to ensure that efficient and effective services were rendered to beneficiaries.<sup>700</sup>

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<sup>695</sup> Medical Schemes Act 131 of 1998.

<sup>696</sup> Pension Funds Act 24 of 1956 (as amended).

<sup>697</sup> See schedule 4 and 5 of the Constitution.

<sup>698</sup> *Mashavha v President of the Republic of South Africa* 2004 (12) BCLR 1243 (CC).

<sup>699</sup> Section 4(1)(a) and (b) of the South African Social Security Agency Act 9 of 2004.

<sup>700</sup> Section 3 of the South African Social Security Agency Act *ibid*.

However, in the recent past, the social security system has faced many hurdles, ranging from administrative delays in processing grants, failure to communicate the outcome of applications, failure to communicate reasons for rejection of applications as prescribed by law,<sup>701</sup> and the termination of social assistance grants without a hearing. As a result, this has culminated in a series of judgements dealing with the issues raised above.

For example, in *MEC Social Development, Eastern Cape v Mdodisa*,<sup>702</sup> a recipient of a disability grant had her grant terminated abruptly. The payments were simply withdrawn by SASSA without notice. She instituted proceedings to have the termination declared unlawful, set aside and prayed for payment of arrear payments from the date of termination. Her application was premised on breach of Section 3(2)(b) of Promotion of Administrative Justice Act (PAJA)<sup>703</sup> following termination without notice and opportunity to be heard.<sup>704</sup>

The Supreme Court of Appeal held that termination of a disability grant without notice was procedurally unfair. Termination is only permissible for a valid reason. From this case, it is clear that where an administrative action is to be taken, an adequate notice should be given to the affected party indicating the nature and purpose of the administrative action, giving reasonable opportunity to be heard, outlining the administrative action, giving adequate notice of right to review or appeal and the right to request reasons.<sup>705</sup> This case demonstrates the vital role played by the courts in the protection of the right to social security, as well as the enforcement of the state's duty of ensuring that the beneficiaries of social grants are not prejudiced by arbitrary decision making.

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<sup>701</sup> Section 14(3)(b) of Social Assistance Act 13 of 2004; Cf Koma S 'A critical commentary on the establishment of South African Social Security Agency: The case of alternative service delivery' (2005) Vol.XVI (2) *African Journal of Public Administration* 1-6.

<sup>702</sup> *MEC Social Development, Eastern Cape v Mdodisa* 2010 (6) SA 415 (SCA) (*MEC Social Development, Eastern Cape*).

<sup>703</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>704</sup> *MEC Social Development, Eastern Cape* para 19.

<sup>705</sup> *MEC Social Development, Eastern Cape*.

Okpaluba concurs that section 33 of the Constitution requires government administration in respect of social assistance to be conducted in a *lawful* manner; that decisions or actions taken must be *reasonable*; and that the procedure leading to such administrative decision or action must be *fair*.<sup>706</sup> As is expounded later in this chapter on the interplay between administrative law principles and social assistance, focus is presently on the administrative bottlenecks faced by the beneficiaries of social assistance since the establishment of SASSA. It will become apparent from the present discussion that the administrative hurdles faced by the beneficiaries of social assistance is a thorny issue regarding the right to have access to social security and the courts have shown discontent in respect of these administrative blockages faced by the beneficiaries.

In *Mbanga v MEC for Welfare, Eastern Cape and Another*,<sup>707</sup> the court awarded an applicant back pay, together with interest, in respect of an old-age grant, which was never processed by the Director-General. The ineptitude, inefficiency and general administrative disarray of the Welfare Department was expressed by Leach J as follows:

...While patience is a virtue, I venture to suggest that even the patience of job would have been tested by the inefficiency of officialdom in this case as, notwithstanding regular enquiries being made to the office of the Department of Welfare in Port Elizabeth, time passed without any indication whether the applicant's application had been granted or refused.<sup>708</sup>

In this case, the court played a crucial role in protecting social assistance rights of the applicant, in particular by ordering the Director-General to pay back the applicant's old-age grant based on the inordinate delay in processing that grant.

In a number of decisions, the courts confirmed that the unilateral suspension of social assistance grants is unlawful and invalid and does not conform to the principles of administrative justice. For instance, the case of *Ngxuza v*

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<sup>706</sup> Okpaluba C (note 690 above) 49-50.

<sup>707</sup> *Mbanga v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 359 (SE) (*Mbanga v MEC for Welfare*).

<sup>708</sup> *Mbanga v MEC for Welfare*.

*Permanent Secretary, Department of Welfare, Eastern Cape*,<sup>709</sup> which dealt with the decision by the department in the province to terminate the applicants grants without notice. The applicants claimed relief on their own behalf and on behalf of many other people in the same position in the Eastern Cape. The government disputed their standing to act on behalf of the class. The High Court ruled that the applicants had standing to sue on their own behalf and on behalf of other persons who had similarly been deprived of their social grants.<sup>710</sup>

The department was ordered by the High Court to reinstate the grants retrospectively to the date of their cancellation or suspension together with payment of outstanding arrears and interests. The Eastern Cape Government lodged an appeal against that judgement. The SCA upheld the High Court judgement of the High Court in all material respects.<sup>711</sup> Cameron JA who delivered the judgement of the Court held that the individuals concerned in this case were victims of official excess, bureaucratic misdirection and unlawful administrative method.<sup>712</sup>

With regard to the inherent challenges associated with the enforceability of social assistance, Okpaluba<sup>713</sup> states that “the crisp issue has been the inability of the provincial bureaucracy to translate the legislative measures as required by the Constitution”. He further notes that the beneficiaries of this legislative largess have come up against bureaucratic inefficiency, lack of responsiveness, and disregard of the judicial system.

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<sup>709</sup> *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) (*Ngxuza and Others*).

<sup>710</sup> *Ngxuza and Others* para 627.

<sup>711</sup> *Ngxuza and Others*.

<sup>712</sup> *Ngxuza and Others* para 11.

<sup>713</sup> Okpaluba C (note 690 above) 50.

In addition, major administrative problems such as lack of documentation and poor conditions prevail at grants pay points.<sup>714</sup> Certain weaknesses in the administration and payments occur, resulting in some persons not timeously receiving assistance. Due to administrative delays, some wait for months before they can access grants for which they have applied. This was challenged in *Vumazonka and others v MEC for Social Development and Welfare for Eastern Cape*,<sup>715</sup> where the applicant applied for a disability grant and she was assured that the outcome of her application would be made in three months. When she received no response in three months, she went to the High Court to challenge the department to make a decision regarding her eligibility to have access to this grant timeously. It was held that the delay in dealing with her application was unreasonable.

In *Ngalo v SASSA*,<sup>716</sup> the applicant sought to claim her constitutional right of access to social security which is guaranteed by section 27(1)(c) of the Constitution. The applicant in this matter, Ms Zukiswa Ngalo, is the mother of Inathi Duba, a disabled minor child born on 21 July 2002. Ms Ngalo is a semi-illiterate unemployed South African citizen. Inathi is suffering from septic arthritis and hip deformity, which resulted in one of her legs being shorter than the other. Because of her deformity, she walks with a noticeable limp although she uses crutches and orthopedic shoe. The doctor who examined her on the 27 September 2010 in Nelson Mandela Academic hospital opined that Inathi “qualified for a care dependency grant because she will have a long-term disability”.<sup>717</sup>

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<sup>714</sup> Bonthuys E ‘Realising South African children’s basic socio-economic claims against parents and the State: What courts can achieve’ (2008) Vol.22 *International Journal of Law, Policy and the Family* 333-340.

<sup>715</sup> *Vumazonka and Others v MEC for Social development and Welfare for Eastern Cape* 2005 (6) SA 229 (SE).

<sup>716</sup> *Ngalo v The South African Social Security Agency (SASSA)* (2013) 2 All SA 347 (ECM) (*Ngalo*).

<sup>717</sup> *Ngalo* para 8.

Notwithstanding a series of attempts to access the disability grant on behalf of her child, the applicant received no response from the SASSA.<sup>718</sup> She then brought an application seeking a *mandamus* directing SASSA to consider and decide the application for a care dependency grant and to inform the applicant's attorneys of the outcome thereof within 15 days from the date of the decision.<sup>719</sup>

In its decision, the court referred to *Mbanga v MEC for Welfare*<sup>720</sup> and *Nomala v Permanent Secretary Dept of Welfare*,<sup>721</sup> where it was emphasised that the state should provide social assistance grant within a reasonable time of application. In other cases, the courts also emphasised that the unilateral suspension or termination of grants without proper adherence to the administrative law principles of natural justice and the rights which accrued in terms of the statute, is unlawful and invalid.<sup>722</sup> According to the court, treating human beings with dignity requires of the state to act in a reasonable manner towards those claiming social security rights, such as the right to social grant.<sup>723</sup> The court further remarked that punitive orders should be extended to unreasonably delayed outcomes of applications for a social grant.<sup>724</sup>

In the case of *Kebogile Lobisa Ngamole v SASSA*,<sup>725</sup> the High Court criticised the conduct of SASSA in respect of delays in processing applications for grants and noted that the applicants should have been communicated in advance to avoid unreasonable delays.<sup>726</sup> The court ordered that SASSA communicates to the applicants the reasons for denial of their application within 15 days.

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<sup>718</sup> *Ngalo* para 10.

<sup>719</sup> *Ngalo* para 11.

<sup>720</sup> *Mbanga v MEC for Welfare*.

<sup>721</sup> *Nomala v Permanent Secretary Dept of Welfare* 20 (2001) 8 BCLR 844 (E).

<sup>722</sup> *Ngalo* para 23.

<sup>723</sup> *Ngalo* para 26.

<sup>724</sup> *Ngalo* para 24.

<sup>725</sup> *Kebogile Lobisa Ngamole v South African Social Security Agency* [2008] ZANWHC 35 (18 September 2008) (*Kebogile Lobisa Ngamole*).

<sup>726</sup> *Kebogile Lobisa Ngamole* para 34-35.

In *Seodigeng v The Chief Executive of SASSA*,<sup>727</sup> the court was again called upon to adjudicate a case involving alleged administrative inefficiencies. This case dealt with applicants who alleged that they had not received an outcome following applications for social grants while the other group alleged that they had not received reasons for rejection of their applications by SASSA.

The applicants argued that SASSA had infringed their right to fair administrative action as enshrined in section 33 of the Constitution of South Africa as well as their right to social assistance as prescribed by section 27(1)(c) of the Constitution. However, the court dismissed the applications for failure to exhaust the internal remedies. What is of critical importance in this case is the fact that the court went out of its way to formulate guidelines to be followed by applicants for social assistance before approaching the courts for any relief.

The court directed SASSA to ensure that its staff complies with the applicable regulations,<sup>728</sup> that applications are considered within three months from the date of submission, applicants for social grants are informed of the outcome as prescribed by law, to ensure that reasons for approval or rejection of applications are proffered.<sup>729</sup> From these guidelines, it seems the court was merely emphasising the need for SASSA to comply with its statutory obligations in terms of the Social Assistance Act, 2004.

In respect of applicants, the court directed that internal remedies must be exhausted before approaching the court. In addition, the court ordered that the prescribed period in section 5 and 7 of PAJA must be complied with strictly while if there is no response to application after three months, the applicant should follow-up with the appropriate office with all the relevant information thus avoiding

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<sup>727</sup> *Seodigeng v The Chief Executive of South African Social Security Agency* 1682/07) [2011] ZANWHC1 (*Seodigeng*).

<sup>728</sup> Regulation 10 of Regulation No.898 of 22 August 2004.

<sup>729</sup> *Seodigeng* para 126.



pre-mature litigation which may result in payment of cost *de bonis propriis*.<sup>730</sup> Considering the content and nature of these vital guidelines, it is submitted that from the judiciary's perspective, all parties involved in the administration of social assistance, whether as claimants or officials of SASSA, should abide by the relevant legislative provisions for efficiency and avoidance of unnecessary litigation which may be costly.

Furthermore, SASSA as a public institution is required to respect, promote, and fulfil the rights in the Bill of Rights. This implies that any violation of social assistance rights as entrenched in section 27(1)(c) of the Constitution can be challenged by the applicant of social assistance in the court of law.

#### **4.3 Access to courts by applicants of social assistance**

The claimants of social assistance who have been aggrieved by the decision of government are entitled to approach the court to seek relief. Liebenberg points out that communities who are marginalised by a complex web of factors such as their race, gender, poverty, disability and their spatial location in remote rural areas face almost insurmountable obstacles in gaining access to courts so as to vindicate their constitutional rights.<sup>731</sup> She states that access to legal services also remains a perennial problem in South Africa. She further acknowledges that one way in which the constitutional dispensation has made it slightly easier for impoverished groups to gain access to courts is to broaden the category of people entitled to approach the court for appropriate relief when their rights have been infringed or threatened. In her opinion, the legal right or standing to institute a court action is no longer reserved for the person directly and personally affected by a breach of a legal right.

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<sup>730</sup> *Seodigeng*.

<sup>731</sup> Liebenberg S 'Forging new tools for vindicating the rights of the poor in the crucible of the Eastern Cape' (2014) public lecture delivered at the Rhodes University Law Faculty 28 July 2014 available at [http://blogs.sun.ac.za/seraj/files/2014/08/Public-Lecture\\_Rhodes\\_FINAL.pdf](http://blogs.sun.ac.za/seraj/files/2014/08/Public-Lecture_Rhodes_FINAL.pdf) (date of use 25 May 2015).

According to Currie and De Waal, legal standing concerns whether someone who approaches a court is the appropriate person to present the matter to the court for adjudication.<sup>732</sup> In cases where a beneficiary of social security alleges that his/her right to have access to social security as provided in section 27(1)(c) has been violated, such a person can rely on the provisions of section 38 of the Constitution. In *Gerber v Vooritter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening*,<sup>733</sup> the court held:

The aim of section 38 was intended to make provision for virtually unlimited standing so that as little interference as possible would occur in respect of the means of approaching courts, the nature of the enquiry and the remedy to be granted. The purpose of the section was to ensure that fundamental rights were upheld. To achieve this purpose, courts had to be placed in the position to be able to determine whether an applicant's fundamental rights had been infringed or threatened and to grant appropriate relief where such violations had occurred.<sup>734</sup>

The Constitution affords everyone the right to have any dispute that can resolved by application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>735</sup> In sections 9 (1) and 35(3), the Constitution guarantees equal protection of the law and the right to a fair trial. The right of access to the courts is used in this study to denote access to the courts or tribunals that adjudicate social security disputes. Nyenti observes that the legal dimension of the concept of access to justice was developed as an element of the fundamental principle that all people should enjoy equality before the law.<sup>736</sup> According to him, each person should have effective means of protecting his/her rights or entitlements under the substantive law.<sup>737</sup>

Therefore, it is crucial that the right to have access to justice be interpreted widely so as to include many of the needs of the poor, in particular the realisation

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<sup>732</sup> Currie I and De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed (Juta & Co Ltd, 2014) 73.

<sup>733</sup> *Gerber v Vooritter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* 1998 (2) SA 559 (T).

<sup>734</sup> *Gerber ibid* at 569D-F.

<sup>735</sup> Section 34 of the Constitution.

<sup>736</sup> Nyenti M 'Access to justice in the South African social security system: Towards a conceptual approach' *De Jure* (2013) 903.

<sup>737</sup> Nyenti *ibid*.

of their social security rights.<sup>738</sup> Scholars interpret access to justice in light of section 34 requirements that prescribe for a legal institutional framework to serve the whole population better and to make good on constitutional promises of genuine socio-economic advancement.<sup>739</sup>

#### 4.3.1 *Locus standi and class action in socio-economic rights litigation*

With regard to the right to have access to justice, the South African Constitution, includes broad provisions for *locus standi* to enable people to act either on their own behalf or on behalf of others in situations where their fundamental constitutional rights have been infringed or threatened.

The Constitution provides a broader approach to standing when fundamental rights are affected or threatened. Section 38 of the Constitution reads:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are, a person acting -

- (a) In his/her own interests;<sup>740</sup>
- (b) On behalf of another person who cannot act in his/her own name;
- (c) As a member of, or in the interest of, a group or a class of persons;
- (d) In the public interest; or
- (e) As an association acting in the interest of its members.<sup>741</sup>

It is clear that the Constitution allows applicants of social security to approach the courts whenever their fundamental right to social security has been violated. Furthermore, the rules of legal standing require the applicant to have capacity to

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<sup>738</sup> Holnes D 'The constitutional justification for free legal services in civil matters in South Africa' *Speculum Juris* 2 (2013) 2.

<sup>739</sup> Brickhill J 'The right to a fair civil trial: The duties of lawyers and law students to act *pro bono*' *South African Journal on Human Rights* (2005) 293.

<sup>740</sup> The notion interest includes the interest required for the joinder of a party in an action or an application.

<sup>741</sup> Section 38 of the Constitution; See also *Permanent Secretary, Department of Welfare, EC v Ngxuza* 2001 (4) SA 1184 para 4 and 5 (*Permanent Secretary, Department of Welfare, EC v Ngxuza*). For further reading on the scope and ambit of class action, see *Children's Resource Center Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA); *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC); *Ferreira v Levin* NO 1996 1 SA 984 (CC); See also Swanepoel N 'The judicial application of the "interest" requirement for standing in constitutional cases: A radical and deliberate departure from common law' (2014) *De Jure* 63-84.

sue and a sufficient interest in the proceedings.<sup>742</sup> According to Currie and De Waal, the concept of 'sufficient interest' is linked to the categories of persons listed in section 38.<sup>743</sup> For example, an association acting in the interest of its members must show that the members have a *sufficient interest* in the remedy it seeks. Similarly, a person acting in the public interest must show that the public has a sufficient interest in the remedy he/she seeks.<sup>744</sup> And lastly, a person acting in his/her own interest must show that a contested law or decision directly affects his/her rights or interests, or potential rights or interests.<sup>745</sup>

In the context of social assistance, class action provides a potent weapon in the hands of individuals whose social security rights have been violated. It allows for a single or small group of representative plaintiffs to institute legal action on behalf of a large group who share with the representative plaintiff (s) the same cause of legal action and interest in the remedy sought.<sup>746</sup> In *Permanent Secretary, Department of Welfare, EC v Ngxuza*,<sup>747</sup> Cameron JA, writing for the Full Bench had this to say:

In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it.

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<sup>742</sup> Currie I and De Waal J (note 732 above) 78-79.

<sup>743</sup> Currie I and De Waal J *ibid*; See also Okpaluba C 'Constraints on judicial review of executive conduct: The juridical link between the Marikana mineworkers' imbroglio and the Gauteng e-tolling saga' *TSAR* 2 (2015) 286.

<sup>744</sup> Currie I and De Waal J (note 732 above).

<sup>745</sup> Currie I and De Waal J *ibid*; See also *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and Others* 1996 (1) SA 984 (CC); *National Coalition for Gay and Lesbian Equality and other v Minister of Justice and Others* 1998 (6) BCLR 726 (W).

<sup>746</sup> For further reading on selected case law on class action in social assistance matters see, De Villiers N 'Procedural fairness and reasonable administrative action with the social assistance system: Implications of some settled class actions' (2006) 22 *SAJHR* 405-438; *Children's Resource Center Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA); *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC); De Vos W 'Judicial activism gives recognition to a general class action in South Africa' (2013) 2 *TSAR* 370-380; Cf Hurter E 'Certification: The procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure' (2000) Vol.33 (1) *Comparative and International Law Journal of Southern Africa (CILSA)* 42-52; Hurter E 'Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions' (2006) Vol.39 (3) *CILSA* 485-503.

<sup>747</sup> *Permanent Secretary, Department of Welfare, EC v Ngxuza* paras 4 and 5.

The SCA in *Permanent Secretary, Department of Welfare, EC v Ngxuza* stated that the class action provision of section 38(c) must be interpreted in light of the constitutional entitlements of such persons, who are most lacking in protective and assertive armour.<sup>748</sup> It is submitted that the class action mechanism in South Africa is uniquely positioned to address socio-economic rights reform.

#### **4.4 The role of the courts in crafting remedies for violation of social security rights**

It is important to recall that section 7(2) of the Constitution requires the state to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights. This section imposes three types of obligations on the state. First, the obligation to respect requires the state to refrain from interfering directly or indirectly with the enjoyment of all human rights and freedoms of the individual.<sup>749</sup> This entails that a state should refrain from engaging in any practice or activity that denies or limits equal access to adequate social security, arbitrarily or unreasonably interfere with institutions that have been established to provide social security.<sup>750</sup>

Second, the obligation to respect requires the state to take measures that prevent non-state actors or third parties including individuals, groups, corporations and other entities from interfering with economic and social rights.<sup>751</sup> This obligation entails the creation and maintenance of a framework by an effective interplay of laws, regulations, and other measures so that individuals and groups will be able to realise their rights and freedoms. Third, the obligation to fulfil requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures including relevant national

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<sup>748</sup> *Permanent Secretary, Department of Welfare, EC v Ngxuza* para 13.

<sup>749</sup> Ssenyonjo M *Economic, social and cultural rights in international law* (United Kingdom, Hart Publishing, 2009) 24-25.

<sup>750</sup> Ssenyonjo *ibid.*

<sup>751</sup> Ssenyonjo (note 749 above) 25.

policies to ensure full realisation of the economic and social rights to those who cannot secure rights through their personal efforts.<sup>752</sup>

The state's obligation to respect, protect, promote and fulfil fundamental rights, in particular the right to housing has been acknowledged by the court in *Jaftha v Schoeman and Van Rooyen v Stoltz*.<sup>753</sup> In *casu*, the Constitutional Court decided that the provisions in the Magistrates' Court Act<sup>754</sup> that allowed, without adequate judicial oversight, the sale of a person's home to defray a judgement debt, breached the duty to respect the right of everyone to have access to adequate housing.<sup>755</sup>

Ssenyonjo acknowledges that the obligation to fulfil has three-dimensional elements. These are the obligations to *facilitate*, *promote* and *provide access to socio-economic rights*.<sup>756</sup> Accordingly, the obligation to facilitate requires the state to take positive measures that enable and assist individuals and communities to enjoy economic and social rights. In addition, the obligation to promote requires the state to undertake actions that create, maintain and restore the realisation of these rights.

In *Glenister v President of the RSA*,<sup>757</sup> the court noted that section 7(2) of the Constitution imposes an implicit obligation on the state to take reasonable steps to respect, protect, promote and fulfil the rights in the Bill of Rights. According to the court, this means that the measures the state adopts to fulfil its constitutional obligation must be reasonable.<sup>758</sup> When it comes to determining what is reasonable, the Constitutional Court further explained that section 39(1)(b) of the

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<sup>752</sup> Ssenyonjo *ibid*.

<sup>753</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* (2005) 1 BLLR 78 (CC).

<sup>754</sup> Magistrates' Court Act No. 32 of 144.

<sup>755</sup> For further reading on the insolvent's right to adequate housing, see Roger E 'Does an insolvent debtor have a right to adequate housing?' (2013) Vol.25 (2) *South African Mercantile Law Journal* 119-146.

<sup>756</sup> Ssenyonjo (note 749 above).

<sup>757</sup> *Glenister v President of the RSA* 2011 (3) SA 347 (CC).

<sup>758</sup> For further reading on the standard of reasonableness, see Wesson M 'Disagreement and the constitutionalisation of social rights' (2012) Vol.2 *Human Rights Law Review* 233-238.

Constitution provides that the courts must consider international law. The notion of reasonableness is used by Tooze,<sup>759</sup> to mean that government should be called upon to demonstrate the following:

- That the steps adopted are reasonable, reasonableness being determined by reference to available resources and to the likelihood that progressive realisation of the rights will result;
- That they are using available resources equitably, effectively, and efficiently;
- That they are developing societal resources;
- That resources are targeted to subsistence requirements and essential services with a view to protecting the most vulnerable; and
- That they are monitoring progress made and modifying programmes where progress is insufficient.

According to the author, under such approach, the burden of proof resting on the state should increase as the levels of progress decline and in particular where the state regresses.<sup>760</sup> With regard to the enforcement of social security and fundamental rights entrenched in the Constitution, only the Constitutional Court may decide that Parliament or the President has failed to comply with a constitutional obligation.<sup>761</sup>

In defining the confines of the constitutional obligation, the Constitutional Court in *Doctors for Life International v The Speaker of the National Assembly &*

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<sup>759</sup> Tooze J 'The rights to social security and social assistance: Towards an analytical framework' in Baderin M and McCorquodale R *Economic, social and cultural rights in action* (New York, Oxford University Press, 2007) 335. See also Liebenberg S 'The value of freedom in interpreting socio-economic rights' in Barnard – Naude *AJ et al Dignity, freedom and the post-Apartheid legal order: The critical jurisprudence of Laurie Ackermann* (Juta & Co Ltd, 2008) 151-154. For further reading on an alternative to the reasonableness review model see, Muller G 'Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to the reasonableness review model' (2015) Vol.30 (1) *SA Public Law* 71-93.

<sup>760</sup> Tooze J (note 759 above).

<sup>761</sup> Section 167(4)(e) of the Constitution.

*Others*,<sup>762</sup> stated that the word ‘constitutional obligation’ in section 167(4)(e) should be given a narrow meaning.<sup>763</sup> That if the phrase is interpreted as applying to all questions concerning the constitutional validity of Acts of Parliament, it would be in conflict with the powers of the Supreme Court of Appeal and the High Courts to make orders concerning the validity of Acts of Parliament.<sup>764</sup> The court further stated that the word ‘constitutional obligation’ regulates the constitutional challenges that seek to enforce the fulfilment of constitutional obligations and contains no restrictions as to the person or the stage at which a challenge may be launched.<sup>765</sup>

In as far as the enforcement of social security rights is concerned; the Constitutional Court is the highest court of the land in all constitutional matters.<sup>766</sup> The Constitution describes a constitutional matter as any issue involving the interpretation, protection or enforcement of the Constitution. The recent Constitutional Amendments provides that the Constitutional Court has jurisdiction in all Constitutional matters...and any other matter in which it may grant leave to appeal on the grounds that the matter raises an arguable point of law of general public importance.<sup>767</sup> For ease of reference, the amendment to section 167(3) now reads:

The Constitutional Court, is the highest court in all constitutional matters of the Republic, and may decide only constitutional matters, and issues connected with decisions on constitutional matters, and *any other matter*, if the Constitutional Court grants leave to appeal on the grounds that the matter raises arguable point of law of general public importance which ought to be considered by that Court, and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter within its jurisdiction.<sup>768</sup>

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<sup>762</sup> *Doctors for Life International v The Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) (*Doctors for Life International*).

<sup>763</sup> *Doctors for Life International* para 19.

<sup>764</sup> *Doctors for Life International*.

<sup>765</sup> *Doctors for Life International* para 51.

<sup>766</sup> S 167(3)(a) of the Constitution.

<sup>767</sup> Constitution Seventeenth Amendment Act of 2012, GN 72 in GG 36128 dated 1 February 2013. For further reading on the jurisdiction of the Constitutional Court in terms of the Constitution Seventeenth Amendment Act of 2012, see Rautenbach I and Heleba S ‘The jurisdiction of the constitutional court in non-constitutional matters in terms of the Constitution Seventeenth Amendment Act of 2012’ (2013) 3 *TSAR* 405-418.

<sup>768</sup> Constitution Seventeenth Amendment Act *ibid*.



In *Fredericks and Others v MEC for Education and Training, Eastern Cape & Others*,<sup>769</sup> Justice O'Regan evoking the Constitutional Court's interpretations in *S v Boesak*<sup>770</sup> remarked that:

The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of section 172(1)(a) and section 167(4)(a) of the Constitution, constitutional matter must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under section 167(7), the interpretations, application and upholding of the Constitution are also constitutional matters. So too, under section 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.<sup>771</sup>

In determining whether a matter is constitutional, Justice Langa in *Minister of Safety & Security v Luiters*<sup>772</sup> stated that "when determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful...the question is whether the argument forces us to consider constitutional rights or values..."<sup>773</sup> In light of the above developments, it is clear that the Constitutional Court is an apex court of South Africa. Moreover, it is the highest court in the republic on constitutional matters and in any other matter which the Constitutional Court grants leave to appeal on the grounds that the matter raises arguable point of law of general public importance.

Another important aspect relating to constitutional litigation is the fact that in order for the litigant to approach the Constitutional Court, and apart from

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<sup>769</sup> *Fredericks and Others v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC).

<sup>770</sup> *S v Boesak* 2001 (1) SA 912 (CC) (*S v Boesak*).

<sup>771</sup> *S v Boesak* para 10.

<sup>772</sup> *Minister of Safety & Security v Luiters* (2007) 28 ILJ 133 (CC).

<sup>773</sup> *Minister of Safety & Security* *ibid* para 23.

complying with the procedural aspects envisaged in the rules of that court,<sup>774</sup> he/she must convince the court that it is in the interest of justice to bring a dispute to the court's attention. Furthermore, the litigant must obtain leave from the court to consider the dispute,<sup>775</sup> and must satisfy the court that the dispute constitutes a constitutional matter.

It follows in this discussion that the right to social security enshrined in section 27 (1)(c) of the Constitution qualifies to be a constitutional matter. Therefore any one whose constitutional right to social security has been violated has the right to approach the courts for appropriate relief. In cases where there is violation of the right to have access to social security the Constitution entitles the courts to fashion a wide range of remedies.<sup>776</sup>

The Courts are empowered, whenever they decide on any issue involving the interpretation, protection and enforcement of fundamental rights in the Constitution, to make any order that is just and equitable and may grant appropriate relief.<sup>777</sup> Specific constitutional remedies include orders of invalidity, the development of the common law to give effect to the constitutional rights, the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights,<sup>778</sup> and sometimes payment of damages in cases involving the inordinate delay in paying social grants to the intended beneficiaries.<sup>779</sup>

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<sup>774</sup> Promulgated under Government Notice R1675 in GG 25726 of 31 October 2003.

<sup>775</sup> Section 167(6) of the Constitution.

<sup>776</sup> See Swart M 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215- 240. For further on structural injunctive remedies in South Africa, see Hirsch D 'A defense of structural injunctive remedies in South African law' (2007) Vol.9 (1) *Oregon Review of International Law* 1-66.

<sup>777</sup> See section 172(1)(b) of the Constitution. In an attempt to give substance to the term appropriate relief the Supreme Court of Appeal has stated that the word appropriate means specially suitable or proper, see *Pharmaceutical Society of South Africa v Tshababala-Msimang* 2005 (3) SA 238 (SCA) para 76. The court referred to the Constitutional Court decision in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) paras 42-43, in which it was stated that, in the context of the Constitution, appropriateness imports the elements of justice and fairness.

<sup>778</sup> Section 172(1) provides:

'When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and

In addition to the courts, there are also other institutions which are constitutionally entrusted with the task of monitoring compliance with and enforcing the constitutional fundamental rights. The South African Human Rights Commission is mandated to, *inter alia*, monitor and assess the obligation of the state to progressively realise the rights in the Bill of Rights.<sup>780</sup> The administration of social assistance is undertaken by the SASSA, which obtains its mandate from the SASSA Act.<sup>781</sup>

The Social Assistance Act<sup>782</sup> regulates the payment of social assistance grants. The new framework could be described as a centralised institution with limited autonomy, extensive ministerial direction and involvement (for example concurrence/approval of the minister is required for a range of decisions; a CEO manages the Agency subject to the direction of the minister, the minister may override any decision taken by the CEO).

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- (b) may make any order that is just and equitable, including –
- i. an order limiting the retrospective effect of the declaration of invalidity; and
  - ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect’.

<sup>779</sup> In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), the Constitutional Court recognised that monetary damages are capable of being awarded for a constitutional breach. Delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations, but the relief that is permitted by section 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative and indirect means of asserting and vindicating constitutional rights. For further reading on monetary damages as a remedy for the infringement of social assistance, see *Member of the Executive Council of the Department of Welfare v Kate* 2006 SCA 46 (RSA); *Mahambehlala v Member of Executive Council of Welfare, Eastern Cape* 2002 1 SA 342. In this case the court held that the prolonged delay in awarding social assistance to the applicant resulted in an unlawful and unreasonable infringement of the applicant’s fundamental right to just administrative action, and awarded damages equivalent to interest for the period of delay, this was done in order to place the applicant in the position in which she would have been had her constitutional right not been breached by the tardy manner in which her application for a social grant was processed. Cf Roach K ‘The challenges of crafting remedies for violation of socio-economic rights’ available at [http://www.law.utoronto.ca/documents/Roach/challenge\\_crafting.pdf](http://www.law.utoronto.ca/documents/Roach/challenge_crafting.pdf) (date of use 22 May 2015).

<sup>780</sup> See section 184(1) of the Constitution.

<sup>781</sup> Joubert W *et al The law of South Africa* Vol.13 (3) (Durban, LexisNexis, 2013) 24-25.

<sup>782</sup> Social Assistance Act 13 of 2004 (as amended).

Noteworthy is the absence of any Board or other advisory or supervisory structure/institution of a representative nature. The main focus of the SASSA is to act as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance, with the possibility of some wider functions in the future (for example taking over social insurance payments).<sup>783</sup> Nevertheless, this may not even involve physically rendering payments, as this may according to the Agency Act still be contracted out.

In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of SASSA and Others*,<sup>784</sup> which dealt with review of the tender process in procuring a service provider for the provision of payment services for social grants in terms of the Preferential Procurement Policy Framework Act of 2000. The first applicants applied to the North Gauteng High Court to set aside the decision of the second respondent (SASSA) to appoint the third respondent (Cash Payment Services (CPS) as a service provider regarding a tender for the provision of payment services for social grants in the country.<sup>785</sup>

The High Court *per* Matojane found that the tender process was illegal and invalid as it did not comply with the requirements set out in the relevant tender documents and was procedurally unfair.<sup>786</sup> It declared the tender process invalid, but declined to set the tender aside because it would disrupt the payment of social grants.<sup>787</sup> The Supreme Court of Appeal held that a fair process does not demand perfection in every step, and that a tender should not be set aside for

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<sup>783</sup> Section 3 of the South African Social Security Agency Act 9 of 2004.

<sup>784</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay 1*) and *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay 2*).

<sup>785</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (7447/2012) [2012] ZAGPPHC 185 para 3.

<sup>786</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (7447/2012) [2012] ZAGPPHC 185, at para 80 (*hereinafter AllPay High Court*).

<sup>787</sup> *AllPay High Court* para 80.

inconsequential irregularities.<sup>788</sup> On this basis, it concluded that the award of the tender to Cash Paymaster Services (Pty) Ltd (CPS) was not unfair. *AllPay* appealed against the decision of the SCA to the Constitutional Court.

The Constitutional Court had to consider a just and equitable remedy arising from the court's previous order declaring that the tender was invalidly awarded. The order of invalidity was primarily premised on two grounds, namely; SASSA's failure to ensure that the empowerment credentials claimed by CPS were objectively confirmed and that Bidders Notice 2 did not specify with sufficient clarity what was required of bidders in relation to biometric verification. Consequently, this rendered the process uncompetitive and made any comparative consideration of cost-effectiveness impossible.

The Constitutional Court upheld the appeal.<sup>789</sup> It held that the assessment of the fairness and lawfulness of the procurement procedure must be independent of the outcome of the tender process, and that it must be assessed in terms of the provisions of the Promotion of Administrative Justice Act. The court declared the award of the tender by SASSA to the third respondent, that is, Cash Paymaster Services constitutionally invalid.<sup>790</sup> The declaration of invalidity was based on two grounds. The first was that SASSA failed to ensure that the empowerment credentials claimed by Cash Paymaster Services were objectively confirmed. However, the second was that Bidders' Notice 2 did not specify with sufficient clarity what was required of bidders in relation to biometric verification, with the result that only one bidder was considered in the second stage of the process. This rendered the process uncompetitive and made any comparative consideration of cost-effectiveness impossible.

On the flipside, despite the court having previously ordered that CPS could not benefit while it continued to administer the payments, CPS affiliated companies,

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<sup>788</sup> *AllPay*, Supreme Court of Appeal para 96.

<sup>789</sup> *AllPay* 1.

<sup>790</sup> *AllPay* 2 para 1.

such as Moneylife and Smartlife, were benefiting. It was submitted that these companies used CPS's access to beneficiaries' personal data to offer them loans and sell them airtime and electricity. They then debited what was owed from beneficiaries' bank accounts immediately after their social grants were paid and before beneficiaries could access them.

The Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v SASSA* referred to the decision in *Steenkamp No v Provincial Tender Board, Eastern Cape*,<sup>791</sup> where the court held that the remedy must fit the injury. And further, that section 172(1)(b) of the Constitution is clearly relevant for invalid administrative action to allow the competent authority to correct the defect. The court also held that due regard has to be given to those who stand to be affected by any remedy, particularly children beneficiaries.<sup>792</sup> In addition, the court noted that although CPS is not a state organ, it too must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>793</sup> According to the court, this is based on the nature of services performed by the CPS, which are public in nature, thus exercising a public power. In addition, the court also held that SASSA does not, by virtue of concluding a contract, divest itself of constitutional responsibilities and public accountability, and by concluding a contract with SASSA, CPS too became accountable to the people of South Africa.<sup>794</sup>

Most importantly, the court held that, submission by both SASSA and CPS, to the effect that the court has no power to amend an existing contract, should be rejected.<sup>795</sup> The Constitutional Court relied on section 172 of the Constitution, which empowers it when deciding a constitutional matter within its power, to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Furthermore, this section also allows the Court

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<sup>791</sup> *Steenkamp No v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

<sup>792</sup> *AllPay* 1 para 27.

<sup>793</sup> *AllPay* 1 para 49.

<sup>794</sup> *AllPay* 1 para 51-52.

<sup>795</sup> *AllPay* 1 para 37.

to make any order that is *just and equitable*,<sup>796</sup> including, an order limiting the retrospective effect of the declaration of invalidity, and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

The Constitutional Court declared the decision to award the tender to CPS constitutionally invalid. It then ordered SASSA to award a new tender for the payment of social grants within 30 days. In the event that a new tender process is initiated, such process should not prejudice existing grants beneficiaries. If a new tender process is not initiated, CPS must file with the court an audited full statement.

The court imposed a structural order requiring SASSA to report to it (court) at various stages of the tender process and mandated that new members of the Bid Evaluation and Bid Adjudication Committee be appointed.<sup>797</sup> Accordingly, the ruling by the Constitutional Court underscores the importance that the court attaches to the fundamental values of accountability and transparency as underlying values of governance and public administration. The Constitution requires executive action, policies and procedures to result in accountability and transparency: being open about how and why certain decisions and actions are taken.<sup>798</sup>

The implications of the *Allpay* decision in the area of social assistance and administrative justice are threefold. Firstly, SASSA as an organ of state is bound to the basic values and principles governing public administration set out in section 195 of the Constitution.<sup>799</sup> Secondly, the Constitutional Court made it clear that once the law prescribes a particular administrative process, it is subject

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<sup>796</sup> Sections 172(b) and 167(7) of the Constitution.

<sup>797</sup> *AllPay* 2 para 3.

<sup>798</sup> Du Preez J Center for Constitutional Rights available at <http://www.cfc.org.za/index.php/latest/261-case-discussion-allpay-consolidated-investment-holdings-pty-ltd-and-cash-paymaster-services-pty-ltd-cps> (date of use 24 March 2015).

<sup>799</sup> *Allpay* 2 para 73.

to the norms of procedural fairness codified in PAJA. Sonnekus contends that the tender process and tender award following consideration of the tenders submitted constituted administrative acts governed by the Constitution and other relevant legislations and were reviewable under PAJA.<sup>800</sup>

In circumstances where administrators depart from legally binding procedures, the basis for doing so must be reasonable, justifiable and the process of change must be procedurally fair. Thirdly, in as far as appropriate remedy is concerned, Okpaluba argues that the term “appropriate relief” is used in section 38 of the Constitution in respect of the enforcement of the Bill of Rights while “just and equitable” order was used in other circumstances, where the court deals with constitutional matters under section 172 of the Constitution. However, the courts have tended to use both expressions interchangeably.

He further remarks that the courts treat these terms as meaning effective remedy for the infringements of the constitutional rights and that in determining what the relief must be, the interests not only of the plaintiff but also of the defendant and the public at large must be taken into account.<sup>801</sup>

In *Allpay 2*. The court had to consider the proper legal approach to determining a just and equitable remedy in the context of public procurement contracts.<sup>802</sup> Okpaluba shows that in coming to a conclusion on the “appropriate remedy” the court had to choose such a remedy that will not disrupt the payment of existing grants.<sup>803</sup> In the context of the infringement of the right to have access to social

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<sup>800</sup> Sonnekus J ‘Procurement contracts and underlying principles of the law – No special dispensation for organs of state (Part 1) (2014) 2 *TSAR* 324.

<sup>801</sup> Okpaluba C ‘Constraints on judicial review of executive conduct: The juridical link between the Marikana mineworkers’ imbroglio and the Gauteng e-tolling saga (2015) 2 *TSAR* 292.

<sup>802</sup> For further reading on contractual issues and principles of law arising from procurement contracts, Sonnekus J ‘Procurement contracts and underlying principles of the law – No special dispensation for organs of state’ (Part 1) (2014) 2 *TSAR* 320-336; Sonnekus J ‘Procurement contracts and underlying principles of the law – No special dispensation for organs of state (Part 2 – developing the common law, consequences and remedies) (2014) 3 *TSAR* 536-559.

<sup>803</sup> Okpaluba (note 801 above) 292.



assistance for applicants of social security. *Allpay's* case introduces innovative remedies in cases of improper administrative action.<sup>804</sup>

Theoretically, the structure of social assistance in South Africa appears to be a perfect system, but the experiences of the poor and marginalised in South Africa would provide a different picture. The South African courts face the challenge of enforcing social and economic rights, while at the same time showing an appropriate level of deference to the legislative and executive bodies, which have the mandate and capacity to make broad policy choices in this area.<sup>805</sup>

Bilchitz<sup>806</sup> considers three possible ways of construing the content of socio-economic rights with a particular focus on the jurisprudence of the South African Constitutional Court. He identifies the reasonableness approach, the equality approach, and the minimum core approach as viable approaches to ensuring that socio-economic rights have teeth. However, Bilchitz illustrates the weaknesses of the reasonableness review approach of the Constitutional Court in enforcing socio-economic rights. He argues that the approach limits the scope for the normative development of socio-economic rights. On the positive side, Liebenberg<sup>807</sup> demonstrates how equality can be incorporated in the interpretation of socio-economic rights. She notes that measures designed to achieve the fulfillment of socio-economic rights must take into account the broader patterns of inequality in society.<sup>808</sup>

It is submitted that accountability-centered approach to socio-economic rights realisation can assist in making the government and other stakeholders to

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<sup>804</sup> Okpaluba (note 801 above) 293-296.

<sup>805</sup> Cf Brand D 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stellenbosch Law Review* 614-638; De Ville J 'Deference and difference: Judicial review and the perfect gift' (2006) Vol.9 (2) *PER* 41-78.

<sup>806</sup> Bilchitz D in a Paper presented to the International Association of Constitutional Law (IACL) Conference, (2007) available at <http://www.enelsyn.gr/papers/pdf> (date of use 20 February 2015).

<sup>807</sup> For further reading on this regard see, Liebenberg S *Socio-economic rights: Adjudication under a transformative Constitution* (Juta & Co Ltd, 2010) 381-382.

<sup>808</sup> Liebenberg *ibid* 419.

account for the non-fulfilment of these rights.<sup>809</sup> The accountability-Centered approach is premised on the notion of participation of stakeholders in defining goals and measuring socio-economic rights achievements at a local level. It also requires political units to measure and share data about progress towards these goals, and to adopt best practices of other units.<sup>810</sup> Against this backdrop, the next section provides a discussion on the interplay between administrative law principles and the right to have access to social assistance.

#### **4.5 Administrative law principles and the right to have access to social assistance**

To place this discussion in its proper context, it is necessary to consider the relationship between administrative law and social security. In the past, South African courts were hesitant to pronounce upon non-compliance with the values of administrative justice in social security matters.<sup>811</sup> In other words, the principles of administrative justice were non-existent. These structural weaknesses in South African administrative law were based on four pillars, which were against the system of open and accountable public administration.<sup>812</sup>

These were the constitutional doctrine of parliamentary sovereignty,<sup>813</sup> the repudiation of its counter-balance (the universal franchise), race classification and a racially-based system of according rights and privileges, and limited scope for judicial review of the exercise of public power.<sup>814</sup> According to Dicey:

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<sup>809</sup> See Klein A 'Judging as nudging: New governance approaches for the enforcement of constitutional social and economic rights' (2008) *Columbia Human Rights Law Review* 39 355-356.

<sup>810</sup> Klein *ibid.*

<sup>811</sup> Olivier M *et al Introduction to social security* (Durban, LexisNexis, 2004) 509.

<sup>812</sup> Plasket C 'Post -1994 administrative law in South Africa: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law' Vol.21 (1) (2007) *Speculum Juris* 25.

<sup>813</sup> See further Du Plessis M 'The legitimacy of judicial review in South Africa's new constitutional dispensation: Insights from the Canadian experience' Vol.33 (2) *Comparative and international Law Journal of Southern Africa* (2000) 227-228.

<sup>814</sup> Plasket (note 812 above). For further reading on judicial review, see Harel A and Shinar A 'Between judicial and legislative supremacy: A cautious defense of constrained judicial review' Vol.10 (4) *International Journal of Constitutional Law* (2012) 950-975.

The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined, has under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.<sup>815</sup>

As discussed in Chapter Two Parliament in South Africa prior to the coming of the democratic Constitution was at liberty to enact laws which were discriminatory in nature. However, one of the most dominant features in the changes to the social security system has been an introduction of the concept of judicial review emanating from the Constitution itself. For instance, courts do not hesitate to intervene and to assist beneficiaries where their statutory entitlements to, for example, social assistance grants, have not been recognised or where administrative law principles have not been observed. Karim and Leslie conceptualise judicial review as “the means by which those with a sufficient interest can challenge the exercise or non-exercise of public powers by public bodies on the grounds of *illegality, irrationality or procedural impropriety*”.<sup>816</sup> According to them, judicial review challenge may be brought based on the following principles, namely; *lawfulness, reasonableness, and fairness*.

In the context of decision making by SASSA, judicial review predisposes that the decision made regarding the delivery of social assistance grants to prospective applicants must be procedural and substantively fair. In the words of Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service*,<sup>817</sup> judicial review has developed to a stage today when... one can conveniently classify it under three grounds upon which administrative action can be sought. The first ground being, illegality, the second irrationality and the third procedural impropriety. Karim and Leslie aptly summarise these principles of judicial review as follows. Illegality, involves the question whether the decision made was lawful; natural

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<sup>815</sup> Dicey A *An introduction to the study of the law of the Constitution* 10 ed (London, Macmillan Publishers, 1959) 39-40.

<sup>816</sup> Karim S and Leslie J *Judicial review law and practice* 2<sup>nd</sup> ed (Jordan Publishing, Bristol, 2015) iv.

<sup>817</sup> *Council of Civil Service Unions v Minister for Civil Service* (1985) AC 374 (HL) 410.

justice involves whether the decision arrived at was fair; and irrationality or proportionality speaks to unreasonableness of the decision.<sup>818</sup>

Lawfulness encompasses a number of requirements for a valid administrative action. PAJA provides a comprehensive list of statutory grounds upon which administrative action may be reviewed for lack of lawfulness.<sup>819</sup> These requirements are classified under the following titles:

- The requirement which give effect to the fact that the authority to act must be authorised by law;<sup>820</sup>
- The requirement related to the delegation of authority and the proper exercise of the discretion flowing from such delegation; and
- The requirement that all administrative actions must be constitutionally sound or otherwise lawful.

The first requirement, *authority to act*, denotes that public authority taking administrative action must be authorised by the enabling statute or other relevant statutes.<sup>821</sup> The most telling example relates to the case where the court could find no lawful authority for the particular administrative action involving the summarily and unilateral suspension of social welfare benefits of thousands of pensioners by the Department of Health and Welfare in the then Northern Province.<sup>822</sup> Justice Cameron condemned this high-handed and unlawful administrative behaviour in *Ngxuza's* case as extreme and as having savage consequences for destitute victims.<sup>823</sup> *Ngxuza* case provides a practical example where the official had prescribed authority, but then went beyond the authority

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<sup>818</sup> Karim S and Leslie J (note 816 above) 4.

<sup>819</sup> See section 6(2) of PAJA.

<sup>820</sup> See section 6(2)(a)(i) of PAJA.

<sup>821</sup> De Ville J *Judicial review of administrative action in South Africa* (South Africa, Butterworths, 2003) 89.

<sup>822</sup> See *Rangani v Superintendent General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T), 395 B-C.

<sup>823</sup> *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* (2001) (4) SA 1184 (SCA) para 7.

expressly or impliedly conferred or even contravened the given authority by the method used to eliminate fraudulent claimants.

In light of the above discussion, it is clear that PAJA allows for judicial review of an administrative action if the action concerned consists of a failure to take a decision.<sup>824</sup> Where the authority is granted to a public official or body to take an administrative action or decision whether, for example a person qualifies for a social grant, the official is obliged to take a decision in this regard. Should the official fail to take the action or decision within the period prescribed or within a reasonable period, the actions or inactions may constitute unlawful administrative action.<sup>825</sup>

The second requirement relates to the delegation of authority and the proper exercise of the discretion flowing from such delegation. The general rule is that the body, which is granted powers in terms of the empowering legislation, has to exercise those powers itself.<sup>826</sup> It may in other words not delegate those powers to any other body or person unless authorised to do so expressly or by necessary implication by the authorising statute. The basis for the maxim *delegatus non potest delegare* is that where an authority does not have the power to perform an act, it also cannot delegate such power to anyone.<sup>827</sup> PAJA provides for judicial review if the administrator who took the action, acted under a delegation of power which was not authorised by the empowering provision.<sup>828</sup>

The third requirement of taking constitutionally sound administrative action, allows for judicial review of an administrative action if the action is

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<sup>824</sup> Section 2 of PAJA. See also Currie I and De Waal J *The bill of rights handbook* 6<sup>th</sup> ed (Juta & Co Ltd, 2014) 654-656.

<sup>825</sup> See *Mahambehla v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and Another* 2001 (9) BCLR (SE).

<sup>826</sup> De Ville J (note 821 above) 139. See also Dixon M 'Delegation, agency and the alter ego rule' (1987) Vol.11 *Sydney Law Review* 326-347.

<sup>827</sup> See section 238 of the Constitution provides a different interpretation in as far as *delegatus non potest delegare* is concerned. For further reading on the maxim *delegatus non potest delegare* see, De Ville J (note 821 above) 139-149.

<sup>828</sup> S 6(2)(a)(ii) of PAJA.

unconstitutional or unlawful.<sup>829</sup> In principle, administrative action must be in tandem with the provisions and values of the Constitution in order to determine its lawfulness. The requirement of lawfulness of an administrative action represents an application of the principle of legality as an aspect of the rule of law. It is also implicit in the Constitution in particular section 1(c) it applies to all exercises of public power. The principle of legality provides an essential safeguard when action does not qualify as an 'administrative action' for the purposes of the Constitution.<sup>830</sup> Currie and De Waal contend that the principle of legality imply that those who exercise public power must act within their powers and lawfully.<sup>831</sup> In *Pharmaceutical Manufacturers* case, the Constitutional Court held that the principle of legality also requires decisions involving public power to be rational; more specifically, they must be rationally related to the purpose for which the power was given.<sup>832</sup>

In light of the above, it is clear that judicial review has played a key role in the field of social security. It has permeated into many areas of decision making despite the limits to the courts' power of intervention. According to Davis, whenever a judge is asked to review an administrative action or decision or subordinate legislation, he/she is in effect invited by one of the parties to intervene in a matter that has been entrusted to another arm of government.<sup>833</sup> Traditional understanding of judicial review since *Marbury v Madison*<sup>834</sup> has been based on an understanding that courts can and should strike down laws to the extent of their inconsistency with the Constitution. Furthermore, since the Constitutional judgement in *Pharmaceutical Manufacturers case*,<sup>835</sup> judicial

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<sup>829</sup> Section 6(2)(i) of PAJA.

<sup>830</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 97 and 144.

<sup>831</sup> Currie I and De Waal J *The Bill of Rights handbook* 6<sup>th</sup> ed (Juta & Co. Ltd, 2014) 668.

<sup>832</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 para 17.

<sup>833</sup> Davis D *et al Fundamental rights in the Constitution – Commentary and cases* 1<sup>st</sup> ed (Juta & Co Ltd, 1997) 3.

<sup>834</sup> *Marbury v Madison* 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

<sup>835</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674.

review has been extended to cases dealing with executive conduct and exercise of public power generally.<sup>836</sup> The Constitution empowers the courts to suspend declarations of invalidity on whatever terms they consider appropriate and just.<sup>837</sup>

In *Ronald Bobroff & Partners Inc. v De La Guerre, South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*,<sup>838</sup> the court remarked that the Constitution allows judicial review of administrative action, but in a circumscribed manner. According to the court, underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Furthermore, the court stated that, courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws.<sup>839</sup> The court went further to state that the principle of legality that underlies the Constitution requires that, in general, the laws made by the legislature must pass a legally defined test of rationality.<sup>840</sup>

In the words of the court in *Albutt v Center for the Study of Violence and Reconciliation and Others*,<sup>841</sup> where the executive decision is challenged on the grounds of rationality, courts are obliged to examine whether the means selected are rationally related to the objective sought to be achieved. In addition, if objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This clearly shows that the courts have a pivotal role of safeguarding fundamental rights enshrined in the Constitution. Therefore, once a

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<sup>836</sup> Cf Currie I and De Waal J *The Bill of Rights handbook* 6<sup>th</sup> ed (Juta & Co Ltd, 2014) 104 - 107.

<sup>837</sup> Section 172 of the Constitution.

<sup>838</sup> *Ronald Bobroff & Partners Inc. v De La Guerre, South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (4) BCLR 430 (CC) at para 6 (*Ronald Bobroff & Partners Inc. v De La Guerre*).

<sup>839</sup> *Ronald Bobroff & Partners Inc. v De La Guerre*.

<sup>840</sup> *Ronald Bobroff & Partners Inc. v De La Guerre*.

<sup>841</sup> *Albutt v Center for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51.

litigant has shown that legislation limits his/her fundamental rights, the limitation may only be justified under section 36 of the Constitution.<sup>842</sup>

In a sense, the right to social security can be described as administrative law action, as the violation of social assistance benefits frequently turn on the exercise of administrative decision-making powers. A vast and complex body of common law administrative law principles has been built up over the decades.<sup>843</sup> However, the administrative law landscape in South Africa has changed because of the just administrative action clause of the Bill of Rights,<sup>844</sup> section 33, which provides<sup>845</sup> that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>846</sup> It also provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>847</sup>

Furthermore, section 33(3) provides that national legislation must be enacted to give effect to these rights. Moreover, it must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal, (b) impose a duty on the state to give effect to the rights in subsections (1) and (2), and (c) to promote an efficient administration.

In order to give effect to this constitutional provision, the Promotion of Administrative Justice Act<sup>848</sup> was passed. PAJA gives effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the

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<sup>842</sup> For further reading on the limitation of fundamental rights, see *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC); *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2013 (12) BCLR 1429 (CC).

<sup>843</sup> See Hoexter C *Administrative Law in South Africa* 4<sup>th</sup> ed (Juta & Co Ltd, 2013).

<sup>844</sup> For further reading on the right to lawful administrative action, see Brynard D 'The right to lawful administrative action: A public administration perspective' Vol.6 (1) *African Journal of Public Affairs* (2013) 80-94

<sup>845</sup> Corder H 'Administrative justice in the final Constitution' (1997) 13 *South African Journal on Human Rights* 28.

<sup>846</sup> Section 33(1) of the Constitution.

<sup>847</sup> Section 33(2) of the Constitution.

<sup>848</sup> PAJA.



right to written reasons for administrative action as contemplated in section 33 of the Constitution, and to provide for matters related thereto. The objective of this Act is to promote fair administration. Therefore, PAJA places an obligation on SASSA to provide written reasons on why a particular decision was taken, for example, why a grant application was unsuccessful or the termination thereof.

Furthermore, PAJA sets out the general rules and principles that ought to be followed in the exercise of administrative power.<sup>849</sup> In the context of the right to have access to social assistance, PAJA requires the social assistance administrators to make a decision of accepting or rejecting applications according to the rules of the Social Assistance Act.<sup>850</sup>

The courts have had an opportunity to review the constitutional validity of legislation and executive acts. For example, in the case of *Vumazonke v MEC for Social Development, Eastern Cape*,<sup>851</sup> the court had to deal with an application to review the actions of the Eastern Cape MEC for Social Development on the grounds that no decision in respect of the applicants' application for social welfare grants had been taken. Plasket J expressed his extreme dissatisfaction with the sheer volume of applications complaining of maladministration in the Eastern Cape Department of Social Welfare.

In other cases, the courts have expressed concern regarding the inefficiency and ineptitude of the Department of Social Welfare. In *Somyani v MEC for Welfare*,

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<sup>849</sup> PAJA provides that all administrators must, follow fair procedure when making a decision and clearly explain any decisions taken; allow relevant parties to voice their opinion before making any decision that might affect their rights; inform people about any redress mechanisms. If there is no internal appeal system, they must tell citizens of their right to ask the courts to review the decision; and inform people that they have the right to ask for the reasons for any decision taken to be given to them in writing. If a person is unhappy with the decision of an administrator, the first step is to request written reasons for the decision within 90 days of the decision being made. If the person is not satisfied with the decision of the administrator he/she can lodge internal appeal. If it appears that the person is dissatisfied with the decision of the internal appeal procedure he/she may approach the court for review within 160 days (6 months) of the internal appeal having been decided.

<sup>850</sup> Social Assistance Act 13 of 2004.

<sup>851</sup> *Vumazonke v MEC for Social Development, Eastern Cape*, 2005 (6) SA 229 (SE).

*Eastern Cape and Another*,<sup>852</sup> the situation had proceeded to the point where the respondents were called upon to show cause why they should not be committed to prison for contempt of court because of their failure to give heed to courts orders.

In some cases, the courts have found that the unilateral suspension or withdrawal of grants to be unlawful and invalid.<sup>853</sup> In other cases, the courts have successfully vindicated the constitutional rights of the indigent applicants for social security. In *Ngalo v SASSA* (discussed above),<sup>854</sup> the court made it clear that the delay of over two years in processing the application for a care dependency grant is unacceptable as it prejudices the applicant.<sup>855</sup> The court remarked that human dignity, as a fundamental constitutional value and a fundamental right enshrined in the Bill of Rights, is an important catalyst to alleviate poverty among the historically deprived”.<sup>856</sup>

In *Kate v MEC for the Department of Welfare, Eastern Cape*,<sup>857</sup> the Eastern Cape High Court awarded back-pay together with interest on the outstanding arrears as a remedy for long delays in processing social grants payment. This remedy was confirmed by the SCA on appeal, which recognised the validity of these kinds of orders as a form of constitutional damages for the breach of the right of access to social security entrenched in the Constitution.<sup>858</sup> In the words of the court, “if the provincial administration must seek further funds, in addition to those that have been appropriated for providing social assistance, in order to meet claims for damages, hopefully its accountability to the Legislature will

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<sup>852</sup> *Somyani v Member of the Executive Council for Welfare, Eastern Cape* (SECLD 1144/01) (undated) 60.

<sup>853</sup> *Mbanga v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 359 (SE); *Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Nguzuza and Others* 2001 (4) SA 1184 (SCA).

<sup>854</sup> *Ngalo*.

<sup>855</sup> *Ngalo* para 25.

<sup>856</sup> *Ngalo* para 26.

<sup>857</sup> *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE).

<sup>858</sup> *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) paras 32-33.

contribute to a proper resolution. But this has been caused by the unlawful conduct of the provincial administration and it does not justify withholding a remedy”<sup>859</sup>.

In *Minister of Health v Treatment Action Campaign*, it was held that the state’s policy regarding the provision of nevirapine, an antiretroviral drug to prevent the mother-to-child transmission of HIV was unreasonable and inconsistent with the constitutional protection of the right to health care services, because, among other things, it was inflexible.

In the context of eviction applications, the courts have frequently made mandatory orders. The latter required the parties to engage with each other with a view to exploring mutually acceptable solutions to the dispute, including the possibility of securing suitable alternative accommodation for the occupants. In *Port Elizabeth Municipality v Various Occupiers*,<sup>860</sup> the Supreme Court of Appeal set aside the order of eviction granted by the High Court,<sup>861</sup> and agreed with the Respondents that the Applicant (Port Elizabeth Local Municipality) was under obligation to provide alternative accommodation to unlawful occupiers.<sup>862</sup>

The municipality applied to the Constitutional Court for leave to appeal against the decision of the SCA and to have the eviction order restored. More specifically, the municipality sought a ruling that it was not constitutionally obliged to find alternative accommodation to unlawful occupiers. Justice Sachs held that in cases where there is a conflict between section 25 (dealing with property rights) and section 26 (concerned with housing rights) of the Constitution,<sup>863</sup>

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<sup>859</sup> *MEC, Department of Welfare, Eastern Cape* *ibid.*

<sup>860</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (*Port Elizabeth Municipality*).

<sup>861</sup> *Port Elizabeth Municipality* para 4.

<sup>862</sup> *Port Elizabeth Municipality* para 5.

<sup>863</sup> *Port Elizabeth Municipality* paras 19-23.

these sections must be read together in order to find a fair, and equitable outcome.<sup>864</sup>

Liebenberg notes that mandatory orders requiring the parties to engage with each other with a view to exploring mutually acceptable solutions to the dispute, may be accompanied by a reporting order, through which judicial supervision over the engagement process is maintained.<sup>865</sup> In the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*,<sup>866</sup> the Constitutional Court held that meaningful engagement is 'a two-way process in which communities and government talk and listen to each other, and try to understand each other's perspectives, so that they can achieve a particular goal. It is a 'neutral' space where people and the state can discuss and shape options and solutions to difficult issues.

This would imply that if the government is developing a strategy to meet its constitutional obligation of realising a specific socio-economic right, it must engage with the community during the decision-making, planning, implementation and evaluation processes.<sup>867</sup> The series of cases relating to Parliament's constitutional duty to facilitate public involvement in the legislative process starts with *King and Others v Attorney' Fidelity Fund Board of Control and Another*.<sup>868</sup> The Attorney's Act 53 of 1979 provided for the functioning and extent of liability of the Attorneys' Fidelity Fund. It was amended by the Attorneys and Matters Relating to Rules of Court Amendment Act 115 of 1998 so as to preclude any claims in respect of monies deposited with an attorney to invest on

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<sup>864</sup> *Port Elizabeth Municipality* paras 27-37.

<sup>865</sup> Liebenberg S *Socio-economic rights: Adjudication under a transformative Constitution* (Juta & Co, Ltd, 2010) 16-22; Devenish G *A Commentary on the South African Constitution* (Durban, Butterworths, 1998); Mubangizi C 'A South African perspective on the class between culture and human rights ...' (2012) 13 *Journal of International Woman's Studies* 35.

<sup>866</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

<sup>867</sup> Cf Ray B 'Engagement's possibilities and limits as socio-economic remedy' (2010) Vol.9 (3) *Washington University Global Studies Law Review* 403-423.

<sup>868</sup> *King and Others v Attorney' Fidelity Fund Board of Control and Another* (2006) 1 All SA 458 (SCA).

behalf of a client. King and many others had lost money following the insolvency of a firm of attorneys with which they had invested, and they claimed that the public consultation that had preceded the adoption of the amendment was insufficient to constitute a fulfilment of Parliament's duty to facilitate public involvement in its legislative process.

The issue was dealt with by the Supreme Court of Appeal largely as an exercise in deciding which court had jurisdiction to hear the matter, the Constitutional Court or itself. The answer to this turned on an interpretation of sections 167(4) (e) and 172(2)(a) of the Constitution, which defined the jurisdictions of the Constitutional Court and all other superior courts, respectively. Cameron and Nugent JJA ruled that the extent of Parliament's compliance with the 'public involvement' obligation was for the Constitutional Court alone to determine.

In *Joseph and Others v City of Johannesburg and Others*,<sup>869</sup> the Constitutional Court in commenting on the Constitutional prescript of accountable, responsive, and open government held that these values requires the state to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the local government level. The court stated that municipalities are at the forefront of government interaction with citizens. Therefore, compliance by local government with its procedural fairness obligations is crucial, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.

In addressing the values of accountability, responsiveness, and open government, it is important to refer to the Constitutional Court judgement in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and*

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<sup>869</sup> *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 45.

*Others*.<sup>870</sup> The Constitutional Court held that the Department of Mineral Resources had failed to afford the Bengwenyama Community any notice, assistance, consultation, participation and, ultimately, reasons for administrative action, to which they were entitled by law, in respect of the grant of a prospecting right over their land. Similarly, in the case of *Doctors for Life International v The Speaker of the National Assembly & Others*,<sup>871</sup> the meaning of public involvement in the law-making process came under scrutiny. *Doctors for Life International* brought this case directly to the Constitutional Court, challenging the procedure followed by the National Council of Provinces (“NCOP”) before the enactment of four Health Bills. The statutes in question are the Choice on Termination of Pregnancy Amendment Act 38 of 2004 (“the CTOP Amendment Act”); the Sterilisation Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004 (“the THP Act”); and the Dental Technicians Act 24 of 2004. The judgement traverses various other matters related therewith. Firstly, it deals with the question of its jurisdiction over the dispute. The study does not focus on the details of these aspects. However, it is important to note that this case was concerned with a constitutional challenge based on an alleged failure to facilitate public involvement in the legislative processes of Parliament as required by section 72(1)(a) of the Constitution.

The court had to consider whether the NCOP and the provincial legislatures have fulfilled their obligation to facilitate public involvement in their respective legislative processes as required by the Constitution. In dealing with the theoretical issues regarding the general right of a citizen to participate in political processes of his/her government, Ngcobo J defined public involvement as “...access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens”.<sup>872</sup>

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<sup>870</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

<sup>871</sup> *Doctors for Life International*.

<sup>872</sup> *Doctors for Life International* para 131.

According to the court, sections 72(1)(a) and 118(1)(a) of the Constitution required public participation in the legislative processes of the NCOP and the provincial legislatures.<sup>873</sup> This suggests that the need for public involvement requires much more than lip service and a mere adoption of bare formalities. Public involvement requires genuine steps that give meaning and effect to the principle of a government of the people by the people for the people.

It was stated by the court that:

In the end, however, the duty to facilitate public involvement will often require Parliament and the Provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them.<sup>874</sup>

In deciding whether the NCOP has complied with the requirements of sections 59, 72, and 118 of the Constitution, which required public participation in the legislative process of the NCOP and the Provincial legislatures, the court found that the NCOP failed to fulfil its constitutional obligation. The latter entails conducting public hearing with regard to the CTOP Amendment Act and the THP Bill. Therefore, the court found that such conduct was invalid.

In short, the Constitutional Court ruling in *Doctors for Life International*<sup>875</sup> clearly indicates that the courts will not hesitate to intervene in the circumstances where public participation in the legislative processes is negated. In addition, the constitution requires government institutions to implement decisions or policies in an unfettered, arbitrary or capricious manner. In *S v Makwanyane*<sup>876</sup> Ackermann J held that:

We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.<sup>877</sup>

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<sup>873</sup> *Doctors for Life International* para 264.

<sup>874</sup> *Doctors for Life International* paras 120 -121.

<sup>875</sup> *Doctors for Life International*.

<sup>876</sup> *S v Makwanyane* 1995 (6) BCLR 665 (*S v Makwanyane*).

<sup>877</sup> *S v Makwanyane* para 156.

The whole question of rationality should not be circumscribed to being just a minimum requirement for the exercise of public power, but should further be seen as a basis for the exercise of public power upholding the standard of reasonableness in the manner in which government undertakes to formulate its policies or decisions.

However, this must be done notwithstanding the careful application of the rational standard and to accommodate genuine public participation in the broader policy formulation processes. It is submitted that the judiciary should, when pondering the question of when to intervene in enforcing the obligation to facilitate public participation, also border on the sequential extent of the facilitation thereof; that is to say, the process must embrace the standard principles of courtesy and considerate consultation as envisaged in the *Batho Pele* Principles (people first). One of the principal objects of *Batho Pele* is to introduce a new approach to service delivery which puts people at the Center of planning, and delivery of services.

It is submitted that the foregoing discussion should make it clear why meaningful engagement is important. In the words of Woolman,<sup>878</sup> first, it enables state actors responsible for the creation of policy to benefit from insider information about the problem the parties aim to solve. Second, the outcomes of this engagement should create incentives for political institutions to open up their decision making processes to affected stakeholders in advance of conflict so as to seek out non-adversarial solutions.<sup>879</sup>

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<sup>878</sup> Woolman S *The selfless Constitution: Experimentalism and flourishing as foundations of South Africa's basic law* (Juta & Co Ltd, 2013) 279.

<sup>879</sup> Woolman *ibid.*



#### **4.6 A discussion of selected case law on the role of the courts in the protection and enforcement of social security rights**

The courts have played a crucial role of interpreting, giving content to the right to have access to social security as provided in section 27(1)(c) of the Constitution. It is submitted that the right of access to social assistance cannot be interpreted in isolation as there is a close correlation between it and the other socio-economic rights. As pointed out earlier, socio-economic rights must all be read together in the setting of the Constitution as a whole and their interconnectedness needs to be taken into account when determining whether the state has met its constitutional obligation. The focus here is on how the courts have interpreted socio-economic rights in South Africa.

##### *4.6.1 Soobramoney*

The facts of *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>880</sup> were briefly as follows. Soobramoney was diabetic and suffered from ischemic heart disease and cerebrovascular disease. He also suffered from kidney failure. He approached the court when he was in chronic renal failure. His condition was irreversible but his life could be prolonged by regular renal dialysis machine. Soobramoney had received dialysis through private hospitals and doctors. However, his finances became depleted and he could no longer afford to do so.

As a result, he sought dialysis treatment at a state hospital, which had a limited number of dialysis machines and could only treat a limited number of patients. The hospital was required to follow a strict policy in respect of the use of dialysis resources. Patients who suffered from chronic renal failure that could not be cured would not, under this policy, be given automatic access to renal dialysis. Chronic patients were given renal dialysis only if they were eligible for a kidney transplant. Due to his vascular and cardiac disease, Soobramoney was not eligible for a kidney transplant and therefore was not entitled to receive dialysis treatment.

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<sup>880</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (*Soobramoney*).

The hospital did not have the budget for more dialysis machines and trained nurses to admit number of patients eligible for renal dialysis. Soobramoney applied to the High Court for an order directing the hospital to provide him with on-going dialysis treatment. The High Court dismissed the application and he sought leave to appeal directly to the Constitutional Court. The matter was heard on an urgent basis due to Soobramoney's condition. The Constitutional Court had to decide on twofold issues. First, it was whether Soobramoney was entitled to receive dialysis in terms of the right not to be refused emergency medical treatment. Second, can the entitlement be located within section 27(2) of the Constitution.

In this case the Court used the famous dictum of the availability of resources, that the appellant's demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of sub-sections 27(1) and (2) and not section 27(3). These sub-sections entitle everyone to have access to health care services provided by the state within its available resources. As if his woes were far from over, according to the Court one cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life.<sup>881</sup>

The hard and unpalatable fact is that if the applicant were a wealthy man he would be able to procure such treatment from private sources. However, he was not and has to look to the state to provide him with the treatment.<sup>882</sup> But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme.

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<sup>881</sup> *Soobramoney* at para 31.

<sup>882</sup> *Soobramoney*.

Unfortunately, this is true not only of the appellant but for many others who need access to renal dialysis units or to other health services.<sup>883</sup> The court further stated that there are also those who need access to housing, food and water, employment opportunities, and social security. According to the Court, these, too, are aspects of the right to:

...Human life, the right to live as a human being, to be part of a broader community, to share in the experience of humanity.<sup>884</sup>

Finally, the Constitutional Court dismissed the appeal against the order of the High Court, holding that the state had not breached its obligation under section 27 of the Constitution.

#### 4.6.2 *Grootboom*

It is trite that the Constitutional Court case of *Grootboom* is the *locus classicus* when dealing with claims based on the right to housing.<sup>885</sup> It can further be argued that *Grootboom* brought a glimmer of hope for the homeless. Nevertheless, the lived experiences of the poor and marginalised in South Africa would provide a different picture.

The facts and legal history in *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>886</sup> were briefly as follows. Prior to their occupation of the private property, the squatters had lived in an informal squatter camp known as Wallacedene, in the Western Cape. A quarter of the households of Wallacedene had no income at all, and more than two-thirds earned less than R500 per month. About half of the population were children; all lived in shacks.

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<sup>883</sup> *Soobramoney*.

<sup>884</sup> *Soobramoney*.

<sup>885</sup> For a critical analysis of the *Grootboom* case, see Tshoose C 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post *Grootboom*' (2015) 30/1 *SA Public Law Journal* 94-111; Viljoen S 'The systemic violation of section 26 (1): An appeal for structural relief by the judiciary' (2015) 30/1 *SA Public Law Journal* 42-70; Muller G 'Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to the reasonableness review model' (2015) 30/1 *SA Public Law Journal* 71-93.

<sup>886</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*).

They had no water, sewage removal services and only 5% of the shacks had electricity.

Given the conditions at Wallacedene, many residents were the inhabitants of a new area called 'New Rust', which happened to be privately owned. The owner of the private property obtained an order for their eviction, which was granted. Because of their eviction, they applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they were given permanent accommodation. The evidence before the court was that they had nowhere else to go.

The High Court ordered the government to provide children accompanied by their parents with shelter specifying that 'tents, portable latrines and a regular supply of water would constitute the bare minimum'. In addition, the court reasoned that the primary obligation to provide children with shelter lies with their parents and that when the parents are not able to provide shelter the state has a duty to provide the most basic form of shelter.<sup>887</sup> The court referred to section 28(1)(2) which provides that children are entitled to parental care, and section 28(2) to the effect that the best interests of the child are paramount.<sup>888</sup> Accordingly, the court indicated that an order that enforces a child's right to shelter should take account of the need of the child to be accompanied by his/her parent.<sup>889</sup>

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.<sup>890</sup> According to the court these sections discussed above are related and must be read together. The court further held that section 26 does not give the respondents the right to claim shelter immediately. The realisation of this right is dependent on, *inter alia*, the availability of resources. The government

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<sup>887</sup> *Grootboom* at 279 D.

<sup>888</sup> *Grootboom* at 288C-D.

<sup>889</sup> *Grootboom* at 291F.

<sup>890</sup> Section 26(2) of the Constitution.

challenged the correctness of the decision at the Constitutional Court. In this case, the Constitutional Court had to determine the obligations imposed on the state by section 26 of the Constitution. In that regard, the Constitutional Court came to the conclusion that, although the overall housing programme implemented by the State since 1994 had resulted in the building of a significant number of homes, it failed to provide for any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions.<sup>891</sup> Their immediate need had to be met by relief which fell short of housing but which fulfilled the standards of durability, habitability, and stability.<sup>892</sup> For that reason, the court issued a declaratory order, which required the state to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for before the introduction of the Cape Metropolitan Area Accelerated Managed Land Settlement Programme.<sup>893</sup>

The court emphasised that those measures had to be comprehensive,<sup>894</sup> co-ordinated,<sup>895</sup> flexible,<sup>896</sup> inclusive,<sup>897</sup> and sensitive to various degrees of deprivation and reasonably implemented and conceived. The Constitution seeks to ensure that the basic needs of all in society are met effectively and the state must take steps to achieve this goal.<sup>898</sup>

In conclusion, *Grootboom case* illustrates that as at the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the Cape Metro area. In particular, the programmes adopted by the state fell short of the requirements of section 26(2), in that no provision was made for the relief to the categories of people in desperate need.

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<sup>891</sup> *Grootboom* at paras 52-53.

<sup>892</sup> *Grootboom*.

<sup>893</sup> *Grootboom* at para 95.

<sup>894</sup> *Grootboom* at paras 38-40.

<sup>895</sup> *Grootboom* at paras 39-41.

<sup>896</sup> *Grootboom* at para 43.

<sup>897</sup> *Grootboom*.

<sup>898</sup> *Grootboom* at para 45.

This case shows some of the key flaws with regard to the state's housing programme.

Despite major achievements in the progressive realisation of access to housing, there was no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods or fires.<sup>899</sup> It appears that the settlement order in *Grootboom* represented an *ad hoc* arrangement and did not make any provision for security of tenure for the community.<sup>900</sup>

#### 4.6.3 Treatment Action Campaign

*Minister of Health and Others v Treatment Action Campaign and Others*,<sup>901</sup>

involved a challenge to the limited nature of the measures introduced by the state to prevent mother-to-child transmission of HIV. It was argued that the state unreasonably prohibited the administration of the antiretroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites.<sup>902</sup> This drug was of proven efficacy in reducing mother-to-child transmission of HIV/AIDS.

According to the TAC, the aforementioned conduct and omissions of the state constituted violations of the right of everyone to have access to health care services in section 27 of the Constitution as well as children's right to have access to basic health care in section 28(1)(c). The High Court<sup>903</sup> held that the

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<sup>899</sup> *Grootboom* at para 52.

<sup>900</sup> Pillay K 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 6 *Law Democracy and Development Journal* 255.

<sup>901</sup> *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 (*Treatment Action Campaign*).

<sup>902</sup> The programme of government in dealing with HIV/AIDS consisted in establishing testing sites in selected areas where the antiretroviral drug/nevirapine would be administered. Nevirapine was available at two pilot sites per province. See also *Treatment Action Campaign* at paras 10-11.

<sup>903</sup> *Treatment Action Campaign*.

state's programme to prevent mother-to-child transmission of HIV did not comply with its obligations in terms of sub-sections 27(1) and (2).

The High Court went on to state that a programme that leaves everything for the future cannot be said to be coherent, progressive and purposeful.<sup>904</sup> It also pointed out that a programme that has no timescale lacks the impetus required for a programme to move progressively.<sup>905</sup> According to the court, the programme has to be goal-driven and demonstrate a balance between goal and means.<sup>906</sup>

On those grounds, the High Court ordered the respondents to make Nevirapine available to both pregnant women with HIV who give birth in the public health sector and their babies, in public health facilities to which the programme had not yet been extended.<sup>907</sup> The High Court also ordered the state to formulate an effective and comprehensive programme to prevent mother-to-child transmission of HIV on a national basis.<sup>908</sup> The state was further ordered to report back to the High Court what had been done to implement the order, what further steps would be taken in the implementation and when they would be taken.<sup>909</sup>

In explaining the nature of a declaratory order, Liebenberg<sup>910</sup> argues that declaratory order stipulates what parties' obligations are in terms of the law and the Constitution, that it is expected that they will adopt the necessary measures to comply therewith. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,<sup>911</sup> the Constitutional Court observed that a declaratory order 'is a flexible remedy which can assist in clarifying legal and constitutional obligations

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<sup>904</sup> *Treatment Action Campaign* at para 385F.

<sup>905</sup> *Treatment Action Campaign* at para 385H.

<sup>906</sup> *Treatment Action Campaign* at para H-J.

<sup>907</sup> *Treatment Action Campaign* at para 386 J.

<sup>908</sup> *Treatment Action Campaign* at para 387D-E.

<sup>909</sup> *Treatment Action Campaign* at para 387F.

<sup>910</sup> Liebenberg S *Socio-economic rights: Adjudication under a transformative Constitution* (Juta & Co. Ltd, 2010) 399.

<sup>911</sup> *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC).

in a manner which promotes the protection and enforcement of our Constitution and its values’.

When the matter finally reached the Constitutional Court, it confirmed that the state was under a constitutional duty to comply with the positive obligations imposed on it by the Constitution, but that these obligations were subject to qualifications.<sup>912</sup> The court went on to state that, when interpreting socio-economic rights and the corresponding obligations of the state, cognisance must be taken of the social and historical context of South Africa.<sup>913</sup> Consequently, the question to be addressed was not whether socio-economic rights are justiciable, because they clearly are, but whether the measures adopted by the state to provide access to health-care services for HIV-positive mothers fell short of the state’s constitutional obligation.<sup>914</sup>

The court stated that, in order for the State’s policy to be in line with the Constitution, it must be reformulated to meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of women and babies. The state was then ordered, to remove the restrictions that prevented Nevirapine from being made available, to permit and facilitate the use of Nevirapine, to make provision for counsellors based at public hospitals to be trained to provide the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV/AIDS.<sup>915</sup>

Similarly, in line with *Grootboom judgement*, the court denied the existence of an international-law principle of ‘minimum core entitlement’ of every socio-economic right,<sup>916</sup> and ruled that the measures taken by the state must be comprehensive,

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<sup>912</sup> *Treatment Action Campaign* at para 23.

<sup>913</sup> *Treatment Action Campaign* at para 24.

<sup>914</sup> *Treatment Action Campaign* at para 25.

<sup>915</sup> *Treatment Action Campaign* at para 135.

<sup>916</sup> *Treatment Action Campaign* at para 34.



co-ordinated, flexible, inclusive, sensitive to various degrees of deprivation and reasonably implemented and conceived.<sup>917</sup>

Briefly stated, the decision of *Grootboom* adopts a new standard of review. The concept of reasonable measures requires the consideration of the degree and extent of the denial of the right the claimant endeavours to realise.<sup>918</sup> The assessment of the reasonableness of governmental programmes was influenced by two factors. First, the internal limitations of sections 26(2) and 27(2) of the Constitution that require the rights to be progressively realised,<sup>919</sup> and second, the availability of resources as an important factor in determining what is reasonable.<sup>920</sup>

The reasonableness standard of review presupposes that the benchmark should be set according to whether or not measures taken by the state to implement programmes for the progressive realisation of the relevant rights were reasonable.<sup>921</sup> Critiques of the reasonableness approach argue that the court could have identified the content of each right and provide a more concrete meaning to socio-economic rights.<sup>922</sup>

#### 4.6.4 *Mazibuko*

*Mazibuko and Others v City of Johannesburg and Others*<sup>923</sup> concerned a challenge of two aspects of a project (*Operation Gcin' amanzi*) of the City of Johannesburg piloted in Phiri (Soweto) in early 2004 to address the severe problem of water and non-payment for water services in Soweto. This project

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<sup>917</sup> *Grootboom* at paras 38-44. For a detailed discussion on conceptualising minimalism in socio-economic rights, see Young K 'Conceptualising minimalism in socio-economic rights' (2008) Vol. 9 (2) *ESR Review* 6-11.

<sup>918</sup> *Grootboom* at para 44.

<sup>919</sup> *Grootboom* at para 90.

<sup>920</sup> *Grootboom* at para 46.

<sup>921</sup> Liebenberg S 'Protecting economic, social and cultural rights under Bill of Rights: The South African experience' (2007) Vol.16 (3) *Human Rights Defender* 3.

<sup>922</sup> Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 77-80; Bilchitz D 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1-26.

<sup>923</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (*Mazibuko*).

involved re-laying water pipes to improve water supply and reduce water and installing pre-paid meters to charge consumers for use of water in excess of six kilolitres (the monthly free basic water allowance per household).

The applicants, who were residents of Phiri, challenged, firstly, the City of Johannesburg's (hereinafter City) free basic water policy, and secondly, the lawfulness of the installation of pre-paid water meters in Phiri. The three respondents were the City of Johannesburg, Johannesburg Water and the National Minister for Water Affairs and Forestry. The applicants argued that because residents of Phiri were previously provided with water services based on a deemed consumption tariff, the implementation of Operation *Gcin' amanzi*, with the installation of pre-paid meters, constituted a deprivation of their existing right of access to sufficient water. They said this was in breach of the City's negative obligation not to impair the right of access to sufficient water.<sup>924</sup>

The applicants initially succeeded in the High Court, which held that the installation of pre-paid water meters in Phiri was unlawful and unfair. It also held that the city's free basic water policy was unreasonable and therefore unlawful. It ruled that the city should provide 50 litres of free basic water daily to the applicants. On appeal, the Supreme Court of Appeal varied this order.

The SCA held that 42 litres of water per day would be 'sufficient water' within the meaning of the Constitution, and directed the city to reformulate its policy in light of this conclusion.<sup>925</sup> The SCA also held that installation of the pre-paid water meters was unlawful but suspended that order for two years to give the city an opportunity to rectify the situation by amending its by-laws.<sup>926</sup> The applicant applied to the Constitutional Court for leave to appeal against the judgement of the SCA, and in effect, sought reinstatement of the High Court order.

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<sup>924</sup> *Mazibuko* at para 135.

<sup>925</sup> *Mazibuko* at para 28.

<sup>926</sup> *Mazibuko*.

The City and the other respondents also sought leave to cross appeal the order of the SCA. The Constitutional Court had to determine the following issues,<sup>927</sup> firstly, whether the city's free basic water policy, in terms of which six kilolitres of water are provided monthly free of charge to all households in Johannesburg, is consistent with the constitutional right of access to sufficient water in section 27 of the Constitution. Secondly, the court determined whether the city's policy of installing pre-paid water meters was lawful and consistent with the Constitution.

The court defined its role in the enforcement of socio-economic rights as a secondary one. It held:

The purpose of litigation concerning the positive obligation imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy. When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.<sup>928</sup>

It is clear that the court failed to take into account the interest of the households in Phiri, as it set aside the orders of the SCA and High Court. Liebenberg<sup>929</sup> posits that the judgement fails to situate its analysis within recognition of poverty and disadvantage. In fact, had it done so, it would have been required to take a more critical approach to the city's claims. Without assigning any weight to the applicants' interests in having enough water to get through the month, and without reading that interest in the context of deep poverty, vulnerability and

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<sup>927</sup> *Mazibuko* at para 6.

<sup>928</sup> *Mazibuko* at paras 160-161.

<sup>929</sup> Liebenberg S and Quinot G *Law and poverty: Perspectives from South Africa and beyond* 1<sup>st</sup> ed (Juta & Co. Ltd, 2012) 233-234.

overpopulated residential stands, the court deprived itself the opportunity to subject the City's policies to much meaningful evaluation.

According to her,<sup>930</sup> the city's policies were, instead, evaluated, in the abstract, meaning that the city's justifications for them had to be taken at face value. According to Liebenberg, the court could have examined the city's justifications for not providing more free basic water to the residents of Phiri. In the main, these related to the fact that the city said it had more pressing policy priorities, chief among others, was the provision of basic water supplies to informal settlements. Nevertheless, the approach taken by the court did not require it to question whether it was reasonable to prioritise the needs of informal settlers over the residents of Phiri.

The approach that the court, could have taken, is whether the city had sufficient resources to meet the needs of both. The court's failure to define and evaluate the interests at stake in *Mazibuko* undercut its ability to hold the city to any meaningful standard of reasonableness. Because it had little or no regard for the needs and interests of the Phiri residents, nevertheless, it was able to conclude that it was *reasonable* to deprive them of sufficient water.

#### 4.6.5 *Blue Moonlight*

The *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* case,<sup>931</sup> dealt with the eviction of a community from inner City of Johannesburg. In its decision, the Constitutional Court found that it must take into account the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. In *casu*, the court had to determine the following: firstly, whether it is just and equitable to evict the Occupiers from the property and, if so, must the date of eviction be

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<sup>930</sup> Liebenberg *ibid.* For further reading on *Mazibuko* case, see Langford M and Russell A 'Global precedent' or reasonable no more?: The *Mazibuko* case' (2008) 19 *The Journal of Water Law* 73-78.

<sup>931</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) BCLR 150 (CC) (*Blue Moonlight*).

linked to the date by which the City of Johannesburg is required to provide alternative accommodation. Secondly, the court had to determine whether the housing policy of the city of Johannesburg is unconstitutional to the extent that it excludes the occupiers of private-owned property from consideration for temporary housing.

The court ordered that the City of Johannesburg housing policy was unconstitutional, that the city had to, re-allocate resources or re-work priorities so that the occupiers could be accommodated. While the courts have been hesitant in the past to consider the state's spending patterns or to impose specific planning directives regarding socio-economic rights, they have accepted that the provision of constitutional remedies invariably impacts on budgets and planning.<sup>932</sup> The *Moonlight case* demonstrates the extent to which the court will interrogate public resources management on the part of the government.

The court implicitly recognised that it is possible for it to question the state about how it spent (or spends) its budget and, where it finds its explanations wanting, to order proper spending (or budgetary allocation) so that it can realise a constitutional right.<sup>933</sup>

In effect, the ruling requires litigants who rely on public resource constraints arguments to place compelling evidence before the court, and also encourages those who seek to enforce socio-economic rights to carefully consider the fiscal track record of an organ of state which advances such arguments. According to Kruuse,<sup>934</sup> this approach recognises the simple fact that budgets are limited, but it requires the state to show evidence that this is indeed the case in the matter before it.

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<sup>932</sup> *Treatment Action Campaign* at para 38.

<sup>933</sup> *Blue Moonlight* at para 74. For further reading on the *Blue Moonlight* case see, Dugard J 'Beyond *Blue Moonlight*: The implications of judicial avoidance in relation to the provision of alternative housing' (2015) Vol.V *Constitutional Court Review* 265-279.

<sup>934</sup> Kruuse H 'The art of the possible' in realising socio-economic rights: The SCA decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (2011) *The South African Law Journal* 622-631.

#### 4.6.6 *Khosa*

In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*,<sup>935</sup> the applicants were permanent residents. The applicant, *Khosa*, challenged section (3)(c) of the Social Assistance Act 59 of 1992 because it reserved grants for the elderly for South African citizens only and thereby excluded permanent residents. In *Mahlaule*, sub-sections 4(b)(ii) and 4B(b)(ii) of the Act were challenged because they reserved child-support grants and care-dependency grants for South African citizens only. The applicants in both matters would have qualified for social assistance but for the fact that they did not meet the citizenship requirement, they were excluded.

The central question before the court was whether the exclusion of non-citizens from the social welfare system was consistent with the Constitution. The High Court had held that the sections of the Social Assistance Act challenged by the applicants were inconsistent with the Constitution and were, therefore, invalid. In addition, it struck down the sections challenged by the applicants. The Constitutional Court made it clear that equality in respect of access to socio-economic rights is implicit in the reference to “everyone” being entitled to have access to such rights in section 27.<sup>936</sup> Therefore, those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.

The court found the denial of social assistance benefits, apart from being unfair, to have grave consequences. It argued that the exclusion impacts negatively not only on permanent residents without other means of support but also on the families, friends and communities with whom they have contact. The court adopted a purposive approach to the interpretation of rights, arguing that the

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<sup>935</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC), 2004 (6) SA 505 (CC) (*Khosa*).

<sup>936</sup> *Khosa* at para 42.

word “everyone” in section 27(1)(c) cannot be construed as referring only to “citizens”.<sup>937</sup>

The Constitutional Court stressed the importance of the values of human dignity, equality and freedom to *all* people in South Africa.<sup>938</sup> This is in line with the aim of and basis for the existence of a social assistance system, namely: to protect a person’s right to human dignity. The notion of human dignity as entrenched in the Constitution plays an important role with regard to social security and social assistance rights and equal treatment of those who are particularly vulnerable. A social security system aims to include an individual in society through measures or schemes such as social assistance system, implemented by the state and/or civil society, to show solidarity with that individual.

In light of the above discussion, it becomes clear that the courts in South Africa have accepted the notion of progressive realisation qualification with regard to the duty imposed by the realisation of socio-economic rights on the state. This would mean that the courts expect the state to strive towards fulfilment and enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints.

The court observed that the right to housing could not be realised immediately. Consequently, the state must take steps to achieve the goal of the Constitution, which is that ‘the basic needs of all in our country be effectively met’. Although the court in that case rejected the minimum core approach,<sup>939</sup> scholars on the subject argue that the notion minimum core must be seen as part of the concept

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<sup>937</sup> *Khosa* at para 47.

<sup>938</sup> *Khosa* at paras 52 and 104.

<sup>939</sup> For further reading on the criticism levelled against the minimum floor approach, see Lehmann K ‘In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core’ (2006) Vol.22 (1) *American University International Law Review* 163-197.

of progressive realisation.<sup>940</sup> For instance, Chenwi<sup>941</sup> notes that a minimum core approach involves identifying subsistence levels in respect of each socio-economic right and insisting that the provision of core goods and services enjoys immediate priority. It thus represents a “floor” of immediately enforceable entitlements from which progressive realisation should proceed.<sup>942</sup> It is argued in this study that research has revealed that conditional cash transfers improve the livelihoods of the poor, enhance their skill, and supports economic growth.<sup>943</sup> The cash transfers needs to be infused with opportunities to engage meaningfully in the economy.

#### 4.7 Multi - sector responsibility

The non-state actors have come to occupy central positions in the provision of key services and goods essential for individuals.<sup>944</sup> Thus, government alone cannot realise the socio-economic rights enshrined in the Constitution on its own.<sup>945</sup> In essence, multi-actor responsibility denotes that the realisation of the right to have access to appropriate social assistance as enshrined in the Constitution is not the exclusive responsibility of the state. The *Grootboom* case emphasised that the Constitution does not require the state to be the sole provider of socio-economic rights.

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<sup>940</sup> Chenwi L ‘Unpacking progressive realisation: Its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) Vol.46 (3) *De Jure* 747-755.

<sup>941</sup> Chenwi (n 940 above) 753-755. See also Bilchitz D ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) *South African Journal on Human Rights* 111.

<sup>942</sup> Van Ginneken W ‘Social security and the global socio-economic floor: Towards a human rights-based approach’ (2009) Vol.9 (2) *Global Social Policy* 235-238.

<sup>943</sup> Ulriksen M ‘How social security policies and economic transformation affect poverty and inequality: Lessons for South Africa’ (2012) Vol.29 (1) *Development Southern Africa* 5-6.  
Dancey K ‘Why payment systems matter to financial inclusion: Examining the role of social cash transfers’ (2013) Vol.7 (2) *Journal of Payments Strategy & Systems* 120-121;  
Barrientos A and DeJong J ‘Reducing child poverty with cash transfers: A sure thing?’ (2006) Vol.24 (5) *Development Policy Review* 539-546.

<sup>944</sup> For further on the role of civil society and social protection, see Ginneken W ‘Civil society and the social protection floor’ (2013) Vol.66 (3) *International Social Security Review* 70-86;  
See also Malan N ‘Rights, the public and the South African Constitution: Civil society and the performance of rights’ (2008) Vol.31 (1&2) *Anthropology Southern Africa* 58-68.

<sup>945</sup> Olivier M *et al Social security: A legal analysis* 1st ed (Durban, Butterworths, 2003) 85.



The approach of the court, which is applicable to other socio-economic rights, indicates that for those with the ability to support themselves and their dependants, the state's duty is not that of direct provider, but only of unlocking the system and providing a legislative framework to facilitate access to social security. Issues of development and social welfare are raised in respect of those who cannot afford to provide for themselves, and state policy needs to address both of these groups.<sup>946</sup>

What emerges from the discussion above is that, with regard to the enforcement of socio-economic rights, courts should not impose their policy choices upon the legislature which is bestowed with more immediate a democratic mandate. Such "deference" is even more vital if the decision to be taken may have considerable budgetary consequences. On the other hand, it is the courts' very mission to protect individual rights, and this is vital if the individuals involved have virtually no voice in the political process. Vettori argues that the significance of a judiciary that is impotent to enforce its judgements against the state does not do justice to its role in our new-found democracy and the constitutional values upon which it is built.<sup>947</sup> According to her, the courts have wide discretionary powers to fashion remedies in order to ensure that their orders are observed.

In terms of sections 172(1)(b) and 167(7) of the Constitution, when courts are faced with "any issue involving the interpretation, protection or enforcement of the Constitution," they are empowered to make any order that is 'just and equitable'. In terms of sections 173 and 8(3), the courts are empowered to develop the common law in order to give effect to constitutional rights.<sup>948</sup>

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<sup>946</sup> *Grootboom* at para 36.

<sup>947</sup> Vettori S and De Beer R 'The enforcement of socio-economic rights' (2007) 3 *PER* 5-7.

<sup>948</sup> *President of the Republic of South Africa v Modderklip Boerdery* 2004 (6) SA 40 (SCA) 61 at para 42; *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) 834 at para 94.

In the context of right to have access to social assistance, the courts have not hesitated to protect vulnerable people. This plight of the poor has, in the past, motivated the Supreme Court of Appeal to allow a class action to be brought on behalf of a whole group of welfare beneficiaries affected negatively by the (unlawful) suspension of a grant. For example, in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*,<sup>949</sup> an application was made for the reinstatement of disability grants to some 37,000 people with disabilities who had summarily lost their grants because the authorities suspected that there were large numbers of 'ghost pensioners'. The provincial authorities in the Eastern Cape (one of the poorest of the nine South African provinces) unilaterally and without notice, revoked the welfare benefits of various groups of persons receiving social assistance.

In *Ngxuza*, the affected beneficiaries had to re-apply for their existing entitlements, but this procedure, according to the court was harsh and unlawful. The court ruled in favour of the applicants. On appeal, the Supreme Court of Appeal upheld the judgement of the court *a quo*. Taking into account the vulnerable position in which the said beneficiaries found themselves, the court remarked:

It is precisely because so many in our country are in a 'poor position to seek legal redress', and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice.<sup>950</sup>

According to the SCA, the need to protect class of people who are vulnerable and excluded from the protection of the law must animate our understanding of the Constitution's provisions.<sup>951</sup> It is against this background that their constitutional entitlements must be interpreted in the context of class action provision in the Bill of Rights. The circumstances of this particular case – unlawful conduct by a state party against a desperate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not

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<sup>949</sup> *Permanent Secretary, Department of Welfare, EC v Ngxuza*.

<sup>950</sup> *Permanent Secretary, Department of Welfare, EC v Ngxuza* para 2.

<sup>951</sup> *Bernstein v Bester NNO* 1996 2 SA 751 (CC) at para 149; *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) at para 14; *Soobramoney* at para 8; and *Grootboom* at para 25.

incapable of enforcement in isolation should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class action proceedings was unassailable.

It is clear that South Africa's social security system is built on a solid framework and noble principles that aim to alleviate the socio-economic marginalisation of the poor. The system attempts to achieve this through a series of primarily non-contributory, means-tested grants that intend to provide the poor with opportunities they would otherwise not have access to in the absence of social assistance. These grants offer cash transfers that are envisioned to remove barriers preventing the poor from accessing education, healthcare, and employment, with the ultimate goal of significantly decreasing the number of citizens living in poverty.

Lister<sup>952</sup> asserts that the arguable symbolic and mobilising functions of the discourse of human rights, its effectiveness as a political tool will be the closing of that gap between promise and reality, where reality means political implementation of demands for the ostensible rights. According to the author, the call for political action may not achieve the desired results, since in democracies with stratified poverty, the majority vote might not offer rights to the minority, and the persistence of ethnic poverty in many countries is an example. Writing about exclusion and rights, Spicker<sup>953</sup> refers to Dreze and Sen who state that:

See the principal form of redress for people without rights as lying, not in economic processes, but in political ones. The effect of giving people political rights is also to give them the ability to address their problem; and they argue, strikingly, that there has never been a famine in a democracy.

According to him, striking degrees of deprivation and poverty, of social exclusion and the denial of human dignity remain in many modern democracies.<sup>954</sup>

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<sup>952</sup> Lister R *Poverty* (Cambridge, Polity Press, 2004).

<sup>953</sup> Spicker P 'Exclusion and rights' in Williams *et al* (eds) *Law and poverty* (London, Zed Books, 2003).

<sup>954</sup> Cf Lynes T *Welfare rights* (London, Fabian Society, 1969).

In summation, this chapter has shown the contribution of judicial review to ensuring that the wide range of decision making bodies in the field of social security stay within the law and are accountable to those who depend on the system of social security. In particular, it analysed the role played by judicial review in determining the extent to which the expectations of beneficiaries concerning what they perceive to be their rights with regard to have access to social security.

In light of the foregoing discussion, it becomes clear that the courts in South Africa are expressly required to pronounce on the constitutionality of section 27 (1)(c) of the Constitution. However, they must assess government action within the bounds of reasonableness, progressive realisation and available resources. This is a reflection that the Legislature and Executive are the ultimate architects of social economic policy because of the fact of limited resources and the sheer enormity of the task of redistributing wealth and services in the country.

The courts, in particular the Constitutional Court, in safeguarding the fundamental rights, entrenched in the Constitution requires all the organs of state including (in our case SASSA) and the non-state organs to comply with administrative law. Liebenberg<sup>955</sup> posits that when law is declared invalid, the courts have wide powers to control the consequences of the declaration of invalidity through granting 'just and equitable' remedies.<sup>956</sup>

It is also clear from this chapter that before an action is carried out by SASSA, which interferes with the right of an individual to social security, it must ensure that such actions are performed in a manner warranted by law, and this includes, *inter alia*:

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<sup>955</sup> Liebenberg S *Socio-economic rights: Adjudication under a transformative Constitution* (Juta and Co. Ltd 2010) 381-382.

<sup>956</sup> For further reading on the constitutional remedies for infringement of fundamental rights, see Okpaluba C 'Forging new tools and shaping innovative remedies: Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa' (2001) 12 (3) *Stellenbosch Law Review* 462; Okpaluba C 'Extraordinary remedies for breach of fundamental rights: Recent developments' (2007) 17 (1) *SA Public Law* 98.

- An opportunity for genuine consultation with those affected;
- Timely and full disclosure of information on the proposed measures;
- Reasonable notice of proposed actions;
- Legal recourse and remedies for those affected; and
- Legal assistance for obtaining legal remedies.<sup>957</sup>

Notwithstanding the good progress made in terms of making social assistance grants accessible to millions of citizens in South Africa, fundamental challenges still exist in the system and in the manner in which payments are disbursed to the beneficiaries. To mention, but a few of such challenges, delays in terms of approval of social assistance applications, lack of sufficient human resources, under-developed pay-points especially in rural areas, and the periodic legal battles between SASSA and the various paymasters are also not good for the working relationship between the two entities and for service delivery in general. Fraud and corruption remain a huge challenge in SASSA.<sup>958</sup> Unless these challenges are dealt with vigorously, it has the potential to overshadow all the good work done so far. The next chapter examines the role of international and comparative social security law.

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<sup>957</sup> See General Comment 19 on the right to social security, Committee on Economic, Social and Cultural Rights (2007) para 78.

<sup>958</sup> Reddy T and Sokomani A 'Corruption and social grants in South Africa' (2008) Monograph 154 *Institute for Security Studies*; See also Corruption Watch 'Corruption Watch questions SASSA's R317 million payment to Net1' available at <http://www.fin24.com/Tech/News/Corruption-Watch-questions-Sassa-payment-to-Net1-20150402> (date of use 20 May 2015); Duncan J 'Social security debased by the profit motive' *Mail & Guardian* 03 January 2014 available at <http://mg.co.za/article/2014-01-02-social-security-debased-by-the-profit-motive> (date of use 10 December 2014); Parliament on SASSA corruption and fraud available at <http://www.gov.za/speeches/Parliament-sassa-corruption-and-fraud-15-jul-2015-0000> (date of use 01 October 2015). Studies in Poverty and Inequality Institute 'Social grants and crime in South Africa: A preliminary exploration' Working paper no. 2, at 71 available at <http://spii.org.za/wp-content/uploads/2013/11/working-paper-no-2-social-grants-and-crime-in-south-africa-a-preliminary-exploration-studies-in-poverty.pdf> (date of use 23 March 2015).

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## CHAPTER FIVE

### INTERNATIONAL AND COMPARATIVE SOCIAL SECURITY LAW

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#### 5.1 Introduction

Smit and Van Eck<sup>959</sup> citing John Donne state that “no man is an island, entire of itself; every man is a piece of the continent”. It is submitted that this phrase is still relevant today. In particular, when one considers the movement of capital, goods<sup>960</sup> and labour across international borders which create a situation where uniform standards become relevant.<sup>961</sup> According to them, even though there are problems with the enforcement of such standards,<sup>962</sup> the International Labour Organisation (ILO) conventions play a significant role in establishing uniform standards in the world of work.<sup>963</sup>

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<sup>959</sup> Smit P and Van Eck B 'International perspectives on South Africa's unfair dismissal law' (2010) Vol.43 (1) *The comparative and International Law Journal of Southern Africa* 46, quoting the words used by Donne J in the poem 'Devotions upon emergent occasions – mediation XVII' authored in 1623/1624.

<sup>960</sup> Cf Marshall R 'The importance of international labour standards in a more competitive global economy' in Sengenberger W and Campbell D *Essays in commemoration of the 75th anniversary of the International Labour Organisation and the 50th anniversary of the Declaration of Philadelphia*, International Institute for Labour Studies (Geneva) 65-70 available at [http://www2.warwick.ac.uk/fac/soc/law/staff/academic/neal/courses/intlablaw/newdocs/book\\_senpart1.pdf](http://www2.warwick.ac.uk/fac/soc/law/staff/academic/neal/courses/intlablaw/newdocs/book_senpart1.pdf) (date of use 12 January 2014).

<sup>961</sup> Marshall R (note 960 above) 5-8; Vetter S 'The single European market 20 years on achievements, unfulfilled expectations, and further potential' EU Monitor European Integration, Deutsche Bank (DB Research) 31 October 2013 available at <http://www.dbresearch.com...>(date of use 12 January 2014); Evans A 'Economic policy and the free Movement of goods in EEC law' (1983) Vol.32 (3) *The International and comparative Law Quarterly* 577-599; Weatherill S 'Free movement of goods' (2003) Vol.5 (4) *The International and Comparative Law Quarterly* 1021-1030.

<sup>962</sup> Smit and Van Eck (note 959 above). See also, Hodges J 'The role of the International Labour Organisation in balancing work and family in the 21<sup>st</sup> century' (2014) Vol.56 (4) *Journal of Industrial Relations* 566-575; Baccaro L and Mele V 'Pathology of path dependency? The ILO and the challenge of new governance' (2012) Vol.65 (2) *Industrial and Labour Relations Review* 196-200; Lerner Y and Milman-Sivan F 'Global justice, labour standards and responsibility' (2011) Vol.12 (2) *Theoretical Inquiries in Law* 440-464.

<sup>963</sup> See also Weiss M 'International labour standards: A complex public-private policy mix' (2013) Vol.29 (1) *International Journal of Comparative Labour and Industrial Relations* 7-19; Olivier M 'International labour and social security standards: A developing country critique' (2013) Vol.29 (1) *International Journal of Comparative Labour and Industrial Relations* 21-38.

The need to take account of international and comparative developments<sup>964</sup> in the design of social security institutions and norms in South Africa has been recognised before.<sup>965</sup> The goals of legal comparison as a science are to know the differences existing between legal models, and to contribute to knowledge of these models.<sup>966</sup> However, the development of a perfect epistemological single model capable of encapsulating the same model is unrealistic. Equally, the complexity of welfare systems and their governing legislation is recognised as one of the areas of common ground between nation states.<sup>967</sup>

Notwithstanding the problems associated with an attempt to transplant one system from one country to another,<sup>968</sup> South Africa can benefit from international<sup>969</sup> and comparative experiences.<sup>970</sup> Besides, where attempts are being made to completely overhaul or develop institutions and norms, as is the case in South Africa, it is desirable to take account of precedents from elsewhere, notwithstanding the local imperative.<sup>971</sup> Therefore, what follows is a

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<sup>964</sup> For further reading on the rationale for comparison, see Samuel G *An introduction to comparative law theory and method* (UK, Hart Publishing Oxford Portland, 2013) 45-64; See also Shaw S 'Comparative welfare' in Dwyer P and Shaw S *An introduction to social policy* (London, Sage Publications, 2013) 144-153. On the theories and methods in comparative social policy, see Mabbett D and Bolderson H 'Theories and methods in comparative social policy' in Clasen J *Comparative social policy – Concepts, theories and methods* (UK, Blackwell publishers, 1999) 34-56.

<sup>965</sup> Goosen C *et al* 'Industrial and comparative social security standards' in Olivier M *et al* (eds) *social security law: General principles* (Durban, Butterworths, 1999) 527; See also Fombad C 'An overview of the constitutional framework of the right to social security with special reference to South Africa' (2013) Vol.21 (1) *African Journal of International and Comparative Law* 7-11; Berry L and Smit A 'Social assistance needs of children with chronic health conditions: A Comparative study of international and South African eligibility assessment instruments' (2011) Vol.26 (7) *Social Work in Public Health* 635-649.

<sup>966</sup> Samuel G *An introduction to comparative law theory and method* (UK, Hart Publishing Oxford Portland, 2013) 45.

<sup>967</sup> See also Harris N *Law in a complex state – Complexity in the law and structure of welfare* (UK, Oxford and Portland Oregon, 2013) 212.

<sup>968</sup> For further reading on the problems associated with comparative law, see Samuel G (note 966 above) 8-24.

<sup>969</sup> Goodman R and Jinks D *Socialising states – Promoting human rights through international law* (Oxford University Press, 2013) 1-16.

<sup>970</sup> Legrand P 'The Impossibility of legal transplants' (1977) 4 *Maastricht Journal of European and comparative Law* 1111.

<sup>971</sup> Goosen C (note 965 above) 527.

preliminary endeavour to relate current efforts in South Africa to international and comparative developments as part of benchmarking.

It has to be determined whether standard international approaches to establishing and providing social security mechanisms would suit South Africa. Depending on the answer to the above question, one then has to determine what values, norms and standards would best form part of a uniquely South African system. In determining this, it may be necessary to take into account international and regional South African values and norms.

It is within this context that the development of human welfare is now an explicit goal of international development discourse and policy.<sup>972</sup> The Millennium Development Goals commit the United Nations and other international agencies to several targets. They include, among others, to reduce the proportion of people living in extreme poverty, to enrol all children in primary schools, to eliminate gender disparities in primary school and secondary education; to reduce infant and child mortality rates by two-thirds and maternal mortality rates by three-quarters and to provide access for all who need reproductive health care services.<sup>973</sup> These are bold targets, and represent a fundamental shift in global discourse. Nevertheless, the reality is that many countries are lagging behind in meeting these targets.

Global inequality has mushroomed to outrageous levels. According to the *Millennium Development Goals Report*, 1.2 billion people are living in extreme poverty.<sup>974</sup> In sub-Saharan Africa, nine in every 10 people have no basic social protection.<sup>975</sup> The Millennium Development Report states that sub-Saharan

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<sup>972</sup> Wood G and Gough I *Insecurity and welfare regimes in Asia, Africa and Latin America* (UK, Cambridge University Press, 2004) 1-5.

<sup>973</sup> *Millennium Development Goals Report 2013* available at <http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf> (date of 20 January 2014) (*The Millennium Development Goals Report*).

<sup>974</sup> *The Millennium Development Goals Report*.

<sup>975</sup> Chitonge H 'Social protection challenges in sub-Saharan Africa: 'Rethinking regimes and commitments' (2012) Vol.71 (3) *African Studies* 323.



Africa is the only region that saw the number of people living in extreme poverty rise steadily, from 290 million in 1990 to 414 million in 2010, accounting for more than a third of people worldwide who are destitute.<sup>976</sup> In parts of Africa, HIV/AIDS, poverty, famine have degenerated into intolerable levels of human suffering.<sup>977</sup> Faced with these problems, the role of social policy is being rediscovered and reappraised at the international level.<sup>978</sup>

On the 25 September 2015, world leaders gathered at the United Nations Sustainable Development Summit to adopt 2030 Agenda for Sustainable Development (SDG's).<sup>979</sup> This new plan of action is based on 17 goals which are based on, *inter alia*:

- The realisation of human rights for all;
- To achieve gender equality; and
- The empowerment of all women and girls.

In addition, member states committed themselves to end poverty and hunger between now and 2030, and to ensure that all human beings can fulfil their potential in dignity and equality. Although the SDG's have non-binding legal force, they boost moral legal values, which ought to guide countries when measuring their policies on the realisation, protection, and enforcement of economic, social and cultural rights at the domestic level.<sup>980</sup>

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<sup>976</sup> *The Millennium Development Goals Report* (note 973 above) 7.

<sup>977</sup> De Waal A and Whiteside A 'New variant famine: AIDS and food crisis in Southern Africa' (2003) Vol.362 (9391) *The Lancet* 1234-1236.

<sup>978</sup> *The Millennium Development Goals Report* (note 976 above) 6-9.

<sup>979</sup> United Nations General Assembly 'The 2030 Agenda for Sustainable Development' available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/70/L.1&referer=/english/&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.1&referer=/english/&Lang=E) (date of use 23 March 2015).

<sup>980</sup> Cf Cubie D 'An analysis of soft law applicable to humanitarian assistance: Relative normativity in action' (2012) Vo.2 (2) *Journal of International Humanitarian Legal Studies* 183; Griggs D *et al* 'An integrated framework for sustainable development goals' (2014) Vol.19 *Ecology & Society* 1-24. See also Shepherd K *et al* 'Policy: Development goals should enable decision - making' (2015) Vol.523 *Nature (International Weekly Journal of Science)* 153-154. For further reading on the SDG's, see Palmer E 'Introduction: The sustainable development goals forum' (2015) Vol.11 (1) *Journal of Global Ethics* 3-7; Pogge T and Sengupta M 'The sustainable development goals: A plan for building a better world' (2015) Vol.11 (1) *Journal of Global Ethics* 56-63; Pogge T and Sengupta M 'The

It is important to note that international law has both a direct and indirect impact on social security in South Africa. In considering the South African social security system, it is significant to take into account the standard and norms of the ILO. This evaluation examines the extent to which South Africa has complied with the ILO standards. It is submitted that the protection of human rights takes place at two levels, namely; domestic and international level.

## 5.2 Normative element and ILO standards on social security

Dugard<sup>981</sup> defines international law as a body of rules and principles that are binding upon states in their relations with one another. Traditionally, international law used to apply to member states only.<sup>982</sup> Currently, there are other actors on the international stage.<sup>983</sup> It has been accepted that international organisations, such as the United Nations and its specialised agencies, enjoy international personality.<sup>984</sup>

In the context of social security law, there are varieties of international legal instruments making provision for social security.<sup>985</sup> These instruments include,

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sustainable development goals (SDGS) as drafted: Nice idea, poor execution' (2015) Vol.24 (3) *Washington International Law Journal* 571-587; Sachs J 'From millennium development goals to sustainable development goals' (2012) Vol.379 *Lancet* 2206-2211; Kumi E *et al* 'Can post-2015 sustainable development goals survive neoliberalism? A critical examination of the sustainable development – neoliberalism nexus in developing countries'(2014) Vol.16 (3) *Environment, Development and Sustainability* 439-551; Quental N *et al* 'Sustainable development policy: Goals, targets and political cycles' (2009) Vol.19 (1) *Sustainable Development* 15-28.

<sup>981</sup> Dugard J *International law: A South African perspective* 4<sup>th</sup> ed (Juta & Co. Ltd, 2011) 1.

<sup>982</sup> Cf Weiss T *et al The United Nations and changing world of politics* 7<sup>th</sup> ed (Westview Press, United State of America, 2014) 7-11.

<sup>983</sup> Reinisch A 'The changing international legal framework for dealing with non-state actors' in Alston P *Non state actors and human rights* (Oxford University Press, 2006) 40-42 available at [http://www.univie.ac.at/intlaw/reinisch/non\\_state\\_actors\\_alston\\_ar.pdf](http://www.univie.ac.at/intlaw/reinisch/non_state_actors_alston_ar.pdf)(date of use 20 October 2014).

<sup>984</sup> White N *The United Nations system: Toward international justice* (United States of America, Lynne Rienner Publishers, 2002) 28-41.

<sup>985</sup> See for example the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, article 22 and 25; International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly Resolution 2200A(XXI) of 16 December 1966, articles 9, 10 (2) and 10 (3);Convention on the Elimination of All Forms of Discrimination Against Women, adopted by UN General Assembly Resolution 34/180 of

among others, international instruments originating from international organisations (such as the United Nations Organisation (UN) and ILO) and international agreements (bilateral or multilateral) between countries. These agencies are responsible for setting international standards and norms on social security.

Islam notes that 'norms' establishes standard model or pattern of acceptable behaviour.<sup>986</sup> According to him, the normative regime of international law is closely linked to the various categories of sources and diverse social orders. Therefore, international law has authoritative, prescriptive, and prohibitive norms dictating what their subject must and must not do, and peremptory norms (*jus cogens* and *erga omnes*) from which no derogation is permissible.<sup>987</sup> The acceptance of *jus cogens* (peremptory norms) in the Vienna Convention on the Law of Treaties<sup>988</sup> confirmed the creation of the binding and stable norm of international law.<sup>989</sup> These norms form 'hard' law with binding effect in that they

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18 December 1979, see articles 11(1)(e), 11(2)(b) and 14(2); International Convention on the Protection of the Rights of All Migrant Workers and their Families, adopted by UN General Assembly Resolution 45/158 of 18 December 1990, articles 27 and 54; the Convention on the Rights of the Child, adopted by UN General Assembly Resolution 44/25 of 20 November 1989, articles 26, 27(1), 27(2) and 27(4). Finally the Convention on the Rights of Persons with Disabilities, adopted by UN General Assembly Resolution A/RES/61/106 of 13 December 2006.

<sup>986</sup> Islam M *International law: Current concepts and future directions* (Australia, Butterworths, 2014) 15.

<sup>987</sup> Byers M 'Conceptualising the relationship between *jus cogens* and *erga omnes* rules' (1997) Vol.66 (2/3) *Nordic Journal of International Law* at 211-239. For a detailed discussion on *jus cogens* and *erga omnes*, see Cannizzaro E *et al The law of treaties beyond the Vienna Convention* (New York, Oxford University Press, 2011) 381-440. For further reading on the conceptual constructions of *jus cogens* and *erga omnes*, see, Augusto A and Trindade C *International law for humankind: Towards a new jus gentium 2<sup>nd</sup>* ed (Boston, Martinus Nijhoff Publishers, 2013) 291-322.

<sup>988</sup> Articles 53 and 64 of the Vienna Convention on the Law of Treatise 1969. Article 53 of Convention provides that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Furthermore article 64 provides that "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

<sup>989</sup> LinderFalk U 'The source of *jus cogens* obligations - How legal positivism copes with peremptory international law' (2013) Vol.82 (3) *Nordic Journal of International Law* 369-372.

require compliance by all subjects of international law (states and non-state organisations alike).<sup>990</sup>

For example, international treaties and customary law are self-executing, resulting in legally enforceable commitments, rights, and obligations.<sup>991</sup> The norms of international law that dictate what its subjects may or may not do, constitutes 'soft' law, which is the result of various degrees of 'cogency, persuasiveness and consensus'.<sup>992</sup> Soft law is a generic term that refers to non-binding, quasi-legal, and voluntary instruments, such as resolutions, codes of conducts, code of practice, framework treaty in principle, and action plans.<sup>993</sup> The UN General Assembly resolutions and its declarations (the Universal Declaration of Human Rights, 1948) belong to the soft law category.

Accordingly, soft law is capable of exerting a powerful influence over the behaviour of countries, public and private entities.<sup>994</sup> In many circumstances, international soft law can generate impact by being adopted into the domestic legal order of a country.<sup>995</sup> The myriad of 'soft' law instruments are designed to create legal influence rather than enforceable rights and duties.<sup>996</sup> It is important to note that soft law might, if violated, hardly trigger consequences other than

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<sup>990</sup> Cf Smith R *Texts and materials on international human rights* 3<sup>rd</sup> ed (London, Routledge Taylor & Francis Group, 2013) 51-54; Davy U 'Social citizenship going international: Changes in the reading of UN-sponsored economic and social rights' (2013) Vol.22 *International Journal of Social Welfare* 17-18.

<sup>991</sup> Islam (note 986 above).

<sup>992</sup> Islam *ibid*.

<sup>993</sup> Skjaereth J 'Exploring the consequences of soft law and hard law: Implementing international nutrient commitments in Norwegian agriculture' (2010) Vol.10 (1) *International Environmental Agreement: Politics Law & Economics* 3; Ellis J 'Shades of grey: Soft law and the validity of public international law' (2012) Vol.25 (2) *Leiden Journal of International Law* 315-325; Reisman W 'Soft law and law jobs' (2011) Vol.2 (1) *Journal of International Dispute Settlement* 25-27.

<sup>994</sup> Xuan L 'Soft law - making on development: The millennium development goals and post-2015 development agenda' (2013) Vol.10 (3) *Manchester Journal of International Economic Law* 363; Cf Aletter C and Van Eck S 'Employment agencies: Are South Africa's recent legislative amendments compliant with the international labour organization's standards' (2016) Vol.28 (2) *SA Mercantile Law Journal* 300.

<sup>995</sup> Xuan *ibid*.

<sup>996</sup> Karlsson-Vinkhuyzen S and Vihma A 'Comparing the legitimacy and effectiveness of global hard and soft law: An analytical framework' (2009) Vol.3 (4) *Regulation & Governance* 401-417.

diplomatic protests or reputational losses.<sup>997</sup> Certain soft-law instruments are enforced by mechanisms like peer-review procedures. An example of this would be the Millennium Declaration of the UN General Assembly. Every five years, states review the progress achieved towards the attainment of the MDGs.<sup>998</sup>

Non-compliance with soft law obligations may also influence public opinion and draw a response from the international community.<sup>999</sup> Advancing a similar point, Cubie<sup>1000</sup> posits that while recognising the normative impact soft law may have on state practice through international relations, politics and sociology, its political, moral or technical obligations should not be confused or collated with international legal obligations.

International social security agreements between nations, either bilateral or multilateral agreements have been in use for a long time.<sup>1001</sup> These agreements have and are still built on one or more of the following principles: equality of treatment, determination of applicable legislation, maintenance of acquired rights, and maintenance of rights in the course of acquisition and reciprocity.<sup>1002</sup> It is important to note that a number of international standards concerning social security were adopted during the 19<sup>th</sup> century.<sup>1003</sup> These principles, which form the cornerstone of bilateral and multilateral instruments, are embraced in a

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<sup>997</sup> Goldman M 'We need to cut off the head of the king: Past, present, and future approaches to international law' (2012) Vol.25 (2) *Leiden Journal of International law* 347.

<sup>998</sup> Goldman *ibid*.

<sup>999</sup> Shaffer G and Pollack M 'Hard vs. soft': Alternatives, compliments, and antagonists in international governance' (2010) 94 *Minnesota Law Review*, 706; Abbott K and Snidal D 'Hard and soft law in international governance' (2000) 54 *International Organisation* 421-456.

<sup>1000</sup> Cubie D (note 980 above) 183.

<sup>1001</sup> See Roberts S 'Migration and social security: Paraochialism in the global village' in Sigg R & Behrendt C (eds) *Social security in a global village* (Transaction New Brunswick, 2002) 214-215.

<sup>1002</sup> See, for example, ILO Standards for the XXIst Social Security (2002 ILO Geneva) 41-44, ILO Social Security for Migrant Workers (1996 ILO Geneva) 8-20.

<sup>1003</sup> Korda M and Pennings F 'The legal character of international social security standards' (2008) Vol.10 (2) *European Journal of Social Security* 131. See also Weiss M 'International labour standards: A complex public-private policy mix' in Olivier M *et al The role of standards in labour and social security law: International, regional and international perspectives* (South Africa, Juta & Co. Ltd, 2013) 3-13.

variety of ILO instruments on social security protection.<sup>1004</sup> The ILO standards aim to prevent states from restricting or lowering social protection levels.

Olivier *et al*<sup>1005</sup> opine that international norms and standards play a significant role on the regulation of labour markets and, to a certain extent, the social security framework in developing countries. He argues that regional instruments and country statutory frameworks in the developing world covering these areas were developed often with the international standards framework in mind, and invariably show similarities with international and regional instruments.<sup>1006</sup> He acknowledges that the relevance of international law is further supported by the recognition of the role of international law in regional instruments, constitutions and court judgements.<sup>1007</sup>

It is important to note that after the First World War, multilateral standards were developed.<sup>1008</sup> The ILO was established in 1919 after the First World War was instrumental in this area,<sup>1009</sup> the aim being to promote social peace and to prevent another war. The preamble to the ILO Constitution confirms its objectives by stating that:

Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week,

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<sup>1004</sup> Cf ILO Declaration on Social Justice for a Fair Globalisation was adopted by the International Labour Conference (ILC) at its 97th Session (2008).

<sup>1005</sup> Olivier M *et al* *The role of standards in labour and social security law* (note 1003 above) 21.

<sup>1006</sup> Olivier *et al* *ibid*. For further reading on international labour standards see, ILO *Rules of the game: A brief introduction to international labour standards* International Labour Office. - Geneva: ILO, third Revised Edition (2014).

<sup>1007</sup> Olivier *et al* *ibid*.

<sup>1008</sup> United Nations Trade and Development Report, proceedings of the United Nations Conference on trade and development, Geneva (2014) 55-71 available at [http://unctad.org/en/Publicationchapters/tdr2014ch4\\_en.pdf](http://unctad.org/en/Publicationchapters/tdr2014ch4_en.pdf) (date of use 20 October 2014).

<sup>1009</sup> Swepston L 'The future of ILO standards' (1994) Vol.117 (9) *Monthly Labour Review* 16. See also Otting A 'International labour standards: A framework for social security' (1993) Vol.132 (2) *International Labour Review* 163-171.

the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage....<sup>1010</sup>

In the Philadelphia Declaration of 1944, the ILO broadened its scope by defining more explicit social objectives.<sup>1011</sup> One of the objectives mentioned in this declaration was 'the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care'.<sup>1012</sup> The first social security standards of the ILO were developed in an early stage of the development of Western social security systems. Many of the standards that are still applicable today were made in the 1950s and 1960s.<sup>1013</sup>

The development of ILO international standards in the context of social security can be traced during the first era that lasted from 1919 to 1944. Most of the standards envisaged social insurance as the means for their application.<sup>1014</sup> Their objective is the establishment of compulsory insurance schemes for a specific branch of social security (unemployment, industrial accidents, occupational diseases, sickness, old age, invalidity and death) as defined in the Convention.<sup>1015</sup>

During the 1940s, new concepts of social security were developed whose practical application was to transform the pre-war social insurance schemes.<sup>1016</sup> A key element in this development was the Beveridge Report in the early

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<sup>1010</sup> See the Preamble of the ILO Constitution available at <http://www.ilo.org/public/english...> (date of use 20 October 2014).

<sup>1011</sup> See ILO Declaration of Philadelphia, Declaration concerning the aims and purposes of the International Labour Organisation available at [http://www.ilocarib.org.tt/cariblex/pdfs/ILO\\_dec\\_philadelphia.pdf](http://www.ilocarib.org.tt/cariblex/pdfs/ILO_dec_philadelphia.pdf) (date of use 20 October 2014); See also ILO Declaration on Social Justice for a Fair Globalisation, adopted by the International Labour Conference at its 97th session, Geneva, 10 June 2008, available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/...pdf> (date of use 20 October 2014).

<sup>1012</sup> ILO Declaration of Philadelphia 6.

<sup>1013</sup> Korda M and Pennings F 'The legal character of international social security standards' (2008) Vol.10 (2) *European Journal of Social Security* 133.

<sup>1014</sup> Korda M and Pennings *ibid*.

<sup>1015</sup> Korda M and Pennings (note 1013 above).

<sup>1016</sup> Pennings F and Schulte B *Between soft and hard law: The impact of international social security standards on national social security law* (Netherlands, Kluwer Law International, 2006) 6.

1940s.<sup>1017</sup> The new concept of social security expressed in this report included universal and comprehensive coverage, unification of social security schemes, guaranteed income security and medical care for the entire population.<sup>1018</sup> The report was elaborated in the later Anglo-Saxon model and inspired other countries to extend their social security coverage.<sup>1019</sup>

The spread of social insurance after the Second World War was largely the result of the standards laid down by the ILO.<sup>1020</sup> This was followed by the adoption of Convention 102 - the Social Security Minimum Standard Convention of 1952,<sup>1021</sup> which was a milestone in the standard setting activities of the organisation.<sup>1022</sup>

This Convention covers nine main branches of social security in one single instrument, thus encouraging the establishment of general social security protection at a national level.<sup>1023</sup> The nine principal branches or classical risks/contingencies of social security addressed in the Convention are medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivor's benefit.<sup>1024</sup>

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<sup>1017</sup> Beveridge W *Social insurance and allied social services* (London, 1942).

<sup>1018</sup> The Beveridge Report and the post-war reforms 23-34 available at <http://www.psi.org.uk/publications.pdf...> (date of use 20 October 2014).

<sup>1019</sup> Lyons K and Cheyne C 'Social insurance mechanisms in the European Union' (2011) (26) *Recon Online Working Paper Series* 2-5.

<sup>1020</sup> Seeking's J 'The ILO and social protection in the Global South, 1919-2005' Paper presented at a conference organised by the International Institute of Social History in Brussels, Belgium on 'The past and present of the International Labour Organisation', in October 2007, at 3-4 available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/pdf...> (date of use 20 October 2014).

<sup>1021</sup> Social Security (Minimum Standards) Convention No.102 of 1952, adopted, Geneva, 35<sup>th</sup> ILC Session (28 June 1952), entry into force 27 April 1955 available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C102](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C102) (date of use 20 October 2014).

<sup>1022</sup> Kulke U and Lopez G 'Social security – International standards and the right to social security' in Riedel E (ed) *Social security as a human right. Drafting a General Comment on article 9 ICESR- Some challenges* (Berlin- Heidelberg, Springer Verlag, 2007) 91-102.

<sup>1023</sup> See Social Security (Minimum Standards) Convention No.102 of 1952.

<sup>1024</sup> Social Security (Minimum Standards) *ibid*.



Convention 102 sets out the objectives to be achieved rather than describing the applicable techniques. Its wording allows some form of flexibility for various techniques of protection and for different levels of development.<sup>1025</sup> It allows member states to ratify this convention by accepting at least three of its nine branches,<sup>1026</sup> with the option of accepting obligations under other branches, thereby allowing them to attain all of its objectives progressively. It is important to note that Convention 102 does not prescribe how signatory states should attain these objectives but leaves certain flexibility to the member states. In terms of this Convention, signatories can attain its objectives through universal schemes, social insurance schemes with earnings-related or flat rate components or both, and social assistance schemes.

In addition, there are other Conventions<sup>1027</sup> which supplement Convention 102. These Conventions set the higher standards and revised the pre-war Conventions of social insurance. One of the important characteristics of these Conventions is that they are flexible, as affiliate states can choose between alternative standards.<sup>1028</sup> Some Conventions allow developing countries for a momentary period to adopt lower standards than developed countries.<sup>1029</sup>

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<sup>1025</sup> Dijkhoff T *International social security standards in the European Union* (Cambridge, Intersentia, Social Europe Series No.28, 2011) 31-33.

<sup>1026</sup> Social Security (Minimum Standards) Convention (note 1023 above).

<sup>1027</sup> These Conventions include amongst others, the Employment Injury Benefits Convention, 1964, Convention 128, the Invalidity, Old-Age and Survivor's Benefits Convention, 1967, Convention 130, the Medical Care and Sickness Benefits Convention, 1969, Convention 168, the Employment Promotion and Protection against Unemployment Convention, 1998, and lastly, Convention 183, Maternity Protection Convention, 2000.

<sup>1028</sup> Kulke U and Guilbault E 'The social protection floors recommendation, 2012 (No.202) – Completing the standards to close the coverage gap' (2013) Vol.66 (3/4) *International Social Security Review* 92.

<sup>1029</sup> Olivier M *et al* 'Informality, employment and social protection: Some critical perspectives for/from developing countries' (2012), at 6 available at <http://ilera2012.wharton.upenn.edu/RefereedPapers/OlivierMariuspercent20JulianaMasabopercent20EvanckalulaUPDATED.pdf> (date of use 20 October 2014).

### 5.3 The relevance of international and comparative social security

With the advent of democracy, South Africa became a member of the international community. International law is now viewed as one of the pillars of the new democracy.<sup>1030</sup> In considering the rationale of applying international law in South Africa, Olivier<sup>1031</sup> argues that the 1993 Constitution,<sup>1032</sup> for the first time in South African history accorded constitutional recognition to international law, thereby ending the debate on the status of international law in South African domestic law.<sup>1033</sup> Olivier notes that this step was a symbolic break from the apartheid legal system which, was associated with the violation of international law<sup>1034</sup> and indicated to the international community that South Africa was willing to abide by internationally accepted rules.

Elaborating on the importance of considering international law, Olivier<sup>1035</sup> asserts that South Africa has indicated its intention to become a party to, and to be legally bound by, the obligations imposed by the relevant international treaties.<sup>1036</sup> Furthermore, the Constitution compels any court, tribunal or forum, when interpreting the Bill of Rights, to consider international law and foreign law.<sup>1037</sup>

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<sup>1030</sup> Dugard J 'International law and the South African Constitution' (1997) Vol.8 (1) *European Journal of International Law* 77-80; Cf Barber J 'An historical and persistent interest: Britain and South Africa' (1991) Vol.67 (4) *International Affairs (Royal Institute of International Affairs)* 723. For a detailed discussion on the role of the international law in liberation, see Dugard J 'The role of international law in the struggle for liberation in South Africa' (1991) Vol.18 (1/2) *Social Justice* 83-92.

<sup>1031</sup> Olivier M 'Interpretation of the Constitutional provisions relating to international law' (2003) Vol.6 (2) *PER* 26-27.

<sup>1032</sup> The Interim Constitution of the Republic of South Africa, 1993. See also Devine D 'The relationship between international law and municipal law in the light of the Interim South African Constitution 1993' (1995) Vol.44 (1) *The International and Comparative Law Quarterly* 1-5.

<sup>1033</sup> See Christin G 'The status of international treatise in the South African domestic legal system-small steps towards harmony in light of Glenister? South African judicial decisions' (2011) Vol.36 *South African Yearbook of International Law* 308-315.

<sup>1034</sup> Cf Hopkins P 'Nowhere to hide: The case against PW Botha' (2003) Vol.36 (3) *The Comparative and International Law Journal of Southern Africa* 292-298.

<sup>1035</sup> Olivier M *et al Introduction to social security* (Durban, Butterworths, 2004)163-164.

<sup>1036</sup> Cf *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 18.

<sup>1037</sup> See section 39(1)(b) and (c) of the Constitution.

Additionally, section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In *S v Makwanyane and Another*,<sup>1038</sup> it was contended on behalf of the accused that the imposition of the death penalty for murder was a cruel, inhuman and degrading punishment that should be declared unconstitutional. Chaskalson P made extensive and creative use of international law in interpretation of the Constitution. In so doing he concluded that the documents used during the negotiating process (specifically those relating to the position of the death penalty), formed part of the context within which the Constitution should be interpreted.<sup>1039</sup>

He considered circumstances existing at the time the Constitution was adopted in interpreting its relevant. Chaskalson referred to the European Court of Human Rights and the United Nations Committee on Human Rights whose deliberations are informed by *travaux preparatoires* as described by article 32 of the Vienna Convention on the Law of Treaties.<sup>1040</sup> Moreover, Chaskalson P referred to other countries where the constitution is the supreme law such as Germany, Canada, the United States and India, where courts may have regard to circumstances prevailing during the drafting of the Constitution.<sup>1041</sup> He also referred to the Vienna Convention on the Law of Treaties, which may assist the court in interpretation of the Constitution.<sup>1042</sup>

With regard to the interpretation of international law, section 35(1) of chapter 3 of the 1993 Constitution provides:

In interpreting the provisions of this Chapter, a court of law shall promote the values, which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law...

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<sup>1038</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) (*S v Makwanyane*).

<sup>1039</sup> *S v Makwanyane* at paras 12-17.

<sup>1040</sup> *S v Makwanyane* at paras 16 and 17.

<sup>1041</sup> *S v Makwanyane* at para 16.

<sup>1042</sup> *S v Makwanyane*.

The general limitation clause in section 36 of the final Constitution provides that “these rights may be limited ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. It is important to note that the courts in South Africa have not hesitated to invoke the provisions of international instruments when interpreting fundamental rights, including those rights that have a socio-economic character.

As stated by Constitutional Court in *Grootboom*:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.<sup>1043</sup>

Foreign law may also be considered. Decisions by, for example, the European Court of Human Rights, US Supreme Court, the Indian Supreme Court, the Brazilian Federal Court, the German Federal Constitutional Court as well as by other courts in these countries, may serve as valuable models of comparison. However, it should be noted that the South African courts and other institutions have to interpret the South African Constitution and are not obliged to follow foreign law when interpreting the Bill of Rights. Another point regarding the relevance of international law relates to the body of jurisprudence and commentary available on the scope and content of socio-economic rights. For example, the General Comments of the United Nations Committee on Economic Social and Cultural Rights,<sup>1044</sup> the Limburg Principles of 1987,<sup>1045</sup> as well as the

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<sup>1043</sup> *Grootboom* para 26.

<sup>1044</sup> See the United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, 39th session, 5-23 November 2007, General Comment No.19 on the Right to social security available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=Epercent2fC.12percent2fGCpercent2f19&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=Epercent2fC.12percent2fGCpercent2f19&Lang=en) (date of use 20 October 2014); See also Coomans F 'The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights' (2011) Vol.11 (1) *Human Rights Law Review* 2-35; Fombad C 'An overview of the constitutional framework of the right to social security with special reference to South Africa' (2013) Vol.21 (1) *African Journal of International & Comparative Law* 9-10.

<sup>1045</sup> Dankwa *et al* 'Commentary to the Maastricht Guidelines on violations of economic, social and cultural rights' in De Schutter O *Economic, social and cultural rights as human rights* (UK, Edward Elgar Publishing, 2013) 40-65.

Maastricht Guidelines of 1997.<sup>1046</sup> With regard to comparative social policy, it is submitted that social security investigation, both in South Africa and elsewhere, has been based upon theoretical or empirical analysis of the development of welfare provision within specific national contexts.<sup>1047</sup> The large part of social policy debate has been developed within national contexts, dominated by the policies and practices of national governments. However, this has been changing rapidly in the last decade.

Comparative study of the social security and policy debates of different countries is now central to policy research and teaching. International forces are gradually shaping the policy agendas of national governments.<sup>1048</sup> In this respect, the world is becoming symbolically a smaller place, and social policy scholars are progressively seeking to analyse this international context of welfare development.<sup>1049</sup>

It is noteworthy that since the late 20<sup>th</sup> century, the role of policy transfer has become an important influence on the political agenda of many nations.<sup>1050</sup> Policy initiatives developed in one country may well be of relevance to others who wish to address comparable social security needs within similar social and economic circumstances. Even if ideas from one country are not directly replicable in another, they may form the basis of similar initiatives by success or failure elsewhere. This has long been the case of the social insurance ideas promoted initially by Bismarck in Germany in the late nineteenth century. A more

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<sup>1046</sup> Dankwa *et al* *ibid*.

<sup>1047</sup> Graig G and Alcock P *International social policy: Welfare regimes in the developed world* 2<sup>nd</sup> ed (Palgrave Macmillan, 2009) 5-7.

<sup>1048</sup> Cf Shaw S 'Comparative welfare' in Dwyer P and Shaw S *An introduction to social policy* (London, Sage Publication, 2013) 145-152.

<sup>1049</sup> Ellison N *The transformation of welfare states* (Routledge, 2006); Pierson C *Beyond the welfare state: The new political economy of welfare* 3<sup>rd</sup> ed (Polity Press, 2006); Hill M *Social policy in the modern world: A Comparative text* (Blackwell, 2006); Kennett P *A handbook of Comparative social policy* (Edward Elgar, 2004).

<sup>1050</sup> Dolowitz D and Marsh D 'Who learns what from who? A Review of the policy transfer literature' (1996) *Political Studies* 44.

recent case is that of the tax credit measures used to supplement low wages in the United States of America.<sup>1051</sup>

In summary, comparative analysis of social security has threefold purpose. Firstly, it intends to give an overview and introduction to comparative methods and the strengths and weaknesses of comparative analysis.<sup>1052</sup> Secondly, it explores variations between social security systems of different countries and to assess the extent to which they are the result of internal policy-making<sup>1053</sup> or external dynamics.<sup>1054</sup> Thirdly, research projects based on international comparative analysis aim to evaluate the effectiveness of specific policy interventions across a range of countries.<sup>1055</sup>

The value of comparative analysis is critical to our understanding of the diversity of development of social security both nationally and internationally. This will help both to contextualise national change and development, and to provide a basis for understanding how to make appropriate comparisons between differing national social security systems.

#### **5.4 The legal status of international law in South Africa**

Dugard<sup>1056</sup> asserts that there are two main approaches to international law, namely; monist approach and the dualist approach. The monist approach considers international law as part of municipal law without any act of adoption or transformation.<sup>1057</sup> It is worth mentioning that the monist approach while

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<sup>1051</sup> Deacon A 'Learning from the United States of America? The influence of American ideas on new labour thinking on welfare reform' (2000) 20 (1) *Policy and Politics* 5-18; Jordan B *Social policy for the twenty-first century* (Polity Press, 2008).

<sup>1052</sup> Alcock *et al Student's companion to social policy* 3<sup>rd</sup> ed (Blackwell, 2008). See also Classen J (ed) *New perspectives on the welfare state in Europe* (Routledge, 1990).

<sup>1053</sup> Cf Scott C *Comparative law and society* (UK, Edward Elgar, 2012) 175-191.

<sup>1054</sup> Wood G and Gough I 'A Comparative welfare regime approach to global social policy' (2006) 34 (10) *World Development* 1696-1710.

<sup>1055</sup> See Ditch J *et al Comparative social assistance: Localisation and discretion* (Avebury, 1997).

<sup>1056</sup> Dugard (note 1030 above) 43.

<sup>1057</sup> Finegan T 'Neither dualism nor monism: Holism and the relationship between municipal and international human rights law' (2011) Vol.2 (4) *Transnational Legal Theory* 478.

maintaining that international law is not foreign law, this school of thought has been compelled to accept that the whole body of international law binding on a state cannot be directly applied by municipal courts.<sup>1058</sup>

The monist approach acknowledges that in cases of conflict between international law and municipal law, the judge must apply his/her own jurisdictional rules.<sup>1059</sup> On the other hand, the dualist school of thought considers international and municipal law as completely different systems of law, with the result that international law may be applied by domestic courts only if adopted by such courts or transformed into local law by legislation.<sup>1060</sup>

Dugard states that after the British occupation in 1806, the Cape retained Roman-Dutch law as its common law. This common law was accepted by the other colonies and states in Southern Africa. According to him, this meant that international law remained part of the common law of South Africa and was applied directly by the courts without any statutory incorporation. Seemingly, other scholars seem to question whether international law is really law.<sup>1061</sup>

It is important to note that the South African approach to international law falls into two categories. The first category is the position before the adoption of the final Constitution, and the second category is the position after the adoption of the final Constitution. Before the adoption of the final Constitution, the prevailing attitude towards international law was largely negative and its application in municipal law was limited. In the new constitutional dispensation, the role of international law has been specifically addressed in the South African Constitution.

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<sup>1058</sup> Finegan *ibid.*

<sup>1059</sup> Dugard J *International law: A South African perspective* 4th ed (Juta & Co Ltd, 2011)44.

<sup>1060</sup> Finegan T (note 1057 above) 478-479.

<sup>1061</sup> For further reading on the status of international law, see Brand J *Philosophy of law: Introducing jurisprudence* 1<sup>st</sup> ed (UK, Bloomsbury Publishing, 2013) 53; Waldron J 'International law: A relatively small and unimportant part of jurisprudence' in Almeida L, Edwards J and Dolcetti A *Reading HLA Hart's the concept of Law* (UK, Hart Publishing, 2013) 209-223.

Under the 1996 Constitution, an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.<sup>1062</sup> The Constitution creates an exception in that a self-executing provision in a treaty approved by Parliament becomes law in the Republic without the enactment of national legislation, provided that it is not inconsistent with the Constitution or an Act of Parliament.<sup>1063</sup>

Furthermore, the national executive negotiates and signs all international agreements,<sup>1064</sup> which will only bind the Republic on the international plane once they have been approved by the resolution in both the National Assembly and the National Council of Provinces, unless they fall under agreements, which do not require ratification.<sup>1065</sup> These international agreements will bind the Republic internationally without the approval of the National Assembly and the Council of Provinces, but must be tabled in these bodies within a reasonable time.<sup>1066</sup> Section 232 of the Constitution has far-reaching implications for the practice of South African law. Firstly, it assumes that customary international law enjoys a status at least equal to that of legislation and the common law and must be treated accordingly by the courts.<sup>1067</sup> Secondly, the Constitution limits the exclusion of customary international law in two respects, namely; conflict with the Constitution itself or an Act of Parliament.<sup>1068</sup>

According to Van Niekerk,<sup>1069</sup> section 39(1) creates the expectation that public international law, both that which is binding due to ratification as well as that which is not binding due to South Africa not being a party thereto, should be used

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<sup>1062</sup> S 231(2) of the Constitution.

<sup>1063</sup> S 231(4) of the Constitution.

<sup>1064</sup> S 231(2) of the Constitution.

<sup>1065</sup> S 231(3) of the Constitution.

<sup>1066</sup> Constitution *ibid*.

<sup>1067</sup> For a detailed discussion on customary international law, see Scharf M 'Accelerated formation of customary international law' (2014) Vol.20 (2) *Journal of International and Comparative Law* 305-341.

<sup>1068</sup> S 232 of the Constitution.

<sup>1069</sup> Van Niekerk A *et al Law@work* 2<sup>nd</sup> ed (LexisNexis Butterworths, 2011).



for interpreting legislation. In the case of *S v Makwanyane* the Court remarked as follows:

...“International agreements and customary international law provide a framework within which...(the Bill of Rights) can be evaluated and understood and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Interim American Commission on Human Rights and the European Court of Human Rights, had in appropriate cases, report of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions”.<sup>1070</sup>

Dugard<sup>1071</sup> notes that international law is not foreign law and as such, South African courts may take judicial notice thereof as if it forms part of the common law.

## 5.5 Social security as a human right

As a precursor, it is important to define the concept human rights. The philosophers speak about these human rights. These are rights we enjoy as a matter of political morality<sup>1072</sup> and whose existence is not dependent on any legal recognition.<sup>1073</sup> Because they are human rights, they are considered global baseline standards, and they therefore have a minimalist character.<sup>1074</sup> Islam

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<sup>1070</sup> *S v Makwanyane* para 35.

<sup>1071</sup> Dugard J *Essays in honour of Ellison Kahn, the place of public international law in South African Law* (Juta & Co. Ltd, 1989) 119.

<sup>1072</sup> Campbell T ‘Human rights: Moral or legal obligation’ in Kinley D Sadurski W and Walton K *Human rights old problems, new possibilities* (UK, Edward Elgar Publishing Limited, 2013) 1-26.

<sup>1073</sup> Nickel J *Making sense of human rights* 2<sup>nd</sup> ed (Oxford, Blackwell Press, 2007) 9-10. For further reading in this regard, see Griffin J *On human rights* (Oxford University Press, 2008); Beitz C *The idea of human rights* (Oxford University Press, 2009); Wellman C *The moral dimensions of human rights* (Oxford University Press, 2010); Shue H *Basic rights: Subsistence, affluence, and US foreign policy* 2<sup>nd</sup> ed (Princeton University Press, 1980); Davy U ‘Social citizenship going international: Changes in the reading of UN-sponsored economic and social rights’ (2013) Vol.22 *International Journal of Social Welfare* 18-20.

<sup>1074</sup> The ILO recommendations concerning National Floors of Social Protection, reaffirmed that the right to social security is a human right, and acknowledging that the right to social security is, along with promoting employment, an economic and social necessity for development and progress, and recognising that social security is an important tool to prevent and reduce poverty, inequality, social exclusion and social insecurity, to promote equal opportunity and gender and racial equality, and to support the transition from informal to formal employment, and considering that social security is an investment in people that empowers them to adjust to changes in the economy and in the labour market, and that social security systems act as automatic social and economic stabilizers, help stimulate

argues that human rights are “inborn and inherent in all human beings by virtue of their birth as human beings and by the nature of their humanity”.<sup>1075</sup> He further asserts that human beings bear these rights wherever they go, and anywhere they are.<sup>1076</sup> According to him, nationality is immaterial to human rights.<sup>1077</sup>

Nickel<sup>1078</sup> gives a comprehensive definition of human rights. His explanation of human rights can be summarised as follows:

...rights are claims by right-holders against addressees,<sup>1079</sup> who are usually, though not only states, that are held by all persons, are high priority or urgent norms, are numerous and specific claims (for example the right to fair trial, social security) instead of few and highly abstract claims (for example the right to dignity and equality), are normative claims whose truth is not dependent on legal recognition, and are meant to be minimum standards instead of a complete statement of what is just (for example to say our human rights are satisfied is not to say that some situation is just, any more than that a minimum wage is a just wage).

Within this context, it is submitted that human rights must be understood as rights that belong to the individual because of being a human being and for no other reason.<sup>1080</sup> Some scholars argue that this definition of human rights is an important distinguishing feature of human rights in practice and theory.<sup>1081</sup> The

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aggregate demand in times of crisis and beyond, and help support a transition to a more sustainable economy, and considering that the prioritisation of policies aimed at sustainable long-term growth associated with social inclusion helps overcome extreme poverty and reduces social inequalities and differences within and among regions, and recognizing that the transition to formal employment and the establishment of sustainable social security systems are mutually supportive, See The ILO ‘Recommendations concerning National Floors of Social Protection’ 2012 (No.202) available at <http://www.ilo.org/dyn/normlex...>(date of use 20 November 2013).

<sup>1075</sup> Islam M *International law and current concepts and future directions* (Australia, Butterworths 2014) 556.

<sup>1076</sup> Islam (note 1075 above) 557.

<sup>1077</sup> Islam *ibid*.

<sup>1078</sup> Nickel (note 1073 above).

<sup>1079</sup> Cf Barrientos A and Leisering L ‘Social citizenship for the global poor? The worldwide spread of social assistance’ (2013) Vol.22 *International Journal of Social Welfare* 59-61.

<sup>1080</sup> Mubangizi C *The Protection of human rights in South Africa: A legal and practical guide* 2<sup>nd</sup> ed (Juta & Co. Ltd, 2013) 4 -13. See also Huber J ‘What makes human rights Political? A Kantian critique’ (2013) Vol.7 (2) *Journal of Human Rights* 129; See also Weiss T *et al The United Nations and changing world of politics* 7<sup>th</sup> ed (United States of America, Westview Press, 2014) 165-166.

<sup>1081</sup> Nickel (note 1073 above) 7-36; Griffin J *On Human Rights* (Oxford University Press, 2008) 33, and on welfare rights in particular see pages 82-184. For a rejection of this view, see Tasioulas J ‘Are human rights essentially triggers for intervention?’ (2009) 4 *Philosophy Compass* 938; Cf Papisca A ‘Relevance of human rights in the global space of politics:

theory and practice of human rights implies that rights claims have a degree of priority over other political claims and procedures. Mpedi<sup>1082</sup> asserts that the right to have access to social security, which includes social assistance, is a fundamental right that should be enjoyed by everyone.

Other scholars consider social rights as having an aspirational or ‘manifesto’ character.<sup>1083</sup> It is argued that the critics who view human rights as mere aspirations, have now been convinced by philosophers of human rights that social rights are very much a species of human rights, largely for similar reasons accepted by international lawyers and the United Nations.<sup>1084</sup> The Universal Declaration of Human Rights states:

Everyone, as a member of society, has the right to social security and Article 25 formulates it in a more precise way as ...the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>1085</sup>

Enshrined in major international human rights instruments such as the Universal Declaration of Human Rights (UDHR)<sup>1086</sup> and the International Covenant on

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How to enlarge democratic practice beyond state boundaries and build up a peaceful world order’ in Koen De Feyters *et al The local relevance of human rights* eds (Cambridge, 2011) 91.

<sup>1082</sup> Mpedi G ‘Charity begins – but does not end – at home, *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC)’ (2005) *OBITER* 174.

<sup>1083</sup> Feinberg J *Social philosophy* (Englewood-Cliffs, Prentice – Hall, 1973) 67-95;Ulrike D ‘How human rights shape social citizenship: On citizenship and the understanding of economic and social rights’ (2014) Vol.13 (2) *Washington University of Global Studies Law Review* 207-212; O’Neill O ‘The dark side of human rights’ (2005) 81 (2) *International Affairs* 427; For further reading on the objections to the justiciability of economic social and cultural rights see Neier A ‘Social and economic rights: A critique’ *Human rights brief* 13-2 (2006), 1-3; Rosenberg G *The hollow hope: Can courts bring about social change?* (Chicago, University of Chicago Press, 1991);Tomuschat C ‘An optional protocol for the international covenant on economic, social and cultural rights?’ in *Weltinnenrecht - Liber amicorum Jost Delbrück* (Berlin, Duncker & Humblot, 2005) 815-834;Cf Openshaw K and Mansell W *International law: A critical introduction* (Hart Publishing, Oxford and Portland, Oregon, 2013)126-135.

<sup>1084</sup> Shue H *Basic rights: Subsistence, affluence, and US foreign policy* 2<sup>nd</sup> ed (Princeton University Press, 1980); Sen A ‘Elements of a theory of human rights’ (2004) 32 *Philosophy and Public Affairs* 345-348; Wellman C *The moral dimensions of human rights* (Oxford University Press, 2010) 12-13.

<sup>1085</sup> Article 22 of the Universal Declaration of Human Rights.

<sup>1086</sup> Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948; Article 22.

Economic, Social and Cultural Rights (ICESCR),<sup>1087</sup> the right to social security has been fully recognised by the international community as a basic human right.<sup>1088</sup> As such, it should not only be of concern to individual member states to ensure that it is properly applied within their national boundaries; it should also be the responsibility of the entire international community to guarantee its implementation worldwide.

As one of the main objectives of the ILO as laid down in the 1944 Declaration of Philadelphia<sup>1089</sup> and further restated at the International Labour Conference (ILC) in 2001,<sup>1090</sup> the establishment of social security systems of a universal nature is regarded by the international community as the appropriate mechanism for the realisation of this right. In the same perspective, the need for increased international solidarity in order to achieve progress in the development of national social protection systems was reaffirmed by the World Commission on the Social Dimension of Globalisation in 2004.<sup>1091</sup>

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<sup>1087</sup> Adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966; Article 9. For further reading on the legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights see, Vierdag E in De Schutter O *Economic, social and cultural rights as human rights* (UK, Edward Elgar Publishing, 2013)1-39.

<sup>1088</sup> The Committee on Economic, Social and Cultural Rights Fact Sheet No.16 (Rev.1) available at <http://www.ohchr.org/documents/publications/factsheet16rev.1en.pdf> (date of use 20 October 2014); See also Committee on Economic, Social and Cultural Rights, General Comment 19, the right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008) available at <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> (date of use 20 October 2014); The numerous international declarations and conventions also recognises social security as a fundamental human right see for example the Declaration of Philadelphia (1944) which is an integral part of the Constitution of the International Labour Organisation, and the Universal Declaration of Human Rights (1948) adopted by the General Assembly of the United Nations.

<sup>1089</sup> Adopted by the International Labour Conference, 26th session, 1944; Article III (f) recognizes the "solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care".

<sup>1090</sup> See ILO Resolution and conclusions concerning social security (International Labour Conference, 89th session, 2001).

<sup>1091</sup> In this respect, the Commission further stated that basic social security constitutes a recognised human right and a global responsibility.

While social security constitutes a basic right for all, the interesting question that is associated with social rights claims is: What type of normative theory supports the claims of urgency and priority that we associate with human rights discourse?<sup>1092</sup> One is dignity,<sup>1093</sup> or natural rights. The link between universal social security and the concepts of human rights, democracy and the rule of law might best be understood by reference to the notions of human dignity and social cohesion.<sup>1094</sup> Mishra agrees that social rights are not about reducing inequality *per se* but rather about ensuring that a minimum of basic resources and opportunities are available to all, to ensure a life of human dignity and social inclusion.<sup>1095</sup> The ILO General Conference concluded in 2001 that:

Social security is very important for the well-being of workers, their families and the entire community. It is a basic human right and a fundamental means for creating social cohesion, thereby helping to ensure social peace and social inclusion. It is an indispensable part of government social policy and an important tool to prevent and alleviate poverty. It can, through national solidarity and fair burden sharing, contribute to human dignity, equity and social justice. It is also important for political inclusion, empowerment and the development of democracy.<sup>1096</sup>

Promoting social security as a human right,<sup>1097</sup> giving care and social protection, turns out to be a very effective instrument for the extension of social security coverage through activating the role of civil society and the social partners. This is more likely to happen in societies based on the rule of law where legal culture and services, enforcement measures and litigation procedures greatly enhance the bargaining power of non-governmental organisations and local communities

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<sup>1092</sup> For further reading on the rights-based discourse for social protection, see Munro T 'Risk, needs and rights: Compatible or contradictory bases for social protection' in Barrientos A and Hulme D *Social protection for the poor and the poorest: Concepts, policies and politics* (Palgrave Macmillan, 2008) 30-34.

<sup>1093</sup> The CESCR describes the purpose of the right to social security in General Comment No.19 as follows, "The right to social security is of central importance in guaranteeing human dignity for all persons when they faced with circumstances that deprive them of their capacity to fully realize their Covenant rights".

<sup>1094</sup> King J *Judging social rights* (Cambridge University Press, 2012) 22-23.

<sup>1095</sup> Mishra R 'Social rights as human rights: Globalising social protection' (2005) Vol.48 (9) *International Social Work* at 17-18.

<sup>1096</sup> ILO 'Conclusions concerning social security' ILC89-PR16-312-En.Doc(2001), 16/33, [2] available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc89/pdf/pr-16.pdf> (date of use 20 October 2014).

<sup>1097</sup> Cf Krennerich M 'Social security – Just as much a human right in developing countries and emerging markets' (2014) Vol.47 (1) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 105-122.

*vis-à-vis* national bureaucracies and other Centers of power. It is argued that a rights-based approach to social security has the potential of empowering individuals to protect themselves against social risks.<sup>1098</sup>

The culture of rights consciousness within communities can foster citizen's mobilisation against various forms of discrimination and division and help create a kind of social consensus on the goal of social security for all. Another justification for social rights as human rights is found in the idea of freedom. This is sometimes coined normative agency, or autonomy, or capabilities.<sup>1099</sup>

King embraces freedom as a cornerstone of meaningful choices about the lives we want to lead. In addition, freedom denotes not being subject to another person's arbitrary control, about having the capacity to understand political complexities and run for office, and about having the health and income security that allows one to frame and act out a life plan. Furthermore, Rawls believes that a social minimum, though less egalitarian ought to be guaranteed and legally enforceable as a constitutional essential.<sup>1100</sup> Another justification for defending social human rights is found in the idea of social citizenship, civic republicanism, and deliberative democracy.<sup>1101</sup> This justification considers social rights as

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<sup>1098</sup> Cf Jhabwala R 'Civil society, participation and rights-based approaches to social justice' (2010) Vol.35 (2) *The Journal of Decision Makers* 78-80; See also Pawar M 'The adoption of a rights-based approach to welfare in India' (2012) Vol.28 (1) *Journal of Comparative Social Welfare* 35-38.

<sup>1099</sup> King (note 1094 above).

<sup>1100</sup> See Rawls J *Justice as fairness: A restatement* (Cambridge, MA: Harvard University Press, 2001); Rawls J *Theory of justice* (Cambridge, MA: Harvard University Press, 1971).

<sup>1101</sup> Cf Hamilton M 'Democracy and public service' in Richard C *Democracy and public administration* (M.E. Sharpe, Inc, 2007) 3-4; Christina M 'Universal democracy: An international legal right on the pipe dream of the west' (1994-1995) *New York University Journal of International Law and Politics* 289-294. The major international instruments which show the link between democracy and human rights are the International Bill of Human Rights (1948), which comprises the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights, 999 U.N.T.S 171; the International Covenant on Economic Social and Cultural Rights, 993 U.N.T.S.3; the European Convention for the Protection of Human Rights and Fundamental Freedoms (Nov.4,1950,312 U.N.T.S. 221; and the African Charter on Human and People's Rights (June.27, 1981); For further reading on democracy and human rights, see Fukuyama F *The end of history and the last man* 2<sup>nd</sup> ed (London, 2006); Kateb G 'Moral distinctiveness of representative democracy'

instrumental in support of meaningful participation in political decision-making and political outcomes.<sup>1102</sup>

In short, the concept of public participation can be construed as a process through which stakeholders influence the decisions and control the resources which affect them.<sup>1103</sup> Friedman posits that public participation should not only be seen as the product of government willingness to create formal channels for citizen participation. Instead, we need to see it as a process in which citizens exercise their rights, employ methods and channels of their choice (within the constraints imposed by the democratic order), in order to compel governments to deal with issues on their terms, rather than those which are most convenient to power-holders.<sup>1104</sup>

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(1981) *Ethics* 357-374; Ankersmit R *Aesthetic politics: Political philosophy beyond fact and value* (1997) 21-63.

<sup>1102</sup> Cf Weiner D *et al* 'Apartheid representations in a digital landscape: GIS, remote sensing, and local knowledge' in Kiepersol, South Africa, cartography and geographic information systems (1995) 30-44; See also White S 'Depoliticising development: The uses and houses of participation' (1996) 16 *Development in Practice* 6-17; Forester J 'Making participation work when interest conflict' (2006) 72 *Journal of the American Planning Association* 447-456; Gbaffou C 'Introduction: The place of participation in South Africa' (2008) 66 *Transformation* 1-7; Arnstein S 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of Planners* 216-224; Lijphart A 'Unequal participation: Democracy's unresolved dilemma' (1997) 91 *American Political Science Review*, University of California 2-9; For further reading on the concept of public participation, see Surbun V 'Hearing the people on the street testing the extent of public participation in Durban's street-renaming process' (2003) Vol.34 (2) *OBITER* 369-376.

<sup>1103</sup> World Bank Report (1995).

<sup>1104</sup> Friedman S 'Participatory governance and citizen action in post-apartheid South Africa' (2006) paper for International Institute of Labour Studies, 8-11; Smith R *et al* 'The people shall govern: A research report on public participation in policy processes' (2006) Centre for the study of Violence and Reconciliation, South Africa 12-21; See also Warren M 'Can Participatory democracy produces better selves? Psychological dimensions of Habermas's discursive model of democracy' (1993) *Political Psychology* 209-233; Mackenzie W 'Reclaiming the commons: Participatory democracy and Revitalising citizens' role in the management of community halls' (2012) *Practice Reflexions* 55-59; Ray K *et al* Public officials and community involvement in local services 2008 available at <http://www.jrf.org.uk/system/files/2248> - governance; Bruce L 'Public policy and public participation: Engaging citizens and community in the development of public policy' (2003) Population and Public Health Branch, Atlantic Regional Office, Health Canada 1-47 available at [http://www.phacaspc.gc.ca/canada/regions/atlantic/pdf/pub\\_policy\\_partic\\_e.pdf](http://www.phacaspc.gc.ca/canada/regions/atlantic/pdf/pub_policy_partic_e.pdf) (date of use 22 November 2012) 318.

All of these different justifications for social human rights are insightful, and an overlapping consensus between them about the need for social rights of some sort is politically significant. Lastly, justifications for social security as a human right<sup>1105</sup> presuppose the following core human interest. Firstly, it means absence of physical suffering, basis of self-respect. Secondly, autonomy, that is a vision of people controlling to some degree, their own destiny, fashioning it through successive decisions throughout their lives. In sum, it can be argued that the concept of human rights has its origin in religion, humanitarian traditions and the increasing struggle for freedom and equality in all parts of the world.<sup>1106</sup> Mubangizi argues that the notion of human rights is couched in the Bible to mean that people should treat each other in the same way they themselves would like to be treated, thereby espousing the idea of equality.<sup>1107</sup>

## **5.6 The international human rights instruments relating to social security**

As discussed above, social security is a fundamental human right recognised in a number of international declarations and conventions, some of which South Africa has ratified, thereby agreeing to be legally bound by them under international law.

In most cases, the ILO Conventions and Recommendations on social security provide a benchmark against which the South African system can be measured. This benchmark is relevant in respect of, among others, the general responsibility of the state, the role played by cash transfers, and the developmental and integrated approach towards the system of social security.

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<sup>1105</sup> Mpedi G 'Social security disputes resolution and the need for a coherent adjudication' Chapter 7 in *The dispute resolution digest 2013*, Tokiso report on the state of labour resolution in South Africa 2013, 93.

<sup>1106</sup> Mubangizi (note 1080 above) 5.

<sup>1107</sup> Mubangizi *ibid*; See also Matthew 7: 2 and Luke (6)31.



Domestic social security legislation often contains provisions that affect social security right of its citizens. Social cash transfers are the main type of social assistance used in developing countries, and are also recognised as a critical support for solidarity and development in these countries.<sup>1108</sup> International instruments' protecting social security rights (discussed above) generally adopts a holistic approach to social security, and provides a minimum core protection to social security. The minimum core approach seeks to establish a minimum legal content to claims of economic and social rights.<sup>1109</sup>

Various international bodies have developed detailed standards on social security, and socio-economic rights generally. For example, the independent experts and the UN Special Rapporteur on the economic, social and cultural rights and bodies such as the UN Committee on Economic, Social and Cultural Rights have played an important role in protecting, monitoring and defining the content and scope of international law on economic, social and cultural rights, including the right to social security.<sup>1110</sup>

It is submitted that Parliament and government should consider these international standards in drafting legislation and policies relevant to social

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<sup>1108</sup> Cf Samson M *Cash transfers to improve the protection and care of vulnerable children and to empower families in the context of the HIV epidemic in Pappua New Guine – Conceptual Framework (2004)* Department for Community Development, the Institute of National Affairs in Papua New Guinea and UNICEF 3 available at [http://www.unicef.org/eapro/PNG\\_Conceptual\\_Booklet\\_041108\\_V5\\_FINAL.pdf](http://www.unicef.org/eapro/PNG_Conceptual_Booklet_041108_V5_FINAL.pdf) (date of use 20 October 2014).

<sup>1109</sup> For a critical discussion on the minimum core, see Lehmann K 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) Vol.22 (1) *American University International Law Review* 163-196; See also De Schutter O *Economic, social and cultural rights as human rights* (UK, Edward Elgar Publishing, 2013) 293-450.

<sup>1110</sup> Cf Berdyev S *et al* 'Reporting human rights violations to UN Special Procedures – An introductory guide' (2011) *World Alliance for Citizen Participation* (CIVICUS) 3-19. For further reading, see UN Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties obligations (Art. 2, para 1 of the Covenant), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (date of use 20 October 2014); UN 'Special Rapporteur on extreme poverty and human rights, Guiding Principles on extreme poverty and human rights' (2012) available at <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx> (date of use 20 October 2014).

security in South Africa. They must also guide the courts in interpreting the right of access to social security in the Constitution.

#### *5.6.1 United Nations Charter 1945 (UN Charter)*

The founding fathers of the UN Charter were weary of the untold suffering and sorrow that befell the international community during the Second World War, hence in its preamble, the Charter makes it clear that:

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life...

With the foregoing statement in mind, it becomes clear that the member states of the UN Charter sought to address the issue of human rights protection, the promotion of higher standards of living, full employment, and conditions of economic and social progress and development, solutions of international economic, social, health, and related problems.<sup>1111</sup>

In the area of socio-economic rights, this meant that nations committed themselves to achieve international cooperation in solving international problems of economic, social, cultural, humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>1112</sup> Furthermore, the forefathers of the United Nations were committed to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and lastly, to employ international machinery for the promotion of the economic and social advancement of all people”.<sup>1113</sup>

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<sup>1111</sup> Cf UN Charter, Article 55(a).

<sup>1112</sup> Cf UN Charter, Article 55(b) and (c).

<sup>1113</sup> See the Preamble of the UN Charter.

### 5.6.2 *United Nations Universal Declaration of Human Rights of 1948*

The Universal Declaration of Human Rights states that “everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.<sup>1114</sup>

The Declaration recognises that the ILO, based on the mandate contained in its Constitution, including the Declaration of Philadelphia (1944), has the obligation to develop social security programmes. The latter should achieve the objectives of full employment and the raising of standards of living, minimum living wage and the extension of social security measures to provide a basic income to all in need, along with all the other objectives set out in the Declaration of Philadelphia.

In recent years, ILO work on social security has been conducted within the framework of the Global Campaign on Social Security and Coverage for all, as mandated by the International Labour Conference of 2001.<sup>1115</sup> The Campaign focuses on the fact that majority of people in developing countries are regarded as poor.<sup>1116</sup>

The ILO considers that the best strategy for progress is for these countries to put in place a set of basic social security guarantees for all residents,<sup>1117</sup> while planning to move towards higher levels of provision as envisaged in the Social Security (Minimum Standards) Convention as their economies develop. Despite

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<sup>1114</sup> Article 22 of the Universal Declaration of Human Rights.

<sup>1115</sup> ILO ‘Social security for all Building social protection floors and comprehensive social security systems ILO’ (2012) 1-41; See also Kulke U ‘The present and future role of ILO standards in realising the right to social security’ (2007) Vol.60 (2/3) *International Social Security Review* 124-127; Kannan K ‘Social security in a globalising world’ (2007) Vol.60 (2/3) *International Social Security Review* 19-23.

<sup>1116</sup> Kannan *ibid.*

<sup>1117</sup> ILO ‘Social security for all – Building social protection floors and comprehensive social security systems’ Geneva (2012) VI available at [http://www.ilo.org/wcmsp5/groups/public/--ed\\_protect/---soc\\_sec/documents/publication/wcms\\_secsec\\_34188.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_protect/---soc_sec/documents/publication/wcms_secsec_34188.pdf) (date of use 20 October 2014).

the fact that social security is recognised as a human right,<sup>1118</sup> only a minority of the world's population really enjoys that right,<sup>1119</sup> while the majority lacks comprehensive and adequate coverage.<sup>1120</sup>

The ILO encourages all societies to develop strategies to enhance their levels of social security, guided by its social security standards as their economies mature and fiscal space widens.<sup>1121</sup> According to the ILO, social security systems contribute not only to human security, dignity, equity and social justice, but also provide a foundation for political inclusion, empowerment and the development of democracy.<sup>1122</sup>

The ILO strategy for the extension of social security includes several key elements. These includes “establishing and maintaining of *social protection floors* as a fundamental element of national social security systems (horizontal dimension); and *pursuing strategies for the extension of social security* that progressively ensure higher levels of social security to as many people as possible, guided by ILO social security standards (vertical dimension)”.<sup>1123</sup>

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<sup>1118</sup> See ILO ‘A universal challenge: Social security for the world’ available at <http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/lang--en/index.htm> (date of use 20 October 2014).

<sup>1119</sup> ILO ‘World social protection report – Building economic recovery, inclusive development and social justice’ Geneva 2014/15, 2 available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_245201.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_245201.pdf) (date of use 20 October 2014).

<sup>1120</sup> Bailey C ‘Extending social security coverage in Africa, Social Security Policy’ (Geneva), 2-3 available at <http://www.ilo.int/public/english/protection/socsec/pol/campagne/files/addispaper.pdf> (date of use 20 October 2014); See also ILO *Social security: Issues, challenges and prospects’ Report VI (2001)* available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc89/pdf/rep-vi.pdf>, 3-4 (date of use 20 October 2014); Van Ginneken W ‘Social security for the excluded majority: Case studies of developing countries’ Genève, International Labour Office (1999) 33.

<sup>1121</sup> ILO ‘Social security for all – Building social protection floors and comprehensive social security systems’ Geneva (2012) VI available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---soc\\_sec/documents/publication/wcms\\_secsoc\\_34188.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_secsoc_34188.pdf) (date of use 20 October 2014).

<sup>1122</sup> ILO ‘Global campaign on social security for all’ available at [http://www.ilo.org/global/about-the-ilo/media-center/press-releases/WCMS\\_005285/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/media-center/press-releases/WCMS_005285/lang--en/index.htm) (date of use 20 October 2014).

<sup>1123</sup> ILO ‘Social security for all...’ (note 1121 above).

In April 2009, at one of its joint Crisis Initiatives, the UN System Chief Executives Board for Coordination adopted the social protection floor initiative.<sup>1124</sup> The ILO, together with the World Health Organisation (WHO) and a number of collaborating agencies, are leading this initiative.<sup>1125</sup> At its core is the building of a coalition of international agencies and donors, supporting countries in their efforts to plan and implement sustainable social transfer schemes and essential social services based on the concept of a social protection floor.<sup>1126</sup>

This concept was endorsed as a part of the Global Jobs Pact that the International Labour Conference adopted in June 2009.<sup>1127</sup> This Pact requires countries that do not yet have extensive social security to build adequate social protection for all. They should also draw on a basic social protection floor including:

- Access to health care;
- Income security for the elderly and persons with disabilities; and
- Child benefits and income security combined with public employment guarantee schemes for the unemployed and the working poor.

The Pact urges the international community to provide development assistance, including budgetary support, to build up a basic social protection floor on a national basis.<sup>1128</sup>

In recent years, the ILO and other agencies has published a number of reports and other documents discussing the need for social security, and gathering

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<sup>1124</sup> ILO 'Social protection floor initiative, the sixth initiative of the CEB on the global financial and economic crisis and its impact on the work of the UN system' Geneva (2009) 1-4 available at <http://www.ilo.org/public/english/protection/spfag/download/background/spfframework.pdf> (date of use 20 October 2014).

<sup>1125</sup> ILO 'Social protection floor initiative...' *ibid.*

<sup>1126</sup> ILO 'Social protection floor initiative...' *ibid.*

<sup>1127</sup> ILO 'Summit on the global jobs crisis' (Geneva, 15-17 June 2009): International Labour Conference, 98th Session, 2009; See also ILO 'Stemming the crisis: World leaders forge Global Jobs Pact' (2009) No.66 *World of Work* 4-7.

<sup>1128</sup> See also ILO 'Stemming the crisis...' *ibid.*

evidence on its positive economic and social impacts and on the costs and affordability of providing at least basic social protection for all in need in the poorest countries.<sup>1129</sup>

Wilson<sup>1130</sup> asserts that the UN Declaration of Human Rights, in particular article 22, is often quoted because of its reference to everyone's 'right to social security'. But the substance is added by article 25's reference to 'the right to a standard of living adequate for the health and wellbeing' of everyone. According to him, the Declaration contains neither enforceable right for citizens or binding obligations on Member States. In short, it is submitted that the Universal Declaration of Human Rights is a guiding instrument that sets benchmarks that member states should gauge their domestic laws, in particular the fulfilment of human rights protection to their citizens.<sup>1131</sup> In the words of Hurst,<sup>1132</sup> the UN

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<sup>1129</sup> Wouter van Ginneken 'Extending social security: Policies for developing countries' ESS Paper No. 13, Geneva, International Labour Office (2003) 8-15 available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/documents/publication/kd00061.pdf> (date of use 20 October 2014); See also García A and Gruat J 'Social protection – A life cycle continuum investment for social justice, poverty reduction and sustainable development' Geneva, International Labour Office (2003) 12-20 available at <http://www.ilo.org/public/english/protection/download/lifecycl/lifecycle.pdf> (date of use 20 October 2014); ILO *World social security report – Providing coverage in times of crisis and beyond* Geneva, International Labour Office (2010/2011) 13-120 available at [http://ssreform.treasury.gov.za/Publications/Worldpercent20Socialpercent20Securitypercent20Reportpercent20Providingpercent20Coveragepercent20inpercent20Timespercent20ofpercent20Crisispercent20andpercent20Beyondpercent20\(ILO,percent202010\).pdf](http://ssreform.treasury.gov.za/Publications/Worldpercent20Socialpercent20Securitypercent20Reportpercent20Providingpercent20Coveragepercent20inpercent20Timespercent20ofpercent20Crisispercent20andpercent20Beyondpercent20(ILO,percent202010).pdf) (date of use 20 October 2014); Piece T 'Social protection: A development priority in the post-2015 UN development agenda, UN system task team on the post -2015 UN development agenda' ILO 3-11 available at [http://www.un.org/millenniumgoals/pdf/Thinkpercent20Pieces/16\\_social\\_protection.pdf](http://www.un.org/millenniumgoals/pdf/Thinkpercent20Pieces/16_social_protection.pdf) (date of use 20 October 2014); Ehmke E and Skaletz M 'Strengthening social security in economic crises – The need for a social protection floor' FSB briefing paper 14 October 2009, 2-9 available at <http://library.fes.de/pdf-files/iez/global/06739.pdf> (date of use 20 October 2014).

<sup>1130</sup> Wilson J 'Some social policy implications of a right to social security' in Langendonck J *et al* (eds) *The right to social security social* (Europe Series, Intersentia, 2007) 65.

<sup>1131</sup> See also Glendon M 'Knowing the Universal Declaration of Human Rights' (1998) Vol.73 *Notre Dame Law Review* 1153 -1164; Schwelb E 'The influence of the Universal Declaration of Human Rights on international and national law...' (1929-1969) Vol. 53 *The American Society of International Law* 217-229.

<sup>1132</sup> Hurst H 'The status of the Universal Declaration of Human Rights in national and international law' (1996) Vol.25 *Journal of International and Comparative Law* 287-290. See

Declaration of Human Rights remains the primary source of global human rights standards and is the basis for most human rights instruments.

### 5.6.3 *International Covenant on Economic, Social and Cultural Rights, 1996*

The most important international instrument relating to socio-economic rights is the International Covenant on Economic, Social and Cultural Rights, (ICESCR).<sup>1133</sup> Approximately 162 states ratified the Covenant.<sup>1134</sup> South Africa has signed and ratified the ICESCR together with its Optional Protocol.<sup>1135</sup> The South African Human Rights Commission believes that the ratification will enhance the ability of the government to play a meaningful role as one of the key advocates for social, economic and cultural rights in the international arena. It will also enable the country to keep pace with those countries that have ratified the Covenant and thus accelerate and improve the respect and observance of socio-economic rights in South Africa.<sup>1136</sup>

The substantive rights that are recognised by the Covenant in the context of this study, includes: the right to work, the right to social security,<sup>1137</sup> special protection for the family,<sup>1138</sup> mothers and children, an adequate standard of living, including food, clothing, housing and the right to health care services.<sup>1139</sup> The basic obligation imposed by the Covenant on a member state is to take steps...to the maximum of its available resources, with a view to achieving progressively the

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also Gruskin S 'Fifty years of the Universal Declaration of Human Rights' (1998) Vol.3 (2) *Harvard School of Public Health/François-Xavier Bagnoud Center for Health* 3-6.

<sup>1133</sup> Vierdag E 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights' in Schutter O *Economic, Social and Cultural Rights as human rights* (Edward Elgar Publishing, 2013) 3-39.

<sup>1134</sup> United Nations Treaty collection status as at 02-12-2014, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=INDandchapter=4andlang=en\(date of use 02 December 2014\).mtdsg\\_no=IV-3and](https://treaties.un.org/pages/ViewDetails.aspx?src=INDandchapter=4andlang=en(date%20of%20use%2002%20December%202014).mtdsg_no=IV-3and)

<sup>1135</sup> South African Human Rights Commission 18 January 2015 available at <http://www.sahrc.org.za/home/index.php?ipkArticleID=318> (date of use 22 January 2015).

<sup>1136</sup> South African Human Rights Commission *ibid*.

<sup>1137</sup> Article 25(1) of the ICESCR.

<sup>1138</sup> Article 10 of the ICESCR.

<sup>1139</sup> For further reading on the status of South Africa regarding the ICESCR, see Masanque I 'Progressive realisation without the ICESCR: The viability of South Africa's socio-economic rights framework, and its success in the right to access health care' (2012) Vol.43 (2) *California Western International Law Journal* 462-487.

full realisation of the right by all appropriate means, including the adoption of legislative measures.<sup>1140</sup>

This provision has been described as imposing an obligation to move as expeditiously and effectively as possible towards realising the listed objectives.<sup>1141</sup> The primary responsibility for the enforcement of the Covenant lies with the UN Committee on Economic, Social and Cultural Rights. The Committee was established in 1987 to monitor the compliance of member states with their obligations under the Covenant.<sup>1142</sup>

The Committee consists of 18 independent experts, elected by the Economic and Social Council of the UN for a four-year term.<sup>1143</sup> However, the Committee does not have adjudicative functions. Its principal activities are the adoption of 'General Comments' on the content of the ICESCR and the examination of reports submitted by member states.<sup>1144</sup> Since 1991, the Committee has drafted Optional Protocol to the ICESCR to help to reinforce the protection of economic and cultural rights.<sup>1145</sup>

In addition, in terms of the ICESCR, member states have to submit periodic reports to the Committee on the measures taken and progress made with respect

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<sup>1140</sup> Article 2 (1) of the ICESCR; For further reading on the progressive realisation of ICESCR rights, see Saul B *et al* *The International Covenant on Economic, Social and Cultural Rights – Commentary, cases and materials* 1<sup>st</sup> ed (UK, Oxford University Press, 2014) 133-172.

<sup>1141</sup> See Article 2 of the ICESCR.

<sup>1142</sup> ILO 'The Committee on Economic, Social and Cultural Rights' available <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> (date of use 02 December 2014).

<sup>1143</sup> ILO 'The Committee on Economic, Social and Cultural Rights' *ibid*.

<sup>1144</sup> ILO 'The Committee on Economic, Social and Cultural Rights' (note 1142 above).

<sup>1145</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> (date of use 20 March 2015).



to their obligations.<sup>1146</sup> A first report is normally due within two years of ratification of the Covenant and subsequent reports are required within a four-year cycle.<sup>1147</sup>

It is important to note that although the General Comments do not bind South Africa, they are generally regarded as a primary source for determining the content of international socio-economic rights and have regularly been referred to by the Constitutional Court.<sup>1148</sup> Furthermore, according to the Committee, a state's obligations under the Covenant do not end with the duty to refrain from interference with the enjoyment of the socio-economic rights. The rights have an additional positive dimension in that they can be adequately realised only by taking positive steps directed towards fulfilling the rights.<sup>1149</sup>

In terms of the Covenant, socio-economic rights require two forms of action from the state. The first action requires the state to adopt... legislative measures.<sup>1150</sup> This means that the creating of a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. The second action requires the state to implement other measures and programmes designed to assist individuals in realising their rights.<sup>1151</sup>

The positive dimension of the international socio-economic rights is qualified by the use of the phrase 'to the maximum of its available resources', and with a view to achieving 'progressively the full realisation of the right'. The concepts 'to the

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<sup>1146</sup> Article 2 of the ICESCR.

<sup>1147</sup> For further reading on the Human Rights Council and its mechanisms see, United Nations 'The Human Rights Council – A practical guide' (2014) United Nations Office Switzerland Geneva 5-24 available at [www.fdfa.admin.ch/publications](http://www.fdfa.admin.ch/publications) (date of use 20 March 2015).

<sup>1148</sup> See the following judgements, *Treatment Action Campaign*; *Grootboom*, and *Mazibuko*. See also Chirwa D 'An overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa' available at [http://aihr-resourcescenter.org/administrator/upload/documents/Socio-economic\\_rights\\_in\\_Africa.pdf](http://aihr-resourcescenter.org/administrator/upload/documents/Socio-economic_rights_in_Africa.pdf) (date of use 20 November 2014).

<sup>1149</sup> Fombad C 'An overview of the constitutional framework of the right to social security with special reference to South Africa' (2013) Vol.21 (1) *African Journal of International and Comparative Law* 9-10.

<sup>1150</sup> Fombad *ibid*.

<sup>1151</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) 'The nature of states parties obligations' para 4.

maximum of its available resources' and 'progressive realisation of the right' are understood to grant the state some degree of latitude/discretion in selecting the means of achieving socio-economic rights.<sup>1152</sup> Nevertheless, it is argued that this discretion has its own limitations.

For example, Currie and De Waal<sup>1153</sup> argues that the fact that the full realisation of socio-economic rights can only be achieved progressively does not alter the obligation on the state to take those steps that are within its power immediately and other steps as soon as possible. According to them, the burden is on the state to show that it is making progress towards the full realisation of the rights. They further argue that the requirement that a state take 'appropriate' steps towards the realisation of the rights confers a considerable margin of discretion on states, that there is an obligation to justify the appropriateness of the measures adopted.

Currie makes threefold crucial inference regarding the enforcement of socio-economic rights. Firstly, 'the resources scarcity argument does not relieve states of what the Committee on Economic Social and Cultural Rights term 'core minimum obligations'.<sup>1154</sup> Secondly, 'violations of socio-economic rights will occur

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<sup>1152</sup> Chenwi L 'Unpacking progressive realisation: Its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) Vol.46 (3) *De Jure* 742-769.

<sup>1153</sup> Currie I and De Waal J *The bill of rights handbook* 6<sup>th</sup> ed (Juta & Co. Ltd, 2014) 572.

<sup>1154</sup> Currie *ibid*. The concept of minimum core obligation was developed by the [United Nations Committee on Economic, Social and Cultural Rights] to describe the minimum expected of a state in order to comply with its obligation under the [International Covenant on Economic, Social and Cultural Rights]. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a 'minimum essential level' that must be satisfied by the states parties. The committee developed this concept based on 'extensive experience gained by [it] ...over a period of more than a decade of examining States parties' reports'. The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the general comment 'as a means of developing a common understanding of the norms by establishing a prescriptive definition.' Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law (Extract by Jacob J in *Government of the Republic of South Africa and Others v Grootboom and Others* para 31).

when the state fails to satisfy obligations to ensure the satisfaction of minimum essential levels of each of the rights, or fails to prioritise its use of its resources so as to meet its core minimum obligations'. These core minimum obligations apply, unless the state can show that its resources are 'demonstrably inadequate' to allow it to fulfil its duties. Thirdly, 'the fact that obligations are to be realised progressively does not mean that the state may postpone its obligations to some distant or unspecified time in the future'.

A state claiming that it is unable to carry out its obligations because of resource scarcity is under a burden to prove that this is the case. For example, in General Comment 3, the Committee affirms:

...any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources ....In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>1155</sup>

*5.6.4 International social security law and social security standard setting*  
Paskalia<sup>1156</sup> defines international social security law, as rules that are promulgated by international organisations, for example the ILO, the European Council or the European Community. He further asserts that the concept 'international social security law' means the law of social security that is enacted by international organisations imposing on their member states the obligation to adapt their national social security laws to international standards.<sup>1157</sup>

The term international social security law can also be used to describe the immediate international relationship between national social security systems. It is noteworthy that states are at liberty to develop their systems in any way they

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<sup>1155</sup> Committee on Economic, Social and Cultural Rights, General Comment No.3, contained in UN Doc.E/1991/23 (1990), paras 9 and 10.

<sup>1156</sup> Paskalia V *Free movement, social security and gender in the EU* (Hart Publishing, Oxford and Portland, Oregon, 2007) 46.

<sup>1157</sup> Paskalia *ibid.*

wish, provided they do not fall below the criteria established in the international social security rules.<sup>1158</sup>

As it has been stated, setting international social security standards has been one of the core activities of the ILO since its establishment in 1919.<sup>1159</sup> The preamble of the ILO Constitution sets forth a number of goals in this respect, including, the protection of workers against sickness, disease, and injury arising out of employment, the protection of children, young persons, women and provision for old age and injury.<sup>1160</sup> One of the main objectives of the ILO is to obtain social justice<sup>1161</sup> worldwide through the promotion of decent work for all<sup>1162</sup> by the setting of international labour standards.<sup>1163</sup>

The rationale for setting such worldwide applicable standards is the conviction by the world community that social justice has to be addressed collectively, and that it should not be left to bilateral agreements between states.<sup>1164</sup> The standards serve as worldwide agreed guidelines or benchmarks for the adoption of national

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<sup>1158</sup> Paskalia (note 1156 above).

<sup>1159</sup> For further reading on the origins of the International Labour Organisation, see Martin W 'The International Labour Organisation' (1926) Vol.12 (1) *The Academy of Political Science*, 400-410; Collins J 'Fifty years of the International Labour Organisation' (1970) Vol.23 (1) *Pakistan Horizon*,51-61;Samson K 'International Labour Organisation' (1980) Vol.9 (2) *Human Rights* 32-35.

<sup>1160</sup> Kulke U and Lopez G 'Social security – International standards and the right to social security', in Riedel E (ed) *Social security as a human right*, Drafting a General Comment on Article 9 ICESR- Some challenges (Berlin- Heidelberg, Springer Verlag, 2007) 91-124.

<sup>1161</sup> For further reading on the notion of social justice, see Van Staden M 'Towards a South African understanding of social justice: The International Labour Organisation perspective' (2012) (1) *Tydskrif vir die Suid-Afrikaanse Reg* 91-105.

<sup>1162</sup> ILO *The ILO and the EU, partners for decent work and social justice* – Impact of ten years of cooperation, at 20 available at [http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms\\_195135.pdf](http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf) (date of use 20 November 2014); See also, Deranty J and MacMillan C 'The ILO's decent work initiative: Suggestions for an extension of the notion of decent work' (2012) Vol.43 (4) *Journal of Social Philosophy* 386-403.

<sup>1163</sup> Cf Swepston L 'The future of ILO standards' (1944) Vol.117 (9) *Monthly Labour Review* 16-23.

<sup>1164</sup> Tshoose C 'Placing the right to occupational health and safety within a human rights framework: Trends and challenges for South Africa' (2014) Vol.47 (2) *Comparative and International Law Journal of Southern Africa* 289.

social policies and when ratified, they prevent countries from backsliding.<sup>1165</sup> But more importantly, once ratified by member states, the ILO conventions become binding national law.

The need to extend social security has been confirmed by the International Labour Conference in 2001, which also mandates the ILO to launch a major campaign to promote the extension of social security.<sup>1166</sup> Since its establishment, the ILO has adopted 30 Conventions and 23 Recommendations on social security has also been adopted. The most recent Convention in this field was adopted in 2000 and covers maternity protection.

It is noteworthy that ILO Convention 102 is built on the idea that there is no absolute model for social security as it is a concept which grows and evolves over time. Each society must determine how best to ensure income security.<sup>1167</sup> These choices will reflect their social and cultural values, their history, their institutions and their level of economic development.

The Convention does not prescribe specific behaviour from the member states, but rather fixes a set of minimum objectives built on commonly agreed principles, which establish the social floor for all member countries.<sup>1168</sup> The minimum objectives relate to the percentage of the population protected in case of the occurrence of one of the contingencies (discussed above), conditions for

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<sup>1165</sup> Cf Chau N, and Kanbur R 'The adoption of international labour standards Conventions: Who, when, and why?' (2001) *Brookings Trade Forum* 113-153.

<sup>1166</sup> For further reading on the role of ILO in extending social security, see ILO 'Extending social security to all' A guide through challenges and options, International Labour Office, Social Security Department. – Geneva: ILO, 1-110; ILO Social security and the rule of law, International Labour Office, Geneva, (2011), 1-293; The Global Jobs Pact (ILC June 2009) requests countries... to build adequate social protection for all, drawing on a basic social protection floor, and urges the international community... to provide development assistance, including budgetary support, to build up a basic social protection floor on a national basis; ILO Tripartite Meeting of Experts on Strategies for the Extension of Social Security Coverage (Geneva, September 2009), which confirmed the need for the basic set of essential social transfers, as part of the UN social protection floor.

<sup>1167</sup> Paskalia (note 1156 above) 46.

<sup>1168</sup> Ginneken W 'Social security and the global socio-economic floor: Towards a human rights-based approach' (2009) *Global Social Policy*, 230-240, available at <http://www.sagepublications.com> (date of use 20 January 2014).

entitlement and period of entitlement to the prescribed benefits, as well as the level and duration of benefits, and the regular adjustment of pensions.

## **5.7 Socio-economic rights and African Charter on Human and People's Rights of 1981<sup>1169</sup>**

Human rights have grown beyond the exclusive concern of individual nations.<sup>1170</sup> We have a number of regional instruments that have played a crucial role in the development of socio-economic rights in the different regions of the world. In the African continent, the African Charter on Human and People's Rights is the main African human rights instrument that sets out the rights and duties relating to human and people's rights.<sup>1171</sup> Article 22 of the African Charter states:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

The African Charter has cleared any doubts that may persist as to the international status of human rights. African states cannot contract out of customary international law, which includes respect for human rights. It follows that whether or not the African Charter is ratified, the essential human rights principles in it are binding.<sup>1172</sup>

Therefore, the adoption of the African Charter should be regarded as a milestone in the development of human rights in the continent, notwithstanding its imperfections. It is now left for concerned individuals, groups, and institutions to carry on the struggle for the rehabilitation of the human personality after the degradations of the slave trade, colonialism and apartheid.<sup>1173</sup>

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<sup>1169</sup> Also known as Banjul Charter (hereinafter African Charter).

<sup>1170</sup> Tshoose C (note 1164 above).

<sup>1171</sup> Franceschi L *The African human rights judicial system – Streamlining structures and domestication mechanisms viewed from the foreign affairs powers perspective* (UK, Cambridge Scholars Publishing, 2014)106.

<sup>1172</sup> Umozurike U 'The African Charter on Human and Peoples Rights' (1983) Vol.77 (4) *The American Journal of International Law* 912.

<sup>1173</sup> Umozurike *ibid*.

South Africa has ratified the African Charter on Human and Peoples' Rights.<sup>1174</sup> The African Commission on Human and Peoples' Rights is the body enjoined to interpret the African Charter and ensure that member states comply with their obligations.<sup>1175</sup> The Commission is required to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms', upon which African Governments' may base their legislations.<sup>1176</sup> It is also empowered to interpret all the provisions of the African Charter.<sup>1177</sup> In its preamble and purposes, the Organisation of African Unity Charter (OAU Charter) reaffirms the principles of the UN Charter and the Universal Declaration of Human Rights. It also refers to the right to self-determination, the eradication of colonialism, and the welfare and well-being of African people.<sup>1178</sup>

The African Charter<sup>1179</sup> protects, among others, the right to property but provides that it may be 'encroached upon in the interest of public need or the general interest of the community and in accordance with the provisions of appropriate laws.<sup>1180</sup> The Charter also guarantees the right to work "under equitable and satisfactory conditions"<sup>1181</sup> and to equal pay for equal work. It also makes reference to economic, social, and cultural rights.<sup>1182</sup>

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<sup>1174</sup> Available at <http://www.achpr.org/instruments/achpr/ratification/> (date of use 20 January 2014).

<sup>1175</sup> Article 45 of the African Charter.

<sup>1176</sup> Article 45(1)(b) of the African Charter.

<sup>1177</sup> Article 45(3) of the African Charter.

<sup>1178</sup> See the Preamble of the African Charter on Human and People's Rights available at [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (date of use 20 January 2014).

<sup>1179</sup> For a detailed discussion on the impact of the African Charter on Human and People's Rights, see Yusuf A 'The progressive development of peoples' rights in the African Charter and in the case law of the African Commission on Human Rights and People's Rights' in Lenzerini F and Vrdoljak A *International law for common goods: Normative perspectives on human rights, culture and nature* (UK, Hart Publishing Ltd, 2014) 41-60.

<sup>1180</sup> Article 14 of the African Charter.

<sup>1181</sup> Article 15 of the African Charter.

<sup>1182</sup> Odinkalu C 'Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) Vol.23 (2) *Human Rights Quarterly* 336-341.

The right to enjoy the best attainable state of physical and mental health is also guaranteed, as is the right to education and to participation in cultural life.<sup>1183</sup> These provisions serve to remind the member countries to extend the benefits of their resources to the generality of their citizenry rather than to a minority. Other rights of the people recognised in the Charter include the right to pursue their economic and social development.<sup>1184</sup> States parties to the Charter may freely dispose of their national wealth and resources with a view to strengthening African unity and solidarity.<sup>1185</sup>

African states have been very slow in ratifying the Charter with its minimally enforceable responsibilities.<sup>1186</sup> Perhaps the question is how long it will take a majority of African states to ratify the Charter and enable it to take effect. Bello, for example, forecasts with uncanny pessimism that a continental arrangement like the Charter will be “illusory and unworkable,” “an exercise in sheer futility”.<sup>1187</sup> He prefers an arrangement that would embrace like-minded states, starting with Kenya, the Ivory Coast, Nigeria, Senegal, Tanzania, and Zambia. According to him, the possible alternatives are a weak compromise arrangement for all African states such as at present, or a higher level of effectiveness in an agreement with like-minded states. It may be that a Pan-African arrangement will enhance the credibility of the OAU Charter and be helped by it.<sup>1188</sup>

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<sup>1183</sup> Article 17 of the African Charter.

<sup>1184</sup> Article 20 of the Africa Charter.

<sup>1185</sup> Article 21 of the African Charter.

<sup>1186</sup> As of October 1983, the Charter had been ratified by Congo, the Gambia, Guinea, Liberia, Mali, Nigeria, Rwanda, Senegal, Togo, and Tunisia.

<sup>1187</sup> Bello E ‘Human Rights: The rule of law in Africa’ (1981) Vol.30 (3) *The International and Comparative Law Quarterly* 628-637; See also Odinkalu C (note 1182 above) 327-330.

<sup>1188</sup> The Working Group on the Encouragement of Universal Acceptance of Human Rights was set up in 1979 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider, *inter alia*, what assistance the United Nations could give to encourage the ratification of human rights treaties. See also Weissbrodt D ‘A new United Nations mechanism for encouraging the ratification of human rights treaties’ (1982) Vol.76 *The American Journal of International Law (Am. J. Int’l L)* 418-429.



The Charter recognises new rights of mostly economic, social, or cultural import, which are not covered by other international human rights regimes to which African states are party. These rights are found in Articles 13 and 14 of the Charter. They include the rights to participate in the government of one's country,<sup>1189</sup> of access to the public service of one's country,<sup>1190</sup> and of access to public property and services,<sup>1191</sup> all of which the Human Rights Committee has held to entail an obligation on the state to avoid discrimination or persecution on the grounds of political opinion or expression.<sup>1192</sup> The African Charter obliges the nations to 'take the necessary measures'<sup>1193</sup> to protect the health of their people and ensure that all receive attention when they are sick.<sup>1194</sup>

The Charter contains no express guarantees of the rights to social security, food, an adequate standard of living or housing, or prohibition of forced labour. However, these are not outside the scope of interpretive possibilities open to the instrument and would be well covered by a combined reading of Articles 5, 15, and 17 of the Charter.

Scholars view the Charter provisions on economic, social, and cultural rights as "a significant let down from the promise of the preamble".<sup>1195</sup> Odinkalu<sup>1196</sup> asserts that this criticism fails to take into account the interconnectedness, as well as the

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<sup>1189</sup> Article 13(1) of the African Charter.

<sup>1190</sup> Article 13(2) of the African Charter.

<sup>1191</sup> Article 3(3) of the African Charter.

<sup>1192</sup> See African Charter, article 2; Communications 422/1990, 423/1990, 424/1990, *Aduayom and Others v Togo*, reprinted in 1 Butterworths R TSC. ASES6 53, 658 (1997) (case decided by the United Nations Human Rights Committee).

<sup>1193</sup> Article 16(2) of the African Charter.

<sup>1194</sup> *Ibid.*

<sup>1195</sup> Odinkalu C (note 1182 above) 341. See also Chirwa D 'Toward revitalising economic, social, and cultural rights in Africa: Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria' at 15 available at <http://www.wcl.american.edu/hrbrief/10/1chirwa.pdf> (date of use 20 January 2014); Olowu D 'A critique of the African Commission's draft principles and guidelines on economic, social and cultural rights in the African Charter' (2010) Vol.11 (3) *ESR Review* 7-9; Mbazira C 'Enforcing the economic, social and cultural rights in the African Charter on Human and People's Rights: Twenty years of redundancy, progression and significant strides' (2006) Vol.6 (2) *African Human Rights Law Journal* 336.

<sup>1196</sup> Odinkalu (note 1182 above).

implementation and interpretive latitude that the Charter grants to the African Commission. He argues that when these are factored into the analysis, the only limitations that will be seen to exist in the horizon of what is achievable in the realm of economic, social, and cultural rights under the African Charter will be the imagination, political will, and organisational nous of its implementing organ, the African Commission on Human and Peoples' Rights.

The formulation of economic, social, and cultural rights by the African Charter as obligations of immediate legal import has implications for the methodology or procedures that the African Commission may deploy in implementing or realising them. The format adopted by the African Charter enables the Commission to adopt a violations approach to implementing these rights in a way that would have been unavailable to it, had the Charter resorted to the philosophy of "progressive realisation" found in the ICESCR.<sup>1197</sup>

Chapman<sup>1198</sup> explained that, the progressive realisation benchmark assumes that valid expectations and concomitant obligations of states parties under the Covenant are not uniform or universal, but instead relative to levels of development and available resources. This necessitates the development of a multiplicity of performances standards for each enumerated right in relationship to the varied social, developmental, and resources contexts of specific countries.

It should be remembered that the African Commission was established under the Charter to promote human rights and ensure their protection in Africa.<sup>1199</sup> The mandate of the Commission as elaborated in Article 45 of the Charter includes promotional work through awareness-raising programmes such as conferences,

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<sup>1197</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976).

<sup>1198</sup> Chapman R 'A Violations approach for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996)18 *Human Rights' Quarterly* 23-31.

<sup>1199</sup> Article 30 of the African Charter.

seminars, and symposia,<sup>1200</sup> and standard-setting involving the formulation of principles and rules aimed at solving legal problems relating to human and people's rights and fundamental freedoms upon which African Governments may base their legislations.<sup>1201</sup>

The protective mandate of the Commission includes considering cases and communications.<sup>1202</sup> Cases and communications may be initiated by states<sup>1203</sup> or non-state entities.<sup>1204</sup> It also extends to special investigative powers with respect to emergencies or special cases that reveal the existence of a series of serious and massive violations of Charter rights.<sup>1205</sup> There is nothing in the Charter to suggest that violations of economic, social, and cultural rights on a massive scale would not constitute such an emergency. It is more likely, however, that an emergency situation under Article 58 would entail violations of different categories of Charter rights or particularly egregious violations of a single right.<sup>1206</sup>

The Commission also has an advisory competence to interpret the Charter at the request of a state party, an institution of the OAU Charter or an African organisation recognised by the OAU Charter.<sup>1207</sup> In addition, the Commission monitors compliance by state parties with Charter provisions through a state reporting procedure. Under this, it receives and considers periodic reports submitted by the states.<sup>1208</sup> It is important to note that the constitutions of most

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<sup>1200</sup> Article 45(1)(a) of the African Charter.

<sup>1201</sup> Article 45(1)(b) of the African Charter.

<sup>1202</sup> See article 45(2), chapter III, and articles 47-59 of the African Charter; See also Chenwi L 'An appraisal of international law mechanisms for litigating socio-economic rights, with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court' (2011) Vol.22 (3) *Stellenbosch Law Review* 688-690.

<sup>1203</sup> Articles 47-54 of the African Charter.

<sup>1204</sup> Articles 55-57 of the African Charter.

<sup>1205</sup> Article 58 (1)-(3) of the African Charter.

<sup>1206</sup> Murray R 'Serious or massive violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter-American and European mechanisms' (1999) 17 *Netherlands Quarterly Human Rights* 109.

<sup>1207</sup> Article 45(3) of the African Charter.

<sup>1208</sup> Article 62 of the African Charter.

African states recognise or guarantee economic, social, and cultural rights in different ways as enforceable rights.<sup>1209</sup> Finally, the inclusion of social security in a number of international and regional human rights instruments such as the African Union and SADC as well as national legislation is also an acknowledgment of the fact that social security is a human need.

## 5.8 The European Community

There is an increasing proliferation of sources of social rights both at the European level (horizontally) and (vertically) at the national and international levels, for example, collective bargaining, national law, constitutions, European Convention on Human Rights (ECHR), and the ILO.<sup>1210</sup>

The nature of European Union (EU) legal system is based on the following major characteristics. The legal system of the EU does not distinguish between the executive and legislative powers.<sup>1211</sup> The EU law comprises three parts, namely; the primary legislation (treaties),<sup>1212</sup> secondary legislation (for example,

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<sup>1209</sup> For further reading on the enforcement of socio-economic rights in different African countries, see Kapindu R 'Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities' (2013) Vol.13 (1) *African Human Rights Law Journal* 125-151; Arwa J 'Litigating socio-economic rights in domestic courts: The Kenyan experience' (2013) Vol.17 *Law Democracy and Development* 419-441; Chiviru T 'Socio-economic rights in Zimbabwe's new Constitution' (2014) Vol.36 (1) *Strategic Review for Southern Africa* 111-119; Mandlate A 'The protection and enforcement of socio-economic rights in lusophone countries in Africa' (2010) Vol.11 (3) *ESR Review* 22-24; Ramadi D 'The justiciability of socio-economic rights in Botswana' (2013) Vol.57 (1) *Journal of African Law* 108-124; Twinomugisha B 'The constitutional protection of socio-economic rights in East Africa' (2010) Vol.11 (3) *ESR Review* 17-19; Barya J *Social security and social protection in the East African Community* (Kampala, Fountain Publishers, 2011) 1-110; See also Akintayo A 'A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights – Lessons from the Nigerian case of *Bamidele Aturu v Minister of Petroleum Resources and Others*' (2014) Vol.15 (2) *ESR Review* 6-9.

<sup>1210</sup> Barnard C 'The protection of fundamental social rights in Europe after Lisbon: A question of conflict of interests' in Vries S *et al The protection of fundamental rights in the EU after (Lisbon)* Hart Publishing, Oxford and Portland Oregon, 2013) 38-57.

<sup>1211</sup> Cichowski R 'Women's rights, the European Court, and supranational constitutionalism' (2004) Vol.38 (3) *Law and Society Review* 489-493.

<sup>1212</sup> Tăbușcă S 'Evolution of human rights protection within the EU legal system' (2013) (3) *Law of Ukraine/Pravo Ukraini* 256-263; See also Shumba T 'Towards an SADC community sales law: Lessons SADC may learn from the proposal for a common European Sales Law' (2015) Vol. 27 (3) *SA Mercantile Law Journal* 483-484.

regulations, directives,<sup>1213</sup> recommendations and opinions of the EU's institutions in accordance with the treaties) and decisions of the European Court of Justice.<sup>1214</sup>

The legal nature of these instruments is summarised briefly below. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states. A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision that specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force.<sup>1215</sup>

A provision of the EU law may be directly applicable or directly effective or both.<sup>1216</sup> Direct applicability means that a provision of Union law takes effect in the legal orders of the member states without the need for national or union implementation and as such is automatically binding throughout the European Union from the time of its entry into force.<sup>1217</sup> Direct effect, on the other hand,

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<sup>1213</sup> Dickson J 'Directives in EU legal systems: Whose norms are they anyway' (2011) Vol.17 (2) *European Law Journal* 194-210.

<sup>1214</sup> See sources and scope of European Union Law available at [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.2.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf), p 1-4 (date of use 20 January 2014).

<sup>1215</sup> Vries S *et al* *The protection of fundamental rights in the EU after Lisbon* (Hart Publishing, Oxford and Portland, Oregon 2013) 42,70,71,72,73-76; See also *An introduction to the European Union legal system and legislation relevant to the general protection and enforcement of IPR* available at [http://www.ipr2.org/storage/Info\\_pack\\_EU\\_IP\\_law\\_background-EN719.pdf](http://www.ipr2.org/storage/Info_pack_EU_IP_law_background-EN719.pdf)(date of use 20 January 2014); Stefan O 'European Union soft law: New developments concerning the divide between legally binding force and legal effects' (2012) Vol.75 (5) *The Modern Law Review* 879-890.

<sup>1216</sup> Dinu G 'The principle of direct consequences and effect of EU rules on national courts' (2012) Vol.4 (2) *Contemporary Readings in Law and Social Justice* 484-487; Marsden S 'Invoking direct application and effect of international treaties by the European Court of Justice: Implications for international environment law in the European Union' (2011) Vol.60 (3) *International and Comparative Law Quarterly* 737-757.

<sup>1217</sup> Dinu *ibid*; Marsden *ibid*. See also Mpedi G 'Redesigning the South African unemployment protection system: A socio-legal inquiry' (note 46 above) 148; Burgess M 'Introduction: Federalism and building the European Union' (1996) Vol.26 (4) *Publius* 4-6.

refers to the capacity of a provision of Union law to create rights for natural or legal persons that can be enforced by national courts.<sup>1218</sup>

The member states have transferred their legislative, judicial and executive powers to the Union.<sup>1219</sup> All member states are legally bound to uphold the *acquis commu-nautaire*, the body of European law including treaties, secondary legislation, and the jurisprudence of the European Court of Justice (ECJ).<sup>1220</sup> Alter argues that “a failure to fulfil a legal obligation can lead to an infringement suit in front of the ECJ, and as of 1993, the failure to obey a European Court of Justice decision can lead to a fine”.<sup>1221</sup>

Provisions relating to social security protection in the EU can, in principle, be found in the primary legislation as well as secondary legislation.<sup>1222</sup> Social security protection provisions contained in the primary legislation of the EU include those that deal with free movement of persons,<sup>1223</sup> employment policy and social policy. The secondary legislation includes social security coordination instruments,<sup>1224</sup> social security discrimination instruments and employment protection instruments.<sup>1225</sup> It is important to note that the member states of EU are reluctant to lose their decision making on issues relating to social security.

Minderhoud acknowledges that “all member states still have their own national social security system, which they have adapted only to ensure that the free

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<sup>1218</sup> Dinu (note 1216 above).

<sup>1219</sup> Alter K ‘The European Union’s legal system and domestic policy: Spillover or backlash?’ (2000) Vol.54 (3) *International Organisation* 490-502.

<sup>1220</sup> Alter (note 1219 above) 491-492.

<sup>1221</sup> Alter (note 1219 above) 491.

<sup>1222</sup> See Reid A *Law basics student study guides– European Union* 5<sup>th</sup> ed (England, Thomson Reuters, 2013) 17-22.

<sup>1223</sup> Cf Paskalia V *Free movement, social security and gender in the EU* (Canada, Hart Publishing Oxford and Portland, Oregon, 2007) 111-135.

<sup>1224</sup> Adema W and Kahl S ‘Social Assistance in Germany’ OECD Labour Market and Social Policy Occasional Papers, No. 58, (OECD Publishing, 2003) 22.

<sup>1225</sup> Rogers N *et al Freedom of movement of persons in the enlargement European Union* 2<sup>nd</sup> ed (UK, Sweet and Maxwell Thomson Reuters, 2012) 23-39.

movement of workers is not hindered”.<sup>1226</sup> In the area of social and employment law, extensive use has been made of non-binding acts such as resolutions, recommendations, frameworks, action programmes, and charters.<sup>1227</sup> The author asserts that such instruments are generally of a programmatic nature, setting out objectives to be achieved on a Union level.<sup>1228</sup>

#### 5.8.1 European Social Charter (ESC)

The Charter of Fundamental Rights of the European Union recognises “the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices”.<sup>1229</sup> It also provides that “everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices”.<sup>1230</sup> Furthermore, “in order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices”.<sup>1231</sup>

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<sup>1226</sup> Minderhoud P ‘The “other” EU security: Social protection’ (2006) Vol.8 (4) *European Journal of Social Security* 362; For further reading on the freedom of movement of persons in the EU, see Rogers N *et al Freedom of movement of persons in the enlargement European Union* (note 1225 above) 401-413.

<sup>1227</sup> Watson P *EU Social and employment law* 2<sup>nd</sup> ed (UK, Oxford University Press, 2014) 28.

<sup>1228</sup> Watson P *ibid.*

<sup>1229</sup> Article 34(1) of the Charter of Fundamental Rights of the European Union (2010/C 83 /02) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF> (date of use 20 January 2014); For further reading on regional perspectives on labour law, in particular the provisions of the European Social Charter and the emergence of the European Union see Bronstein A *international and comparative labour law* (Palgrave Macmillan, International Labour Organisation, 2009) 195-207; Peers S *et al The EU Charter of Fundamental Rights – A commentary* (UK, Hart Publishing Oxford and Portland, Oregon, 2014) 927-988.

<sup>1230</sup> Article 34(2) of the Charter of Fundamental Rights of the European Union.

<sup>1231</sup> Article 34(3) of the Charter of Fundamental Rights of the European Union.

One of the prominent aspects about the ESC is that it provides the right to protection against poverty and social exclusion. For ease of reference, it provides that with a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; to review these measures with a view to their adaptation if necessary.<sup>1232</sup>

In the area of the right to social and medical assistance, the ESC<sup>1233</sup> encourages member states to either ensure that any person who is without adequate resources and who is unable to secure such resources by his/her own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance. In addition, in case of sickness, the care necessitated by his/her condition; it should ensure that persons receiving such assistance shall not suffer from a diminution of their political or social rights.<sup>1234</sup>

The right to benefit from social welfare services is also provided for in the ESC,<sup>1235</sup> in terms of which member states undertake to provide services, which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment, to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

The right of persons with disabilities is also captured in the ESC.<sup>1236</sup> It encourages social integration and participation in the life of the community. Furthermore, member states are encouraged to provide persons with disabilities with guidance, education and vocational training in the framework of general

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<sup>1232</sup> Article 30 of the ESC.

<sup>1233</sup> Article 13 of the ESC.

<sup>1234</sup> Signed at Parais on 11 December 1953.

<sup>1235</sup> Article 14 of the ESC.

<sup>1236</sup> Article 15 of the ESC.



schemes wherever possible, or where this is not possible, through specialised bodies, public or private; to promote their access to employment through all measures or creating sheltered employment according to the level of disability.<sup>1237</sup>

The enforcement of the Charter is largely premised on the submission of national reports by the contracting parties.<sup>1238</sup> Contracting parties are required to submit reports at two-yearly intervals on the implementation of the provisions of the European Social Charter they have accepted.<sup>1239</sup>

This requirement is similar to that contained in article 19(5)(e) of the ILO Constitution, which requires member states to submit reports on Conventions they have not accepted. The advantage of this provision is that it reminds member states of the existence and need for ratification of the conventions concerned and points to the difficulties standing in the way of acceptance that [may] be taken into account in the revision of convention texts and in the drafting of new conventions in the same area.<sup>1240</sup>

The ESC requires countries “to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security”.<sup>1241</sup>

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<sup>1237</sup> Article 15 of the ESC.

<sup>1238</sup> Part IV of the European Social Charter of 1969.

<sup>1239</sup> Article 21 of the ESC.

<sup>1240</sup> Harris D ‘The European Social Charter’ (1984) Vol.13 (3) *The International and Comparative Law Quarterly*, 1076-1087; Harris D ‘Council of Europe: Protocol Amending the European Social Charter’ (1992) Vol.31 (1) *International Legal Materials* 155-162.

<sup>1241</sup> Article 12(2) of the ESC.

### 5.8.2 Council of Europe

Several international Organisations, including the Council of Europe, have contributed to the improvement of living and working conditions of workers.<sup>1242</sup>

The Council of Europe laid down its social security standards primarily in the European Code of Social Security, adopted in 1964.<sup>1243</sup>

This Code was based on ILO Convention 102. The European Code of Social Security and its Protocol, as well as the Revised European Code of Social Security, set standards in the social security field on the basis of minimum harmonisation of the level of social security, providing minimum standards and permitting (or rather encouraging) the contracting parties to exceed these standards.<sup>1244</sup> These standard-setting instruments set out the underlying principles of what is referred to as the European social security model.<sup>1245</sup>

The Protocol of European Code of Social Security has higher standards than the European Code and Convention 102. It is worth mentioning, that Convention 102 remains relevant to the members of the Council of Europe. Nevertheless, eight of the Members of the Council that ratified Convention 102 did not ratify the European Code.<sup>1246</sup>

The European Code of Social Security came under criticism for not being flexible enough. For this reason, a Revised European Code was adopted in 1990.

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<sup>1242</sup> Cf Pennings F *Introduction to European social security law* (Netherlands, Kluwer law and Taxation Publishers, 1994) 12-14.

<sup>1243</sup> Pennings (note 1242) 13-14.

<sup>1244</sup> See European Code of Social Security available at [http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default\\_en.asp](http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default_en.asp) (date of use 22 March 2015).

<sup>1245</sup> European Code of Social Security available at [http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default\\_en.asp](http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default_en.asp) (date of use 22 March 2015).

<sup>1246</sup> Ratification of the the European Code, available at [www.coe.int](http://www.coe.int)... (date of use 20 January 2014).

Although it was signed by 14 member states,<sup>1247</sup> it has not been ratified at all. Consequently, it has not come into force as yet.<sup>1248</sup>

## **5.9 South African social security system vs. the international norms of the ILO**

The right to social security has been affirmed in international human rights law. The human rights dimensions of social security were clearly spelt out in the 1994 Declaration of Philadelphia which called for the existension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care. The right to social security was consequently incorporated in a range of international human rights intruments treatise and regional human rights treatise. The constionalisation of human rights in South Africa has far-reaching significance both symbolically and practically, and it has a positive impact upon human rights law-making and implementation.

Comparing the South African practice and the ILO standard, it is evident that the South African government has taken proactive measures to promote social security. According to article 2 of the 1952 ILO Convention, each member state shall comply with at least three out of nine social security aspects listed therein.

Olivier acknowledges that many SADC countries have embarked on major reform initaitives in an attempt to overhaul their social security systems comprehensively in order to deal effectively with exclusions and marginalisations in the system and with the need to address poverty holistically and in an intergrated fashion from a social protection point of view.<sup>1249</sup> According to him,

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<sup>1247</sup> Pennings F (note 1242 above) 14.

<sup>1248</sup> Ratification of the the European Code (note 1246 above).

<sup>1249</sup> Olivier M 'Regional overview of social protection for non-citizens in the Southern African Development Community (SADC) (2009) SP discussion paper no.0908, 46.

these reforms have largely been informed by international norms and the involvement of international agencies, such as the ILO and the World Bank.<sup>1250</sup>

Despite this important development, South Africa has not ratified some of the key Conventions on social security. These include, *inter alia*, Social Security (Minimum Standards) Convention, 1952; Equality of Treatment Convention, 1962; Employment Injury Benefits Convention, 1964; Invalidity, Old-Age and Survivors' Benefits Convention, 1967; Medical Care and Sickness Benefits Convention, 1969; Maintenance of Social Security Rights Convention, 1982; Employment Promotion and Protection against Unemployment Convention, 1988.<sup>1251</sup>

In considering the role of international social security standards, one should recall that ILO normative action rests on the voluntary acceptance of international labour standards, which in turn creates binding obligations on states.<sup>1252</sup> This approach was preferred to the approach originally envisaged by the founders of the ILO that would have entrusted the International Labour Conference with the power to directly adopt binding international labour legislation, subject to a right to “opt out” that could be exercised within specific time limits.<sup>1253</sup>

The discussion above reveals that international law plays an important role in the protection of social security in South Africa. This role has to be seen against the background of South Africa’s history of apartheid that was characterised by gross

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<sup>1250</sup> Cf Nyenti M and Mpedi G ‘The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries’ (2012) Vol.15 (1) (*PER*) 244-273; Omilola B and Kaniki S ‘Social protection in Africa: A review of potential contribution and impact on poverty reduction’ (2014) UNDP Study Report 1-39 available at [www.za.undp.org/.../Social%20Protection%20in%20Africa-A%20Review%20of...](http://www.za.undp.org/.../Social%20Protection%20in%20Africa-A%20Review%20of...) (date of use 20 January 2014).

<sup>1251</sup> See NORMLEX – Conventions and Protocols not ratified by South Africa available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:4381966548919:::P11210\\_INSTRUMENT\\_SORT:2](http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:4381966548919:::P11210_INSTRUMENT_SORT:2) (date of use 22 March 2015).

<sup>1252</sup> Chau N, and Kanbur R ‘The adoption of international labour standards Conventions: Who, when, and why’ (2001) *Brookings Trade Forum* 115.

<sup>1253</sup> Maupain F ‘Trade and Core Labour Standards in *Wirtschaftspolitische Blätter*’ (1997) 93.

abuses of human rights. The advent of democracy ushered in a culture of human rights that is in line with international human rights law. In spite of the slow start in ratifying and incorporating important international human rights instruments, there is a reason to believe that South Africa is now committed to the incorporation of international norms on social security within its legal system.

The South African Constitution has adequately provided for measures to embrace international law within the domestic legal system. The courts, in particular the Constitutional Court, have played a major role in recognising international law in South Africa. What remains to be done is to strive to embrace international social security norms more fully by consolidating and giving further effect to the provisions of the Constitution, in particular, the social security rights entrenched in section 27(1)(c) of the Constitution.

In summary, this chapter has analysed the importance and the normative basis of considering international and comparative international law in the context of social security in South Africa. It is clear from this chapter, that international law forms part and parcel of the South African law. Therefore, a comparative analysis of the political legal and constitutional systems of other countries is very relevant.<sup>1254</sup> The next chapter examines the system of social protection in India.

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<sup>1254</sup> Deane T 'Affirmative action: A Comparative study' (2005) unpublished LLD Thesis, University of South Africa, 2.

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## CHAPTER SIX

### THE SYSTEM OF SOCIAL SECURITY IN INDIA

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#### 6.1 Introduction

India, like South Africa, has a system of social security which is intertwined with its colonial past.<sup>1255</sup> Muralidhar<sup>1256</sup> supports this fact when stating that the Indian legal system is inherited from the colonial and common law model. However, there is a marked difference between India and South Africa in terms of population size, socio-economic indicators, and social welfare provisioning. Nevertheless, the history of these countries has much to offer in terms of commonalities and divergences.<sup>1257</sup>

The stark similarities between South Africa and India are worth mentioning. First, both South Africa and India have had a long history of group-based identity movements being organised against colonial and post-colonial states.<sup>1258</sup> Secondly, in India, people are divided into religious communities, caste and tribal identities.<sup>1259</sup> This group division is also common in South Africa. This is evident

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<sup>1255</sup> Kothari J 'A social rights model for social security: Learning from India' *Verfassung und Recht in Ubersee (VRU)* 47 (2014) 8. For further reading on the colonialism in India, see Ziltener P and Künzler D 'Impacts of colonialism – A research survey' (2013) Vol.19 (2) *Journal of World-Systems* 290-306; Midgley J and Piachaud D *Colonialism and welfare: Social policy and the British imperial legacy* (eds) (UK, Edward Elgar Publishing, 2011) 36-54; Sánchez R and Pita B 'Rethinking settler colonialism' (2014) Vol.66 (4) *American Quarterly* 1039-1054; Gupta R 'Social security and mutual assistance in India: A preliminary account' (2007) Vol.46 (3/93) *International Social Security Review* 53-67. For further reading on the legacies and identities of South Africa and India, see Patel S and Uys T *Contemporary India and South Africa: Legacies, identities, dilemmas* 1<sup>st</sup> ed (London, Routledge, 2012) 1-62; Ali A 'The role of the British colonial/Imperial rule in the introduction of representative institutions in India, 1857-1947' (2013) Vol.29 (2) *Journal of European Studies* 137-168; Robb P *A history of India* 2<sup>nd</sup> ed (UK, Palgrave Macmillan, 2011) 184-258.

<sup>1256</sup> Muralidhar S 'India – The expectations and challenges of judicial enforcement of social rights' in Langford M *Social rights jurisprudence – Emerging trends in international and Comparative law* (New York, Cambridge University Press, 2008)102.

<sup>1257</sup> Cf Patel S and Uys T *Contemporary India and South Africa: Legacies, identities, dilemmas* 1<sup>st</sup> ed (London, Routledge, 2012). See also Hofmeyer I and Williams M *South Africa and India – Shaping the global South* (South Africa, Wits University Press, 2011) 2-19.

<sup>1258</sup> See Patel S and Uys T (note 1257 above) 2.

<sup>1259</sup> Patel *ibid*.

in the manner in which South Africa divides its population in terms of race (Black African, Coloureds, White and Indian).<sup>1260</sup>

According to Saini,<sup>1261</sup> “the development of social security in India owes its origins to the traditional forms of social security which were started so as to cover powerful occupational groups in the formal sector, which could influence public policy through well-organised associations and trade unions”. He further states that the most notable among such groups are the government employees who are in the most advantageous position to enforce social protection. It can also be argued that social protection has emerged from the experience of poor and vulnerable workers in developing countries.<sup>1262</sup>

In contextualising the similarities and dissimilarities between India and South Africa, Govindjee asserts that even though the economies of South Africa and India are different, one of the common features of both countries is that their Constitutions recognise and protect fundamental rights.<sup>1263</sup> Srivastava notes that “the Indian Constitution adopted in 1951 contains all the ingredients obliging the state to move towards the realisation of socio-economic rights”.<sup>1264</sup> Chapter III and IV of the Indian Constitution deal with the protection of economic and social rights. The former is titled Fundamental Rights and the latter Directive Principles of State Policy.<sup>1265</sup>

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<sup>1260</sup> Patel S and Uys T (note 1257 above).

<sup>1261</sup> Saini D *Social security in India* (Netherlands, Kluwer Law International, 2011) 43.

<sup>1262</sup> Babu S *et al State of India's livelihoods Report 2013*, 90 available at [http://accessdev.org/downloads/soil\\_report\\_2013.pdf](http://accessdev.org/downloads/soil_report_2013.pdf) (date of use 23 January 2015).

<sup>1263</sup> Govindjee A 'Lessons for South African social assistance law from India: Part 1 – The list that bind: The Indian Constitution and the reasons for comparing South Africa with India' (2005) *OBITER* 576.

<sup>1264</sup> Srivastava R 'A social protection floor for India' *International Labour Organisation* (2013) 16 available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new\\_delhi/documents/publication/wcms\\_223773.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_223773.pdf) (date of use 13 December 2014).

<sup>1265</sup> Srivastava R *ibid*.

The fundamental rights guaranteed to all persons under Part III of the Constitution, include, *inter alia*, the right to life,<sup>1266</sup> and the right to equality.<sup>1267</sup> Furthermore, section 38 of the Constitution compels the state to promote the welfare of the people,<sup>1268</sup> to minimize the inequalities in income, eliminate inequalities in status, and facilitate opportunities among individuals and groups of people residing in different areas or engaged in different vocations.<sup>1269</sup>

In the language of article 39, the State shall, in particular, direct its policy towards securing:

- That citizens, men and women equally, have the right to an adequate means of livelihood;
- That the ownership and control of the material resources of the community are so distributed as best to observe the common good;and
- That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

It is worth mentioning that these Directive Principles of State Policy are not enforceable by any court. The Directive Principles in Part IV have specifically been made non-justiciable or unenforceable by Article 37 of the Constitution, which states:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. They are nevertheless fundamental in the governance of the country and the state is required to apply them in making laws.<sup>1270</sup>

Based on the framework of the Directive Principles of State Policy, numerous pieces of labour legislation (including those on social security) have been

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<sup>1266</sup> Article 21 of the Constitution Indian, 1951 (as amended) ('the India Constitution') available at

<http://www.advocatekhaj.com/library/bareacts/constitutionofindia/index.php?Title=Constitution%20of%20India,%201949> (date of use 13 December 2014).

<sup>1267</sup> Article 14 of the Indian Constitution.

<sup>1268</sup> Section 38(1) of the Indian Constitution.

<sup>1269</sup> Section 38(2) of the Indian Constitution.

<sup>1270</sup> Section 37 of the Indian Constitution.



enacted by the Central and State legislatures. These laws are broadly classified into the following: labour relation laws, laws of wages and monetary benefits, laws of social security and laws relating to conditions of work.

In light of this background, this chapter examines the following issues:

- Contextual and developmental context of social security law in India;
- Economic and social situation, and the key features of social security protection;
- The social and economic life of the Indian people; and
- The composition of the Indian population in terms of its general profile, income level, occupational structure and its social characteristics.

Furthermore, it also examines the manner in which the Courts have interpreted, protected, and promoted the economic and social rights entrenched in the Indian Constitution. It is submitted that the judiciary has played a crucial role in interpreting some of the economic and social rights in the Directive Principles of State Policy as linked to the right to life,<sup>1271</sup> which is a fundamental right under the Constitution.

## 6.2 Historical background of the Indian society

India is a republic in Southern Asia, with the second highest population in the world after China,<sup>1272</sup> which stood at 1.27 billion in 2015.<sup>1273</sup> Although it occupies only 2.4% of the world's land area, it supports over 15% of the world's

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<sup>1271</sup> See Ullah A and Uzair S 'Right to life as basic structure of Indian Constitution' (2011) Vol.26 (2) *A Research Journal of South Asian Studies* 393-397.

<sup>1272</sup> Zepeda E *et al* 'Guaranteeing jobs for the rural poor: An assessment of India's MGNREGA public works programme' in United Nations Development Programme (UNDP) Social protection, growth and employment: Evidence from India, Kenya, Malawi, Mexico and Tajikistan' May 2013 available at [www.undp.org/poverty](http://www.undp.org/poverty) (date of use 15 October 2013).

<sup>1273</sup> India's population 2015 available at <http://www.indiaonlinepages.com/population/india-current-population.html> (date of use 10 January 2015).

population.<sup>1274</sup> About 20% of India's population lives in more than 550,000 villages, and the remainder in more than 200 towns and cities.<sup>1275</sup>

It is one of the most plural societies in the world, with people belonging to different religions, ethnic groups, and language groups and living in regions with diverse cultures.<sup>1276</sup> It comprises a Union of 28 states and seven Union Territories.<sup>1277</sup> Furthermore, it is a multi-party parliamentary democracy. The Head of State is the President who is vested with executive power.<sup>1278</sup>

Like South Africa, India is known for its unequal society since ancient times.<sup>1279</sup> It is the home for 20% of the global population living in poverty, that is, those who live on less than US\$1 dollar per day".<sup>1280</sup> Mutatkar<sup>1281</sup> acknowledges that the Scheduled Castes and Scheduled Tribes,<sup>1282</sup> who together comprise about a quarter of India's total population, are known to be the most deprived social group categories in India across a range of socio-economic indicators. Similarly,

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<sup>1274</sup> See India Foreign Policy and Government Guide Vol.1 USA, Washington DC International Business Publications (2011) 18.

<sup>1275</sup> India Foreign Policy and Government Guide *ibid*.

<sup>1276</sup> Mutatkar R *Social protection in India: Current approaches and issues* in Midgley J and Piachaud D *Social protection, economic growth and social change – Goals, issues and trajectories in China, India, Brazil and South Africa* (UK, Edward Elgar, 2013).

<sup>1277</sup> Panagariya A and Mukim M 'A comprehensive analysis of poverty in India' (2014) Vol.31 (1) *Asian Development Review* 18.

<sup>1278</sup> See section 52 and 53 of the Indian Constitution.

<sup>1279</sup> Singh V *et al Longman - Social science history India*, Dorling Kindersley (2010)188. See also Caste and Class [in India] available at <http://countrystudies.us/india/89.htm> (date of use 23 January 2015); Cf Svizzero S and Tisdell C 'Inequality and wealth creation in ancient history: Malthus' theory reconsidered' (2014) *Economics and Sociology* 222-238.

<sup>1280</sup> Siggel E 'Poverty alleviation and economic reforms in India' (2010) Vol.10 (3) *Progress in Development Studies* 247-258.

<sup>1281</sup> Mutatkar R 'Future prospects of social protection in India' in Midgley J and Piachaud D *Social protection, economic growth and social change* (UK, Edward Elgar, 2013)117.

<sup>1282</sup> According to Saha the concept 'caste' derives its meaning from the Portuguese word *casta* meaning something not mixed, pure or chaste. She notes that the word was applied by the Portuguese to describe social classifications that they saw among the inhabitants of the sub-continent in the middle of the sixteenth century and later the word passed into the English language. See Saha A *et al* 'The Caste system in India and its consequences' (1993) Vol.13 (3/4) *International Journal of Sociology and Social Policy* 1-2.

Chattopadhyay avers that in India, insecurity is directly linked with accessibility to resources, availability of employment and provision of social security network.<sup>1283</sup>

In part, the inequalities are largely because of the 200 years of foreign rule.<sup>1284</sup> Saini traces the history of social security during the British conquest, which started in 1757 with the battle of Plassey and was completed in 1858 with the defeat of the rebellious factions of the Indian army in the Great Mutiny of 1857 when the British enacted the Government of India Act, 1858.<sup>1285</sup> Saini stresses that the conquest of India by the British and the pre-and post-conquest trade relations with Europe has influenced socio-economic conditions of its development.

According to him, the British rule exacerbated the disintegration of the village community by the introduction of the new land revenue systems and also by the process of commercialisation of agriculture.<sup>1286</sup> Notwithstanding this, the British contributed to the administrative consolidation of the country through their conquests.<sup>1287</sup> These conquests led to administrative groupings of territories into presidencies and provinces.<sup>1288</sup>

It should be noted that the British rule in India has had a tremendous impact in her economic development.<sup>1289</sup> The fact that British rule lasted nearly 200 years is indicative of the British control and the resultant lack of public goods such as

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<sup>1283</sup> Chattopadhyay A *poverty and social exclusion in India – Issues and challenges* (New Delhi, Rawat Publication, 2013) 45.

<sup>1284</sup> Saini D *Social security in India* (Netherlands, Kluwer Law International, 2011) 28.

<sup>1285</sup> Saini *ibid.*

<sup>1286</sup> Cf Abedin N 'The impact of WHIG and utilitarian philosophies on the formative phase of local administration in British India' (2013) Vol.30 (2) *Journal of Third World Studies* 192-197.

<sup>1287</sup> See Keay J *India – A history from the earliest civilisations to the boom of the twenty-first century* (New York Grove Press, 2000) 383-413.

<sup>1288</sup> Kulke H and Rothermund D *A history of India* 5<sup>th</sup> ed (London, Routledge Taylor and Francis Group, 2010) 197-198.

<sup>1289</sup> See Ali A 'The role of the British colonial/imperial rule in the introduction of representative institutions in India' (2013) Vol.29 (2) *Journal of European Studies* 137-168.

schools, health facilities, and infrastructure,<sup>1290</sup> which had adverse consequences for development outcomes such as poverty and infant mortality rates.<sup>1291</sup>

Furthermore, during the British rule, the structure of the village community was based on division of labour.<sup>1292</sup> Klein shows that “in colonial India, commercial agriculture was linked to living standards, ownership, indebtedness, agrarian relations, and crowding”.<sup>1293</sup>

The village population itself consumed the food produced by the village; a handicraft industry in the village also got its raw materials produced at the village level.<sup>1294</sup> It is noteworthy that the village communities were self-sufficient, in the sense that they had everything they wanted within themselves. There were the following three types of villages, first, the agriculturists, second, the village artisans and menials who were servants of the people, and third, the village officials.<sup>1295</sup>

As Lee observes, the Industrial Revolution that began in Great Britain marked a distinct break with the continuity of economic life that had dominated the Western world for centuries.<sup>1296</sup> According to Saini,<sup>1297</sup> the British found India as an

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<sup>1290</sup> For further reading on the long term consequences of Colonial rule in India see, Iyer L 'Direct versus indirect colonial rule in India: Long-term consequences'(2010) Vol.92 (4) *Review of Economics and Statistics* 693-709.

<sup>1291</sup> Iyer L *ibid*.

<sup>1292</sup> Jodhka S 'Sociology/anthropology, nation and the village community' Sociology Unit, Institute of Economic Growth, Delhi, National Workshop 19-21 April 2000 11-12 available at <http://www.unipune.ac.in/snc/cssh/HistorySociology/Apercent20DOCUMENTSpercent20Npercent20HISTORYpercent20OFpercent20SOCIOLOGYpercent20INpercent20INDIA/Apercent201percent20Debatespercent20onpercent20sociologypercent20andpercent20anthropologypercent20ofpercent20India/Apercent201percent2023.pdf> (date of use 23 January 2015).

<sup>1293</sup> Klein I 'British reforms, commercial agriculture and agrarian distress in India' (2008) Vol.70 (4) *Historian* 733; Cf Metcalf T 'Rural society and British rule in nineteenth century India' (1979) Vol.39 (1) *The Journal of Asian Studies* 111-119.

<sup>1294</sup> Robb P *A history of India* 2<sup>nd</sup> ed (UK, Palgrave Macmillan, 2011) 49-52.

<sup>1295</sup> Madan G *Social change and problems of development in India* 1<sup>st</sup> ed (Allied Publishers Private Limited, 1971) 84-85.

<sup>1296</sup> Lee W *Greenwood guides to historic events, 1500-1900* (Greenwood Press, eBook, 2009) 39.

<sup>1297</sup> Saini D *Social security law in India* (Netherlands Wolters Kluwer, 2011) 29.

important source of its raw material and a market for its finished products. The British colonisation had a crippling effect on the handicraft industry, which could not withstand competition from machine made goods, and had to close down.<sup>1298</sup> The British thus commercialised agriculture to enhance exports of raw materials from India to England.<sup>1299</sup>

The destruction of handicraft industry led to unemployment on a vast scale, and the British had no alternative plan of action to settle those who became unemployed in the process.<sup>1300</sup> Similarly, the impact of the British on the land system introduced the *zamindari* system by converting the status of revenue collectors to that of private landlords called *zamindars*.<sup>1301</sup>

Saini<sup>1302</sup> observes that the *zamindars* were required to pay enhanced land revenue to the state. In some parts, a system called *ryotwari* was introduced, whereby each peasant who was holding a plot of land was recognised as a landlord and was made responsible to paying the land revenue to the state. In both cases, the British fixed excessive land rents. Eventually, the net result of their land policy was the emergence of subsistence agriculture.<sup>1303</sup> Consequently, employment in the manufacturing industries has risen steadily and rapidly.<sup>1304</sup>

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<sup>1298</sup> Jayapalan N *Economic history of India* 2<sup>nd</sup> ed (New Delhi Atlantic Publishers and Distributors 2008) 132-133.

<sup>1299</sup> Jayapalan (note 1298 above) 133-134.

<sup>1300</sup> Narayan P *Economic history of modern India* (New Delhi, India, Readworthy, eBook, 1957-1947) 30.

<sup>1301</sup> See Pomohaci M 'The influence of the political, social and religious measures upon Caste during British India' (2013) Vol.6 (1) *International Journal on Humanistic Ideology* 118-119.

<sup>1302</sup> Saini (note 1297 above) 30.

<sup>1303</sup> Pomohaci (note 1301 above).

<sup>1304</sup> Bai M *et al* 'Employment growth analysis in Indian manufacturing sector' (2013) Vol.6 (9) *OIDA International Journal of Sustainable Development* 11-15; Cf Das S *et al* 'Trade and labour demand in an emerging market economy: An analysis for Indian manufacturing during 1991-2010' (2014) Vol.48 (3) *The Journal of Developing Areas* 354-375.

This growth in manufacturing sector has had a tremendous effect on the levels of productivity in different states.<sup>1305</sup> In addition, this sector employs about three-quarters of the manufacturing force and contributes 17% of the net domestic product of the unorganized non-agricultural sector.<sup>1306</sup> Quite recently, there have been discussions on the need for systems of social protection for the vulnerable population groups against economic risks.<sup>1307</sup> This has led to some structural reforms on the social protection policies and the economy.<sup>1308</sup>

### 6.3 Demographic, political, economic, social, and cultural profile

The issues in social security are intimately related with population growth, literacy rate,<sup>1309</sup> the place of females in society, composition of the population, poverty line, and unemployment. As discussed above, India has the largest population,<sup>1310</sup> and is the seventh largest in the world.<sup>1311</sup> In terms of size, it has

<sup>1305</sup> Bai M *et al* 'Employment growth analysis in Indian manufacturing sector' (2013) Vol.6 (9) *OIDA - International Journal of Sustainable Development* 15. See also Bhattacharya M *et al* 'The productivity - wage and productivity – employment nexus: A panel data analysis of Indian manufacturing' (2011) Vol.40 (2) *Empirical Economics* 285-300.

<sup>1306</sup> Raj S 'Structure, employment and productivity growth: In the Indian unorganised manufacturing sector: An industry level analysis' (2011) Vol.56 (3) *Singapore Economic Review* 349.

<sup>1307</sup> Justino P Social security in developing countries: Myth or necessity? Evidence from India' Vol.19 (2007) *Journal of International Development* 371; See also Suryanarayana M 'Economic development and inequalities' in Nagaraj R *Growth, inequality and social development in India – Is inclusive growth possible?* 1<sup>st</sup> ed (UK, Palgrave Macmillan, 2012) 63-87.

<sup>1308</sup> Siggel E 'Poverty alleviation and economic reforms in India' (2010) Vol. 10 (3) *Progress in Development Studies* 247-258; See also Justino (note 1307 above) 371-373.

<sup>1309</sup> Jha notes that when it comes to literacy and education literacy for all females is lower than that for males. However, the literacy rate for female youth (those aged between 15 and 24 years) is higher than that for all females but still lower than that for male youth (those between 15 and 24 years). He further asserts that the ratio of girls to boys in primary school enrolment is lower than that for boys but ultimately catches up in the latest year for which these data are available (2008). However, enrolment and actual education are very different with the ratio of female pupils to male pupils in primary education consistently below 50 percent. The ratio of females to males in secondary school enrolment is growing, but always 100 percent. The ratio of females to males in tertiary enrolment is even lower. The pupil teacher ratio in primary schools is high at above 40 %but is lower for secondary schools, See Jha R 'Welfare schemes and social protection in India' (2014) Vol.34 (3/4) *International Journal of Sociology and Social Policy* 219.

<sup>1310</sup> India's population 2015 available at <http://www.indiaonlinepages.com/population/india-current-population.html> (date of use 10 January 2015).

<sup>1311</sup> Saini (note 1297 above) 27.

the largest economy in the world,<sup>1312</sup> depending on whether market exchange rates or purchasing power parity rates are used to translate local currency into US dollars.

Zepeda notes that most recently the economy has proven resilient to a variety of shocks; droughts, high international oil prices and that the global recession did not prevent growth at above 8% between 2009 and 2011.<sup>1313</sup> He further states that the performance of the Indian economy, along with those of other emerging countries, slowed in 2011–2012, and the outlook is now not so bright.<sup>1314</sup> The growth forecast for the 2012–2013 fiscal year was 6.5%.<sup>1315</sup> Its social and cultural diversity is the source of its real strength. India is a plural, multi-ethnic, and multi-level society.<sup>1316</sup>

### 6.3.1 Government structure

The Constitution envisages a parliamentary form of government, which is federal in structure with unitary features.<sup>1317</sup> The Head of State is the President in who is vested all executive power.<sup>1318</sup> In fact, the real power is vested in the Prime Minister who heads the Central (federal) Government consisting of his Council of Ministers.

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<sup>1312</sup> See Bellman E 'India passes China to become fastest growing economy' *The Wall Street Journal* 11 February 2015 available at <http://blogs.wsj.com/indiarealtime/2015/02/11/its-official-india-has-passed-china-to-become-the-worlds-fastest-growing-economy/> (date of use 13 February 2015); See also *Hindustan Times* (New Delhi, India, 10 February 2015) 2.

<sup>1313</sup> Zepeda E *et al* 'Employing India guaranteeing jobs for the rural poor United Nations Development Programme' (2013) 6-7 available at [http://carnegieendowment.org/files/india\\_rural\\_employment.pdf](http://carnegieendowment.org/files/india_rural_employment.pdf) (date of use 13 February 2015).

<sup>1314</sup> Zepeda *ibid*.

<sup>1315</sup> Zepeda (note 1314 above).

<sup>1316</sup> See Bilgrami T 'Multiculturalism in India' (2010) Vol.1 (2) *An International Journal of Education and Social Development* 199-205.

<sup>1317</sup> Bhatt S and Bhargava G *Land & people of Indian States & union territories* (New Delhi, Kalpaz Publications, 2005)117.

<sup>1318</sup> See India Foreign Policy and Government Guide Vol.1 USA, Washington DC International Business Publications (2011) 39.

The federal legislative power is vested in Parliament<sup>1319</sup> which consists of the President and the two houses, that is, House of People (*Lok Sabha*)<sup>1320</sup> – also known as the lower house, and the Council of States (*Rajya Sabha*)<sup>1321</sup> – known as Upper House. Both these houses consist of elected members. The President appoints the Prime Minister and the President on the advice of the Prime Minister appoints other ministers.<sup>1322</sup> The Constitution provides that the President shall act on the aid and advice of the Council of Ministers, which is headed by the Prime Minister.

A Governor appointed by the President for a term of five years administers each state.<sup>1323</sup> In contrast, the President through a Lieutenant Governor or administrator appointed by him/her administers each Union Territory. For every state, there is a legislature that consists of a Governor and a Legislative Assembly. In some states, there is a Legislative Council as well. The real power in a State is vested in the Chief Minister who heads a Council of Ministers at the State level. Like the Prime Minister at the central level, the Chief Minister advises the Governor in the exercise of his/her executive power.

### 6.3.2 Poverty and inequality

It is important to note that a large section of the population remain socially, educationally and economically deprived.<sup>1324</sup> This is reflected in various indicators such as poverty, illiteracy, infant mortality and under nutrition among children, as shown in table 6.1.

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<sup>1319</sup> For further reading on the Indian Parliament, see Shankar B and Rodrigues V *The Indian Parliament – A democracy at work* (New York, Oxford University Press, 2011) 3-62.

<sup>1320</sup> Shankar B and Rodrigues V *ibid*.

<sup>1321</sup> Kapur D and Mehta P 'The Indian Parliament as an institution of accountability' United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programmeme paper Number 23 January 2006, 3-4 available at <https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/bio/uploads/Thepercent20Indianpercent20Parliament.pdf> (date of use 15 January 2015); For further reading on Indian Parliament, see Shankar B and Rodrigues V ( note 1319 above).

<sup>1322</sup> Shankar B and Rodrigues V (note 1319 above).

<sup>1323</sup> Article 153 of the Indian Constitution (Ninety-Eighth Amendment) Act, 2012.

<sup>1324</sup> Midgley J and Piachaud D *Social protection, economic growth and social change: Goals, issue and trajectories in China, India, Brazil and South Africa* (Edward Elgar Publishing Limited, 2013)100-104.



Table 6.1 Selected socio-economic indicators in India.<sup>1325</sup>

<b>(a) Demographic</b>	
Total population (billion) (2011)	1.21
Rural population (%) (2011)	68.84
<b>(b) Economic</b>	
GDP average annual growth rate (%) (2007-12)	8.0
GNI per capita (PPP\$) (2010)	3550
Contribution of agriculture to GDP (%) (2009-10)	14.62
Contribution of industry to GDP (%) (2009-10)	20.16
Contribution of services to GDP (%) (2009-10)	65.22
<b>(c) Literacy and gender gap</b>	
Literacy rate (%) (2011)	74.04
Male literacy rate (%) (2011)	82.14
Female literacy rate (%) (2011)	65.46
<b>(d) Health and nutrition</b>	
Life expectancy at birth (in years) (2011)	65.4
Proportion of underweight children under 5 years of age (%) (2004-09)	43.5
Maternal mortality ration (per 1000 00 live births) (2007-09)	212
Infant mortality rate (per 1000 live births) (2009)	50
<b>(e) Poverty and inequality</b>	
Proportion in poverty (headcount ratio, %) (2009-10)	29.8
Proportion in poverty – rural (headcount ratio, %) (2009-10)	33.8
Proportion in poverty- urban (headcount ratio, %) (2009-10)	20.9
Total number of poor (in millions) (2009-10)	354.68
Gini coefficient (2004-05)	0.33

Social disparity goes back to a history of discrimination against particular population groups.<sup>1326</sup> In the context of social and economic discrimination,

<sup>1325</sup> United Nations Development Programme (2012); Government of India socio-economic indicators (2012), page 26 available at <http://www.cbhidghs.nic.in/writereaddata/mainlinkFile/07percent20Socio-percent20Economicpercent20Indicatorspercent20percent202011.pdf> (date of use 23 December 2014).

Thorat argues that policy processes need to exhibit a radical shift in their focus to improve the ownership of income earning capital assets, agricultural land (land, and non-land) assets, employment, human resource and health situation.<sup>1327</sup> He further observes that appropriate remedies need to be incorporated against discrimination to ensure equity participation of the marginalised communities in the private and the public sectors.

The Constitution has special provisions to protect the interests of the Scheduled Tribes (STs), Scheduled Castes (SCs), and other Backward Castes (OBCs).<sup>1328</sup> Almost 90% of the STs and 80% of the SCs and OBCs live in rural India.<sup>1329</sup> Groups that are being discriminated have been and remain at the bottom of the social and economic pyramid and thus include large concentrations of poor people. The SCs and STs are the most deprived members of society.<sup>1330</sup>

These groups also have limited access to land.<sup>1331</sup> Kumar<sup>1332</sup> argues that these social inequalities may be reduced through bringing about greater economic equality, which is a major step towards reducing poverty through access to land for the deprived communities. The rural section of the population is most neglected so far as the provision of basic amenities of living and social security

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<sup>1326</sup> Jayadev A *et al* 'Patterns of wealth disparities in India during the liberalisation era' (2007) Vol.42 (38) *Economic and Political Weekly* 3853-3863; Dholakia H 'Regional disparity in economic and human development in India' (2003) Vol.38 (39) *Economic and Political Weekly*, 4166-4172; Kurian J 'Widening regional disparities in India: Some indicators' (2000) Vol.35 (7) *Economic and Political Weekly*, 538-550; For further reading on class discrimination in India, see Dhesi A 'Caste, class synergies and discrimination in India' (1998) Vol.25 (6) *International Journal of Social Economics* 1030-1044.

<sup>1327</sup> Thorat S 'Marginalised groups and the common minimum programme' (2004) Vol.32 (7) *Social Scientist* 71-72.

<sup>1328</sup> Kurian N 'Widening economic and social disparities: Implications for India' (2007) *Indian J Med Res* 378.

<sup>1329</sup> Azam M 'A distribution analysis of social group inequality in rural India' (2012) 24 *Journal of International Development* 417.

<sup>1330</sup> See Percentage of poverty by population in India available at [http://planningcommission.nic.in/data/datatable/data\\_2312/DatabookDec2014percent20103.pdf](http://planningcommission.nic.in/data/datatable/data_2312/DatabookDec2014percent20103.pdf) (date of use 23 January 2015); See also United Nations in India available at <http://www.in.one.un.org/task-teams/scheduled-castes-and-scheduled-tribes> (date of use 23 January 2015).

<sup>1331</sup> Kumar C 'Access to land for Scheduled Castes and Scheduled Tribes in Andhra Pradesh' (2014) Vol.3 (12) *Indian Journal of Research* 2-5.

<sup>1332</sup> Kumar (note 1331 above) 1.

are concerned.<sup>1333</sup> According to the Suresh Tendulkar Report,<sup>1334</sup> 38% of India's total population lives below the poverty line. In rural areas, the incidence of poverty is even greater, with 41.8% of the rural population living below the poverty line.<sup>1335</sup>

In India, poverty is defined in terms of absolute poverty, that is, access to sufficient food, energy for biological survival,<sup>1336</sup> while in many developed countries poverty is defined based on relative disparity. Patnail<sup>1337</sup> observes that poverty reduction, and thereby improving the livelihood of the people, has been the objective in India's Five - Year Plan. Often these have translated into major programmes like the Community Development Programmes, Integrated Rural Development Programme (IRDP), Swarnajayanti Gram Swarojgar Yojana (SGSY) and more recently the National Rural Livelihood Mission (NRLM).<sup>1338</sup>

Ramachandran<sup>1339</sup> observes that even after over six decades of independence, poverty remains rampant. He asserts that in the year 2009-2010, 29.8% of the population was still living below the poverty line. According to government

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<sup>1333</sup> Saini D *Social security in India* (Netherlands, Kluwer Law International, 2011) 28.

<sup>1334</sup> Government of India Planning Commission November, 2009 Report of the Expert Group to Review the Methodology for Estimation of Poverty available at [http://planningcommission.nic.in/reports/genrep/rep\\_pov.pdf](http://planningcommission.nic.in/reports/genrep/rep_pov.pdf) (date of use 15 December 2014).

<sup>1335</sup> Government of India Planning Commission June 2014 Report of the Expert Group to Review the Methodology for Estimation of Poverty available at [http://planningcommission.nic.in/reports/genrep/rep\\_pov.pdf](http://planningcommission.nic.in/reports/genrep/rep_pov.pdf) (date of use 15 December 2014).18.

<sup>1336</sup> Ramachandran M 'Poverty and human rights' (2014) Vol.IV (4) *The IUP Law Review* 61; Cf Siggel E 'Poverty alleviation and economic reforms in India' (2010) Vol.10 (3) *Progress in Development Studies* 247-258.

<sup>1337</sup> Patnail S and Prasad C 'Revisiting sustainable livelihoods: Insights from implementation studies in India' (2014) Vol.18 (4) *Vision* 355-356.

<sup>1338</sup> For further reading on the community development programmes in India, see chapter 35 of rural and urban development in India available at [http://mospi.nic.in/Mospi\\_New/upload/statistical\\_year\\_book\\_2012/htm/Ch-35percent20Ruralpercent20andpercent20Urbanpercent20Development/Ruralpercent20andpercent20Urbanpercent20Development-writeup.pdf](http://mospi.nic.in/Mospi_New/upload/statistical_year_book_2012/htm/Ch-35percent20Ruralpercent20andpercent20Urbanpercent20Development/Ruralpercent20andpercent20Urbanpercent20Development-writeup.pdf) (date of use 15 December 2014); See also Mongia J *India's economic development strategies 1951-2000A.D* (Allied Publishers Private Limited, 1985) Chapter 15 and 16. On development of the rural non-farm sector, see Ganguly A 'Development of the rural non-farm sector in India' in Kumar M and Pandey M *Economic challenges to make South Asia free from poverty and deprivation* (New Delhi, India, Academic Foundation, 2010) 37-52.

<sup>1339</sup> Ramachandran (note 1336 above) 59.

figures, poverty continued to decrease between 2004–2005 and 2009–2010 at a faster pace.<sup>1340</sup> Unfortunately, as in many other countries, faster growth was also accompanied by rising inequality.<sup>1341</sup>

The United Nations, in its Human Development Report 2013,<sup>1342</sup> measures inequality in the terms of two indicators: (i) the Income Gini Coefficient (which measures the deviation of distribution of income (or consumption) among the individuals within a country from perfectly equal distribution; (ii) the quintile income ratio, which is a measure of average income of the richest 20% of the population to that of the poorest 20%. India’s inequality increased from 0.286 in 1993–1994 to 0.305 in 2004–2005 in rural areas and from 0.343 to 0.375 in urban areas.<sup>1343</sup> The recent annual report of the Planning Commission showed in table 6.2 below provides a summary of the percentage and number of poor households.

Table 6.2 Source: Planning Commission.<sup>1344</sup>

	Poverty ratio (%)			Number of poor (million)		
	Rural	Urban	Total	Rural	Urban	Total
1. 1993-94	50.1	31.8	45.3	328.6	74.5	403.7
2. 2004-05	41.8	25.7	37.2	326.3	80.8	407.1
3. 2011-12	25.7	13.7	21.9	216.5	52.8	269.3

<sup>1340</sup> See Planning Commission Twelfth five-year plan (2013) Vol.2 at 5.

<sup>1341</sup> See Namissan G ‘The global economic crisis, poverty, and education: A perspective from India’ (2010) Vol.25 (6) *Journal of Educational Policy* 730-732.

<sup>1342</sup> See United Nations Development Programme Human Development Report ‘The rise of the South: Human progress in a diverse world’ (2013) 152-155 available at [http://hdr.undp.org/sites/default/files/reports/14/hdr2013\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/14/hdr2013_en_complete.pdf) (date of use 13 December 2014).

<sup>1343</sup> Cf Panagariya A and Mukim M ‘A comprehensive analysis of poverty in India’ Vol.31 (1) (2014) *Asian Development Review* 6-52.

<sup>1344</sup> See *India’s Planning Commission Annual Report 2013-14*, at 24 available at [http://planningcommission.nic.in/reports/genrep/ann\\_e13\\_14.pdf](http://planningcommission.nic.in/reports/genrep/ann_e13_14.pdf) (date of use 13 December 2014).

4. Annual average decline : 1993-94 to 2004-05 (% age points p.a)	0.75	0.55	0.74			
5. Annual average decline :2004-05 to 2011 – 12 (% age points p.a)	2.32	1.69	2.18			

It is important to note that between the 1990s and the 2000s, the variation in income per capita across states increased substantially to highlight differences in the living conditions of people based on where they lived.<sup>1345</sup> Zepeda opines that the incidence of poverty in different states ranged from 3% of the total population in the richer states to 57% in some of the poorest.<sup>1346</sup> He also asserts that the four states with the lowest poverty incidence housed just 2% of all poor people in India, whereas the 14 poorest states accounted for 80%. In two states, Orissa and Bihar,<sup>1347</sup> more than half the population is poor.

<sup>1345</sup> Cf Bhide S and Mehta A 'Chronic poverty in rural India: Issues and findings from panel data' (2004) Vol.5 (2) *Journal of Human Development* 196-205.

<sup>1346</sup> Zepeda E *et al* 'Guaranteeing jobs for the rural poor: An assessment of India's MGNREGA public works programmeme' 238 available at [http://www.undp.org/content/dam/undp/library/Povertypercent20Reduction/Inclusivepercent20development/Socialpercent20protection,percent20growthpercent20andpercent20employment/SPGand E\\_ch6\\_india.pdf](http://www.undp.org/content/dam/undp/library/Povertypercent20Reduction/Inclusivepercent20development/Socialpercent20protection,percent20growthpercent20andpercent20employment/SPGand E_ch6_india.pdf) (date of use 23 December 2014).

<sup>1347</sup> Cf Gaiha R and Kulkarni V 'Is growth central to poverty alleviation in India' (1998) Vol.52 (1) *Journal of International Affairs* 147.

Todhunter<sup>1348</sup> posits that the issue of poverty keeps rearing its inconvenient head in India. The Planning Commission tends to keep on shifting the poverty line, but it is always at a ludicrously low level, which underestimates the numbers actually living in poverty.<sup>1349</sup>

Drèze<sup>1350</sup> states that the reduction of income inequality is a difficult challenge in India as elsewhere, partly due to incentive problems (for example the possible need for a link between productivity and reward), and partly because of the resistance of privileged classes. He asserts that the universalisation of elementary education would not only reduce educational disparities (and other social inequalities associated with these disparities), but also contribute to a wide range of other economic and social objectives, given the diverse personal and social roles of education. He argues that the achievement of equity depends crucially on political action and the practice of democracy.

Madhu<sup>1351</sup> seems to suggest that in order to address the said inequalities, policies must promote the livelihoods of the poor, as well as promoting their financial growth. He posits that this can be done by following financial inclusion path by increase in bank branch network, increase in bank and credit penetration in rural areas, and ensuring financial inclusion of the poor. The availability of banking facilities, strong bank branch network and financial inclusion of the poor are the major facilitators of developmental and expansionary activities. In turn,

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<sup>1348</sup> Todhunter C 'Poverty and rising social inequality in India' Global Research 3 September 2012 available at <http://www.globalresearch.ca/poverty-and-rising-social-inequality-in-india/5303105> (date of use 13 December 2014).

<sup>1349</sup> Mehta A *et al* 'India Chronic poverty report' *Indian Institute of Public Administration* (2011) 15-16.

<sup>1350</sup> Drèze J and Sen A 'Democratic practice and social inequality in India' (2002) Vol.37 (2) *Journal of Asian and African Studies* 13-14.

<sup>1351</sup> Madhu S 'Financial development and income inequality in India: An application of ARDL approach' (2015) Vol.42 (1) *International Journal of Social Economics* 77. For further reading on the extent, and policy implications of inequality in South Asia, see Rama M *et al* *Addressing inequality in South Asia* World Bank Group Washington DC (2015) 1-174 available at <https://openknowledge.worldbank.org/handle/10986/20395?hootPostID=3056c4dba6c6ca21512c21198cc282ce> (date of use 10 January 2015).

the economic agents will facilitate the growth, development, investment, employment generation and infrastructure development.

### 6.3.3 Labour force participation rate

According to the Annual Employment and Unemployment Survey Report in 2013/2014, the labour force participation rate was estimated to be 52.5%.<sup>1352</sup> The unemployment rate was estimated to be 4.9%.<sup>1353</sup> India has low levels of female labour force participation.<sup>1354</sup> Scholars<sup>1355</sup> suggest that the likely causes of low levels of female participation in the labour market include, *inter alia*, lack of education,<sup>1356</sup> insufficient job opportunities for women,<sup>1357</sup> social status<sup>1358</sup> and occupational segregation of women.<sup>1359</sup> Lanjouw observes that “most of rural India’s workforce (60%) remains primarily involved in agriculture, but in recent decades this sector’s growth has lagged behind other sectors in the

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<sup>1352</sup> See Government of India Ministry of Labour and Employment Press Note Fourth Annual Employment and Unemployment Survey Report (2013/14) 3 available at [http://labourbureau.nic.in/Press\\_note\\_4th\\_EUS.pdf](http://labourbureau.nic.in/Press_note_4th_EUS.pdf) (date of use 10 January 2015).

<sup>1353</sup> Government of India Ministry of Labour and Employment Press Note Fourth Annual Employment and Unemployment Survey Report (2013/14) 4.

<sup>1354</sup> Kapsos S *et al* ‘Why is female labour force participation declining so sharply in India’ ILO Research paper no.10 International Labour Office (2014) 3-5; Government of India Planning Commission ‘Report of the Working Group on Labour Force and Employment Projections constituted for the Eleventh Five Year Plan (2007-2012)’ 13-14 available at [http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11\\_lproj.pdf](http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_lproj.pdf) (date of use 23 December 2014); Venkatanarayana M and Naik S ‘Growth and structure of workforce in India: An analysis of census 2011’ available at [http://mpr.aub.uni-muenchen.de/48003/1/MPRA\\_paper\\_48003.pdf](http://mpr.aub.uni-muenchen.de/48003/1/MPRA_paper_48003.pdf) (date of use 15 January 2015).

<sup>1355</sup> Kapsos S *et al* ‘Why is female labour force participation declining so sharply in India’ ILO Research paper no.10 International Labour Office (2014) 5-23; See also Klasen S and Pieters J ‘What explains the stagnation of female labour force participation in urban India’ Institute for the study of labour (2013) 2-40 available at <http://ftp.iza.org/dp7597.pdf> (date of use 23 December 2014).

<sup>1356</sup> See India - *A World Bank country study* (1997) 15 available at <http://o-elibrary.worldbank.org.oasis.unisa.ac.za/doi/pdf/10.1596/0-8213-3971-0> (date of use 23 January 2015).

<sup>1357</sup> Kapsos S *et al* (note 1355 above).

<sup>1358</sup> Patel R ‘The persistence of traditional gender roles in the information technology sector: A study of female engineers in India’ (2005) Vol.2 (3) *Information Technologies and International Development* 30-40; See also Alesina A *et al* ‘On the origins of gender roles: Women and the plough’ (2013) Vol.128 (2) *The Quarterly Journal of Economics* 470-528.

<sup>1359</sup> Chattopadhyay M ‘Sex segregation in India’s formal manufacturing sector’ (2013) Vol.152 (1) *International Labour Review* 44-56; Croppenstedt A *et al* ‘Gender and agriculture: Inefficiencies, segregation, and low productivity traps’ (2013) Vol.28 (1) *World Bank Research Observer* 80-103.



economy”.<sup>1360</sup> The number of self-employed is high.<sup>1361</sup> In rural areas, the number of people who are self-employed stood at 54.2%,<sup>1362</sup> while in urban areas, the number of informally employed people stood at 41.4% in 2011.<sup>1363</sup> The National Commission for enterprises in the informal sector estimates that in 2005 the total employment in the Indian economy stood at 458 million, of which the unorganised sector accounted for 395 million.<sup>1364</sup> These statistics show that the unorganised sector constitutes 86% of total workers in 2004-2005.<sup>1365</sup>

In keeping with the special status accorded to STs and SCs in the Constitution, the Indian Government has affirmed its commitment to improving the socio-economic status and has taken initiatives that encompass policy, programmatic and legislative intervention.<sup>1366</sup> The most telling examples of government intervention in this regard includes, *inter alia*, the enactment of the Recognition of Forest Rights Act.<sup>1367</sup> This piece of legislation is considered as ground-breaking in that it acknowledges the historical injustice meted out to vulnerable groups, in particular the forest dwellers.<sup>1368</sup> The legislation was promulgated to “recognise and vest forest rights and occupation in forest land in forest dwelling” to tribals

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<sup>1360</sup> Lanjouw P *et al* ‘Nonfarm diversification, poverty, economic mobility, and income inequality: A case study in village India’ (2013) Vol.44 *Agricultural Economics* 461.

<sup>1361</sup> Rani U and Belser P ‘Low pay among wage earners and the self-employed in India’ (2012) Vol.151 (3) *International Labour Review* 228-230.

<sup>1362</sup> The *Economic Times* ‘Over half of India’s workforce [is] self-employed’ available at [http://articles.economictimes.indiatimes.com/2011-06-25/news/29747818\\_1\\_rural-areas-casual-labourers-urban-areas](http://articles.economictimes.indiatimes.com/2011-06-25/news/29747818_1_rural-areas-casual-labourers-urban-areas) (date of use 23 January 2015).

<sup>1363</sup> The *Economic Times* *ibid*.

<sup>1364</sup> National Commission for Enterprises in the Unorganised Sector ‘Report on conditions of work and promotion of livelihoods in the unorganised sector’ 3 available at [http://www.prsindia.org/uploads/media/Unorganisedpercent20Sector/bill150\\_20071123150\\_Condition\\_of\\_workers\\_sep\\_2007.pdf](http://www.prsindia.org/uploads/media/Unorganisedpercent20Sector/bill150_20071123150_Condition_of_workers_sep_2007.pdf) (date of use 23 January 2015).

<sup>1365</sup> National Commission for Enterprises in the Unorganised Sector *ibid*.

<sup>1366</sup> See Government of India ‘Constitution of a High Level Committee to prepare a report on the socio-economic, health and educational status of the tribal communities in India’ 14 August 2013 available at <http://tribal.nic.in/WriteReadData/userfiles/file/highlightPMO.pdf> (date of December 2014).

<sup>1367</sup> Recognition of Forest Rights Act, 2006.

<sup>1368</sup> UNDP India ‘Support Recognition of community rights under Forest Rights Act in Madhya Pradesh and Chhattisgarh: Challenges and way forward’ Samarthan – Center for Development Report commissioned by the Center for Development and Support July 2011 available at <http://www.undp.org/content/dam/india/docs/DG/recognition-of-community-rights-under-forest-rights-act-in-madhya-pradesh-and-chhattisgarh-challenges-and-way-forward.pdf> (date of use 13 December 2014).



and other traditional forest dwellers “who have been residing in forests for generations but whose rights could not be recorded”.<sup>1369</sup>

Despite its commitment to redistribute land to the tribal people, the Recognition of Forest Rights Act has been plagued by many challenges. These challenges range from administrative issues and poor people being able to exercise their rights as provided in the Act.<sup>1370</sup> Other pieces of legislation that focus on the protection and empowerment of SCs and STs include the Land Acquisition Bill, and the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act.<sup>1371</sup> The Land Acquisition Rehabilitation and Resettlement Bill aims to protect the interests of SCs and STs.<sup>1372</sup>

The Prohibition of Employment as Manual Scavengers and the Rehabilitation Act aims to eliminate the inhumane practice of scavenging and the rehabilitation of scavengers.<sup>1373</sup> The key features of this Act were design to prohibit, *inter alia*:

- The construction or maintenance of insanitary toilets;
- The engagement or employment of anyone as a manual scavenger; and

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<sup>1369</sup> For further reading in this regard, see Government of India Ministry of Tribal Affairs Status report on implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 available at <http://tribal.nic.in/WriteReadData/CMS/Documents/201307170312400636473MPRforthemonthofjune2013.pdf> (date of use 13 December 2014); See also Samarthan – Center for Development Support Recognition of community rights under Forest Rights Act in Madhya Pradesh and Chhattisgarh: Challenges and way forward Report commissioned by the Center for Development and Support July 2011, 1-59 available at <http://www.undp.org/content/dam/india/docs/DG/recognition-of-community-rights-under-forest-rights-act-in-madhya-pradesh-and-chhattisgarh-challenges-and-way-forward.pdf> (date of use 13 December 2014).

<sup>1370</sup> UNDP India ‘Support Recognition of community rights under Forest Rights Act in Madhya Pradesh and Chhattisgarh: Challenges and way forward’ Samarthan – Center for Development Report... (note 1368 above) 57.

<sup>1371</sup> The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act No.25 of 2013 available at <http://indiacode.nic.in/acts-in-pdf/252013.pdf> (date of use 23 January 2015).

<sup>1372</sup> Ministry of Rural Development 4 September 2013 available at <http://pib.nic.in/newsite/erelease.aspx?relid=99110> (date of use 23 January 2015); See also Ramesh J ‘India’s rural development’ Minister available at <http://www.governancenow.com/news/regular-story/jairam-ramesh-why-land-bill-landmark> (date of use 23 January 2015).

<sup>1373</sup> See Chapter one of The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act No. 25 of 2013.

- A person from being engaged or employed for hazardous cleaning of a sewer or a septic tank.

The violations of these provisions could result in a years' imprisonment or a fine of INR 50,000 or both.

#### **6.4 The right to social security under the Indian Constitution: A discussion of selected case law**

As discussed above, the Indian Constitution was created after two centuries of British colonial rule in 1947.<sup>1374</sup> It draws extensively from Western legal traditions in its outline of the principles of liberal democracy.<sup>1375</sup> O'Connell asserts that "the Indian Constitution was intended to be a transformative document,<sup>1376</sup> and was infused with a commitment to three over-arching themes, namely; 'protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians'.<sup>1377</sup> Granville<sup>1378</sup> contends that "probably no other nation's constitution has provided so much impetus towards changing and rebuilding the society for the common good".

The conceptualisation of social welfare was based on the need by the democratic government to free itself from foreign rule, and the drafting of the Constitution.

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<sup>1374</sup> Cf Mitra S *Politics in India: Structure, and processes and policy* (Routledge, 2012) 21-23. For further discussion on Constitutional law and the history of Government of India see Anand C *Constitutional law and history of government of India* 8<sup>th</sup> ed (Delhi, Universal Law Publishing, 2008) 1-72.

<sup>1375</sup> Elangovan A 'The making of the Indian Constitution: A case for a non-nationalist approach' (2014) Vol.12 (1) *History Compass* 1-2; See also Scotti V 'India: A critical use of foreign precedents in constitutional adjudication' in Groppi T and Ponthoreau M *The use of foreign precedents by constitutional judges* (United Kingdom, Hart Publishing, 2013) 73-76.

<sup>1376</sup> For further reading on transformative constitutionalism, see Vilhena O *et al Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013) 3-19.

<sup>1377</sup> O'Connell P 'The death of socio-economic rights' (2011) Vol.74 (4) *The Modern Law Review* 545.

<sup>1378</sup> Granville A *The Indian Constitution: Cornerstone of a nation* (New Delhi, Oxford University Press, 1966).

Kumar posits that “the Indian national movement was conscious of the importance of freedom and planning for social and economic development”.<sup>1379</sup> He shows that the government was able to focus the attention of the masses upon growing poverty and recurrence of famine that was due to defective policies of the colonial government.

According to Kumar, “the resolutions of the Indian National Congress from 1929 onwards underscored the need to make revolutionary changes in the present economic structure of the society and to address grave inequalities in order to deal with poverty and ameliorate the condition of the masses. The resolution of 1931 underlined that political freedom must include real economic freedom of the starving millions and elaborated the fundamental rights which should be included in the Constitution of free India to provide a basis for it”.<sup>1380</sup>

The preamble of the Constitution expresses the essential features of political and economic philosophy underlying the provisions of the Constitution. It provides that it would be a sovereign, socialist, and secular democratic republic aimed at securing all its people's justice, liberty, equality and fraternity.<sup>1381</sup> It assures a democratic way of life and embraces the ideal of establishing social, political and economic justice in the country.

It provides protection of individual rights and freedoms as well as the promotion of collective goods. The Fundamental Rights are modelled after the American Bill of Rights enforceable through the judiciary. The judiciary can issue different types of writs to provide remedy to citizens whose fundamental rights are violated. These include the writs of *habeas corpus*, *mandamus*, *certiorari*,

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<sup>1379</sup> Kumar A ‘The welfare state system in India’ in Vivekanandan B and Kurian N *Welfare states and the future* (UK, Palgrave Macmillan, 2005) 338.

<sup>1380</sup> Kumar *ibid.*

<sup>1381</sup> Austin G *The Indian Constitution: Cornerstone of nation* (New Delhi, Oxford University Press, 1966) 50.

prohibition and *quo warranto*.<sup>1382</sup> These writs can be issued against the state in cases of the violation of fundamental rights of citizens.<sup>1383</sup>

The declaratory order requires the state to accept the binding nature of economic, social and cultural rights under Articles 141 and 144 of the Constitution. The judgement in *Unnikrishnan J.P v State of Andhra Pradesh*<sup>1384</sup> provides an example of a declaration order. In *casu*, the court held that the right to education is implicit in and flows from the right to life guaranteed under Article 21 and that a child (citizen) has a fundamental right to free education up to the age of 14 years.

It is fascinating to note the manner in which the Constitution protects the fundamental rights of minorities. This is clearly portrayed in the seminal case of *S.P. Gupta v Union of India*,<sup>1385</sup> where the Supreme Court held that poor people, persons in custody, women and children can seek enforcement of their fundamental rights by writing a letter to any Supreme Court judge without an accompanying affidavit. This category of cases has attracted what is called public

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<sup>1382</sup> Jaiswal summarises these writs as follow; *habeas corpus* literally means that human person is sacred. Hence no man may be detained illegally. Whenever a man is detained, he must be produced before a court. This writ is a powerful safeguard against arbitrary arrest and detention. *Mandamus* is a 'command' calling upon public servants to perform some duties. Thus mandamus is issued against dereliction of duty. Prohibition is writ issued by the Supreme Court or the High Courts, to prohibit inferior courts under them to overstep their jurisdiction. Criterion enables a superior court of compels inferior courts to submit records of proceedings to the higher court. *Quo warranto* is a writ issued to determine the legality of a person's claim to public office. The purpose of this writ is to prevent usurpation of a public office by an undesirable or, unqualified person. See Jaiswal V 'Right to constitutional remedies in Indian Constitution' (2013) available at <http://www.importantindia.com/2030/right-to-constitutional-remedies-indian-constitution/> (date of use 23 January 2015); See also Reddy G 'Right to constitutional remedies writs' available at <http://www.mchrtdi.gov.in/splfc/week3/PCCI-Constitutional%20Remedies%20-%20Dr.G.B.Reddy.pdf> (date of use 23 January 2015); Mathur A 'Citizen hope: The soul of the law' (2015) available at <http://indianexpress.com/article/india/india-others/citizen-hope-the-soul-of-the-law/> (date of use 23 January 2015); Ranjan S *Justice, judocracy and democracy in India: Boundaries and breaches* 1<sup>st</sup> edition (New Delhi, Routledge India, 2012).

<sup>1383</sup> See *Sajjan Singh v State of Rajasthan* 1965 AIR 845, 1965 SCR (1) 933, at para 959.

<sup>1384</sup> *Unnikrishnan J.P v State of Andhra Pradesh* 1993 AIR 2178, 1993 SCR (1) 594, p 8 available at <http://indiankanoon.org/doc/1775396/> (date of use 23 January 2015).

<sup>1385</sup> *S.P. Gupta v Union of India* AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365.

interest litigation.<sup>1386</sup> After this judgement, a large number of cases involving public interest litigation have been decided by the judiciary by way of this process.

A further step in this direction has been permitting petitions to be filed through writing of letters to the chief justice highlighting a question of public importance thereby invoking the jurisdiction of the court.<sup>1387</sup> Commentators agree that the essential foundation of public interest litigation was due to the willingness on the part of the judges of the Supreme Court, and later the High Courts, to relax the ordinary strictness of procedural forms for litigation.<sup>1388</sup> One of the characteristics of public interest litigation is that it is not directed to self-interest as this is usually conceived in the courts.<sup>1389</sup> However, self-interest is what ordinarily gives a litigant standing - a litigant must not be a mere busybody. According to Mendelsohn,<sup>1390</sup> the rules had to be varied to allow third parties, lawyers, social workers, journalists, and academics to bring action in pursuit of a cause that the court was prepared to see as their legitimate concern. It is argued that public interest litigation is the principal vehicle that allows poor people to access the courts and find remedies in cases where their fundamental rights have been violated.<sup>1391</sup>

The court also pointed out that it could appoint socio-legal commissions to enforce fundamental rights of people. It can also award compensation to the aggrieved where the infringement of rights is gross or it is unduly harsh because

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<sup>1386</sup> See Sahoo S 'Globalisation and politics of the poor in India' (2014) Vol.49 (1) *Journal of Asian and African Studies* 12.

<sup>1387</sup> Ramachandran (note 1336 above) 67.

<sup>1388</sup> Mendelsohn O *Law and social transformation in India* (New Delhi, Oxford University Press, 2014) 251. For further reading on public interest litigation, see Govindjee A 'Lessons for South African social assistance law from India: Part 1 - the list that bind - The Indian Constitution and reasons for comparing South Africa with India' (2005) *OBITER* 589-593; See also Mendelsohn O *Law and social transformation in India* (New Delhi, Oxford University Press, 2014) 250-255.

<sup>1389</sup> Mendelsohn O *ibid.*

<sup>1390</sup> Mendelsohn O *ibid.*

<sup>1391</sup> Scotti V 'India: A critical use of foreign precedents in constitutional adjudication' in Groppi T and Ponthoreau M *The use of foreign precedents by constitutional judges* (UK, Hart Publishing, 2013)79.

of their poverty, disability or socially or economically disadvantaged position. According to Saini, this development of judicial availability to the poor can also be said to be a form of social security to the poor in the Indian context.<sup>1392</sup>

Part III of the Constitution enumerates the rights of individuals as fundamental rights that are sacred and inviolate. In contrast, Part IV provides certain principles that are fundamental in the governance of the country which guide the institutions for law-making and governance. The government policy with respect to fulfilment of economic and other rights is guided by obligation on the State contained in the *Directive Principle* of the Constitution. By contrast, the forefathers of the South African Constitution recognised the urgent need to realise a more equitable distribution of benefits such as health care<sup>1393</sup> and housing,<sup>1394</sup> and this resulted in the entrenchment of justiciable socio-economic rights in the Constitution.<sup>1395</sup>

It is convenient at this stage to deal with relevant principles on economic and social rights as provided in the Constitution of India. Article 41 directs the state to “within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”. Furthermore, Article 45 stipulates that “the state shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children”. Article 47 stipulates that “the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties”.

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<sup>1392</sup> Saini (note 1297 above) 36.

<sup>1393</sup> See s 27(1)(a) of the Constitution of the Republic of South Africa.

<sup>1394</sup> S 26 of the Constitution of the Republic of South Africa.

<sup>1395</sup> Pillay A ‘Judicial activism and the Indian Supreme Court: Lessons for economic and social rights adjudication’ in Lazarus L *et al Reasoning rights – Comparative judicial engagement* (UK, Hart Publishing, 2014) 340.

The preamble expresses the essential features of political and economic philosophy underlying the provisions of the Constitution. Though the individual rights are protected through fundamental rights under Part III, the claims of social good and egalitarianism are enshrined in Part IV.<sup>1396</sup>

These two parts are rightly observed by Austin as the core commitment to social revolution and the conscience of the Constitution. Fundamental rights in the Constitution recognises the importance of the individual in the affairs of the state and seek to assure every citizen full freedom to enjoy life, liberty and happiness as he likes and the state will interfere with it only if consideration of public good justifies such interference.

Another important aspect that must be taken into consideration is that the directive principles make precaution to provide inbuilt provisions on the strength of which reconciliation has to be attempted between the rights of individuals and the claims of social good.<sup>1397</sup> The framers of the Constitution were clear in their mind that directive principles are fundamental in the governance of the country.<sup>1398</sup> The significance of directive principles in relation to that of fundamental rights can be determined only by referring to the intention of the framers in making these principles as an integral part of the Constitution.<sup>1399</sup>

The objectives of the directive principles can be achieved by making appropriate law by the state. Articles 36 to 51 reflect the socio-economic principles in the governance of the country. The provisions relating to social security are included in Part IV though the right to life and protection from discrimination and exploitation are laid down in Part III dealing with the Fundamental Rights. In the

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<sup>1396</sup> Mishra A 'Evolution of the relationship between fundamental rights and directive principles under the Constitution of India' (2014) Vol.IV (1) *The IUP Law* 42.

<sup>1397</sup> Abraham C *Environmental jurisprudence in India* (London, Kluwer Law International, 1999) 17-21.

<sup>1398</sup> Abraham C ( note 1397 above) 17-22.

<sup>1399</sup> Abraham *ibid.*

context of the right to life, the Supreme Court in *Bandhua Mukti Morcha v Union of India and Others*,<sup>1400</sup> held that:

[The] right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government... has the right to take any action which will deprive a person of the enjoyment of these basic essentials.<sup>1401</sup>

Directive Principles are instruments to the executive and the legislature as to how they should exercise their power. It was in *State of Madras v Chempakam Dorairajan*,<sup>1402</sup> that the Supreme Court held that directive principles had to conform to and run as subsidiary to the chapter on fundamental rights on the reason that the latter are enforceable in the courts, while the former are not.

In *Sajjan Singh v State of Rajasthan*,<sup>1403</sup> it was observed that even if the fundamental rights could be taken as unchangeable, the needs of the viable dynamism would still be satisfied by properly interpreting the fundamental rights in the light of values and ideologies contained in Directive Principles of State Policy. Moreover, the Supreme Court in *Golaknath v State of Punjab*,<sup>1404</sup> held that the fundamental rights are the primordial rights necessary for the development of human personality. They are the rights that enable a man to chalk out his own life in the manner he likes best.<sup>1405</sup> Furthermore, it also held that the directive principle and fundamental rights enshrined in the Constitution

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<sup>1400</sup> *Bandhua Mukti Morcha v Union of India and Others* 1984 AIR 802, 1984 SCR (2) 67.

<sup>1401</sup> See *Bandhua Mukti Morcha* (note 1400 above) at para 2.

<sup>1402</sup> *The State of Madras v Chempakam Dorairajan* 1951 AIR 226, 1951 SCR 525, at para 531 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1403</sup> *Sajjan Singh v State of Rajasthan* 1965 AIR 845, 1965 SCR (1) 933, at para 948 [*emphasis added*] available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1404</sup> *Golaknath v State of Punjab* 1967 AIR 1643, 1967 SCR (2) 762 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1405</sup> *Golaknath v State of Punjab* (note 1404 above) at para 789 E.



formed an 'integrated scheme and was elastic enough to respond to the changing needs of the society'.<sup>1406</sup>

It is noteworthy that the Constitution of India was amended in 1972 to establish the pre-eminence of some of the directive principles over some of the fundamental rights, for example the 25th Amendment Act inserted Article 31-C. The validity of this amendment was challenged in *Kesavananda Bharati v State of Kerala*.<sup>1407</sup> While recognising the significance of Directive Principles in the Constitution, the Supreme Court by majority upheld the validity of the 25th Amendment. In *Mumbai Karigar Sabha v Abdulbhai*,<sup>1408</sup> it was held that, where two statutory choices are available, the construction in conformity with the social philosophy of the Directive Principles has to be preferred.

The Supreme Court in *Uttar Pradesh Electricity Board v Hari Shanker* further explained the judicial role.<sup>1409</sup> More specifically, the Supreme Court expressed the view that even though courts are not free to direct the making of legislation, they are bound to evolve and adopt principles of interpretation which would further the goals set out in the Directive Principles of State Policy.

In *Kasturilal v State of Jammu & Kashmir*,<sup>1410</sup> the Supreme Court found that the concept of reasonableness in fact pervades the entire constitutional scheme. According to the court, the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and, as several decisions of the court show, this concept of reasonableness finds its positive manifestation

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<sup>1406</sup> *Golaknath v State of Punjab* *ibid*.

<sup>1407</sup> *Kesavananda Bharati v State of Kerala And Anr* on 24 April, 1973 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1408</sup> *Mumbai Karigar Sabha v Abdulbhai* 1976 AIR 1455, 1976 SCR (3) 591, at p16 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1409</sup> *Uttar Pradesh Electricity Board v Hari Shanker* 1980 AIR 65, 1979 SCR (2) 355, p 8 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1410</sup> *Kasturilal v State of Jammu and Kashmir* 1980 AIR 1992, 1980 SCR (3)1338, para 2 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

and expression in the lofty ideal of social and economic justice that inspires and animates the Directive Principles.

The duty of the courts to apply Directive Principles in interpreting the Constitution and other laws was emphasised in *Unnikrishnan v State of A.P.*<sup>1411</sup> In this case, the court held that the provisions of Part III and Part IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve that goal indicated in Part IV.

In *National Textile Worker's Union v PR Ramakrishnan*,<sup>1412</sup> the Supreme Court pointed out the significant position of workers in Indian society and reiterated the profound concern to the workers by the socio-economic order envisaged in the preamble and the Directive Principles of the Constitution. Though the Companies Act does not provide any right to the workers to intervene in the winding up proceedings, it was decided that such a right of the workers had to be spelt out from the Preamble and Articles 38, 39, 42, 43 and 43A of the Constitution.<sup>1413</sup> The Directive in Article 45A of the Constitution,<sup>1414</sup> for example, the provision for securing the worker's participation in management, were accordingly read into fundamental right of the shareholders to carry on or not to carry on their trade or business guaranteed under Article 19(l)(g).

The constitutional mandate is unequivocally clear that the management of the enterprise should not be left entirely in the hands of the suppliers of capital but the workers should also be entitled to participate in it. The reason is in a socialist pattern of society, the enterprise which is a Center of economic power should be controlled not only by economic power but also by capital and labour". In *Air India*

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<sup>1411</sup> *Unnikrishnan v State of A.P* 1993 AIR 2178, 1993 SCR (1) 594, para 12 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1412</sup> *National Textile Workers Union v PR Ramakrishnan* 1998 94 CompCas 784 Kar para 46 and 47[emphasis added] available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1413</sup> *National Textile Workers Union v PR Ramakrishnan* (note 1412 above) para 38.

<sup>1414</sup> *National Textile Workers Union v PR Ramakrishnan* (note 1412 above) para 12 (d).

*Statutory Corporation v United Labour Union*,<sup>1415</sup> the Supreme Court observed that the Directive Principles are, in substance, human rights.

One of the first cases of the Supreme Court was *D.S. Nakara v Union of India*,<sup>1416</sup> which was a case where non-contributory retirement pension was denied to a class of persons who had retired on a different date. The Supreme Court held that looking to the goals for the attainment of which pension is paid and the welfare state proposed to be set up in the light of the Directive Principles of State Policy and preamble of the Constitution, it is indisputable that pension was a right.<sup>1417</sup>

It held that the state while formulating a pension scheme in order to augment social security in old age to government servants, could not grant the benefits only to those who retired subsequent to the specified date and deny the same to those who had retired prior to that date. Pension was held to be a social welfare measure by providing economic security in old age and that Article 41 mandated the state to ensure to citizens a reasonably decent standard of life, medical aid and freedom from want.<sup>1418</sup>

In another case of *C.E.S.C Ltd v Subhash Chandra Bose*,<sup>1419</sup> the Supreme Court held that the right to social justice is a fundamental right. Furthermore, the right to livelihood springs from the right to life guaranteed under Article 21, which includes the right to human dignity, development of personality, social protection, right to rest and leisure. It was held that socio-economic rights are the basic aspirations for a meaningful right to life and that the right to social security and

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<sup>1415</sup> *Air India Statutory Corporation v United Labour Union* 06/11/1996, 20-22 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1416</sup> *D.S. Nakara v Union of India* 1983 AIR 130, 1983 SCR (2) 165 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1417</sup> *D.S. Nakara v Union of India* (note 1416 above) 21-22 (*Emphasis added*).

<sup>1418</sup> *D.S. Nakara v Union of India* *ibid*.

<sup>1419</sup> *C.E.S.C Ltd v Subhash Chandra Bose* 1992 AIR 573, 1991 SCR Supl. (2) 267 para 4 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

protection of the family are an integral part of this right. The right to social and economic justice was held to be a fundamental right, so was the right of workers to medical care and health for protection against sickness.<sup>1420</sup>

It is important to note that the Supreme Court and the High Courts in India have interpreted the fundamental rights, in particular the right to life under Article 21 of the Constitution to include various social rights including the right to social security. Govindjee argues that the right to life in the Indian Constitution can be used as a solution for people not qualifying for any social assistance in South Africa despite being in desperate need.<sup>1421</sup>

In addition, the Supreme Court in the matter of *LIC of India and Anr. v Consumer Education and Research*<sup>1422</sup> held that the interpretation of right to life extends to right to livelihood.<sup>1423</sup> It also held that Article 38 in the Chapter of Directive Principles enjoins the state to promote the welfare of the people by securing and protecting effective social order in which socio-economic justice shall inform all the institutions of the national life.

The court relied on Article 25 of the Universal Declaration of Human Rights. The declaration envisages that everyone has the right to an adequate standard of living for himself/herself and of their family including food, clothing, medical care and necessary social services and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond their control.<sup>1424</sup>

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<sup>1420</sup> *C.E.S.C Ltd v Subhash Chandra Bose* *ibid*.

<sup>1421</sup> Govindjee A 'Lessons for South African social assistance law reform from India: Part 2 - Is there more to the right to life in South Africa' *OBITER* (2006) 33.

<sup>1422</sup> *LIC of India and Anr. v Consumer Education and Research* 1995 AIR 1811, 1995 SCC (5) 482 available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=1194> (date of use 23 January 2015).

<sup>1423</sup> *LIC of India and Anr. v Consumer Education and Research* (note 1422 above).

<sup>1424</sup> *LIC of India and Anr* (note 1423 above).

Furthermore, the Supreme Court also referred to Article 7 of the International Convention on Economic Social and Cultural Rights. The Convention assures the right to everyone to the enjoyment of just and favourable conditions of work, including adequate remuneration, fair wages and a decent living to the workers for themselves and their families.<sup>1425</sup>

The court held that the basic framework of the Constitution is to provide a decent standard of living to all and especially provide security as a welfare state. Based on these principles, the court held that the fundamental rights and Directive Principles accord the right to livelihood to include a meaningful life and that the social security and disablement benefits are integral schemes of socio-economic justice for people, particularly, the middle class and lower middle class.

From the above analysis, it is clear that the Directive Principles of State Policy strive to promote the welfare of the people by securing and protecting social order in which justice, social, economic, and political rights of citizens are protected.<sup>1426</sup> Some of the important directives relate to the rights to work, to education, to public assistance in cases of unemployment, old age, sickness, disablement, provision for just and humane conditions of work and maternity relief, a living wage for workers, provision for early childhood care, and the education of children. The Directive Principles though not justiciable,<sup>1427</sup> are fundamental in the governance of the country and it is the duty of the state to apply these principles in making laws.<sup>1428</sup> Over the years, the Directive Principles were slowly interpreted by the courts to be read into and along with fundamental rights.<sup>1429</sup>

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<sup>1425</sup> *LIC of India and Anr ibid* (note 1422 above).

<sup>1426</sup> For a detailed discussion on the socio-economic rights adjudication in India, see Pillay A 'Judicial activism and the Indian Supreme Court: Lessons for economic and social rights adjudication' in Lazarus L *et al Reasoning rights – Comparative judicial engagement* (UK, Hart Publishing, 2014) 339-356.

<sup>1427</sup> Article 37 of the Indian Constitution.

<sup>1428</sup> Mishra A 'Evolution of the relationship between fundamental rights and directive principles under the Constitution of India' (2014) Vol.4 (1) *IUP Law Review* 42-43.

<sup>1429</sup> See *State of Madras v Shrimathi Champakkam Doarairajan AIR 1951 SC 226*; *Golak Nath v State of Punjab AIR 1967 SC 1643*; *Randhir Singh v Union of India and Ors 1982 AIR SC*

Notwithstanding the Directive Principles guaranteeing crucial socio-economic rights, majority of many groups, especially Scheduled Castes, Scheduled Tribes, Other Backward Classes and weaker sections, including minorities remain excluded from the scope of protection afforded by the Directive Principles. The lack of inclusiveness is borne out by data on several dimensions of performance.<sup>1430</sup> For instance, according to the recent data released by the Planning Commission, the percentage of the population below the official poverty line has come down from 37.2% in 2004/5 to 21.9% in 2011/12.<sup>1431</sup> The rate of decline in poverty has not accelerated alongside the growth in Gross Domestic Product (GDP), and the incidence of poverty among certain marginalised groups, for example, the Scheduled Tribes, has hardly declined at all.

Other indicators of deprivation suggest that the proportion of the population deprived of a minimum level of living is much higher. For example, the National Family Health Survey shows that almost 46% of the children in the 0-3 year's age group suffered from malnutrition in 2005/6.<sup>1432</sup> Indicators of human development such as literacy and education, and maternal and infant mortality rates, show improvement, but they also suggest that progress is slow and that the country lags behind several other Asian countries.<sup>1433</sup>

India has an adverse sex ratio with only 940 women per 10000 men as per the latest 2011 census. More disturbing is the child sex ratio (0 to 6 years), which has declined from 927 in 2001 to 914 in 2011.<sup>1434</sup> The decline in sex ratio is

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879; *D.S. Nakara and Others v Union of India* 1983 AIR 130; *Federation of All India Customs and Central Excise Stenographers v Union of India and Ors* 1988 AIR SC 1291.

<sup>1430</sup> Government of India, Planning Commission, Eleventh Five-Year Plan (2007-2012), Vol. I., Inclusive Growth, (New Delhi, Oxford University Press, 2008).

<sup>1431</sup> Cf World Bank 'India achievements and challenges in reducing poverty' (1997) available at <http://www-wds.worldbank.org...>(date of use 20 January 201).

<sup>1432</sup> Government of India, Planning Commission (note 1429 above).

<sup>1433</sup> Kushwha R 'India and China: A Comparative study of social welfare policies for better future' (2013) Vol.5 (3) *Journal of Social Welfare and Management* 161-162.

<sup>1434</sup> Census of India 2011, Provisional Population Totals, Paper 1 of 2011, India Series 1 (New Delhi: Office of the Registrar General and Census Commissioner, India, 2011) 90.

largely attributable to poverty in the country. The general condition of the poor people is marked by high infant mortality, extremely poor medical facilities, unhygienic conditions of living, absence of pre-natal and post-natal care and high death rate among women.

Notwithstanding these challenges, it is important to acknowledge the extensive interpretation of socio-economic rights protection by the Supreme Court of India. The case in point relates to the matter of an individual who had fallen from a train in Calcutta and suffered extensive head injuries, but had been refused access to several public medical facilities on the basis that they were either ill-equipped to treat his condition or did not have free beds. The court held that:

The Constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligation undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health Centers which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the state and medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in [a] violation of his right to life guaranteed under Article 21.<sup>1435</sup>

The court interpreted the right to access to emergency medical treatment as a minimum core of the right to health care derived from Article 21 of the Constitution. As well as awarding the applicant damages, the court also issued a declaration order requiring the state to implement a comprehensive plan to improve availability of and access to emergency medical treatment.

In *Francis Coralie Mullin v The Administrator*,<sup>1436</sup> the Supreme Court delineated the scope of article 21, when it stated that:

The right to life includes the right to live with human dignity and all that goes with it, the bare necessities of life such as adequate nutrition, clothing and shelter

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<sup>1435</sup> *Paschim Banga Khet Mazdoor Samity v State of West Bengal* [1996] INSC 659 (6 May 1996).

<sup>1436</sup> *Francis Coralie Mullin v The Administrator* 1981 AIR 746, 1981 SCR (2) 516, at para 6. See also *Maneka Gandhi v Union of India and Another* (1978) 1 SCC 248.

and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must...the bare necessities of life and also the right to carry on such functions and activities as constitute the bare expression of the human self.

The Supreme Court's interpretation of the right to food in *People's Union for Civil Liberties (PUCL) v Union of India*,<sup>1437</sup> provides a profound example of how the court's approach to socio-economic rights intensified. This case has been lauded as a victory for India's impoverished population. The PUCL brought the case in order to force government to take steps to ensure the effective implementation of the food distribution schemes created by the Famine Code. PUCL argued that failure to implement the schemes violated the right to life.

The court ordered the government to convert food distribution scheme into legal entitlements. It also ordered the government to complete the identification of people who fell into the groups targeted for food distribution, issue cards to allow these people to collect the grain and distribute the grain to the relevant Centers. The order also provided for governmental inspections to ensure fair quality grain. In subsequent orders, the court set out requirements on reporting, accountability, monitoring, transparency and dissemination of court orders aimed at ensuring that its orders are followed.

In as far as the right to education is concerned, the court has introduced far reaching developments. For example, in *State of Bihar and Others v Project Uchcha Vidya, Sikshak Sangh and Others*,<sup>1438</sup> the court ordered that a committee be appointed to investigate departures from the State of Bihar's policy concerning the establishment of Project Schools aimed at improving its poor education record. The court appointed a committee to investigate the matter. The court's order included details as to the composition and functions of the

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<sup>1437</sup> *People's Union for Civil Liberties (PUCL) v Union of India* (2001) 5 SCALE 303.

<sup>1438</sup> *State of Bihar and Others v Project Uchcha Vidya, Sikshak Sangh and Others* (2006) 2 SCC 545.



committee, guidelines as to what would constitute irregularities in the implementation of the policy and an expectation that the State of Bihar would take remedial action if the committee found any irregularities.<sup>1439</sup>

In summation, the right to social security in India is guaranteed in the Directive-Principles of State Policy, and the right to life. These principles have acted as the guiding doctrines for the India Government and the lawmakers in initiating social reform legislations. They have been cited by the courts in interpreting the constitutional provisions, and are accepted by the Planning Commission as basic guidelines for evolving their approach to nation-building on a democratic basis.<sup>1440</sup>

As much as remedies adopted by the court's to protect fundamental rights, the Supreme Court of India must be commended for adopting an innovative stance in ensuring the monitoring of fundamental social rights. In *Shuntistar Builders v Narayan K Totame*,<sup>1441</sup> the Supreme Court ordered the government to establish a competent authority to monitor the implementation of the housing scheme for members of economically weaker sections of the community.

## 6.5 Traditional system of social protection in India

Gunasekaran<sup>1442</sup> identified two types of poverty alleviation programmes. The first one is the welfare programmes for the poor and the other is the programmes for economic and social justice. He notes that the welfare programmes are mostly concerned with transfer of income through transfer payments, doles, and relief measures in either cash or kind.

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<sup>1439</sup> *State of Bihar* (note 1438 above) at 21-22.

<sup>1440</sup> Granville A *The Indian Constitutions seamless web* (New Delhi, Rajiv Gandhi Foundation, RGICS paper no.15, 1994).

<sup>1441</sup> *Shuntistar Builders v Narayan K Totame* (1997) II SCC 121.

<sup>1442</sup> Gunasekaran S 'Poverty alleviation programmemes in Tamil Nadu' in Chattopahyay A *Poverty and social exclusion in India – Issues and challenges* (New Delhi, Rawat Publications, 2013) 208.

He further argues that people should be assured with economic freedom and to assure this, the anti-poverty programmes should be in the nature of improving their income-earning power, their capabilities, and their asset position, implementing participatory development programme and ultimately enabling them to participate in the process of decision making.<sup>1443</sup>

The main social security laws enacted<sup>1444</sup> are the following:

- The Employees State Insurance Act;<sup>1445</sup>
- The Employee's Provident Funds and Miscellaneous Provisions Act;<sup>1446</sup>
- The Workmen's Compensation Act;<sup>1447</sup>
- The Maternity Benefit Act;<sup>1448</sup> and
- The Payment of Gratuity Act.<sup>1449</sup>

Furthermore, there is also the National Social Assistance Programme. This part provides a synopsis of the social security legislation in India.

(a) *The Employees State Insurance Act*

This Act covers factories and establishments with 10 or more employees and provides for comprehensive medical care to the employees and their families as well as cash benefits during sickness and maternity and monthly payments in case of death or disablement. The workers and employers' contribution is 1.75% and 4.75% of wages respectively.

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<sup>1443</sup> For further reading on government initiatives for poverty reduction, see Asian Development Bank 'Understanding poverty in India' (2011) 113-158 available at <http://www.adb.org/sites/default/files/publication/28930/understanding-poverty-india.pdf> (date of use 23 December 2014).

<sup>1444</sup> See Ministry of Labour and Employment, Government of India available at <http://labour.gov.in/content/division/social-security.php> (date of use 22 December 2014).

<sup>1445</sup> Employees State Insurance Act, 1948.

<sup>1446</sup> The Employee's Provident Funds and Miscellaneous Provisions Act, 1952.

<sup>1447</sup> The Workmen's Compensation Act, 1923.

<sup>1448</sup> The Maternity Benefit Act, 1961.

<sup>1449</sup> The Payment of Gratuity Act, 1972.

The scheme, which was first introduced at two Centers in 1952 with an initial coverage of 1.20 workers, covered 1.64 workers and their families in about 807 Centers in the country. Medical care is provided through 150 ESI Hospitals, 42 ESI Annexes, 1463/93 ESI Dispensaries/ISM Units and 1447 Clinics of Insurance Medical Practitioners.

(b) *The Employee's Provident Funds and Miscellaneous Provisions Act (EPFO)*

This Act applies to specific scheduled factories and establishments employing 20 or more employees and ensures terminal benefits to provident fund, superannuation pension, and family pension in case of death during service. Separate laws exist for similar benefits for the workers in the coal mines and tea plantations. The EPFO is one of the world's biggest social security providers in terms of volume.<sup>1450</sup> It provides amongst others, provident funds, pension, and insurance. Both the employer and employee contribute to the Provident Fund.

(c) *The Workmen's Compensation Act*

This Act provides for the payment of compensation to the workman or his family in cases of employment related injuries resulting in death or disability.

(a) *The Maternity Benefit Act*

The Maternity Benefit Act provides for 12 weeks wages during maternity as well as paid leave in certain other related contingencies.

(b) *The Payment of Gratuity Act*

This Act provides 15 days wages for each year of service to employees who have worked for five years or more in establishments having a minimum of 10 workers. In addition, the Government of India has introduced major social protection schemes. The list of these social protection schemes is summarised in table 6.3 below.

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<sup>1450</sup> Government of India 59<sup>th</sup> Annual Report, EPF India 2011-12 available at [http://www.epfindia.com/annual\\_reports/ar\\_2011-12.pdf](http://www.epfindia.com/annual_reports/ar_2011-12.pdf) (date of use 23 January 2015).

Table 6.3 Major social protection schemes in India: Source - Srivastava<sup>1451</sup>

Name of scheme	Objective	Target group	Coverage	Nature of scheme
<b>Education, nutrition and health support for pre-school and school – aged children</b>				
(a) Sarva Shiksha Abhiyan (SSA)	To support universal enrolment and retention of children in elementary schooling and to support the provision of quality education	6-14 year children in elementary school.	All government financed elementary schools	Non-statutory, but supports the implementation of the Right to Education Act
1 (b) Integrated Child Development Scheme (ICDS)	Improvement in the nutritional and health status of children 0-6 years through a package of	All children in the eligible age group and pregnant and lactating mothers in areas	Services provided to 7.48 crore children under 6 years and 1.8 crore pregnant and lactating mothers	Non-statutory but major components part of proposed National Food Security Act.

<sup>1451</sup> Srivastava R 'A social protection floor for India' International Labour Organisation (2013) 27 available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new\\_delhi/documents/publication/wcms\\_223773.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_223773.pdf) (date of use 13 December 2014).

	services providing nutritional and health support to children and pregnant and lactating mothers	served by ICDS Centers		
1 (c) National Programme of Mid-Day Meal in Schools	National Programme of Mid-Day Meal in Schools	School going children in all recognized schools and educational Centers providing primary, upper-primary or non-formal education	12 crore children in about 12 lakh schools	Non-statutory but major components part of proposed NFSA
<b>National health protection</b>				

<p>2 (a) National Rural Health Mission (NRHM) (now National Health Mission)</p>	<p>Provision of accessible, affordable and accountable health services, in coordination with states, through a decentralized and convergent approach</p>	<p>Rural, and now urban population</p>		<p>Non-statutory</p>
<p>2 (b) Rashtriya Swasthya Bima Yojana (RSBY)</p>	<p>To protect poor families from major health shocks that involve hospitalization through insurance for which beneficiaries only pay a nominal registration fee</p>	<p>Below Poverty Line Poor families and other families of informal workers to whom coverage has been extended.</p>	<p>3.42 crore smart cards issued by March 2013 covering almost half of BPL families</p>	<p>Semi-statutory</p>

Total Sanitation	To accelerate sanitation coverage in rural areas & to develop community managed environmental sanitation systems	All rural families with an incentive to Below Poverty Line families		Non -statutory
2 (d) National Rural Drinking Water Programme (NRDWP)	To provide solutions for safe drinking water to all rural households			Non-statutory
<b>Food security</b>				
Targeted Public Distribution System (TPDS)	Stabilization of food prices & provision of subsidized foodgrains to poor households	Three tier provision of subsidized cereals and other essential commodities (APL, BPL	36.2 % households in 2009-10 (NSS estimates).	Non-Statutory at present but will become part of the proposed NFSA

		& Antyodaya or destitute households)		
<b>Employment and livelihood security for the rural and urban poor</b>				
4 (a) Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS)	Provision of up to 100 days of employment in public works to rural households demanding manual employment and creation of public assets.	All rural households demanding unskilled manual employment in public works.	24% rural households provided employment (2009-10 survey)	Statutory, with nearly 90% contribution by Central government, remaining by States
National Rural Livelihood Mission (Ajeevika) (from June 2011) [reformed	To reduce poverty by enabling the poor households to access gainful self-employment	Below Poverty Line rural poor in self-help groups	Inception in 1999, 42.69lakh SHGs formed. During 2010-11 21.09 lakh persons received	Non-statutory



Swarna Jayanti Gram Swarozgar Yojana or SGSY)	and skilled wage employment through strong grassroots institutions (self-managed Self Help Groups (SHGs) and federated institutions)		assistance (69.5% women)	
4 (c) Swarna Jayanti Shahri Rozgar Yojana (SJSRY) / National Urban Livelihood Mission (NULM)	Creation of employment through specified public work activity and through assistance to women self-help groups and individual female and male microentrepreneurs	Urban poor (BPL) individuals and (women) members of SHGs	17.2 lakh urban poor and women SHG members assisted in setting up enterprises; 23.61 lakh poor given skill training; 797.35 lakh man days of employment generated up to Dec, 2011.	Non-statutory
Prime Minister's Employment	Generation of employment through assistance	Urban and rural micro	3.8 crore jobs during 2008-12	Non-statutory

nt Guarantee Programm e (PMEGP)	in the form of margin money subsidy in setting up of micro enterprises	entrepr eneurs		
<b>State assisted pensions for the poor (National social assistance programme)</b>				
National Old Age Pension Scheme (NOAPS)	Provision of pensions	Poor persons (Below Poverty Line) above 60 years (Provisi on of food assistan ce under Annapur na Scheme to persons eligible under NOAPS	1.65 crores (2012-13)	Semi-statutory

		but not getting it)		
Indira Gandhi National Widows' Pension Scheme (IGNWPS)	Provision of pensions	Poor widows (Below Poverty Line) between 40 & 64 years	84 lakhs (2012-13)	Semi - statutory
Indira Gandhi National Disability Pension Scheme (IGNDPS)	Provision of pensions	Poor disabled persons (Below Poverty Line) between 40 & 64 years	12 lakhs	Semi-statutory
<b>Housing for the poor</b>				
Awas a (IAY)	Construction of dwelling units and up gradation of existing unserviceable kutcha houses by	Rural people below the poverty-line belonging to SCs/STs, freed bonded labourers and non-SC/ST categories	27.15 & 22.30 lakh houses in 2010-11 & 2011-12 respectively.	Non-statutory

	providing grant-in-aid			
6 (b) BSUP / IHSDP Rajiv Awas Yojana (RAY)	Urban Housing / Basic Services/ Slum Upgradation		10 lakh dwelling units built or under construction (2005-2012)	Non-statutory
<b>Life and disability cover for the poor</b>				
7 (a) Aam Admi Sima Yojana (AABY)	Life, accident and disability cover to the main breadwinner	Agricultural Labour families; age of insured 18-59 years	82 lakh insured by Sep 2009	
7 (b)  Family Benefit Scheme (NFBS (component of the NSAP)	One-time benefit on death of breadwinner	BPL families	4.5 lakhs	Semi-statutory

## 6.6 An analysis of selected legislation and programmes aimed at the empowerment of the poor

Yesudian<sup>1452</sup> argues that in India the fruits of economic growth have not benefited everyone uniformly. He observes that the modern economy is technology-driven and not labor-intensive, and as a result, this leads to uneven development in the society. It is submitted that in order to address the plight of the poor the government of India developed a unique model of social security<sup>1453</sup> by providing for basic social rights to work, food, and education. It should be noted that this model is different from other models of welfare and social security measures provided by developing countries such as Brazil and South Africa in that it provides a statutory basis for guarantee of social rights.

Pawar<sup>1454</sup> advocates for a rights-based approach to guarantee employment to the rural poor and to protect workers in the unorganised sector. Furthermore, he argues that such an approach is important as India's occupational structure is changing and poverty and unemployment remain high in the midst of economic growth.

He defines the rights-based approach as an “empowering approach that stems from the Universal Declaration of Human Rights, which suggests that citizens have justifiable entitlement, with human dignity and worth, to basic services for example, food, education, health, and employment, and justifiable duties to the community and nation-states have an obligation to meet those entitlements, and citizens have obligation to meet duties”.<sup>1455</sup>

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<sup>1452</sup> Yesudian C 'Poverty alleviation programmes in India: A social audit' (2007) 126 *Indian J Med Res* 365; See also Raghendra J 'Economics reforms and human development indicators in India' (2008) 3 *Asian Economic Policy Review* 297-300.

<sup>1453</sup> See Justino P 'Social security in developing countries: Myth or necessity? Evidence from India' (2007) Vol.19 *Journal of International Development* 371-379.

<sup>1454</sup> Pawar M 'The adoption of a rights-based approach to welfare in India' (2012) Vol.28 (1) *Journal of Comparative Social Welfare* 35-36.

<sup>1455</sup> Pawar *ibid.*



Its size has no precedent in India or in any other country, posing important design and management challenges. MGNREGA envisages an employment guarantee scheme with legislative foundation.<sup>1460</sup> It mandated the implementation of an ambitious, demand-driven employment creation programme aiming to benefit poor people in rural areas directly through the income provided by jobs, paying a socially acceptable wage and indirectly through the execution of investment projects that improve productivity in agriculture and alleviate land degradation.

MGNREGA also sets important social goals, including women's empowerment<sup>1461</sup> and improved opportunities for marginalised groups, and seeks to strengthen community decision-making bodies and fight corruption through transparent administration of the programme. Chakrabarti<sup>1462</sup> notes that MGNREGA has a threefold purpose. Firstly, it creates durable assets, secondly it strengthens the livelihood resource base of the rural poor, and thirdly it provides training for upgrading of skills of unskilled labourers.

Rao and Durgaprasad<sup>1463</sup> argue that "the impact on poverty would be more sustainable if all the related schemes of the state and central government converge with MGNREGA and also the stakeholder institutions (banks/post offices, line departments, insurance agencies, legal system, management and technical institutions and media) work in unison and the local governments function with a pro-poor bias".

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<sup>1460</sup> See Malangmeih L *et al* 'Impact of MGNREGA on livelihood security of rural households: A case study of Bankura District of West Bengal State, India' (2014) Vol.59 (2) *Economic Affairs* 137-146.

<sup>1461</sup> For further reading on the impact of MGNREGA on gender, see Pellissery S and Jalan S 'Towards transformative social protection: A gendered analysis of the Employment Guarantee Act of India (MGNREGA)' (2011) Vol.19 (2) *Gender and Development* 283-291; Carswell G and De Neve G 'MGNREGA in Tamil Nadu: A story of success and transformation' (2014) *Journal of Agrarian Change* 1-20.

<sup>1462</sup> Chakrabarti B and Abraham B 'Wage Employment: Impact of MGNREGS in Bardhaman, West Bengal' (2013) Vol.32 (1) *Journal of Rural Development* 20.

<sup>1463</sup> Rao K and Durgaprasad P 'Rural poverty alleviation in India: Contributions of NREGS' (2008) Vol.27 (1&2) *IASSI Quarterly* 16.

### 6.6.2 *The National Food Security Act*

The social protection system in India dates back to the times of colonialism and imperialism. Historically, social safety-net measures in place were very strong. The colonial government had established measures such as price control and food rationing systems. Nevertheless, these measures did not work and consequently, the great Bengal famine took place in 1943 and millions of people perished.<sup>1464</sup>

Faced with a myriad of socio-economic challenges, the Government of India saw the need to establish the Indian Planning Commission, which was tasked with making economic plans since the early 1950's.<sup>1465</sup> As a result, various social safety-nets were introduced to deal with poverty both in the rural and urban areas.

MGNREGA<sup>1466</sup> was followed by the introduction of the National Food Security Act<sup>1467</sup> which aims to provide for food and nutritional security by ensuring access to an adequate quantity of quality food at affordable prices to people to live a life with dignity.<sup>1468</sup> Furthermore, the National Food Security Act is intended to cover

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<sup>1464</sup> Sen A 'Starvation and exchange entitlements: A general approach and its application to the great Bengal famine' (1977) Vol. 1 (1) *Cambridge Journal of Economics* 33-56; See also Patnaik U 'The Republic of hunger' (2004) Vol. 32 (9) *Social Scientist* 9-33; Greenough P 'Indian famines and peasant victims: The case of Bengal in 1943-44' (1980) Vol.14 (2) *Modern Asian Studies* 205-235.

<sup>1465</sup> See Government of India's Resolution setting up the Planning Commission, dated 15 March 1950 available at <http://planningcommission.gov.in/aboutus/history/PCresolution1950.pdf> (date of use 24 March 2015).

<sup>1466</sup> For further reading on the success of MGNREGA, see Novotny J *et al* 'A multi-dimensional analysis of the impacts of the Mahatma Gandhi National Rural Employment Guarantee Scheme: A tale from Tamil Nadu' (2013) 34 *Singapore Journal of Tropical Geography* 322-339.

<sup>1467</sup> National Food Security Act No.20 of 2013 available at <http://dfpd.nic.in/?q=node/955> (date of use 23 January 2015).

<sup>1468</sup> For further reading on human right to food in India, see Ziegler J *et al* *The fight for the right to food* (Palgrave Macmillan, 2011) 257-276; See also Panda R and Das D 'Guaranteeing food security: A holistic approach' in Patel B *Food security law – Interdisciplinary perspectives* (Eastern Book Company, 2014) 81-108; Kishore A *et al* *a Novel approach to food security* chapter 3 available at <http://dfpd.nic.in/fcamin/FSBILL/Rajpatra.pdf> (date of use 23 January 2015).



every person belonging to priority households,<sup>1469</sup> and these households are entitled to receive five kilograms of food grains per month at subsidised rates from the state government under the Targeted Public Distribution System. In case of non-supply of the entitled quantities of food grains or meals to entitled persons, such persons shall be entitled to receive such food security allowance from the concerned state government to be paid to each person, within such time and manner as may be prescribed by the Central Government.<sup>1470</sup>

Scholars note that this programme offers a legal entitlement to have access to grain and millets to families at an economic price.<sup>1471</sup> The food subsidy offered through the public distribution system is managed by state governments, which supply other commodities such as pulses, salt, and coarse clothing.<sup>1472</sup> In addition, the central government determines the total procurement of food grains and their allocation across states.<sup>1473</sup> The government determines the off-take, public distribution, and the list of commodities provided and retail prices. One important finding raised by Bhalotra is that food security falls under the Directive Principles of State Policy.<sup>1474</sup> In *Harit Recyclers Assn. v Union of India*,<sup>1475</sup> the Delhi High Court said:

...the need of food is the basic human need. A civilized society does not countenance starvation. In a cultured society cry for food is not thought of. Throughout the globe nutrition, health and education have been recognised as the basic needs of a member of the society as man cannot be allowed to have animal existence. The court went further to state that when the food is not available to meet the cry of hunger that tantamount to nullification of life.

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<sup>1469</sup> Kothari J 'A social rights model for social security: Learning from India' (2014) 47 *Verfassung und Recht in Ubersee* VRU 17.

<sup>1470</sup> Kothari *ibid.*

<sup>1471</sup> Hossain M 'Building responsible social protection in South Asia: India's Food Security Act as a new direction' (2014) Vol.34 (2) *South Asian Research* 148. See also *People's Union for Civil Liberties v Union of India, Civil Writ Petition* 196 of 2001.

<sup>1472</sup> Bhalotra S 'Welfare implications of fiscal reform: The case of food subsidies in India' in Addison T and Roe A *Fiscal policy for development, poverty reconstruction and growth* (UK, Palgrave Macmillan, 2004) 238.

<sup>1473</sup> Bhalotra *ibid.*

<sup>1474</sup> Bhalotra (note 1472 above).

<sup>1475</sup> *Harit Recyclers Assn. v Union of India* (2013) 2 SCC 688.

## 6.7 Protection against social exclusion and discrimination

The notion social exclusion refers to the inability of the society to keep all groups and individuals within reach of what we expect of society to realise their full potential. Discrimination of certain groups occurs in most societies including developed countries and perhaps it is more pronounced in underdeveloped countries.<sup>1476</sup> It is important to mention that in addition to the social protection measures discussed above which focuses on risks and vulnerability faced by individuals. The Indian government has also developed schemes which focus on certain social groups. These are social groups which have historically experienced social and economic exclusion and discrimination in terms of access to employment and social needs.

The notion social exclusion in its widest sense means persistent of complex and multiple disadvantages.<sup>1477</sup> As a process, social exclusion examines the way individuals or groups become excluded in the society in which they live. As a condition or outcome, it identifies the most disadvantaged people or social groups who could be labelled as 'excluded' from larger social system and relationship.<sup>1478</sup>

Levitas<sup>1479</sup> adopts a combination of rights and participation in defining social exclusion. He defines social exclusion as a complex and multidimensional process involving the lack or denial of resources, rights, goods, services and inability to participate in the normal relationships and activities available to majority of people in a society, whether in economic, social, cultural, or political arenas.

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<sup>1476</sup> Nayar K 'Social exclusion, caste and health: A review based on the social determinants framework' (2007) 126 *Indian J Med Res* 359.

<sup>1477</sup> Alam M 'Understanding social exclusion' in Chattopadhyay A *Poverty and social exclusion in India – Issues and challenges* (New Delhi, Rawat Publication, 2013) 16-17.

<sup>1478</sup> Alam M *ibid*.

<sup>1479</sup> Levitas R *et al The Multiple-dimensional analysis of social exclusion* (Bristol, Bristol Institute for Public Affairs, 2007) 25.

Other scholars<sup>1480</sup> define social exclusion within the context of neo-liberal, re-labelling of poverty and transformationalist framework. Bell's<sup>1481</sup> viewpoint is that the neo-liberal approach holds social exclusion as unfortunate but inevitable side effects of global economic realignment. Simply put, the emergence of free trade and a single global market has resulted in exclusion of workers from the benefits of trade barriers and social and employment protection.

The author argues that social exclusion is a smoke screen, representing little more than unhelpful re-labelling of poverty. It is rather a tool used to shift the spotlight away from inequality caused by malfunctioning of the economic system. He also suggests that the transformational approach focuses attention on social relations embedded in formal and informal institutions, and signals the use of the social exclusion framework to analyse international processes and institutional relationships associated with rapid social and economic global change and the local impacts and responses.<sup>1482</sup>

As already discussed above, social exclusion revolves around institutions that discriminate against certain groups based on identities such as caste, ethnicity, religion, gender and disability. The government has used three-fold strategies indicated below to address the risks and vulnerability faced particularly by scheduled caste, scheduled tribe, women and other excluded groups. Firstly, legal protection has been mandated against discrimination in civil, cultural, political and economic spheres. Secondly, the government has enacted affirmative action policies for improving ownership of assets, participation in public employment, in education, legislature and public housing. Thirdly, the government offers financial compensation to the persons and families who

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<sup>1480</sup> See Beall J 'Globalisation and social exclusion in cities: Framing the debate with lessons from Africa and Asia' (2002) Vol.14 (1) *Environment and Urbanisation* 41-51.

<sup>1481</sup> Beall *ibid.*

<sup>1482</sup> Beall *ibid.*

suffered from physical violence/atrocities, destruction of property and socio-economic boycott.<sup>1483</sup>

## 6.8 Social protection as instrument of empowering women in India

Gender and development is a widely accepted and practiced field of development cooperation. Lama<sup>1484</sup> defines empowerment of women as “moving women from a position of enforced powerlessness to one of power”. In this process, women should be empowered socially, economically, educationally and politically that can help them to take self-decision regarding education, mobility, economic independency, political participation, public speaking and awareness to exercise rights”.

Chadha<sup>1485</sup> indicates that “in India women have a long history of suffering and exploitation. Women remained victims of violent actions and they had to suffer various types of discrimination, exploitation and torture both physical and mental not only in the men’s society but also within the four walls of the family thereby disturbing the equilibrium in the society.”<sup>1486</sup>

Oestreich<sup>1487</sup> acknowledges that “efforts to promote the civil and political rights of women in India are wide-ranging and important. These include capacity building

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<sup>1483</sup> Cf Human Rights Watch ‘Caste discrimination against Dalits or so-called Untouchables in India’ (2007) India’s fifteenth to nineteenth periodic report presented at the seventieth session of the Committee on the Elimination of Racial Discrimination, 19-33 available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/chrj-hrw.pdf> (date of use 23 January 2015).

<sup>1484</sup> Lama P ‘Women empowerment in India: Issues and challenges’ (2014) Vol.1 (6) *International Journal of Multidisciplinary Approach and Studies* 388; See also, Singhal D ‘Women empowerment through social initiatives an Indian Story’ (2014) Vol. 24 (1) *DLSU Business and Economics Review* 35-42.

<sup>1485</sup> Chadha A ‘Political participation of women: A case study in India’ (2014) Vol.7 (3) *OIDA International Journal of Sustainable Development* 93.

<sup>1486</sup> Cf Pattenden J ‘Social protection and class relations: Evidence from Scheduled Caste Women’s Associations in rural South India’ (2011) Vol.42 (2) *Development and Change* 472-473.

<sup>1487</sup> Oestreich J ‘The United Nations and the rights - Based approach to development in India’ (2014) 20 *Global Governance* 87.

of government institutions to consider women's place in society, to extend benefits to women, and to make sure they participate in government programmes".<sup>1488</sup>

Bonu<sup>1489</sup> argues that "some developing countries have adopted mandatory representation for the socially excluded groups, especially women, to protect interests of the socially excluded in decentralised institutions". He further states that the Parliament of India passed the 73<sup>rd</sup> Constitutional Amendment in 1992 to provide mandatory representation for women and non-forward castes in the rural local governments. One-third of all the positions in the rural local government were reserved for women, and positions proportional to the population of the non-forward castes were reserved for the non-forward castes.

It was argued that the representation of women and non-forward caste representatives in the rural local government would articulate a development agenda that addresses gender and caste based inequalities in development. It was also believed that the representation of women and non-forward caste would address their concerns on matters relating to health care and education.<sup>1490</sup>

In as far as the participation of women in MGNREGA is concerned Kabeer<sup>1491</sup> argues that "public works programmes in their conventional forms tend to benefit able-bodied men". She concludes that "direct transfer approaches are likely to be of particular benefit to women in those Indian states where there is no tradition of waged work for women, participation in the MGNREGA is very low, and women have domestic responsibilities that make it difficult for them to participate in any

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<sup>1488</sup> See India Country Report 2013, 54-56 available at [http://mospi.nic.in/mospi\\_new/upload/SAARC\\_Development\\_Goals\\_percent20India\\_Country\\_Report\\_29aug13.pdf](http://mospi.nic.in/mospi_new/upload/SAARC_Development_Goals_percent20India_Country_Report_29aug13.pdf) (date of use 23 January 2015).

<sup>1489</sup> Bonu S *et al* 'Empowering the socially excluded in rural local governments: An exploratory study from a state in India' (2011) Vol.23 *Journal of International Development* 43.

<sup>1490</sup> See Chattopadhyay R and Duflo E 'Women as policy makers: Evidence from India- wide randomised policy experiment' Mimeographed, Department of Economics (2001).

<sup>1491</sup> Kabeer N 'A gender perspective on social protection' in Vasudevan G *Social protection floors for 21<sup>st</sup> century India* Issue 7 *Prayas* (2012) 22.

public work". Standing *et al* record how women relied on other women in the village for most of their work.<sup>1492</sup> For example, a cattle rearing is a source of work for most village women. When the cow delivers a calf, although a great deal of work is required, it is a time of joy when other women in the community come to help.

It is important to note that access to social protection for women in rural India continues to be a challenge. Studies have revealed that the impact of poverty on women is severe.<sup>1493</sup> In fact, Pellissery shows that "although the women often provide informal care to other members of the household, their access to welfare rights (from the state) is negotiated informally in the household or community because their links with the outside world are shaped through male family members".<sup>1494</sup> The said reality is that the informal and formal access to social protection remains to be gender bias.<sup>1495</sup>

In so far as the involvement of women in the economy is concerned, scholars have maintained that micro-finance empowers women by putting capital in their hands and allowing them to earn an independent income and contribute financially to their households and communities.<sup>1496</sup> Organising women into collectives not only increases their economic clout and bargaining power but also opens up other opportunities for change. Frequently, women's organisations have enabled women to gain increased access to new markets or to negotiate better terms in old arrangements. Handicraft and clothing co-operatives

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<sup>1492</sup> Standing G *Social income and insecurity – A study in Gujarat* (London, Routledge Taylor and Francis Group, 2010) 91-93.

<sup>1493</sup> Krishna V and Shashidhar R 'Eradication of poverty, social welfare policies in India: Initiatives and policy implications' (2013) Vol.6 (8) *OIDA International Journal of Sustainable Development* 84.

<sup>1494</sup> See Pellissery S 'Gender gaps in social protection: Differential access to non-contributory income maintenance in rural India' (2008) Vol.30 (2) *Social Development Issues* 16-18.

<sup>1495</sup> Pellissery *ibid*.

<sup>1496</sup> Torri M 'Women's empowerment and micro-entrepreneurship in India: Constructing a new development paradigm' (2014) Vol.14 (1) *Progress in Development Studies* 35.

organised by Banaskantha in Gujarat,<sup>1497</sup> helped women organise to bypass exploitative middlemen and to access urban garment markets, thereby increasing their earnings by over 300%.<sup>1498</sup> The institutional micro-finance schemes such as group lending programmes and collaterals play a crucial role in serving the poor that have been excluded from the formal banking system.<sup>1499</sup>

The vast majority of workers are employed in the informal sector with no job security, unfavourable working conditions and no social security benefits such as healthcare, maternity leave, medical insurance, and old age security.<sup>1500</sup> Pawar argues that these workers are vulnerable as they do not have guaranteed fixed income and days of work, and are often also exploited.<sup>1501</sup> The National Commission for Enterprises in the Unorganised Sector Report has found that majority of workers in India are employed in the informal economy.<sup>1502</sup>

These were categorised as poor and vulnerable, with the remaining 23% being middle class and higher income groups. The poor and vulnerable category included 88% of the Scheduled Caste and Scheduled Tribe population, and 85% of the Muslim population.<sup>1503</sup> About 92% of workers in this category were informal

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<sup>1497</sup> Priyan P and Trivedi J 'A study on agribusiness through microfinance' in Patel B *et al Food security law - Interdisciplinary perspectives* (New Delhi, Eastern Book Company Lucknow, 2014) 32-42.

<sup>1498</sup> Chen M *et al Speaking out: Women's economic empowerment in South Asia* (Intermediate Technology Publications, 1996).

<sup>1499</sup> Mashigo P and Schoeman C 'Micro credit and the transforming of uncertainty since 1976: International lessons for South Africa' (2011) 61 *New Contree* 151-152.

<sup>1500</sup> See Report of the India's National Commission for Enterprises in the Unorganised Sector, 2012 available at [http://msme.gov.in/Chapterpercent208-Eng\\_200708.pdf](http://msme.gov.in/Chapterpercent208-Eng_200708.pdf) (date of use 20 December 2014).

<sup>1501</sup> Pawar M 'The adoption of a rights-based approach to welfare in India' (2012) Vol.28 (1) *Journal of Comparative Social Welfare* 38.

<sup>1502</sup> See National Statistical Commission Government of India Report of the Committee on Unorganised Sector Statistics (2012) 9-17 available at [http://mospi.nic.in/mospi\\_new/upload/nsc\\_report\\_un\\_sec\\_14mar12.pdf](http://mospi.nic.in/mospi_new/upload/nsc_report_un_sec_14mar12.pdf) (date of use 20 December 2014).

<sup>1503</sup> National Commission for Enterprises in the Unorganised Sector (2007) available at [http://nceuis.nic.in/condition\\_of\\_workers\\_sep\\_2007.pdf](http://nceuis.nic.in/condition_of_workers_sep_2007.pdf) (date of use 20 December 2014). See also Ambedkar B *Report on the status of Backwardness of Scheduled Castes (SC) and Scheduled Tribes (ST) in Bihar* (2012) SC and ST Welfare Department Government of Bihar, 8-86 available at

workers.<sup>1504</sup> The Commission observed that these groups were illiterate and without primary education. As a result, it recommended the following proposals to the government:

- Firstly, a national minimum social security scheme for all informal workers;
- Secondly, minimum conditions of work for wage workers in the informal sector; and
- Thirdly, promotional measures to reduce poverty and enhance livelihood opportunities for all workers in the informal sector.<sup>1505</sup>

It recommended that a national scheme of minimum social security for all informal workers should be introduced on a statutory basis in order to address their core needs with regard to health, death or disability and old age. This includes health benefits to cover expenses for hospitalisation, maternity benefits, life insurance cover, and old-age security consisting of a state pension for workers belonging to below poverty line.<sup>1506</sup>

In order to reduce poverty and increase opportunities for livelihoods, an action plan was recommended to cover workers and microenterprises in both the agriculture and non-agriculture sectors. For casual workers, the commission suggested strengthening the public employment programme such as employment guarantee schemes in both rural and urban areas. In contrast, for the self-employed, it suggested a series of measures for accessing credit, technology, marketing and raw materials to improve their productivity and thereby their earnings.

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[http://scstwelfare.bih.nic.in/docs/scstpercent20reportpercent20ofpercent2016thpercent20A ugustpercent20Copy.pdf](http://scstwelfare.bih.nic.in/docs/scstpercent20reportpercent20ofpercent2016thpercent20A%20ugustpercent20Copy.pdf) (date of use 20 December 2014).

<sup>1504</sup> National Commission for Enterprises in the Unorganised Sector (2007) available at [http://nceuis.nic.in/condition\\_of\\_workers\\_sep\\_2007.pdf](http://nceuis.nic.in/condition_of_workers_sep_2007.pdf) (date of use 20 December 2014).

<sup>1505</sup> National Commission for Enterprises in the Unorganised Sector (2007) available at [http://nceuis.nic.in/condition\\_of\\_workers\\_sep\\_2007.pdf](http://nceuis.nic.in/condition_of_workers_sep_2007.pdf) (date of use 20 December 2014).

<sup>1506</sup> Kannan K and Papola T 'Workers in the informal sector: Initiatives by India's National Commission for Enterprises in the unorganised sector' (2007) Vol.146 (3-4) *International Labour Review* 321-329.



Furthermore, in order to address the socio-economic disparities facing workers in the informal economy, the Indian Government has also introduced the Universal Insurance Scheme for workers in the informal economy.<sup>1507</sup> This scheme provides up to 30,000 rupees for hospitalisation expenses; secondly, 50 rupees per day for up to 15 days to make up for loss of income during hospitalisation, and thirdly, 25,000 rupees in the event of death of income earners due to accident. It is financed by 1 rupee per day for below poverty line households of different sizes.<sup>1508</sup>

In order to address these challenges faced by workers in the unorganised sector, the government has enacted various pieces of legislation and programmes aimed at protecting workers in this sector. For example, the government has enacted the Unorganised Sector Workers Social Security Act.<sup>1509</sup> The main purpose of the Act is to provide for social security and welfare for unorganised sector workers.

Its main features include, among others, a pension of 500 rupees per month on retirement or disability; hospitalisation benefits; and higher coverage of 125,000 rupees in case of death or disability. By the registration of unorganised workers, every worker in the unorganised sector is eligible for registration subject to the following conditions: he/she should have completed 18 years of age; and that he/she should make a self-declaration affirming that he/she is a worker in the unorganised sector.

In addition, workers are required to contribute 1 rupee per day. Those earning less than 6,500 rupees annually will be designated as living below poverty line, and their 1 rupee share will be paid for by the federal government. In this regard,

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<sup>1507</sup> See Ginneken W 'India: Inclusive development through the extension of social security' in Midgley J and Tang K *Social security, the economy and development* (UK, Palgrave Macmillan, 2008) 292-295.

<sup>1508</sup> Ginneken W (note 1507 above) 294.

<sup>1509</sup> Unorganised Sector Workers Social Security Act of 2008.

the agricultural workers have adopted far-reaching survival strategies to cope with problems of unemployment, low wages, and inadequate access to formal social security. One of the renowned strategies that the agricultural labour households adopted is to participate in the labour market through *mutah labour*.<sup>1510</sup>

Mitra<sup>1511</sup> describes *mutah labour* as a coping strategy adopted by women who stayed behind in Bihar villages while men migrated to far-off places either in India, or abroad. Under this system, a group of labourers along with their supervisor take up agricultural work based either on a piecemeal rate or on a daily wage.

In addition, it is common practice in rural India that labourers borrow from cultivators-cum-money-lenders to meet their consumption needs, especially during the slack season, with an express understanding that during the peak season the former would work for the latter at wages less than those in the market. Another strategy employed by agricultural workers is to diversify their employment portfolio. These workers are involved in renting land, livestock-rearing and non-farm activities.<sup>1512</sup>

## 6.9 Targeting the Ultra Poor Programme

Huda and Kaur<sup>1513</sup> provide a summary on the impact of the Ultra Poor Programme (TUP Programme) on the livelihoods of the poor in India. According

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<sup>1510</sup> Durgam R 'Organising practices and coping strategies of agricultural labourers - A case of *mutah* labour in South India' in Paerregaard K and Webster N *The byways of the poor – Organising practices and economic control in the developing world* (Denmark, Museum Tusculanum Press, 2012) 29-30.

<sup>1511</sup> Mitra M 'Women in colonial agriculture: *Bihar* in the late 18<sup>th</sup> and 19<sup>th</sup> century' (1981) Vol.12 (1) *Development and Change* 29-53.

<sup>1512</sup> Durgam R 'Organising practices and coping strategies of agricultural labourers - A case of *mutah* labour in South India' in Paerregaard K and Webster N *The byways of the poor – Organising practices and economic control in the developing world* (Denmark, Museum Tusculanum Press, 2012) 30.

<sup>1513</sup> Huda K and Kaur S 'It was as if we were drowning: Shocks, stresses and safety nets in India' (2011) Vol.19 (2) *Gender and Development* 214.

to them, TUP Programme has been set up by the Consultative Group to Assist the Poor (CGAP) and the Ford Foundation to reach very poor people and help them graduate out of extreme poverty in a sustainable way. They state that the Graduation programme is based on an innovative approach pioneered in Bangladesh by BRAC, one of the largest micro-finance organisations in the world.<sup>1514</sup> It combines livelihoods and safety-nets in order to help extremely poor female-headed households manage risk better.

They note that the TUP Programme identifies the poor people in the community. They are then offered a small cash stipend to help them meet their consumption needs, a productive asset so they can begin generating their own income, access to health services, access to a self-help group (SHG)<sup>1515</sup> that can provide financial and peer support, and complimentary services such as skills and social development training and veterinary services.

TUP participants receive this assistance for a total of 33 months, with the goal of moving them onto a sustainable livelihood. Once participants have graduated, they can take loans from the SHG and continue to grow and diversify their income generating activities. The key elements of the TUP programme are summarised in table 6.2 below.

Table 6.2 key elements of the TUP programme.<sup>1516</sup>

Targeting	300 participants are targeted. Families must own less than 40 decimals of land, have no productive assets, and have
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<sup>1514</sup> For further on microfinance as empowerment tool, see Mukherjee A 'Empowerment through government subsidized microfinance programme' (2015) Vol.42 (1) *International Journal of Social Economics* 2-16.

<sup>1515</sup> For further reading on the notion of self-help group in India, see Swanson B 'Extension strategies for poverty alleviation: Lessons from China and India' (2006) Vol.12 (4) *Journal of Agricultural Education and Extension* 292-293; Sinha A *et al* 'The impact of NABARD's self-help group – Bank linkage programme on poverty and empowerment in India' (2012) Vol.20 (4) *Contemporary South Asia* 487-508.

<sup>1516</sup> Huda and Kaur (note 1513 above) 215.

	school-age children engaged in child labour. They are excluded if they have earning male members of the household or a micro-finance loan.
Asset transfer	Participants received a combination of livestock, poultry and assets for petty trade up to a value of US\$100 dollars. They also receive training on veterinary services. Towards the end, participants are given additional inputs for fish cultivation or paddy husking so that they could diversify their livelihoods.
Consumption stipend	Participants receive 91 rupees (US\$2) a week for 12 to 32 weeks (depending on their assets)
Self-help group	The self-help group operates as a village-based financial intermediary composed of 10-20 Ultra Poor Programme members. Members deposit at least 10 rupees a week, and could borrow against the fund. The group decides collectively on loan terms. <sup>1517</sup>
Personal coaching	Six Human Development Center officers visit participants twice a week, once at home, and once at the self-help Group meeting. Their duties includes, conducting self-group meetings, home visits to check on enterprises, providing health and social messaging, conducting livelihood training

<sup>1517</sup> Sinha A *et al* 'The impact of NABARD's self-help group – Bank linkage programmeme on poverty and empowerment in India' (2012) Vol.20 (4) *Contemporary South Asia* 488-508.

	and evaluating member's progress.
Healthcare provisions	Health strategy focuses upon family health (sanitation for common ailments), and maternal health (antenatal and postnatal check-ups, family planning, social messaging), and child health (immunisations and nutrition).

The World Bank<sup>1518</sup> in its review of the social protection in India commissioned by the government of India proposed that central social protection programme should aim over time for a '3+Block' strategy. This would consist of the following:

- A major social assistance programme, by way of a significantly reformed food subsidy offered through the public distribution programme, merged for specific groups with existing social pension programmes, and in reform of public distribution programme, a preference for a predominantly cash transfer approach;
- A public works programme, for which the MGNREGA would be the building block, as well as piloting expansion in urban areas;and
- A basic social security package for those outside the formal sector, which would consist of the core pillars of social security, which the government aims to expand, such as life, disability, old-age pension and health.

The World Bank review recommends that beyond the three blocks (discussed above), states could receive an additional transfer and implement state specific social protection interventions. It stipulates that a common core national social protection system under the three blocks could promote portability of basic entitlements, and would allow for more flexibility to states or districts in deciding their social protection expenditure priorities, while maintaining a common national core social protection system. The review recommends making a transition from

<sup>1518</sup> The World Bank Social Protection for a changing India available at <http://www.worldbank.org/en/news/feature/2011/05/18/social-protection-for-a-changing-india> (date of use 23 December 2014).

the current programme-driven approach to social protection towards an overarching social protection system, which would lead to a more coherent social protection strategy.

In as far as development and growth is concerned, Unni argues that “there is an increasing awareness across the world that the goal of development has to be social justice and not economic growth alone. In other words, economic growth is worthwhile only if it leads to social justice in the form of equitable distribution, reduction in poverty, and reasonable incomes, and if it meets basic securities such as health and education and promotes political, cultural and economic freedom”.<sup>1519</sup>

Seemingly, economic growth is necessary for alleviating poverty by pulling the poor into gainful employment. Since independence, the Indian government has chosen to address poverty through both growth and redistribution. Because the level of income at independence was extremely low and increased by only a small amount until at least the 1980s due to slow growth, the revenues available for redistribution remained meagre. However, with growth having accelerated, since 2003-2004, more amounts of revenue have accrued to the government, making large-scale redistributive programmes, such as National Rural Employment Guarantee Scheme possible.

Notwithstanding these significant strides made, more citizens remain below the official poverty line.<sup>1520</sup> Since the majority of workers are employed in the agricultural sector, it has been argued that in order to improve their position within the economy and wages, the focus must be on productivity growth.<sup>1521</sup> This entails moving these workers from low-productivity agriculture into high-

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<sup>1519</sup> Unni J and Rani U ‘Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms’ (2003) Vol.34 (1) *Development and Change* 127.

<sup>1520</sup> See Gupta R and Kumar P ‘Social evils, poverty and health’ (2007) 126 *Indian J Med Res* 283-284.

<sup>1521</sup> Datt G and Ravallion M ‘Has India’s economic growth become more pro-poor in the wake of economic reforms’ (2011) Vol.25 (2) *The World Bank Economic Review* 160.

productivity industry and services and from the informal to the formal sector within industry and services.

Zaman<sup>1522</sup> argues that providing employment opportunities could be one of the most sustainable routes out of poverty. In addition, the World Bank<sup>1523</sup> seems to suggest that India ought to invest in irrigation systems, flood control, investment in people, in their health, education, nutrition and in their ability to shape their own economic and social destiny.

## 6.10 Health care reforms

Baru notes that over the last two decades, there has been growing recognition of the persistence, and in some cases, the widening of inequities in health outcomes as well as access to health services.<sup>1524</sup> The health care consists of a public sector, a private sector, and an informal network of care providers.<sup>1525</sup> Ramesh asserts that “when India entered the 21<sup>st</sup> century, its health care system was inadequate and dominated by the private sector”.<sup>1526</sup>

According to him, insufficient beds in public hospitals, and shortage of doctors affected the system of health. In view of these challenges, the government has expanded the public private health care partnership (PPP) as a means of meeting the shortage rather than expanding its direct role in provision of health

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<sup>1522</sup> Zaman H ‘Assessing the impact of employment Generation programmes in challenging rural poverty: Comparative study on Bangladesh and India’ (2011) Vol.15 (3) *Journal of Poverty* 264.

<sup>1523</sup> See India - A World Bank country study (1997) 17-19 available at <http://0-elibrary.worldbank.org.oasis.unisa.ac.za/doi/pdf/10.1596/0-8213-3971-0> (date of use 23 January 2015).

<sup>1524</sup> Baru R and Bisht R ‘Health service inequities as challenge to health security’ Oxfam India working papers series September (2010) 1-2.

<sup>1525</sup> Mehta A *et al* ‘Improving health and education service delivery in India through public – private partnerships’ (2010) Asian Development Bank 36 available at [http://www.pppinindia.com/pdf/health-education-delivery-india-ppp\\_adb\\_dea.pdf](http://www.pppinindia.com/pdf/health-education-delivery-india-ppp_adb_dea.pdf) (date of use 20 October 2014).

<sup>1526</sup> Ramesh M *et al* ‘Second best governance? Governments and governance in the imperfect world of health care delivery in China, India and Thailand in Comparative perspective’ (2015) *Journal of Comparative Policy Analysis: Research and Practice* 9.

care. The Tenth Five-Year Plan (2002–2007) proposed an enhanced role for the private sector in the delivery of health services.<sup>1527</sup> The World Bank and the National Commission on Macroeconomics in Health supported the proposed PPP mechanism on the grounds that it would enhance efficiency as well as bridge the resource and skills shortage in the public sector.<sup>1528</sup>

The launch of the National Rural Health Mission (NRHM) which provides primary care to rural populations in the 18 least developed states (out of 28) has led to improvements in key health indicators such as institutional deliveries, out-patient cases, complete immunisation, availability of diagnostic and family welfare services and disease control programme.<sup>1529</sup> It is a decentralised programme co-financed and administered by state governments. Since many states lack both administrative and fiscal capacity to implement the programme, however, less than half the funds allocated by the national government were actually spent.<sup>1530</sup>

The introduction of the national health insurance scheme (Rashtriya Swasthya Bima Yojana - RSBY) in 2007 has been welcomed as the effective instrument for providing basic health cover to the poor.<sup>1531</sup> This health insurance scheme

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<sup>1527</sup> Mehta A *et al* 'Improving health and education service delivery in India through public – private partnerships' (2010) Asian Development Bank 46-49 available at [http://www.pppinindia.com/pdf/health-education-delivery-india-ppp\\_adb\\_dea.pdf](http://www.pppinindia.com/pdf/health-education-delivery-india-ppp_adb_dea.pdf) (date of use 20 October 2014).

<sup>1528</sup> Raman A and Björkman J 'Public/Private Partnership in the provision of health care services to the poor' Research study supported by the Indo-Dutch Programme on Alternatives in Development (2006) available at [www.south.du.ac.in/fms/idpad/report/cover\\_Ack.pdf](http://www.south.du.ac.in/fms/idpad/report/cover_Ack.pdf) (date of use 20 October 2014).

<sup>1529</sup> Available at... <http://healthmarketinnovations.org/sites/default/files/Lowcostpercent20Healthcarepercent20Deliverypercent20percent281percent29.pdf> (date of use 20 October 2014).

<sup>1530</sup> Rao M and Choudhury M 'health care financing reforms in India' Working papers 12/100, National Institute of Public Finance and Policy (2012).

<sup>1531</sup> Dhoot V Efficacy of government health cover scheme Rashtriya Swasthya Bima Yojana under scanner *The Economic Times* 8 October 2013 available at [http://articles.economictimes.indiatimes.com/2013-10-08/news/42829102\\_1\\_rashtriya-swasthya-bima-yojana-rsby-domestic-workers](http://articles.economictimes.indiatimes.com/2013-10-08/news/42829102_1_rashtriya-swasthya-bima-yojana-rsby-domestic-workers) (date of use 23 December 2014); See also Acharya A *et al* 'The impact of health insurance schemes for the informal sector in low- and middle-income countries: A systematic review' (2012) Vol.28 (2) *The World Bank Research Observer* 237-251.



covers approximately 120 million people.<sup>1532</sup> It provides free in-patient and day-care in designated private and public facilities to recognised poor households to a maximum of 30,000 rupees (US\$ 553) per annum. State governments identify eligible families but the scheme is implemented through private insurance companies. The premium for the scheme is shared 75,25 between central and state governments.

Ramesh notes that “as a result of the new government’s measures, over 300 million people, or more than a quarter of the population, gained access to some form of health insurance by 2010, up from 55 million in 2003–2004. More than 180 million of the newly covered were people below the poverty line”.<sup>1533</sup>

He also suggests that “more than 630 million persons, or about half of the country’s population, are expected to be insured by 2015.”<sup>1534</sup> However, the depth of coverage remains low, as RSBY only covers hospitalisation and not out-patient care, which accounts for 74% of all OOP expenses (Out-of-pocket expenses). Most of the OOP expenditures continue to be spent on drugs, much of them purchased over the counter without prescription”.<sup>1535</sup>

## 6. 11 Institutional framework of social security

Thomas<sup>1536</sup> states that the state acts as a provider of basic needs, as well as a facilitator in crises. He further asserts that state support rests on strict norms and ‘objective’ eligibility conditions. These objective conditions often come

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<sup>1532</sup> Sharma Y and Das S *Budget 2014: Rashtriya Swasthya Bima Yojana may be shifted to Health Ministry* available at [http://articles.economictimes.indiatimes.com/2014-07-07/news/51133512\\_1\\_health-ministry-rsby-rashtriya-swasthya-bima-yojana](http://articles.economictimes.indiatimes.com/2014-07-07/news/51133512_1_health-ministry-rsby-rashtriya-swasthya-bima-yojana) (date of use 23 December 2014).

<sup>1533</sup> Ramesh (note 1526 above).

<sup>1534</sup> World Bank available at [www.worldbank.org/en/news/feature/2012/10/11/government-sponsoredhealth-insurance-in-india-are-you-covered](http://www.worldbank.org/en/news/feature/2012/10/11/government-sponsored-health-insurance-in-india-are-you-covered).

<sup>1535</sup> Ramesh (note 1526 above).

<sup>1536</sup> Thomas B ‘Resilient and resourceful? – A case study on how the poor cope in Kerala, India’ (2010) Vol.45 (1) *Journal of Asian and African Studies* 40.

detrimental to the interests of people who are at the brim of the poor. He also acknowledges that the private institutions, NGOs, play the role of a buffer.

Still on the issue of development, it has been suggested that the real question in the process of environment reforms is not the “sterile debate” between “the state and a pure market” but the question of how to manage the transition. This transition is from excessive to reduced state intervention; from intervention in the wrong areas to those in previously neglected important one; and from one form of reliance on quantity controls to another form (reliance on prices) of policy.<sup>1537</sup> Satija<sup>1538</sup> highlights that a better way of targeting the poor is to expand rural employment programmes at low wages, which will attract only the needy.

On the other hand, Goel and Rishi<sup>1539</sup> propose a triangular complimentary model that can assist in poverty alleviation. This conceptual model highlights the casual relationship between entrepreneurial activities, capacity building, and poverty alleviation. Their conceptual framework consists of three main sectors, namely; the government sector, the private sector, and the citizens’ sector. In terms of the triangular conceptual framework, the government sector attempts to alleviate poverty with a two-prong strategy.

The government attempts to attack poverty by promoting entrepreneurship through institutional support, policies, training schemes, and financial and marketing support, as well as capacity building schemes by providing directed funds and resources. It also offers various employment schemes for the poor for predefined wages at the subsistence level. The employment schemes provide an immediate but short-term solution to the threat of poverty, whereas the

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<sup>1537</sup> Satija K ‘Economic reforms and social justice in India’ (2009) Vol.36 (9) *International Journal of Social Economics* 946.

<sup>1538</sup> Satija K (note 1537 above) 958.

<sup>1539</sup> Goel G and Rishi M ‘Promoting entrepreneurship to alleviate poverty in India: An overview of Government schemes, private – sector programmes, and initiatives in the citizens’ sector’ (2012) Vol.54 (1) *Thunderbird International Business Review* 49-50.

entrepreneurship promotion schemes and capacity building aim at creating a long-lasting solution.<sup>1540</sup>

The private sector has been divided into two overlapping sectors (social entrepreneurs and business entrepreneurs). While business entrepreneurs may have an impact on poverty by creating jobs, social entrepreneurs are distinguished by their focus on social and environmental goals in a financially sustainable form. Social entrepreneurs are interested in the impact they make on society. They do not only contribute to poverty eradication, but also provide capacity building through job creation by way of microcredit, technical assistance, and job training.<sup>1541</sup>

The citizens' sector that includes a broad range of citizen's activities that are outside the direct control of the government such as unions, community associations, voluntary organisations, non-governmental organisations, and self-help groups.<sup>1542</sup> The UNDP<sup>1543</sup> considers citizens as best positioned to create their own poverty eradication strategies, based on local needs and priorities. It becomes clear within the Indian context that the government alone cannot be entrusted with the alleviation of poverty. Therefore, the tri-sectoral approach is imperative towards the realisation of alleviating poverty. This approach recognises the complementarities between the government, the private sector and the citizens' sector.

In light of the above discussion, it is clear that poverty has persisted in India in both the rural and urban areas despite a number of programmes being launched since independence in 1947. Nevertheless, the lesson from the Indian experience is that growth must be broad-based to make significant dent on

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<sup>1540</sup> Goell G and Rishi M (note 1539 above) 49.

<sup>1541</sup> Goel G and Rishi M *ibid.*

<sup>1542</sup> For further reading on a conceptual model of Trisector initiatives, see Goel G and Rishi M (note 1539 above) 46-55.

<sup>1543</sup> United Nations Development Programme (UNDP) Annual Report 2011/2012 available at [http://www.undp.org/content/dam/undp/library/corporate/UNDP-in-action/2012/English/UNDP-AnnualReport\\_ENGLISH.pdf](http://www.undp.org/content/dam/undp/library/corporate/UNDP-in-action/2012/English/UNDP-AnnualReport_ENGLISH.pdf) (date of use 23 December 2014).

poverty and the narrow sectoral growth may widen the personal and regional income inequality. In recent years, the rise of civil society has given a voice to the marginalised section of the society.

Many laws and programmes (discussed above) have been established with a view of alleviating poverty and developing the livelihood of the poor people in India. It is submitted that these laws and programmes have a potential of paving the way for the poor in negotiating their shares in the economy. Despite the relegation of socio-economic rights into Directive Principles of State Policy which are non-enforceable, the judiciary has adopted a robust approach in the enforcement of socio-economic rights, finding such rights are closely linked to the right to life, thus enforceable. The judiciary has also promoted access to the courts through the concept of public interest litigation.<sup>1544</sup>

Furthermore, it is submitted that the Indian government policies on social protection tend to focus on social protection floor initiative which is critical to the expansion of employment opportunities and decent work. Scholars seem to suggest that the creation of social protection floor arises from the interpretation of the right to life as a right to life with dignity and the Directive Principles of the Indian Constitution.<sup>1545</sup> This chapter supports the suggestion proposed by Srivastava, when he stated that “India seems to have moved successfully towards the creation of legal rights which imply a minimum floor in some areas such as education, employment and food security”.<sup>1546</sup>

It is submitted that in order to achieve a coherent social protection strategy, the social protection floor must not only adhere with its own constituent elements. It must also be consistent with the larger social protection strategy, and the latter

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<sup>1544</sup> Cf Thiruvengadam A ‘Swallowing a bitter pill? Reflections on progressive strategies for public interest litigation in India’ 519-531 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2465783](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465783) (date of use 23 December 2014).

<sup>1545</sup> Srivastava R (note 1451 above) 159.

<sup>1546</sup> Srivastava R *ibid*.

and macro-economic policy must cohere with each other in order to maintain a rapid tempo of sustainable, equitable and socially inclusive growth.<sup>1547</sup>

Srivastava<sup>1548</sup> eloquently summarises the key benefits of adopting the social protection floor initiative. Firstly, such an approach has a significant impact on the conditions and lives of the poor as can be seen in India from the rise in enrolments, rise in rural wages and consumption, decline in rural poverty in the recent period, and a greater degree of empowerment. Secondly, it can help in stabilizing the economy, a role which became manifestly clear in the post-crisis period. Thirdly, it can create some pressure on the state and other obligation holders to follow concerted strategies which can lead to the fulfilment of rights that have been created.

This strategy includes higher allocation of resources to the relevant areas, which, we have shown has occurred to some extent. Fourthly, the creation of rights and specific entitlements might lead to strengthened demand, encourage a process of greater participation, and give greater voice, which is otherwise lacking among dispersed and poor social groups. Fifthly, this might lead to greater accountability of the providers and increase the efficiency of delivery, a crucial issue in countries like India where governance structures are weak.

In a nutshell, it is recognised in India that the issue of poverty alleviation ought to be tri-sectoral, in that the government, private sector and the citizens should play a collaborative role in addressing the scourge of poverty.<sup>1549</sup> The challenges that India is faced with includes the implementation of these far-reaching policies and making these programmes available to rural communities.<sup>1550</sup> The next chapter examines the Brazilian social security system

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<sup>1547</sup> Srivastava R (note 1451 above) 160.

<sup>1548</sup> Srivastava R (note 1451 above) 161.

<sup>1549</sup> For further reading on the trisectoral approach to poverty alleviation in India, see Goel G and Rishi M (note 1539 above) 45-56.

<sup>1550</sup> Mehta S 'Including Scheduled Tribes in Orissa's Development: Barriers and opportunities' India Institute for Human Development IHD – UNICEF Paper Series, Working paper no..9

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## CHAPTER SEVEN

### THE SYSTEM OF SOCIAL SECURITY IN BRAZIL

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#### 7.1 Introduction

In recent years, Brazil has developed various social<sup>1551</sup> and economic strategies aimed at addressing social exclusion,<sup>1552</sup> hunger,<sup>1553</sup> inequality<sup>1554</sup> and poverty.<sup>1555</sup> According to the report of the Institute of Applied Economic Research,<sup>1556</sup> the number of poor people living on US\$1 or US\$ 2 per day, decreased from 19.1 million to 15.7 million, while the number of people living in

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- (2011) 11-19 available at [http://www.ihdindia.org/IHD-Unicefwp-PDF/IHD-UNICEFpercent20WPpercent2010\\_saumya\\_kapoor.pdf](http://www.ihdindia.org/IHD-Unicefwp-PDF/IHD-UNICEFpercent20WPpercent2010_saumya_kapoor.pdf) (date of use 23 January 2015).
- <sup>1551</sup> Giambiage F and de Mello L 'Social security reform in Brazil: Achievements and remaining challenges' (2006) OECD Economic Department, Working paper no. 534, OECD Publishing 2-18 available at <http://www.oecd-ilibrary.org/docserver/download/5l9drplxxs0x.pdf?expires=1433236932&id=idandaccname=guestandchecksum=3739B47881039D79459EB335879A41FB> (date of use 22 March 2015).
- <sup>1552</sup> Kabeer N 'Social exclusion: Concepts, findings and implications for the MDGs' Institute of Development Studies 1-33 available at <http://www.gsdr.org/docs/open/se2.pdf> (date of use 22 March 2015); Popay J *et al* 'Understanding and tackling social exclusion' (2008) Final report to the WHO Commission on Social Determinants of Health from the Social Exclusion Knowledge Network 32-184; available at [http://www.who.int/social\\_determinants/knowledge\\_networks/final\\_reports/sekn\\_finalpercent20report\\_042008.pdf?ua=1](http://www.who.int/social_determinants/knowledge_networks/final_reports/sekn_finalpercent20report_042008.pdf?ua=1) (date of use 22 March 2015); Pochmann M 'Local development, social protection and inclusion: Typology of selected initiatives in Brazil' (2008) *International Labour Organisation* 19-34; Marió EG and Woolcock M 'Social exclusion and mobility in Brazil' (2008) *The World Bank* 1-35.
- <sup>1553</sup> Rocha C 'Developments in national policies for food and nutrition in Brazil' (2009) Vol.27 (1) *Development Policy Review* 51-63.
- <sup>1554</sup> Agénor P and Canuto O 'Gender equality and economic growth in Brazil' (2013) The World Bank 1-4 available at <https://openknowledge.worldbank.org/handle/10986/17027> (date of use 20 March 2015).
- <sup>1555</sup> Burton G 'An end to poverty in Brazil? An assessment of the Lula and Rouseff Governments' poverty reduction and elimination strategies' (2013) (12) *Journal of Policy Practice* 194-211; see also Barrientos A 'A review of social protection in Latin America' (2009) Center for Social Protection 2-30 available at <https://www.ids.ac.uk/files/dmfile/SocialProtectioninLatinAmerica.pdf> (date of use 20 March 2015). For further reading on the role of conditional cash transfers in Brazil, see Sedlacek G 'Safety net for the poor: The role of conditional cash grant programmes' (2003) available at <http://publications.iadb.org/handle/11319/4137> (date of use 20 March 2015); Hall J *et al* 'Entrepreneurship and innovation at the base of the pyramid: A recipe for inclusive growth or social exclusion' (2012) Vol.49 (4) *Journal of Management Studies* 785-808.
- <sup>1556</sup> De Souza P 'Poverty, inequality and social policies in Brazil, 1995-2009' (2012) Institute for Applied Economic Research (IPEA) Working paper no.87 available at <http://www.ipc-undp.org/pub/IPCWorkingPaper87.pdf> (date of use 20 March 2015).

extreme poverty went down from 7.6 million to 6.5 million. The report also shows that the income gap narrowed in 2012, and the per capita income for households in the poorest 10% of the population increased by 14%. Despite the foregoing challenges, there are policies which have brought far-reaching developments on Brazil's socio-economic landscape.<sup>1557</sup> This includes, *inter alia*, the conditional cash transfers,<sup>1558</sup> which are supplemented by other social protection programmes aimed at addressing the plight of vulnerable and poor people.<sup>1559</sup> The basis for the reforms that led to the implementation of social protection policies is located within the 1988 Constitution<sup>1560</sup> which establishes the principle of solidarity for a free and just society, aimed at poverty eradication and social exclusion, and to reduce social and regional inequalities.<sup>1561</sup>

This chapter is organised as follows. Section one discusses the historical background of the social assistance programmes, and new forms of social assistance emerging including conditional and unconditional income transfers and integrated anti-poverty programmes. Section two examines the constitutional framework of social security. In contrast, section three looks at the judicial enforcement of socio-economic rights. The last section of this chapter discusses

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<sup>1557</sup> Doctor M 'Inequality, social policy and state welfare regimes in developing countries: The case of Brazil' in Connolly J and Hayward J *The withering of the welfare state* (UK, Palgrave Macmillan, 2012) 155-170; Holmes R *et al* 'Social protection in Brazil: Impacts on poverty, inequality and growth' (2011) Overseas Development Institute 4-11 available at <http://www.odi.org/search/site/socialpercent20protectionpercent20inpercent20Brazil> (date of use 20 March 2015); Piron L and Curran Z 'Public policy responses to exclusion: Evidence from Brazil, South Africa and India' (2005) Overseas Development Institute 4-14 available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2303.pdf>(date of use 20 March 2015);International Social Security Association (ISSA) 'Social security coverage extension in the BRICS: A Comparative study on the extension of coverage in Brazil, the Russian Federation, India, China and South Africa' (2013) 18-40 available at <http://apsredes.org/site2013/wp-content/uploads/2014/03/2-BRICS-report-final.pdf> (date of use 22 March 2015).

<sup>1558</sup> Matthew L 'Considering post-crisis stimulus measures welfare policy and social inclusion in Brazil' (2014) Vol.XLI (2) *Journal of Sociology and Social Welfare* 127-140.

<sup>1559</sup> Kassouf L and de Oliveira P 'Impact evaluation of the Brazilian non-contributory pension programme *benefício de prestação continuada* (BPC) on family welfare' (2012) Partnership for Economic Policy 1-4 available at <http://www.pep-net.org/> (date of use 20 March 2015).

<sup>1560</sup> Brait-Poplawski L and Santarelli Roversi M 'Aspects of social security in Brazil:From fome zero to Brasil *sem miséria*' (2012) *Instituto Brasileiro de Análises Sociais e Econômicas* (IBASE) 12-17.

<sup>1561</sup> Article 3 of the Brazilian Constitution, 1988 (The Constitution).

the institutional framework of social security and the lessons emerging from this comparative analysis.

## 7.2 The rationale for a comparative social security study with Brazil

The BRICS countries (Brazil, the Russian Federation, India, China and South Africa) are prominent due to their rapid economic growth and corresponding rise in political status.<sup>1562</sup> BRICS countries are well known for their commitment to social protection and the extension of social security coverage.<sup>1563</sup>

In spite of different cultural, political and socio-economic backgrounds, the BRICS countries share common challenges in enhancing social protection for their populations.<sup>1564</sup> These include the following; addressing inequalities, relatively high official and hidden unemployment (especially among unskilled workers); uneven regional development; large income gaps between various social groups; fragmentation of social security schemes and barriers to portability of social security benefits; weak grass-roots/frontline social security infrastructure; gaps in the utilization of information and communications technology; coordination of social security programmes with other social policies and programmes; and the need to extend protection to informal-sector and migrant workers.<sup>1565</sup>

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<sup>1562</sup> International Social Security Association (ISSA) 'Social security coverage extension in the BRICS: A Comparative study on the extension of coverage in Brazil, China and South Africa' (2013) available at <http://apsredes.org/site2013/wp-content/uploads/2014/03/2-BRICS-report-final.pdf> (date of use 22 March 2015).

<sup>1563</sup> ISSA 'Social security for all: The BRICS countries' (2008) available at [www.issa.int](http://www.issa.int) (date of use 22 March 2014).

<sup>1564</sup> Buss P 'Health and development in BRICS countries' (2014) Vol.23 (2) *Saúde Soc. São Paulo* 391-400; Reisen H 'Economic policy and social affairs in the BRICS' 6-31 available at [http://www.sgi-network.org/brics/pdf/BRICS\\_Economy\\_and\\_Social\\_Affairs.pdf](http://www.sgi-network.org/brics/pdf/BRICS_Economy_and_Social_Affairs.pdf) (date of use 22 March 2015); Osório R and Lara de Arruda P 'Youth and employment among the BRICS' (2014) The International Policy Center for Inclusive Growth, United Nations Development Programme 4-35 available at <http://www.ipc-undp.org/pub/IPCPOvertyInFocus28.pdf> (date of use 22 March 2015).

<sup>1565</sup> International Social Security Association (ISSA) 'Social security for all: The BRICS countries' (2008) available at [www.issa.int](http://www.issa.int) (date of use 22 March 2014).



The expectations of the population are also evolving, leading to increased demands for higher benefits and better services which in turn requires administrations to address the long-term social and financial sustainability of programmes.<sup>1566</sup>

### 7.3 Poverty, Inequalities, and the Brazilian population

Brazil is the largest country in South America and one of the largest in the world,<sup>1567</sup> with an area of 8.5 million square kilometers, and about 7,500 kilometers of coastline, on the Atlantic Ocean.<sup>1568</sup> Discovered by the Portuguese in 1500,<sup>1569</sup> it was a Portuguese colony until 1822 and a monarchy (empire) until 1889, when it became a federated republic.<sup>1570</sup> The country is a federal republic consisting of 26 states and a Federal District.<sup>1571</sup>

It has a population of around 200 million people,<sup>1572</sup> and per capita gross domestic product (GDP) is estimated to be around US\$ 13,237.<sup>1573</sup> In addition, the country has been recorded as the highest spender on social assistance

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<sup>1566</sup> ISSA *ibid.*

<sup>1567</sup> Coleman D 'Brazil 2015 country review' 109 available at [http://0-eds.b.ebscohost.com.oasis.unisa.ac.za/eds/pdfviewer/pdfviewer?vid=16and\\_sid=057f1638-8aaf-46e2-ae3d-f04490f4869bpercent40sessionmgr11and\\_hid=108](http://0-eds.b.ebscohost.com.oasis.unisa.ac.za/eds/pdfviewer/pdfviewer?vid=16and_sid=057f1638-8aaf-46e2-ae3d-f04490f4869bpercent40sessionmgr11and_hid=108) (date of use 22 March 2015).

<sup>1568</sup> Leite C 'Brazil' (1994) *Journal of International and Comparative Social Welfare* 28.

<sup>1569</sup> Prono L *Encyclopedia of world poverty* (2006) Thousand Oaks, Sage Publication Inc. 3-7 available at [http://knowledge.sagepub.com/view/worldpoverty/n65.xml?rskkey=WgLIrYand\\_row=6](http://knowledge.sagepub.com/view/worldpoverty/n65.xml?rskkey=WgLIrYand_row=6)(date of use 22 March 2015).

<sup>1570</sup> Metcalf A *Go-betweens and the colonisation of Brazil: 1500-1600* (Austin, University of Texas Press, 2005) 1-157; Marchant A 'Feudal and capitalistic elements in the Portuguese settlement of Brazil' (1942) Vol.22 (3) *The Hispanic American Historical Review* 493-512; Prado C *The colonial background of modern Brazil* (London, University of California Press, 1967) 1-15.

<sup>1571</sup> World Health Organisation 'Brazil-country cooperation strategy at a glance' available at [http://www.who.int/countryfocus/cooperation\\_strategy/ccsbrief\\_brazil\\_09\\_en.pdf](http://www.who.int/countryfocus/cooperation_strategy/ccsbrief_brazil_09_en.pdf) (date of use 22 March 2015).

<sup>1572</sup> Antonio da Fonseca Menezes F *et al* 'Aspects of social security in Brazil: From fome to zero' (2012) *Instituto Brasileiro de Análises Sociais e Econômicas* (IBASE) 10-45 available at [https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/analyse\\_33\\_englisch\\_social\\_security\\_in\\_Brasil.pdf](https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/analyse_33_englisch_social_security_in_Brasil.pdf) (date of use 20 March 2015).

<sup>1573</sup> Brazil: Gross domestic product (GDP) per capita in current prices from 2010 to 2020 (in U.S. dollars available at <http://www.statista.com/statistics/263774/gross-domestic-product-gdp-per-capita-in-brazil/>(date of use 22 March 2015).

programmes in Latin America.<sup>1574</sup> The increase in expenditure is largely due to the expansion of *bolsa família*, with also more gradual increases in the outflow on social pensions and disability.<sup>1575</sup>

Despite recent improvements regarding the reduction of socio-economic inequalities, 30 million people are still poor and 8.9 million are extremely poor.<sup>1576</sup> Thus, the protection of the poor in the form of social assistance in Brazil has had a long history.<sup>1577</sup> It came into being in response to the high levels of inequality and has been viewed as the only effective means of reducing both poverty and inequality in the country.<sup>1578</sup>

Nattrass reports that South Africa and Brazil hold the undesirable record of having the most unequal distribution of income.<sup>1579</sup> According to Coleman,<sup>1580</sup> the

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<sup>1574</sup> Cerutti P *et al* 'Social assistance and labour market programmes in Latin America' (2014) *The World Bank* 24.

<sup>1575</sup> Cerutti P *et al* *ibid*.

<sup>1576</sup> Millennium Development Goals Report, 2010 available at <http://www.un.org/millenniumgoals/pdf/MDGpercent20Reportpercent202010percent20Enpercent20r15percent20-lowpercent20respercent2020100615percent20-.pdf> (date of use 20 January 2014); The World Bank Country Report Brazil critical issues in social security (2001) 3; Piron L and Curran Z 'Public policy responses to exclusion: Evidence from Brazil, South Africa and India' (2005) Overseas Development Institute 4 available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2303.pdf> (date of use 22 March 2015); Burton G 'An end to poverty in Brazil? An assessment of the Lula and Rouseff Governments' poverty reduction and elimination strategies' (2013) *Journal of Policy Practice* 195; Reis E 'Elite perceptions of poverty' (1999) Vol.30 (2) *Institute of Development Studies Bulletin (IDS Bulletin)* 127-135.

<sup>1577</sup> Maharaj R and Town K 'Developing a social assistance strategy for the SADC region based on the success of Brazil's *bolsa família* programme' (2007) *South African Trust* 8.

<sup>1578</sup> Cf Harrison G *et al* Trade policy and poverty reduction in Brazil (2004) Vol.18 (3) *The World Bank Economic Review* 289-315 ;Laurel A 'Social welfare and social work the meaning of poverty programmes in Latin America' (1996) 5 *Scandinavian Journal of Social Welfare* 131-133.

<sup>1579</sup> Nattrass N and Seekings J 'Democracy and distribution in highly unequal economies: the case of South Africa' (2001) Vol. 39 (3) *The Journal of Modern African Studies* 471.

<sup>1580</sup> Coleman D 'Brazil 2015 country review' 70-71 available at <http://0-eds.b.ebscohost.com.oasis.unisa.ac.za/eds/pdfviewer/pdfviewer?vid=16and sid=057f1638-8aaf-46e2-ae3d-f04490f4869bpercent40sessionmgr111and hid=108> (date of use 22 March 2015). Human Development Index (HDI) is a composite index that measures the level of well-being in 177 nations in the world. It uses factors such as poverty, literacy, life-expectancy, education, gross domestic product, and purchasing power parity to assess the average achievements in each nation. It has been used in the United Nation's Human Development Report since 1993. HDI is based on certain indicators used to calculate the Human Poverty Index. Probability at birth of not surviving to age 40, adult literacy rate,

population living on US\$1 a day is estimated to be 9.8%, whereas 8.2% of the population survives on US\$ 2 a day, and the population living beneath the poverty line is 22.4%.<sup>1581</sup>

According to the World Bank, poverty has fallen markedly.<sup>1582</sup> From 2003-2013, over 26 million people were lifted out of poverty and inequalities were reduced significantly.<sup>1583</sup> In 2008, Gini coefficient fell from 0.604 in 1993 to 0.55.<sup>1584</sup> Barros *et al* agree with these findings by concluding that the Gini fell from 0.60 in 1995 to 0.552 in 2007.<sup>1585</sup> Both of these studies use household income per capita in their calculations. On the South African side, Leibbrandt *et al* calculate Gini coefficient using per capita income to show that South Africa's income inequality increased from 0.66 in 1993 to 0.70 in 2008.<sup>1586</sup>

#### 7.4 The evolution of social security in Brazil

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population without sustainable access to an improved water source, and population below income poverty line are the indicators assessed in this measure, see Chakravarty S 'A generalised human development index' (2003) Vol.7 (1) *Review of Development Economics* 99-112; Herrero C *et al* 'A newer human development index' (2012) Vol.13 (2) *Journal of Human Development and Capabilities* 248-260.

<sup>1581</sup> Coleman (note 1580 above).

<sup>1582</sup> See Agénor P and Canuto O 'Gender equality and economic growth in Brazil' (2013) Working Paper Number 109, The World Bank 1-4 available at <http://siteresources.worldbank.org/EXTPREMNET/Resources/EP109.pdf> (date of use 22 March 2015).

<sup>1583</sup> World Bank Country Report available at <http://www.worldbank.org/en/country/brazil/overview> (date of use 22 March 2015).

<sup>1584</sup> Neri M 'The decade of falling income inequality and formal employment generation in Brazil' chapter 2 in OECD *Tackling inequalities in Brazil, India, China and South Africa: The role of labour market and social policies* (OECD publishing, 2010); See also Leubolt B 'Social policies and redistribution in Brazil' (2014) Global Labour University Working paper no.26, International Labour Organisation 1-19 available at [http://www.global-labour-university.org/fileadmin/GLU\\_Working\\_Papers/GLU\\_WP\\_No.26.pdf](http://www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.26.pdf) (date of use 22 March 2015).

<sup>1585</sup> Barros R *et al* 'Markets the state and the dynamics of inequality in Brazil'. Chapter 6 in Lopez-Calva L and Lustig N (eds) *Declining inequality in Latin America: A decade in progress?* (United Nations Development Programme, New York, 2010); Verma A Gomes A 'Labour market flexibility and trajectories of development: Lessons from Brazil, India and China' (2014) Vol.50 (1) *The Indian Journal of Industrial Relations* 54.

<sup>1586</sup> Leibbrandt M *et al* 'Trends in South African income distribution and poverty since the fall of Apartheid' OECD Social, employment and migration, Working paper no. 101, January (2010).

Schwarzer observes that the origins of the modern formal social security dates back from the colonial times to the 19<sup>th</sup> century.<sup>1587</sup> During this era social assistance and care for the poor were considered a matter of Christian charity, particularly by way of the expansion of charitable hospitals known as *Santas Casas de Misericórdia*.<sup>1588</sup>

The inception of the current social security system came with the Eloy Chaves Law,<sup>1589</sup> approved in 1923.<sup>1590</sup> This law granted pensions and health benefits to private sector railroad workers.<sup>1591</sup> According to Koyasu, these workers were transporting primary products such as coffee, the latter being Brazil's main export.<sup>1592</sup> It is important to note that coverage was restricted to a segment of urban employees from select companies, but was gradually extended to include other groups from all formal companies.<sup>1593</sup>

The welfare state was developed in line with those in many advanced industrial economies.<sup>1594</sup> The government in the pre-war period followed developments in Europe as policy emulation was a common feature.<sup>1595</sup> For that reason, it adopted social security practices from Germany in the 1920s and corporatist

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<sup>1587</sup> Schwarzer H and Querino A 'Non-contributory pensions in Brazil: The impact of poverty reduction' (2002) *International Labour Organisation*, ESS paper no.11, 2.

<sup>1588</sup> Schwarzer H and Querino A *ibid*.

<sup>1589</sup> Legislative Decree No. 4,682, of 24 January 1923 (also known as Eloy Chaves Law). This law implemented the cash retirement and pensions system for workers in railroad industry, which represents the implementation period of Brazilian social security system.

<sup>1590</sup> Malloy J *The politics of social security in Brazil* United (State of America, University of Pittsburgh Press, 1979) 3.

<sup>1591</sup> Oliveria J *et al* 'Recent developments in financing social security in Latin America' (1996) *ILO* 31.

<sup>1592</sup> Koyasu A 'Social security reform by the Cardoso government of Brazil: Challenges and limitations of reform ten years after 'democratisation' (2004) Vol.XLII (2) *The developing Economies* 249.

<sup>1593</sup> Beltrao K and Pinhanez M 'Brazil's social security system: Prospective trajectory and reform alternatives' (2014) Vol.34 (4) *Public Administration and Development* 307-309.

<sup>1594</sup> Midgley J and Piachaud D *Social protection, economic growth and social change: Goals, issues and trajectories in China, India, Brazil and South Africa* (UK, Edward Elgar, 2013) 131; Mussi C and Pinto M 'Pension deficit in Brazilian social security system: Legal remarks and strategies towards financial sustainability' (2014) Vol.2 (2) *Panorama of Brazilian Law* 312.

<sup>1595</sup> Doctor M 'Inequality, social policy and state welfare regimes in developing countries: The case of Brazil' in Connelly J and Hayward J *The withering of the welfare state regression* (UK, Palgrave Macmillan Publishers, 2012) 158.

institutions from Italy in the 1930s.<sup>1596</sup> Nitsch and Schwarzer argue that it was only after the Second World War that there was a clear disjuncture between Brazilian and European state institutional development.<sup>1597</sup> It was only in 1963 that new efforts were made to include rural workers into the scope of social security legislation.<sup>1598</sup> In order to ensure that social security services were to reach rural workers effectively, the Basic Plan of the Social Security System (*Plano Básico da Previdência Social*) was created in 1969. It was initially directed at supporting rural workers in the sugar cane industry and it would be funded by contributions from both employees and employers.

From 1971, new programmes were introduced to replace the Basic Plan of the Social Security System. The aim was to offer policies for the elderly,<sup>1599</sup> disability pensions, survivors' benefit, social and medical assistance to rural workers and their family members. Consequently, coverage was extended to rural workers (by means of a then still separate regime called *Prorural/Funrural*) and domestic employees.<sup>1600</sup> Barrientos notes that the aftermath of the economic crisis during the 1980s has led to the reforms of social insurance policies, in particular

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<sup>1596</sup> Cf Dos Santos M 'The Brazilian social protection system: History and present configuration' in Midgley J and Piachaud D *Social protection, economic growth and social change: Goals, issues and trajectories in China, India, Brazil and South Africa* (UK, Edward Elgar, 2013) 131; Luna F and Klein H *The economic and social history in Brazil since 1889: The Vargas period, 1930-1945* (Cambridge University Press, 2014) 82-142 available at <http://ebooks.cambridge.org/ebook.jsf?bid=CBO9781107337046> (date of use 22 March 2015).

<sup>1597</sup> Connelly J and Hayward J *The withering of the welfare state: Regression* (UK, Palgrave Macmillan, 2012) 158-159.

<sup>1598</sup> Beltrão K *et al* 'Rural population and social security in Brazil: An analysis with emphasis on constitutional changes' (2004) Vol.57 (4) *International Social Security Review* 22-31; Lloyd-Sherlock P and Barrientos A 'Brazil's rural pension system: Its development and impacts - Lessons from China' New Dynamics of Ageing available at <http://www.newdynamics.group.shef.ac.uk/assets/files/168.pdf> (date of use 22 March 2015).

<sup>1599</sup> Jardim M and Da Silva S 'New pension legislation for federal public servants in Brazil' (2015) Vol.15 (2) *Global Journal of Human - Social Science* 21-28.

<sup>1600</sup> Nitsch M and Schwarzer H 'Recent developments in financing social security in Latin America' ILO, Discussion paper no.1 (2004) 37 available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---soc\\_sec/documents/publication/wcms\\_207711.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_207711.pdf) (date of use 22 March 2015).

pension funds system.<sup>1601</sup> It was during the late 1990s that social policy shifted towards social assistance, with the emergence of large scale programmes focusing on poverty and vulnerability reduction.<sup>1602</sup>

Therefore, it was only after the 1988 Constitution that social protection acquired a broader framework. It then became a 'social right' for every citizen.<sup>1603</sup> These developments have required involvement of the three federative government levels (the national government, the federal states, and municipalities).<sup>1604</sup> The constitutionalisation of social welfare law brought major reforms in the area of social security.<sup>1605</sup> Eventually, these reforms aim to transform social security into a more equitable system in the long run. Scholars agree that even though some reforms have been introduced,<sup>1606</sup> more work needs to be done to further address poverty, income inequalities<sup>1607</sup> and the ageing population.<sup>1608</sup>

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<sup>1601</sup> Barrientos A and Santibanez C 'New forms of social assistance and the evolution of social protection in Latin America' (2009) Vol.41 (1) *Journal of Latin American Studies* 3. For further reading on the structure of pension system in Brazil, see Valdés-Prieto S 'Pension reform and the development of pension systems: An evaluation of World Bank assistance' (2007) Background Paper – Brazil Country Study World Bank 1-43 available at [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2010/08/31/000356161\\_20100831004857/Rendered/PDF/563430WP0brazi10Box349502B01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2010/08/31/000356161_20100831004857/Rendered/PDF/563430WP0brazi10Box349502B01PUBLIC1.pdf) (date of use 22 March 2015); Caetano M 'Recent history, perspectives and challenges to social insurance: The Brazilian case' (2009) United Nations Research Institute for Social Development 3-47 available at [http://www.unrisd.org/unrisd/website/document.nsf/8b18431d756b708580256b6400399775/4d8e7bff9fc5078ec1257604004c5588/\\$FILE/draftCaetano.pdf](http://www.unrisd.org/unrisd/website/document.nsf/8b18431d756b708580256b6400399775/4d8e7bff9fc5078ec1257604004c5588/$FILE/draftCaetano.pdf) (date of use 22 March 2015).

<sup>1602</sup> Barrientos *ibid*; Ansiliero G and Paiva L 'The recent evolution of social security coverage in Brazil' (2008) Vol.61 (3) *International Social Security Review* 1-26.

<sup>1603</sup> Dos Santos M 'The Brazilian social protection system: History and present configuration' in Midgley J and Piachaud D *Social protection, economic growth and social change: Goals, issues and trajectories in China, India, Brazil and South Africa* (UK, Edward Elgar, 2013) 131.

<sup>1604</sup> Dos Santos *ibid*.

<sup>1605</sup> See Kay S 'The Brazilian pension model: The pending agenda' (2014) Vol.16 (1) *International Social Security Review* 71-91; Beltrao K and Pinhanez M 'Brazil's social security system: Prospective trajectory and reform alternatives' (2014) Vol.34 (4) *Public Administration and Development* 305-318; Lanzara A and Antía F 'Multi-pillared social insurance systems: The post-reform picture in Chile, Uruguay and Brazil' (2011) Vol.64 (1) *International Social Security Review* 53-68.

<sup>1606</sup> The literature has also found positive effects of programmes such as *bolsa escolar* in Brazil, see Bourguigno F *et al* 'Conditional cash transfers, schooling, and child labour: Micro-simulating Brazil's *bolsa escola* programme' Vol. 17 (2) *World Bank Economic Review* (2003) 229–254; Filho I 'Household income as a determinant of child labour and

## 7.5 Constitutional framework: The protection of social security rights in Brazil

The Brazilian legal system is a mix of the (North) American and continental European (Roman-Germanic civil) legal systems.<sup>1609</sup> As a civil law country, its legal system is based on codes and legislation enacted primarily by the federal legislature, as well as the states and municipalities.

The Federal Constitution is the seventh constitution since Brazil became an independent country in 1822.<sup>1610</sup> The Constitution establishes the legislature, executive, and judiciary as the three branches that compose the government. It has been hailed as the landmark document that represents democratic transition and in the movement towards the institutionalisation of human rights.<sup>1611</sup> Researchers agree that it represents the break with the era of the authoritarian military regimes that had held power since 1964.<sup>1612</sup> Moreover, the adoption of

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school enrollment in Brazil: Evidence from a social security reform' (2012) Vol.60 (2) *Economic Development and Cultural Change* 399-432.

<sup>1607</sup> Ferreira de Mendonca H and Martins Esteves D 'Income inequality in Brazil: What has changed in recent years' (2014) *Comisión Económica Para América Latina Review (CEPAL Review)* 108 -122.

<sup>1608</sup> Cunha F and Dos Santos M 'The impact of social security reform on occupational and retirement behaviour: A qualitative assessment for Brazil' (2010) 2-14 available at [https://www.economicdynamics.org/meetpapers/2010/paper\\_977.pdf](https://www.economicdynamics.org/meetpapers/2010/paper_977.pdf) (date of use 22 March 2015); Ferreira S 'Social security reforms under an open economy: The Brazilian case' (2004) Vol.58 (3) *Rio de Janeiro* 344-365 available at <http://www.scielo.br/pdf/rbe/v58n3/a03v58n3.pdf> (date of use 22 March 2015).

<sup>1609</sup> Hoffmann F and Bentes F 'Accountability for social and economic rights in Brazil' in Gauri V and Brinks D *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (United States of America, Cambridge University Press, 2008) 101.

<sup>1610</sup> Cordeiro J 'Constitutions around the world: A view from Latin America' (2008) *Institute of Developing Economies*, Discussion paper no.164, 13 available at <http://www.ide.go.jp/English/Publish/Download/Dp/pdf/164.pdf> (date of use 22 March 2015).

<sup>1611</sup> Jaccoud L *et al* 'The consolidation of social assistance in Brazil and its challenges, 1998-2008' Brazil Institute for Applied Economic Research (IPEA) Working paper no..76 (2010) 1; Baptista T *et al* 'State responsibility and right to health in Brazil: A balance of the branches action' (2009) Vol.14 (3) *Ciência and Saúde Coletiva* 830-831 available at [http://www.scielo.org/pdf/csc/v14n3/en\\_18.pdf](http://www.scielo.org/pdf/csc/v14n3/en_18.pdf) (date of use 22 March 2015).

<sup>1612</sup> Piovesan F 'Impact and challenges of social rights in the courts' in Langford M *Social rights jurisprudence: Emerging trends in international comparative law* (United States of America, Cambridge University Press, 2008) 182; Feinrider M 'Judicial review and the protection of human rights under military governments in Brazil and Argentina' (1981) Vol.5 (2) *Suffolk*



this Constitution ushered in a new era of socio-economic rights protection which has led to far-reaching socio-economic rights jurisprudence.<sup>1613</sup>

According to Malloy,<sup>1614</sup> social security in Brazil is defined as mandated programmes designed to protect certain designated groups from the impact of common problems that could interfere with a breadwinner's ability to work; for example, sickness, old age, invalidity, and death. In other words, social security consists of an integrated series of actions by the government and society, with the purpose of ensuring the rights to health,<sup>1615</sup> social insurance and social assistance.<sup>1616</sup>

In its preamble, the Brazilian Constitution stipulates that:

We the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.

The Constitution recognises a series of social rights. These includes among others, the right to education, health, food,<sup>1617</sup> work, housing, leisure, social

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*Transnational Law Journal* 175-177; Loundo D 'Welfare designs and peripheral realities: The Brazilian dilemma' in Vivekananda B and Kurian N *Welfare states and the future* (UK, Palgrave Macmillan, 2005) 278-280.

<sup>1613</sup> Brazil. Federal Constitution, 5 October 1988, with Constitutional Amendments 1/1992 to 61/2009 and Constitutional Amendments n° 1 to 6/1994. Brasília: Chamber of Deputies of Federal Republic of Brazil, 2009 available at <http://www.v-brazil.com/government/laws/constitution.html> (date of use 22 March 2015) (hereinafter 'Constitution of Brazil'); Zimmermann A 'Constitutional rights in Brazil: A legal fiction' (2007) Vol.14 (2) *Murdoch University E Law Journal* 28-55; Barroso L 'Brazil's Constitution of 1988 on its twenty first anniversary: Where we stand now' 1-36 available at [http://www.luisrobertobarroso.com.br/wp-content/themes/LRB/pdf/vinte\\_e\\_um\\_anos\\_da\\_constituicao\\_brasileira\\_o\\_estado\\_a\\_que\\_c hegamos\\_en.pdf](http://www.luisrobertobarroso.com.br/wp-content/themes/LRB/pdf/vinte_e_um_anos_da_constituicao_brasileira_o_estado_a_que_c hegamos_en.pdf) (date of use 22 March 2015).

<sup>1614</sup> Malloy J *The politics of social security in Brazil* (United State of America, University of Pittsburgh Press, 1979) 4-5.

<sup>1615</sup> Article 196 of the Constitution of Brazil.

<sup>1616</sup> Article 194 of the Constitution of Brazil.

<sup>1617</sup> See Chmielewska D and Souza D 'The food security policy context in Brazil' Country Study, International Policy Center for Inclusive Growth, No. 22 (2011) available at <https://www.econstor.eu/dspace/bitstream/10419/71772/1/663315239.pdf> (date of use 22 March 2015). See also Rocha C 'Developments in national policies for food and nutrition



security,<sup>1618</sup> social insurance, maternity and infant protection, and assistance for the destitute.<sup>1619</sup> According to the Constitution, the policies encompassing pensions, unemployment insurance, health care and social assistance should be cohesive in order to improve coverage and deliver social protection as a right of citizenship.

The chapter on social order<sup>1620</sup> includes the following concepts of integrated services and the guiding principles of social security;

- Universal coverage and service provision; uniform and equivalent benefits and services for urban and rural populations;
- Equitable and redistributive provision of benefits and services; the irreducibility of the value of benefits; equitable funding;
- A diverse funding base; and
- Democratic and decentralised administration and community participation.<sup>1621</sup>

The Constitution has discarded the notion of restricting coverage to those employed in the formal labour market, loosened the link between contributions and benefits eligibility and created solidarity and redistributive mechanisms.<sup>1622</sup>

The loosening of the contributory requirement and the broadening of the vision of social assistance were especially clear in two decisions that were crucial for guaranteeing rights in Brazil.<sup>1623</sup> The Constitution further extended social security coverage to any persons in need, independently of their social insurance contributions, and that social assistance programmes shall pay a monthly benefit

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security in Brazil' (2009) Vol.27 (1) *Development Policy Review* 51-63; Cohen M and Brown M 'Access to justice and the right to adequate food' (2005/6) *Sustainable Development Law and Policy* 55. For further reading on the right to food in Brazil, see Zeigler J *et al The fight for the right to food – Lessons learned* (UK, Palgrave Publishers, 2011) 135-154.

<sup>1618</sup> Article 7 of the Constitution of Brazil.

<sup>1619</sup> Article 6 of the Constitution of Brazil.

<sup>1620</sup> Article 194 of the Constitution of Brazil.

<sup>1621</sup> See 194 of the Constitution of Brazil.

<sup>1622</sup> Sposati A *Modelo brasileiro de proteção social não contributiva. concepções fundantes*. in: *Concepção e gestão da proteção social não contributiva no Brasil*. Brasília: Unesco/MDS (2009).

<sup>1623</sup> Sposati *ibid*.

equivalent to one minimum wage to disabled and older people, or their families, if they can prove they do not have the means to support themselves. This constitutional imperative resulted in the introduction of the social assistance benefits.

The Constitution is organised into eight parts, arranged with regard to, fundamental principles,<sup>1624</sup> fundamental rights and guarantees,<sup>1625</sup> the organisation of the state,<sup>1626</sup> the organisation of the powers,<sup>1627</sup> the defence of the state<sup>1628</sup> and of the democratic institutions,<sup>1629</sup> taxation and budget,<sup>1630</sup> the economic and financial order,<sup>1631</sup> and the social order. The next part discusses only fundamental social rights as entrenched in the Constitution.

In the first title of the Constitution, it is established that Brazil is a Federal Republic, constituted as an *estado democratico de direito* (democratic rule).<sup>1632</sup> Among the fundamental principles of the Republic are citizenship, human dignity, and political pluralism.<sup>1633</sup> The Constitution lays out the following as the main objectives to be pursued by the Brazilian state;

- The construction of a free, just society based on solidarity, national development, the eradication of poverty and substandard living conditions,

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<sup>1624</sup> Article 1 of the Constitution of Brazil.

<sup>1625</sup> Chapter I of the Constitution of Brazil.

<sup>1626</sup> Chapter I of the Constitution of Brazil, article 18-33.

<sup>1627</sup> Chapter I of the Constitution of Brazil, article 44-50.

<sup>1628</sup> Chapter VI of the Constitution of Brazil, article 34-36.

<sup>1629</sup> Chapter VII of the Constitution of Brazil, which deals with public administration. Article 23 of the Constitution of Brazil provides that 'the Union, the states, the Federal District and the municipalities, have the power to ensure that the Constitution, the laws and the democratic institutions are respected...'.<sup>1630</sup>

<sup>1630</sup> Chapter I of the Constitution of Brazil, which deals with the national tax system.

<sup>1631</sup> Title VII of the Constitution of Brazil which deals with the economic and financial order.

<sup>1632</sup> Zimmermann A 'Constitutional rights in Brazil: A legal fiction' (2007) Vol.14 (2) *Murdoch University E Law Journal* 31; Leite de Souza C 'Participatory democracy in Brazil: Constitutional guarantees, innovations and challenges' Arab Reform Initiatives 3 available at [http://www.arab-reform.net/sites/default/files/Participatory\\_Democracy\\_in\\_Brazil--\\_constitutional\\_guarantees\\_innovations\\_and\\_challenges.pdf](http://www.arab-reform.net/sites/default/files/Participatory_Democracy_in_Brazil--_constitutional_guarantees_innovations_and_challenges.pdf) ( date of use 22 March 2015).

<sup>1633</sup> In terms of article 1, the Federal Republic of Brazil, is formed by the union of States and Counties (*municípios*), as well as the Federal District.

- The reduction of social and regional inequality, and the promotion of public welfare; and
- Free from discrimination, arising from race, sex, colour, age, and any other kind of discrimination.<sup>1634</sup>

It establishes principles that should govern the conduct of the Brazilian state in the international arena. This includes, *inter alia*, the recognition of human rights, and self-determination of all people.<sup>1635</sup> The Constitution states that, “the rights and guarantees established in this Constitution do not exclude others derived from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party”.<sup>1636</sup> This implies that Brazilian Constitution recognises the international protection of human rights.<sup>1637</sup>

The Constitution defines social rights as the entitlement to education, health, work, housing, leisure, safety, social security, social welfare, and protection for motherhood and childhood.<sup>1638</sup> It also guarantees a comprehensive set of fundamental rights to its citizens.<sup>1639</sup> It empowers the Federal Supreme Court to conduct judicial review.<sup>1640</sup> Moreover, the Constitution provides for the creation of procedural and administrative mechanisms to ensure that these constitutional rights will actually be enforced.<sup>1641</sup>

The Federal Supreme Court is the highest court and is entrusted with the duty of safeguarding the Constitution,<sup>1642</sup> as well as functioning as a court of review. It has original jurisdiction to try and decide direct actions of unconstitutionality (*Ação direta de inconstitucionalidade*) of a federal or state law or normative act,

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<sup>1634</sup> Article 3 of the Constitution of Brazil.

<sup>1635</sup> Article 4 of the Constitution of Brazil.

<sup>1636</sup> Article 5 and 2 of the Constitution of Brazil.

<sup>1637</sup> Article 5, para 2 of the Constitution of Brazil.

<sup>1638</sup> Article 6 of the Constitution.

<sup>1639</sup> Chapter II on Social Rights of the Constitution of Brazil.

<sup>1640</sup> Krieger J *et al Introduction to comparative politics: Political challenges and changing agendas* 6<sup>th</sup> ed (London, Wadsworth Cengage Learning, 2013) 441.

<sup>1641</sup> Article 29 of the Constitution of Brazil.

<sup>1642</sup> Article 102 of the Constitution of Brazil.

or declaratory actions of constitutionality (*Ação declaratória de constitucionalidade*) of a federal law or normative act,<sup>1643</sup> which somewhat resemble the issuance of advisory opinions a situation not allowed in the Supreme Court of the United States,<sup>1644</sup> but allowed in South Africa and Canada. It is important to note that Brazilian courts do not follow the doctrine of *stare decisis*,<sup>1645</sup> and the Supreme Court started issuing binding decisions (*Súmulas Vinculantes*) in special situations<sup>1646</sup> only recently, after the amendment of the Constitution.<sup>1647</sup>

In relation to the rights of working people, the Constitution stipulates, among other things, that a minimum wage must provide all the basic needs of workers and their families: housing, food, education, health, leisure, clothing, hygiene, transportation and social security.<sup>1648</sup> According to Zimmermann, Article 5 alone, 'impressively appears to protect virtually every form of known human right'. He posits that the concept of human rights in Brazil is more thoroughly protected in legislation than in any other country in the world.<sup>1649</sup>

Chapter II of the Constitution provides a general guarantee of the social security. According to Article 194, social security consists of an integrated group of actions by the government and society, designed to assure rights relating to health,

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<sup>1643</sup> Article 102(I)(a) of the Constitution of Brazil.

<sup>1644</sup> Barbosa J 'Reflections on Brazilian constitutionalism' (2007) Vol. 12 *UCLA Journal of International Law and Foreign Affairs* 183.

<sup>1645</sup> The doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.

<sup>1646</sup> Article 103-A.

<sup>1647</sup> On December 30, 2004, Congress amended the Constitution and established that the final decisions issued by an absolute majority of the members of the Federal Supreme Court would have a binding legal effect on the entire judiciary. The so-called *Súmulas Vinculantes* are now regulated by Law No. 11,417 of December 19, 2006, and enable the judiciary to judge in a definitive and final way thousands of cases dealing with the same issue. *Emenda Constitucional* No. 45, de 30 de Dezembro de 2004, available at [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Emendas/Emc/emc45.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm); and Lei No. 11.417, de 19 de Dezembro de 2006, available at [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/2006/Lei/L11417.htm](http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11417.htm) (date of use 22 March 2015).

<sup>1648</sup> Article 7, IV of the Constitution of Brazil.

<sup>1649</sup> Zimmermann A 'Constitutional rights in Brazil: A legal fiction' (2007) Vol.14 (2) *Murdoch University E Law Journal* 28.

social security and social assistance. In terms of the Constitution, it is the responsibility of the government, to organise social security. Moreover, social security should be based on the following objectives;

- Universality of coverage and attendance;
- Uniformity and equivalence of benefits and services for urban and rural populations;
- Selectivity and distribution in the provision of benefits and services; irreducibility of the value of the benefits;
- Equitable participation in funding; diversity on the basis of financing; and
- Democratic and decentralised character of administration, through four-part management, with participation of workers, employers, retirees and the government through its collegial agencies.<sup>1650</sup>

Article 195 provides that social security shall be financed by the entire society, directly and indirectly, as provided by law, through funds derived from the budgets of the Union, States, Federal District, Counties.<sup>1651</sup> Interesting feature of the Constitution is that Article 5 and 1 states that the “rules defining fundamental rights and guarantees apply immediately”. This provision can be interpreted to mean that every fundamental right is endowed with immediate efficacy.<sup>1652</sup>

Lírio do Vale agrees that this express command was jurisprudentially extended to each fundamental right, including socio-economic rights.<sup>1653</sup> According to the author, the most important consequence is that any violation of fundamental rights expressed in the Constitution may be submitted to judicial appreciation, in a competency shared by all the levels of the judiciary power, and not reserved to the Constitutional Court.

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<sup>1650</sup> Article 194 of the Constitution of Brazil.

<sup>1651</sup> For further reading on social security financing in Brazil, see article 194,195 and 204 of the Constitution.

<sup>1652</sup> Lírio do Vale V ‘Judicial adjudication in housing rights in Brazil and Colombia: A Comparative perspective’ available at <http://ssrn.com/abstract=2252991> (date of use 22 March 2015); Durand - Lasserre A and Royston L *Holding their ground: Secure land tenure for the urban poor in developing countries* (UK, Earthscan Publications Ltd, 2002) 139.

<sup>1653</sup> Lírio do Vale V *ibid.*

The Constitution may be amended and sets out the procedure in the manner in which that can be done.<sup>1654</sup> For example, the Constitution requires 75% majority votes in each House of National Congress before it can be amended.<sup>1655</sup> The Constitution also states that any amendment that would abolish the Constitution's individual rights and guarantees is prohibited.<sup>1656</sup> This means that the Part II provisions relating to individual rights and guarantees (including social rights) may not be the subject of retrogressive constitutional amendment, for example, any constitutional amendment that purported to remove the right to social security from the Constitution would be prohibited.<sup>1657</sup> This provision is commonly referred to as the "stone clause".<sup>1658</sup> Similarly, the Constitution of Brazil makes provision for progressive amendments of social rights. This means that the catalogue of social rights in the Constitution may be expanded. It has already occurred on two occasions, with housing<sup>1659</sup> and food<sup>1660</sup> being added to the Constitution's original list of social rights. The following paragraph examines the system of social security in Brazil in detail.

## 7.6 The pillars of social security

The Constitution establishes a legal foundation of social assistance as guaranteed rights for the needy and also an obligation of the state to provide health and education services, among others, the access to which is established

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<sup>1654</sup> Negretto G 'Replacing and amending Constitutions: The logic of constitutional change in Latin America' (2012) Vol.46 (4) *Law and Society Review* 749-760; Pachón M 'Presidential dominance sans formal power: Amending the Constitution in Brazil' (2008) Conference papers-Midwestern Political Science Association 2-32 available at [http://0-eds.a.ebscohost.com.oasis.unisa.ac.za/eds/pdfviewer/pdfviewer?vid=3and\\_sid=83704212-2593-4034-85b8-6c9334a0499cpercent40sessionmgr4003and\\_hid=4108](http://0-eds.a.ebscohost.com.oasis.unisa.ac.za/eds/pdfviewer/pdfviewer?vid=3and_sid=83704212-2593-4034-85b8-6c9334a0499cpercent40sessionmgr4003and_hid=4108) (date of use 22 March 2015).

<sup>1655</sup> Article 60 of the Constitution.

<sup>1656</sup> Article 60(4)(IV) of the Constitution.

<sup>1657</sup> Gaetani F 'The intriguing Brazilian administrative reform' 5-7 available at <http://www.bresserpereira.org.br/Terceiros/Autores/Gaetani,Francisco/gaetani2.pdf> (date of use 22 March 2015).

<sup>1658</sup> Article 60 of the Constitution.

<sup>1659</sup> *Emenda Constitucional* (Constitutional Amendment) 26 (14 February 2000).

<sup>1660</sup> *Emenda Constitucional* 64 (4 February 2010).

as a basic right of all citizens.<sup>1661</sup> The system of social security is composed by pillars, such as social assistance consisting of non-contributory policies, contributory social insurance, and private social security.<sup>1662</sup> The non-contributory social transfers play a key role in the alleviation of poverty.<sup>1663</sup>

Social assistance is provided to those who need it, regardless of contributions to social security, and has the following objectives: protection of the family, maternity, childhood adolescence and old age, support for the needy children and adolescents, promotion of integration into the labour force, training and rehabilitation of the handicapped and promotion of their integration into the community, and guarantee of a monthly benefit of one minimum wage to the handicapped and elderly who prove that they are without means to provide for their own support or having it provided by their family.<sup>1664</sup> In addition, the Constitution protects social security coverage in the following key areas, coverage of the events of illness; disability; death and advanced age; maternity protection; protection for the involuntarily unemployed; family allowance and confinement aid for dependents of insured persons with low incomes; a pension for the death of an insured man or woman, for the spouse or companion, and dependents.<sup>1665</sup>

Over the years, the Government of Brazil has introduced the link between income transfers and the fostering of productive activities among the public. As a result, several public actions linked to productive inclusion in different fields and involving a wide range of institutions have emerged. The following are among the

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<sup>1661</sup> Lindert K *et al* 'The nuts and bolts of Brazil's *bolsa família* programme: implementing conditional cash transfers in a decentralised context' (2007) The World Bank.

<sup>1662</sup> Article 202 of the Constitution.

<sup>1663</sup> Hall A 'The last shall be first: Political dimensions of conditional cash transfers in Brazil' (2012) Vol.11 (1/2) *Journal of Policy Practice* 1-15; Rasella D 'Impact of conditional cash transfer programmes and primary health care programmes on childhood mortality Evidence from Brazil' (2013) *Child Poverty Insights* UNICEF available at [http://www.unicef.org/socialpolicy/files/Child\\_Poverty\\_Insights\\_September\\_2013.pdf](http://www.unicef.org/socialpolicy/files/Child_Poverty_Insights_September_2013.pdf) (date of use 22 March 2015).

<sup>1664</sup> Article 203 of the Constitution.

<sup>1665</sup> Article 201 of the Constitution.

main fields of action: training and raising skills for work, technical assistance, access to credit, support for commercialisation, fostering production logistics, support for co-operativism, and various forms of economic solidarity.

Despite these innovative efforts to curb poverty and unemployment, the programme has often been criticised as being fragmented with poor integration and coordination. Over the years, government has introduced social assistance programmes, aimed at the alleviation of poverty. The most important examples of these programmes are discussed below.

### 7.6.1 *Bolsa família*

The government has invested significantly in social protection, and the country has one of the best-developed systems among middle-income countries, approximately 25% of the population.<sup>1666</sup>

The social policies are based on constitutional guarantees and human rights-based on social justice.<sup>1667</sup> Although the Constitution has in practical terms, not eliminated poverty and inequalities, this clause has been used effectively and dynamically. The conditional cash transfers programmes<sup>1668</sup> have been organised under one policy, which is *bolsa família*. Introduced in 2003, the *bolsa família* programme combined a number of earlier federal Brazilian conditional cash transfers programmes, such as, *the bolsa escola* (school bag),<sup>1669</sup> *bolsa*

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<sup>1666</sup> Holmes R *et al* 'Social protection in Brazil: Impacts on poverty, inequality and growth' Overseas Development Institute available at [http://www.developmentprogress.org/sites/developmentprogress.org/files/brazil\\_social\\_protection.pdf](http://www.developmentprogress.org/sites/developmentprogress.org/files/brazil_social_protection.pdf) (date of use 22 March 2015).

<sup>1667</sup> Article 5 of the Constitution.

<sup>1668</sup> For example *Bolsa Escola* was a conditional cash transfer programme that offered mothers in poor households a monthly stipend if their children ages 6-15 attended school on a regular basis. The programme was implemented across Brazil between 2001 and 2003, until it was merged with the *bolsa família* programme. See Lindert K 'Brazil: *Bolsa família* programme – Scaling – up cash transfers for the poor' *MFDR Principles in Action: Sourcebook on Emerging Good Practices* (Washington D.C, World Bank, 2005).

<sup>1669</sup> Barrientos S 'Social assistance and integration with the labour market' in ILO *Social protection and inclusion: Experiences and policy issues* (2006) ILO, Geneva 168. In 2001, the Federal Government of President Fernando Henrique Cardoso introduced the Federal *Bolsa Escola* Programme as a replacement to the PGRM.<sup>18</sup> The Federal *Bolsa Escola*



*alimentação*,<sup>1670</sup> *fome zero*,<sup>1671</sup> *cartão alimentação* and *auxílio gás*,<sup>1672</sup> which were aimed respectively at improving school enrolment, household food

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Programme was modeled after the municipal programmes and managed by the Ministry of Education. Under the BE programme, poor families (with per capita incomes less than R\$90, or half the minimum wage at that time) received R\$15 (US\$ 7) per month per child up to a maximum of three children, conditional upon a minimum school attendance of 85 percent. The four central objectives of *Bolsa Escola* (BE) were to (a) increase educational attainment and thus attempt to reduce poverty in the long run; (b) reduce short-term poverty by providing an income transfer to poor families; (c) reduce child labour; and (d) act as a potential safety net. *Bolsa Escola* targeted families with children in the age range from 6 to 15 years, and with per capita monthly incomes no greater than R\$90 (US\$43); For further reading on Brazil's *Bolsa Escola*, Feitosa de Brito T 'The emergence and popularity of conditional cash transfers in Latin America' in Barrientos A and Hulme D *Social protection for the poor and the poorest: Concepts, policies, and politics* 1<sup>st</sup> ed (Great Britain Palgrave Macmillan, 2008) <http://inspirasi.co/books/1410258393.pdf> (date of use 22 May 2015) 183-191.

<sup>1670</sup> *Ministério da Saúde Programmea alimentação saudável* (2002) 5-65 available at [http://bvsmms.saude.gov.br/bvs/publicacoes/alimenta\\_saudavel.pdf](http://bvsmms.saude.gov.br/bvs/publicacoes/alimenta_saudavel.pdf) (date of use 22 March 2015); *Bolsa Alimentação* programme, Brazil available at [http://www.who.int/social\\_determinants/knowledge\\_networks/phconditions/pphc\\_example.pdf](http://www.who.int/social_determinants/knowledge_networks/phconditions/pphc_example.pdf) (date of use 22 March 2015). Established in 2001, *Bolsa Alimentação* aimed at reducing causes of malnutrition, reduce nutritional deficiencies and infant mortality among the poorest households in Brazil. Built on the conditional cash transfer model pioneered for education, the programme was managed by the Ministry of Health. The *Bolsa Alimentação* programme paid benefits of R\$15 per child up to a maximum of three children, to poor families with a per capita monthly income below R\$90.21 The programme targeted pregnant and lactating women and young children. The programme targeted pregnant and lactating women and young children. Programme conditionalities consisted of complying with a minimum schedule of pre-natal and post-natal-care visits, monitoring the growth of children, and keeping their vaccinations up to date, as well as participation in nutritional education seminars. Eligibility for BA expired when children completed 7 years of age. They then became eligible for the BE programme as they entered the school system.

<sup>1671</sup> In 2003, President Lula launched his administration's flagship umbrella initiative known as the "Fome Zero" (zero hunger) programme. More than a programme, Fome Zero serves as a mission statement that focused government efforts on eradicating the most extreme forms of poverty and hunger in Brazil. The Fome Zero initiative spans a collection of over 60 programmes in many ministries related to the multi-dimensional facets of extreme poverty and hunger. One of the first measures under Fome Zero was the introduction of yet another cash transfer programme (pilot) called "the *Programmea do Cartão Alimentação*" (PCA). This programme was managed by the (former) Ministry of Food Security and provided a monthly benefit payment of R\$50 to poor families with a per capita income of less than half the minimum wage per month. The programme sought to promote food consumption, and beneficiaries were supposed to use the transfer for food purchases. See Da Fonseca Menezes F *et al* 'Aspects of social security in Brazil: From Fome Zero to Brasil Sem Miséria' (2012) *Germany Diakonisches Werk der EKD e.V. for "Brot für die Welt"* Stafflenbergstrasse 19-24 available at [http://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/analyse\\_33\\_englisch\\_social\\_security\\_in\\_Brasil.pdf](http://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/analyse_33_englisch_social_security_in_Brasil.pdf) (date of use 22 March 2015).

<sup>1672</sup> De la Brière B and Lindert K 'Reforming Brazil's *Cadastro Único* to Improve the Targeting of the *bolsa família* programme' (2005) The World Bank 9 available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/0527.pdf> (date of use 22 March 2015). In 2002, the federal government introduced another cash transfer, *auxílio gás* (*vale gás*), as a compensatory measure for the phasing out of cooking gas

consumption, and lowering household fuel costs. The programme is strongly identified with the former President Luis Inácio Lula da Silva.<sup>1673</sup> It presently covers all Brazilian poor, equivalent to over 13 million Brazilian households.<sup>1674</sup>

Thus, *bolsa família* reaches nearly three times as many people and is about three times as large in terms of budget as the well-known conditional cash transfer programme.<sup>1675</sup> As of 2008, only four out of the country's 5564 municipalities had not signed an agreement with the federal government to implement the programme.<sup>1676</sup> *Bolsa família* programme is created under the National Secretariat on Citizenship (*Secretaria Nacional de Renda de Cidadania*) under the Federal Ministry of Social Development.<sup>1677</sup>

The central administration's policy, namely; *bolsa família* is implemented in all of Brazil's municipalities.<sup>1678</sup> Its impact on household is extraordinary. For example, studies have found that families that were living in extreme poverty that

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subsidies. The AG programme provided an unconditional transfer of R\$7.50, paid in bi-monthly installments of R\$15 to poor families with a monthly per capita income of less than half a minimum wage. The programme was administered by the Ministry of Mines and Energy and it used both the BA's and the BE's registries to select its target beneficiary population.

<sup>1673</sup> Hall A 'The last shall be first: Political dimensions of conditional cash transfers in Brazil' (2011) Vo.11 (1-2) *Journal of Policy Practice* 24-41; Hunter W and Power T 'Rewarding Lula: Executive power, social policy, and the Brazilian elections' (2006) Vol.49 (1) *Latin American Politics and Society* 1-30.

<sup>1674</sup> Hall A 'The last shall be first: Political dimensions of conditional cash transfers in Brazil' (2011) Vo.11 (1-2) *Journal of Policy Practice* 24-41.

<sup>1675</sup> Kaufmann K *et al* 'Learning about the enforcement of conditional welfare programmes: Evidence from the *bolsa família* programme in Brazil' (2013) 6 available at <https://www.aeaweb.org/aea/2014conference/.../retrieve.php?pdfid...> (date of use 22 March 2015).

<sup>1676</sup> The World Bank 'The state of social safety nets 2014' at 27 available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/05/12/000350881\\_20140512111223/Rendered/PDF/879840WP0FINAL00Box385208B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/05/12/000350881_20140512111223/Rendered/PDF/879840WP0FINAL00Box385208B00PUBLIC0.pdf) (date of use 22 March 2015); Sánchez-Ancochea D and Mattei L '*Bolsa família*, poverty and inequality: Political and economic effects in the short and long run' (2011) Vol.11 (2/3) *Global Social Policy* 299-318.

<sup>1677</sup> OECD 'Public sector integrity in Brazil, case study 2: Family grant programme, Federal Ministry of Social Development and fight against hunger' (2011) 9-12 available at <http://www.oecd.org/gov/ethics/49019877.pdf> (date of use 22 March 2015).

<sup>1678</sup> Kaufmann K *et al* 'Learning about the enforcement of conditional welfare programmes: Evidence from the *bolsa família* programme in Brazil' (2013) 6 available at <https://www.aeaweb.org/aea/2014conference/.../retrieve.php?pdfid...> (date of use 22 March 2015).

participated in the *bolsa família* moved out of extreme poverty into the income range of non-extreme poverty.<sup>1679</sup> Furthermore, a study by Lindert *et al*<sup>1680</sup> found that the programme seeks to help: reduce current poverty and inequality, by providing a minimum level of income for extremely poor families; and break the intergenerational transmission of poverty by conditioning these transfers on beneficiary compliance with human capital requirements (school attendance, vaccines, pre-natal visits).

<sup>1679</sup> ILO '*Bolsa família* in Brazil: Context, concept and impacts' (2009) 1-17 available at [http://www.ilo.org/public/libdoc/jobcrisis/download/109B09\\_28\\_engl.pdf](http://www.ilo.org/public/libdoc/jobcrisis/download/109B09_28_engl.pdf) (date of use 22 March 2015); Curry M *et al* 'Brazil's *bolsa família* and the Philippines's "4Ps" CCT programmes: Considering South-South cooperation for social protection' (2013) Vol.13 (1) *Asia-Pacific Social Science Review* 1-12; Matthew L 'Considering post-crisis stimulus measures: Welfare policy and social inclusion in Brasil' (2014) Vol.XLI (2) *Journal of Sociology and Social Welfare* 135-140; Vídero Vieira Santos L '*Bolsa família* programmeme: Economic and social impacts under the perspective of the capabilities approach' (2010) 3-26 available at [http://www.ids-uva.nl/wordpress/wp-content/uploads/2011/07/10\\_Videira.pdf](http://www.ids-uva.nl/wordpress/wp-content/uploads/2011/07/10_Videira.pdf)(date of use 22 March 2015); Keshavarz M 'A Conditional cash transfer programme in Brazil: How *bolsa família* came to affect millions of children' (2012) Department of Spanish, Portuguese and Latin American Studies, Stockholms Universitet 14-18 available at <http://www.diva-portal.org/smash/get/diva2:605922/FULLTEXT01.pdf> (date of use 22 March 2015); Cunha R 'Entitlement to income in Brazil: The experience of the *bolsa família* Programmeme' 11-22 available at [http://www.ipc-undp.org/doc\\_africa\\_brazil/ARTIGO\\_ROSANICUNHA\\_English.pdf](http://www.ipc-undp.org/doc_africa_brazil/ARTIGO_ROSANICUNHA_English.pdf) (date of use 22 March 2015); Bruner J 'Is poverty reduction enough? Lessons from *bolsa família* in Brazil' Michigan State University available at [https://www.msu.edu/~brunerju/Justin\\_Bruner/Research\\_files/BrunerCIES2011.pdf](https://www.msu.edu/~brunerju/Justin_Bruner/Research_files/BrunerCIES2011.pdf)(date of use 22 March 2015); ILO 'Brazil's conditional cash transfer programmeme *bolsa família*' (2012) IBSA International Conference on South-South Cooperation available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new\\_delhi/documents/presentation/wcms\\_175274.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/presentation/wcms_175274.pdf)(date of use 22 March 2015); For a critical analysis of *família* see, Hall A 'Brazil's *bolsa família*: A double-edged sword' (2008) Vol.39 (5) *Development and Change* 799-819; Medeiros M *et al* 'Targeted cash transfer programmemes in Brazil: BPC and the *bolsa família*' (2008) Working paper no..46, International Poverty Center 12-16 available at [http://www.unicef.org/socialpolicy/files/Targeted\\_Cash\\_Transfer\\_Programmes\\_in\\_Brazil.pdf](http://www.unicef.org/socialpolicy/files/Targeted_Cash_Transfer_Programmes_in_Brazil.pdf) (date of use 22 March 2015); Stahlberg S 'Going beyond *bolsa família* to solve underdevelopment problems in the Brazilian Northeast' 1-29 available at [http://cddrl.fsi.stanford.edu/sites/default/files/Stahlberg\\_Going\\_Beyond\\_Bolsa\\_Familia\\_to\\_Solve\\_Underdevelopment\\_Problems\\_in\\_the\\_Brazilian\\_Northeast.pdf](http://cddrl.fsi.stanford.edu/sites/default/files/Stahlberg_Going_Beyond_Bolsa_Familia_to_Solve_Underdevelopment_Problems_in_the_Brazilian_Northeast.pdf) (date of use 22 March 2015); Langou G and Forteza P 'Validating one of the world's largest conditional cash transfer programmemes: A case study on how an impact evaluation of Brazil's *bolsa família* programmeme helped silence its critics and improve policy' (2012) Center for the Implementation of Public Policies Promoting Equity and Growth (CIPPEC) Working paper no..16, at 6-24 available at [http://www.3ieimpact.org/media/filer\\_public/2012/11/30/wp-16\\_brazil\\_case\\_study\\_-\\_final.pdf](http://www.3ieimpact.org/media/filer_public/2012/11/30/wp-16_brazil_case_study_-_final.pdf) (date of use 22 March 2015).

<sup>1680</sup> Lindert K *et al* 'The nuts and bolts of Brazil's *bolsa família* programme: Implementing conditional cash transfers in a decentralised context' (2007) The World Bank 1-116 available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Safety-Nets-DP/0709.pdf> (date of use 22 March 2015).

This new form of social assistance has been hailed as a successful programme in the reduction of poverty and inequality in Brazil.<sup>1681</sup> According to the study conducted by Paes-Sousa *et al*<sup>1682</sup> Brazil's *bolsa família* has contributed to decreasing child mortality, in particular for deaths attributed to poverty-related causes such as malnutrition and diarrhoea. It provides families with certain amount of money in exchange to having to comply with specific conditions<sup>1683</sup> like keeping their children in school with a class attendance of at least 85% of the school year.<sup>1684</sup> In addition, the family must submit to obligatory healthcare examination every six months (or monthly in the case of pregnant women). In order to conduct the verifications, the municipalities transfer the information to the Brazilian Ministry of Health, and every six months, the Ministry of Social Development collects the data.<sup>1685</sup> The other conditionality is that each year, families are required to update and keep up-to-date information on the *bolsa família* programme database.<sup>1686</sup>

This system identifies families from all Brazilian municipalities, in a poverty situation, in order to provide orientation for the implementation of public policies

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<sup>1681</sup> Bohn S *et al* 'Can conditional cash transfers programme generate equality of opportunity in highly unequal societies? Evidence from Brazil' (2014) Vol.22 (52) *Revista de Sociologia e Política* 111-130; Sousa R and Vaitsman J 'The zero hunger and Brazil without extreme poverty programmes: A step forward in Brazilian social protection policy' (2014) Vol.19 (1) *Revista Ciência and Saúde Coletiva* 4351-4360; Barrientos A 'The rise of social assistance in Brazil' (2013) Vol.44 (4) *International Institute of Social Studies* 887-907.

<sup>1682</sup> Paes - Sousa R *et al* 'Conditions for success in implementing CCT programmes: Lessons for Asia from Latin America and the Caribbean' (2013) *Inter-American Development Bank* 10.

<sup>1683</sup> For further reading on the aspect of enforcing *bolsa família*, see Kaufmann K *et al* 'Learning about the enforcement of conditional welfare programmes: Evidence from the *bolsa família* programme in Brazil' (2013) 1-46 available at <https://www.aeaweb.org/aea/2014conference/.../retrieve.php?pdfid...> (date of use 22 March 2015).

<sup>1684</sup> Curry M *et al* 'Brazil's *bolsa família* and the Philippines "4Ps" CCT programmes: Considering South – South cooperation for social protection' (2013) Vol.13 (1) *Asia – Pacific Social Science Review* 6-7.

<sup>1685</sup> Bastagli F 'From social safety net to social policy: The role of conditional cash transfers in welfare state development in Latin America' (2009) International Policy Center for Inclusive Growth, Working paper no..60, 8-9 available at <http://www.ipc-undp.org/pub/IPCWorkingPaper60.pdf> (date of use 22 March 2015).

<sup>1686</sup> Curry M *et al* (note 1684 above).

with selective criteria.<sup>1687</sup> It also offers municipal, state and federal governments with information about the following:

- Families registered (actual and potential beneficiaries of the programmes) regarding income;
- Family expenses (rent, transport, food and others);
- Characteristics of housing (number of rooms, kind of construction, water and sanitary conditions); and
- Composition of the family (number of family members, pregnant members, breast feeding mothers, elderly, disabled), schooling, professional qualification and situation in the labour market.

The single register is an important instrument used by the three spheres of government (Union, State, and Municipalities) to monitor and control targeted social policies.<sup>1688</sup>

Castaneda and Lindert recognise the role data and information management play in implementing social protection schemes.<sup>1689</sup> In addition, Castaneda and Lindert mention a "... unified household information registry (or "cadastre") which includes all interviewed households ... and serves to do the following:

- Collect, record, and store updated and historical information on household characteristics and circumstances ...;
- Verify and check the consistency of this information;

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<sup>1687</sup> Veras Soares F *et al* 'Evaluating the impact of Brazil's *bolsa família*: Cash transfer programmes in Comparative perspective' (2010) Vol.45 (2) *Latin American Research Review* 176.

<sup>1688</sup> Mourão L and Macedo de Jesus A 'C-*bolsa família* (Family Grant) Programmeme: an analysis of Brazilian income transfer programmeme' (2012) 4 *Field Actions Science Reports* 44-45 available at <http://factsreports.revues.org/1560>(date of use 22 March 2015);Cunha R 'Entitlement to income in Brazil: The experience of the *bolsa família* programmeme 11 available at [http://www.ipc-undp.org/doc\\_africa\\_brazil/ARTIGO\\_ROSANICUNHA\\_English.pdf](http://www.ipc-undp.org/doc_africa_brazil/ARTIGO_ROSANICUNHA_English.pdf) (date of use 22 March 2015).

<sup>1689</sup> Castaneda T and Lindert L 'Designing and implementing households targeting systems: Lessons from Latin America and the United States' (2005) World Bank Social Protection, Discussion Paper Series No.052, at 18 available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/0526.pdf> (date of use 22 March 2015).

- Automatically screen for eligibility of specific programs by comparing household information with pre-established program-specific eligibility criteria (to create sub-registry beneficiary lists); and
- Provide needed information to support service planning and projections”.

In their study, Curry *et al* indicate that the local schools and municipalities have been equipped with computers that communicate with the national system run by the Brazilian Ministry of Education.<sup>1690</sup> They further assert that every three months the Ministry of Social Development collects the attendance data in order to verify conditionality compliance. Municipalities lacking a computer network or internet access are permitted to send reports and are encouraged to apply for funding and training to implement a local online structure.<sup>1691</sup>

*Bolsa família*'s payments are made through the *caixa economica*, a public bank that also hosts and runs the unified registry of beneficiaries.<sup>1692</sup> To handle the large number of transactions, beneficiaries are assigned a different day of payment based on the last digit of the social identification number of the family representative.<sup>1693</sup>

An interesting feature of *bolsa família* is that failure by a beneficiary to comply with his/her co-responsibility eventually triggers the interruption of all payments to the whole family.<sup>1694</sup> The interruption is not immediate, as it is preceded by a

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<sup>1690</sup> Curry M *et al* 'Brazil's *bolsa família* and the Philippines' "4Ps" CCT Programmes: Considering South-South cooperation for social protection' (2013) Vol.13 (1) *Asia-Pacific Social Science Review* 7.

<sup>1691</sup> Curry M *et al* *ibid*.

<sup>1692</sup> Paes – Sousa R *et al* 'Conditions for success in implementing CCT programmes: Lessons for Asia from Latin America and the Caribbean' (2013) *Inter-American Development Bank* 31 available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11990.pdf> (date of use 22 March 2015); See also Brazil 'Technology programme country note' (2010) available at <http://www.cgap.org/sites/default/files/CGAP-Technology-Programme-Country-Note-Brazil-Dec-2010.pdf> (date of use 22 March 2015).

<sup>1693</sup> Paes – Sousa R *et al* *ibid* at 56.

<sup>1694</sup> For further reading on the *bolsa família* conditionalities, see Da Silva M 'The conditionalities of the *bolsa família*' available at [www.usbig.net/.../Mariapercent20Ozanirapercent20dapercent20Silvapercent20epercent20Silva-](http://www.usbig.net/.../Mariapercent20Ozanirapercent20dapercent20Silvapercent20epercent20Silva-) (date of use 22 March 2015); Da Silva E and Silva M 'The *bolsa família* and social

series of warnings (delivered through bank receipts of previous transfers, before payments are blocked) and verification by the local authorities.<sup>1695</sup> Scholars argue that although the threat to interrupt the cash transfer is a powerful incentive to comply with programme co-responsibilities, the interruption may further aggravate beneficiaries' difficulties.<sup>1696</sup> Failure to comply may be due to external causes such as lack of transport, teachers and doctors' absenteeism, situations of domestic violence, programmes' operational glitches.<sup>1697</sup>

It is therefore important to investigate the reasons for non-compliance and take corrective measures where needed. Social workers play an important role in this process.<sup>1698</sup> Brazil also offers income-linked transfer actions targeting families in extreme poverty situations (for instance Family Fund Programme,<sup>1699</sup> Programme for the Eradication of Child Labour,<sup>1700</sup> Programme for Youth Agents of Social and Human Development).<sup>1701</sup> The Family Fund Programme was launched in

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protection in Brazil: Problematizing the conditionalities as limits for the implementation of the citizenship basic income' (2012) paper, presented to the 14th Congress of the Basic Income Earth Network, held in Munich, Germany 8-16 available at <http://www.basicincome.org/bien/pdf/munich2012/DaSilva.pdf> (date of use 22 March 2015); *Secretaria Nacional de Renda de Cidadania* 'Conditionalities of the *bolsa família* programme conception, design and results (2014) available at [https://www.wwp.org.br/sites/default/files/presentation\\_conditionalities\\_bolsa\\_familia\\_programme\\_conception\\_design\\_results.pdf](https://www.wwp.org.br/sites/default/files/presentation_conditionalities_bolsa_familia_programme_conception_design_results.pdf) (date of use 22 March 2015).

<sup>1695</sup> Paes - Sousa R *et al* 'Conditions for success in implementing CCT programmes: Lessons for Asia from Latin America and the Caribbean' (2013) Inter-American Development Bank 53 available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11990.pdf> (date of use 22 March 2015); See also Brazil 'Technology programme country note' (2010) available at <http://www.cgap.org/sites/default/files/CGAP-Technology-Programme-Country-Note-Brazil-Dec-2010.pdf> (date of use 22 March 2015).

<sup>1696</sup> Paes - Sousa R *et al* *ibid* at 54.

<sup>1697</sup> Paes - Sousa R *et al* *ibid*.

<sup>1698</sup> Paes - Sousa R *et al* *ibid*.

<sup>1699</sup> ILO 'Social protection and inclusion: Experiences and policy issues' (2006) 186-188 available at <http://ifwea-org-bin.directo.fi/@Bin/825c4ad72cdf409399aed3cf3825545a/1434619853/application/pdf/148744/2006StrtgiesExclsnPvrtyprgrmm.pdf> (date of use 22 March 2015).

<sup>1700</sup> ILO 'Understanding the Brazilian success in reducing child labour: Empirical evidence and policy lessons' (2011) Understanding Children's Work), a joint ILO, World Bank and UNICEF project 1-78 available at [http://www.ucw-project.org/attachment/Brazil\\_20june1120110622\\_103357.pdf](http://www.ucw-project.org/attachment/Brazil_20june1120110622_103357.pdf) (date of use 22 March 2015).

<sup>1701</sup> Schwartz A and Abreu G 'Conditional cash transfer programmes for vulnerable youth: Brazil's youth agent and youth programmes' (2007) Vol.10 (1) *CICE Hiroshima University, Journal of International Cooperation in Education* 115-123.



October 2003 under the coordination of the Ministry of Social Development and the Fight against Hunger, created at that time.<sup>1702</sup> It is recognised as being the most important of the programmes and actions included in the so-called Zero Hunger Policy, defined as a priority by the government.<sup>1703</sup> Meade *et al* offer the following description overview of the programme:

The programme comprises 60 different initiatives with a goal of providing food access to 11.4 million families (or roughly 50 million people) within 5 years. The programme is to be supported by agrarian reforms, producer incentives, and the enactment of minimum agricultural income policies. Other initiatives include a Food Coupon Programme (inspired by the Food Stamp program in the U.S.), food vouchers to be exchanged at government-licensed food outlets, and food banks to redistribute surplus food from supermarkets and restaurants.

Additional initiatives will target low-income workers, while nutrition programmes will supply food to pregnant women, new mothers, and babies. The School Meals Programme aims to increase the quality of school meals using regional foodstuffs. Existing school meals programmes will be expanded to cover siblings of children attending school and potentially be extended over school vacation periods. Other initiatives include food and nutrition campaigns to educate the population about healthy eating to prevent obesity and malnutrition.<sup>1704</sup>

According to the ILO, the establishment of the Federal Government's various income transfer programmes (for example, Food Allowance, School Grant, Food Card, and Petrol Aid) were amalgamated,<sup>1705</sup> the Family Fund became the most far-reaching programme of this kind in force in Latin America. The ILO further note that by the end of 2005, when it had been running for two years, the Family

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<sup>1702</sup> ILO 'Social protection and inclusion: Experiences and policy issues' (2006) 186-188 available at <http://ifwea-org-bin.directo.fi/@Bin/825c4ad72cdf409399aed3cf3825545a/1434619853/application/pdf/148744/2006StrtgiesExclsnPvrtyprgrmm.pdf> (date of use 22 March 2015).

<sup>1703</sup> ILO 'Social protection and inclusion: Experiences and policy issues' (2006) *ibid*.

<sup>1704</sup> Meade B *et al* 'Brazil's food security and food assistance programmes to reduce poverty' (2004) Washington, Economic Research Service, United States Department of Agriculture available at [www.ers.usda.gov/publications/GFA15/GFA15.pdf](http://www.ers.usda.gov/publications/GFA15/GFA15.pdf), (date of use 21 October 2014); For further reading on the Zero Hunger programme and other related poverty reduction programmes in Brazil, see Belik W and Del Grossi M 'Brazil's Zero Hunger programme in the context of social policy' prepared for the 25<sup>th</sup> International Conference of Agricultural Economists in Durban, South Africa, August 2003 at 3-33 available at <http://www.eco.unicamp.br/artigos/download/artigo293.pdf> ( date of use 22 March 2015); Da Silva J *et al* 'The Fome Zero (Zero Hunger Programme): The Brazilian experience' (2011) Ministry of Agrarian Development *Brasilia* 13-319 available at <http://www.fao.org/docrep/016/i3023e/i3023e.pdf> ( date of use 22 March 2015).

<sup>1705</sup> ILO 'Social protection and inclusion: Experiences and policy issues' (2006) Geneva International Labour Office 186 available at <http://ifwea-org-bin.directo.fi/@Bin/081205b6daf9845ee0697d5c6ea4ad4d/1434633915/application/pdf/148744/2006StrtgiesExclsnPvrtyprgrmm.pdf> (date of use 22 March 2015).



Fund Programme was found in 100% of Brazil's municipalities and was reaching 8.7 million families in its target group.<sup>1706</sup>

In order to receive the benefit monthly, the families pledge to keep an agenda for health (keep vaccinations up to date, attend pre-natal check-ups, etc.) and education (school age children and adolescents must have a minimum of 85% attendance in the schooling networks).<sup>1707</sup>

The programme stipulates that responsibility for supervising the health and education conditions is shared between the three levels of government society and the families themselves.<sup>1708</sup> This requires these services to work well and also be strictly monitored, above all by the government's municipal departments; it is recognised that this is a significant challenge. The upgrading and updating of the single register of low income families is a field of action directly linked to the Family Fund (as well as to other programmes involving income cash transfer).<sup>1709</sup>

## 7.7 The protection of self-employed workers

The protection of self-employed workers is problematic because large number of workers find themselves excluded from the ambit of social security protection<sup>1710</sup> since the formal social security mainly protects workers engaged in formal employment. Scholars argue that the system does not cover the unemployed, undeclared rural and urban workers, and different categories of self-employed workers.<sup>1711</sup> They suggest that the formalisation of employment is caused partly

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<sup>1706</sup> ILO 'Social protection and inclusion: Experiences and policy issues' (2006) Geneva International Labour Office 186-187 available at <http://ifwea-org-bin.directo.fi/@Bin/081205b6daf9845ee0697d5c6ea4ad4d/1434633915/application/pdf/148744/2006StrtgiesExclsnPvrtyprgrmm.pdf> (date of use 22 March 2015).

<sup>1707</sup> ILO 'Social protection and inclusion: Experiences and policy issues' (2006) *ibid* 187.

<sup>1708</sup> ILO *ibid*.

<sup>1709</sup> ILO *ibid*.

<sup>1710</sup> Nagamine Costanzi R *et al* 'Extending social security coverage to self-employed workers in Brazil' (2013) Vol. 152 (3/4) *International Labour Review* 549-556; Henley A and Reza Arabsheibani G 'On defining and measuring the informal sector: Evidence from Brazil' (2008) Vol.37 (5) *World Development* 997-998

<sup>1711</sup> Nagamine Costanzi R *et al* *ibid*.

by, *inter alia*, trade liberalisation, rising labour costs, flexibility arising from Constitutional reforms.<sup>1712</sup>

Similarly, Barrientos *et al* argue that the perceived failure of social insurance institutions to reach workers in informal employment and groups in poverty has been the main driving force behind the expansion of social assistance.<sup>1713</sup> For Barrientos, the Federal Government has a long-standing tradition of assisting the informal workers from rural areas.<sup>1714</sup> Accordingly, he acknowledges that after the 1988 Constitution, such a support was consolidated into the *Prêvidencia Rural* (Rural provision programme), which since 1991 supports rural informal workers reaching the age of 55 if women and 60 if men, or disabled.<sup>1715</sup> Quite recently, Brazil launched a number of programmes aimed at expanding social protection coverage to the informal sector workers. These programmes include, *inter alia*, formalising micro-enterprises,<sup>1716</sup> measures at formalising women working at home,<sup>1717</sup> and social security plan for the self-employed.<sup>1718</sup>

## 7.8 The judicial enforcement of socio-economic rights in Brazil: A discussion of selected case law

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<sup>1712</sup> Kucera D and Roncolato L 'Informal employment: Two contested policy issues' (2008) Vol.147 (4) *International Labour Review* 337.

<sup>1713</sup> Barrientos A *et al* 'Growing social protection in developing countries: Lessons from Brazil and South Africa' (2013) Vol. 30 (1) *Development Southern Africa* 60.

<sup>1714</sup> Barrientos A 'A review of social protection in Latin America' (2009) Center for Social Protection 15 available at <https://www.ids.ac.uk/files/dmfile/SocialProtectioninLatinAmerica.pdf> (date of use 22 March 2015).

<sup>1715</sup> Barrientos *ibid*.

<sup>1716</sup> Nagamine Costanzi R *et al* (note 1710 above) 551-553; Corseuil C *et al* 'An exploratory analysis of the effects of the formalisation policy for individual micro-entrepreneurs' (2014) International Policy Centre for Inclusive Growth 10-13 available at [http://www.ipc-undp.org/pub/eng/WP129\\_An\\_Exploratory\\_Analysis\\_of\\_the\\_Effects\\_of\\_the\\_Formalisation\\_Policy.pdf](http://www.ipc-undp.org/pub/eng/WP129_An_Exploratory_Analysis_of_the_Effects_of_the_Formalisation_Policy.pdf) (date of use 22 March 2015).

<sup>1717</sup> Law No. 12470, of August 2011, establishes a differential voluntary contribution rate for the insured who have no income and who are exclusively engaged in domestic work within their residence; and provided the family has a low income. Under this rule, the insured waives the right to obtain retirement based on contribution time and begins to pay into social security at a rate of 5% of the national minimum wage (R \$ 36.20) available at [https://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/112470.htm](https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112470.htm) (date of use 22 March 2015).

<sup>1718</sup> Nagamine Costanzi R *et al* (note 1710 above) 549-556.

The debate on the proper role of courts in the enforcement of social and economic rights remains dynamic and controversial despite the current widespread recognition of these social rights considered as legal rights in several constitutions and laws of many countries.<sup>1719</sup>

For many, the legal enforcement of these rights present courts with difficulties of two different (although largely interrelated) orders. Firstly, it presents the dilemma of legitimacy and institutional competence as to whether the unelected judges should interfere with the conception and implementation of the social and economic policies on which individuals' enjoyment of health, education, and housing necessarily depends.<sup>1720</sup> Secondly, it poses the question whether the judicial process is capable of dealing with the complex, technical and political issues? These twin issues have been dominating the debate on the justiciability of socio-economic rights around the world.<sup>1721</sup>

Directed by its Federal Supreme Court (FSC) and aided by the constitutional entrenchment of socio-economic rights, the judiciary has handed down a number of watershed decisions that have positively impacted on the justiciability and realisation of socio-economic rights claims. The FSC is the highest judicial body in Brazil and its jurisdiction is purely to hear constitutional matters,<sup>1722</sup> along the same lines as the South African Constitutional Court. In terms of Constitution Twelfth Amendment Act 2012, the courts in South Africa, using the power of

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<sup>1719</sup> Wiles E 'Aspiration principles or enforceable rights: The future for socio-economic rights in national law' (2006) Vol.22 (1) *American University International Law Review* 36-39; For critical analysis on the role of the courts as institutional voice of the poor in Brazil, see Afonso da Silva V and Terrazas F 'Claiming the right to health in Brazilian courts: The exclusion of the already excluded' (2011) Vol.36 (4) *Law and Social Inquiry* 825-849;Rodriguez-Garavito C 'Beyond the courtroom: The impact of judicial activism on socio-economic rights in Latin America' (2011) Vol. 89 *Texas Law Review* 1669-1698.

<sup>1720</sup> Cf Rios-Figueroa J and Taylor M 'Institutional determinants of the judicialisation of policy in Brazil and Mexico' (2006) Vol.38 (4) *Journal of Latin American Studies* 739-766; Mota Prado M 'The debatable role of courts in Brazil's health care system: Does litigation harm or help' (2013) *Journal of Law, Medicine and Ethics* 125-135.

<sup>1721</sup> See Ferraz O 'Harming the poor through social rights litigation: Lessons from Brazil' (2011) Vol.89 *Texas Law Review* 1643-1652; Landau D 'The reality of social rights enforcement' (2012) Vol.53 (1) *Harvard International Law Journal* 405-443.

<sup>1722</sup> Article 102 of the Constitution provides that the FSC's principal function is safeguarding the Constitution.

judicial review, can declare invalid, any amendment which is not in accordance with the Constitution and the law and which is in contravention of the rule of law which is a pillar of our democracy.<sup>1723</sup>

In addition, Hoffmann and Bentes note that there are four federal superior courts, with the Superior Tribunal *de Justica* (STJ) being the most important.<sup>1724</sup> The STJ is the final court of appeal for all infra-constitutional matters, whether on the federal or the state level. Formerly, there are the ordinary courts on the federal and state level, the Federal Courts of Justice (court of first instance), and the Regional Federal Tribunals (court of second instance), the jurisdiction of which comprises federal legislation.

On the state level, there is the *Tribunals de Justica*, which is divided into single judge (first-instance chambers, and (second instance chambers).<sup>1725</sup> In addition to the tribunals, there are a number of other relevant judicial actors, namely; the State and Federal Prosecutor's Office, the Public Defender's Office, Municipalities, and Solicitor's Office. The Prosecutor's office is an independent judicial body present at both the State and Federal levels. It is charged with the enforcement of law and order, the protection of the democratic system of government, and the protection of social or individual interests.<sup>1726</sup>

The Prosecutor's Office has a wide range of powers. These include, *inter alia*, the supervision of compliance by public authorities on all levels with the rights guaranteed in the Constitution and the initiation of a particular type of suit.<sup>1727</sup> For example, it has competency to conduct public class action on behalf of the

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<sup>1723</sup> Constitution of the Republic of South Africa Twelfth Amendment Act 2012.

<sup>1724</sup> Hoffmann F and Bentes F 'Accountability for social and economic rights in Brazil' in Gauri V and Brinks D *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (New York, Cambridge University Press, 2008) 101.

<sup>1725</sup> Hoffmann F and Bentes F *ibid*.

<sup>1726</sup> Article 127 of the Constitution of Brazil.

<sup>1727</sup> Aida Silva C 'Brazilian prosecutors and the collective demands: Bringing social issues to the courts of justice' paper delivered at the meeting of Latin American Studies Association Hyatt Regency Miami, March 16-18, (2000)<sup>11</sup> available at <http://lasa.international.pitt.edu/Lasa2000/CSilva.PDF> (22 March 2015).

litigants. Brazilian prosecutors do not only perform public-interest litigation (in criminal and civil cases) and challenge the constitutionality of laws. They are also empowered to ensure that public authorities effectively respect the rights guaranteed by the Constitution.<sup>1728</sup>

Consequently, it can sue the state, its agencies and its authorities to ensure that public policies are implemented (or for failure to oversee the activities of non-state actors) in matters as wide-ranging and politically sensitive as the environment, health, education, security, childcare, assistance for the elderly or disabled, housing and urban issues, consumer and indigenous peoples. Sadek considers the Brazilian *Ministério Público* (prosecution services) as an instance of what Guillermo O'Donnell calls "horizontal accountability".<sup>1729</sup> In addition, the former asserts that "from an institutional point of view, changes in the powers and role of the Public Prosecution constitute the most significant reform embodied in the Federal Constitution of 1988; no other institution underwent such a profound reform or expansion of responsibilities."<sup>1730</sup> In fact, the Federal Constitution of 1988 prescribes full legal assistance to those in need of it<sup>1731</sup> and also raises the status of the Public Defender's Office to that of institution essential to the exercise of the jurisdictional function of the state, which is responsible for legal advice and defence at all levels of need.<sup>1732</sup>

The Constitution of Brazil grants access to justice as a fundamental right.<sup>1733</sup> With regard to the legal process, the majority of socio-economic rights cases, in particular in the area of health and education rights, comprises of just two types of civil action, individual and public action.

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<sup>1728</sup> Article 129 II of the Constitution.

<sup>1729</sup> Sadek M and Batista Cavalcanti R 'The new Brazilian public prosecution: An agent of accountability' in Mainwaring C and Welna S *Democratic accountability in Latin America* eds (2003) 206 available at <http://www.oxfordscholarship.com/oasis.unisa.ac.za/view/10.1093/0199256373.001.0001/acprof-9780199256372-chapter-7> (date of use 22 March 2015).

<sup>1730</sup> Sadek M and Batista Cavalcanti R (note 1729 above) at 207.

<sup>1731</sup> Article 5 LXXIV of the Constitution.

<sup>1732</sup> Article 134 of the Constitution.

<sup>1733</sup> Article 107 of the Constitution.

This part analyses the judgements of the Brazilian Federal Supreme Court in as far as the enforcement of socio-economic rights is concerned. It is important to note that before the emergence of watershed socio-economic rights jurisprudence from Brazil's apex court, it was largely assumed that the 1988 constitutional norms entrenching social and economic rights did not have an immediate effect. Instead, they were rather "programmatic," and "aspirational", for example, were aimed at the executive organs of the state and depended on the adoption of legislation specifying the mode of their implementation.<sup>1734</sup>

Consequently, such constitutional provisions were seen as non-justiciable and therefore inappropriate for direct adjudication by the courts. However, unlike its South African counterpart, the South African Constitutional Court, the Supreme Court and the High Courts in India, and the FSC in Brazil has not hesitated from determining the nature and content of these socio-economic rights and from issuing mandatory injunctions to compel the state to immediately provide the corresponding goods and services to litigants.<sup>1735</sup> In fact, the declaration of health as a fundamental right and the creation of a public health care system entitled those who do not have their health needs fulfilled to file lawsuits against the state claiming a violation of their fundamental rights to health care.<sup>1736</sup>

Wang<sup>1737</sup> argues that the challenge faced by the courts is that legal cases generally involve problems of commutative justice (rules concerning the transition of fair transfers and exchanges) and retributive justice (rules concerning crimes

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<sup>1734</sup> Ferraz O 'Harming the poor through social rights litigation: Lessons from Brazil' (2011) Vol.89 *Texas Law Review* 1647-1652.

<sup>1735</sup> João B *et al* 'Between the court and the clinic: Lawsuits for medicines and the right to health in Brazil' (2012) Vol.14 (1) *Health and Human Rights: An International Journal* 1-17; Mahajan M 'The right to health as the right to treatment: Shifting conceptions of public health' (2012) Vol.79 (4) *Social Research* 824-834; Prado M 'The debatable role of courts in Brazil's health care system: Does litigation harm or help' (2013) Vol.41 (1) *Journal of Law, Medicine and Ethics* 124-135.

<sup>1736</sup> Wang D 'Courts and health care rationing: The case of the Brazilian Federal Supreme Court' (2013) Vol.8 (1) *Health Economics, Policy and Law* 75.

<sup>1737</sup> Wang D (note 1736 above) 76.

and punishments). In contrast, deciding about what the public health care system should offer to citizens is a matter of distributive justice (rules concerning the allocation of scarce resources in society). He further argues that when courts are called upon to decide whether a given health need implies a right to health claim, paid for by the public health care system, they are introduced to problems and dilemmas policymakers often face, such as scarcity of resources, opportunity costs and trade-offs between values and interests.

It should be noted that this dilemma has not deterred Brazilian courts from aggressively protecting the social and economic rights claims, particularly the rights to education and health.<sup>1738</sup> A few judgements in the area of health care and education in Brazil are selected for further discussion. The reason is that there are a large number of cases on health care and other socio-economic litigation cases amounting to hundreds of thousands hence selected illustrations will suffice in the present context.

According to Wang, healthcare litigation is the confluence of two phenomena that have been expanding in the last decades, health care costs and judicial review.<sup>1739</sup> The former is the result of an ageing and better informed population that, coupled with the constant development and marketing of new health technologies expanding what is possible to do to improve people's health, increase the mismatch between the healthcare patients expect to receive and the care public health systems can afford to provide.<sup>1740</sup> The latter is the expanding review power of courts to issues of public policies that in the past were left to the complete discretion of politicians and bureaucrats.<sup>1741</sup>

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<sup>1738</sup> Perlingeiro R 'Recognising the public right to healthcare: The approach of Brazilian courts' (2014) Vol.32 (2) *Rev Port Saúde Pública* 134-142.

<sup>1739</sup> Wang D 'Courts as healthcare policy-makers: The problem, the response to the problem and problems in the responses' (2013) London School of Economics and Political Science, Research paper series – Legal studies Paper No. 75 at 4 available at [http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11198/RPS\\_75\\_final.pdf?sequence=1](http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11198/RPS_75_final.pdf?sequence=1) (date of use 22 March 2015).

<sup>1740</sup> Wang D *ibid.*

<sup>1741</sup> Wang D *ibid.*

The increasing involvement of courts in issues that were traditionally seen as the prerogative of the political branches has been observed carefully in the last decade.<sup>1742</sup> Scholars agree that Latin America is the continent where judicialisation of health has been most pronounced.<sup>1743</sup> For example, in Brazil, the right to healthcare litigation has been growing exponentially. The decision of the Supreme Federal Tribunal is poignant in the context of adjudicating the right to health care when it held that:

The right to health - as well as a fundamental right of all individuals - represents an inextricable constitutional consequence of the right to life....The interpretation of a programmatic norm cannot transform it into a toothless constitutional promise . . . Between protecting the inviolability of the right to life, an inalienable fundamental right guaranteed by the Constitution itself (*article 5*, main clause) or ensuring, against this fundamental prerogative, a financial and secondary interest of the state, I believe - once this dilemma is established - ethical and legal reasons impose on the judge one single and possible option: unswerving respect for life.<sup>1744</sup>

The jurisprudence developed by the Brazilian courts represent minimum core approach, in terms of which all urgent needs are met as a matter of immediate individual entitlement. Although the South African courts have rejected the minimum core approach,<sup>1745</sup> Brazilian courts have adopted the minimum core

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<sup>1742</sup> Perlingeiro R 'Recognising the public right to healthcare: The approach of Brazilian courts' (2014) Vol.32 (2) *Rev Port Saude Publica* 135-142; Ferraz O *et al* 'Judging the price of life: Cost considerations in right to health litigation' in Aasen H *et al* *Juridification and social citizenship in the welfare state* (UK, Edward Elgar, 2014) 121-124.

<sup>1743</sup> Ferraz O *et al* 'Judging the price of life: Cost considerations in right to health litigation' in Aasen H *et al* *Juridification and social citizenship in the welfare state* (UK, Edward Elgar, 2014)121-145;World Bank Initiative: Promoting the right to health in Latin America 8 August 2013 available at <http://reospartners.com/world-bank-initiative-promoting-the-right-to-health-in-latin-america/> (date of use 22 March 2015);Gloppen S 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) Vol.10 (2) *Health and Human Rights* 21-33;Cubillos L *et al* 'Universal health coverage and litigation in Latin America' (2012) Vol.26 (3) *Journal of Health Organisation and Management* 390-403;Nunes R 'Ideational origins of progressive judicial activism: The Colombian constitutional court and the right to health' (2010) Vol.52 (3) *Latin American Politics and Society* 67-92.

<sup>1744</sup> RE 271.286 AgR-RS (2000), Relator Min. Celso de Mello. Quoted in Ferraz 'The right to health in the Courts of Brazil: Worsening health inequities' (2009) 11 *Health and Human Rights* 33.

<sup>1745</sup> Wiles E 'Aspirational principles or enforceable rights: The future for socio-economic rights in national law' (2006) *AM. U. INT'L L. REV* 50-51.



approach.<sup>1746</sup> It is argued that the judgements of the Brazilian courts provides a classic example for the respect for life as an inalienable subjective right, in contrast to the financial or other secondary interests of the state.<sup>1747</sup>

In 2013, the Court of Appeal of the State of São Paulo,<sup>1748</sup> in an extraordinary decision, ruled that the City of São Paulo should provide at least 150,000 new spots in childcare facilities and elementary schools by 2016, for children aged five years old and under. This decision reversed the lower court's ruling, which had accepted the municipality's argument that the judiciary should remain silent in matters of public policy.

The main innovation of this case is not the decision of the court to interfere in public policy matters or even the forcefulness of the "obligation to fulfill" imposed by the judiciary upon the executive. Viera submits that "the most unique aspect of this case is the way in which the dispute, led by the NGO, *Ação Educativa*, was conducted and how the court ruled that its decision should be implemented".<sup>1749</sup> According to the court, if the executive does not fulfil its obligation to protect or promote a fundamental right, it is for the "judiciary, when triggered, to act to protect it". The principle of separation of powers cannot serve as a shield for the executive administration to fail to perform its obligations, "violating rights".<sup>1750</sup>

However, the dilemma in such cases is how to impose a complex obligation upon the executive without interfering with its role of designing and implementing a given public policy. The court ordered the municipality itself to draft a plan, with a

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<sup>1746</sup> Wiles E (note 1745 above) 51.

<sup>1747</sup> Piovesan F 'Brazil - Impact and challenges of social rights in the courts' in Langford M *Social rights jurisprudence-Emerging trends in international and Comparative law* (United States of America, Cambridge University Press, 2008) 185-186.

<sup>1748</sup> *Ação Educativa v Municipalidade de São Paulo*: RE, 2013.0000792670 available at [http://www.acaoeducativa.org/images/stories/pdfs/decisao\\_tjsp\\_educacao\\_infantil.pdf](http://www.acaoeducativa.org/images/stories/pdfs/decisao_tjsp_educacao_infantil.pdf) date of use 22 March 2015).

<sup>1749</sup> Viera O 'Judicial experimentation and public policy: A new approach to the right to education in Brazil' (2014) available at <http://ohrh.law.ox.ac.uk/judicial-experimentation-and-public-policy-a-new-approach-to-the-right-to-education-in-brazil/> (date of use 22 March 2015).

<sup>1750</sup> *Ação Educativa v Municipalidade de São Paulo* (note 1748 above).

fixed deadline that has just expired, for the provision of 150,000 additional school places. Simultaneously, the municipality should make it clear that the expansion of the school system must meet various educational quality standards established by law as well as by the National and the Municipal Councils for Education.<sup>1751</sup> Moreover, the judges ruled that the court's section on children's rights would be responsible for monitoring the implementation of the plan, along with civil society organisations, the Public Prosecutor's Office, the Public Attorney's Office, among others, "in relation to the opening of new school vacancies, or in relation to the provision of quality education".<sup>1752</sup>

In another matter that dealt with the right to health, the court illustrated that the right to health is intrinsically linked to the right to life. In this case, the FSC considered an appeal against a lower court decision requiring that the *Porto Alegre* Municipality and the State of *Rio Grande do Sul* provide free access to medicine and medical treatment.<sup>1753</sup> In its judgement, the FSC held that:

The right to health cannot be allowed to degenerate into an inconsequential constitutional promise, and the public administration permitted to substitute, illegitimately and in default of the collectivity's just expectations, the fulfilment of its duty, with an irresponsible gesture of governmental infidelity to that which the Constitution itself requires. In this context, a very serious obligation falls on the government, namely, to make health services effective, to promote, in favour of individuals and communities, preventative and rehabilitative measures that, grounded in suitable public policy, have as their objective the realisation and concretisation of the right to health.

In a separate but concurring judgement, Judge Marco Aurélio considered that a principal element of the state's overriding obligation under the Constitution was to provide the minimum resources required to ensure the maintenance of human dignity. The impact of this judgement for ordinary people infected by HIV/AIDS in Brazil is tremendous. Firstly, it provides legal victory for a universal legislative response; as a result, a law was passed that mandated the free provision of

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<sup>1751</sup> *Ação Educativa v Municipalidade de São Paulo* (note 1748 above).

<sup>1752</sup> *Ação Educativa v Municipalidade de São Paulo* (note 1748 above).

<sup>1753</sup> *Município de Porto Alegre v Dina Rosa Vieira* (12 September 2000) AGRRE 271.286-8 (RS) (FSC).

medicine for all people living with HIV.<sup>1754</sup> Secondly, this judgement sanctioned the National Health Service to supply all the necessary medicine for HIV/AIDS treatment.

In *Estado do Rio Grande do Sul v Rodrigo Skrsypcsak*,<sup>1755</sup> which dealt with an appeal from a lower court decision declaring that the State of *Rio Grande do Sul* was obliged to provide Rodrigo Skrsypcsak, a minor who suffered from a rare condition, the medication required to treat his condition. The medication was not made in Brazil, and was only available in the United States or in Switzerland. The FSC dismissed the appeal. In its judgement, the court referred to the priority that Article 227 of the Constitution gives to children.<sup>1756</sup> The FSC considered that it had been proven that the rare condition affected approximately 20 children in the state of *Rio Grande do Sul* (a number which presumably included Rogrigo Skrsypcsak), and posed a serious risk to the lives and development of those children.

While noting that the medication was expensive, the FSC stated that the state's Secretary of Health had an obligation to pay for the medication, and that in any case the Constitution required the state to meet the cost. The court further held that:

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<sup>1754</sup> Law No. 9313 of 13 November 1996 on the free distribution of medicine to HIV carriers and AIDS patients; For further reading in this regard, see Smallman S 'A Comparative history of AIDS in Latin America: Brazil and Cuba' (2003) *International Studies Faculty Publications and Presentations* 11-16 available at [http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1008&context=is\\_fac](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1008&context=is_fac) (date of use 22 March 2015); Galvao J 'Brazil and access to HIV/AIDS drugs: A Question of human rights and public health'(2005) Vol.95 (7) *American Journal of Public Health* 1110-1114; Greco D and Simao M 'Brazilian policy of universal access to AIDS treatment: Sustainability challenges and perspectives' (2007) Vol.21 (4) *AIDS* 37-45.

<sup>1755</sup> *Estado do Rio Grande do Sul v Rodrigo Skrsypcsak* (22 February 2000) RE 195.192-3 (RS) (FSC).

<sup>1756</sup> Article 227 of the Constitution provides that the family, society at large and the State are responsible for ensuring that children and adolescents will be given absolute priority with regard to the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as for guarding them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

The state should accept the functions that the Constitution imposes upon it, and budgetary constraints cannot be permitted to frustrate the implementation of constitutional obligations.

In *Estado do Rio de Janeiro v. Ministério Público do Rio de Janeiro*,<sup>1757</sup> the Public Prosecutor sued the State of *Rio de Janeiro* for failing to provide sufficient teachers in the *São Gonçalo* Municipality to deliver pre-school and primary education. The object of the initial proceedings was to obtain a court order requiring the state to employ more teachers. The Public Prosecutor was successful in the lower courts, and the state appealed to the FSC. In its judgement dismissing the state's appeal, the FSC simply affirmed that the right to education was "fundamental and non-derogable", and that the state had an obligation to provide the resources necessary for the exercise of the right. Any omission in that respect would constitute a violation of the Constitution.<sup>1758</sup>

Piovesan notes that the judicial action in the area of the right to education has principally concerned elementary schooling (pre-school education and childcare).<sup>1759</sup> According to him, this constitutional right has been derived from the duty of the state with respect to education, and the courts have stressed the importance of verifying unrestricted compliance with constitutional dictates and not shying away from them on the pretence of deficient funding.

In the context of addressing the inequalities in higher education, in two separate judgements, the Supreme Court has ruled on the constitutionality of two higher education affirmative action programmes. The first case (*Racial Quotas* case) concerned the use of racial quotas for black, mixed-race and indigenous students

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<sup>1757</sup> *Estado do Rio de Janeiro v Ministério Público do Rio de Janeiro* (23 June 2009) RE 594.018-AgR (RJ) (FSC) at 1.

<sup>1758</sup> *Estado do Rio de Janeiro* (note 1757 above) at 2364.

<sup>1759</sup> Piovesan F 'Impact and challenges of social rights in the courts' in Langford M *Social rights jurisprudence: Emerging trends in international comparative law* (United States of America, Cambridge, University Press, 2008) 188.

in university admissions.<sup>1760</sup> In late April of 2012, the Supreme Court unanimously approved the constitutionality of using racial quotas in selecting candidates for admission at the University of Brasília (UnB), a public university.

The court held that government has an obligation to make positive measures to correct social discriminations against minorities in order to steer Brazil towards material equality. It is submitted that this case offers a valuable lesson in as far as adopting a positive stance in enforcing socio-economic rights. Ahnert argues that the court's decision ends years of uncertainty and helps consolidate the racial equality programmes initiated under the presidency of Fernando Henrique Cardoso in higher education as well as in the public sector.<sup>1761</sup>

Subsequent to this case, on 29 August 2012, Brazil President, Dilma Rousseff, signed a new law called the Law of Social Quotas,<sup>1762</sup> and it requires public universities in Brazil to reserve half of their enrollment spots for public school students, in hopes of increasing the number of black children attending universities.<sup>1763</sup> President Rousseff signed this law as an attempt to reverse years of racial and economic inequality in Brazil.

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<sup>1760</sup> *Notícias STF: STF julga constitucional política de cotas na UnB* [STF Update: The STF rules in favor of UnB's quota programme] SUPREMO TRIBUNAL FEDERAL (Apr. 26, 2012), available at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206042> (date of use 22 May 2015).

<sup>1761</sup> Ahnert B 'Brazil: Supreme Court deems racial quotas constitutional' (2012) available at <http://www.pulsamerica.co.uk/2012/04/30/brazil-this-week-58/> (date of use 22 May 2015); Ikawa D 'The right to affirmative action for Blacks in Brazilian universities' (2009) Vol.3 *The Equal Rights Review* 28-35.

<sup>1762</sup> Cf Evensen T 'Affirmative action in Brazil: Is Brazil a racial democracy?' 17 February 2014 available at <http://gotothinktank.com/affirmative-action-in-brazil-is-brazil-a-racial-democracy> (date of use 22 May 2015).

<sup>1763</sup> Kramer W 'Brazil and the law of of social quotas: An analysis of whether Brazil's recent affirmative action would survive review under U.S. Constitutional standards' (2013) Vol.42 (2) *Journal of Law and Education* 373-379; Rosenn K 'Recent important decisions by the Brazilian Supreme Court' (2014) Vol.45 (2) *Inter-American Law Review* 297-332.

The second case (*Pro Uni* case) concerned the provision of scholarships to disadvantaged students in private universities.<sup>1764</sup> In April 2012, the STF decided on a case brought by Democratas, a political party, challenging the constitutionality of the University of Brasília's affirmative action programme, which for a 10 year period reserves 20% of its admissions for blacks (and a few spots for indigenous persons). The programme was instituted in 2004. The essential argument of Democratas was that affirmative action violated the Constitution's guarantee of equality, and that race-based admissions are unnecessary in a country like Brazil where racism was never institutionalised. The STF affirmed the constitutionality of affirmative action at this federal university. The court upheld the constitutionality of a programme called University for All (Prouni).<sup>1765</sup>

In *Município de Santo André v Ministério Público do Estado de São Paulo*,<sup>1766</sup> the court rejected the municipality submissions when it attempted to argue, among others things, that the lower court decision had violated the principle of the separation of powers requiring it to register children for crèche and pre-school despite an alleged lack of funds to finance the necessary programmes. According to the FSC, the interpretation of the constitutional obligation to provide pre-school education that it had made in 2005 judgement, cast the obligation as being of an absolute nature. In his judgement, Judge Marco Aurélio stated:

As provided for in article 208, item IV of the Constitution, the state has a duty in relation to education, namely; to guarantee that children of zero to six years of age can attend day-care Centers and pre-schools. The state... should equip itself for unrestricted compliance with the dictates of the Constitution, and not prevaricate by making excuses related to deficient funding.<sup>1767</sup>

In summation, it is clear that the courts in Brazil requires the state to immediately and on an on-going basis to guarantee the social rights entrenched in the

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<sup>1764</sup> For further reading on the effects of ProUni programme, see De Carvalho Andrade E 'Effects of the Brazilian university policy of targeting the poor' (2007) Vol.37 (3) *EST ECON São Paulo* 664-683.

<sup>1765</sup> See Rosenn K (note 1763 above) 297-334.

<sup>1766</sup> *Município de Santo André v Ministério Público do Estado de São Paulo* (26 April 2007) RE 384.201-4 (SP) (FSC).

<sup>1767</sup> *Município de Santo André* (note 1766 above) at 1.

Constitution, rather than to realise those rights progressively until full realisation is reached. Although the Constitution in article 208 (II) provides an exception to this, for example, it imposes on the state to achieve progressively universal access to free secondary school education. Notably, this express reference to progressive realisation indicates that generally speaking (and in the absence of any such reference), the Constitution's obligations apply immediately and in full. Finally, the FSC has completely abandoned the deferential approach with regard to the enforcement of socio-economic rights expressed in the decision quoted above.

Bentes and Hoffmann assert that the courts, tend to decide health rights cases based on the right to life or, less frequently, the right to health, as well as the guarantee of personal dignity as set out in article 1, section III, of the Constitution.<sup>1768</sup> They further state that, courts have founded their decisions, *inter alia*, on a range of complementary arguments, such as that fundamental rights and human dignity prevail over administrative or budgetary norms, that certain fundamental social rights are essential part of the "humane democracy" (*democracia humanizada*).<sup>1769</sup> Ferraz notes that since 1997, the FSC has been consistently applying a highly assertive and substantive model of review in which the content of the right to health is defined by the judiciary against the will of the political branches and forcefully imposed upon them through mandatory injunctions.<sup>1770</sup>

## 7.9 The institutional framework and social security administration

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<sup>1768</sup> Bentes F and Hoffmann F 'Accountability for social and economic rights in Brazil' in Gauri V and Brinks D *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (United States of America, Cambridge University Press, 2008) 120.

<sup>1769</sup> Bentes F and Hoffmann F *ibid.* See also, Ferraz O *et al* 'Judging the price of life: Cost considerations in right to health litigation' in Aasen H *et al Juridification and social citizenship in the welfare state* (UK, Edward Elgar, 2014)127.

<sup>1770</sup> Ferraz O 'Harming the poor through social rights litigation: Lessons from Brazil' (2011) Vol.89 *Texas Law Review* 1656.

There are three institutions related to social security administration in Brazil. The Ministry of Social Development, which establishes policies and guidelines, the National Institute of Social Security, responsible for verifying eligibility, performing medical inspections and paying social security benefits, and the Ministry of Social Security's Technology and Information Corporation, responsible for the databases and softwares used by the social security systems.

In principle, the government uses a horizontal model of conditional cash transfers programme implementation. Most of the implementation of *bolsa familia* is performed by the municipal governments-based contracts signed with the federal government. These municipalities are responsible for registering all poor households into the national unified registry, monitoring conditionality compliance in education and health, set up social councils responsible for the overall monitoring of *bolsa familia* implementation at the municipal level.

### **7.10 Factors behind Brazil's social protection success**

The Constitution provides that it is the obligation of the state to guarantee employment and social protection to the whole of the active population.<sup>1771</sup> Recently, there have been debates on the issue of linking social protection programmes and labour supply. In fact, the World Bank in 1998 conducted a programme called Analytical and Advisory Activities ("the Labour AAA") focused on the interface between social protection programmes and labour supply and productivity. Robalino *et al*<sup>1772</sup> note that this focus relates to the debates in Brazil surrounding the issue of helping transfer beneficiaries "graduate" from poverty and from dependence on transfer incomes.

The Labour AAA programme is structured along two pillars. The first pillar addresses questions related to the impacts of explicit and implicit public transfers

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<sup>1771</sup> Article 7 of the Constitution Brazil.

<sup>1772</sup> Robalino D *et al* 'Social protection programmes and labour supply impacts on the poor in Brazil' (2008) World Bank 1-4.



on labour supply and savings decisions. In particular, what is the effect of public transfers such as *bolsa familia* and those related to the social insurance system (pensions and unemployment) on work incentives, early entry and retirement, sector choice, and ultimately, public expenditures, human capital accumulation and growth.<sup>1773</sup>

The second pillar focuses on programme design and evaluation. The end goal is to identify how the portfolio of transfer and active labour market programmes can be optimized to enhance the “employability” of the poor, help promote their graduation from poverty, and, ultimately, from dependence on transfer income. The focus is on “jobs agenda” and improving the “employability” of the poor.

Thus, federal, state and municipal governments and other actors have promoted a range of labour support services, both public and private, designed to support productivity and earnings. These can be roughly divided into five categories:

- Support to “human capital” and qualifications of the worker (various types of training services);
- Support to “job placement” (job search services, job placement, etc.);
- Support to urban self-employment (micro credit, formalisation of micro enterprises, technical assistance);
- Support to rural self-employment (micro credit, technical assistance for family agriculture, market access, etc.); and
- Linking beneficiaries to other complementary services.

Not all of these are designed to reach the poor or transfer beneficiaries. Nonetheless, governments at all levels are looking at ways in which they could adapt these services to reach the poor (and link transfer beneficiaries to these services) better.

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<sup>1773</sup> Robalino D *ibid.*

In order to improve the employability of the youth, the government has launched a programme called *Pronatec* programme (which has provided eight million courses in technical schools).<sup>1774</sup> In terms of this programme, access to vocational college has been made feasible in all regions of the country with no cost to students,<sup>1775</sup> and has also been offering scholarships in order to reduce dropouts to guarantee the completion of the courses by low family income students.<sup>1776</sup> Finally, this programme aims to provide professional training to unemployed workers, and it is mandatory for all workers who have applied for the unemployment benefit more than two times in the past 10 years. In the next chapter, the conclusions and recommendations arising from this study are made.

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<sup>1774</sup> Comprehensive growth strategy: Brazil October 2014 available at [https://g20.org/wp-content/uploads/2014/12/g20\\_comprehensive\\_growth\\_strategy\\_brazil.pdf](https://g20.org/wp-content/uploads/2014/12/g20_comprehensive_growth_strategy_brazil.pdf) (date of use 22 March 2015); Employment plan 2014 – Brazil at 5 available at [https://g20.org/wp-content/uploads/2014/12/g20\\_employment\\_plan\\_brazil.pdf](https://g20.org/wp-content/uploads/2014/12/g20_employment_plan_brazil.pdf) (date of use 22 March 2015).

<sup>1775</sup> Employment plan 2014 – Brazil at 5 available at [https://g20.org/wp-content/uploads/2014/12/g20\\_employment\\_plan\\_brazil.pdf](https://g20.org/wp-content/uploads/2014/12/g20_employment_plan_brazil.pdf) (date of use 22 March 2015).

<sup>1776</sup> See Brazil Employment Plan 2014 at 5 available at [https://g20.org/wp-content/uploads/2014/12/g20\\_employment\\_plan\\_brazil.pdf](https://g20.org/wp-content/uploads/2014/12/g20_employment_plan_brazil.pdf) (date of use 22 March 2015); On the job training programme targeted to the young population in Brazil, see Corseuil C *et al* 'The effects of a youth training programme on youth turnover in Brazil' (2012) available at <http://reap.org.br/wp-content/uploads/2012/06/042-The-Effects-of-a-Youth-Training-Programme.pdf> (date of use 22 March 2015).

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## CHAPTER EIGHT

### CONCLUSIONS AND RECOMMENDATIONS

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#### 8.1 Conclusions

Firtly, this study has shown that social assistance as a pillar of social security plays a crucial role in the lives of poor and vulnerable people. Accordingly, the broader objectives of social security would have defined the following objectives: tackling poverty, vulnerability, poverty, and exclusion from public policy provisions.<sup>1777</sup> Secondly, it provides preventive function.<sup>1778</sup> Thirdly, it provides a promoting function when it aims to enhance the ability of individuals to participate in all spheres of activity. Fourthly, it provides for a transformative function.<sup>1779</sup> Lastly, social security provides a developmental and generative function,<sup>1780</sup> as it increases the consumption patterns of the poor and enables him/her access to economic and social activities.<sup>1781</sup>

Chapter one of this study has shown that the exclusionary nature of the system of social security in South Africa is an issue that needs to be tackled immediately. It also addressed the challenges posed by the fact that a very few number of South Africans are adequately equipped to participate effectively in the labour market to secure their social needs.

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<sup>1777</sup> Giovannetti G *et al* 'Success in social protection: What lessons can be learned' (2011) Vol.32 (4) *Canadian Journal of Development Studies* 440.

<sup>1778</sup> Ruel M 'Social protection for inclusive growth' (2008) International Food Policy Research Institute, Brussels at 3 available at [http://www.google.com/url?url=http://www.ifpri.org/file/34799/download&rct=j&frm=1&q=and&esrc=sand&sa=U&ved=0CB8QFjACOB5qFQoTCLqf2bLU1cgCFQJEGgodd9YMhQandusg=AFQjCNHECI0TfoM\\_cftFHBfxLJbjoA6R3g](http://www.google.com/url?url=http://www.ifpri.org/file/34799/download&rct=j&frm=1&q=and&esrc=sand&sa=U&ved=0CB8QFjACOB5qFQoTCLqf2bLU1cgCFQJEGgodd9YMhQandusg=AFQjCNHECI0TfoM_cftFHBfxLJbjoA6R3g) (date of use 20 March 2015).

<sup>1779</sup> Ruel M *ibid*.

<sup>1780</sup> Midgley J 'Social development and social protection: New opportunities and challenges' (2013) Vol.30 (1) *Development Southern Africa* 10. For further reading on the development aspect of social protection, see Holzmann R *et al* 'Social risk management – The World Bank's approach to social protection in a globalizing world' The World Bank (2003) 1-18 available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Publications/20847129/SRMWBApproachtoSP.pdf> (date of use 20 March 2015).

<sup>1781</sup> Barr N *Economics of the welfare state* 5<sup>th</sup> ed (Oxford University Press, 2012) 336-348.

Chapter two dealt with the historical context of social security in South Africa. It further examined the constitutional right to social security post-1994, and highlighted some of the socio-economic realities which stand in the way of realising social security for everyone.

Chapters three and four have presented a holistic explanation of the case for the constitutional protection of social security rights, specifically the right to have access to social assistance in section 27(1)(c) of the Constitution. It sought to provide the rationale of conceptualising social security rights within the rubric of fundamental human rights. These chapters also laid substantive foundational content of social security rights. This is important because such content may in specific cases guide the tasks of adjudicators, legislators, and the executive, but also because it provides a much needed conceptual completeness to our thinking about constitutional social security rights. The discussion of minimum core approach to social security rights sought to provide the normative bedrock for precisely what is meant in the discussion of social human rights.

In addition, the developments which the courts have introduced over the past years include the comprehensive and integrated approach towards social rights. While courts will be hesitant to interfere in budgetary provisions in the area of social security, the Constitutional Court nonetheless indicated in its *Certification* judgement that courts could grant orders which may have budgetary implications.

In *Grootboom* case, the Constitutional Court stressed, within the context of the right to access to housing, that effective implementation requires at least adequate budgetary support by the national government. It emphasised that it is essential that a reasonable part of the national housing budget be devoted to granting relief to those in desperate need, but that the precise allocation is for national the government to decide in the first instance. Guidelines drawn up in the wake of budget constraints have to be reasonable.

Chapter five analysed the importance and the normative basis of considering international law, in the context of social security. It is clear from this chapter that international law forms part and parcel of the South African law. Furthermore, the relevant provisions of the Constitution and other international law instruments on social security buttress this.

Chapter six examined the system of social security in India. It showed the innovative programmes introduced by the Indian Government in an attempt to reduce the scourge of poverty and inequalities in that country. The lesson learnt from the Indian experience is that growth must be broad-based to make significant dent on poverty and the narrow sectoral growth may widen the personal and regional income inequality.

Lastly, the study examined the system of social security protection in Brazil, by looking at the historical background of social protection, socio-economic realities facing Brazil. The study scrutinised innovative programmes dealing with the scourge of unemployment, inequalities, and poverty. In addition, this chapter has also shown the approach adopted by the Brazilian Supreme Court in protecting and interpreting social rights entrenched in the Constitution of Brazil.

## **8.2 Recommendations**

In light of the above discussion, it becomes clear that the extension of social assistance in South Africa faces several constraints, which includes, among others, finance, exclusionary nature of the system of social security, poverty, unemployment and inequalities. Notwithstanding these challenges, the following recommendations are pertinent.

It is submitted that social assistance as an enforceable claim requires the transfer of certain powers from those who deliver benefits such as social

assistance grants to those who receive them.<sup>1782</sup> This goes beyond allowing beneficiaries to participate, or consulting them; it implies empowering them as claimants. Lessons can be drawn from recent innovations in India, where social audits create a collaborative and constructive platform for participatory governance of social assistance programmes.<sup>1783</sup> In essence, collaborative governance provides the most vulnerable with a voice to assert their rights and hold the local administration accountable.

There are stark differences among decision of the courts in South Africa, and India. For instance, the South African Constitutional Court has tended to adopt a combination of strong rights, weak remedies, and no monitoring approach.<sup>1784</sup> In iconic cases such as *Grootboom* and *Treatment Action Campaign*, it has chosen not to set deadlines or follow-up proceedings of enforcement. For example, *Grootboom* waited and died before she could get a house. In contrast, the Indian Supreme Court has rationally resorted to a mixture of strong rights, strong remedies, and strong monitoring mechanisms. It is submitted that this is a lesson for South Africa in monitoring the realisation and enforcement of socio-economic and cultural rights.

On the other hand, the jurisprudence developed by the Brazilian courts represent minimum core approach, in terms of which all urgent needs are met as a matter of immediate individual entitlement. Although the South African courts have rejected the minimum core approach, Brazilian courts have adopted the minimum core approach. It is argued that the judgements of the Brazilian courts provides a classic example for the respect for life as an inalienable subjective right, in contrast to the financial or other secondary interests of the state.

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<sup>1782</sup> Devereux S 'Trajectories of social protection in Africa' (2013) Vol.30 (1) *Development Southern Africa* 22.

<sup>1783</sup> See Vij N 'Collaborative governance: An analysis of social audits in MGNREGA in India' (2011) Vol.42 (6) *IDS Bulletin* 29-32.

<sup>1784</sup> Cf Landau D 'Aggressive weak-form remedies' (2015) Vol.v *Constitutional Court Review* 244-264.

In addition, it may thus be reasonably presumed that many people who are excluded from the ambit of social security are among the poorest of the poor. What appears to be required is a more holistic understanding about social assistance grants, poverty, and unemployment. Within this context, the definition of poverty and poverty lines should be devised as a priority if the grants are aimed at assisting with its alleviation.

More some in the context of India, laws and programmes have been established with a view to alleviating poverty and developing the livelihood of poor people. It is submitted that these laws and programmes have a potential of paving the way for the poor in negotiating their shares in the economy. The Indian Supreme Court has played a pivotal role in the interpretation and enforcement of socio-economic rights using the Directive State Policy principles. By using public interest litigation, India<sup>1785</sup> shows how the courts are keen to come to the aid of the poor and vulnerable.

Furthermore, it is submitted that the Indian government policies on social protection tend to focus on *social protection floor* initiative which is critical to the expansion of employment opportunities and decent work. The creation of social protection floor arises from the Indian interpretation of the right to life as a right to live with dignity as provided in the Directive Principles of the Indian Constitution. Therefore, lessons can be drawn by South Africa from India in the protection of social security rights.

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<sup>1785</sup> It is submitted that South Africa's understanding of public interest litigation is different from India in that NGO's are able to represent people in Court, whereas in India people can petition the Supreme Court for relief. For further reading on public interest litigation, see Dugard J and Langford M 'Art of science? Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *South African Journal of Human Rights* 39- 64; Amit R 'Winning isn't everything: The barriers to effective change through public interest litigation' (2011) 27 *South African Journal of Human Rights* 8-38; Cote D and Van Garderen J 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' (2011) 27 *South African Journal of Human Rights* 167-182; Deva S 'Public interest litigation in India: A critical review' (2009) 1 *Civil Justice Quarterly* 19-40; Sen S 'Public interest litigation in India: Implications for law and development' (2012) *Mahanirban Calcutta Research Group* (India)3-35 available at <http://www.mcrg.ac.in/PP47.pdf> (date of use 20 March 2015).

There are key benefits of adopting the social protection floor initiative. These include, *inter alia*, firstly, such an approach has a significant impact on the conditions and lives of the poor as can be seen in India from the rise in enrolments, rise in rural wages and consumption, decline in rural poverty in the recent period, and a greater degree of empowerment. Secondly, it can help in stabilising the economy, a role which became manifestly clear in the post-crisis period. Thirdly, it can create some pressure on the state and other obligation holders to follow concerted strategies which can lead to the fulfilment of rights that have been created.

This strategy includes higher allocation of resources to the relevant areas, which, we have shown has occurred to some extent. Fourthly, the creation of rights and specific entitlements might lead to strengthened demand, encourage a process of greater participation, and give greater voice, which is otherwise lacking among dispersed and poor social groups. Fifthly, this might lead to greater accountability of the providers and increase the efficiency of delivery, a crucial issue in countries like India where governance structures are weak.

Finally, it is recognised in India that the issue of poverty alleviation ought to be tri-sectoral. This means that the government, private sector and the citizens should play a collaborative role in addressing the scourge of poverty.<sup>1786</sup> Lastly, the challenges that India is faced with includes the implementation of these far-reaching policies and making these programmes available to rural communities.

Notwithstanding these challenges, the discussion on the system of social security in India offers important lessons for South Africa. In fact, the judiciary in India has made major inroads in the enforcement of social rights by taking a robust

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<sup>1786</sup> Cf India 'Poverty alleviation through community participation – UBSP India' available at <http://www.unesco.org/most/asia12.htm> (date of use 20 March 2015).



approach. Therefore, vital lessons to be drawn from the Indian experience include the following:

- The judiciary has developed the concept of minimum core obligations, particularly concerning the rights to food, education and health.<sup>1787</sup> This makes it easier for the state to assess compliance with its obligations and for the disadvantaged groups to assert their rights in court;
- The Supreme Court has developed the concept of public interest litigation which enhances access to justice through the removal of technical legal procedural barriers. This is critical because most of the people whose rights are violated cannot afford legal representation;
- The Supreme Court has also developed the concept of continuing *mandamus* which is an order that enables it to monitor and evaluate the implementation of its orders. This development ensures that the court retains jurisdiction over a matter until its order is fully complied with;
- In complex and sophisticated matters, the court has also relied on experts, set commissions or the assistance of *amicus curiae*. This measure thus defeats the argument that courts lack expertise and information on economic and social questions and lack the competency to resolve policy questions; and
- The judiciary builds into its directives a forewarning of the consequences of non-compliance or disobedience. It has actually threatened contempt of court proceedings in respect of violation of its orders.

From these key elements of the Indian jurisdiction, it is clear that the Supreme Court has shown the will and capacity to improve social and economic conditions. It is submitted that the South African judiciary may draw lessons from this progressive approach.

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<sup>1787</sup> For further reading on the right to food in India, see Ziegler J *et al* *The fight for the right to food: Lessons learned* (UK, Palgrave Macmillan, 2011) 257-276.

The Brazilian approach with regard to universal health care, education system indicators, and its social assistance coverage, is significant in terms of its impact on poverty reduction and capital accumulation. Brazil's experience shows that fiscal intervention supported by a significant increase in state funding seems so far to have been altogether compatible with Brazil's goals of economic growth and development. Moreover, the government has developed practical and creative approaches by providing social assistance on a massive scale and creating links between social assistance and local development policies.

The expansion of social protection in Brazil provides a rich diversity of experiences and lessons on how best to reduce poverty. Changes in the past two decades include adapting eligibility criteria and programme design to extend non-contributory pensions such as the *benefício de prestação continuada*, a means-tested disability and old-age pension, and the *previdência rural*, an old-age pension for rural informal sector workers. Meanwhile, cash transfers have been reformed, consolidated and expanded,<sup>1788</sup> with the aim of targeting poor households.

Notwithstanding these achievements, there are a number of challenges in social assistance, in its attempt to reduce extremely high levels of poverty and inequality. Despite this, the case holds a number of important lessons for South Africa:

- Positive impacts of social assistance on poverty and inequality have been achieved as part of a broader social policy package, including investments in education and health alongside economic policies such as the minimum wage;
- Broad coverage and accurate targeting of *bolsa família* have contributed to the programme's effectiveness in contributing to reductions in inequality and poverty;

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<sup>1788</sup> Souza R 'Bolsa família: A way out of poverty or a welfare trap? A 2030 backcasting of the Brazilian conditional cash transfer programme' (2013) Vol.6 (2) *Asian Journal of Public Affairs* 111-114.

- From the standpoint of the social protection system, the most important innovations include: the introduction of the rural pension scheme;<sup>1789</sup> the use of taxes on financial transactions to generate funding from the formal economy,<sup>1790</sup> mainly to support the extension of social protection; improvements in the administrative and institutional framework of the collection system;<sup>1791</sup> measures to facilitate and increase tax coverage and social protection coverage in micro and small enterprises;<sup>1792</sup> and
- Brazil has been able to achieve a great degree of macroeconomic stability,<sup>1793</sup> which relies heavily on the effect of social programmes on the demand for domestic consumption. However, these achievements are largely attributable to the Government's responsible management of its monetary and fiscal affairs. The management of the country's external debt and of the external sector of the economy has been a key element in the creation of fiscal space – so much so that the Brazilian economy has become a foreign creditor.<sup>1794</sup>

To this end, the government has introduced accountability mechanisms into social service delivery.<sup>1795</sup> For example, studies have found that families that

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<sup>1789</sup> Cf Barrientos A 'Comparing pension schemes in Chile, Singapore, Brazil and South Africa' (2002), IDPM discussion paper series, paper no. 67 United Nations Research Institute for Social Development (UNRISD) 2-26 available at <http://ageconsearch.umn.edu/bitstream/30560/1/dp020067.pdf> (date of use 22 March 2015); Bonturi M 'The Brazilian pension system: Recent reforms and challenges ahead' (2002) OECD Economics Department, Working paper no.. 340, OECD Publishing 5-32 available at <http://www.oecd-ilibrary.org/docserver/download/5lgsjhvj7z37.pdf?expires=1436782729&id=idandaccname=guestandchecksum=A4D5192E8EFD56C80D0F1C6F057E1CA8> (date of use 22 March 2015).

<sup>1790</sup> Durán-Valverde F and Pacheco J 'Fiscal space and the extension of social protection: Lessons learnt from developing countries' (2012) International Labour Office, Social Security Department– Geneva: ILO 72 available at <http://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=34168> (date of use 22 March 2015).

<sup>1791</sup> Durán-Valverde F and Pacheco J *ibid.*

<sup>1792</sup> Durán-Valverde F and Pacheco J (note 1790 above).

<sup>1793</sup> Durán-Valverde F and Pacheco J (note 1790 above).

<sup>1794</sup> Durán-Valverde F and Pacheco J (note 1790 above).

<sup>1795</sup> Raha S 'Social accountability engagements in CCTs and lessons going forward in the Philippines' 8-11 available at <http://gpsaknowledge.org/wp-content/uploads/2015/03/Paper-on-Social-Accountability-in-CCTs-and-Philippines-4Ps-Final.pdf> (date of use 22 March 2015).

were living in extreme poverty that participated in the *bolsa família* moved out of extreme poverty into the income range of non-extreme poverty. As discussed in Chapter Seven, the main objectives of *bolsa família* are to: reduce current poverty and inequality, by providing a minimum level of income for extremely poor families; and break the intergenerational transmission of poverty by conditioning these transfers on beneficiary compliance with human capital requirements (school attendance, vaccines, and pre-natal visits).

*Bolsa família* has been hailed as a successful programme in the reduction of poverty and inequality in Brazil. It has contributed to decreasing child mortality, in particular for deaths attributed to poverty-related causes such as malnutrition and diarrhoea. It provides families with certain amount of money in exchange to having to comply with specific conditions like keeping their children in school with a class attendance of at least 85% of the school year. In addition, the family must submit to obligatory healthcare examination every six months (or monthly in the case of pregnant women). In order to conduct the verifications, the municipalities transfer the information to the Brazilian Ministry of Health, and every six months, the Ministry of Social Development collects the data. The other conditionality is that each year, families are required to update and keep up to date information on the *bolsa família* programme data base.

In light of the above, discussion the key areas where lessons from *bolsa família* can be relevant to South Africa include, accountability, monitoring implementation of social policies, and human development.<sup>1796</sup> Although South

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2015); See also 'Social accountability and service delivery' Center for the future state available at [http://r4d.dfid.gov.uk/PDF/Outputs/FutureState/CFS\\_social\\_accountability.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/FutureState/CFS_social_accountability.pdf) (date of use 22 March 2015); Joshi A 'Producing social accountability? The impact of service delivery reforms' (2008) Vol.38 (6) *IDS Bulletin* 10-16; Cf Brown T *et al* 'Accountability and voice for service delivery at the local level' (2008) *UNDP* 2-23 available at <http://www.theidgroup.com/documents/AccountabilityandVoiceforServiceDeliveryattheLocalLevel.pdf> (date of use 22 March 2015).

<sup>1796</sup> Cf Barrientos A *et al* 'Antipoverty transfers and inclusive growth in Brazil' (2014) International Research Initiative on Brazil and Africa, School of Environment, Education and Development, The University of Manchester at 38 available at

Africa has been successful in expanding coverage and adopting a large number of innovative solutions, many challenges remain. Social security policy-making is currently fragmented among the Ministries of Social Security, Health, Social Development, and Labour. As described above, this means that agencies charged with granting and monitoring the payment of benefits or promoting the provision of services are dispersed among the departments.

One of the great challenges is to promote a more integrated approach in order to improve efficiency and expand services to the poor and vulnerable people. These problems may well lead to impasses that can put severe brakes on building a just and equitable society.

In dealing with the scourge of hunger associated with poverty, Oxfam recommended the following:<sup>1797</sup>

- Establishment of a National Food Act to ensure that no one goes hungry. The Act would require cooperation and accountability from the government, private sector and individuals;
- Opening of the latest National Food and Nutrition Policy to meaningful public consultation;
- A fair, accountable and sustainable food industry that ends practices such as price fixing, reduces waste and does more to help small scale producers;
- Improved rights to land and waterways to help communities facing hunger provide for themselves;<sup>1798</sup> and

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[http://www.brazil4africa.org/wp-content/uploads/publications/working\\_papers/IRIBA\\_WP04\\_Antipoverty\\_Transfers\\_and\\_Inclusive\\_Growth\\_in\\_Brazil.pdf](http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP04_Antipoverty_Transfers_and_Inclusive_Growth_in_Brazil.pdf) (date of use 22 March 2015).

<sup>1797</sup> Oxfam 'Hidden hunger strips away dignity, perpetuates inequality and destroys South Africans potential to prosper' (2014).

<sup>1798</sup> For further reading on the intricacies of land redistribution, see Ntsebeza L 'The land question-Exploring obstacles to land redistribution in South Africa' in Shapiro I and Tebeau K *After apartheid-reinventing South Africa?* (London, University of Virginia Press, 2011) 294-307.

- Plans to tackle climate change and reduce carbon emissions which negatively impact on food production.

Furthermore, there is a need for social assistance to be linked with employment and development. The right to have access to social assistance can further be improved, if the beneficiaries of the system are informed, and know the procedures that need to be followed in cases where their rights have been violated. This will, it is submitted, bring far-reaching benefits to the system of social security in as far as access to justice is concerned.

Consequently, more resources should be made available for addressing poverty, unemployment, and inequalities. Furthermore, these resources should be made available to enable the extension of social assistance programmes. It is submitted that the current economic model should be reviewed to examine the impacts of macro-economic policy and trade liberalisation on poverty and social inequality. It should be ensured that the benefits of economic growth are more evenly distributed.

It is submitted that considering all the socio-economic challenges facing our country, perhaps the time is ripe to introduce the basic income grant for the poorest of the poor in South Africa. According to McCarthy, the redistributive quality of the grant would effectively bolster aggregate demand and stimulate the economy. He further argues that the rationale behind this is that those in higher income brackets are claimed to have a higher propensity to save and spend their disposable income on imported luxury goods. Conversely, those in lower income brackets have a lower propensity to save and generally consume more locally produced goods.<sup>1799</sup> Consequently, the different policy interventions on poor

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<sup>1799</sup> McCarthy D 'A basic income grant as the solution to South Africa's social security crisis' (2015) available at [www.dnaeconomics.com/.../public\\_finance/?...Basic\\_Income\\_Grant...South\\_Africas](http://www.dnaeconomics.com/.../public_finance/?...Basic_Income_Grant...South_Africas) (date of use 24 June 2015); See also Meth C 'Basic income grant: There is no alternative' (2008) University of Kwazulu Natal, School of Development Studies Working paper no..54, 2-33 available at [sds.ukzn.ac.za/files/WP54.pdf](http://sds.ukzn.ac.za/files/WP54.pdf) (date of use 24 June 2015); Cf Barchiesi F

people's lives have provided a useful framework for understanding people's priorities. The methodology used in the Impact Assessment Studies concluded that the needs of the poor people can be broadly categorised as, survival, security, and quality of life.<sup>1800</sup>

These elements are discussed in detail below.

- *Survival*

The bottom line for all poor people is a fear of destitution and homelessness, and a desire to survive. Given that poverty is a dynamic condition, and the improving poor people of today can be the declining of tomorrow, poor people want a range of measures to protect those whose conditions are improving or coping against the possibility of risks such as ill-health, and those who are declining or falling still further (safety-nets).

- *Security*

The next key objective for poor people is a search for security. In other words, the means to protect, as well as improve their current quality of life, and ensure that potential risks, such as unemployment, do not threaten their existence. Security is associated with income streams, access to consumption and investment savings and loans, educational opportunities<sup>1801</sup> which are an investment for the future, and strong social networks to support families in times

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<sup>1800</sup> 'South African debates on the basic income grant: Wage labour and the post-apartheid Social Policy' (2007) Vol. 33 (3) *Journal of Southern African Studies* 561-575.

<sup>1800</sup> Cf Herbert A 'Evaluation of DFID support to poverty reduction' (2000) School of Public Policy, University of Birmingham 8-33 available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1782.pdf> (date of use 24 June 2015).

<sup>1801</sup> Jacobs P *et al* 'Developmental social policies for the poor in South Africa: Exploring options to enhance impacts' Paper presented at the conference titled "Overcoming inequality and structural poverty in South Africa: Towards inclusive growth and development" 20-22 September 2010, Birchwood Hotel, Johannesburg, South Africa 3 available at <http://www.plaas.org.za/sites/default/files/publicationspdf/Ngcobopercent20etpercent20al.pdf> (date of use 24 June 2015).

of crisis.<sup>1802</sup> For women, improved security includes income as well as protection against violence and discrimination.

- *Quality of Life*

Once these needs are met, but also alongside them, poor people are interested in improving their quality of life. They may want to participate in local politics, and participate in decisions about their local area. They are interested in participating in skill training programmes which may offer them the chance of better employment prospects, and helping them to escape poverty.<sup>1803</sup> They may want to invest time and resources in lobbying for, and maintaining, basic environmental infrastructure, and in attending courses to improve basic hygiene and health care.

As far as lessons for policy makers are concerned, there is a need to engage in a wide range of activities in order to meet the multiple needs of poor people. Similarly, there is a need to develop more sophisticated systems within each category or service to deal with different people's capacities and interests. Financial services, for instance, should provide a wide range of loan services in response to the different needs of clients - development loans for the improving poor who may wish to create or expand their enterprises.<sup>1804</sup> Therefore, this framework does not only provide a basis against which poor people's priorities can be translated into operational plans, but also the means to understand that

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<sup>1802</sup> Cf Swain R 'Is microfinance a good poverty alleviation strategy: Evidence from impact assessment' (2004) SIDA 4-26 available at [http://www.sida.se/contentassets/9f00892e021a41278a27f77545181a7d/evidence-from-impact-assessment\\_1096.pdf](http://www.sida.se/contentassets/9f00892e021a41278a27f77545181a7d/evidence-from-impact-assessment_1096.pdf) (date of use 24 June 2015).

<sup>1803</sup> UNESCO 'Education transforms lives' (2013) United Nations Educational, Scientific and Cultural Organisation 4 available at <http://unesdoc.unesco.org/images/0022/002231/223115E.pdf> (date of use 24 June 2015); See also ILO 'Skills for improved productivity, employment growth and development' Report V of the International Labour Conference, 97<sup>th</sup> session (2008) 55-79 available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_092054.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_092054.pdf) (date of use 24 June 2015).

<sup>1804</sup> Mosley P 'Assessing the success of micro insurance programmes in meeting the insurance needs of the poor' (2009) DESA Working paper no. 84 6-23 available at [http://www.un.org/esa/desa/papers/2009/wp84\\_2009.pdf](http://www.un.org/esa/desa/papers/2009/wp84_2009.pdf) (date of use 24 June 2015).



the way in which actions are planned must take into account of the different needs of target groups.

Therefore, poverty reduction especially for the poorest can be greatly enhanced through distributional policies. All the evidence confirms that distribution is central to fighting poverty.<sup>1805</sup> Distribution objectives, particularly for assets, should be an integral part of the poverty reduction agenda. Furthermore, in order to address poverty and the inequalities, there is a need to address the causes of insecurity, which includes, among others, social exclusion, political, economic exclusion, access to land, lack of employment, and resource distribution.

Consequently, targeting the poor and vulnerable is a crucial aspect in social security.<sup>1806</sup> As pointed out in the *Grootboom* judgement, “the poor are particularly vulnerable and their needs require special attention”.<sup>1807</sup> Finally, state obligations to fulfil the right to social security should be reviewed in the context of the overall level of state resources. In a country with such an abundance of resources, it should be possible to ensure the right to social security of all South Africans.

Zhang *et al* suggest that government facing budget constraints have to weigh the relative merits of spending across different sectors and sets its expenditure priorities.<sup>1808</sup> They assert that a dynamic and comprehensive approach to fiscal

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<sup>1805</sup> Cf Hellier J and Chusseau *Growing income inequalities – Economic analysis* (UK, Palgrave Macmillan, 2013) 294-300.

<sup>1806</sup> See Domelen J ‘Reaching the poor and vulnerable: Targeting strategies for social funds and other community-driven programmes’ (2007) The World Bank 4-40 available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Social-Funds-DP/0711.pdf> (date of use 13 June 2015).

<sup>1807</sup> *Grootboom* para 36.

<sup>1808</sup> Zhang Y *et al* ‘Sequencing, cost-efficiency and fiscal-sustainability of social protection – An overview’ (2012) United Nations Development Programme, New York 36-37 available at <http://www.ca-sp.org/files/ILOpercent20SEULpercent20SP.pdf> (date of use 13 June 2015). For further reading on the fiscal space and the extension of social protection, see Durán-Valverde F and Pacheco J ‘Fiscal space and the extension of social protection: Lessons learnt from developing countries’ (2012) ILO, Social Security Department, Geneva 1-156 available at <http://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=34168> (date of use

space and fiscal sustainability of social protection implies that a government's revenue and expenditure policies must be assessed in the context of the government's broad strategic priorities and states fiscal objectives over the short and longer term. According to them, a dynamic and comprehensive approach also implies that we need a better understanding of the long-term effects of social protection spending on economic growth and human development.<sup>1809</sup>

Baderin and McCorquodale acknowledge that the aim should first be to identify or target the beneficiaries of social assistance; or rather the direction of expenditure to those most in need is key and must be considered alongside the level of expenditure itself.<sup>1810</sup>

Samson *et al* have developed a useful model to indicate how targeting can be guided by the principles in the table below.<sup>1811</sup>

<b>Country characteristics</b>	<b>Factors that suggest targeting will reduce the cost of social transfers</b>	<b>Factors that suggest targeting will increase the cost of social transfers</b>
<b>Government</b>	If government capacity is	If government

13 June 2015);International Policy Centre for Inclusive Growth and United Nations Development Programmeme 'Intersections between social protection, inclusive growth and fiscal space' (2013) Issues paper for G20 DWG on Growth with Resilience 2-13 available at <http://www.ipc-undp.org/pub/IPCTechnicalPaper5.pdf>(date of use 13 June 2015);Harris E 'Financing social protection floors: Considerations of fiscal space' (2013) Vol.33 (3/4) *International Social Security Review* 111-136;Ortiz I 'Fiscal space for social protection: Options to expand social investments in 187 Countries' (2015) 203-207 *Global Labour Column* 7-9; Mukul G and Azad B 'Financing social protection in developing Asia: Issues and options' (2014) Vol.31 (1) *Journal of Southeast Asian Economies* 68-86.

<sup>1809</sup> Zhang Y (note 1808 above).

<sup>1810</sup> Baderin M and McCorquodale R *Economic, social and cultural rights in action* (New York, Oxford University Press, 2007) 358.

<sup>1811</sup> Cf Samson M *et al* 'Designing and implementing social transfer programmemes' Economic Policy Research Institute, EPRI Press, Cape Town (2006) at 42-45 available at [http://www.unicef.org/socialpolicy/files/designing\\_and\\_implementing\\_social\\_transfer\\_programmemes.pdf](http://www.unicef.org/socialpolicy/files/designing_and_implementing_social_transfer_programmemes.pdf) (date of use 20 September 2015).

<b>administrative capacity</b>	strong, then it is more likely to succeed in implementing targeting.	capacity is weak, then targeting may over-tax the government's limited administrative resources, and may prove counter-productive.
<b>Poverty profile</b>	If poverty rates are low, then targeting can potentially generate significant savings and is more likely to reduce the costs of social transfers.	If poverty rates are high, then targeting has little potential to generate significant savings, and is less likely to reduce the cost of social transfers.
<b>Social solidarity</b>	If social solidarity is strong, the middle class is more likely to accept the need to allocate resources to the poor, and targeting will incur lower political costs.	If social solidarity is weak, the middle class is more likely to resent their exclusion from social transfer programmes,

		and the political backlash may compromise the success of the programme.
<b>Formalisation</b>	If the poor are well integrated into the formal economy, their economic status will be easier to verify, and targeting will be less costly and more likely to succeed.	If the poor subsist in the informal economy, their economic status will be difficult to verify, and targeting will be more costly and less likely to succeed.
<b>Stigma</b>	If the poor suffer little discrimination, stigma created by overt targeting mechanisms is likely to be less costly and targeting is more likely to reduce the costs of transfers.	If the poor suffer from significant social exclusion, targeting may highlight their plight and increase the psychological costs of poverty.

The United Nations has indicated that without access to employment opportunities, health services, and education, African populations will not be lifted out of chronic poverty and African countries will not achieve neither the MDGs nor the SDGs, or sustain gains already made.<sup>1812</sup>

To this end, the theoretical underpinnings of social security in addressing the plight of the poor and vulnerable have at least shown that the state has an obligation to respect, promote, and fulfil the social security rights, within its available maximum resources. Furthermore, it is submitted that the state ought to do more in terms of devising plans and strategies which will ensure that it makes resources available to people who are most vulnerable and poor.

Access to justice in social assistance matters need to be improved. In addition, the state ought to improve administrative inefficiencies which are aggravated by the fact that litigation takes too long to be finalised. For example, in the famous case of *Mankayi v AngloGold Ashanti*,<sup>1813</sup> judicial proceedings took over five years to be finalised by the Constitutional Court, having passed through the High Court and the Supreme Court Appeal. At the time, when the Constitutional Court passed the judgment, Mr Mankanyi had already passed away.

The pattern of prolonged judicial proceedings was also evident in *Grootboom* judgement. *Grootboom* revealed that the government had failed to appreciate that its national programme did not provide a short-term solution for the people in dire need of access to adequate housing in this context. It misconstrued its

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<sup>1812</sup> United Nations 'Social protection schemes in the context of the post-2015 development agenda' available at [http://www.un.org/en/development/desa/policy/untaskteam\\_undf/groupb\\_eca\\_socprotect.pdf](http://www.un.org/en/development/desa/policy/untaskteam_undf/groupb_eca_socprotect.pdf) (date of use 20 September 2015).

<sup>1813</sup> *Mankayi v AngloGold Ashanti Ltd* 2011 32 ILJ 545 (CC). For further reading on *Mankayi* judgement, see Tshoose C 'Justice delayed is justice denied: Protecting ex-miners against occupational injuries and diseases: Comments on *Mankayi v AngloGold Ashanti Ltd* (2011) 32 ILJ 545 (CC)' (2011) Vol.14 (7) *PER Journal* 233-257.

constitutional obligations, and as a result, failed even to attempt to meet the needs and constitutional rights of the respondents.

The Committee of Inquiry must be commended for its examination of the current social security system. Most importantly, it should be commended for its excellent recommendations regarding transformation of the security system into a comprehensive system that will ensure an adequate minimum standard of living for all, with additional assistance for vulnerable groups, and a range of support services to enable the maximum wellbeing and development of children and their families.<sup>1814</sup> Concerted efforts should be made to alleviate poverty and provide minimum income support measures. Additional improvements are required to the existing grants, with additional measures to reduce the current gaps. Of most importance is the state's commitment to protecting its citizens and improving living conditions for all, in particular, for the most vulnerable members of society.

Therefore, there is a need for a radical rethinking of social security goals and policies. Social security thinking and policy-making must not be curative (in the sense of providing compensation), but also preventative and remedial in nature.<sup>1815</sup> One should concentrate on the causes of social insecurity (for example, social exclusion), rather than on the effects thereof. One should also implement measures aimed at preventing human damage, for instance, employment creation policies; preventative health care; and remedying or repairing damage, such as re-skilling or re-training, access to the labour market,

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<sup>1814</sup> Guthrie TA 'A comprehensive package of family social security benefits in South Africa – A framework proposed by the Children's Institute' (2002) available at <http://www.ci.org.za/depts/ci/pubs/pdf/poverty/workpap/compsss.p> <http://bit.ly/f8HJwn> (date of use 13 June 2015).

<sup>1815</sup> Olivier M *et al* (eds) *Introduction to social security* (Durban, LexisNexis Butterworths, 2004) 31-32.

and social integration,<sup>1816</sup> should be adopted as an integral part of the social security system, alongside compensatory measures.<sup>1817</sup>

Regarding Africa's development, Cheik Diop believes that there is an urgent need for an African renaissance, led by the African intellectual.<sup>1818</sup> This entails the concurrent recovery of political sovereignty, economic sovereignty and psychic autonomy. An essential task of this renaissance is for Africa to re-establish connections with the intellectual products of its past and integrate these into modern thought for the movement into its future of self-development.

Tsanga contends that Africans need to face the question of what works for them in particular.<sup>1819</sup> He notes that Africans will need to have the courage of their convictions in order to rally their vast human resources in its support. He argues that local initiatives need to be given more attention with a view to learning from the best practices that have taken place on the continent, and exchanging their experiences to realise social economic and cultural rights.<sup>1820</sup> The Constitutional Court in *Grootboom*<sup>1821</sup> judgement held that:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The court further remarked that the poor are particularly vulnerable and their needs require special attention.<sup>1822</sup> Thus, social security ought to be sustainable taking into account the quality and quantity of benefits. In order to attain these

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<sup>1816</sup> Van Rensburg J and Olivier M 'South African poverty law: The role and influence of international human rights instruments' in Williams L (ed) *International poverty law: An emerging discourse* (London, Zed Books, 2006)108-110.

<sup>1817</sup> Samson M *et al* (note 1811 above) 2-3.

<sup>1818</sup> Cheikh D *Towards the African renaissance: Essays in Africa culture and development* (London, Karnak House, 1996) chapter 3.

<sup>1819</sup> Tsanga A 'Moving beyond rights in the realisation of economic, social and cultural rights: Challenges in contemporary Africa' (2008) *African Foundation for International Law* 85-86.

<sup>1820</sup> Tsanga A (note 1819 above).

<sup>1821</sup> *Grootboom* para 23.

<sup>1822</sup> *Grootboom* para 36.

noble goals, it is submitted that South Africa needs to divert its fiscal spending and invest capital in human development,<sup>1823</sup> improve tax collection system, deal with fraud and corruption, ensure good financial governance, and deal with wasteful and fruitless expenditure.

Considering the intricacies and challenges associated with the state's failure to respect, protect, and fulfil the social security rights of the poor and vulnerable, the General Secretary of the United Nations, Ban Ki-moon remarked:

Shortfalls have occurred not because the goals are unreachable, or because time is too short. We are off course because of unmet commitments, inadequate resources and a lack of focus and accountability.<sup>1824</sup>

Ocheje writes "as in the struggles for the first independence, ordinary Africans are looking for developmental democratic states that can offer them political freedoms, economic well-being, and cultural comforts, that can expand the possibilities of their humanity".<sup>1825</sup> To this end, Davis warns that:

The danger exists in our country as in any other, that new elite will emerge, which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and the oppressed\_oppressed. The only difference will be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of a racial oppression we will have non-racial oppression.<sup>1826</sup>

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<sup>1823</sup> For further reading in this regard, see Suescún R 'The role of fiscal policy in human development and growth' Latin America and the Caribbean Region, World Bank (2007) 3-34 available at <http://siteresources.worldbank.org/INTLAC/Resources/Fiscal0Policy0LAC0Suescun.pdf> (date of use 13 June 2015).

<sup>1824</sup> United Nations Human Rights 'Who will be accountable? Human rights and the post-2015 development agenda' (2013) Office of the High Commissioner, New York and Geneva 10-69 available at <http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf> (date of use 13 June 2015).

<sup>1825</sup> Ocheje P 'Neo-liberal economic reforms and the realisation of social and economic rights in Africa' (2008) *African Foundation for International Law* 202.

<sup>1826</sup> Davis D 'Socio-economic rights: The promise and limitation - A South Africa perspective' in Barak-Erez D and Gross A *Exploring social rights – Between theory and practice* (Oxford, Hart Publishing, 2007) 193.



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