

**THE RIGHT TO SOCIAL SECURITY AND SOCIAL ASSISTANCE WITH
PARTICULAR REFERENCE TO OLDER PERSONS IN THE EASTERN
CAPE PROVINCE: A CASE STUDY OF NKONKOBÉ MUNICIPALITY**

By



**Thesis submitted in fulfilment of the requirements for the Degree of
Doctor of Laws (LLD) in the Faculty of Law, University of Fort Hare,
Alice, South Africa**

Promoter: Professor Nasila S Rembe

April 2010

DECLARATION

I, Nombulelo Lubisi-Nkoane declare that the contents of this thesis submitted for partial fulfillment of the Requirement of *Doctor Legum* at the University of Fort Hare, represent my own work, and has not been formally submitted to another university towards any qualification. Furthermore, it represents my own opinion and not necessarily those of the University of Fort Hare.

Signed by

N. Lubisi

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To husband Enoch, Cousin Siyabulela and Son Siyanda



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ABSTRACT

The right to social security and social assistance is among the human rights recognized in the International Covenant of Economic, Social and Cultural Rights (1966) and in the Constitution of South Africa (1996). The right is of central importance for safeguarding the human dignity of all persons when they face circumstances that potentially deprive them of their capacity to fully enjoy their human rights. The realization of this right requires the government to adopt a number of progressive measures and marshal adequate resources to social security and pro poor programmes.

The thesis examines the right to social security and social assistance with particular reference to older persons in the Nkonkobe Municipality of the Eastern Cape Province, South Africa. It addresses the question of access to resources and social service delivery, the level of protection offered by the government, and problems of implementation. In doing so, the study adopts a human rights-based approach.

South Africa has adopted a number of policies and legislation in line with international norms and standards, and in conformity with the Constitution. She has put in place a social security framework that focus on improving the human condition of a number of beneficiary groups, such as old persons; children, etc. While many of the above groups have benefited, there are some who are still excluded from accessing these grants due to lack of information on the existence of the scheme; lack of the necessary documents such as birth certificates; and inefficiency in the Department of Social Welfare. At the same time, while the current social security system is unable to deliver because of poor implementation, poverty remains a continuing challenge despite the adoption of pro poor policies.

The government should provide the poor and those who have no capacity to meet their basic needs with the necessary means to sustain their livelihoods. However, the continued reliance on social grants alone does not empower the poor to move out of the poverty trap. The thesis recommends that special measures should be adopted for older persons in addition to those agreed and already in place, more in particular in households where there is more than one elderly member. The government should also encourage and assist the elderly to engage in income generating and self sufficiency activities in order for the latter to meet the increasing burden of having to care for, and educate, grandchildren and orphans, and also support other members of the extended family.

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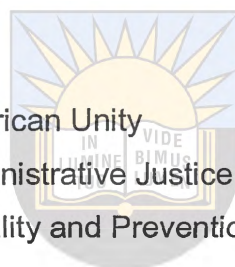
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ACRONYMS AND ABBREVIATIONS

ACHPR:	African Charter on Human and People' Rights
ACHR:	American Commission of Human Rights
AD:	Appellate Division
AIDS:	Acquired Immune Deficiency Syndrome
ANC:	African National Congress
Art:	Article
BCLR:	Butterworths Constitutional Law Reports
BIG:	Basic Income Grant
CASE:	Community Agency for Social Enquiry
CBO:	Community Based Organisations
CBPWP:	Community Based Public Works Programme
CDG:	Care Dependency Grant
CLJ:	Cambridge Law Journal
CSG:	Child Support Grant
COIDA:	Compensation for Injuries and Diseases Act
CESCR:	Covenant on Economic, Social and Cultural Rights
CEDAW:	Convention on the Elimination of All forms of Discrimination Against Women
CSG:	Child Support Grant
CC:	Constitutional Court
COSATU:	Congress of South African Trade Unions
DG:	Disability Grant
GIA:	Grant-In-Aid
ECA:	European Communities Act
ECHR:	European Convention on Human Rights
ECHR:	European Court of Human Rights
ESCRC:	Economic, Social and Cultural Rights Committee
EC:	Eastern Cape
ECP:	Eastern Cape Region

Ed:	edition
ed(s)	editor(s)
EEA:	Employment Equity Act
ER:	English Reports
ECSR:	European Convention on Social Rights
ESC:	European Social Charter
FCG:	Foster Care Grant
FES:	Friederich Ebert Stiftung
FC:	Frystaat
GA:	Gauteng
GDP:	Gross Domestic Product
HBA:	Human Rights-Based Approach
HC:	High Court
HCBC:	Home Community Based Care
HIV:	Human Immune Deficiency Virus
HRC:	Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic Social and Cultural Rights
ICROP:	Integrated Community Outreach Programme
IDASA:	Institute for Democracy in South Africa
ID:	Identification Document (South Africa)
ILC:	International Law Commission
ILO:	International Labor Organization
ILJ:	Industrial Law Journal
KZN:	Kwazulu-Natal
LAWSA:	Laws of South Africa
LIM:	Limpopo
LRA:	Labour Relations Act
MDG's:	Millennium Development Goals
MINMEC:	Minister of Welfare and Provincial Members of the Executive Council

MLR:	Modern Law Review
MP:	Mpumalanga
NALEDI:	National Labour and Economic Development Institute
NBER:	National Bureau of Economic Research
NC:	Northern Cape
NEDLAC:	National Economic Development and Labour Council
NGO:	Non-Governmental Organisation
NPA:	National Prosecuting Authority
NW:	North West
OAG:	Old Age Grant
OAP:	Old Age Pension
OAU:	Organisation of African Unity
PAJA:	Promotion of Administrative Justice Act
PEPUDA:	Promotion of Equality and Prevention of Unfair Discrimination Act
RISDP:	Indicative Strategic Development Plan
SA:	South Africa
SAA:	Social Assistance Act
SALJ:	South African Law Journal
SADC:	Southern African Development Community
SADCC:	Southern African Development Coordination Conference
SAJHR:	South African Journal of Human Rights
SC:	Supreme Court
SASSA:	South African Social Security Agency
SERAC:	Social and Economic Rights Action Centre
SOCPEN:	Social Pension
TAC:	Treatment Action Campaign
UDHR:	Universal Declaration of Human Rights
UK:	United Kingdom
UN:	United Nations
US:	United States of America



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WLR:	Weekly Law Reports
WP:	Western Province
WVG:	War Veteran Grant
ZACC:	Constitutional Court of South Africa
ZALC:	South African Law Commission
ZASCA:	South African Supreme Court of Appeal



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African Charter on Human and Peoples' Rights, 1981.
American Convention on Human Rights, 1969
American Declaration of the Rights and Duties of Man, 1948
Convention on the Elimination of All Forms of Racial Discrimination, 1965
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Employment Promotion and Protection against Unemployment Convention 168 of 1988
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General Comment No. 5 The Rights of Persons with Disability
General Comment No. 6 The Economic Social and Cultural Rights of older persons, 1995
General Comment No. 13 The Right to Education, 1999
General Comment No. 19: The Right to Social Security, 2008
General Assembly Resolution 421 (V), 1950
General Assembly Resolution 543 (VI), 1952
ILC Report on State Responsibilities, 1999
International Covenant on Economic, Social and Cultural Rights of 1966
International Covenant on Civil and Political Rights, 1966
ILO Social Security (Minimum Standards). 1952. Convention 102, Geneva.

Invalidity, Old Age, and Survivors Benefit Convention No 128 of 1967
The Limburg Principles on the Implementation of the International Covenant on
Economic, Social and Cultural Rights, 1987
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Government of the Republic of South Africa v Grootboom (2000) 11 BCLR 1169 (CC).

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In X v The Netherlands, Decision of 20 July 1971



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CHAPTER ONE

BACKGROUND OF THE STUDY

1.1 Introduction

The Constitution of the Republic of South Africa provides that everyone has a right of access to social security and appropriate social assistance.¹ Social security is considered to be an effective tool for assisting those who fall below the poverty line.² However, there are still individuals who do not exercise their right to benefit from the social security system. It is pertinent to point out that over 12 million citizens in South Africa derive their income from the system.³

The older persons in South Africa face a number of challenges, many of them arising from their vulnerability to poverty. The level of poverty in South Africa is widespread.⁴ The World Bank estimates show that the poverty rate in Sub-Saharan Africa remained around 50 percent although there are signs of progress since the mid 1990s.⁵ New estimates of poverty show that the proportions of people living below poverty line in South Africa in 2007 are in KwaZulu-Natal province (33 percent) followed Eastern Cape Province (29 percent).⁶ Poverty is

¹ See section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 [hereinafter "the Constitution" or "the 1996 Constitution"].

² Liebenberg, S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' 2002 6 *Law and Democracy* 160. Liebenberg and Tilley *Poverty and Inequality Hearings Social Security Themes* (1998) 3. See also The White Paper on Social Welfare (1997).

³ National Treasury 'Budget 2008: Briefing for the Joint Budget Committee' (22 February 2008). Available at www.pmg.org.za/files/docs/080222budget.ppt.

⁴ Chen S and Ravallion M 'The Developing World Is Poorer Than We Thought, no Less Successful in the Fight Against Poverty' 2008 *The World Bank Development Research* 2008. Available at <http://web.worldbank.org>

⁵ Ibid.

⁶ South African Institute of Race Relations *South Africa Survey 2007/2008*.

inherent among the rural dwellers and the majority are older persons. Most elderly blacks who grew up under apartheid were marginalized by that system. During the days of apartheid, the aged were excluded from accessing social security protection. With the change of government in 1994 and the adoption of the 1996 constitutional order, the situation has changed. The government committed itself to redress the imbalances caused by the apartheid system. The Preamble to the Constitution recognises the injustices of the past and spell out the following four objectives, namely, to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.⁷

An extensive constitutional protection of rights is available in South Africa, and this is reinforced by various statutory protections.⁸ A cursory look at the preamble to the Constitution as highlighted above will reveal that the Constitution is an important document for the protection of rights of individuals.⁹

⁷ See the Constitution, *op cit* note 1.

⁸ Ibid. The various legislations are provided under section 1.2 below.

⁹ *S v Makwanyane & Another* 1995 (3) SA 391 (CC) 262.

The Constitution contains a Bill of Rights which guarantees both political and socio-economic rights. The latter include the right to social security and social assistance. The Bill of Rights provides in section 27 as follows:

- (1) Everyone has the right of access to -
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
- (3) No one may be refused emergency medical treatment.

The right to social security is regarded as a second-generation right.¹⁰ In the three generations of human rights negative rights are often associated with the first and positive rights with the second generation.¹¹ The first generation consists of civil and political rights while the second generation embraces economic, social and cultural rights. The third generation is variously known as group rights, collective rights, peoples' rights or solidarity rights and consists of the right to development, the right to environment, the right to peace and self-determination.¹²

¹⁰ Eide, A and Rosas, A 'Economic, Social and Cultural Rights' in Eide, A, Krause, C and Rosas A (Eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 22.

¹¹ Ibid.

¹² Rembe NS 'The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects' (1991) *Human and Peoples' Rights Monograph Series No 6* 1. Civil and political rights include the right to equality, the right to dignity, the right to life, the right to liberty and security, freedom from torture and inhuman treatment, the right to privacy, and the right to a fair trial.

Socio-economic rights forms part of the International Covenant on Economic, Social and Cultural Rights of 1966.¹³ They are also included in most national constitutions. This cluster of rights together with other rights will be discussed in chapters Three and Four.

The Constitution protects 'everyone' including elderly persons. Under the Constitution, elderly persons are entitled to a number of rights, such as the right to equality (s9), the right to dignity (s10), protection against arbitrary deprivation of property (s25), the right to have access to adequate housing (s26), the right to have access to food and water (s27), and the right to just administrative action (s33), among others. In addition to the protection offered to older persons by the above rights, the Constitution also provides for the right to social security and social assistance.

The Constitution recognises that social security is a tool to assist those who are unable to support themselves more in particular those who fall below the poverty trap.¹⁴ The South African White Paper on Social Welfare also recognises the domain of social security to include poverty prevention and alleviation, rehabilitation, social compensation, income distribution and the maintenance of a basic standard of living.¹⁵ Similarly, the Lund Committee recognises social security and social assistance as being fundamental in ensuring that persons living in poverty are able to access a minimum level of income to meet their basic needs.¹⁶

¹³ The International Covenant on Economic, Social and Cultural Rights (United Nations 1966) (hereinafter "ICESCR"), adopted 16 December 1966, entered into force on 3 January 1976, G.A. Res.2200A (XXI). UN Doc. A/6316 (1966).

¹⁴ Liebenberg, *op cit* note 2, 160.

¹⁵ White Paper on Social Welfare (1997) 1 [hereinafter "White Paper"]. See also Olivier, MP 'The concept of social security' in Olivier, MP, Smit, N, Kalula, ER and Mhone GCZ (eds) *Introduction to Social Security Law* (2005) 20.

¹⁶ Report of the Lund Committee on Child and Family Support (August 1996) 10.

Cichon and Hagemejer estimate that between one third and one half of the population in the developing world lack access to effective health services.¹⁷ The two authors estimate that not more than 20 to 30 percent of the global population has access to meaningful cash benefits. Between 70 and 80 percent of the global population has no access to formal social security. Within this latter group, 20 percent live in deep poverty, on less than one US dollar per person a day.¹⁸ The United Nations Report on Economic and Social Protection also noted the important role played by social protection, namely:

....to increase capabilities and opportunities and, thereby, human development. While by its very nature social protection aims at providing at least minimum standards of well-being to people in dire circumstances enabling them to live with dignity, one should not overlook that social protection should not simply be seen as a residual policy function of assuring the welfare of the poorest but as a foundation at a societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity. This is a clear indication of the important role played by social security and social assistance.¹⁹

It has been observed by a number of scholars that the South African welfare system is facing a lot of challenges.²⁰ These challenges involve designing appropriate measures and integrated strategies to address the needs of a vast

¹⁷ Cichon, M and Hagemejer, K 'Changing the development paradigm: Investing in a social security floor for all' *International Social Security Review* 60 2-3 (2007) 169,196.

¹⁸ Ibid. The World Bank estimate that 1.4 billion people live on less than 1.25 US Dollar a day (note 4 above).

¹⁹ The United Nations Economic and Social Council Enhancing Social Protection and Reducing Vulnerability in a Globalizing World, *Report of the Secretary-General* (2000) E/CN.5/2001 7 December 2000 Para 16.
Available at <http://www.globalaging.org/waa2/documents/socprotect.pdf> accessed on 31 August 2007.

²⁰ See Liffman, R, Mlalazi, B, Moore, V, Ogunronbi, S & Olivier MP 'Those Who Have and Those Who Don't. An Investigation into the Limited Scope and Application of Social Security in South Africa' (2002) 4 *Law, Democracy & Development* 15, 23.

majority of the population who live in poverty, and to redress past disparities and the fragmentation of the institutional framework in the delivery of social welfare services.²¹

It is acknowledged that social security is one important mechanism for the alleviation and prevention of poverty.²² The White Paper on Social Welfare recognizes that social security is an integral part of the national developmental social welfare strategy, and indeed should be targeted to the elderly and disabled people. The latter live in poverty, they are vulnerable, and they have special needs arising from their age and physical condition.²³ Socio-economic rights involves rights and duties which ensure that everyone has access to social services.²⁴ The aim and justification for the existence of social security is to protect the personal dignity of the individual.²⁵

The right to human dignity is particularly important especially with regard to social security and the protection of vulnerable people. This is evident from the jurisprudence of the Constitutional Court on equality where the Court has indicated that dignity is a decisive criterion in proving cases of alleged unfair discrimination.²⁶ This also shows that there is a close connection between

²¹ Ibid.

²² See Liebenberg *op cit* note 2, 160. See Van Ginneken, W and McKinnon R 'Introduction: Extending social security to all' *International Social Security Review* 60 2-3 (2007) 5-6. See also Triegaart, JD. Transformation of Social Security in South Africa: Accomplishments and Challenges for Partnership in Development' (2005) Development Bank of Southern Africa (DDSA).

²³ White Paper *op cit* note 15, 1 - 48.

²⁴ See Liebenberg, S 'The Value of Human Dignity in Interpreting Socio-economic Rights' (2005) 21 *SAJHR* 1.

²⁵ See Jansen van Rensburg & Lamarche, L 'The Right to Social Security and assistance' in Brand D and Heyns C (Eds) *Socio-economic Rights in South Africa* (2005) 210. Liebenberg says: "at the core of the value of human dignity lies the injunction to respect the intrinsic worth of all human beings" Liebenberg *op cit* note 24, 11.

²⁶ See for example, *Harksen v Lane* NO 1997 11 BCLR 1489 (CC); *Government of the Republic of South Africa v Grootboom*, (2000) 11 BCLR 1169 (CC).

human dignity and equality, a link that is in line with the goals of social security. The importance of human dignity as a fundamental right is central to the success of the social security system which places emphasis on the eradication of poverty and vulnerability.²⁷ When people's human dignity is undermined they do not enjoy an adequate standard of living.²⁸ In *Government of the Republic of South Africa v Grootboom*,²⁹ the Court stated that:

All our rights in the Constitution are interrelated and mutually supporting. 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 their other rights enshrined in chapter 2. The realization of these rights is also the 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.

Without such constitutional protection and the provision of basic necessities, people will not be able to live a normal and dignified life or enjoy fundamental rights and preserve their dignity.³⁰ The protection of the human rights of the elderly people is necessary to enhance their dignity and enable them to overcome their vulnerability. We subscribe to the view of Liebenberg when she says:

We cannot be regarded as a society that values human dignity if we do not respond positively to conditions of deprivation. The value of human dignity gives us rights, but at the same time, it imposes reciprocal duties on us all to ensure the basic conditions of human survival and development.³¹

²⁷ Olivier *op cit* note 15, 15 – 16.

²⁸ Ibid.

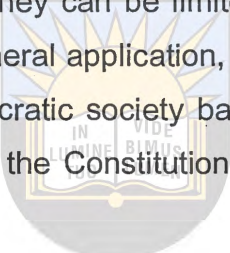
²⁹ 2000 11 BCLR 1169 (CC) para 23.

³⁰ Olowu D 'Conceptualizing a Rights-based approach to poverty alleviation in Africa: The platform for Social Security' (2003) 43 *Indian Journal of International Law* 67, 80.

³¹ Liebenberg *op cit* note 24.

The link between social security, social assistance and human rights emphasizes that human rights have to take a lead role in the protection of individuals. According to Olivier, respecting fundamental human rights is very important for addressing poverty and the unequal treatment of those who are historically deprived.³²

The right to social security is closely connected with other rights, such as dignity and equality. The problem with social security system and other welfare rights is that they are not absolute and they can be limited. However, such limitations must be effected by a law of general application, must be reasonable, as well as justifiable in an open and democratic society based on equality, human dignity and freedom.³³ Section 36, of the Constitution, which is the limitation clause, provides:

- 
- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and the extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of rights.

³² Olivier, MP 'Revisiting the social security policy framework in South Africa' (2000) 4 *Law, Democracy and Development* 101, 102.

³³ Section 36, of the 1996 Constitution.

The full and effective enjoyment of all human rights can be realized through the proper implementation of the right to social security and social assistance. Furthermore, as the state becomes transparent and accountable, all human rights will be respected.

The purpose of this thesis is to investigate the current social security protection offered to older persons in South Africa and particularly the Nkonkobe Municipality of the Eastern Cape Province, and the shortcomings experienced by the system. Older persons in South Africa face poverty and they are the most vulnerable because of their condition. One solution that can address their plight is to look at the right to social security as provided for in the Constitution and social welfare policies.

The study intends to examine the right to social security and social assistance and in this regard, considers the extent to which the right to social security and social assistance is realizable and protected. In doing so, the study employs a human rights-based approach. A human rights-based approach enables individuals or groups to claim access to basic services and to a basic income.³⁴ In the context of a human rights-based approach, the issue is how to define the claims of the rights holders and the obligations of the duty holders.

1.2 Background to Social Security System in South Africa

The South African social security system has been affected by the apartheid labour and welfare policies. For decades the poor were not considered a priority for social welfare and development by the government. In order to avoid

³⁴ Van Ginneken W 'Social Security and the Global Socio-Economic Floor; Towards a Human Rights-Based Approach' paper presented in a Conference on Social policy in a Globalizing World: Developing a North-South Dialogue, Florence, 6-8 September 2007, 13.

destitution the only assistance was provided by churches.³⁵ Social security schemes benefits were first introduced formally for workers³⁶ and children³⁷. Older persons lived under unhealthy conditions during the apartheid rule and were further marginalized by the inequality and the imbalances created by the system.³⁸ Little attention was paid to the elderly and other marginalized groups who were discriminated against by the apartheid laws. In order to avoid destitution, means-testing of the elderly for the award of old age pension was introduced in South Africa in 1928 for White, Indians and Coloured people but excluded blacks. However, 'blacks' were catered for later in 1947.³⁹

It was only in the late 1970s that social welfare reforms took place.⁴⁰ Further changes were introduced in 1994, when the government set out a number of specific goals in the area of social policy.⁴¹ These goals included, amongst other things, equitable income distribution, the provision of a reasonable income for old age, and the elimination of poverty.⁴² The ANC's Reconstruction and Development Programme (RDP) advocated for a better life for everyone.⁴³ Its Manifesto promised that:

³⁵ Strydom E 'Introduction to Social Security Law' in Strydom, EML, le Roux, PAK, Landman AA, Christianson, MA, Dupper, OC, Myburgh, P, Barker, FS, Garbers, C & Basson, AC *Essential Social Security Law* (2005) 18.

³⁶ The Workmen's Compensation Act of 1914.

³⁷ The Children's Protection Act of 1913.

³⁸ Fakir, S 'The challenges of addressing poverty and environmental linkages in South Africa' *Policy Think Tank series* no 14 of the World Conservation Union, (2002) *IUCN*. Accessed 24 April 2007.

³⁹ Van der Berg, S 'South African social security under apartheid and beyond' *Development Southern Africa*, vol 14 No 3 December (1997).

⁴⁰ Strydom *op cit* note 35, 19.

⁴¹ African National Congress, 'The Reconstruction and Development Programme: A Policy Framework', (1994), Johannesburg.

⁴² *Ibid*.

⁴³ *Ibid*, 5, 16, and 79.

Attacking poverty and deprivation, is the first priority of the democratic government. The RDP aims to set South Africa firmly on the road to eliminating hunger, providing land and housing to all our people, providing access to safe water and sanitation for all, ensuring the availability of affordable and sustainable energy sources, eliminating illiteracy, raising the quality of education and training for children and adults, protecting the environment, and improving our health services and making them accessible to all.⁴⁴

When the ANC government came into power in 1994, it inherited a social security system that was complex, fragmented and fraught with inequality. Social security was regulated through a number of statutes, some of which excluded certain categories of people. It was administered by 14 departments for different population groups and homelands.⁴⁵ Under the previous apartheid government administration, the Ciskei and Transkei used different administration systems with their own procedures and approaches. For example, the old age pension beneficiaries in the areas under the previous government administration were paid on a monthly basis whereas in the Ciskei and Transkei it was made on a quarterly basis. These abnormalities were subsequently rectified by the Constitution and the White Paper.

The first task of the new democratic government was to give effect to the Constitution through legislation that resonated with the values and ethos of the new democratic order. Among the legislation adopted the following are included: the Promotion of Equality and the Prevention of Unfair Discrimination Act, 4 of 2000; the Unemployment Insurance Act, 63 of 2001; and the Unemployment Insurance Contribution Act, 4 of 2002. The Promotion of Administrative Justice Act 4 of 2000; The Social Assistance Act, 59 of 1992 (which has been replaced by the Social Assistance Act, 13 of 2004), the Aged Pensions Act, 81 of 1967

⁴⁴ Ibid.

⁴⁵ Liebenberg S 'Human Right and Social Security' (1998) 1 (2) *ESR Review* 1.

(replaced by the Older Persons Act, 9 of 2006), and the South African Social Security Agency Act, 9 of 2004 which establishes the new South African Social Security Agency, were also promulgated.

The Strategic Plan of the Department of Social Development in the Eastern Cape is concerned about the welfare of the elderly.⁴⁶ In this document, the government pledged its commitment to design and implement an integrated service for the care, support and protection of older persons.⁴⁷ This would facilitate the utilisation of old-age homes and the implementation of the Home and Community Based Care Model. The model is designed to transfer skills to younger people through intergenerational programmes and in so doing, promote the rights of the older persons and facilitate their engagement in economic empowerment initiatives.⁴⁸ The primary focus of the Department is on those individuals that are most vulnerable, because of poverty and deprivation.⁴⁹ The Department is also committed to addressing the problem of poverty. The Department's Strategic Plan for 2007 provides three niche areas:⁵⁰

Firstly, to improve the social well being of vulnerable individuals, groups and poor communities through facilitation of social processes for increased participation, power and control by recipients over the resources and services delivered.

Secondly, to focus on the promotion of the citizenship of the majority who were previously disenfranchised and disempowered from participation in their own development, thus giving effect to people-centred approach to development.

⁴⁶ Province of the Eastern Cape Department of Social Development Strategic Plan (2007-2008 – 2009/10) and Annual Performance Plan. Available at <http://socdev.ecprov.gov.za/documentscentre/Strategies%20Plan%202004-2007.pdf>

⁴⁷ Ibid, 134.

⁴⁸ Ibid, 8.

⁴⁹ Ibid, 5.

⁵⁰ Ibid, 7.

Lastly, to provide poverty alleviation and reduction, and interventions that would close the gap between the first and second economies.⁵¹

South Africa's White Paper recognizes that both social welfare and social security form an integral part of the national developmental social welfare strategy.⁵² South African social security system is composed of four elements.

The first element is private savings, under which people voluntarily save for unexpected contingencies such as disability, retirement and chronic diseases.⁵³

The second is social insurance. This is contributory and risk-based scheme that give rise to fixed benefit payments aimed at income maintenance based on the insurance principle. Social Insurance is restricted to those that engaged in formal employment. These contingencies are associated with unemployment, ill health, disability, work-related injury and old age.⁵⁴

The third element is social assistance. This is a minimum income-protection or a "safety net" that is designed for the most vulnerable groups with no other means of support, including the elderly, mentally and physically challenged people, and parents and foster parents who cannot provide adequate protection for their children.⁵⁵ The allocation of social assistance is primarily needs-based, and such allocation is therefore often subject to means-testing, although not always necessarily so. Benefits do not derive from specific contributions but are provided for as part of the state budget.

⁵¹ Ibid.

⁵² White Paper *op cit* note 15.

⁵³ Ibid, 42.

⁵⁴ Ibid, 10.

⁵⁵ Ibid, 42.

Lastly, social relief, which is a short term measure that is provided to individuals or communities in cases of emergency, for example, disasters, fires and floods.⁵⁶

Social assistance in South Africa is mainly concerned with the payment of grants and is regulated by the Social Assistance Act.⁵⁷ The assistance provided to an individual is cash. The social assistance system provides support in the form of grants and more than 12 million South Africans receive social grants. These grants are old age pension, child support grant, disability grant, foster-care grant, care dependency grant, war veterans grants and grant in-aid. Each of the above is elaborated below.

The Old Age Pension (OAP) is a means-tested benefit with eligibility based on age, level of income and citizenship. The maximum monthly amount is currently R1010 South African Rands. In the fight against poverty the government amended the Social Assistance Act in 2008 to equalize access to old age grants at the age of 60.⁵⁸ In terms of the amended Act, men aged 63 and 64 qualified for the grant in 2008. Those aged 62 and 61 are eligible in 2009, and by 2009, both men and women will apply for the grant from the age of 60.⁵⁹ More than 2.2 million South Africans receive this grant.

The Child Support Grant (CSG) was established as a result of the recommendation of the Lund Committee of inquiry and it was introduced in 1997.⁶⁰ The grant is means-tested on the basis of the income of the primary care-giver and her/his spouse. The maximum monthly amount is currently R230.

⁵⁶ Ibid.

⁵⁷ Social Assistance Act No. 13 of 2004 [hereinafter SAA or Act No. 13 of 2004].

⁵⁸ Social Assistance Amendment Act, No. 6 of 2008.

⁵⁹ Ibid.

⁶⁰ See note 16 above. The Lund Committee was appointed by the Committee of the Minister of Welfare and the Provincial Members of the Executive Council (the Welfare MINMEC) in 1996 to investigate the problems of the State Maintenance Grant.

Initially, only children under the age of 7 qualified for the grant, but now the coverage has been extended to all children in need under the age of 15.

The Disability Grant (DG) is provided by the state to the disabled (including the blind) from age 18 to retirement age, subject to medical eligibility criteria and the same means-test. The maximum monthly amount is currently R1, 010.

The Foster Care Grant (FCG) is payable to a foster parent in respect of a foster child who has been legally placed in her/his custody in terms of the Child Care Act. The level of the Foster Care Grant is currently R960 per month.

The Care Dependency Grant (CDG) is payable to the caregiver of a child that is in need of fulltime care as a result of a severe mental or physical disability. The level of the Foster Care Grant is currently R960 per month. This grant is means-tested on the basis of the income of R4, 000 to R9, 400 per month for single persons.

The War Veterans' Grant (WVG) is available to war veterans' if he or she has attained the age of 60 years; or owing to a physical or mental disability, is unable to provide for his or her maintenance. A war veteran is described as a person who served in the First (1914–1918) or Second World War (1939–1945) or in the Korean War (1950–1955).⁶¹ The grant is currently R960 per month.

Lastly, the Grant in Aid (GIA) is available to a person, subject to section 5 of the Act,⁶² who is in such a physical or mental condition that he or she requires regular attendance by another person.

⁶¹ Department of Social Development available at www.dsd.gov.za.

⁶² See Act, No. 13 of 2004 *op cit* note 57.

1.3 Statement of the Problem

Lack of access to social security and other basic necessities of life pose a threat to a number of citizens in South Africa. This is exacerbated by the plight of poverty. Older persons are mostly affected. An ageing population is a human milestone that requires the provisions of better public health and nutrition, but also brings with it a shift of policy issues and directions.⁶³ Old persons are among the most vulnerable groups in any contemporary society for many reasons. Social cohesion and the traditional family support and solidarity has broken down in most countries, more in particular in South Africa.⁶⁴ Once the elderly reach a certain age, they are rendered vulnerable to many risky situations, such as disability, violence and abuse, discrimination, loss of income, and being left alone without anybody to take care of them or with whom they can call and rely upon.

HIV/AIDS impacts heavily on human survival and development in South Africa.⁶⁵ According to the projections of the US Bureau of Census, life expectancy is dropping dramatically in South Africa.⁶⁶ Research has shown that life expectancy has dropped from 62.77 years in 1990 to 45.43 in 2002.⁶⁷ On the other hand, the population of the elderly (60+) has increased progressively. The census which was done in 2001 found that 7.3 percent of the population was

⁶³ See also Noumbissi, A 'Living conditions of the Elderly in South Africa' (2003) ACAP University of Pennsylvania USA, 201, 216.

⁶⁴ Ibid.

⁶⁵ Liebenberg, S 'The Judicial Enforcement of Social Security Rights in South Africa' in Riedel, E (eds) *Social Security as a Human Right: Drafting a general Comment on Article ICESCR – Some Challenges* (2006) 69- 71.

⁶⁶ Legido-Quiley, H 'The South African Old Age Pension: Exploring the role on poverty alleviation in households affected by HIV/AIDS' (2003) *International Social Security Association*, 11. Available at <http://www.issa.int>.

⁶⁷ Ibid.

between 60 and 79, out of which 0.9 percent were 80 years and above.⁶⁸ Ferreira and Charlton note that the aged population of 65 and over is expected to reach 7.4 million by the year 2035.⁶⁹ The implication of this is that there is also an increase in the number of destitute persons requiring help and this present a major challenge to the welfare and human rights systems.

Older persons are in the worst position because they find it difficult to protect themselves from the conditions that ensue from the harsh socio-economic environment under which they live. According to Ferreira and Charlton, this is true since it has been shown that poverty, high unemployment, lack of sufficient funds, inefficient administration of funds, and the fall-out from HIV/AIDS contribute to the vulnerability of the elderly.⁷⁰ The two authors contend that where poverty, lack of experienced administrators and insufficient funds exist, the protection of destitute persons will not be adequate.⁷¹

The vast majority of elderly people live in poor conditions without access to clean water, electricity, and proper sanitation.⁷² This problem is acute in the Eastern Cape Province of South Africa. In this Province, as in many parts of South Africa, older people who have suffered a lifetime of poverty enter old age with very little or no resources at all and often in poor health. They lose their financial stability and as a result, rely on social grants as their main source of income.⁷³ However, not all of those in need are afforded such assistance. Social insurance

⁶⁸ Statistics South Africa, *Report of the Census Sub-Committee to the South African Statistics Council on Census 2001, 2003* Pretoria.

⁶⁹ Ferreira, M, & Charlton, K 'Aging inequitably in South Africa' (1998) accessed 27/08/07 available at <http://www.islasat.com/healnews/aged/monica.html> .

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Noumbissi *op cit* note 63, 216.

⁷³ Ibid.

only caters for those in the formal sector.⁷⁴ However, the government has made provisions for assisting the old-age population in the form of social assistance grants. The social security system can contribute positively to the vulnerability of older persons.⁷⁵ The positive benefits of social security are highlighted in the research conducted by the Department of Social Development on the impact of social security on the lives of elderly South Africans. The findings of the research are summarized as follows:

[S]ocial grants not only reduce poverty and contribute to social cohesion, but ... they also have positive impacts on the economic opportunities of households receiving grants. The provision of social grants translates relatively quickly into enduring positive impacts on labour markets participation, employment success, and realized wages. In addition, social grants have positive indirect effects on economic growth through improved education.⁷⁶

However, the present system is not without its shortcomings. The government has been experiencing a lot of pressure from civil society to reform and improve the social security system. In response to this growing pressure, a new Social Security Agency (SASSA)⁷⁷ was established. Other measures taken by the government include the promulgation of the Social Assistance Act,⁷⁸ and the Older Persons Act.⁷⁹ Various committees have also been appointed in the past

⁷⁴ Olivier *op cit* note 32, 102.

⁷⁵ Economic Policy Research Institute, Department of Social Development *The Social and Economic Impact of South Africa's Social Security System – Summary Report Commissioned by the Directorate : Finance and Economics (2004)* ('Department of Social Development Report').

⁷⁶ Ibid.

⁷⁷ The Agency was appointed in terms of South African Social Security Agency Act 9 of 2004. In the Preamble to the Act it is stated that the purpose of the Social Assistance Agency Act is to ensure that national standards are set for the effective use of the limited resources available to the state for social security.

⁷⁸ Act, No. 13 of 2004.

⁷⁹ Act, No. 9 of 2006.

to consider reform measures that can improve the present social security system. This includes the Taylor Committee of Inquiry into the Comprehensive Social Security System which was appointed in 2000.⁸⁰

The government has adopted a number of programs for social welfare services and reform of social security for the elderly people. However, social policies and programs in themselves have not yet guaranteed the full and adequate enjoyment of the benefits of social security by the elderly. Many elders are unemployed or work in the informal sector where there is not much that they can rely on for their living. Concern has been raised by the South African Human Rights Commission (SAHRC) that progress in the realization of the right to social security is confronted by a number of challenges such as poverty, social exclusion and unemployment.⁸¹ There is a noticeable gap between promising and doing. Poverty is still prevalent among the elderly; many do not have jobs or retirement income, suitable housing, food or health care. Although a primary health care service exist, it is not properly implemented. Some of the aged are kept in institutions, while for those who need it, institutional care is not easily available. However, despite all of the efforts that have been made by the government, the problems of poverty, inequality and vulnerability have not adequately been addressed.

The issue under investigation is whether or not our policies and laws mitigate the vulnerability of the elderly in South Africa. This requires an examination of the adequacy of public policy responses to the vulnerability of the elderly. The link between poverty, inequality and discrimination is well established. A report by SAHRC clearly indicates that the standard of living of people trapped in poverty

⁸⁰ The Committee was appointed by Cabinet in 2000 under the chairpersonship of Judge Satchwell.

⁸¹ South African Human Rights Commission (SAHRC), The Social Security, and 6th Economic and Social Right Report Series 2003/2006 Financial Year, August 2006 at 64.

has declined and the gap between the rich and the poor has widened.⁸² The report of the Chronic Poverty Research Centre (CPRC) on poverty and older people indicated that during 1999 many households were earning less than R800.00 per month.⁸³ A similar concern has also been raised recently by the Minister of Social Development, Mr. Z Skweyiya, at the International Bi-regional Conference on Social Protection:⁸⁴

The Southern African sub-region incorporates (*sic*) some of the poorest countries in the world, with about 40% of people living in poverty if the crude one dollar a day measure is taken. It is argued that inequality in the African sub-region is manifested through increasing levels of impoverishment, rising unemployment and the inability of the majority of people to access to sources of livelihood or basic services... HIV and AIDS remains one of the key challenges of our time and has its most severe impact on the African continent. The disease is robbing our children of their parents and a substantial livelihood and burdening them with the costs of care, medicine and funerals.⁸⁵

The SAHRC notes that budgetary constraints also delay the progress of the realisation of the right to social security and social assistance.⁸⁶ At the provincial level, the social security system experiences serious problems with delivery, the criteria for coverage and eligibility for accessing the grants.⁸⁷ Old age grant are paid subject to a means-test and an income component is attached to the

⁸² Ibid.

⁸³ May, J 'Chronic poverty and older people in South Africa' *Chronic Poverty Research Centre Working Paper 25* at 68. Available at <http://www.chronicpoverty.org.pdf>.

⁸⁴ The then Minister of Social Development Skweyiya a speech presented at the International Bi-regional Conference on Social protection at Somerset West on the 7th of June 2007. Available at <http://www.info.gov.za/speeches/2007/07060809151001.htm>.

⁸⁵ Ibid.

⁸⁶ The Report of the South African Human Rights Commission "The Social Security 6th Economic and Social Right Report Series 2003/2006", financial year (August 2006) 64.

⁸⁷ Ibid.

means-test. For example, people with an income of more than R1, 410 and those with assets worth more than R252 000 do not qualify for the state old age grant.⁸⁸ This leads to the exclusion of the majority of the aged population from the provision of social assistance. Determining the income of older persons can at times be very difficult. For example, a component of the right to social security is the right to social assistance if one, due to old age, is unable to support himself or herself.

The Eastern Cape Department of Social Development has been the site of large scale maladministration. Research shows that the problematic area confronting the government in the process of realising its obligation is in the area of finance and withdrawal of social security grants.⁸⁹ In this regard the Department has been challenged on many occasions for terminating social grants (old age, disability and child-support grants) to thousands of beneficiaries or requiring them to re-apply in order to establish their eligibility. In a number of cases, the courts have found the suspension or withdrawal of these grants to be unlawful and invalid.⁹⁰ Froneman J observed that for a number of years there had been a “persistent and huge problem with the administration of social grants in the Eastern Cape”.⁹¹

Older persons also have the right to equality, and non-discrimination. Equality refers to equal benefits or opportunities for individuals or groups within a society.

⁸⁸ In the case of married couple the amount is R2610.00 a month.

⁸⁹ See Community Agency for Social Enquiry (CASE) ‘Monitoring Socio-Economic Rights in South Africa: Public Perceptions’ (CASE Johannesburg, 2002), 54-56.

⁹⁰ In these cases the court ordered the re-instatement of the grants. In the Eastern Cape the social assistance grants applicants took the government to court when the government departments ‘failed to process their applications and discontinued the payment of grants without notifying the beneficiaries’. In *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E), 2000 (12) BCLR (C) 1322; *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E).

⁹¹ In *Kate v MEC for Welfare, Eastern Cape* 2005 (1) SA 141 (SE), [2005] 1 All SA 745 (SE).

Section 9(3) of the Constitution enshrines equality and non-discrimination as a core value of the South African social order.⁹² Section 9 of the Constitution provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

People classified as vulnerable and formerly disadvantaged groups should not be discriminated against in enjoying the right to social security and social assistance. It is for this reason that the Constitution provided that national legislation must be enacted to prevent or prohibit unfair discrimination.

People located in remote rural areas often encounter problems of accessing social security services, especially when they try to make application for the grant. Reports have highlighted how vulnerable older persons are to abuse,

⁹² Section 9 of the Constitution *op cit* note 1.

often because their rights are not adequately protected under existing laws.⁹³ For example, the law differentiates between pensionable ages of females and males.⁹⁴ Although the years have been reduced from 65 to 64 and 63 in 2008, and 62 and 61 in 2009, and 60 to everyone in the year 2010, this is still a violation of section 9 of the Constitution which enshrines equality and non-discrimination as core value of South African social order.⁹⁵ There is still discrimination for those who are at sixty this year (2009). According to Strydom, this difference in age may be regarded as age discrimination which therefore exacerbates the plight of the elderly people in South Africa.⁹⁶ Older persons' right to social security is particularly vulnerable to violation due to the means-test which was introduced in South Africa since 1928.

The right to social security is protected and enforceable through a variety of law making processes and institutions. For example, the courts, the executive, the legislature, and administrative bodies are entrusted with this duty. The constitutional framework in South Africa recognizes the right to social security. Although as of May 2009 South Africa had not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹⁷ it has a Constitution that has incorporated most of the provisions of the Covenant in its Bill of Rights.⁹⁸

⁹³ Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons, *Mothers and Fathers of the Nation: The Forgotten People?* (February 2001).

⁹⁴ Section 25 of the Aged Pensions Act 2006 defines aged persons as:
"A person who, in the case of a male, is sixty-five years of age or older, and, in the case of a female, is sixty years of age or older". Social Assistance Act No 13 of 2004 defines older persons for eligibility of grants at 60 and 65 years respectively for men and women". (s10).

⁹⁵ Social Assistance Amendment Act of 2008.

⁹⁶ Strydom *op cit* note 35, 20.

⁹⁷ International Covenant on Economic, Social and cultural Rights (United Nations 1966) (hereinafter "ICESCR"), adopted 16 December 1966, entered into force on 3 January 1976, G.A. Res.2200A (XXI). UN Doc. A/6316 (1966).

⁹⁸ Section 27 of the 1996 Constitution.

The question therefore is whether the government can rely on the latter when dealing with older person.

The right to social security has been dealt with in many international instruments and national legislations. For example, the Universal Declaration of Human Rights (UDHR) was the first instrument to introduce the right to social security.⁹⁹ Article 22 provides that: 'Everyone as a member of society has the right to social security'.¹⁰⁰ This is a very general guarantee which takes into account the organization and resources of each country. Article 25 also recognizes various forms of social security. Article 25 (1) provides:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and 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 circumstances beyond his control.¹⁰¹

The ICESCR, on the other hand, contains some of the most significant international legal provisions on economic, social and cultural rights. Its provisions include rights relating to social protection. States parties to the Covenant undertake 't[o] recognize the right of everyone to social security, including social insurance'.¹⁰² In terms of the ICESCR, states undertake to realise the rights 'progressively' and 'within the available resources'.¹⁰³

⁹⁹ Universal Declaration of Human Rights, (hereinafter "UDHR"), adopted on the 10, December, 1948, GA Res 217 A (III), UN Doc A/810 (1948).

¹⁰⁰ Art 22 of UDHR.

¹⁰¹ Art 25 of UDHR *op cit* note 99.

¹⁰² Article 9 of the ICESCR *op cit* note 97.

¹⁰³ Ibid.

The South African Constitution enshrines a rights-based approach on issues of inequality and social injustice. However, the right to social security is not cast in stone, neither has much been done or said about how to secure older person against want, destitution and diseases which inflict them by virtue of their age. The socio-economic crisis in which they are mired coupled with lack of proper social security protections necessitates an investigation into how the right to social security for the elderly can be effectively protected by law.

As stated heretofore, the Constitution provides that everyone has the right to have access to social security. This includes the right to social assistance when one is unable to support himself or herself. It is sad to note that the Social Assistance Act does not have any specific provision regarding people classified as vulnerable, particularly those from formerly disadvantaged groups and older persons. While social security constitutes a fundamental right, certain categories of people still lack access to adequate levels of social protection. This seems to indicate that assistance through means-tested benefits is not sufficient for the right to social security, but that entitlement without individual assessment of need is required.

Means-testing makes it difficult for older persons to exercise their basic rights. This affects the most vulnerable segments of the population, particularly women. Furthermore, the state is mandated by the Constitution to ensure that social security is accessible to all and in this regard, the government has to ensure that adequate measures exist to protect its citizens against social risks. In our opinion, the Constitution is too vague as to the precise content and nature of the right and equally, not explicit as to how far the right can be limited. Therefore, an investigation is necessary in order to identify various obligations that flow from the right and the gaps that exist in its implementation.

The above would seem to suggest that older persons are one group that has fallen within the cracks of poverty.¹⁰⁴ In this regard, a number of questions can be asked: how far does human rights law help to remedy the problem of poverty, vulnerability and inequality? What measures must the government take in order to ensure that its people enjoy social security, and conversely, protect them against the violation of their social security rights? Is the current law adequate to cater for the needs of the elderly people?

In order to address poverty and to ensure that social security is accessible to all older persons on the basis of gender equality, it is necessary to explore the extent to which the legal framework protects the elderly against all forms of vulnerability and how the law responds to their needs. The right to social security, and more in particular social assistance, is an important right both in itself and for the realisation of other rights in the Constitution.

In the context of a human rights-based approach, the study will focus on the claims of the rights holders and the obligations of the duty holders. At the same time, a rights-based approach paves the way for a developmental social welfare system.¹⁰⁵ Therefore, the study intends to examine the right to social security and social assistance, identify and analyse the extent to which the right is realized and protected.

The Constitutional Court has played a very crucial role in the interpretation of socio-economic rights in South Africa and it has developed an extensive and admirable jurisprudence on the obligations imposed by other socio-economic rights in the Constitution. The interpretation and analysis of the content of the right to social security and social assistance will be guided, among others, by the jurisprudence generated by the Courts.

¹⁰⁴ May *op cit* note 83.

¹⁰⁵ Patel L *Social Welfare and social development in South Africa* (2005) 98.

1.4 Aims and Objectives of the Study

The central area of the study is the right to social security and social assistance as provided for by section 27 of the Constitution and by other international instruments. The main aim is to find out to what extent the right to social security for older persons is protected in South Africa and to identify the nature of problems they encounter while accessing old age grant. The study is specifically aimed at establishing the legislative, administrative and physical barriers that affect old persons in accessing social security and social welfare services, and in this regard, assess the impact of old age pension on households. This will be done by analyzing relevant policies and legislative instruments which protect social security as a human right. It will also examine how the rights of the aged are realized in practice in a manner that responds adequately to the needs and requirements of their age.

This study explores the realization of the right to social security and social assistance in the Nkonkobe Municipality which has not been given prominence in the literature on socio-economic rights. The study will also identify the obligations flowing from the right to social security as protected by national and international legal frameworks. More specifically, the study will:

- (i) identify the nature of the problems experienced by older persons while accessing social security and social welfare services;
- (ii) identify various obligations flowing from the right to social security;
- (iii) determine the extent to which the legal framework responds to the needs of the elderly in South Africa;
- (iv) identify the social programmes that have led or may lead to poverty alleviation and policy issues that enhance or constrain the development and implementation of social programmes in the Nkonkobe Municipality; and

- (v) make tentative recommendations for policy and legislative interventions.

1.5 Research Questions

The research questions are:

- (i) Is the right to social security and social assistance adequately protected by the South African Constitution, legislation and policies?
- (ii) What are the various obligations flowing from the right to social security and social assistance?
- (iii) To what extent is lack of access to resources or poor social service delivery a limitation of the right of older persons to social security and social assistance?
- (iv) Are existing programmes for the elderly adequately and properly implemented?
- (v) What measures must the government take in order to ensure that the elderly fully enjoy their right to social security, and conversely, protect them against the violation of their social security rights?

1.6 Rationale of the study

The study is inspired by the need to address the vulnerability of older persons and the social problems that they face in the Eastern Cape. It will examine the adequacy and effectiveness of policy and legislative frameworks intended to ameliorate the social conditions of the elderly. Older persons do not have an income to support themselves, or other means to ease the plight of the increasing number of children orphaned by HIV/AIDS who are placed under their care.

The SAHRC identified poverty, unemployment, social exclusion and the HIV/AIDS pandemic as challenges that are fundamental for the realisation of the right to social security. The SAHRC report also noted that the delivery of social services has not been efficiently effected in some parts of the country.¹⁰⁶ In the Eastern Cape Province, the vulnerability and neglect of the elderly people is most severe and this has exacerbated their plight. The Department of Social Development has been struggling to provide an efficient and timeous service to its beneficiaries. At the same time, it has also been challenged on many occasions for terminating social grants (old age, disability and child-support grants) to thousands of beneficiaries or compelling them to re-apply in order to establish their eligibility.

The fundamental right to social security and social assistance of aged people is protected both internationally and nationally by appropriate human rights instruments and laws.¹⁰⁷ Human rights law plays an important role in protecting the rights of individuals.¹⁰⁸ It is the aim of this study to bring into light the legal rights of people, more in particular, the aged. It will be shown that respect for human rights reduces poverty and acknowledges the dignity of every person.

The study adopts a human rights-based approach. A human rights-based approach is grounded on freedom, equality and human dignity.¹⁰⁹ The aforesaid approach justifies legitimate claims to such rights, based on the fact that the realization of these rights is an important goal in itself. One of the most important

¹⁰⁶ SAHRC, The Social Security, 5th Economic and Social Right Report Series 2002/2003 Financial Year, June 2004.

¹⁰⁷ "ICESCR" *op cit* note 97, UDHR *op cit* note 99, etc.

¹⁰⁸ Drzewiski, K 'Internationalization of Human Rights and Their Juridization' in Hanski R, & Suski, M (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (1997) 28.

¹⁰⁹ Declaration of Philadelphia, preamble to ILO official bulletin, 1944. The Declaration proclaims that "all human beings have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."

characteristic of a human rights-based approach is that every human being is a right-holder and that every human right has a corresponding duty-bearer.¹¹⁰ In a human rights-based approach, we can identify rights-holders and their entitlements and the corresponding duty bearers and their obligations, and this strengthens the capacity of right holders to make claims, and the duty bearers to meet their obligations.¹¹¹ According to Twomey, a human rights-based approach ensures that human rights are a centre of reference in policy-making decisions; it requires the integration of minimum standards into all plans, policies, budgets, and institutions.¹¹² He asserts further that in the context of poverty reduction, a rights-based approach does not only stop at requiring that strategies and goals be explicit but also that the strategies identified be applied with the participation of the poor.¹¹³

This approach has many complexities as there are many factors that increase the uncertainty with regard to the precise content of the obligations. This research is aimed at fulfilling this need in the area of the right to social security and social assistance. Identifying the nature and content of the rights to social security and the nature of the obligations that it imposes is useful for strengthening the implementation of the right. For this reason, the government needs to know what is it that it is obliged to do in order to comply with its duties and obligations. A clear understanding of the right will also make it easier to identify and deal with the violation of such rights. Similarly, in order to enhance the protection of the right to social security and social assistance, it is necessary

¹¹⁰ Drzewiski *op cit* note 108, 49.

¹¹¹ UNICEF 'The Human Rights Based-Approach: Statement of understanding,' 92, available at www.unicef.org/sowc04/files/AnnexB.pdf

¹¹² Twomey P 'Human Rights-Based Approach to Development: Towards Accountability' in Baderin, A.M. & McCorquodale R (Eds) *Economic, Social and Cultural Rights in Action* (2007), 49.

¹¹³ *Ibid.*

to clarify the normative content of the right to social security and to identify the obligations that flow from it.

This study will also generate new knowledge that may fill the gap that exists regarding the content, scope and protection of the right to social security. It is hoped that in the end the right to social security and social assistance would achieve its objective of alleviating poverty and ensuring that people live their lives in dignity.

The recommendations from the study will provide a sound basis for effective planning aimed at improving the well-being of older persons. The study will also make a contribution to the debate regarding the policies that best promote and protect the interest, and cater for the needs, of older persons in the country. The need for such policies is very important given the rate at which the population is aging in South Africa. It is also hoped that the study will enable policy-makers to address the issue of vulnerability and poverty of elderly people.

The link between social security and human rights law signifies that human rights law may provide an invaluable instrument in the protection of the rights of elderly people. The protection offered by human rights law is crucial for addressing the poverty and other social problems faced by the elderly. The application and enforcement of socio-economic rights in general has been researched by scholars to such an extent that a large amount of literature is already available. However, the literature on the content, scope and protection of the right of elderly people to have access to social security is limited.¹¹⁴ This study intends to fill this gap.

¹¹⁴ See Olivier, MP 'The concept of social security' in Olivier, MP, Smit, N, Kalula, ER and Mhone GCZ (eds) *Introduction to Social Security Law* (2005) 20. Liffman, R, Mlalazi, B, Moore, V, Ogunronbi, S & Olivier MP 'Those Who Have and Those Who Don't. An Investigation into the Limited Scope and Application of Social Security in South Africa' (2002) 4 *Law, Democracy & Development* 15, 23.

Finally, the research may be used to challenge policy actions and programmes that are inappropriate or those that hinder the proper realization of the right to social assistance as provided by the Constitution.

1.7 Research Approach

There are two research approaches, namely, the qualitative and quantitative methods.¹¹⁵ The research adopts both the qualitative and quantitative method of collecting data. Barbie and Mouton explain that qualitative research refers to “that generic research approach in social science according to which research takes its departure point as the insider perspective on social action.” Valandez and Bamberger¹¹⁶ justify the use of a qualitative methodology as follows:

Qualitative methods can also be justified on ethical grounds. Because many programmes produce major changes in the lives of the population (not all of which are positive), planners have a moral obligation to understand how people feel about these programmes and how they affect them. Not to try to understand the point of view of a community resident (who will perhaps suffer if the project does not go as expected) is tantamount to ignoring democratic principles of social participation. Although quantitative methods can describe some of the behavioral changes that occur; they usually cannot reveal how people feel about these changes. Direct face to face contact with the affected population may often be the best way to find out.

¹¹⁵ Barbie, E and Mouton, J *The practice of social research* (2006) 53.

¹¹⁶ Valandez, J and Bamberger, M *Monitoring and Evaluating Social Programmes in Developing Countries: A Handbook for Policymakers, Managers and Researchers* (1994) 331.

On the other hand, quantitative approach involves a number of related themes which include:¹¹⁷

- An emphasis on the quantification of constructs. The quantitative researcher believes that the best or the only way of measuring the properties of phenomena (e.g. the attitudes of individuals towards certain topics) is through quantitative measurement, i.e. assigning a number to the perceived qualities of things.
- A related topic concerns the central role of variables in describing and analysing human behavior. In some circles, this has become known as variable analysis.
- The central role afforded to control sources of error in the research process. The nature of the control is either through experimental control (in experimental designs) or through statistical controls (in multivariate analyses).¹¹⁸

For this purpose, the qualitative and quantitative approaches will enable the researcher to explore and identify the protection offered to the elderly by the South African social security system as a whole. The researcher reviewed literature to obtain insights of social security and the plight of the elderly. Personal interviews and structured questionnaires were used as well as focus group discussions with participants in order to obtain the required information.

1.7.1 Research population

The study was conducted in the Nkonkobe Municipality, which covers the following areas: Alice, Fort Beaufort, Hogsback, Middle drift, Balfour, and Seymour. The Nkonkobe municipality falls within the Amathole District Municipality, which is one of the seven district municipalities in the Eastern Cape Province. The Amathole District Municipality has the largest number of people in

¹¹⁷ Barbie and Mouton, *op cit* note 115, 49.

¹¹⁸ Ibid.

the province, with an estimated population of 1 657, 373 in 1999. This translates to 91% Africans, 3% coloured and 5% whites. This will be detailed further in Chapter Seven below.

1.7.2 Sampling

The Nkonkobe municipality is selected for the sake of convenience and knowledge of the area by the researcher. It is visibly one of the poorest municipalities in the Amathole District. The researcher has been around the area constituting this municipality for more than 30 years and she is employed by the University which is located in the same area. Basic interviews were conducted with key informants. These included managers, social workers, municipal officers and councilors. The data for older persons was collected from a representative sample of persons aged 60 years and above. The sample was selected to be representative of 21 wards in Nkonkobe Municipality. The sample size is 180. Visiting points in each area were chosen randomly.

1.7.3 Data Collection

Literature study, interviews, focus groups and discussions were employed as methods of data collection. The research involved a comprehensive study of international as well as national literature in the field of human rights and social security. The European social security system as well as the African system was used to give a comparative perspective, and in particular, as indicative of the standards derived from international instruments. The literature study entailed the use of various library sources and electronic library facilities to acquire relevant information. National literature comprised both published and unpublished documents on various aspects pertaining to the South African human rights and social security law. Documentary information on the number

of monthly applicants and old age beneficiaries was obtained. The statistical information for fraud cases and budgets for the province was also obtained.

The data was collected from a representative of the 21 different wards in the Nkonkobe Municipality. Interviews were also conducted with officials of the department of South African Social Security Agency (SASSA), social workers from the Department of Social Development and community members from NGO's representing older persons in order to gather information related to social security and social assistance and the existing programs concerning older persons. Three different sets of questionnaires were designed for those receiving pension and those who are eligible but have not applied for pension. Two questionnaires were developed for welfare officials from SASSA and social workers. One set of questionnaire was developed for municipal councillors. The questionnaires were piloted in Alice and the final questionnaires were administered in all the areas.

A total of two hundred and two (202) questionnaires were administered in the Nkonkobe local municipality. One hundred and sixty seven (167) questionnaires were administered to pensioners, and twenty one (21) questionnaires administered to municipal councilors. Three (3) questionnaires were administered to SASSA officials and one (1) to social welfare department official.

Two (2) focus group discussions were held with municipal councillors at Nkonkobe Municipality. The latter are responsible for ensuring that services are delivered to the community. The former had ten (10) participants while the latter had eleven (11). The focus group method was employed to learn how the respondents talk about issues and policies that inform them. Focus group interviewing is described by Terre Blanche and Durrheim,¹¹⁹ as:

¹¹⁹ Terreblanche, M and Durreim, K *Research in Practice: Applied methods for Social sciences* (1999) 388.

A general term given to a research interview conducted with a group. A focus group is typically a group of people who share a similar type of experience, but that is not 'naturally' constituted as an existing social group.

Participants were asked by the interviewer to reflect on certain questions.¹²⁰ The idea behind the group discussion was to enable the participants to express and clarify their views. The focus group method was relevant for this study since sensitive issues were discussed.

Basic interviews were conducted with key informants. These covered central issues regarding the implementation, distribution and delivery of social services. Interviewing is regarded as a two-way conversation initiated by the interviewer for the specific purpose of obtaining relevant research information.¹²¹ Babbie and Mouton describes a qualitative interview as:

...an interaction between an interviewer and a respondent in which an interviewer has a general plan of inquiry but not a specific set of questions that must be asked in particular words and in a particular order. A qualitative interview is essentially a conversation in which the interviewer establishes a general direction for the conversation and pursues specific topics raised by the respondent. Ideally, the respondent does most of the talking.¹²²

1.7.4 Data analysis

In analysing the data the researcher labelled the audio tapes and coded the transcribed interviews. This enables the researcher to keep the data intact,

¹²⁰ Patton, MQ *Qualitative evaluation and research methods* (1990) 335.

¹²¹ Rembe, SW *The Politics of Transformation in South Africa: An evaluation of Education policies and their implementation with particular reference to the Eastern Cape Province*. An unpublished doctoral thesis (2005) 101.

¹²² Babbie and Morton *op cit* note 115, 289.

organised and accessible. The data was managed through organising files and converting them to appropriate stories. The researcher then transcribed the tapes and translated IsiXhosa into English.

The results of the data analysed are presented in Chapter Seven of the thesis where the results are interpreted and discussed. The data was analysed by way of a statistical package SPSS. The analysis was done by comparing the means of different measures of the standard of living of elderly persons according to gender, age and marital status.

1.8 Research ethics



The principles of research ethics were followed in this study. Ethics concerns values and the trustworthiness of researchers and the research they produce. To comply with ethical standards, participants were informed about the purpose of collecting information from them.¹²³ Confidentiality has been maintained in order to gain trust from the respondents. After being informed of the purposes they voluntarily gave their consent to supply the information. After the participants were informed about the purpose of the study, each one was asked if he / she wished to participate in the research study before proceeding with the interviews. They were assured that everything that they said during the study will be kept confidential. In order to ensure anonymity the names of the participants quoted in the study were changed. The end result will also be shared with them so that it can serve as a source of education, information and an instrument to fight for the betterment of the quality of their lives.

The importance of this study is premised on the advancement of the right to social security and social assistance that would ensure the advancement of the interest of the elderly people. Therefore, this study will strive to emphasize the

¹²³ See Bassey, M *Creating education through research*, (1995) 15.

importance of respecting human dignity and preserving the rights of the elderly and the poor. The Constitution of the Republic of South Africa enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.¹²⁴

1.9 Significance of the study

The South African Constitution of 1996 is regarded as a democratic constitution committed to both social justice and fundamental human rights.¹²⁵ The significance of the study can be appreciated from a theoretical and a practical standpoint. Basically, the study will contribute to a theoretical enhancement of the current level of knowledge on the existing literature on the right to social security. The significance of this study is premised on the provision of the right to social security in order to ensure the advancement of the interest of the elderly people. It is the aim of this study to highlight how human rights law plays a crucial role in the protection and promotion of the rights of elderly, and therefore ensure that their dignity is respected.

This study will also generate new knowledge that may fill the gaps that exist in various legal instruments in South Africa and elsewhere regarding the content, scope and the protection of the right to social security. It is hoped that the right to social security and social assistance, if properly implemented, would achieve its objective of alleviating poverty and ensuring that older persons live their lives in dignity. The recommendations from this study will provide a sound basis for effective planning and implementation of policies and legislation aimed at improving the well-being of older persons in general and in the Nkonkobe Municipality in particular.

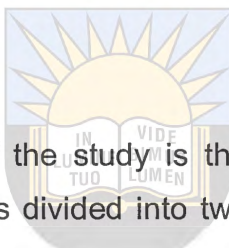
¹²⁴ See section 1 of the 1996 Constitution.

¹²⁵ See the Preamble to the 1996 Constitution.

1.10 Delimitation of the study

The study is limited to the South African context and it focuses on Nkonkobe municipality in the Eastern Cape Province. The study is limited to these areas: Alice, Fort Beaufort, Hogsburg, Middle drift and Seymour which fall within the Nkonkobe municipality. The selection of the Nkonkobe municipality as a research site naturally brings forth many limitation as far as generalization of the results of the study is concerned.

1.11 Limitations of the study



One of the major limitations of the study is the geographically spread of the Municipality. The Municipality is divided into twenty one (21) wards with many villages in a ward. It proved difficult to conduct interviews in each of the villages. Coloured townships could not be accessed due to the fact that the researchers needed to be escorted to enter such areas. Similarly, the researchers could not reach other rural areas because she faced hostility from the village headmen. The reason was that the government has made certain promises which were unfulfilled, and therefore they distasted anything that appeared to be close to the government. Although the researcher took time to explain the purpose of the research and that she did not agree with or necessarily share the views of the government, they still refused her to enter into the village.

Obtaining the necessary documents and information from the SASSA offices proved to be time consuming. Some officials at the welfare offices declined to be interviewed citing confidentiality and referred the researcher to the regional and district offices. Some refused to provide information claiming that they do not posses sufficient knowledge on the subject matter and this caused some delays.

1.12 Organisation of the study

The study is organised under eight chapters. Chapter One is an orientation to the background of the study. It covers the background to the study, the statement of the problem, the aims and objectives of the study, the research questions and justification for the study, the methodology used, limitations and organisation of the study.

Chapter Two provides an overview of how social security is defined and provided. Defining key concepts is significant in order to provide common understanding of the usage of these concepts in the context of the research. Theoretical perspective on the approaches to the right to social security is vast. The legal definition is provided in order to give meaning to the terms such as social security, social protection, social assistance, comprehensive social protection and social insurance.

Chapter Three deals with the development of socio-economic rights generally. It attempts to explain the nature and the development of the right to social security, from both national and international contexts.

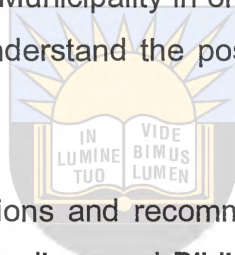
Chapter Four presents relevant international human rights instruments pertaining to social security and social assistance. The interpretation of the right to social security is also highlighted.

Chapter Five explores the right to social security and social assistance provided under section 27(1) (c) of the Constitution and the nature of the obligations attached to it. In this regard, the South Africa's legislative framework on social security, policies, legislation and case law is discussed. The chapter also looks at the policy framework and programmes available for social security. An attempt is also made to discuss the protected interests of the right to social security in South Africa.

Chapter Six considers the scope of the right to social security. It examines the structure and coverage of the social security system, and analyses in detail social assistance delivery mechanisms.

The findings of the research are presented in Chapter Seven. It is based on fieldwork that was carried out between 2007 and 2008 in rural and urban areas of Nkonkobe Municipality in the Eastern Cape Province of South Africa. The Chapter begins with an analysis of older persons followed by a discussion of important features of Nkonkobe Municipality in order to provide a background for the thesis. This helps us to understand the position of older persons and the situation that they live in.

Chapter Eight provides conclusions and recommendations emanating from the study. This is followed by Appendices and Bibliography of the sources used in the thesis.



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CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

The purpose of this Chapter is to provide a conceptual and theoretical framework that will apply in the context of this study. In order to understand certain concepts, it is important to offer some definitions that will elaborate the context in which they apply. This is crucial, perhaps in view of the challenges that social security system is confronted with today. The right to social security has become a centre of debates in recent years. It is one of the most important major themes of social protection which involves participation of different stakeholders. The literature on social security offers a number of different definitions which necessitates clarity. This Chapter will give an overview of the concept and discuss different approaches to it. First, the concept of the right to social security will be discussed, followed by an analysis of related concepts, lastly discussion of the human-rights-based-approach.

2.2 Conceptualization of the Right to Social Security

2.2.1 The Concept of Social Security

The literature on social security offers various definitions of the concept. In all the definitions provided none has been adopted universally.¹²⁶ Social security

¹²⁶ See Midgley, J *Social Security Inequality and the Third World* (1984) 81. See also Van Rensburg, J & Lamarche, L 'The Right to Social Security and assistance' in Brand, D, and Heyns, C (Eds) *Socio-economic Rights in South Africa* (2005) 210. Moore, V 'The Concept of Social Security' in Olivier, MP, Okpaluba, MC, Smit, N, & Thompson, M *Social Security Law: General Principles* (1999) 9.

has not been defined in the International Labour Organisation Convention (ILO) that specifically deals with social security.¹²⁷ Instead, the concept has been defined in one of its publications entitled 'Introduction to Social Security' published in 1942.¹²⁸ It defined social security in terms of protection against certain risks. The ILO views social security as follows:

The protection which society provides for its members through a series of public measures, against the economic and social distress that otherwise would 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 with children.¹²⁹

This definition by the ILO distinguishes between various contingencies and risks of social security according to their occurrence.¹³⁰ The ILO Convention applies to all contingencies recognised by legislation: a condition requiring medical treatment; incapacity for work arising from sickness; unemployment; old age; employment injury or occupational diseases; dependent children; maternity; invalidity; and the death of a breadwinner.

Although social security is not properly defined in South African legislation, it is accepted that social security should be understood widely so that the aims of

¹²⁷ International Labour Organisation Social Security (Minimum Standards) Convention No. 102 of 1952, adopted 28 June 1952, [hereinafter "ILO Convention 102". Available at <http://www.ilo.org/ilolex/english/convdispl.htm>. In this Convention social security schemes are divided into nine branches: they include provision of medical care, sickness benefit, unemployment benefit, old age benefit, employment benefit, family benefit, maternity benefit, invalidity benefit; and survivors benefit.

¹²⁸ Midgley *op cit* note 126, 81.

¹²⁹ International Labour Organization *Introduction to Social Security* (1984) 3-5.

¹³⁰ The ILO Convention applies to all contingencies recognised by legislation: a condition requiring medical treatment; incapacity for work arising from sickness, unemployment, old age, employment injury, occupational diseases; dependent children; maternity; invalidity and the death of a breadwinner. ILO Convention 102 *op cit* note 127.

each scheme can be included.¹³¹ South African policy documents and writers reveal that the government has a broader understanding of what is entailed by the concept of social security.¹³² In this respect, the White Paper views social security as:

[covering] a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are poverty prevention, poverty alleviation, social compensation and income distribution.¹³³

Others view social security not only as encapsulating social risks but rather as policy instruments that try to elaborate on a certain aim.¹³⁴ Moore maintains that:

Social security then refers to the set of policy instruments that is set up to compensate for the financial consequences of a number of social contingencies or risks. It can also be argued that social security should also refer to actions that are aimed at preventing the contingencies or risks from occurring.

The right to social security has been defined by some in terms of its aims and objectives.¹³⁵ Social security has been accepted as a policy aspect throughout the developed and developing nations.¹³⁶ According to some scholars, the term social security refers to measures of protection afforded to needy individuals in

¹³¹ Moore *op cit* note 126, 7.

¹³² Strydom *et al op cit* note 35, 23.

¹³³ White Paper *op cit* note 15.

¹³⁴ Ibid.

¹³⁵ South African Human Rights Commission (SAHRC) *The Right to Social Security* 5th Economic and Social Rights Report Series 2002/2003 (21 June 2004) 4.

¹³⁶ Moore *op cit* note 126, 7.

order to cover all their contingencies of life. Van Ginneken asserts that social security could be defined as a protection offered to individuals and households as a means of ensuring that all those who are poor have access to a basic minimum income in order to meet their basic needs, particularly in cases of old age and other contingencies.¹³⁷ Van Rensburg and Lamarche, on the other hand, view social assistance and social security as 'different means of promoting the ultimate goal of social protection'.¹³⁸

Olowu describes social security as a protection offered to an individual by society against certain social risks of life.¹³⁹ According to Riedel, social security uses both social insurance and social assistance schemes to guarantee a constant and above-minimum standard of living, and hedges against incapacity to work.¹⁴⁰

Since social insurance is linked to employment, this means that when an individual is unemployed, social assistance will come into play in order to prevent people from being rendered destitute.¹⁴¹ It is clear from the above definitions that social assistance forms part of social security. This is also in line with the definition offered by the ILO.¹⁴² Kulke states:

¹³⁷ Van Ginneken, W 'Social Security and the Global socio-economic floor: Towards a Human Rights-Based Approach' *Global Social Policy* 2009, 9, 228, 229. Available at <http://gsp.sagepub.com/cgi/content/refs/9/2/228>, 229. See also Olivier *et al op cit* note 15, 20, 21.

¹³⁸ Janseen van Rensburg & Lamarche, *op cit* note 25, 210. According to Lamarche, the ultimate goal of social security is 'the maintenance or protection of a decent standard of living in all cases where personal or economic conditions make it impossible to rely on individual initiatives'.

¹³⁹ Olowu *op cit* note 30, 70-71. He invokes the principle of solidarity, meaning that society as a whole is responsible for its citizens.

¹⁴⁰ Riedel A, *The Right to Social Security* (2006), 21.

¹⁴¹ *Ibid.*

¹⁴² Kulke, U 'The present and future role of ILO standards in realizing the right to social security' Vol. 60 No 2-3 (2007) *International Social Security Review* Extending Social Security to all, 119, 125.

... it clearly appears that social security, as defined within the ILO framework, does include social assistance. This approach is strengthened by the formulation of the Income Security Recommendation, 1944 (No. 67), and the Medical Care Recommendation, 1944 (No. 69), adopted by the International labour Conference. In addition, the requirement of Social Security (Minimum Standards) Convention, 1952 (No. 102), which constitutes the cornerstone of ILO standard-setting in the field of social security, unquestionable point to that direction. First, the Convention's provisions setting out the coverage requirements under the various branches of social security leave to the ratifying State the possibility of providing benefits following the occurrence of most contingencies, with the exclusion of employment injury and maternity benefits, to all residents whose means during the contingency do not exceed a certain level. Furthermore, Article 71 of the Convention leaves open the option that the costs, both of the benefits provided under the Convention and of their administration, be borne collectively by way of taxation.¹⁴³

The ILO envisages social security as “a set of rights and rules based payments, dealing with a full range of social needs”.¹⁴⁴ In other words, social security is an instrument that is designed to ensure social justice and economic wellbeing. The ILO definition has been criticised by some scholars for being too narrow, for failing to include social assistance in the definition of social security, and also for placing more emphasis on formal employment which focus on social insurance. Mpedi, views the definition offered by ILO as very problematic in many respects. He states:¹⁴⁵

Firstly, it associates itself strongly with formal employment – something which is not readily available for millions of South Africans. Secondly, social security as conceptualized in the social security (Minimum) Standards Convention is too

¹⁴³ Ibid.

¹⁴⁴ ILO ‘Social Security for all: Investing in global social and economic development’ *A Consultation Discussion Paper* 16 August 2006 7.

¹⁴⁵ Mpedi LG ‘Pertinent social security issues in South Africa’ *Socio-economic rights Project Research Series* 4 (2008) 6.

narrow for a developing country's context. Social security in developing countries, such as South Africa, should also strive towards the provision of basic needs such as shelter, nutrition, adequate health care, clean water and not only be concerned with cash benefits. Thirdly, the traditional approach does not capture particular risks to which many people in the developing world are exposed – such as political and natural disasters and calamities. These needs and risks extend beyond the initial ILO's nine classical risks which are generally catered for by means of social insurance and social assistance. Another oversight in this definition is that it only refers to 'public measures' and, therefore, excludes informal and private measures. Finally, social security is not merely curative (in the sense of providing compensation) but also preventative and remedial in nature."

Olivier for example, suggests that one should refrain from defining social security too narrowly.¹⁴⁶ According to Guhan, social security for poor countries has to be viewed as part of anti-poverty policies.¹⁴⁷ This suggests that the definition should be widened. This poses a question as what should be covered in the wider definition? Liebenberg asserts that social security includes both the contributory forms of social insurance and needs-based social assistance.¹⁴⁸ She argues that in modern social security system there is no division between the contributory and non-contributory social security schemes. Therefore, what is best is to give social security a wide definition which encompasses both types of social security.¹⁴⁹ Barker and Holtzhausen¹⁵⁰ view social security as:

¹⁴⁶ Olivier *op cit* note 15. See also Moore 'The Concept of Social Security' in Olivier *et al op cit* note 126, 11.

¹⁴⁷ Guhan S 'Social security options for Developing Countries' in *International Labour Review* (1994) Vol 133 No 1, 35-53.

¹⁴⁸ Liebenberg, S 'The right to social security: Response from a South African perspective' in Brand, D & Russell S (Eds) *Exploring the core content of Socio-economic rights: South African and International perspectives* (2002) 146, 154.

¹⁴⁹ Liebenberg, S 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project UWC* 1 (Liebenberg children's Rights).

¹⁵⁰ Barker, F and Holtzhausen, M *South African Labour Glossary* (1996) 138.

A system of social assistance by the state, granted to people in need when their normal source of income has been interrupted or ended (for example through sickness, unemployment or retirement). It could entail assistance to certain disadvantaged groups (for instance the handicapped, the families of deceased workers or people suffering from industrial injuries), or supplementing the incomes of pensioners. It could also include social insurance schemes but in a more strict sense of the word it refers to assistance schemes financed from taxation.

According to Franz and Keebet von Benda-Beckmann,¹⁵¹ a wider definition of social security would include all institutions that provide members of society who are not in a position to care for themselves with food, housing, health care, education and protection by way of social assistance. We agree with this view because it embraces a system of social protection. Although both the ILO and the White Paper interpret social security to include the notion of social protection, this study feels that there is more need to be done in order to offer full protection.

It has been said that social security encapsulates social insurance, social assistance, social services and developmental strategies.¹⁵² However, some of the definitions still leave out the vast majority of the population, especially those in the rural and in the informal sector. Therefore, a clear cut definition is needed which will not ignore the role of social assistance as a source of income maintenance. It is common knowledge that the vast majority of South Africans live in the rural areas where they struggle to make ends meet, and therefore access to social security is crucial. They also face very high unemployment rate. It is for these reasons that the study favours a wider and elaborated definition of social security which would embrace what has been stated above. It

¹⁵¹ von Benda-Beckmann, F and von Benda-Beckmann, K 'Rural Populations, Social Security and Legal Pluralism in the Central Moluccas of Eastern Indonesia' in Dixon J and Scheurell RP (eds) *Social Security Programmes: A Cross-cultural perspective* (1995) 79.

¹⁵² Ministerial Committee on *Abuse, Neglect and Ill-Treatment of Older persons, Mothers and fathers of the Nation: The Forgotten People* (2001).

is also important to emphasise that social security is related to social welfare and social development. The unique focus of social security is on the prevention and alleviation of poverty.

While there is no clear approach to the concept of social security, the provisions of the South African Constitutional appear to view social insurance and social assistance as forming part of social security. The Constitution protects the rights of everyone to have access to social security and appropriate social assistance if they are unable to protect themselves and their dependents.¹⁵³

According to Dixon, the domains of social security includes: poverty prevention, poverty alleviation, social compensation and income redistribution.¹⁵⁴ The South African White Paper on social welfare also recognises the domains of social security to include poverty prevention, rehabilitation, poverty alleviation, social compensation, income distribution and the maintenance of a basic standard of living.¹⁵⁵ There is an agreement that social security is the most important tool for poverty alleviation; it ensures a basic minimum standard of living for people whose income has ceased or is disrupted, and it contributes to their development.¹⁵⁶ According to Mohamed, poverty alleviation involves strategies for curbing unemployment, reduction of inequalities in income and wealth as well as increasing the productivity of the poor.¹⁵⁷ The major strategies that have been

¹⁵³ For example, see section 27(1) (c) of the Constitution.

¹⁵⁴ Dixon J *Social Security Traditions and their Global Applications* (1986) 1.

¹⁵⁵ White Paper *op cit* note 15, 1.

¹⁵⁶ Liebenberg S and Tilley A 'Poverty and Inequality Hearings Social Security Themes' (1998), 3.

¹⁵⁷ Chole E 'Introduction: What is Social Development?' in Mohammed R *Social Development in Africa: Strategies, Policies and Programmes after the Lagos Plan* ACARTSOD Monograph Series African Social Challenges, 4 (1991), 10.

identified involve social assistance, social insurance and social allowance.¹⁵⁸ These are discussed below.

2.2.1.1 Social Assistance

The ILO defines social assistance as a service or scheme which 'provides benefits to persons of small means granted as of right in amounts sufficient to meet minimum standards of need and financed from taxation.'¹⁵⁹ The definition put an emphasis on three distinctive features of social assistance:

Firstly, it is non-contributory, regulated through legislation, financed through taxes and is restricted to those who qualify in terms of a means test.

Secondly, the social assistance provided to an individual takes the form of cash. It is financed through public revenue.

Thirdly, since these schemes have a legislative basis there is a right to entitlement; once assessed as qualifying for assistance, applicants have a legal right to social assistance.¹⁶⁰ Social assistance is governed by a set of rules and regulations which governs the level of payments, the ground for awarding benefits, its duration and other conditions pertinent to it. Social assistance provides assistance in the form of the various grants outlined above.¹⁶¹ Social assistance schemes differ in type, level, and duration of benefits. For example, sometimes benefits are paid on a temporary basis while on the other side they are permanent.

¹⁵⁸ Dixon *op cit* note 154. See also Mpedi *op cit* note 145, 8.

¹⁵⁹ Dixon *op cit* note 154.

¹⁶⁰ See Social Assistance Act, of 2004, section 27 of the 1996 Constitution, and South African Social Security Agency Act of 2004.

¹⁶¹ See Chapter One, para 1.2 from note 57- 62.

2.2.1.2 Social Insurance

Moore defines social insurance as:

Insurance administered by the state to give the wage earner and his or her dependants a minimum income during periods when his or her earnings are impaired or cut through conditions largely beyond his or her control. It can be distinguished from social security in that it is normally confined to employees and is financed fully or in part from contributions by those entitled to benefits.¹⁶²

Social insurance is a contributory and risk-based scheme giving rise to fixed benefit payments aimed at income maintenance.¹⁶³ It is designed to protect members and their families against risks. These risks are known as contingencies. These contingencies are specified in the ILO Social Security (Minimum Standards) Convention of 1952. All the nine contingencies are covered in this Convention. Benefits awarded under the scheme usually cover medical aid schemes, life insurance, and pension funds. Social insurance caters only for those in formal employment and benefits are restricted to members of the scheme and their dependents.¹⁶⁴

2.2.1.3 Social Allowances

Social allowances are paid to everyone irrespective of the beneficiary's income or assets and are funded from government revenues.¹⁶⁵ Social allowance is intended to compensate individuals.¹⁶⁶ There are conditions attached to social

¹⁶² Moore *op cit* note 126, 11.

¹⁶³ Dixon *op cit* note 154, 4.

¹⁶⁴ See Olivier, MP & Kalula ER 'Legal framework and scope of coverage' in Olivier *et al* *Introduction to Social Security* (2005), 36-37.

¹⁶⁵ See Midgley, J. *Social Security, Inequality and the Third World* (1984), 82.

¹⁶⁶ Mpedi *op cit* note 145, 8.

allowance and they are covered in a relevant legislation which designates the categories of beneficiaries to be included in the scheme.¹⁶⁷ Social allowance schemes are governed by the principle that those who are in need should be assisted irrespective of their income or assets. According to Midgley, due to its nature, social allowance may be viewed as a form of compensation paid by the state to those who face additional demands, whether they have resources or not.¹⁶⁸ This is the situation in other countries in the SADC region, such as Botswana. Social allowances in Botswana are universal payments made to a certain category of persons who are in exceptional need.¹⁶⁹

2.2.2 Other Related Concepts

2.2.2.1 Social Protection



Social protection is characterized as a broader concept which embraces social security and is directed towards the reduction of social risks and human damage by “increasing capabilities and opportunities”.¹⁷⁰ According to the Asian Development Bank, social protection entails “policies and programs 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 interruption/loss of income”.¹⁷¹

¹⁶⁷ Ibid.

¹⁶⁸ Midgley *op cit* note 165, 101.

¹⁶⁹ Ntseane D and Solo K *Social Security and Social Protection in Botswana* (2007), 26.

¹⁷⁰ Mpedi *op cit* note 145, 7.

¹⁷¹ Asian Development Bank *Social Protection Index for Committed Poverty Reduction* (2008) volume 2. Available at <http://www.adb.org/Documents/Books/Social-Protection/volume2/Part1.pdf>

2.1.2.2 Comprehensive social protection

The Committee of inquiry into social security in South Africa expanded the social security system to include those people who are excluded from the ambit of the present social security system. The Taylor Report defined Comprehensive Social protection as follows:

Comprehensive social protection for South Africa to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. 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 standards of all citizens. It embraces the traditional measures of social insurances, 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.¹⁷²

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2.2.2.2 Indirect Social Security

According to Mpedi, indirect social security refers to:

Those services [such as those relating to the provision of food and nutrition, water and sanitation, housing, basic education and energy] that are not part of direct or traditional social security, but are nonetheless crucial in preventing human damage and imperative in aiding human beings in living dignified lives.¹⁷³

¹⁷² Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the future to the present – protecting the future* (2002) 41.

¹⁷³ Mpedi LG 'Indirect social security' in Olivier *et al Introduction to Social Security* (2004) 101.

Indirect social security contingencies involve the provision for clean environment, land, housing, food and nutrition, water and sanitation, education, transport, energy and communication.¹⁷⁴

2.2.2.3 Integrated and inclusive framework for Social Protection

Kaseke suggested that provision should be made for an integrated and inclusive framework for social protection.¹⁷⁵ He suggested the establishment of social assistance schemes where such schemes do not exist, and their improvement where they exist. In order to fulfill this challenge, the government should put priority on the release of resources to sustain social assistance.¹⁷⁶ The government should also create awareness among the beneficiaries of social assistance, both on the existence and accessibility of social assistance schemes. The author further proposes that social assistance schemes should be linked to poverty alleviation strategy.¹⁷⁷

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2.2.3 Definition of Elderly Persons

Defining 'old age' or the 'elderly' is very difficult because there are many things which are associated with 'being old'. The literature suggests that being old can occur at different chronological ages as determined by the prevalent socio-cultural milieu, or even by the specific context of sub-groups within society.¹⁷⁸

¹⁷⁴ Ibid, 103-108.

¹⁷⁵ Kaseke A 'Social Protection in SADC: Developing an integrated and inclusive framework – A Social Policy Perspective' in Olivier MP and Kalula ER *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (2004) 10.

¹⁷⁶ Ibid.

¹⁷⁷ Kaseke *op cit* note 175, 10.

¹⁷⁸ May *op cit* note 83, 3.

According to May,¹⁷⁹ economic structures also play a crucial role in determining when old age starts. In most developed countries, 65 years is accepted as the threshold defining the transition into old age. However, the situation may not be the same in many traditional societies. For example, an individual goes through a series of recognized stages from the moment of birth to old age.¹⁸⁰ Rwezaura argues that whether we wish to define the elderly “as a non-active person who has attained retirement age that depends on the economic and social organisation of that particular society.”¹⁸¹ Furthermore, he asserts that what is important in “our understanding of the term elderly is to stress the characteristics of old age, such as physical frailty and mental dullness which often accompany sanity”.¹⁸² Accordingly all these characteristics make the elderly wholly or partially dependent upon others to provide them with care and support for the remaining period of their lives.¹⁸³

Gorman¹⁸⁴ defines old age thus:

The ageing process is of course a biological reality which has its own dynamic, largely beyond human control. However, it is also subject to the constructions by which each society makes sense of old age. In the developed world, chronological time plays a paramount role. The age of 60 or 65, roughly equivalent to retirement ages in most developed countries is said to be the beginning of old age. In many parts of the developing world, chronological time has little or no importance in the meaning of old age. Other socially constructed

¹⁷⁹ Ibid.

¹⁸⁰ Rwezaura BA ‘Changing Community obligations for the elderly in Contemporary Africa’. *Journal of Social Development in Africa* (1989) 4, 1, 5-24. Available at <http://digital.lib.msu.edu/projects/africajournals/pdfs>

¹⁸¹ Ibid, 15.

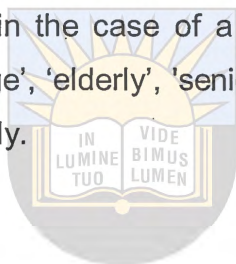
¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Gorman, M ‘Development and the rights of older people’ in Randel J et al (Eds) *The ageing and development report: poverty, independence and the World’s older people* (1999) 3-21.

meanings of age are more significant such as the roles assigned to older people; in some cases it is the loss of roles accompanying physical decline which is significant in defining old age. Thus, in contrast to the chronological milestones which mark life stages in the developed world, old age in many developing countries is seen to begin at the point when active contribution is no longer possible.¹⁸⁵

The United Nations has not adopted a standard criterion but generally uses 60+ years to refer to the older population.¹⁸⁶ On the other hand, the South African legislation defines an elderly person as “a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.”¹⁸⁷ Terms such as ‘old age’, ‘elderly’, ‘senior citizen’ and ‘the aged’ will be used in this study interchangeably.



2.3 Theoretical Framework

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2.3.1 A Human Rights-Based Approach to Social Security

The study is based on a human rights-based approach. Following international trends, South Africa entrenched the right to social security in the Bill of Rights of the 1996 Constitution, although ironically, it has not yet ratified the ICESCR. The Constitution does not make any reference to the traditional division which was made between the first, second and third generation rights.¹⁸⁸ However, it recognises the connection between positive and negative action by the state in

¹⁸⁵ Ibid.

¹⁸⁶ United Nations, *Personal correspondence*, (2001). Available at <http://www.who.int/healthinfo/survey/ageingdefnolder/en/index.html>

¹⁸⁷ The Older Persons Act No 13 of 2006. Section 10 of the Social Assistance Act of 2004 provides that:

“A person eligible for an older persons’ grant if :

(a) In the case of a women, she has attained the age of 60 years; and
(b) In the case of a man, he has attained the age of 65 years.”
(c)

¹⁸⁸ See Olivier *et al op cit* note no 15, 29.

the implementation of various rights.¹⁸⁹ The absence of any differentiation between the categories of rights clearly implies that the Constitution recognise the indivisibility, interrelatedness and interdependence of these rights. The Vienna Declaration and Programme of Action adopted by the Vienna World Conference on Human Rights in 1993, reaffirmed that the notion of interdependence and indivisibility of human rights constitutes a fundamental tenet in the field of promotion and protection of human rights.¹⁹⁰

The right to social security is guaranteed in a number of human rights instruments. Social security was accepted as a human right under the Universal Declaration of Human Rights (UDHR). Article 22 of the UDHR provides that:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his (sic) dignity and the free development of his personality.¹⁹¹

Article 25 also provides a further obligation on states and enhances the definition of social security by providing that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of

¹⁸⁹ Rautenbach, I M 'The Limitations of Rights and "Reasonableness" in the right to just administrative action and the right to access to adequate housing, health services and social security' *Tydskrif vir die Suid-Afrikaanse reg.* (2005) 4, 627-654.

¹⁹⁰ UDHR *op cit* note 99. The Vienna Declaration and Programme of Action of 1993 Distr. General A/CONF.157/23 12 July 1993 GE.93-14233 (E) Paragraph 5 of the Declaration mention that "All human rights are universal, indivisible and interdependent and interrelated."

¹⁹¹ Art 22 of UDHR *op cit* note 99.

unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

The 'right to social security' was also adopted in the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).¹⁹² Article 9 recognises the right of everyone to social security, including social insurance, while Article 11 further provides the right of everyone to an adequate standard of living, including food, clothing and housing. The Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁹³ contains a general reference to the right to social security. In terms of CERD, States parties undertake to eliminate racial discrimination in all its forms and to guarantee equality before the law, *inter alia*, in the enjoyment of the right to social security and social services.¹⁹⁴ Article 5 of the Convention provides:

In compliance with the obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(e) economic, social and cultural rights, in particular:

...

(iv) The right to public health, medical care, social security and social services.

¹⁹² ICESCR *op cit* note 97.

¹⁹³ The Convention on the Elimination of All Forms of Racial Discrimination of 1965. Adopted and opened for signature on 21 December 1965, entry into force 4 January 1969, GA Res 2106 (XX) (1965). [Hereinafter CERD].

¹⁹⁴ Art 5 of CERD *op cit* note 193.

The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) also guarantees equal rights of all women to social security.¹⁹⁵ Article 11(1) provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

...

- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work as well as the right to paid leave.¹⁹⁶

ILO instruments have been considered as the main point of reference regarding the interpretation of the right to social security. During the ILO Conference of 2001, it was affirmed that social security "is a basic human right and a fundamental means for creating social cohesion."¹⁹⁷

The international debate about the issue of socio-economic rights influenced the South African Bill of Right.¹⁹⁸ The debate in South Africa began with the justiciability of socio-economic rights but today this is no longer an issue. The protection of the right to social security in South Africa has to be seen in the context of the debate on the justiciability of socio-economic rights. During the drafting of the Constitution, the South African Human Rights Commission opposed the inclusion of socio-economic rights in the Constitution. It was argued

¹⁹⁵ Convention on the Elimination of All forms of Discrimination Against Women of 1979, adopted on 18 December 1979, entered into force 3 September 1981, GA. Res 34/180 [hereinafter CEDAW].

¹⁹⁶ Art 11 of CEDAW *op cit* note 195.

¹⁹⁷ Resolutions and Conclusions concerning social security, International Labour Conference 89 Session of 2001.

¹⁹⁸ Seleane M *Socio-Economic Rights in the South African Constitution: Theory and Practice* (2001).

that these rights would not be enforceable and would therefore undermine the legitimacy of the Bill of Rights.¹⁹⁹ Some scholars also argued that socio-economic rights should only be included as 'directive principles' of state policy as it has been the case in India and other jurisdictions.²⁰⁰ This approach was supported by many proponents.²⁰¹

In certifying the draft text of the 1996 Constitution, the Constitutional Court pointed out that socio-economic rights in the Constitution are justiciable, even though the inclusion of these rights may have direct financial and budgetary implications.²⁰² In *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, the Court remarked:



It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.

¹⁹⁹ See De Waal, Currie I and Erasmus, G *The Bill of Rights handbook* (2003), 433.

²⁰⁰ Davis, DM 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' 8 *SAJHR* (1992) 475 – 490. See De Villiers, B 'Social and Economic Rights' in van Wyk D *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 513-537.

²⁰¹ See Brand D and Heyns C *Socio-economic Rights in South Africa* (2005), 14. See also Sachs A 'The Judicial Enforcement of socio-Economic Rights: The *Grootboom* case' in Jones, Peris and Stokke (Eds) *Democratising Development: The politics of socio-economic rights in South Africa* (2005).

²⁰² *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, 1996 paras 76 – 78.

2.3.1.1 The Interdependence Approach

The right to social security is entrenched in the Bill of Rights of the 1996 Constitution. The latter does not make any reference to the traditional division which was made between the first, second and third generation rights.²⁰³ The absence of any differentiation between the categories of rights is a recognition of their interrelatedness as reaffirmed by the Vienna Declaration.²⁰⁴ Meeting in New York in 2005, the World leaders reiterated that the universality of human rights is beyond question.²⁰⁵ They agreed that “all human rights must be treated in a fair and equal manner, on the same footing, and with the same emphasis.”²⁰⁶ Furthermore, “all States, regardless of their political, economic and cultural systems have the duty to promote and protect all human rights and fundamental freedoms.” They also agreed that “civil, political, economic, social and cultural rights including the right to development are to be enjoyed by all people.”²⁰⁷

Increasingly various scholars now view all human rights as indivisible and interdependent and that no right can be promoted or realised at the expense of others.²⁰⁸ In other words, the realisation of civil and political rights is indispensable for the realisation of economic, social and cultural rights, and vice versa. The Constitutional Court unequivocally stated that realising a particular socio-economic right, such as the right to access housing, would require that other elements of socio-economic rights, such as the right to land, must be in

²⁰³ Olivier *et al op cit* note 15, 29.

²⁰⁴ UDHR and the Vienna Declaration *op cit* note 190.

²⁰⁵ Resolution adopted by the General Assembly in 2005. UN Doc. A/RES/60/1 2005 World Summit Outcome. [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NO5/487/60/PDF](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NO5/487/60/PDF?OpenDocument). Para 119-123.

²⁰⁶ Ibid, para 120.

²⁰⁷ Ibid, para 121.

²⁰⁸ Van Ginneken *op cit* note 34, 18.

place.²⁰⁹ The Court affirmed that all the rights in the Bill of Rights are interrelated and mutually supporting and reinforcing.²¹⁰ Realising one set of rights may have a bearing on the extent to which, or the manner in which, the state has to give effect to other rights.²¹¹ Thus, the interdependence approach views civil and political rights as being inherent elements of economic, social and cultural rights and vice versa. One right cannot be protected without giving equal attention to the other and the protection of one right can and should be extended to the other.

2.3.1.2 Rights and Duties

The study is based on a human rights approach. In order to understand a rights-based approach it is necessary to explore the core values underlying a human rights system. For a human rights approach human dignity is the most important value. Academic literature defines a rights-based approach in various ways, based on legal, socio-economic and political perspectives. A rights-based approach model has its origin from the practice of Rights-Based Approaches to Development (RBA).²¹² According to O'Flaherty, this approach refers to "efforts to undertake development activities in a manner that serves to promote the human rights of the affected population." The United Nations had sought to identify core principles of RBA, in this regard, a Statement of Common

²⁰⁹ *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) para 53; *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) para 40. There are other rights which play a big role in social security these are the right to equality, the right to privacy, the right to property and the right to just administrative action.

²¹⁰ *Grootboom and Khoza*. See Olivier *et al op cit* note 15, 124.

²¹¹ In *Khoza* the court once again stressed the importance of adopting a holistic approach which takes into account the fact that all rights are interrelated, interdependent and equally important.

²¹² O'Flaherty, M 'Towards Integration of United Nations Human Rights Treaty Body Recommendations: The Rights-Based Approach Model' in Baderin, MA & Mccorquodale, R *Economic, Social and Cultural Rights in Action* (2007), 33. Oxford University Press.

Understanding was adopted at Stamford, Connecticut, USA and this was called the "Stamford Statement".²¹³ The Stamford Statement provides that:

Human rights standards contained in, and principles derived from, the UDHR and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process... Development cooperation contributes to the development of the capacity of 'duty bearers' to meet their obligations and/or of rights-holders to claim their rights.²¹⁴

The principles described as integral to RBA are universality and inalienability, interdependence and interrelatedness, non-discrimination and equality; participation and inclusion; and accountability and the rule of law.²¹⁵ According to human rights-based approach all social activities must be identified, applied and evaluated with due consideration of human dignity, freedom, active and informed participation of the poor.²¹⁶ This approach ensures that human rights are the central frame of reference in policy making by ensuring that people have material means to demand and exercise their rights.²¹⁷ The focus is placed on respect for well-being, human survival and freedom for all. In the context of a human rights-based approach, the issue would be to define the claims of the rights holders and obligations of duty holders.²¹⁸

²¹³ O'Flaherty, *op cit* note 212, 34.

²¹⁴ Report of the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Content of UN Reform (Stamford, Connecticut, 5-7 May 2003. available at http://www.undq.org/documents/4128-uman_Rights_Workshop_Stamford_final_Report.doc

²¹⁵ O'Flaherty, *op cit* note 212, 34.

²¹⁶ Rautenbach, I M 'The Limitations of Rights and "Reasonableness" in the right to just administrative action and the right to access to adequate housing, health services and social security' *Tydskrif vir die Suid-Afrikaanse reg.* (2005) 4, 627-654. Rautenbach says: "The identification of the protected interests and the conduct and the duties of those bound by the right in respect of such interests and conduct forms part of the first stage of a Bill of Rights investigation".

²¹⁷ Twomey *op cit* note 112.

²¹⁸ *Ibid* 49.

The literature emphasizes that dignity plays a very crucial role for the survival of an individual and, therefore, dignity must be respected and protected. Human rights speak in broad terms about fundamental entitlement of all human beings to live in dignity and in conditions of social justice. The Justice of the High Court of Australia notes that human rights are all about human dignity and justice.²¹⁹ Furthermore, attaining these rights is also very important.²²⁰ It has been acknowledged that being a human being is the only key to the enjoyment of these rights.²²¹ Mary Robinson²²² defines a rights-based approach as “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.” According to van Rensburg and Lamarche, the “universal aim and basis for the existence of social security rights is to protect a person’s right to human dignity”.²²³

Some scholars have suggested that for one to understand what a rights-based approach means, one should first understand the difference between ‘a right’ and ‘a need’. Bolivar argues that rights are associated with ‘being’, whereas needs are associated with ‘having’. He describes a rights-based-approach as:²²⁴

²¹⁹ Kirby, A C CMG Justice of the High Court of Australia ‘The never-ending paradoxes of HIV/AIDS and human rights’, 180 (2004) 4 *African Human Rights Law Journal* 163, 180.

²²⁰ Ibid, 180.

²²¹ Mubangizi, J C ‘Towards a New approach to a classification of human rights with specific reference to the African Context’ (2004) 4 *African Human rights Law Journal*, 93, 94.

²²² Robinson, M ‘Statement to the Third United Nations Conference on the Least Developed Countries’ (14 May 2001) *UN High Commissioner for Human Rights*. Available at www.unhchr.ch/.

²²³ Jansen van Rensburg & Lamarche *op cit* note 27, 210.

²²⁴ Bolivar, L. ‘The Fundamentalism of Dignity,’ in *A Human Rights Message*, edited by Swedish Institute (Stockholm: The Ministry of Foreign Affairs of Sweden, 1998), 29-30. Available at <http://www.humanrightsleague.com/index.php?>

An understanding of the difference between a right and a need. A right is something to which I am entitled solely by virtue of being a person. It is that which enables me to live with dignity. Moreover, a right can be enforced before the government and entails an obligation on the part of the government to honor it. A need, on the other hand, is an aspiration which can be quite legitimate, but is not necessarily associated with an obligation on the part of the government to cater to it; satisfaction of a need cannot be enforced. Rights are associated with “being,” whereas needs are associated with “having.”

In a similar vein, Goldewijk argues that:

Whereas human dignity is the core and the foundation of human rights it is through the implementation of rights that dignity is protected. ...Dignity is inherent to each and every person simply because of his or her being human. As such dignity is a category of *being*, not just *having*. Indeed, human dignity cannot be limited to something that people have; it must first of all be seen as belonging to their 'being'.²²⁵

The underlying assumption of this approach is that as human beings we have certain needs which are expressed as rights in order to ensure that they are not denied.

Campbell presents human rights as “universal rights (at least to persons) in contrast to the rights of particular persons or types of persons, or at particular times, or places.”²²⁶ Drzewicki identifies various components as being essential characteristics of human rights, namely, the right holder and the duty holder.²²⁷

²²⁵ Goldewijk, B K 'From Settle to Porto Alegre: Emergence of a new focus on Dignity and the Implementation of Economic, Social and Cultural rights', in Goldewijk, B K Baspinario, A C & Carbonaris, P C (eds) *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002), 6.

²²⁶ Campbell, T Goldsworthy, J and Stone, S A *Protecting Human rights: Instruments and Institutions* (2003) 19. Oxford University Press, UK.

²²⁷ Drzewicki describes right-holders as an “individual (natural person), a group of individuals or non-governmental organization, entitled to the rights conferred in a legal rule and, depending to their procedural capacity, to take legitimate action to secure those rights. On

As a human rights-based approach is built on the dignity and well-being of an individual, it justifies legitimate claims to such rights based on the fact that the realization of these rights is an important goal in itself.²²⁸ Consequently, those who have the obligation to respect, protect and fulfill the rights of the right holders are also duty bearers.²²⁹

According to Campbell, rights talk is a moral discourse which claims that there are moral grounds for setting up entitlements that can be relied upon for the protection and furtherance of specified interests.²³⁰ Campbell notes that legal rights are not that different from societal rights, the only difference is that legal rights have the backing of legal institutions such as courts, legislatures, government administrators and the police, whilst on the other hand societal rights are part of stable practices and attitudes embedded in traditional cultures.²³¹ Campbell describes legal rights as the rights on which “we can fall back when societal rights fail, because legal rights can be enforced by the coercive power of the state.”²³² The critical point is that legal rights are not effective unless they have the support of officials and public opinion.²³³ He notes that:

the other hand, a duty –holder as an “entity, normally a state (government), obliged either to realize the subject’s demand or to create the conditions necessary for their realization.” Drzewicki, K ‘Internationalization of Human Rights and Their Juridization’ in Hanski, R & Suski, M (Eds) *An Introduction to the International Protection of Human Rights: A Textbook* (1997) 28-29.

²²⁸ According to Drzewicki one of the most important characteristic of a human rights-based approach is that every human being is a right holder and that every human right has a corresponding duty. Drzewicki *op cit* note 227, 28.

²²⁹ Section 7(2) of the Constitution places an obligation on the state to protect, respect, promote and fulfill the rights in the Bill of Rights.

²³⁰ Campbell T *Rights: a critical introduction* (2006) 87.

²³¹ *Ibid.*

²³² *Ibid*, 88.

²³³ *Ibid.*

The political support of officials and citizens for legal rights must itself be made effective in the provision of sufficient resources to enable the legal system to operate, and to make available the material and organizational infrastructure required to implement specific rights. Legal rights that actually provide what people are entitled to are not a matter of paper rules but implemented rules and that implementation takes us far beyond police and courts to the administrative and economic organization of society.²³⁴

The rights and obligations are specified in the rules providing for economic, social and cultural rights and civil and political rights.²³⁵ Given the fundamental importance of realizing economic, social and cultural rights for the dignity of an individual, all the branches of government have a duty to protect these rights. It is clear from the above that the full realization of any right requires the fulfillment of correlative duties and obligations. In terms of the Constitution, the state has an obligation to protect its citizen against any risk so that they can live a worthy life as human beings.²³⁶

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²³⁴ Campbell *et al op cit* note 226. Wellman summarized it as follows:

"[A] legal right is a complex cluster of legal liberties, claims, powers, and immunities involving the first party who possesses the right, second parties against whom the right holds, third parties who might intervene to aid the possessor of the right or the violator, and various officials whose diverse activities make up the legal system under which the first, second and third parties have their respective legal liberties, claims, powers and immunities and whose official activities are in turn regulated by the legal system itself... Any adequate analysis of a legal right must distinguish the several roles of the individual citizens living under the law (the roles of the first, second and third parties) and of the officials (policemen, prosecutors, judges, jurymen, legislators and administrators) whose activities transform what Llewellyn called a 'paper right' into a real and functioning legal right." Wellman C (1975) 52, cited in Campbell T *Rights: a critical introduction* (2006) 87.

²³⁵ Hanski R & Suski M, (Eds) *An Introduction to the International Protection of Human Rights: A Textbook* (1997).

²³⁶ This obligation is spelt out in s 27(2) of the Constitution.

There are different ways in which to view the obligations of states, for example, the obligation to respect, protect and fulfill.²³⁷ These obligations require the state to protect individuals especially the vulnerable groups and to protect them against violation of their rights by a third party (non-state actors). States are required to ensure the fulfillment of human rights by acting in a way that right holders enjoy the rights to which they are entitled to. To respect human rights means that the state has a duty to refrain from interfering with the enjoyment of socio-economic rights. Protecting human rights means that the state has a duty to prevent other individuals from interfering with the freedom of the individual. It also requires the state to provide a system which will prevent violations of such right by third parties and provides the latter with protection against such interference. To fulfill human rights means the state is required to adopt appropriate legislative, administrative, budgetary, judicial, and promotional and other measures towards the full realization of the right in question.²³⁸

For example, legislations such as those covering pensions, medical insurance and unemployment insurance must be set out in a way that protects individuals against discrimination or access to benefits. In *Tseleng v The Chairman, Unemployment Insurance Board & Another*,²³⁹ the Court was requested to review the policy of the Unemployment Insurance Board in terms of which the granting of additional benefits as provided for by s35 of the Unemployment Insurance

²³⁷ This is a commonly used typology of state obligations. This typology was first suggested by Shue H Basic rights: Subsistence, affluence and US foreign policy (1980) 60. According to Shue, the fulfillment of every basic right involves the following duties:

- “(1) To avoid depriving;
- (2) To protect from deprivation: (i) by enforcing duty (1) and (ii) by designing [and creating, KA] institutions that avoid the creation of strong incentives to violate duty (1).
- (3) To aid the deprived: (i) who are one's special responsibility, (ii) who are victims of social failures in the performance of duties, and (iii) who are victims of natural disasters.”

²³⁸ Olivier and Kalula *op cit* note 164, 19.

²³⁹ In *Tseleng v The Chairman, Unemployment Insurance Board & Another* (1995) 4 LCD 139 (T); 1995 16 ILJ 830 (T) at 845E-G.

Act²⁴⁰ was made subject to the requirement that the applicant must satisfy the Board that he or she actively sought work while receiving the initial unemployment benefits. The Court found the policy to be unconstitutional because the policy was not made known to the applicant. Therefore the failure to disclose the policy to the applicant amounted to breach of his constitutional right to procedural and fair administrative action, which was conferred by section 24 of the Interim Constitution (now section 33 of the 1996 Constitution).

Another debate in South Africa revolves around the fact that the protection of socio-economic rights is dependent on the availability of resources. Government departments have been criticized for failing to formulate and implement policies and programs that prioritize the needs of the poor. It has been said that the availability of resources allows the government to claim scarcity of resources to justify its failure to implement socio-economic rights.²⁴¹ It is argued that it is meaningless to provide such rights in the social order without providing adequate and necessary resources, including the capacity to ensure their protection.²⁴² The right to social security stated in s 27 implies both negative and positive duties on the state.

The availability of resources is crucial to the enforcement of socio-economic rights.²⁴³ Justiciability centres around certain concerns such as: the legitimacy of judicial intervention and the competence of courts to adjudicate on such matters.

²⁴⁰ Act No. 30 of 1966.

²⁴¹ It was argued in the Treatment Action case that reasonable measures give a state such wide latitude that maybe everyone will get the bare minimum in 20 or 30 years. In the meantime, people will live and die with their constitutional rights in their hand. Steinberg, C 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence' (2006) 123 SALJ 264.

²⁴² Mubangizi J.C 'The Constitutional Protection of Socio-Economic Rights in Selected African countries: A Comparative Evaluation' *African Journal of Legal Studies* (2006) 2 1-19.

²⁴³ Erasmus G 'Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments' *International Journal of Legal Information* 32:2 (2004) 243-257, 244.

In *Government of South Africa v Grootboom*,²⁴⁴ *Minister of Health v Action Campaign and Others*,²⁴⁵ and *Khosa v Minister of Social Development*²⁴⁶ the Court rejected the argument of limited resources advanced by the States. In the *Grootboom* case, the Court stated that “the state must take reasonable and legislative measures, within its available resources to achieve the progressive realization of these rights.”²⁴⁷ The Court laid down principles on the requirement that the state must take reasonable legislative and other measures.²⁴⁸ The Court considered that:

Reasonableness will not require whether other more desirable or favourable measures could have been adopted, or whether public money could have been spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that 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 that the measures do so, this requirement is met.

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Although the Constitutional Court rejected the unavailability of resources relied upon by the government, this decision has been vigorously criticised by some scholars for failure to hold other branches of the government accountable. The critics of the Courts' judgments contend that the latter failed to take due regard to the needs of the poor.²⁴⁹ The reasonableness approach is also not viewed as a proper standard to measure state compliance.

²⁴⁴ 2001 (1) SA 46 (CC).

²⁴⁵ 2002 (5) SA 703 (CC).

²⁴⁶ 2004 (6) SA 505 (CC).

²⁴⁷ *Grootboom* paras 46, 44.

²⁴⁸ *Ibid*, para 41.

²⁴⁹ Roux argues that the Court should have said the government should prioritise the need for shelter ahead of other housing. Roux T 'Understanding *Grootboom*: A Response to Cass R. Sunstein', 12 CONST Q 41 (2002) (Publication of the Canadian Centre for constitutional Studies).

Bilchitz argues that the court failed to draw a line “between the invariant, universal standard that must be met in order for an obligation to be fulfilled, and numerous particular methods that can be adopted to meet this standard”.²⁵⁰ He asserts that:

... imposing a minimum core obligation would have had the benefit that the state would have been provided with a more definite standard against which to judge its behaviour. Thus, instead of merely being implored to be ‘reasonable’ the state would have been required to ensure that people have ‘effective protection from the elements and basic services, such as toilets and running water.’²⁵¹

It is argued that the court is obliged first to define the content of the right with reference to its minimum core content; it is only then that it can proceed with an evaluation of reasonableness.²⁵² Bilchitz states:

[T]here is a need for the Court to clarify the state’s obligations imposed by socio-economic rights. This would entail that the state is not left with an amorphous standard with which to judge its own conduct, but would be able to assess its conduct against clear benchmarks. The current system of invoking the amorphous notion of reasonableness does not provide a clear and principled

²⁵⁰ Bilchitz D ‘giving socio-economic rights teeth: The minimum core approach and its importance’ (2002) 119 SALJ 484 at 487. This concept emanates from the views expressed by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) in its interpretation of the provisions of the ICESCR. General Comment no 3: The Nature of States Parties Obligations, 5th Sess. (1990, CESCR, reprinted in Compilation of General comments, UN Doc. HRI/GEN/1/ Rev. 1 at 45, Para 10 (1994). The Committee is of the opinion that minimum core obligation entails the availability of basic necessities such as essential foodstuff, essential primary health care, shelter, and housing, or the most basic forms of education. According to the Committee minimum core obligation should be provided to everyone unconditional. See also Russell in Danie Brand and Sage Russell *Exploring the Content of socio-economic Rights: South African and International Perspectives*.

²⁵¹ Bilchitz *op cit* note 250, 500. Similarly in Liebenberg, S ‘South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective tool in Challenging Poverty?’ 6 *Democracy & Development* (2002) 159 – 174.

²⁵² Bilchitz D ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19 SAJHR 1 at 10.

basis for the evaluation of the state's conduct by judges or other branches of government in future cases.²⁵³

It has been argued that the minimum core should be established in order to ensure that at least the minimum requirements for a dignified life are provided to each individual.²⁵⁴ According to Russell, the minimum core obligation includes non-discrimination, the obligations to respect, protect and the obligation to fulfil.²⁵⁵

The minimum core obligations approach has been rejected by the Constitutional Court on the basis of the non-availability of statistical data.²⁵⁶ The court in *Treatment Action Campaign* case stated that the socio-economic rights in sections 26 and 27 should not be construed as entitling everyone to claim a minimum core to be provided to them.²⁵⁷ It is argued that the court was right in rejecting the minimum core obligation approach because it is not an appropriate tool for decision making.²⁵⁸ Furthermore, the court's reasonableness approach sounds better than the minimum core approach. In criticising the minimum core, Karin said that it is both "conceptually and pragmatically misconceived".²⁵⁹ Kende also contends that although the criticism lashed on the court seems to be

²⁵³ Ibid.

²⁵⁴ Bilchitz *op cit* note 250, 487.

²⁵⁵ Brand D & Russell, S (Eds) *Exploring the core content of socio-economic rights: South African and International perspectives* (2002) 109, 231.

²⁵⁶ In *Grootboom* paras 31-33.

²⁵⁷ The court stated that: "All that is possible, and all that can be expected of the state, is that it acts reasonable to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis." Ibid para 35. The court emphasized in Para 68 quoting from *Grootboom* in Para 45 that: "[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize. Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right."

²⁵⁸ Karin L 'In defense of the constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 -1, 163-197.

²⁵⁹ Karin *op cit* note 258, 167.

powerful, the critics are misguided in that they lack a perspective.²⁶⁰ Moreover, the ruling of the court represents a major human rights victory which has improved the life situation of many poor people. In order to give a definition to the minimum core obligation of these rights, Rautenbach suggests that:

... it is proper to say it consists of duties not to infringe the interests of individuals in their lives, human dignity, personal freedom and security and other interest protected by other rights either by *interference* with their access to adequate housing, health services and social services or by inaction to provide access to adequate housing, health services and social services.²⁶¹

Some scholars suggested that the minimum core analysis might serve as a great measure in the interpretation of socio-economic rights and, in particular, the right to social security.²⁶² According to Olivier, taking the interrelated nature of fundamental rights might lead one to conclude that a constitutional basis exists for an entitlement to an adequate level of minimum social security support. In support of this contention he made reference to the case of *Khosa* where the Court remarked that:²⁶³

²⁶⁰ Kende, MS 'The South African Constitutional Court's Construction of Socio-Economic Rights: A response to critics' *Connecticut Journal of International Law* 19:57 (2004) 617-629.

²⁶¹ Rautenbach *op cit* note 218, 650. Rautenbach made reference to the case of *Khosa* 2004 (6) SA 505 (CC) Para 44. Where the Court stated that: "When interpreting the right to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of resources in determining whether the state has complied with the constitutional standard of reasonableness."

²⁶² Olivier M 'Realizing Social Security as a Human Right in South Africa' in Van Langendonck J (ed) *The Right to Social Security* (2007) 431. See also Tracy-Lynn Field 'Book Review': Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives by Brand D and Russell S SALJ 638-642. See also Olivier, *et al* 'Constitutional issues' in Olivier, M, Smit, N & Kalula, ER *Social Security: A Legal analysis* (2003) 57-58.

²⁶³ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) 573A (case head note summary).

A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those who are unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.

2.3.2 The Social Elements of the Right to Social Security

The ICESCR Committee offers a number of elements and various factors that should be taken into account at any given time when dealing with the right to social security. These include elements of availability; social risks and contingencies; adequacy; accessibility; including the relationship with other rights. The study will use these elements to analyse states' obligations.

2.3.2.1 Availability

For a proper implementation of the right to social security, a social security system must be available and put in place in order to ensure that benefits can be accessed for the relevant social risks and contingencies. The system should be established under domestic law and public authorities must take responsibility for its supervision. Schemes should also be sustainable, particularly those providing pensions in order to ensure that the right to social security can be realised for the present and future generations.²⁶⁴

²⁶⁴

General Comment No. 19: *The Right to Social Security*. UN Doc E/C.12/GC/19 4 February 2008. Para 11. Available at <http://www2.ohchr.org/eng/bodies/cescr/docs/cescr39/E.C.12.GC.19.pdf>

2.3.2.2 Social risks and contingencies

The ICESCR Committee pointed out that Social security system should cover nine contingencies of social security which include health care, sickness, unemployment, disability, maternity, old age, employment injury, family and child support, and survivors and orphans.²⁶⁵ These nine risks and contingencies are also mentioned in ILO Convention 102 of 1952.²⁶⁶ Under the latter ILO Convention, it is required that each state must at least fulfill the minimum standard of three of the nine contingencies enumerated above.²⁶⁷

2.3.2.3 Adequacy

A benefit must be sufficient in order to ensure an adequate standard of living. The level of benefits provided under various schemes should meet a defined minimum benefit. With regard to social assistance, benefits should be sufficient to ensure that the recipients do not fall beneath the poverty line and the kind of benefits provided should be appropriate to the kind of risk or contingency faced.²⁶⁸ The ICESCR Committee notes that to meet the adequacy criterion, State Parties to the Covenant should be guided by the principle of dignity and the right to non-discrimination which may influence the level of benefits and the form in which they are provided. What is crucial in this criterion is monitoring which should be done regularly to ensure that beneficiaries are able to afford the goods and services they require to realise their rights. Under the adequacy criterion, the ICESCR Committee stressed the building of a relationship between earnings,

²⁶⁵ Ibid, para 12.

²⁶⁶ ILO Convention 102 *op cit* note 132.

²⁶⁷ Ibid.

²⁶⁸ General Comment No. 19 *op cit* note 264, para 22. According to Langford, adequacy means 'adequate benefits that ensure the rights to family protection and an adequate standard of living and right to health'. Langford, M 'Social Security and Implications for Law, Policy and Practice' in Riedel E (Eds) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2006) 34.

paid contributions, and the amount of relevant benefit more in particular when a person makes a contribution to a social security scheme that provides benefits to cover lack of income.²⁶⁹

2.3.2.4 Accessibility

The attachment of conditions to entitlement to social security and social assistance may raise issues of economic and non-discriminatory accessibility. According to the Committee, accessibility goes along with coverage, eligibility, affordability, participation and information as well as physical access.²⁷⁰ These terms will be elaborated below.

Coverage requires that all persons must be covered by the social security system, including the most disadvantaged or marginalized sections of the population without discrimination.²⁷¹ This means that the state should make provision for a social security system which is not discriminatory on any of the prohibited grounds. It must include a positive obligation to eradicate any differences over time.²⁷²

Eligibility as a qualifying condition for benefits must be reasonable, proportionate and transparent.²⁷³

Affordability requires that if a social insurance scheme is used, the contributors should be informed in advance of the extent of their liabilities. The cost and

²⁶⁹ Ibid para 22.

²⁷⁰ Ibid, para 23.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid, para 24.

charges associated with making the contribution must be affordable and must not threaten the realization of other rights.²⁷⁴

Information and participation requires that the beneficiaries of social security schemes must be able to participate in the administration of the system.²⁷⁵ The national system must ensure that existing information on social security is available to everyone in a clear and transparent manner.²⁷⁶

Lastly, physical access requires that benefits should be provided timely and for the beneficiaries to be able to access information and contribute, and where relevant, they should first have physical access to social security services.²⁷⁷



2.4 Conclusion

It is clear from the concepts defined in this Chapter that the White Paper, ILO Conventions and the ICESCR focus on the protection of rights of individuals, to social security. The human rights-based approach on the other hand ensures that all individuals live in dignity. The ICESCR offers a number of elements and various factors that should be taken into account when dealing with the right to social security. This will be explored in Chapters Four and Five. Chapter Four explores whether an inference can be drawn from international law to address the shortcomings of the South African social security system. The following Chapter will address the nature and the development of socio-economic rights.

²⁷⁴ Ibid para 25.

²⁷⁵ Ibid, para 26. Articles 71 and 72 of the ILO Convention 102 contain similar requirements.

²⁷⁶ Ibid.

²⁷⁷ Ibid, para 27.

CHAPTER THREE

THE NATURE AND HISTORICAL DEVELOPMENT OF SOCIO-ECONOMIC RIGHTS

3.1 Introduction

In order to understand the origin of the right to social security it is necessary first to discuss the development of socio-economic rights. This Chapter will explore the nature and development of socio-economic rights. Firstly, it will focus on the International Bill of Rights, followed by a short overview of socio-economic rights. This would include the developments that have taken place both at the international and national level.

Based on the principle of human dignity, human rights law has established individual and group rights relating to civil, political, cultural, economic and social spheres. The economic, social and cultural rights can be traced back to the 19th century.²⁷⁸ With the adoption of the Universal Declaration of Human Rights (UDHR), economic, social and cultural rights were universally accepted in the international sphere.²⁷⁹ The rights and freedoms set out in the UDHR were later articulated in the two international covenants on human rights, namely: the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁸⁰ and the International Covenant on Civil and Political Rights (ICCPR).²⁸¹ Until recently, human rights were divided into different categories or generations, some considered as being more important or legal in their nature while others

²⁷⁸ Sachs A 'The Judicial Enforcement of socio-Economic Rights: The *Grootboom* Case' in Jones, Peris and Stokke (eds) *Democratising Development: The politics of socio-economic rights in South Africa* (2005).

²⁷⁹ UDHR *op cit* note 99.

²⁸⁰ ICESCR *op cit* note 97.

²⁸¹ The International Covenant on Civil and Political Rights of 1966 adopted by the UN General Assembly Resolution 2200A (XXI) of the 10 December 1966 (entered into force 23 March 1976).

were seen as policy goals and principles without any binding legal effect.²⁸² As a result, socio-economic rights have received less attention than civil and political rights; they could not easily be invoked before a court of law.²⁸³

Although South Africa has not ratified the ICESCR, it has committed itself to the protection of socio-economic rights.²⁸⁴ South Africa has gone far in protecting these rights in various policy and legislative interventions. The Courts, in particular, have dealt with various issues pertaining to the nature of the state's obligation and the justiciability and enforcement of socio-economic rights. The discussion on these issues will be dealt with below and in the preceding chapters.

3.2 The International Bill of Rights

Traditionally, international law did not concern itself with issues regarding individual human rights and how the state treated its own nationals was not the business of other states. Due to sovereignty, states could not intervene in the affairs of another state because that was considered to fall exclusively within the scope of its domestic affairs, neither could they impose obligations on individuals for certain acts or omissions.²⁸⁵ However, the view that an individual is free from state intervention gradually began to lose ground with increasing attempts to protect and impose obligations on individuals at the international level.²⁸⁶ These

²⁸² Oloka-Onyango J 'Beyond the rhetoric: Reinvigorating the struggle for economic and cultural rights in Africa' *California Western International Law Journal* (1995) 26 (1) 1.

²⁸³ Oloka-Onyango *op cit* note 282.

²⁸⁴ Coomans F (ed) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 4.

²⁸⁵ Donnelly, J *The Concept of Human Rights* (1985) St Martin's Press, Inc, New York, 1.

²⁸⁶ International human rights law has its historical antecedents in a number of legal documents. The most prominent being: the British Magna Carta (1215) and Bill of Rights (1668), the American Declaration of Independence (1776) and the French Déclaration des Droits de l'Homme et du Citoyen (1789). After the Second World War

developments have had profound influence at the national level as well, for example, states incorporated individual's rights in their national constitutions.²⁸⁷ Gradually, the concern for human rights became more visible at the international level in the 19th century. One of the most significant events that marked the beginning of the internationalisation of human rights was the abolition of the slave trade, protection of minorities, and the establishment of the International Labour Organisation (ILO).²⁸⁸ However, the ILO was only concerned with labour related issues.²⁸⁹

Another significant development took place with the inclusion of human rights in the Charter of the United Nations of 1945.²⁹⁰ The Charter includes in the Preamble the determination "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".²⁹¹ More importantly, Article 56 states: "All members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55"²⁹² *inter alia*, the achievement of higher standards of living, full employment, and

United Nations General Assembly adopted on December 10, 1948, the Universal Declaration of Human Rights and in 1950 the Council of Europe adopted the European Convention on Human rights and Fundamental Freedoms on the 4th of November 1950. See Van de Luytgaarden, E *Introduction to the Theory of Human Rights* (1993) 5.

²⁸⁷ Donnelly *op cit* note 285, 5.

²⁸⁸ Alston P and Steiner H *International human rights in context: Law, Politics, morals* (2000) 257.

²⁸⁹ Ibid, 257. The ILO was established by the Treaty of Versailles in 1919 to abolish the "injustice, hardship and privation" which workers suffered and to guarantee "fair and human conditions of labour".

²⁹⁰ The Charter of the United Nations was signed on 26 June of 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. [hereinafter the UN Charter] Available at <http://www.un.org/aboutun/charter/>.

²⁹¹ The preamble to the UN Charter.

²⁹² Art 56 of the UN Charter.

conditions of economic and social progress and development, and, universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.²⁹³ In order to translate these generalities into measurable rights and obligations, the United Nations General Assembly adopted on the December 10, 1948, the Universal Declaration of Human Rights (UDHR).²⁹⁴ The preamble of the UDHR recognises that “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”²⁹⁵

The UDHR represents the first statement by the world community, acknowledging that basic human rights are universal attributes and must be promoted and protected in order to preserve human dignity, equality and freedom of all individuals.²⁹⁶ The rights and freedoms set out in the UDHR were later articulated in the two international covenants on human rights,²⁹⁷ and reinforced by a procedure for securing their protection in the Optional Protocol to the Covenant on Civil and Political Rights.²⁹⁸ These instruments combined constitute the International Bill of Human Rights and they set out the basic standards of behaviour for all states.²⁹⁹ Human rights law has established individual and group rights relating to civil, political, social, economic, and cultural rights in all spheres of human life.³⁰⁰

²⁹³ Art 55 of the UN Charter.

²⁹⁴ Esquivel, AP & Farer TJ *The International Bill of Rights* (1981) xvi.

²⁹⁵ Preamble to the UN Charter *op cit* note 290.

²⁹⁶ Esquivel & Farer *op cit* note 294.

²⁹⁷ ICESCR *op cit* note 97 and ICCPR *op cit* note 281.

²⁹⁸ The Optional Protocol to the International Covenant on Civil and Political Rights which was adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) on 16 December 1966. Entered into force on 23 March 1976 in accordance with Article 9.

²⁹⁹ See Drzewicki *op cit* note 227, 32-35.

³⁰⁰ Van der Luytgaarden, E *Introduction to the Theory of Human Rights* (1993) 29.

Human rights are defined by van der Luytgaarde as “basic rights protecting human life and dignity in all variety”.³⁰¹ Buergenthal describes the international law of human rights as a “law which deals with the protection of individuals and groups against the violations by governments of their internationally guaranteed rights and with the promotion of these rights.”³⁰² Rosa and Ditschke also describe international human rights law as a framework containing “agreements between states that create rights and duties under international law.”³⁰³ Therefore, states are obliged to respect human rights by adopting legal and administrative measures to protect and to prevent other individuals and non-state actors from violating them.

Although the Preamble to the UDHR affirms the indivisibility and interdependence of human rights, the normative content of human rights has not been without ambiguities and disagreements.³⁰⁴ Human rights are those rights that are possessed by human beings simply because they are humans.³⁰⁵ Quoting Jeremy Bentham, Donnelly described rights as merely beneficial obligations: “It is by imposing obligations, or by abstaining from imposing them, that those rights are established or granted.”³⁰⁶ According to Donnelly, this is the ‘simple beneficiary theory’ of rights. He argues that by just being a beneficiary of an obligation, it is sufficient to be in possession of a right.³⁰⁷ Accordingly,

³⁰¹ Ibid, 29.

³⁰² Buergenthal, T *International Human Rights in a Nutshell* (1988) 1.

³⁰³ Rosa S and Dutschke M ‘Child Rights at the Core: The use of International Law in South African cases on children’s socio-economic rights’ SAJHR (2006) 22, 224 at 226-227.

³⁰⁴ The Preamble to the declaration provides that: “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

³⁰⁵ Donnelly *op cit* note 285, 11.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

"human rights represent a social choice of a particular moral vision of human potentiality which rests on a particular substantive account of the minimum requirement of a life of dignity".³⁰⁸ Campbell, Goldsworthy and Stone present human rights as universal rights in contrast to the rights of particular persons or types of persons, or at particular times or places.³⁰⁹ The above scholars argue that rights are inalienable because they are recognised as rights that belong to all human beings and the latter possess them all the time.³¹⁰

Van de Luytgaarden criticised the above view as creating confusion because it does not say who owes what right and to whom.³¹¹ In human rights theory, there should be a claim and a duty. This means that there should be a rights-bearer and a duty bearer.³¹² Van de Luytgaarden describes this as the 'relational theory of rights'. In this theory 'one has a right to something with respect to/or in relation to certain persons'.³¹³ For this theory to be credible, certain elements must be present, namely, that a person should have a human right; he/she should be able to exercise the right; the duty-bearer should respect the person's rights; and finally, the bearer of the right should be in a position to enjoy it.³¹⁴ Therefore the relationship between the right-holder and the duty-holder, as well as the circumstances under which the right-holder execute his/her right is very

³⁰⁸ Ibid, 17.

³⁰⁹ Campbell T, Goldsworthy, J, and Stone A, *Protecting Human Rights: Instruments and Institutions* (2003) 17.

³¹⁰ Ibid, 20

³¹¹ Van de Luytgaarden says when analyzing the term right in the concept of 'human rights' five elements can be brought forward. These elements include: first, the element of right refers to the holder of a right or the subject of a right. Second, right refers to the object of a right. Third, the term right is linked with effectiveness. He argues that if the right cannot be justified it cannot be effected. Accordingly the term effectiveness refers to justification. Van der Luytgaarden *op cit* note 300, 29.

³¹² Van der Luytgaarden *op cit* note 300, 31.

³¹³ Ibid.

³¹⁴ Ibid.

important.³¹⁵ In the practice of human rights there are five premises that have to be respected, namely: the right-holder; duty-bearer; communication relationship between the right-holder and the duty-bearer; the content of the right, and the means circumstances.³¹⁶

Macfarlane describes human rights as those moral rights which are owed to each man or woman by every man or woman solely by reason of being a human being.³¹⁷ He contends that there are inherent characteristics that distinguish human rights from other moral rights. These include: 'universality, individuality, paramountcy, practicability and enforceability'.³¹⁸

The traditional understanding of what international human rights are designed for has changed. Human rights are more seen not merely as political aims but rather as practical legal tools that an individual can use against the actions of the state. The idea that human rights in whatever form are inalienable seems to be beyond doubt. However, which persons and to what extent a person can call upon certain rights is a subject of argumentation between different cultures, political structures and legal norms. The debate between universality and relativity of human rights still rears its ugly head although it seems to have been buried. The United Nations without doubt has been the promoter of the idea that everyone as a human has inalienable rights, regardless of his/her culture, political or legal background.³¹⁹ However, the UN has described human rights as follows:³²⁰

³¹⁵ Ibid, 33.

³¹⁶ Ibid.

³¹⁷ Macfarlane L. J *The Theory and practice of Human Rights* (1985) 3.

³¹⁸ Ibid.

³¹⁹ Macfarlane *op cit* note 317, 3.

³²⁰ Levin, L *Human Rights Questions and Answers* (2009), 21-22.

Human beings are born equal in dignity and rights. These are moral claims that are inalienable and inherent in all human individuals by virtue of their humanity alone. These claims are articulated and formulated in what today we call human rights, and have been translated into legal rights, established according to the law-creating processes of societies, both on the national and international level. The basis of these legal rights is the consent of the governed that is the consent of the subjects of rights.

Human rights are nevertheless a way of establishing a minimal understanding of what a human well-being means, and thereby draw a line that the disputes should not cross. No dispute should justify the loss of innocent lives, make rape acceptable, or allow a government to starve its population.³²¹

Clearly, then, human rights are those rights one possesses by virtue of being human. One need not possess any other qualification to enjoy human rights other than the fact that he or she is a human being. It can therefore be inferred that human rights should be enjoyed by all regardless of their social status or their geographical or regional location.

3.3 The scope of the Universal Declaration of Human Rights

The UDHR recognises human right as the foundation for freedom, justice and peace.³²² The UDHR presents two sets of rights, namely, civil and political rights, and economic, social, and cultural rights. The extent to which the UDHR obliges states which have accepted it or signed the United Nations Charter has been a source of controversy and debate. Some critics have maintained that the UDHR merely has a moral value and does not impose any binding legal obligations on states.³²³ Others viewed the UDHR as an authoritative

³²¹ Ibid.

³²² UDHR *op cit* note 99.

³²³ Steiner & Alston *op cit* note 281, 227-231.

enumeration of those human rights and fundamental freedoms mentioned in the United Nations Charter and, consequently, the former has the same legal status as the latter towards member states.³²⁴

Contributors to this discussion within political or moral philosophy agree that the rights of the UDHR are moral in nature.³²⁵ Maurice Cranston considers moral rights to be distinct from legal rights, the former belonging to the category of 'what ought to be', while the latter belonging to 'what is'.³²⁶ He argues that the economic, social and cultural rights in the UDHR are not human rights and that their inclusion resulted in a diminished respect for the traditional human rights (i.e. the civil and political rights) and for the UDHR as such.³²⁷ Human rights in the sense of "what ought to be" may be called natural human rights.³²⁸ By the nature of being adopted as a declaration, it was not meant to be legally binding. Neither does the General Assembly have any legislative competence. Although it is so, it is well accepted and recognised that the UDHR contains fundamental obligations that all states have to respect and comply with.³²⁹

Despite the differences in ideas about the UDHR, the intended objective of the declaration was clearly articulated. This is found in the last section of the Preamble, where it is stated:

³²⁴ Drost, NP *Human Rights as Legal Rights: The Realization of Individual Human Rights in Positive International Law* (1951). The Vienna Convention of the Law of Treaties.

³²⁵ Cranston, M *What are Human Rights?* (1973) 9. See also Rembe, NS 'To Reaffirm Faith in Fundamental Human Rights: The Challenge of Managing Diversity in Africa' *Connecticut Journal of International Law* (2002) 303-309.

³²⁶ Ibid.

³²⁷ Ibid, 17.

³²⁸ Drost, *op cit* note 324.

³²⁹ The reaffirmation of the universality of the Universal Declaration is to be found in the Preamble of the Vienna Declaration and Plan of Action, adopted by the World Conference of Human Rights, held in Vienna on 14-25 June 1993; see UN Doc. A/CONF.157/23, 2.

Now, therefore, the General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement of all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of member States themselves and among the peoples of territories under their jurisdiction.

Today the UDHR is universally accepted as being the main source of the meaning of the human rights commitments in the UN Charter, and most of its provisions have been included in international and regional treaties, and in national constitutions of virtually all states. Some of its provisions have also become part of customary international law because of the wider acceptance of the UDHR in state practice. Therefore, human rights cannot be understood or interpreted without regard to the 'context' articulated in the UDHR and in subsequent international instruments.³³⁰

3.4 The normative character of socio-economic rights under international Law

Although the Preamble to the UDHR affirms the indivisibility and interdependence of human rights, the normative character of economic, social and cultural rights has remained controversial and contested at both international and national level.³³¹ Due to the historical evolution of human rights, and for the reasons that are not clear, they have been divided into three different categories

³³⁰ See Arts. 31-32 of the Vienna Convention on the Law of the Treaties, 1969.

³³¹ The Preamble to the UDHR declaration provides that: "the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". UDHR *op cit* note 99.

or generations,³³² namely the first, second, and third generation rights.³³³ During the process of drafting the covenants, there were debates around what must be included in the document. This resulted in the United Nations General Assembly placing civil and political rights into one category consisting of the first generation rights and economic, social and cultural rights into another category of the second generation rights.³³⁴ Resolution 421 of the General Assembly called on the Human Rights Commission to adopt a single convention containing both civil and political rights and economic, social and cultural rights.³³⁵ However, the decision was reversed and the Commission, through the directive of Resolution 542(VI), divided the rights contained in the UDHR into two separate international covenants, one containing civil and political rights and the other economic, social and cultural rights.³³⁶ It was apparent that the ideological rift between the East and the West coupled with the emergence of a large number of newly independent states with different viewpoints from the former accentuated the difficulty of adopting one document.

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³³² The generations approach was introduced by Karel Vasak in 1977. See Karel Vasak 'A 30 Year-Struggle: The Sustained Effort to Give Force of Law to the Universal Declaration of Human Rights; UNESCO Courier, (1977) 29-30.

³³³ Within the philosophy of human rights, some philosophers and political scientists make a distinction between negative and positive rights. According to this view, a positive right imposes a moral obligation to a particular person to give a guarantee for a certain thing. On the other hand negative right obliges the other to refrain from interfering with someone's attempt to do something. <http://en.wikipedia.org/wiki> accessed 27/12/2007.

³³⁴ In the three generations negative rights are often associated with the first generation and positive rights are associated with the second generation. The first generation consists of civil and political rights and second generation consists of economic, social and cultural rights, and the third generation consists of group rights. Eide A and Rosas A 'Economic, Social and Cultural Rights' in Eide, A, Krause, C and Rosas, A (Eds) *Economic, Social and Cultural Rights: A textbook* (2001) 22. With regard to group rights see Lerner N, *Group Rights and Discrimination in International Law* 2003.

³³⁵ General Assembly Resolution 421 (V) of 4 December 1950.

³³⁶ General Assembly Resolution 543 (VI) of 5 February 1952.

At the time of the adoption of the covenants it was argued that civil and political rights³³⁷ were absolute, immediate and enforceable.³³⁸ On the other hand, socio-economic rights were considered programmatic and their realization progressive; they were not considered justiciable or enforceable in a court of law. It is also assumed that it is easier to gain access to civil and political rights since a state is obliged to refrain from interfering with the exercise of the right (negative obligation).³³⁹ For example, when the right to vote is violated, the court will hold the relevant state conduct or legislation unconstitutional. Van der Luytgaarden argues that civil rights have the aim of ensuring every individual by way of protecting some aspects of life against violation of the government or by other individuals or groups.³⁴⁰ Eichenhofer views civil and political rights as a tool to protect the individual against the action of the government.³⁴¹

Economic, social and cultural rights³⁴² are perceived as relative rights which cannot be realized immediately but progressively.³⁴³ This generation traditionally requires states to take positive action, i.e. by effecting equitable distribution of resources, provisions of services such as health, education and employment. These rights have been interpreted by scholars as amounting to a mere

³³⁷ Civil and political rights include the right to equality, and the right to dignity, the right to life, the right to liberty and security, freedom from torture and inhuman treatment, the right to privacy, and the right to a fair trial.

³³⁸ Eide in Eide *et al op cit* note 334, 10.

³³⁹ For example, when the right to vote is violated, the court will hold the relevant state conduct or legislation unconstitutional. Mureinik E, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) *SAJHR* 464 at 467.

³⁴⁰ Van de Luytgaarde *op cit* note 300, 65.

³⁴¹ Eichenhofer, E 'What a Right – The Right to Social Security?' in Van Langendonck, J (Eds) *The Right to Social Security* (2007) 155.

³⁴² These rights include, but are not limited to, the right to work, the right to fair remuneration, the right to collective bargaining, the right to property, the right to housing, the right to education, the right to health care services, the right to social security and the right to participate in the cultural life of one's community.

³⁴³ Eichenhofer *op cit* note 341, 155.

declaration of “aspirations” or “goals to be achieved.”³⁴⁴ For example, Cranston denies the human rights status of socio economic rights and simply labels them as ‘utopian endeavours’.³⁴⁵ The implementation of rights of this nature usually involves resources and planning, and the capacity of the state to deliver.³⁴⁶ The State is obliged to take positive actions through legislative and administrative procedure in order to realize these rights. Social and economic rights are normally not formulated as justiciable or enforceable rights. One cannot easily invoke these rights before a court of law.³⁴⁷ Van de Luytgaatde asserts that in every sub-premise of the relational theory, there are also five differences between civil and political rights on the one hand, and economic, social and cultural rights on the other.³⁴⁸ This is illustrated below:

The key international instrument on socio-economic rights is the International Covenant on Economic, Social or Cultural rights. From its inception, it gave rise to the debates of whether these rights were judicially enforceable. The Committee for the Implementation of the Covenant on Economic, Social and Cultural Rights noted:

If governments were to assume definite obligations in respect of the observance of such rights, they would have to take legislative and other measures enabling an action to be brought in respect of their non-observance, the courts being empowered to provide redress.³⁴⁹

³⁴⁴ See Vierdag, EW ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’ (1978) 9 *Netherlands Yearbook of International Law* 69, 80.

³⁴⁵ Cranston *op cit* note 325, 9.

³⁴⁶ Alston, P and Quinn, G ‘The Nature and Scope of States parties obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156, 172.

³⁴⁷ Alston & Quinn *op cit* note 338.

³⁴⁸ Van der Luytgaarden *op cit* note 300, 46.

³⁴⁹ UN doc. E/CN.4/SR.248, 6.

Hence State parties to the Covenant must abide by the provisions therein in upholding the socio-economic rights of their citizens.³⁵⁰

One of the main objectives of the Covenant is to uphold the nature of socio-economic rights as universal norms. The Covenant attempts to do this in a comprehensive manner, striking a reasonable balance between generality and specificity,³⁵¹ and by means of General Comments.³⁵² The latter provide an adequate general framework in terms of which specific socio-economic rights can be elaborated.³⁵³ The difference that underlies the two classes of rights can be seen as rights to conduct and rights to result.³⁵⁴ The International Law Commission, when working out general principles of state responsibilities suggested different typology of obligations: the obligation of conduct and obligation of results.³⁵⁵ The Special Rapporteur pointed out that article 20 and article 21, paragraph 1, set out the distinction between obligation of conduct and result.³⁵⁶ The proposed article 20 reads:

Article 20. Obligation of Conduct and obligation of result

³⁵⁰ Steiner, H.J. and Alston, P *International Human Rights in Context*, (1996) 1175-81

³⁵¹ Ibid.

³⁵² See for example, General Comment No. 3 'The nature of States parties' obligations in article 2(1).

³⁵³ Ibid.

³⁵⁴ Buergenthal T, 'To Respect and Ensure: State Obligations and Permissible Derogations' in Henkin L (ed) *The International Bill of Rights* (1981).

³⁵⁵ ILC Report on State Responsibility (1999), 48. Available at http://www.lcil.com.ac.uk/prospects/states_responsibility_documents.htm

³⁵⁶ Ibid, para 132.

1. An international obligation requiring a state to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.
2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.³⁵⁷

There is a requirement in the ICESCR that the right should be realised progressively, whereas the ICCPR requires states to 'respect and ensure' the rights recognised in the Covenant.³⁵⁸

Some scholars regard it as a mistake to place civil and political rights and social, economic and cultural rights into distinct and separate divisions with the former being justiciable and enforceable while the latter is relegated to legislative and executive branches of government.³⁵⁹

The Preamble to the UDHR affirms the indivisibility and interdependence of human rights and this is also echoed in the Teheran Conference on Human Rights. Paragraph 13 of the Teheran Declaration states:

Since the adoption of the UDHR the United Nations has made substantial progress in defining standards for the enjoyment and protection of human rights and fundamental freedoms. During this period many important instruments were adopted but much remains to be done in regard to the implementation of those rights and freedoms.³⁶⁰

³⁵⁷ ILC Draft Articles on State responsibilities, 2001, 57.

³⁵⁸ Buergenthal *op cit* note 354.

³⁵⁹ Colm O' Cinneide and Lord Lester of Herne Hill 'The Effective Protection of Socio-Economic Rights' in Ghai Y, and Cottrell J *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 18.

³⁶⁰ Proclamation of Teheran, International Conference on Human Rights, Teheran (13 May 1968) para 13. http://www.unhchr.ch/html/menu3/b/b_teheran.htm

The equal status of these two sets of rights was reaffirmed in the United Nations General Assembly Resolution 32/130 of 16 December 1977, which asserts that:

- (a) All human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;
- (b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible;
- (c) The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies and social development, as recognized by the Proclamation of Teheran of 1968...³⁶¹

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The relationship between the two categories was also stressed in the General Assembly resolution 41/128 of 4 December 1986, containing the Declaration on the Right to Development. Article 6 of the Declaration reads as follows:

- (1) All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
- (2) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion, and protection of civil, political, economic, social and cultural rights.

³⁶¹ United Nations General Assembly Resolution 32/130 (16 December 1977), in UN Doc. A/32/45, Resolution and Decisions adopted by the General Assembly, GAOR, 32nd session (1977), Suppl. No. 45.

- (3) States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.³⁶²

The Vienna Declaration and Programme of Action reaffirmed that all human rights are universal, indivisible, interrelated and interdependent and this constitutes a fundamental tenet in the field of the promotion and protection of human rights.³⁶³ Paragraph 5 of the Declaration provides that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.³⁶⁴

It is trite to note that the text of the UDHR does not separate rights into clusters but put them in one crucible. The Preamble to the UDHR affirms the indivisibility and interdependence of human rights.³⁶⁵ Recently, most opinions have turned in favour of the indivisibility and interdependence of both sets of rights. It has rightfully been said that in order for rights to have substance, they must be justiciable, and must be enshrined in laws that can be enforced.³⁶⁶

³⁶² Article 6 of the United Nations General Assembly Resolution 41/128 (04 December 1986) (Declaration on the Right to Development).

³⁶³ UN Doc. A/CONF.157/23. Vienna Declaration and Programme of Action of 1993.

³⁶⁴ Ibid, para 5.

³⁶⁵ The Preamble to the Universal declaration declared that: The inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

³⁶⁶ Veit-Wilson asserts that: a right to social security must include positive policies for the juridification of rights to welfare, the setting of agreed standards of what that welfare is to

Civil and political rights and economic, social and cultural rights are not fundamentally different from each other. It is no use to having civil and political rights without economic, social and cultural rights and vice versa. The debate over the nature of economic and social claims, however, may persist if the challenge or failure to address extreme poverty and improved the human condition of millions of people persists.³⁶⁷ In the General Comment No. 3, the Committee interpreted the obligation of State parties under Article 2 (1). It viewed the term 'to take steps' to imply that the

Full realisation of the relevant rights may be achieved progressively, [but] steps towards that goal must be taken within a reasonable short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligation recognised in the Covenant.³⁶⁸

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In General Comment No. 9 the Committee strongly contested the non-justiciability of socio-economic rights thus:

... there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a

be, and the implementation of adequate incomes for all. Access to rights must also be justiciable – subject to test and remedy in the judicial system of courts and tribunals. John Veit-Wilson 'Some Social policy implications of a right to social security' in Van Langendonck J, *The Right to Social Security* (2007) 59.

³⁶⁷ Hill D.M 'Rights and their Realisation' in Beddard R, & Hill DM (eds) *Economic, Social and Cultural Rights: Progress and Achievement* (1992) 9.

³⁶⁸ General Comment No 3 of the ICESCR: 'The nature of States parties' obligations' UN Doc. E/1991/23/ (E/C.12/1990/8).

considerable range of matters which have important resource implications. The adoption of the rigid classification of economic, social and cultural rights which puts them, by definition beyond the reach of the Courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable disadvantaged groups in society.³⁶⁹

In recent years there has been a shift of opinion on the division of human rights into different generation rights. A significant shift, heralded by Henry Shue's study of basic rights, is the growing consensus among human rights scholars (with some exceptions) on the interdependence of civil and political rights and economic and social rights.³⁷⁰ However, the debate starts by emphasizing that civil and political rights are linked to economic, social and cultural rights. Cinneide and Hill points out three possible ways in which an individual can successfully call upon social rights:

(a) Discrimination - the court can give direct effect to a non discriminatory norm (e.g. Article 26 ICCPR) in connection with a social right, giving the last right desired effect in legal force and justiciability;

(b) A court can protect social rights of an individual when there is a conflict with another human right (e.g. a civil right) of another person; and

(c) When interpreting vague legal terms like abuse of power, the court can take a social right into account and thus increase the legal validity of a norm incorporated in a social human right.³⁷¹

³⁶⁹ General Comment No 9 of the ICESCR para 10.

³⁷⁰ Shue H *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980).

³⁷¹ O' Cinneide and Lord Lester *op cit* note 359, 18.

In the case of *Airey v Ireland*,³⁷² the European Court of Human Rights found that a watertight division between civil and political rights and economic and social rights cannot be maintained.

While there may be significant differences of emphasis between civil and political rights and economic, social and cultural rights, the two groups of rights are not essentially different.³⁷³ This difference concerns the role of the state.³⁷⁴ The main emphasis in civil right is on freedom from state intervention, whereas a major element in economic, social and cultural rights is the claim on the state for the provision of protection and assistance.³⁷⁵ Without securing socio-economic, as well as civil and political rights, the most deprived, vulnerable and powerless will remain excluded from the enjoyment of their essential entitlement. What is essential is that all human rights be translated into practice so that their enjoyment becomes a reality.

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3.5 Socio-Economic Rights in the Regional Human Rights System

The majority of international instruments followed the model of the UDHR and included the right to social security and social assistance. At the regional level, the American Declaration of the Rights and Duties of Man protected civil, political and economic, social and cultural rights.³⁷⁶ In 1969, the American Convention on Human Rights was adopted.³⁷⁷ Article 26 provides:

³⁷² European Court of Human Rights *Airey v Ireland* (1979) A-32 par 26.

³⁷³ Aide and Rosas *op cit* note 11, 5.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ The American Declaration of the Rights and Duties of Man, 1948.

³⁷⁷ American Convention on Human Rights, 1969.

The states Parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The above rights were elaborated in the Additional Protocol to the American Convention on Human Rights, also called "Protocol of San Salvador".³⁷⁸

The human rights instruments of the European region are the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁷⁹ and the European Social Charter.³⁸⁰ The European Social Charter of 1961 and the revised European Social Charter of 1996 provides a more comprehensive protection. It is the only treaty that addresses all the aspects of social protection. The social rights protected under the Social Charter were further recognized under the Additional Protocol of 1992.³⁸¹

At the African regional level, socio-economic rights are protected in African Charter on Human and Peoples' Rights.³⁸² The Charter in the first human rights instrument that contains all the three generations of human rights. It does not

³⁷⁸ Additional Protocol to the American Convention on Human Rights (1988), entered into force on 16 November 1999.

³⁷⁹ The European Convention for the Protection of Human Rights and Fundamental Freedoms, [hereinafter the "European Convention" opened for signature 4 November 1950, 213 UNTS 221 (1950) ETS 5, entered into force on 3 September 1953, amended by Protocol No 13 of 2002, ETS 187 (2002).

³⁸⁰ European Social Charter, [hereinafter "Social Charter"] opened for signature 18 October 1961, ETS 35 (1961), entered into force on 26 February 1965, revised by ETS 163 (1996).

³⁸¹ The Additional Protocol of 1992, which entered into force on 4 September 1992. Under this Protocol article 4 recognise the right of elderly persons to social protection.

³⁸² African Charter of Human and Peoples' Rights, adopted by the Eighteenth Session of the Assembly of Heads of State and Government of the Organization of African Unity (OAU), 27 June 1981, entered into force 21 October 1981, OAU Doc. CAB/LEG/67/3 rev 5 (1981).

distinguish between civil and political rights, and economic, social and cultural rights, but also treat them as interrelated, interdependent and indivisible.³⁸³ It recognises that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as their universality.³⁸⁴ The Charter incorporates a wide range of economic, social and cultural rights. These include: the right to property;³⁸⁵ the right to work under favourable conditions and equal pay for equal work;³⁸⁶ right to health;³⁸⁷ and right to education;³⁸⁸ special assistance to the family, children, the aged and people living with disabilities.³⁸⁹

In addition to the above rights, the African Charter incorporates third generation rights. These include: equality of peoples and their right to existence,³⁹⁰ the right to self-determination,³⁹¹ the right to freely dispose of wealth and natural resources;³⁹² the right to economic, social and cultural development;³⁹³ peace,³⁹⁴ and satisfactory environment.³⁹⁵ The African Charter also recognises that

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³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Article 14.

³⁸⁶ Article 15.

³⁸⁷ Article 16.

³⁸⁸ Article 17.

³⁸⁹ Article 18.

³⁹⁰ Article 19.

³⁹¹ Article 20.

³⁹² Article 21.

³⁹³ Article 22.

³⁹⁴ Article 23.

³⁹⁵ Article 24.

individuals have certain obligation towards other individuals, the family, society the state and towards the national and international community.³⁹⁶

The African Charter has often been criticised for lack of enforcement mechanisms. The African Commission was often regarded as weak for enforcing human rights in general and in particular, economic, social and cultural rights.³⁹⁷ However, recently a major decision on economic, social and cultural rights was delivered by the Commission in *Social and Economic Rights Action Centre & another v Nigeria (SERAC case)*.³⁹⁸ In this decision, the Commission developed a strong jurisprudence on the enforcement of socio-economic rights in Africa and within the international community.³⁹⁹

In the *SERAC* case, a state owned Nigerian National Company and Shell Petroleum Development Corporation exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. As a result, water, soil and air contamination brought about serious short and long term health problems such as skin infections, gastrointestinal and respiratory ailments, increased cancer rates, and neurological and reproductive complications. The Communication by the applicants alleged that the Nigerian government condoned these harmful

³⁹⁶ Hansungule 'SERAC and another v Nigeria: What lessons to draw from in perspectives for human & Peoples Rights within the African System of Human Rights' paper presented at an international conference organized by Kreddah International, The Hague, Netherlands September 2006.

³⁹⁷ Oloka-Onyango J 'Reinforcing marginalized rights in the age of globalization: International mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) *American University International Law Review*, 852.

³⁹⁸ The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria. 155/96. Decisions on Communications brought before the African Commission on 30th Ordinary Session, Banjul, The Gambia, October 2001.

³⁹⁹ Chirwa, D.M. 'Toward revitalizing, social and Cultural rights in Africa: Social and Economic Rights Action Centre (SERAC and the Centre for Economic and Social Rights v Nigeria' 2002 3(2) ESR Review 19.

operations. It also averred that the government aided the perpetrators, by placing the legal and military powers of the State at the disposal of the oil companies. The government neither monitored the oil companies nor consulted the Ogoni people on issues concerning the development of their land. Other allegations included the repressive measures taken by the government to prevent resistance by the Ogoni people against these violations.

The Commission found that the Nigerian government had violated the right to health and the right to a clean environment by directly contaminating water, soil and air, which harmed the health of the Ogoni people, and by failing to protect the community from the harm cause by the oil companies.⁴⁰⁰

The above case is significant for the protection of socio-economic rights, as it has set a new ground in African human rights jurisprudence. It also rejected arguments against the recognition of the justiciability of economic, social and cultural rights. With the establishment of the African Court of Justice and Human Rights, the work of the African Commission will be strengthened and the protection of socio-economic rights in Africa made a reality.

3.6 Socio-Economic Rights in South Africa

Having regard to the above discussion it is necessary to examine the way in which South Africa deals with the issue of socio-economic rights. Therefore, this section will examine socio-economic rights in the South African context. South Africa is one of the countries which is promising in the field of protection of socio-economic rights.⁴⁰¹ The context in which socio-economic rights should be

⁴⁰⁰ Ibid.

⁴⁰¹ Coomans F (ed) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 4.

protected has been an issue of jurisprudential controversy in South Africa.⁴⁰² The protection of the right to social security has to be seen in the context of the debate on the Justiciability of socio-economic rights. One of the pressing issues which the Constitutional Court had to deal with in the certification of the draft text of the 1996 Constitution was whether socio-economic rights are generally enforceable and justiciable.⁴⁰³ Some scholars contend that economic, social and cultural rights are a type of fundamental rights which the individual cannot directly invoke before a court.⁴⁰⁴ These rights impose positive obligation on the government for their implementation.⁴⁰⁵ Due to the nature of socio-economic rights, it has been argued that the courts should not be involved in the distribution of resources.⁴⁰⁶

During the drafting of the Constitution those who opposed the inclusion of socio-economic rights in the Constitution argued that these rights would not be enforceable and this would therefore undermine the legitimacy of the Bill of Rights.⁴⁰⁷ Some scholars also argue that socio-economic rights should only be included as 'directive principles' of state policy of which India is cited as an example.⁴⁰⁸ This approach is supported by a number of proponents.⁴⁰⁹ It is also

⁴⁰² Ibid.

⁴⁰³ This question was debated particularly in the Constitutional Court's first Certification judgment (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 par 78) and authorities cited.

⁴⁰⁴ Devenish *The South African Constitution* (2005) 146.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ See J De Waal, I Currie and G Erasmus, *The Bill of Rights handbook* (2003) 433.

⁴⁰⁸ Davis, DM 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' 8 *SAJHR* (1992) 475 – 490. See also De Villiers, B 'Social and Economic Rights' in van Wyk Dawid et al *Rights and Constitutionalism: The New South African Legal Order* (1994) 513-537.

⁴⁰⁹ See Sachs A 'The Judicial Enforcement of socio-Economic Rights: The *Grootboom* Case' in Jones, Peris and Stokke (eds) *Democratising Development: The politics of socio-economic rights in South Africa* (2005).

argued that the inclusion of these rights is inconsistent with the constitutional principle of separation of powers.⁴¹⁰ This would lead to the court having to dictate on how the state should allocate the budget.⁴¹¹ In certifying the draft text of the 1996 Constitution, the Constitutional Court pointed out that socio-economic rights in the constitution are justiciable, even though the inclusion of these rights may have direct financial and budgetary implications.⁴¹² The Court stated:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.⁴¹³

The Court again in the *Government of South Africa v Irene Grootboom and Others*,⁴¹⁴ held that:

[T]hese rights are, at least to some extent, justiciable. As we have stated...many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give right to similar budgetary implications without compromising their Justiciability. The fact that socio-economic rights will almost invariably give rise to such implications does not seem to us be a bar to

⁴¹⁰ In *Ex parte Chairman of the Constitutional Assembly: in Re: Certification of the Constitution of the Republic of South Africa* (1996) 10 BCLR 1253 (CC) 77.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Ibid, para 77.

⁴¹⁴ 2000 11 BCLR 1169 (CC).

their Justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.⁴¹⁵

The Constitution does not make any reference to the traditional division which was made between the first, second and third generation rights.⁴¹⁶ The South African courts have acknowledged that the division between these two sets of rights is untenable and therefore no longer applies. In *Soobramoney v Minister of Health, Kwazulu-Natal*,⁴¹⁷ the Court noted that:

The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with such treatment. But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme.⁴¹⁸

The Court in the *Grootboom* case examined the measures taken by the government in its national housing programme and found out that the government has failed to take immediate steps to help those in crisis. In this respect, the Court 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 in Chapter 2 of the Constitution."⁴¹⁹ The Court added that:

The state is obliged to take action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their

⁴¹⁵ Ibid, para 20.

⁴¹⁶ Olivier *et al op cit* note 15, 29.

⁴¹⁷ 1997 12 BCLR 1696 (CC).

⁴¹⁸ Ibid para 30.

⁴¹⁹ *Grootboom op cit* note 414 para 23.

interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.⁴²⁰

The Constitutional Court held that “the right of access to adequate housing cannot be seen in isolation. There is a close connection between it and the other socio-economic rights which must all be read together in the setting of the Constitution as a whole.”⁴²¹ The Court unequivocally states that realising a particular socio-economic right, such as the right of access to housing, would require that other elements not related to socio-economic rights, such as the right to land, the right to property be also available.⁴²² For example, in *Grootboom*,⁴²³ the Court states 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. This difference is significant. It recognizes that housing entail more than brick and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to

⁴²⁰ Ibid, para 24.

⁴²¹ Ibid.

⁴²² *Government op cit* note 414, para 53; *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) para 40. There are other rights which play a big role in social security these are the right to equality, the right to privacy, the right to property and the right to just administrative action.

⁴²³ *Grootboom* supra note 414 para 35.

adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

For the purposes of socio-economic rights litigation, the most important constraint on the discretion of the courts is their inability to step into the domain of the other branches of government because of the doctrine of separation of powers. In *Minister of Health & others v Treatment Action Campaign and others*,⁴²⁴ it was argued that the Court did not have powers to make orders that entail executive policy decisions.⁴²⁵ In this respect the Court held that the duty of the court is to apply the Constitution and the law impartially and without fear, favour or prejudice. It further held that the state is required by the Constitution to respect, protect and fulfill the rights in the Bill of Rights. When dealing with the constitutional validity of a certain policy, the Court has to consider whether the state in formulating and implementing that policy has given effect to its constitutional mandate.⁴²⁶

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In deciding constitutional matters, and particularly matters involving the enforcement of socio-economic rights, judges are required to perform a complex task of weighing and balancing various interests. On the one hand, they need to consider their role as protectors of the Constitution, but on the other, they need to be aware of the need to accord an appropriate degree of deference to the legislative and executive arms of government to establish policy and determine budgets and expenditure.⁴²⁷ This is clear from the language of section 38 of the Constitution which states that the court may grant “appropriate relief, including a declaration of rights”. In the context of socio-economic rights, the effect of the

⁴²⁴ 2002 10 BCLR 1033, para 97- 98.

⁴²⁵ In para 98 it was stated that under the doctrine of separation of powers policy making falls within the sphere of the executive not the Court.

⁴²⁶ Ibid, para 99.

⁴²⁷ O'Regan K 1999 'Introducing socio-economic rights' 1 *ESR Review* 4.

remedial provisions of the Constitution is to confer a wide discretion on the courts to fashion appropriate and innovative remedies to meet the needs of the poor. The impact of this wide remedial power is reinforced by the jurisprudence developed by the Constitutional Court,⁴²⁸ which emphasizes that in order to be 'appropriate,' a remedy must be effective.

Generally speaking, socio-economic rights are a category of rights which impose a positive duty on the state to enhance the condition of its bearers. This reflects upon the actions of the government which has to take measures and enact legislation to fulfill its constitutional obligation. Socio-economic rights require the state to take positive measures in order to realize these rights.⁴²⁹ What is important is that the government should take appropriate steps towards enhancing the realization of economic and social rights. However, decisions about prioritization are not just economic but depend on constitutional and political decisions (e.g. whether to spend less on defence and more on education, health or social assistance). Thus, in the South African context, the judiciary has made judgments based on the "reasonableness" associated with the affordability of specific policies or state actions.⁴³⁰

In the case of *Grootboom*,⁴³¹ despite the fact that the Court found that the state had no obligation to provide shelter to the applicants immediately, it held that the measures adopted by the former to provide shelter were unreasonable. In this case, Irene Grootboom and others were living under appalling conditions in informal settlement in Wallacedene Cape Town. In trying to better their lives they decided to move and illegally occupy a private owned land which was earmarked for low cost housing. As a consequence, they were evicted and left

⁴²⁸ See decisions made in landmark socio-economic rights cases such as *Grootboom* and the *TAC* case.

⁴²⁹ The 1996, Constitution.

⁴³⁰ See *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (CC).

⁴³¹ *Grootboom op cit* note 414.

homeless because the place where they previously lived was already occupied by others. The respondents applied to the Cape of Good Hope High Court for an order requiring the government to provide them with 'adequate basic shelter or housing pending their obtaining permanent accommodation.'

In the High Court,⁴³² Davis J found that the rights of access to housing in s26 (1) and (2) were not violated. The Court ordered the government to provide shelter to the applicants in accordance to s 28(1) (c) of the Constitution.⁴³³ The government appealed to the Constitutional Court.⁴³⁴ The Court had to decide whether the government housing programme was constitutional or valid in terms of sections 26(1) and (2) of the Constitution. The Court found the housing programme to be unreasonable because it failed to make provision for those who are in dire need.⁴³⁵ The Court introduced the reasonableness test as the standard of review. In considering what is reasonable, the Court stated:

The programme must be capable of facilitating the realization of the right. The precise contours and content of measures to be adopted are primarily a matter for the legislature and the executive. They must however ensure that the measures they adopt are reasonable. ... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have

⁴³² *Grootboom v Oostenberg Municipality* 2000 (3) BLLR 277 (c).

⁴³³ The High Court ordered that: in terms of section 28 of the Constitution :

- (a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;
- (b) the applicant parents are entitled to be accommodated with their children in the foregoing shelter; and
- (c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children;

(3) The several respondents are directed to present under oath a report or reports to this Court as to the implementation of paragraph (2) above within a period of three months from the date of this order. . .

⁴³⁴ *Grootboom op cit* note 414.

⁴³⁵ *Ibid*, paras 78-79.

been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.⁴³⁶

According to the Court:

In determining whether a set of measures are reasonable, it will be necessary to consider housing problems in their social and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for the attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of the society cannot be reasonable.⁴³⁷

... measures cannot leave out of account the degree and extent of the denial of the right they endeavor to realize. Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.⁴³⁸

The Court observed further that the case

...reminded us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated; for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.⁴³⁹

⁴³⁶ Ibid, para 41.

⁴³⁷ Ibid, para 43.

⁴³⁸ Ibid, para 45.

⁴³⁹ Ibid, Para 53.

Although the Constitutional Court has been commended for its extensive jurisprudence on socio-economic rights, it has also been criticized for failing to set out the scope and content of socio-economic rights.⁴⁴⁰

3.7 Conclusion

The South African Bill of Rights contains a range of socio-economic rights and the formulation of these rights determines the duties they impose and entitlements they create.⁴⁴¹ Olivier *et al* notes that the inclusion of the right to social security in the Bill of Rights signifies an important innovation of the South African Constitution regarding the protection of socio-economic rights.⁴⁴²

The inference that can be drawn from the principles outlined above is that human rights are universal and should apply to all persons at all times and without distinction. The universality of human rights means that they are all to be enjoyed by everyone, without discrimination. Their inalienability means that they are inherent in each individual. The principle that human rights are inter-dependent and inter-related recognizes that the full enjoyment of any particular

⁴⁴⁰ See Bilchitz *op cit* note 250; Liebenberg, S 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective tool in Challenging Poverty? 6 *Democracy & Development* (2002) 159; Bilchitz *op cit* note 252, 10; Roux *op cit* note 249.

⁴⁴¹ Brand D 'Textual basis: The Rights and Related provisions' in D Brand and C Heyns (Eds) *Socio-economic Rights in South Africa* (2005) 3. These are the rights to education, food, health care, housing, water, land, social security and social assistance and environmental rights. This generation traditionally requires a state to take positive action in distributing resources.

⁴⁴² Olivier, MP, Khoza JF, Janse van Rensburg L and Klinck E 'Constitutional Issues' in Olivier and Kalula (eds) *Social Security: A legal Analysis* 2003 at 66. See generally Freedman W *et al* "Constitutional issues" in Olivier MP *et al Social Security Law: General Principles* Butterworths 1999 499; Klinck E "It takes three to tango: the right to equality, social security and Constitutional law in South Africa" 2001 *European Journal of Law Reform* 163; Sloth-Nielsen J "The Child's Right to Social Services, The Right to Social Security and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 2001 17 *SAJHR* 210; De Vos P "*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 17 *SAJHR* 258; Liebenberg S "The Right to Social Assistance: The Implication of *Grootboom* for Policy Reform in South Africa" 2001 17 *SAJHR* 232.

human right depends upon the enjoyment of others.⁴⁴³ Gradually, the right to social security will be recognized as a right and not perceived as a mere expression of solidarity.

Social rights as second generation human rights are to be situated between civil and political rights and third generation rights. Social rights impose obligations on others, and in this respect, they are similar to civil and political rights if these are considered as individual rights to be guaranteed and respected equally among all human rights.



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⁴⁴³ Twomey *op cit* note 112, 46.

CHAPTER FOUR

INTERNATIONAL AND REGIONAL SOCIAL SECURITY SYSTEMS

4.1 Introduction

The preceding Chapter has dealt with socio-economic rights in general. This Chapter examines international standards of social security more in particular as articulated under international and regional human rights instruments. The purpose of this Chapter is to evaluate the approach of the international instruments on the right to social security. It will also identify key areas where practice can be drawn that will be appropriate for application in the South African social security system.

Human rights play a crucial role in bringing about political stability, economic and social development. Until recently, the right to social security did not feature as a concern in the discourses on human rights.⁴⁴⁴ However, it is acknowledged that "the right to social protection is a fundamental human right in all states and an essential mainstay of society".⁴⁴⁵ The concept of social security was used by President Roosevelt in the Social Security Act of 1935.⁴⁴⁶ According to Townsend, the omission of this right in the early years was a mistake which was due to over generalized and undirected international poverty strategy.⁴⁴⁷ It is

⁴⁴⁴ Townsend P 'The Right to Social Security and National Development Lessons from OECD Experience for Low Income Countries' *Discussion Paper 18* (2007) 1. See also Van Langendonck J 'The Meaning of the Right to Social Security' in Van Langendonck J (ed) *The Right to Social Security* (2007) 4.

⁴⁴⁵ Van Steenberge J, Jorens Y, van Eeckhoutte W. Foreword in Olivier M *et al.* (eds), *Social Security Law: General Principles* (1999) 28.

⁴⁴⁶ Van Langendonck 'The Meaning of the Right to Social Security' in J Van Langendonck (ed) *The Right to Social Security* (2007) 4.

⁴⁴⁷ Van Langendonck *op cit* note 446.

acknowledge that during these years anti-poverty strategies were unsuccessful.⁴⁴⁸

The right to social security is provided in a number of human rights instruments both at the international, regional and national level, some of which have been ratified by South Africa. A vast number of these instruments are formulated in such a way that they protect human rights. These instruments include the UDHR⁴⁴⁹; the ICESCR;⁴⁵⁰ the (ILO) Conventions;⁴⁵¹ European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁵² the European Social Charter;⁴⁵³ the African Charter;⁴⁵⁴ the Charter of Fundamental Social Rights in the South African Development Community (SADC);⁴⁵⁵ and the SADC Draft Code on Social Security.⁴⁵⁶ The provisions of these instruments, as well as the South African Constitution and legislation, promote and uphold the rights of older persons of access to social security and other social services.

In South Africa, international instruments are an important aid for interpreting the provisions of the Bill of Rights. This is clear from the wording of section 39(1) (c) of the Constitution, which provides that when a court, tribunal or forum is interpreting a right in the Bill of Rights, it 'must consider international law'.⁴⁵⁷

⁴⁴⁸ Ibid.

⁴⁴⁹ UDHR *op cit* note 99.

⁴⁵⁰ ICESCR *op cit* note 97.

⁴⁵¹ ILO Convention 102 *op cit* note 127.

⁴⁵² The European Convention of 1950.

⁴⁵³ The European Social Charter of 1961.

⁴⁵⁴ The African Charter of 1981.

⁴⁵⁵ SADC Charter of Social Rights.

⁴⁵⁶ SADC Code on Social Security.

⁴⁵⁷ S 39 (1) (b), 1996 Constitution.

Section 233 of the Constitution also 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.'⁴⁵⁸ Therefore, decisions of tribunals and specialized agencies may provide guidance on the proper interpretation of the provisions of the Bill of Rights.⁴⁵⁹ This approach has been followed in a number of cases.⁴⁶⁰ In *S v Makwanyane*,⁴⁶¹ the Constitutional Court affirmed that conventions and recommendations are a major source of South Africa's public international law which includes binding and non binding law.

International legal instruments cover a wide range of rights which are to be protected and these rights form part of the human-rights system.⁴⁶² In terms of these instruments, state parties assume a range of binding obligations.⁴⁶³ According to Olivier and Mhone, international instruments provide a framework within which the Bill of Rights can be evaluated and understood.⁴⁶⁴ Accordingly, decisions of other courts or tribunals can be of value to South Africa, more in

⁴⁵⁸ S 233, 1996 Constitution.

⁴⁵⁹ The decisions of the United Nations Committee on Human Rights Established under Article 28 of the International Covenant on Civil and political Rights of 1966; the European Commission on Human Rights established in terms of Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; and the European Court of Human Rights.

⁴⁶⁰ See for example, *Ferreira v Levin* No 1996 (1) SA 984 (CC); *S v Rens* 1996 (1) SA 1218 (CC); *in Re: Gauteng School Education Bill* 1995, 1996 (3) SA 165 (CC); *The Government of the Republic of South Africa v Grootboom & others* (2000) 11 BCLR 1169 (CC) para 26.

⁴⁶¹ 1995 3 SA 391 (CC) para 35.

⁴⁶² Rembe N S 'The System of Human Rights under the African Charter on Human and People's Rights: Problems and Prospects' *Human and Peoples' Rights Monograph Series* No. 6 (1991) 28.

⁴⁶³ Rembe *op cit* note 462.

⁴⁶⁴ Olivier M and Mhone G 'Social Protection in SADC: Developing an Integrated and Inclusive Framework – The case of South Africa' in Olivier and Kalula (eds) *Social protection in SADC: Developing an Integrated and Inclusive Framework* (2004) 134.

particular when interpreting the Bill of Rights.⁴⁶⁵ One of the aims of the White Paper on social welfare is 'to give effect to those international conventions of the United Nations system which have been ratified by the Government, and which are pertinent to developmental social welfare.'⁴⁶⁶

International law can be used for interpreting domestic law. The importance of ratification of international instruments needs to be emphasized. This is supported by the jurisprudence and commentary on socio-economic rights. In this respect, reference is made to the General Comments, the Limburg Principles of 1986, as well as the Maastricht Guidelines of 1997.⁴⁶⁷

South Africa is signatory to the ICESCR which was adopted in 1966, but she has not yet ratified this Covenant.⁴⁶⁸ By signing the Covenant, South Africa has the obligation to refrain from taking steps that would defeat its purpose and object.⁴⁶⁹ Although South Africa has not yet ratified the ICESCR, it has indicated an intention to be a party to relevant international treaties.⁴⁷⁰ The ratification by South Africa of this instrument may serve as a baseline for social security protection in the country as a whole.

The right to social security was included in the UDHR⁴⁷¹ and it was later also included in the International Covenant on Economic, Social and Cultural Rights

⁴⁶⁵ Olivier and Mhone *op cit* note 464.

⁴⁶⁶ White Paper *op cit* note 15, 19.

⁴⁶⁷ Jansen van Rensburg L and Olivier MP 'International Standards' in Olivier *et al* (eds) *Introduction to Social Security* (2004) 164.

⁴⁶⁸ ICESCR, *op cit* note 97.

⁴⁶⁹ Jansen van Rensburg and Olivier *op cit* note 467, 171. See also Article 18 of the Vienna Convention on the Law of Treaties, 1969.

⁴⁷⁰ *Ibid*, 164.

⁴⁷¹ The Universal Declaration of Human Rights which was proclaimed by the United Nations (UN) on the 10th December in 1948, G.A.Res.217A (III), UN Doc. A/81, 71 (1948).

of 1966. The concept of social security is a broad one and because the term can be interpreted to contain both a limited and a wider spectrum of entitlements, it is closely related to, and often supplemented by, a number of inter-related rights that feature in these instruments.

This Chapter provides an international and regional perspective on the debate on the right to social security in South Africa. It will examine the nature and content of the right to social security and also how this right has been realized in practice.

4.2 The Right to Social Security in the International Human Rights Framework

The international human rights instruments provide a legal framework on strategies to reduce poverty. International human rights and social security law has developed tremendously and has exerted an important influence on the development of national institutions. The introduction of human rights in the international arena has much to offer to strengthen the social security system. The role played by social security in uplifting the life of many individuals cannot be denied. As one scholar puts it, it is one of the greatest achievements of modern society, a key element for social protection.⁴⁷² Although the right is so crucial to the lives of many individuals, it is not clearly defined.⁴⁷³ International instruments define the right to social security, but they lack clarity on the precise nature of the obligations assumed by States parties.⁴⁷⁴ The term social security is often understood as being limited to social benefits 'earned' by workers'

⁴⁷² Put J 'Social security Rights' in Van Langendonck J (Ed) *The Right to social Security* (2007) 187.

⁴⁷³ Van Langendonck *op cit* note 446, 5.

⁴⁷⁴ Ibid.

contributions to insurance schemes and excludes social assistance in the form of non-contributory welfare payments financed from the general revenue.⁴⁷⁵

Before 1945, international law dealt with the relations between states and did not concern itself with how states treated their own citizens. The treatment of individuals, the regulation and the provision of their welfare was left within the internal domain of individual states. Escalating poverty and the need to regulate employer and employee relations were the issue that gave rise to the development of social welfare policies.⁴⁷⁶ In 1883-84, Otto Von Bismarck initiated social security schemes whereby employers and employees were to pay contributions in order to finance sickness insurance and workers compensation.⁴⁷⁷ After the schemes successfully functioned for some years, they were complemented with old insurance programs that were partly financed through taxes.⁴⁷⁸ In the course of time, the right to social security did not go beyond the framework of social insurance.⁴⁷⁹ Nevertheless, it was only after the First World War that an express link between social rights and human rights was established. Some of the new Constitutions that evolved after 1918 included an acknowledgement of the principle of social insurance.⁴⁸⁰ The then newly established International Labour Organisation was very active in establishing an international regime for social insurance.⁴⁸¹

⁴⁷⁵ See Scheinin, M 'The Right to Social Security' in Eide, Krause and Rosas (eds) *Social, Economic and Cultural Rights* (2001) 211.

⁴⁷⁶ Zacher HF 'Jurisdiction in the Field of Social Security' in Taubner G (ed) *Jurisdiction of Social Spheres* (1987) 19.

⁴⁷⁷ Zacher *op cit* note 476, 19.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

Despite the doubts expressed against the right to social security, the latter compliments other rights which are necessary to enhance human dignity and enable individuals to deal with the risks of social life.⁴⁸² Social security is a basic right which has to be protected and realised.⁴⁸³ In this respect, the state is mandated by law to protect all human rights, the right to social security included. Many states have included this right in their constitutions either in principles of national policy or as justiciable human rights within Bills of Rights.⁴⁸⁴ As the human rights discourse expands and flourishes, it is difficult to deal with certain issues. For example, the normative content of "human rights" is in itself subject to controversy and contest.⁴⁸⁵

When the Universal Declaration was adopted in 1948, all the Nordic and most of the countries in Europe had introduced some form of social security legislation.⁴⁸⁶ A common element in these legislations was that they offered assistance to people in utmost need. Few of them were universal in the sense that they were available to the whole population irrespective of the income.⁴⁸⁷

⁴⁸² 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' *SAJHR* (2006) 22 197, 208-209.

⁴⁸³ Jansen van Rensburg and Lamarche *op cit* note 37, 121. They noted that:

"As a human right, social security can contribute to social protection by providing useful benchmarks to assess how the economic, political and ideological initiatives arising from the need for social protection contribute to respect for human rights, including the right to social security."

⁴⁸⁴ The Constitution of the Republic of South Africa of 1996 mandates the government to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

⁴⁸⁵ Campbell T, Goldberg, D, Mclean S, and Mullen T *Human Rights: from Rhetoric to Reality* (1986) 17. Oxford and New York: Basil Blackwell. There are many counterfeits that lie for recognition as human rights, including animal rights.

⁴⁸⁶ Campbell *et al op cit* note 485, 17.

⁴⁸⁷ *Ibid.*

In the international human rights discourse, the UDHR was the first instrument to introduce the right to social security. As the adoption of the covenant was delayed, codification of right to social security was initiated by ILO. The ILO adopted in 1952 Convention No 102 on Minimum Standard of Social Security. Convention 102 defines nine benefits. In addition to the provisions of the ILO Convention No. 102, there are several other ILO conventions which are also relevant to social security.⁴⁸⁸ The ILO Committee of Experts started to supervise the implementation of these standards by reviewing regular reports by states.⁴⁸⁹ In the UN system, a more general codification of the right to social security as a human right was achieved when the ICESCR was adopted in 1966.⁴⁹⁰

The development of international and regional codification of the right to social security has been notable in the human rights system of the Council of Europe. According to Campbell *et al*, the European Social Charter (ESC) of 1961 and the revised European Social Charter of 1996 go beyond the simple protection of the right to social security by providing for a more complete protection.⁴⁹¹ It is the only treaty to date that addresses all the aspects of social security protection.⁴⁹² In addition to the right to social security, it provides for the right to social and medical assistance and the right to benefit from social services.⁴⁹³

⁴⁸⁸ These include the Maternity Protection Convention (revised), 1952 (No.103), Equality of Treatment (Social Security) Convention, 1962 (No.118), Employment Injury Benefits Convention, 1964 (No. 121), Invalidity, Old Age, and Survivors' Benefits Convention, 1967 (No. 128), Medical Care and Sickness Benefits Convention 1969 (No. 130), Maintenance of Social Security Rights Convention, 1982 (No.157), Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168).

⁴⁸⁹ Campbell *et al op cit* note 485, 123.

⁴⁹⁰ Article 9 of the ICESCR *op cit* note 97.

⁴⁹¹ Campbell *et al op cit* note 485.

⁴⁹² Ibid.

⁴⁹³ Ibid.

When social security is considered, the work of ILO and the standards it has developed is an important source for the interpretation and the definition of this right.⁴⁹⁴ The right to social security features in several ILO conventions and the latter has been central to its development.⁴⁹⁵ The creation of ILO was one of the results of the Treaty of Versailles. Its aim was to create conditions for peace and social justice.⁴⁹⁶

ILO's first convention concentrated on labour conditions. Soon however, the ILO adopted several conventions that aimed at creating national mechanisms for protecting workers from industrial and social risks.⁴⁹⁷ The right to social security was developed in a context in which industrial work predominated in Europe and other developed countries and at a time when the male industrial worker was seen as the family breadwinner and therefore became the first direct beneficiary of this right.⁴⁹⁸

The international legal framework recognizes various mechanisms for the reduction of poverty.⁴⁹⁹ These include the human rights based approach to social security. According to Chinkin:

A rights-based approach allows links to be made between otherwise disparate issues and gives legal weight and content to many of the concepts that are traditionally seen and analysed in terms of development, management and welfare. It thus moves away from the instrumentalist and utilitarian language of

⁴⁹⁴ Ibid.

⁴⁹⁵ Midgley *op cit* note 126.

⁴⁹⁶ Ibid.

⁴⁹⁷ See ILO conventions 17 and 18, 24, 25, 35, 40, 44.

⁴⁹⁸ Townsend, P 'The Right to Social Security and National Development: Lessons from OECD experience for low-income countries' Discussion Paper 18, 4.

⁴⁹⁹ Dixon *op cit* note 154.

development economists to that of the entitlements and obligations enshrined within the formal legal system, while the authority for other approaches lack.⁵⁰⁰

Various international instruments concerning social security are described below, specific attention being given to the provisions regarding social security.⁵⁰¹ Protocols adopted within, for example, the Southern African Development Community (SADC), also affect the provisions of social security in South Africa.

4.2.1 The Universal Declaration of Human Rights of 1948

The right to social security is provided for in the UDHR.⁵⁰² The UDHR recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.⁵⁰³ When the UDHR was adopted in 1948, most of the developed countries had introduced some form of social security legislation that offered assistance to people in utmost need.⁵⁰⁴ However, very few countries were able to make social security cover the whole population, irrespective of the income.⁵⁰⁵ Others offered benefits only to members of trade unions or other associations based on membership and solidarity.⁵⁰⁶

⁵⁰⁰ Chinkin C 'The United Nations Decade for the Elimination of Poverty: What role for International Law?' *Current Legal problems* (2001), 564.

⁵⁰¹ See section 4.2.1 and the following sections.

⁵⁰² UDHR *op cit* note 99.

⁵⁰³ See the Preamble to the UDHR, *Ibid*.

⁵⁰⁴ Andreassen, B A 'Article 22: The Universal Declaration of Human Rights in Alfredson G and Eide A (eds) 1999 at 459. See also Tang KL 'Noncontributory Pensions in Hong Kong: An Alternative to Social Security' in Midgley, J and Sherraden M *Alternatives to Social Security: An International Inquiry* (eds) 1997.

⁵⁰⁵ *Ibid*.

⁵⁰⁶ *Ibid*.

It would appear that the right to social security is limited by the requirement of 'available resources.' Article 22 of the UDHR does not define the minimum core of the right to social security, which is "indispensable for the dignity and personal development of the individual".⁵⁰⁷ As explained by Andreassen, it was the intention of the drafters of the UDHR to avoid details in order to give the possibility for elaborating on this provision by ILO and more specific international treaties on the subject.⁵⁰⁸ In the same vein, Article 25(1) of the UDHR refers both to social welfare and social security.⁵⁰⁹ However, it does define social security by listing the social risks to be covered. Different views have been advanced about the status of the UDHR. Some view the Declaration as having a moral value rather than imposing legally binding obligations on states.⁵¹⁰ Others regard the UDHR as an authoritative interpretation of the human rights and fundamental freedoms referred to in the Charter of the United Nations, and consequently, binding on member states.⁵¹¹ However, the wide acceptance of the UDHR in state practices, its continuous recitation in subsequent international instruments and its incorporation into national constitutions is evidence of *opinio juris* and the attainment of the status of customary international law.⁵¹²

The rights and freedoms set out in the UDHR were later reinforced by the two International Covenants on Human Rights, namely: the International Covenant

⁵⁰⁷ Van Langendonck J (eds) *The Right to Social Security* (2007) 5.

⁵⁰⁸ See Andreassen *op cit* note 158, 462-488.

⁵⁰⁹ Wouter Vandenhoele *Article 26: The Right to Benefit from Social Security* (2007) 3.

⁵¹⁰ Alston P and Steiner H *International human rights in context: Law, Politics, morals* (2000) at 227-231. See also John Veit-Wilson 'Some Social Policy Implications of a Right to Social Security' in Van Langendonck J (eds) *The Right to Social Security* (2007) 65.

⁵¹¹ Drost, NP *Human Rights as Legal Rights: The realization of Individual Human Rights in positive International Law* (1951).

⁵¹² Cranston, M *What are Human Rights?* (1973), 9. See also Rembe N S 'Prospects for the realisation of the New International Economic Order: An African perspective' *CILSA* (1984) 322, 330-333. Goosen C *et al* 'International and Comparative Social Security standards' in Olivier M *et al.* (eds), *Social Security Law: General Principles* (1999) 527.

on Economic, Social and Cultural Rights (ICESCR)⁵¹³ and the International Covenant on Civil and Political Rights (ICCPR),⁵¹⁴ and the practice generated by their respective supervisory bodies. These will be examined below.

4.2.2 International Convention on Economic Social and Cultural Rights (ICESCR).

The term 'right to social security' has been included in the ICESCR.⁵¹⁵ The ICESCR provides that 'everyone has a right to social security,⁵¹⁶ and that all people are entitled to an adequate standard of living, including food, clothing and housing.'⁵¹⁷ Although the text of the ICESCR is quite brief regarding the right to social security and for years there was no specific General Comment, social security was covered in other General Comments.⁵¹⁸ Article 9 of the ICESCR provides that states parties 'recognize the right of everyone to social security including social insurance'.⁵¹⁹ According to the ICESCR Committee people should be protected in situations caused by ill-health, sickness, old-age, unemployment, employment injury, insufficient family, child support, and death of family member, survivors and orphans.⁵²⁰ The ICESCR Committee pays tentative attention to the enjoyment of the right to social security by everyone.

⁵¹³ ICESCR *op cit* note 97.

⁵¹⁴ ICCPR *op cit* note 261.

⁵¹⁵ ICESCR *op cit* note 97. See Eide A *et al op cit* note 334, 3.

⁵¹⁶ Article 9 of the ICESCR.

⁵¹⁷ Article 11 (1) of the ICESCR.

⁵¹⁸ The United Nations Committee on Economic, Social and Cultural rights has issued a number of General Comments which relate to rights to social security, designed to assist States to fulfill their reporting obligations in relation to people with disabilities, older people, etc. See UN Doc. E/1995/22. General Comment No. 5. The rights of persons with disabilities, 09/12/94; UN Doc. E/1996/22. General Comment No. 6. The Economic, Social and cultural rights of older persons. 08/12/95.

⁵¹⁹ Article 9 of the ICESCR.

⁵²⁰ General Comment No. 19: *The Right to Social Security*. UN Doc. E/C.12/GC/19, adopted 23 November 2007, entered into force on 4 February 2008 para 2.

Section 27 of the South African Constitution guarantees that everyone has the right to have access to: 'social security, including if they are unable to support themselves and their dependents, appropriate social assistance.'⁵²¹ The State is obliged to take reasonable and other measures, within its available resources to achieve the progressive realization of this right.⁵²² South Africa is signatory to ICESCR which was adopted in 1966 but today it has not ratified it.⁵²³ By signing the Covenant, South Africa has the obligation to refrain from taking steps that would defeat its purpose.⁵²⁴ ICESCR does not contain any clear reference to the rights of older persons, except in Article 9 where it recognizes the right of old age benefits.⁵²⁵ Most states in the industrialised world are faced with the challenge of adapting social and economic policies to meet the growing needs of their ageing population, especially as regards social security.

It is clear that older persons are entitled to enjoy the rights recognized in the ICESCR. Article 9 is a general provision which does not specify the level of protection guaranteed by ICESCR. In order to implement the provisions of Article 9, States parties should, within available resources, provide old age benefits and other forms of assistance to all older persons. This should come when they reach the age prescribed in national legislation. Those that have not completed a qualifying period of contribution, those that are not entitled to an old age pension or other social security benefit or assistance, and those that have no other source of income are not covered. Article 10 (2) also recognises the right

<http://www2.ohchr.org/eng/bodies/cescr/docs/cescr39/E.C.12.GC.19.pdf>

⁵²¹ S 27(1), Constitution.

⁵²² S 27(2), Constitution.

⁵²³ ICESCR *op cit* note 97.

⁵²⁴ Jansen van Rensburg L and Olivier MP 'International Standards' in Olivier *et al* (eds) *Introduction to Social Security* (2004), 171. See also Article 18 of the Vienna Convention on the Law of Treaties 1969, *op cit* note 27.

⁵²⁵ Article 9 of the ICESCR.

of working mothers to “adequate social security benefits” while Article 10 (3) requires that states undertake special measures of protection and assistance for children and young people. Article 11 also recognises the right to an adequate standard of living, including adequate food, clothing, and housing and to the continuous improvement of living conditions. States parties undertake to take appropriate steps to ensure the realization of this right, having regard to the essential importance of international co-operation.

Article 9 of the ICESCR repeats the wording of the UDHR but adds “social insurance”. It can therefore be stated that the concept of social security was not clearly defined in all these instruments and it was left open for later discussion.⁵²⁶ According to Lamarche, it was agreed with ILO that the ICESCR should continue the practice and standards developed by the former.⁵²⁷ The lack of clarity has created a gap in the social security system. Riedel views this as a loophole intended by the drafters of these international instruments.⁵²⁸

The right to social security was not taken into consideration in the early formulation of development programs.⁵²⁹ The Committee of Experts took many years to elaborate on the right to social security in the ICESCR. Although the Committee had issued a number of General Comments on disabled and older persons,⁵³⁰ there is a need for a General Comment which would give a clear

⁵²⁶ See Van Langendonck *op cit* note 507, 5.

⁵²⁷ Lamarche L ‘Social Security as a human right’ in D Brand & S Russell (Eds) *Exploring the core content of socio-economic rights: South African and International perspectives* (2002) 109. See Lamarche L ‘The Right to Social Security and assistance’ in D Brand and C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 210.

⁵²⁸ Aibe Riedel ‘The Human Right to Social security: Some Challenges’ in E Riedel (eds) *Social Security as a Human Right: Drafting a General comment on Article 9 ICESCR – Some Challenges* (2007) 18.

⁵²⁹ *Ibid.*

⁵³⁰ The United Nations Committee on Economic, Social and Cultural rights has issued a number of General Comments which relate to rights to social security, designed to assist States to fulfill their reporting obligations in relation to people with disabilities, older people, Etc. See UN Doc. E/1995/22. General Comment 5: The rights of person with disabilities,

description of certain elements of social security. Such need is expressed by a number of experts who attended a workshop in Berlin,⁵³¹ and this resulted in the adoption of General Comment No 19: the right to social security.⁵³² Therefore, in order to see how these rights are realized in practice, it is useful to pay attention on the General Comments of the Committees on Economic, Social and Cultural Rights.

It is worth mentioning that the ICESCR has been discussed above in Chapter Three. Chapter Four looks at the right to social security under international instruments. The ICESCR is the key international instrument on socio economic rights of which the right to social security is part. In order to have a clear understanding of the content of General Comment No. 19 which elaborates the right to social security, it is necessary to illustrate the significance of the General Comments. This is discussed hereunder.

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4.2.2.1 The significance of the General Comments

4.2.2.1.1 The Role of General Comments

One important tool of the Committee is the adoption of General Comments, which have served as authoritative statements by the ICESCR on the nature, content and scope of the rights enumerated in the ICESCR.⁵³³ They clarify the

09/12/94; UN Doc. E/1996/22. General Comment 6: The Economic, Social and cultural rights of older persons. 08/12/95. Recently it has issued General Comment no 19: The Right to Social Security. UN Doc E/C.12/GC/19 4 February 2008. See also Aibe Riedel 'The Examination of State Reports in Ekart Klein (ed), *The Monitoring System of Human Rights Treaty obligations* (1998) at 95, 105.

⁵³¹ Riedel A 'The Human rights to Social Security: Some Challenges' in Aibe Riedel (eds) *Social Security as a Human Right* 2007 at 17. Riedel said "The right to social security in Article 9 of the ICESCR has not received the attention it deserves."

⁵³² General Comment No 19 *op cit* note 530.
<http://www2.ohchr.org/eng/bodies/cescr/docs/cescr39/E.C.12.GC.19.pdf>

⁵³³ Veriava F and Coomans F 'The right to education' in Brand D and Heyns C (eds) *Socio-economic Rights in South Africa* (2005) 57, 58.

substantive areas of the Covenant and on the obligations of states.⁵³⁴ They also point to the information that should be included in the reports by state parties.

4.2.2.1.2 Clarifying States' Parties Obligations

From the outset it was clear that the Committee, which began its work in 1987, should focus on clarifying the normative content of the rights in the Covenant. The ICESCR Committee met to consider the nature of state parties' obligations provided under Article 2(1) of the Covenant. The Article reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁵³⁵

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This major issue was discussed at an expert meeting which took place in Maastricht on 2-6 June 1986. The outcome of this meeting was the so-called Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.⁵³⁶ They provide an interpretation of the nature and scope of states parties' obligations under Articles 2-5 in particular. These Principles were used by the Committee as an inspiration and input when it started drafting the General Comment on Article 2(1), which was adopted in 1990

⁵³⁴ Ibid.

⁵³⁵ Article 2(1) of the ICESCR.

⁵³⁶ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex; also published in the *Human Rights Quarterly*, Vol. 9, 1987, pp. 122-135, together with a commentary and preparatory papers (pp. 136-273).

at its fifth session.⁵³⁷ It laid the foundation for the future normative content and monitoring activities of the Committee.⁵³⁸

The Committee clarified the meaning of the obligation 'to take steps'. It is of the view that although the rights in the Covenant may be realized progressively, a state party must begin to take measures aimed at implementing the rights shortly after the Covenant enters into force for that particular State.⁵³⁹ Such measures should be 'deliberate, concrete and targeted as clearly as possible' towards meeting its obligations.⁵⁴⁰ This means that a government may not lean back and take a passive attitude once it has ratified the Covenant.⁵⁴¹ After all, the ICESCR is aimed at realizing higher levels of the enjoyment of the substantive rights in the ICESCR.⁵⁴² However, the clause 'achieving progressively the full realization of the rights' means that the drafters were aware of the fact that in many countries the full realization of the rights will not be achieved at once or within a short period of time. Therefore, the progressive realization is 'a necessary flexibility device', which reflects the realities and difficulties of the real world.

The object and main feature of the Covenant is that it lays down obligations for states aimed at the full realization of the rights under the Covenant. Consequently, the phrase 'progressive realization' imposes an obligation 'to move as expeditiously and as effectively as possible' towards the full realization of the rights. Deliberate and retrogressive measures which imply a step

⁵³⁷ UNCESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, par. 1), UN Doc. E/1991/23, Annex III. See Coomans F 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' *ZaöRV* 65 (2005), 167, 180.

⁵³⁸ *Ibid.*

⁵³⁹ General Comments No. 3 para 9.

⁵⁴⁰ *Ibid.*, para 2.

⁵⁴¹ See Coomans *op cit* note 537.

⁵⁴² *Ibid.*

backward in the level of the enjoyment of rights would require careful consideration and full justification in the light of the object and purpose of the Covenant.⁵⁴³ On the other hand, the Limburg principles provide that:

21. The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.
22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant.
23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.
24. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.⁵⁴⁴

In General Comment No. 3, the Committee introduces a new concept that is meant to lay down some minimum level of enjoyment of a right that should be guaranteed under all circumstances. This is the notion of 'minimum core' obligation that aim to ensure the satisfaction of, at the very least, the minimum essential levels of each of the rights'.⁵⁴⁵ According to Coomans, each right has a

⁵⁴³ General Comment No. 3, para 9.

⁵⁴⁴ See Limburg Principles *op cit* note 536 paras 21-24.

⁵⁴⁵ *Ibid*, para 10. Compare the Limburg Principles, *op cit* note 536 para 28. For application of this concept to the right to education, see, Coomans F "Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization", in: Y Donders and V Volodin (eds.), *Human Rights in Education, Science and Culture* Paris/Aldershot (2007) 183-229, 196.

minimum or core content which should be ‘translated’ or operationalized at the national or regional level, taking into account national or regional characteristics and all circumstances, and the specific needs of individuals and groups.”⁵⁴⁶ In his view, the core content of a right refers to the essential elements of a right in terms of protecting human dignity.⁵⁴⁷ Accordingly, this means that all governments programmes must provide for the realization of a core element of a right otherwise if it does not it would lose its meaning as a human right.⁵⁴⁸ He asserts that: “The core of a right is to be considered as an expanding floor (note a fixed ceiling), or a bottom floor which the government should endeavour to go up, trying to reach levels of realization”.⁵⁴⁹

The Committee argued that:

a minimum core obligation to ensure the satisfaction of, at least, the minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant.⁵⁵⁰

⁵⁴⁶ Coomans *op cit* note 545, 196.

⁵⁴⁷ *Ibid*, 197.

⁵⁴⁸ Coomans *op cit* note 545, 197. See also Coomans F ‘In Search of the Core Content of the Right to Education, in Brand D and Russell S (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, Protea Book House, (2002) 180.

⁵⁴⁹ *Ibid*.

⁵⁵⁰ General Comment No 3, para 10. Compare the Limburg Principles, *op cit* note 536 para 25.

The ICESCR Committee, also views that in the light of the obligation to take steps to the maximum of its available resources, states must give priority to the satisfaction of the minimum core obligation.⁵⁵¹

In this respect it is important to note that 'available resources' refer to both domestic resources and those from the international community through international cooperation and assistance.⁵⁵² It may also imply that a state must reorient its national priorities, for example, from spending on military equipment to spending health issues. In times of severe resource constraints, a government may also be required to adopt low-cost targeted programs or safety nets to protect the most vulnerable members of the society.⁵⁵³

The final clause is the obligation to take steps 'by all appropriate means'. Legislative measures are singled out in Article 2(1), but other measures may also be appropriate, depending on the domestic situation.⁵⁵⁴ These may include administrative and judicial remedies, financial measures such as a progressive income policy, a housing policy facilitated by allowances for low income households, or the distribution of food to those in need or who are unable to take care of themselves.

General Comment No. 3 has been influential, because some of its key notions have been applied in other General Comments on substantive rights in the Covenant. An example is the notion of core obligations which has been included in all General Comments since 1999.⁵⁵⁵

⁵⁵¹ Ibid, para 10.

⁵⁵² Ibid, para 13. Compare the Limburg Principles, *op cit* note 436 para 26.

⁵⁵³ Ibid, para 12.

⁵⁵⁴ Ibid, paras 3, 4. Compare the Limburg Principles, *op cit* note 536 above) paras 16-20.

⁵⁵⁵ Compare, for example, General Comment No. 13 on the right to education, UN Doc. E/C.12/1999/10, par 57 and General Comment No. 19 on the right to social security, UN Doc. E/C.12/GC/19, paras 59-61. See also the Committee's Statement on Poverty and the ICESCR, UN Doc. E/C.12/2001/10, paras 15-18.

There are other concepts that have been developed in the academic debate on socio-economic rights and subsequently applied in General Comments. These include the so-called typology of obligations – the obligation to respect, to protect, and to fulfil – which seeks to clarify and specify the obligations of States' parties.⁵⁵⁶ Each General Comment on a substantive right uses this typology to define negative and positive state obligations.⁵⁵⁷ For example, the obligation to respect the right to social security requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation to protect requires that States parties prevent third parties, such as employers, from interfering with the enjoyment of the right to social security. With this obligation human rights legislation and human rights commission has a role to play in this regard. In South Africa, the South African Human Rights Commission is entrusted with the mandate to protect, promote and monitor the government's compliance with human rights. Finally, the obligation to fulfill requires States parties to adopt the necessary measures, such as the establishment and implementation of a social security scheme directed towards the full realization of this right.⁵⁵⁸

4.3 Content of the General Comment No 19: The Right to Social Security

The Committee begins by identifying the normative content of the right to social security. It identifies a number of features and dimensions of this right. Next the

⁵⁵⁶ See, for a detailed discussion of the development of the typology of obligations, Sepúlveda M *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (2003), chapter V.

⁵⁵⁷ Coomans *op cit* note 537, 207. He describes obligation to respect as cost-free (negative), on the other hand, the obligation to protect and fulfill as positive obligations.

⁵⁵⁸ See for a more detailed discussion, General Comment No. 19, *op cit* note 543, paras 43-51 and Riedel E (Ed), *Social Security as a Human Right – Drafting a General Comment on Article 9 ICESCR*, 2007.

Committee explains and interprets the nature of the obligations of states. It distinguishes between domestic obligations, core obligations and international obligations followed by violations. Finally, the Committee explains how the right to social security should be implemented at the national level.

The Committee recognizes the right to social security to include: the right to access and to maintain benefits, whether in cash or in kind, in order to secure protection from lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; unaffordable access to health care; insufficient family support, particularly for children and adult dependents.⁵⁵⁹ Article 2(1) of the ICESCR requires states to take steps to the maximum of their resources, with a view to achieving progressively the full realization of the rights in the ICESCR.⁵⁶⁰ Measures to be taken can include both contributory and non-contributory schemes.⁵⁶¹ These schemes must be available and in place to ensure that benefits can be accessed for the relevant social risks and contingencies. Schemes should also be sustainable, particularly in relation to the provision of pension in order to ensure that the right can be realised for the present and future generation.⁵⁶²

The Committee considers a number of elements and factors that should be taken into account at any given time when dealing with the right to social security, which include: availability; social risks and contingencies; adequacy; accessibility; and also the relationship with other rights. These elements are documented below.

⁵⁵⁹ General Comment No. 19, para 2.

⁵⁶⁰ Article 2 (1) of ICESCR.

⁵⁶¹ General Comment No. 19, paras 4 (a), (b).

⁵⁶² Ibid, para 15.

4.3.1 Elements of the Right to Social Security

4.3.1.1 Availability

For a proper implementation and of the right to social security, a social security system must be available and in place to ensure that benefits can be accessed for the relevant social risks and contingencies. The system should be established under domestic law and public authorities must take responsibility for the supervision of the system. Schemes should also be sustainable, particularly in relation to the provision of pension in order to ensure that the right can be realised for the present and future generations.⁵⁶³

4.3.1.2 Social risks and contingencies

The Committee pointed out that Social security system should cover nine aspects of social security. These include health care, sickness, unemployment, disability, maternity, old age, employment injury, family and child support, and survivors and orphans.⁵⁶⁴ These nine risks and contingencies are also mentioned in ILO Convention 102 of 1952.⁵⁶⁵ Under the latter Convention, it is required that each state must at least fulfill the minimum standard of three of the nine contingencies enumerated above.⁵⁶⁶

4.3.1.3 Adequacy

Another requirement is that a benefit must be adequate to ensure an adequate standard of living. The level of benefits provided under various schemes should meet a defined minimum benefit. With regard to social assistance benefits, they

⁵⁶³ Ibid, para 11.

⁵⁶⁴ Ibid, para 12.

⁵⁶⁵ ILO Convention No. 102.

⁵⁶⁶ Ibid.

should be sufficient to ensure that the recipients do not fall beneath the poverty line and similarly, the kind of benefits provided should be appropriate to the kind of risk or contingency faced.⁵⁶⁷ The Committee notes that to meet the adequacy criterion, State parties should be guided by the principle of dignity and the right to non-discrimination which may influence the level of benefits and the form in which they are provided. What is crucial in this criterion is monitoring which should be done regularly in order to ensure that the beneficiaries are able to afford the goods and services they require to realise their rights. Under the adequacy criterion, the Committee stressed the need to build up a relationship between earnings, paid contributions, and the amount of relevant benefit. This is necessary particularly when a person makes a contribution to a social security scheme that provides benefits to cover lack of income.⁵⁶⁸

4.3.1.4 Accessibility

The attachment of conditions to entitlement to social security and social assistance may raise issues of economic and non-discriminatory accessibility. According to the Committee accessibility goes along with coverage, eligibility, affordability, participation and information, as well as physical access.

Coverage requires that all persons be covered by the social security system, including the most disadvantaged or marginalized sections of the population, and without discrimination.⁵⁶⁹ This means that the state should make provision for a social security system which is not discriminatory on any of the prohibited

⁵⁶⁷ General Comment No. 19 para 22. According to Langford, adequacy means 'adequate benefits that ensure the rights to family protection and an adequate standard of living and right to health'. Malcom Langford, 'Social Security and Implications for Law, Policy and Practice' in Riedel E (Eds) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2006) 34.

⁵⁶⁸ Ibid, para 22.

⁵⁶⁹ Ibid, para 23.

grounds. It must include a positive obligation to eradicate differences over time if they exist.⁵⁷⁰

Regarding *eligibility*, the Committee noted that qualifying conditions for benefits must be reasonable, proportionate and transparent.⁵⁷¹

Social security should be affordable and accessible. If a social insurance scheme is used, contributors should be informed in advance of the extent of their liabilities. Cost and charges associated with making the contribution must be affordable and must not threaten the realization of other rights.⁵⁷²

Information and Participation requires that beneficiaries of social security schemes must be able to participate in the administration of the system.⁵⁷³ The national system must ensure that relevant information on social security is available to everyone in a clear and transparent manner.⁵⁷⁴

Lastly *physical access* requires that benefits should be provided timely and for the beneficiaries to be able to access information and contribute, and where necessary, they should first have physical access to social security services.⁵⁷⁵

4.3.1.5 Relationship with other rights

Although the right to social security plays an important role in the realization of other rights⁵⁷⁶ in the Covenant, other measures are needed to complement this

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid, para 24.

⁵⁷² Ibid, para 25.

⁵⁷³ Ibid, para 26. Articles 71 and 72 of the ILO Convention 102 contain similar requirements.

⁵⁷⁴ Ibid, para 26.

⁵⁷⁵ Ibid, para 27.

right.⁵⁷⁷ These measures cannot be used as substitutes for the creation of social security schemes. According to the Committee, social security and income maintenance schemes are of particular importance for people with disabilities and such support should reflect the special needs for assistance and other expenses often associated with disability. Other measures should also be adopted to combat social exclusion and poverty.⁵⁷⁸

4.3.2 Obligations of State Parties

As already mentioned above, Article 2(1) of the ICESCR requires State parties to take steps to the maximum of their resources, with a view to achieving progressively the full realization of the rights in the Covenant. It is implicit from General Comment No 19 that there are certain elements that are to be applied immediately. In this respect, the latter mentions certain steps that can be taken immediately which “must be deliberate, concrete and targeted towards the full realization of the right to social security”.⁵⁷⁹ The existence of immediate obligations is also mentioned by the Committee in other General Comments.⁵⁸⁰

⁵⁷⁶ Such as the right of everyone to an adequate standard of living, adequate food, clothing, and housing (Art 11(1)), the right to be free from hunger, (Art 11 (2)), the right to the enjoyment of the highest attainable standard of physical and mental health (Art 12), right to education (Art 13) and the right to take part culture life and enjoy the benefits and applications (Art 15) of the Covenant.

⁵⁷⁷ General Comment No 19, para 28.

⁵⁷⁸ Ibid.

⁵⁷⁹ According to the Committee on Economic, Social and Cultural Rights “While the Covenant provides for progressive realization and acknowledges the constraints owing to the limits of available resources, the Covenant also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (article 2, par 2), ensuring the equal rights of men and women (article 3), and the obligation to take steps (article 2 par 1), towards the full realization of article 11 par 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to social security.” Para 40.

⁵⁸⁰ General Comment No. 3 par 1; General Comment No. 9 par 10; General Comment No. 4 par 8; General Comment No. 11 par 11; General Comment No. 12 par 6; General Comment No. 14 par 30 and General Comment No. 15 para 17.

Among the obligations that the Committee has indicated to be of immediate nature are the guarantee of the right without discrimination and the obligation to take steps to realize the equal rights of men and women.⁵⁸¹ The immediate effect of the non-discrimination clause has been recognized in the case law of the European Court of Human Rights and the Human Rights Committee.⁵⁸²

While the ICESCR Committee acknowledges that the realization of the right to social security has financial implications, it notes that:

The fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level. If necessary, they should avail themselves of international cooperation and technical assistance in line with article 2, paragraph 1 of the Covenant.⁵⁸³

All rights impose different types of obligations on states and the right to social security does likewise. This right imposes on States parties the obligation to respect, and to protect, as well as the obligation to fulfill. Under these obligations, the State is obligated to adopt legislative and other measures with a view to the progressive realisation of the right to social security.⁵⁸⁴

⁵⁸¹ General Comment No. 3 para 1; General Comment No. 11 para 10; General Comment No. 13 paras 31 & 43.

⁵⁸² See for example, *Zwaan-de Vries v. the Netherlands* Communication No. 182/1984, Yearbook of the Human Rights Committee 1987, Vol. II, pp.300-304, *Broeks v. the Netherlands*⁵⁸² Communication No. 172/1984, Yearbook of the Human Rights Committee 1987, Vol. II, pp.293-297, *Gueye et al. v. France*, Communication No. 196/1985, Official records of the Human Rights Committee 1988/89. European Court of Human Rights case of *Stec and others v United Kingdom* judgment of 12 April 2006, European Court of Human Rights, case of *Koua Poirre v France*, judgment delivered on the 30 September 2003.

⁵⁸³ General Comment No 19, para 41.

⁵⁸⁴ Ibid, paras 43-51.

The Committee has further stated that it is the core obligation of States to ensure the satisfaction of at least the minimum essential levels of each of the rights stated in the Covenant.⁵⁸⁵ In so doing, States are required to:

- (a) ensure access to social security scheme that provides a minimum level of benefits to all individuals and families;
- (b) ensure the right of access to social security schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;⁵⁸⁶
- (c) respect existing social security schemes and protect them from unreasonable interference;⁵⁸⁷
- (d) adopt and implement a national social security strategy and plan of action;⁵⁸⁸
- (e) take steps to implement social security schemes, particularly those that protect the disadvantaged and marginalized individuals and groups;⁵⁸⁹ and
- (f) monitor the extent of the realization of the right to social security.⁵⁹⁰

The ICESCR Committee is of the opinion that the minimum core obligation entails the availability of basic necessities such as essential foodstuff, essential primary health care, shelter, and housing, or the most basic forms of education.

⁵⁸⁵ Ibid, para 59. See also the General Comment No 3 (1990) on the States Parties' obligations Article 2 para 1.

⁵⁸⁶ Ibid, paras 29-31.

⁵⁸⁷ Ibid, paras 44-46.

⁵⁸⁸ Ibid, paras 68-70.

⁵⁸⁹ Ibid, paras 31-39.

⁵⁹⁰ Ibid, para 74.

According to the ICESCR Committee, the minimum core obligation should be provided to everyone unconditionally.⁵⁹¹

The ICESCR Committee notes that in assessing the compliance of States with the above actions, it will look into different aspects such as “whether the implementation is reasonable or proportionate with respect to the attainment of the relevant rights, whether the state complies with human rights and democratic principles and whether it is subject to an adequate framework of monitoring and accountability.”⁵⁹²

Finally, the ICESCR Committee emphasized that it is incumbent on States parties and other actors in a position to assist to provide international assistance and cooperation, especially of an economic and technical nature, to enable the developing countries to fulfill their minimum core obligations.⁵⁹³

4.4. General Comment No 5

In this Comment the ICESCR Committee noted that:

The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources would need to be made available for this purpose and that a wide range of specially tailored measures will be required.⁵⁹⁴

⁵⁹¹ Ibid., para 59.

⁵⁹² Ibid, para 63.

⁵⁹³ Ibid, para 61.

⁵⁹⁴ General Comment No 5, para 9.

The Committee further notes that social security and income maintenance schemes are of particular importance for people with disabilities and that such support should reflect the special needs for assistance and other expenses often associated with disability.⁵⁹⁵

4.5 General Comment No 6

State parties to the Covenant are obliged to adapt their social and economic policies according to the needs of their ageing population, especially with regards to social security.⁵⁹⁶ However, to give adequate protection for the aged is a problem that every society faces. Elderly people are among the poorest of the poor due to the following reasons: first, traditional family support is diminishing in every country. Second, during their working time, few elders manage to save or set aside other resources of their own for old age. Third, they do not have job based social protection benefits. Lastly, they are vulnerable to diseases such as loss of sight or hearing that restrict them from working.⁵⁹⁷

In 1982, the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing. This document provided for measures which states should take to safeguard the rights of older persons in the context of the rights proclaimed by the International Covenant on Economic, Social and Cultural Rights.⁵⁹⁸

⁵⁹⁵ Ibid, para 28.

⁵⁹⁶ Health News 'The Economic, Social and Cultural Rights of Older Persons' www.islamet.com/healnews/aged/economic.html accessed August 27 2007.

⁵⁹⁷ Susanne Paul and Alischa Kugel 'Social protection for older people: A Plan of Action' (2007) *Social Watch Report* 24.

⁵⁹⁸ General Comment No 6, para 4.

In 1991, the UN General Assembly adopted the “United Nations Principles for Older Persons” to ensure that priority attention is given to the situation of older people.⁵⁹⁹ These principles address a number of issues pertaining to older persons: their independence, participation, care; self-fulfillment and dignity. The General Assembly also encourages governments to incorporate the above principles into their national programmes whenever possible. These principles are elaborated below.

Independence enables older persons to have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support, and self-help. In particular, they should be able to: have the opportunity to work or to have access to other income-generating opportunities; participate in determining when and at what pace withdrawal from the labour force takes place; be able access to appropriate educational and training programmes; be able to live in an environment that is safe and adaptable to personal preferences and changing capacities; and be able to reside at home for as long as possible.⁶⁰⁰

Older persons should be able to remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with the younger generations.⁶⁰¹ Equally, they should have access to social and legal services to enhance their autonomy, protection and care.⁶⁰²

⁵⁹⁹ United Nations General assembly ‘United nations Principles for Older Persons’ (1991) Resolution 46/91.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid.

⁶⁰² Ibid.

Older persons should attain self-fulfillment, which is, being able to pursue opportunities for the full development of their potential. They should have access to the educational, cultural, spiritual and recreational resources of society.⁶⁰³

Lastly, older persons should be able to live in dignity and security and be free of exploitation and from physical or mental abuse. They should also be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.⁶⁰⁴

All things considered, it seems that the essential principles of individual freedom should, on the whole, be enjoyed equally by the elderly and the rest of the population. In 2002, the United Nations World Assembly on Ageing in Madrid took up the question of how older people can be assured of a decent livelihood. The Madrid International Plan of Action on Ageing adopted by governments from 159 countries supported the policy objectives of the Plan of Action.⁶⁰⁵ Uganda, for example, committed itself to developing a social pensions system and ordered that all government departments pay attention to the nutritional and health requirements for the elderly.⁶⁰⁶

The Committee stated that although Article 9 of the Covenant does not contain any clear reference to elder persons, it does recognize the right to old-age benefits.⁶⁰⁷ Another issue that was left open by the Covenant is whether discrimination on the basis of age is prohibited. In this respect, the Committee noted that:

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Paul S and Kugel A 'Social Protection for Older People: A Plan of Action' (2008) 24. Available at www.socialwatch.org/en/cn/html

⁶⁰⁶ Ibid.

⁶⁰⁷ General Comment 6, para 10.

While it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited. Moreover, it must be emphasized that the unacceptableness of discrimination against older persons is underlined in many international policy documents and is confirmed in the legislation of the vast majority of states. In the few areas in which discrimination continues to be tolerated, such as in relation to mandatory retirement ages or access to tertiary education, there is a clear trend towards the elimination of such barriers.⁶⁰⁸

The ICESCR Committee noted that in order to be able to implement the provisions of Article 9 of the Covenant, States parties should, within the limits of available resources, provide non-contributory old age benefits and other assistance for all older persons, who, when they reach the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old age pension or other social security benefit or assistance and have no other source of income.⁶⁰⁹

4.6 ILO Instruments

4.6.1 The Social Security (Minimum Standards) Convention, No 102 of 1952

The codification of the right to social security was initiated by the ILO. The ILO's work and the standards it has developed are the most important source for the interpretation of the definition of the right to social security.⁶¹⁰ The right to social

⁶⁰⁸ Ibid, para 12.

⁶⁰⁹ Ibid, para 30.

⁶¹⁰ Van Langendonck says: "one reason why the Declaration and the International Covenant remained vague about the meaning of the right to social security was that a specialised institution under the UN, the International Labour Organisation (ILO) had the explicit mission of establishing international labour Standards, including social security." Van

security is the core of several ILO conventions and the ILO has been the central developer of this right.⁶¹¹ The creation of ILO was one of the results of the Treaty of Versailles.⁶¹² Its aim was to create the conditions for peace and social justice.⁶¹³ In the Philadelphia Declaration of 1944, the ILO expanded its line of operation by explicitly defining its social objectives.⁶¹⁴ One innovation adopted by ILO was that at all decision-making levels, member states, employers and employees representatives were to be given the right to vote.⁶¹⁵ In a resolution of the 89th ILO International Labour Conference, it was stated as follows:

Social security is very important for the well being of workers, of their families and of society as a whole. It is a basic human right and an essential instrument to create cohesion, and thus it contributes to maintaining social peace and social integration. It is an indispensable part of the social policy of governments and an important tool to avoid and alleviate poverty. Through national solidarity and the fair distribution of the burden, it can contribute to human dignity, equity and social justice. It is also important for political integration, the participation of citizens and the development of democracy.⁶¹⁶

Kulke, Cichon and Pal defines social security as a set of institutions, measures, rights and obligations whose primary goal is to provide income, security and

Langendonck J 'The Meaning of the Right to Social Security' in Van Langendonck J (ed) *The Right to Social Security* (2007) 4.

⁶¹¹ Langendock *op cit* note 610, 4.

⁶¹² Treaty of Versailles of 1919.

⁶¹³ Pennings F 'The Meaning of International Standards in Social Security' in Van Langendonck (eds) *The Right to Social Security* (2007) at 205. The preamble to the ILO Constitution read "Whereas universal and peace can be established only if it is based upon social justice...".

⁶¹⁴ Langendonck *op cit* note 610. One of the objectives of the Declaration was: "(f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care".

⁶¹⁵ Penning *op cit* note 613, 205.

⁶¹⁶ Resolution 89th of the ILO International Labour Conference at Geneva (21 June 2001).

health to individual members of a society according to specified rules.⁶¹⁷ On the operational level social security may be understood as a set of all transfers in a society that seek to provide income security and prevent or alleviate poverty; all measures that guarantee access to health and social services; and all measures that protect the income, health and well being of workers.⁶¹⁸

ILO's first conventions concentrated on labour conditions. Soon however, it adopted several conventions that aimed at the creation of national mechanisms for protecting workers from industrial and social risks.⁶¹⁹ The major convention dealing with the protection of social rights is the ILO Convention No. 102 on the "Minimum standards of Social Security."⁶²⁰ This Convention focuses on the implementation of the right to social security.⁶²¹ Although South Africa has not signed or ratified the Convention, she has been influential in the drafting of labour laws⁶²² and social security laws.⁶²³ What is covered under social security law in South Africa are risks and contingencies which are mentioned in the ILO Convention 102 of 1952.

The ILO Convention covers all nine aspects of social security. These are: medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit, and

⁶¹⁷ Kulke, U, Cichon, M, Pal K, 'Changing Tides: A Revival of Rights-Based Approach to Social Security' in Van Langendonck (Ed) *The Right to Social Security* (2007) 13.

⁶¹⁸ Ibid, 13.

⁶¹⁹ ILO Convention No 102 of 1952 concerning (Minimum Standards) of Social security concluded in Geneva on 28 June 1952 and came into force on 27 April 1955. This Convention may be cited as the Social Security (Minimum Standards) Convention, 1952.

⁶²⁰ Ibid.

⁶²¹ See Humblet M and Silva R *Standards for the XX1st Century – Social Security* (2002) 7-8.

⁶²² See the Labour Relations Act, No 66 of 1995.

⁶²³ Olivier *et al op cit* note 164.

survivor's benefit.⁶²⁴ The ILO standards define the scope of the Convention in terms of the persons protected; temporary exceptions for developing countries; methods of calculating the rate of cash benefits; general responsibility for the state; participation of insured persons; financing of benefits; rights of appeal; and suspension of benefits.⁶²⁵

In terms of the Convention, each state is required to fulfill the minimum standard of at least three of the nine contingencies enumerated above.⁶²⁶ One of these must either be old age benefit; unemployment benefit; employment injury benefit; or an invalidity or survivors benefit.⁶²⁷ Each part of the Convention provides specific standards aimed at guaranteeing the benefit as well as the level of benefit and protected classes of persons. In addition to the provisions of ILO Convention No. 102, there are several other ILO conventions which are also relevant. These include the Equality of Treatment (Social Security) Convention;⁶²⁸ the Employment Injury Benefits Convention;⁶²⁹ the Invalidity; Old Age; and Survivors' Benefits Convention;⁶³⁰ the Medical Care and Sickness Benefits Convention;⁶³¹ the Maintenance of Social Security Rights Convention;⁶³² the Employment Promotion and Protection against Unemployment

⁶²⁴ Humblet & Silva *op cit* note 621, 8. See also Olivier, 177.

⁶²⁵ Humblet & Silva, 8 -14.

⁶²⁶ Mikkola M 'Common Denominators of European Social Security' in Jef Van Langendonck (eds) *The Right to Social Security* (2007), 225 - 231.

⁶²⁷ Jansen van Rensburg L and Lamarche L 'The right to social security and assistance' in Brand D and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 226.

⁶²⁸ No 118 of 1962, was adopted on 28th June 1962 entered into force on 25 April 1964.

⁶²⁹ No 121 of 1964.

⁶³⁰ No 128 of 1967.

⁶³¹ No 130 of 1969.

⁶³² No 157 of 1982.

Convention,⁶³³ and finally, Maternity Protection Convention⁶³⁴ No matter how important these conventions are, South Africa has not yet signed or ratified many of them.

4.6.2 The Maternity Protection Convention No. 183 of 2000

This Convention was adopted to offer protection in a form of maternity leave to all pregnant employed women. This is a revised version of Convention 103 of 1952 which was designed to promote equality of all women at the workplace. The Convention has not been ratified by South Africa.

4.6.3 ILO Convention No. 130 of 1969 on Medical Care and Sickness Benefits

In terms of Convention 102, the state has to cover medical care. A state must be able to ensure that a specified group is protected from social risks. ILO Recommendation No. 134 advocates for the extension of medical care to all economically active persons. South Africa has not ratified this Convention.

4.6.4 The ILO Convention No. 128 of 1967 on Invalidity, Old Age, and Survivors' Benefits

The ILO has adopted Convention No. 128 which deals with disability and old age benefits. This Convention has not been ratified by South Africa. In terms of this Convention, benefits relate to persons' inability to work at a certain age or after the occurrence of a particular event. The invalidity benefit has to be granted throughout the contingency or until an old-age benefit becomes payable. The Convention obligates states to take measures for the provision of rehabilitation

⁶³³ No 168 of 1988.

⁶³⁴ No 183 of 2000.

services designed to prepare disabled persons to be “integrated into the society”.⁶³⁵

This instrument prescribes 65 as the age for eligibility of benefits, and such age is decided by a competent authority taking into account the working ability of elderly persons in that particular country.⁶³⁶ Convention No 128 provides that where the prescribed age is 65 or higher, this age shall be lowered in respect of persons who have been engaged in occupations that are deemed to be “arduous or unhealthy”.

The benefit is meant to guarantee protection for persons who have reached a certain age to decent standards of living for the rest of their lives. Therefore sufficient amount of pensions and timely payment of these pensions are crucial for the survival of the beneficiary. According to this Convention, states parties set a compulsory old age benefit starting at a particular age prescribed by national legislation. The benefits should be increased in certain circumstances for the benefit of those beneficiaries who need constant help.⁶³⁷

4.6.5 ILO Convention No. 121 of 1964 on Employment Injury Benefits

Convention No. 121 places an obligation on states to take measures to prevent employment injuries. This Convention has not been ratified by South Africa. The Convention provides for three types of benefits: medical care; cash benefit in the event of incapacity for work and loss of earning; and cash benefit in the event of the death of the breadwinner. It may be noted that Convention No. 121 provides broader protection than that accorded by Convention 102. This means that

⁶³⁵ See Olivier *et al op cit* note 15, 164.

⁶³⁶ Article 26, ILO Convention No 128.

⁶³⁷ In keeping with the recommendation No 131 contained in Conventions Nos. 120 and 128.

injured persons requiring constant assistance of another person have to be provided with additional benefits.

4.6.6 ILO Convention No. 118 of 1962 on Equality of Treatment (Social Security)

ILO Convention No. 118 on Equal Treatment in Social Security is another convention for interpretation of ICESCR. South Africa has not ratified this convention. The reason why South Africa has not signed these ILO conventions is not clear. However, the Constitution guarantees to everyone right to equality and to enjoyment of this right.⁶³⁸ Section 9(1) of the Constitution provides for the equality before the law. Section 9(2) recognises that equality includes the full and equal enjoyment of all rights and freedoms.⁶³⁹ The term 'everyone' clearly implies that every person in the jurisdiction of the state is entitled to the enjoyment of this right.

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Therefore, the ILO Convention deals with equality of treatment in all nine social security branches. It provides that equal treatment should be granted to nationals of any other member states to the ILO Convention.⁶⁴⁰ The treatment should be equal both as regards coverage and benefits in respect of every branch of social security for which that State has accepted the obligations of the Convention. Under the ILO Convention, equality of treatment must be granted to refugees and stateless persons as well.⁶⁴¹ According to the Convention, non-nationals should also be provided with equal treatment irrespective of their nationality. Equal treatment is reciprocal, that is, it should not be granted to

⁶³⁸ Section 9 of the 1996 Constitution.

⁶³⁹ Ibid.

⁶⁴⁰ See Olivier and Jansen van Rensburg *op cit* note 164, 178. See also *ILO Social Security Standards* (2002).

⁶⁴¹ Ibid, 178.

nationals of members' states which ignore this responsibility to nations of other States.⁶⁴²

Since the aim of social security is to substitute loss of income, the level of benefits is closely linked to previous earnings, and depends on the categories of the population covered by the benefit.⁶⁴³ It is clear that international institutions such as the ILO have helped to pave the way for social security, and in this regard, alleviate and prevent human misery.

4.6.7 The Discrimination (Employment and Occupation) Convention No 111 of 1958

South Africa ratified this Convention on 5 March 1997. This Convention deals with the promotion of equality of treatment and opportunity of employment and occupation.⁶⁴⁴ It also aims to achieve equality of opportunities and treatment in employment and occupation through the elimination of discrimination. In South Africa the ILO Convention is enforced through the Employment Equity Act (EEA) of 1998.⁶⁴⁵ The EEA fulfills the South Africa's obligation in terms of the ILO Convention. The primary purpose of the Act is to achieve employment equity through the elimination of unfair discrimination and the implementation of affirmative action measures to advance black people, especially women and people with disability.⁶⁴⁶ This is the category that was adversely affected during the apartheid era.

Section 6(1) of EEA which prohibits unfair discrimination provides:

⁶⁴² Article 3(3), ILO Convention No. 118.

⁶⁴³ Ibid.

⁶⁴⁴ Article 2, ILO Convention No. 111.

⁶⁴⁵ Employment Equity Act No. 55 of 1998.

⁶⁴⁶ The purpose of the Act is set out in chapter 1.

No person may unfairly discriminate directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”⁶⁴⁷

This section protects against both direct and indirect discrimination and therefore covers a difference in outcome that results in failure to treat people differently. Section 6 mirrors the wording of section 9 of the Constitution. The Constitution enshrines equality and non-discrimination as a core value of South African social order.⁶⁴⁸ To give effect to s 9(4) of the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was enacted. PEPUDA covers a wide range of practices that can lead to unfair discrimination such as labour and employment, education, health care services and benefits, housing, accommodation, land and property insurance services, pensions, provision of goods, services and facilities, etc.⁶⁴⁹

4.7 The Practice of the Human Rights Committee and the European Court of Human Rights

Although the right to social security is traditionally included in social instruments,⁶⁵⁰ there are elements of social security that have been discussed by both the Human Rights Committee and the European Court of Human Rights.

⁶⁴⁷ Section 6, Employment Equality Act, 1998.

⁶⁴⁸ Section 9 of 1996 Constitution.

⁶⁴⁹ See s 29 and Schedule 1 to the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000.

⁶⁵⁰ European Code of Social Security (1964), Protocol to the Code (1964); European Social Charter and the European Code of Social Security (revised); European Convention of Human Rights, Additional Protocol No 1, Article 1.

Although these are two distinct organs, they are treated together because of the common approach that the two have taken on social security. They have adopted the interdependence approach and viewed the rights mainly in the context of equality and non-discrimination. Thus, the right to social security has been viewed as justiciable by the two organs at least as regards equality and non-discrimination, the right to have access to courts, and the right to property.

4.8 Protection of the Right to Social Security through Equality and Non-Discrimination

The right to social security has been analysed in the context of non-discrimination. Non-discrimination is a human right on its own and it is inherent in the fundamental idea of universal human rights. The prohibition of discrimination is a standard of attainment in all international human rights treaties.⁶⁵¹ However, the protection of the right to social security has also been developed with some considerable success through the complaint procedures in treaties dealing with civil and political rights.

Under the individual complaints mechanism, the Human Rights Committee found breaches of Article 26 (non-discrimination) of the International Covenant on Civil and Political Rights⁶⁵² in the Dutch cases relating to social security, namely, *Zwaan-de Vries v the Netherlands*⁶⁵³ and *Broeks v the Netherlands*.⁶⁵⁴ These cases concerned legislation on the eligibility for unemployment benefit, which

⁶⁵¹ Article 2 of the Universal Declaration of Human Rights; Article 2(2) of the ICESCR; and Article 26 of CCPR.

⁶⁵² International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 993.

⁶⁵³ Communication No. 182/1984, Yearbook of the Human Rights Committee 1987, Vol. II, pp.300-304.

⁶⁵⁴ Communication No. 172/1984, Yearbook of the Human Rights Committee 1987, Vol. II, pp.293-297.

required married women to first prove that they were the 'bread-winner' of the household, a condition not applied to married men. In another case, the Committee found that a breach of Article 26 had taken place on the grounds of nationality (classified as 'other status') where retired Senegalese soldiers in the French army were awarded lower pensions than French citizens in an equal position.⁶⁵⁵ Applying Article 26 to cases involving the right to social security, the Human Rights Committee explained:

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligations with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.⁶⁵⁶

The Committee noted that the Netherlands did not change its law but found it appropriate to recommend the state to provide effective remedy.⁶⁵⁷ In analyzing whether differential treatment was or was not justified in the above cases, the Committee used the proportionality test.

In the case of *Pauger v Austria*,⁶⁵⁸ the Committee found that it was not reasonable to differentiate between widows and widowers in providing full pension. The Committee noted: "this in fact means that men and women, whose

⁶⁵⁵ *Gueye et al. v. France*, Communication No. 196/1985, Official records of the Human Rights Committee 1988/89.

⁶⁵⁶ Para. 12.4 in the Zwaan-de Vries case quoted in Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds.) *Social, Economic and Cultural Rights*. Kluwer Law International, (2001), 33.

⁶⁵⁷ Para 12, 4 of HRC: Communication No 182/1984.

⁶⁵⁸ HRC: Communication No 415/1990.

social circumstances are similar, are being treated differently, merely on the basis of sex, such a differentiation is not reasonable...⁶⁵⁹

In the case of *Stec and others v United Kingdom*,⁶⁶⁰ the applicants alleged that the establishment of the retirement age as the limit for the payment of a work-related accident compensation allowance was discriminatory because the United Kingdom had different retirement ages for men and women (65 for men and 60 for women). The European Court of Human Rights considered two aspects. First, it considered that linking the payment of the accident compensation allowance with the normal employment period, and establishing its limit as the retirement age, had a legitimate purpose and was therefore reasonable. It then considered the gender-related difference in retirement age. The Court found that a different retirement age for men and women was originally justified as a measure aimed at correcting existing inequalities between men and women and therefore could be reasonable, but that the difference should cease when social and economic changes remove the need for special treatment for women.⁶⁶¹

In another case of *Koua Poirres v France*,⁶⁶² the applicant, a disabled person from Cote d'Ivoire, contested that the denial of a disability grant benefits on the ground of nationality was discriminatory. The Court decided that the distinction on the grounds of nationality lacked objective and reasonable justification and was therefore discriminatory, thus violating Article 14 of the European Convention of Fundamental Human Rights and Freedoms.⁶⁶³

⁶⁵⁹ Para 7.4 of HRC: Communication No 415/1990.

⁶⁶⁰ European Court of Human Rights case of *Stec and others v United Kingdom* judgment of 12 April 2006.

⁶⁶¹ Paras 54-56.

⁶⁶² European Court of Human Rights, case of *Koua Poirres v France*, judgment delivered on the 30th September 2003.

⁶⁶³ Paras 46-49.

The above cases demonstrate that some aspects of the right to social security have been dealt with by international courts and human rights bodies having regard to their interconnectedness with other rights.

4.9 The Protection of the Right to Social Security through the Right to Property

The right to social security benefits has been included in the interest protected by the right to property.⁶⁶⁴ The European Commission of Human Rights has considered in many cases that social security benefits constitute “property” and “possessions.”⁶⁶⁵ In *X v The Netherlands*,⁶⁶⁶ the European Commission held:

While it is clear that no right to pension is as such included in the Convention (European Convention of Human Rights), the making of compulsory contributions to a pension fund may, in certain circumstances, create property right in a portion of such fund and that such right may be affected by the manner in which the fund is distributed.

Protocol No 1 adopted under the European Convention protects the right to property. In the case of *Gaygusuz v Austria*,⁶⁶⁷ the Court established a link between the right to social security and the right to property. The Court held that the right deriving from the payment of contributions to social security system

⁶⁶⁴ Christian Courtis ‘The right to social security: can it be brought to court?’ in Dignity and Right: Making the universal right to social security a reality *Social Watch* (2007) 35.

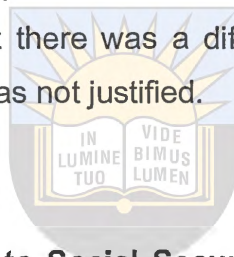
⁶⁶⁵ Courtis *op cit* note 664.

⁶⁶⁶ Decision of 20 July 1971 collection 38, page 9.

⁶⁶⁷ European Court of Human Rights: *Gaygusuz v Austria* decision of 16 December 1996 paras 36 – 41.

is a pecuniary right for the purposes of Article 1 of Protocol no 1 of the European Convention.⁶⁶⁸ That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay taxes or other contribution.

In another case, *van Raalte v The Netherlands*,⁶⁶⁹ unmarried women over 45 years without a child were exempted from the obligation to pay contribution under the General Child Care Benefit Act, whereas a man in the same position had an obligation to pay contribution. The applicant, an unmarried man, filed an objection, stating that the exemption should be extended to men in the same situation. The Court found that there was a difference in treatment based on gender and that this treatment was not justified.



4.10 Protection of the Right to Social Security through the Right to Fair Trial

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The European Court of Human Rights found several breaches of Article 6(1) of the European Convention on Human Rights in cases involving social security. Art. 6 (1) guarantees the right to a fair hearing. In *Feldbrugge v. the Netherlands*⁶⁷⁰ and *Deumeland v. Germany*,⁶⁷¹ the Court extended the protection

⁶⁶⁸ The European Convention for the Protection of Human Rights and Fundamental Freedoms, [hereinafter the "European Convention" opened for signature 4 November 1950, 213 UNTS 221 (1950) ETS 5, entered into force on 3 September 1953, amended by Protocol No 13 of 2002, ETS 187 (2002). Article 1 of the Protocol No 1 provides: "Every natural or legal person is entitled to peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and general principle of international law."

⁶⁶⁹ European Court of Human Rights: *van Raalte v The Netherlands* (1997).

⁶⁷⁰ Judgment of 29 May 1986, Publications of the European Court of Human Rights, Series A, No.99. In *Fedbrugge v the Netherlands*, the applicant was no longer entitled to sickness benefits she has been receiving previously as the doctor had found her fit to work. After consulting other doctors Mrs Fedbrugge appealed against the decision of the Commission, claiming that she has not been give a fair trial.

⁶⁷¹ Judgment of 29 May 1983, Publications of the European Court of Human Rights, Series A, No. 100.

of Article 6 (1) to the social security system in cases which concerned benefits. The Court considered that in many countries social security is based on private law. The Court found that the disputes could be considered civil and thus Article 6(1) was applicable.

The case of *Salesi v Italy*⁶⁷² was concerned with social assistance as opposed to social insurance. In this case, the Court considered the applicability of legitimacy proceedings for a monthly disability benefit. Here the benefits were entirely financed through public funds. The Court ruled that:

Certainly there are differences between two [welfare assistance and social security], but they cannot be regarded as fundamental at the present stage of development of social security. This justifies following, in relation to the entitlement to welfare allowances, the opinion which emerges from the aforementioned judgments as regards the classification of the right to social insurance benefits, namely that State intervention is not sufficient to establish that Article 6 paragraph 1 is inapplicable.

As in the two cases previously referred to, other considerations argue in favour of the applicability of Article 6 paragraph 1 in the present case. The most important of these lies in the fact that despite the public law features pointed out by the Government, Mrs Salesi was not affected in her relations with the administrative authorities as such, acting in the exercise of discretionary powers; she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution.⁶⁷³

The Court held further that "the development in the law that was initiated by those judgments and the principle of equality of treatment warrant taking the view

⁶⁷² Judgment of 26 February 1993, Publications of the European Court of Human Rights, Series A, No.257.

⁶⁷³ Ibid, para 19.

that today the general rule is that Article 6 paragraph 1 does apply in the field of social insurance.”⁶⁷⁴

The above principle was confirmed by subsequent case law. In a case of *Schuler-Zgraggen v. Switzerland*,⁶⁷⁵ non-discrimination clause was used in conjunction with the fair trial principle. The protection under Article 6 of the Convention was extended to cases involving statute-based social security benefits with a public law character. In *Schuler- Zgraggen* case, the Court held that the right to an invalidity pension was an individual economic right to which Article 6(1) applied.⁶⁷⁶

It is also possible that cases with facts concerning the right to social security could potentially be heard through the interpretation of provisions relating to the right to life, the right to private and family life or even the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

4.11 Regional Instruments

4.11.1 European Social Security Framework

The majority of international instruments followed the model of the UDHR and included the right to social security and social assistance. The development and codification of the right to social security has been notable in the human rights protection system under the Council of Europe.⁶⁷⁷ The European Social Charter of 1961 and the Revised European Social Charter of 1996 (RESC) go further from offering a simple protection of the right to social security to providing a more

⁶⁷⁴ *ibid.*

⁶⁷⁵ Judgment of 24 June 1993, Publications of the European Court of Human Rights, Series A, No. 263.

⁶⁷⁶ Quoted in Scheinin *op cit* note 475, 37.

⁶⁷⁷ European Social Charter of 1961 and the Revised ESC of 1996.

comprehensive protection. In addition to the right to social security, it provides for the right to social and medical assistance and the right to benefit from social services.⁶⁷⁸

The Revised Charter to the European Code of Social Security of 1964 makes reference to ILO Convention No 102.⁶⁷⁹ The Code has been amended by a Protocol of 1964 which provides a higher level of protection and widens the scope of the beneficiaries. The Revised Code of Social Security was adopted in 1990 and it provides for higher standards of social security and more flexibility.⁶⁸⁰ The European Court of Human Rights also developed the justiciability of rights to social security through Article 1 of Additional Protocol No 1 which protect saved contributions.

Under CESCR, states are obliged to adopt legislative and other measures with a view to the progressive realization of the right to social security. This implies that any deliberate retrogressive measures 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.'⁶⁸¹ With regard to the European instrument, the European Committee of Social Rights stated that substantial gaps in social security schemes, or low level of benefits, would imply that a state party is not complying with its obligations.⁶⁸² References to ILO Convention (in the ESC) and the European Code of Social Security (in the Revised ESC) also establish material minimum standards for social security benefits.

⁶⁷⁸ Ibid.

⁶⁷⁹ Charter to the European Code of social Security of 1964 revised in 1990.

⁶⁸⁰ Riedel E 'The Human Right to Social Security: Some Challenges in Riedel E (eds) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2006) 22.

⁶⁸¹ General Comment No. 3, The nature of States parties obligations (Art.2, para.1of the Covenant) (Fifth Session, 1990), UN Doc. E/1991/23, para.9.

⁶⁸² See Scheinin, *op cit* note 475, 217.

The right to social security is protected by Article 12 of the European Social Charter. Article 12 of the Revised ESC provides:

With a view to ensuring the effective exercise of the right to social security, the Parties undertake to:

1. establish or maintain a system of social security;
2. maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, . . . in order to ensure:
 - (a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
 - (b) the granting, maintenance and resumption of social security rights by such means as the accommodation of insurances or employment periods completed under the legislation of each of the Parties.

While Article 12 (1) requires state parties to 'raise progressively' their standards, the European Committee has noted with concern the regression of standards in some States' reports.⁶⁸³ On the other hand, Article 13 of the RESC deals with the right to social assistance while Article 14 guarantees the right to benefit from social welfare services.⁶⁸⁴

⁶⁸³ Ibid. 217.

⁶⁸⁴ Vandenhoe W, *Article 26 The Right to Benefit from Social Security* (2007) 9.

The Charter of Fundamental Rights of the European Union also recognizes entitlements to social security benefits.⁶⁸⁵ Article 34 of the Charter provides:

1. The Union recognizes and respects 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.
2. 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.
3. In order to combat social exclusion and poverty, the union recognizes 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.

4.11.2 The African Social Security Framework

4.11.2.1 The African Charter on Human and Peoples' Rights (1981)

The African Charter on Human and Peoples' Rights (Banjul Charter) of which South Africa ratified in 1996, obliges member States to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa.⁶⁸⁶ It requires State Parties to pay "particular attention to the right to development" and also emphasise that "civil and political right cannot be dissociated from economic, social and cultural rights in their conception and in their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and

⁶⁸⁵ Charter of Fundamental Right of the European Union *Official Journal C 36*, 18 December 2000, 1-22.

⁶⁸⁶ The African Charter on Human and People's Rights (1981) which came into effect in 21 October 1986.

political rights”.⁶⁸⁷ The right to social security is not specifically recognized as a human right under the African Charter.⁶⁸⁸

The Charter is one of the first international attempts to include socio-economic rights alongside civil and political rights in a single document, as well as providing for their enforcement.⁶⁸⁹ The Charter emphasises the family as the natural unit and basis of society, which should be protected by the State. It further obliges the State to assist the family, which is the custodian of morals and traditional values recognised by the community. The Charter further recognises that the aged and disabled shall have the right to special measures of protection in keeping with their physical or moral needs. In addition, it states that individuals shall have duties towards the family and society.⁶⁹⁰

4.11.2.2 Social protection in Africa as a tool for combating poverty

ILO Report on Africa states that: “Low economic growth, conflicts, internal strife and political instability have combined to hamper any significant reduction in poverty in Africa.”⁶⁹¹ The Report notes further that Africa lags behind other continents in key social indicators such as life expectancy, infant and maternal mortality rates, school enrolment and access to health care.⁶⁹² Most African countries have no social assistance provisions comparable to South Africa.⁶⁹³

⁶⁸⁷ The Preamble to the African Charter.

⁶⁸⁸ Ouguergouz F *The African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (2003) 42.

⁶⁸⁹ Goosen C *et al.* “International and comparative social security standards” in Olivier M *et al.* (eds), *Social Security Law: General Principles* (1999) 527.

⁶⁹⁰ Article 18 of the Charter. See Pillay K, Proudlock P. ‘South Africa's Constitutional and International Obligations with regard to Children with Disabilities’ (May 2000). *Child Health Policy Institute, UCT*.

⁶⁹¹ The Report of the Director General on ILO Activities in Africa for the 10th regional Meeting in Addis Ababa in December 2003.

⁶⁹² *Ibid.*

Social insurance schemes tend to exclude large portions of the population from their coverage.⁶⁹⁴ Kasente indicated that social security in Africa covers not only formal and state systems but also community, informal, traditional and non-governmental schemes.⁶⁹⁵ Botswana, Namibia and Lesotho have universal old age pensions.⁶⁹⁶ Morocco and Seychelles have both employment based social insurance systems and a universal old age pensions.⁶⁹⁷ Liberia has a social insurance and social assistance system.⁶⁹⁸ Kenya, Swaziland and Uganda have provident funds where formal and informal workers can pay into and receive their contributions plus interest.⁶⁹⁹ Finally, Nigeria has mandatory individual accounts that public and private sector employees pay into.⁷⁰⁰ While Nigeria does not offer social assistance in the form of cash transfers, its legislation provides a wide range of indirect social security through free and subsidised services.⁷⁰¹

Fultz and Pieris view the social security system in the Sub-Saharan African countries as generally characterized by limited productivity, high inflation rates, high informal sector employment, skewed income distributions, demographic

⁶⁹³ UNICEF 'Social Protection Initiatives for Children, Women and Families: An analysis of recent experiences' (2006) 10.

⁶⁹⁴ Marius Olivier 'Acceptance of Social Security in Africa' Paper presented at ISSA Regional Conference, Zambia (9-12 August 2005) 12.

⁶⁹⁵ Kasente, D 'Gender and Social security reform in Africa' *International Development Research Centre* (1998) 1-2.

⁶⁹⁶ UNICEF 'Social Protection Initiatives for Children, Women and Families: An analysis of recent experiences' (2007) 10. Ibid.

⁶⁹⁷ Ibid.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid.

⁷⁰¹ Child Health Policy Institute, UCT Report 'Social Security Policy Options for People with Disabilities in South Africa: an International and Comparative Review' (2001) at 67.

characteristics, uneven population densities, low life expectations, high birth rates, differing patterns of retirement, issues of governance relating to emerging democracies, and weak systems of public administration.⁷⁰² In addition, the high levels of unemployment and underemployment as well as inadequate levels of social protection standards affect the delivery of social protection service in the region.⁷⁰³

4.11.3 Social Security in SADC

The Southern African Development Community (SADC) consists of fifteen countries in the Southern African region, namely, Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. SADC resulted from the Southern African Development Coordination Conference (the SADCC) which was established in 1980 between Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. Its intended goal was to promote economic independence within these countries through regional integration. For example most countries were dependent on South Africa's economy, technology as well as transport infrastructure.⁷⁰⁴

The SADC objectives are found in the SADC Treaty which aim at the promotion of economic growth and social development, alleviate poverty, enhance the quality of life of the people of southern Africa, and support the socially disadvantaged through regional integration.⁷⁰⁵ The preamble to the SADC

⁷⁰² Fultz, E and Pieris, B 'Social security schemes in Southern Africa: An overview and proposals for future development ILO/SAMAT (1999), 7-12.

⁷⁰³ Olivier, M 'Regional social security: Are innovative development in southern Africa relevant to the European experience?' Paper presented at the EISS (European Institute of Social Security) Annual Conference, Bergen, Norway (September 2001).

⁷⁰⁴ See Osode P "The Southern African Development Community in legal historical perspective" (2003) 28 *Journal for Juridical Science* 1.

⁷⁰⁵ Article 5 of the SADC Treaty.

Treaty also speaks to the “need to mobilize its own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration.”⁷⁰⁶

To restructure SADC institutions in the sub-region, the SADC Heads of State and Government approved a Report on the Restructuring of SADC Institutions as set out in Article 5 of the SADC Treaty.⁷⁰⁷ This was designed to address a number of principles, namely, development orientation, subsidiary, market integration and development, facilitation and promotion of trade and investment, and geometry.⁷⁰⁸

The SADC Summit of Heads of State and Government also approved the Regional Indicative Strategic Development Plan (RISDP) during 2002.⁷⁰⁹ This strategy aimed to realise the intended objectives of SADC, namely: to harmonize and promote the development of human resources; promote the development of policies and programmes; promotion and development of welfare policies for vulnerable groups; promotion and development of HIV/AIDS policies and other diseases; improve economic management and performance through regional co-operation; promote the employment creation; promote coordination and harmonization of the international relations of member states; secure international understanding, and ensure the efficient and effective management of the SADC Regional Disaster Management Centre.⁷¹⁰

⁷⁰⁶ See The preamble to the SADC Treaty. See also Olivier MP and Kalula ER “ Regional social security” in Olivier et al (eds) *Introduction to Social Security* (2004) 184.

⁷⁰⁷ Olivier and Kalula, *op cit* note 706, 185.

⁷⁰⁸ *Ibid*, 186.

⁷⁰⁹ *Ibid*, 186 – 187.

⁷¹⁰ *Ibid*. See also <http://www.sadc.int>.

Measures taken by the SADC countries include the Code of HIV/AIDS and employment, and the SADC Charter of Fundamental Social Rights.⁷¹¹ In its continued fight against the HIV and AIDS pandemic, the region has adopted a Code on HIV and AIDS.⁷¹² The Charter recognizes social security as a right. Article 10 of the Charter provides that:

Member States shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance

The SADC Social Charter compliments the objectives of the SADC Treaty.⁷¹³ The aim of the Charter is to:

facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishment of the following objectives: ensure the retention of the tripartite structure of the three social partners, namely: governments, organisations of employers and organisations of workers; promote the formulation and harmonization of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in Member States; promote labour policies, practices and measures, which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony and increase productivity, in Member States; provide a framework for regional co-operation in the collection and dissemination of labour market information;

⁷¹¹ The Charter of Fundamental Rights in the SADC (SADC Social Charter) (available at <http://www.sadc.int>) entered into force on 26 August 2003.

⁷¹² This is in line with the 2003 Maseru Declaration on Combating HIV and AIDS in the SADC region.

⁷¹³ Olivier and Kalula *op cit* note 706, 190. (Article 2(1) of the *SADC Social Charter*).

promote the establishment and harmonization of social security institutional capacities as well as vocational and technical skills in the Region.

It also makes provision for, among others, freedom of association and collective bargaining; equal treatment for men and women; and social protection.⁷¹⁴ A Committee of Experts developed a Draft Code on Social Security.⁷¹⁵ The SADC Draft Code provides in Article 3:

- (1) Everyone in SADC has the right to social security.
- (2) Every member state should establish and maintain a system of social security in accordance with the provisions of this code and Article 10 of the Charter of Fundamental Social Rights in the SADC.
- (3) Every member state should maintain its social security system at a satisfactory level at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952.
- (4) Every member state should progressively raise its system of social security to a higher level, which should include achieving the meaningful coverage of everyone under the system, bearing in mind the realities of development in the particular member state.

Articles 22(1) of the SADC Treaty require member states to conclude Protocols in each area of co-operation, which include: social and human development and special programmes as well as social welfare.⁷¹⁶ They both recognize the importance of a comprehensive social security and social protection system.⁷¹⁷

⁷¹⁴ Article 6 of the Charter.

⁷¹⁵ The *Draft Code on Social Security in the SADC* (2004).

⁷¹⁶ Ibid.

⁷¹⁷ Ntseane D and Solo K *Social Security and Social Protection in Botswana* (2007) 33.

4.11.3.1 Universal and non-contributory pension schemes

There are several countries which have adopted a type of pension scheme that places emphasis on universality. In the SADC countries, only Mauritius offers a dual universal and social insurance system.⁷¹⁸ In Botswana, Lesotho, Liberia, Mauritius, Namibia and South Africa the governments fully fund old-age pension schemes. Although these universal social assistance programmes are gaining popularity, they are still not an established norm.⁷¹⁹ Mauritius and Botswana are the only other developing countries which operates a universal non-contributory system.⁷²⁰ Mauritius and Botswana are discussed below.



4.11.3.2 Mauritius

Mauritius which became independent in 1968, has a population of approximately of 1.2 million people.⁷²¹ In Mauritius the family is still the primary care of its elderly members which provides for their needs. Mauritius just like South Africa has a Constitution which guarantees fundamental rights and freedoms of individuals.⁷²² Mauritius Constitution is the Supreme Law of Mauritius; any law inconsistent with it is invalid.⁷²³ However, the right to social security is not protected under the constitutions. Social security is covered by legislations and regulations.

⁷¹⁸ Berry L in Madotyeni Z 'An overview of social welfare provision of Britain, Germany, Hong Kong and Mauritius CHPI (2000) 68.

⁷¹⁹ Ibid, 18.

⁷²⁰ Ibid.

⁷²¹ Luca Barbone and Luis-Alvaro Sanchez B "Pensions and Social Security in Sub-Saharan Africa: issues and options" A paper presented at the XIII International Social Security Association African Regional Conference, Accra, Ghana 6-9 July 1999. At 11.<http://ec.europa.eu/europeaid>

⁷²² Section 2 of the Constitution of Mauritius of 1968. Available at <http://www.gov.mu>

⁷²³ Chapter II of the Constitution of Mauritius.

Mauritius has an extensive set of policies and programmes consisting of free education, health care, a basic retirement pension, social assistance, low cost housing, food subsidies, social aid transfer and micro-credit schemes.⁷²⁴ The first social assistance scheme in Mauritius was provided for under the National Pensions Act. Social security system in Mauritius started way back 1950s and it was means-tested. The means-test was surrounded by controversies which led to its abandonment in 1957.

The National Pensions Act (NPA),⁷²⁵ and Social Aid Act (SAA),⁷²⁶ provides an invalid's basic pension and social aid (non contributory, social assistance, cash transfers). Mauritius combine elements of universality and social insurance through a basic pension for all residents (without a means test) and is supplemented from earnings of contributions paid by employers and workers.⁷²⁷ The elderly person in Mauritius receives income support from a non-contributory pension from the age of 60.⁷²⁸

The NPA makes provision for the working age group. It consists of basic pensions, contributory pensions, industrial injury pensions, and insurance schemes. The basic pension schemes make provision for persons who have attained the age of 60 and receive the basic retirement pension; and widows who are under the age of 60 and have not contracted a subsequent marriage.⁷²⁹

⁷²⁴ Ibid.

⁷²⁵ National Pensions Act, of 1976.

⁷²⁶ Social Aid Act, of 1983.

⁷²⁷ Clive Bailey 'Extending Social Security Coverage in Africa' *Social Security Policy (Geneva)* 6.

⁷²⁸ Barbone and Sanchez *op cit* note 721, 11.

⁷²⁹ Ibid.

The Social Aid Act states that “any person who is temporarily or permanently incapable of earning his livelihood adequately and has insufficient means to support himself and his dependants shall be qualified to claim social aid.” The Act makes provision for persons who are in receipt of other benefits (such as the basic retirement pensions) and have insufficient means to support themselves and their dependants. Provision is also made for the spouses of persons who are in police custody or serving a term of imprisonment, as well as those who are admitted to a government hospital for treatment. The Act also makes provision for private or charitable institutions who provide free board and lodging to persons who are unable to support themselves.

Mauritius has a three-tier system of pensions which is non-contributory, contributory and also provisions for supplementary pensions on a voluntary basis.⁷³⁰ In Mauritius every resident aged 60 or over is eligible for a monthly pension. These basic pensions are not income-tested, neither are they retirement-tested. They are taxable as ordinary income; those who continue to work or have other source of income return some of their pension to the government in the form of tax.⁷³¹ The complications in the application of the scheme led to the introduction of the universal pension.⁷³²

Old age pension is universal and available to everyone from age 60. To qualify one must have resided in Mauritius for at least 12 years after the age 18. There is no residence requirement for the age 70 and above. Non-citizens must have resided in Mauritius for at least 15 years since the age 40. Retirement is not necessary. The monthly value of the pension scheme increases with age.⁷³³

⁷³⁰ Ibid.

⁷³¹ Larry Willmore ‘Universal pensions in Mauritius; Lessons for the rest of us’ paper presented at the 4th International Research Conference on social Security (5-7 May 2003) 3.

⁷³² Ibid.

⁷³³ Mauritius SSPTW: Africa, 2007.

There is also enhanced basic old-age pension which is paid to the beneficiaries of the basic old age pension who are totally blind, totally disabled or need constant care and attention. An inmate's allowance is paid to inmates of government subsidised institutions, provided that they would have been entitled to a basic old-age pension before their admission to such an institution.

4.11.3.3 Botswana

Botswana as well has a Constitution which has a Bill of Rights. Chapter II of the Constitutions of Botswana provides for protection of fundamental rights and freedoms of individuals.⁷³⁴ Unlike the South African Constitution, the Botswana constitution does not provide for a right of access to social security and social assistance.⁷³⁵ Botswana does not have national social security legislation.⁷³⁶ However, it has a universal pension programme for all citizens. Private work injury insurance exists where the employer bears the full costs, with lump sum payments based on full or partial disability.⁷³⁷ The government of Botswana provides services which are aimed at reducing poverty for both families and children. These services includes: programmes for destitute persons; orphan care programme; supplementary feeding for vulnerable groups; universal old age pension; World War II veterans; labour based drought relief programme; and programme for remote area dwellers. Disability benefit is provided to registered destitute disabled persons under the destitute program. A flat-rate monthly pension of 166 Pula is also provided and adjusted periodically according to changes in the cost of living. Botswana has a legislation which covers pensions

⁷³⁴ Chapter II of the Constitution of Botswana of 1966.

⁷³⁵ Ibid.

⁷³⁶ Ntseane D and Solo K *Social Security and Social Protection in Botswana* (2007) 26.

⁷³⁷ Ibid, 26.

and child care.⁷³⁸ Botswana's universal non-contributory pension system was launched for the first time in 1996.⁷³⁹

The old-age pension covers all citizens of Botswana aged 65 and above. Beneficiaries receive their benefits at the post office. Botswana provides monthly cash benefits (61 *Pula*) and monthly food rations (equal to 172 *Pula*) to all destitute residents, including those that are unable to support themselves because of old age; disability; or a chronic health condition; and needy children younger than age 18 with a terminally ill parent.⁷⁴⁰

Only Botswana citizens qualify to benefit under the old age pension, when they reach the age of 65. The allowance is not means-tested. Under the said scheme, Botswana citizens are not excluded if they receive any other pensions, either in Botswana or outside.⁷⁴¹

It is worth mentioning that in 1980 the government introduced a National Policy on Destitute Persons. This policy was designed to provide assistance to the most needy in Botswana.⁷⁴² The Botswana Revised Policy on Destitute Persons⁷⁴³ defines a destitute person as:

- a) An individual who, due to disabilities or chronic health condition is unable to engage in sustainable economic activities and has insufficient assets and income sources. Insufficient assets and income sources refer to a person possessing not more than four livestock units or earning or receiving an income of less than

⁷³⁸ Ibid.

⁷³⁹ Ibid, 89.

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid, 97.

⁷⁴² Ibid, 89.

⁷⁴³ Botswana National Revised Policy on Destitute Persons of 2002.

P120.00 per month without dependents or less than P150.00 per month with dependent.

b) An individual who is incapable of engaging in sustainable economic activity and has unreliable and limited sources of income due to old age, mental or physical disability, emotional or psychological disability or is a terminally ill patient with no means of support.

c) A child under the age of 18 who is in need of care and may not be catered for under the orphan care program or has parent (s) who are terminally ill and are incapable of caring for the child or has been abandoned and is in need of care.

Under this programme destitute persons are provided with food, soap, other essential households products, medical care, access to social services, rehabilitation, funeral expenses if there is no one to provide for that and shelter if needed.⁷⁴⁴ In terms of the policy destitute persons are excluded from paying service levies, school fees, medical fees, water, taxes and electricity.⁷⁴⁵ The destitute programme is fully funded by the government.⁷⁴⁶

4.12 Conclusion

As shown above the right to social security is recognized in a number of international and regional instruments as human right that has to be protected and respected. The role of international law is to set minimum standards which states set to achieve and adhere to. ILO Conventions set out clearly the groups of persons that should be covered by the social security system. Thus it is left to the state to decide who should be covered.

⁷⁴⁴ Ntseane and Solo *op cit* note 736.

⁷⁴⁵ *Op cit* note 743.

⁷⁴⁶ *Ibid* , 83.

It has been clearly elaborated in the General Comments that the right to social security has different elements. Thus what is needed is the adoption of measures for the creation of a proper social security system; for example, legislation and policies.

South Africa has not ratified both the International Covenant on Economic, Social and Cultural Rights and the International Labour Organisation Convention 102 of 1952. The reason for the non-ratification is not clear, particularly in view of the fact that the Bills of Rights already contain socio-economic rights.

It is also clear from above that the Charter of Fundamental Social Rights and the SADC Treaty provides a baseline support for the protection of social security in the Southern African region. As shown above, Mauritius and Botswana are the only other developing countries which operate a universal non-contributory system.⁷⁴⁷

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⁷⁴⁷

Ibid.

CHAPTER FIVE

THE RIGHT TO SOCIAL SECURITY AND SOCIAL ASSISTANCE IN SOUTH AFRICA

5.1 Introduction

Chapter Four examined the right to social security under international and regional instruments. This Chapter investigates the South African social security system. It argues that the implementation of the right to social security will ensure human dignity and respect for human rights. The right to social security in South Africa is not just a right but a fundamental human right protected in section 27 of the Bill of Rights.⁷⁴⁸ As a fundamental right, the right to social security is related to the responsibility of the state to provide basic necessities to each individual. The right to social security includes the right to social insurance and social assistance, which are regulated by the Constitution and other legislations.⁷⁴⁹

This Chapter will discuss the core components of the right to social security. It will also examine the social security strategies, policies and programmes subsequently introduced by the South African government following the adoption of the White Paper on Social Welfare. The first part will discuss Constitutional principles. This will be followed by the approach used by the courts when adjudicating socio-economic rights under the principle of equality and non-

⁷⁴⁸ The 1996 Constitution.

⁷⁴⁹ Chapter 2, 1996 Constitution. See also statutory protection such as the one provided by the following legislations the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000, the Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contribution Act, 4 of 2002. The Social Assistance Act 59 of 1992 was replaced by the Social Assistance Act, 13 of 2004, the Aged Pensions Act 81 of 1967 was replaced by the Older Persons Act, 13 of 2006 and the South African Social Security Agency Act 9 of 2004, which establishes the new South African Social Security Agency, was also established.

discrimination and also in relation to the right to property. Finally, the minimum content of social security will be discussed, together with the problems related to the protection and implementation of the right to social security in South Africa.

The Constitution affirms the universal right to social security, including social assistance and commits the state to develop a comprehensive social security system.⁷⁵⁰ Along with the Constitution and relevant legislation, the jurisprudence of the Constitutional Court plays an important role in the interpretation and enforcement of socio-economic rights, including the right to social security.⁷⁵¹

5.2 The Framework established under the Constitution

5.2.1 The Debate on the Inclusion of Socio-Economic Rights

During the first Certification Judgment, socio-economic rights were not included in the Constitution. When the draft text of the 1996 Constitution was first tabled in Parliament for certification, many opposed to the idea of including socio-economic rights in the Constitution. Many argued that these rights are not enforceable and thus the legitimacy of the Bill of Rights would be undermined.⁷⁵² Some asserted that economic, social and cultural rights are a type of fundamental rights which the individual cannot directly invoke before a court of law.⁷⁵³ Others were concerned with the constitutional implication of these rights, and argued that their inclusion would be inconsistent with the constitutional principle of separation of powers.⁷⁵⁴ Accordingly, this would lead to the court

⁷⁵⁰ MP Olivier, F Khoza, L Jansen van Rensburg & E Klinck 'Constitutional Framework' in Olivier et al.(eds) *Introduction to Social Security* (2004) 121.

⁷⁵¹ See for example, the cases cited under section 2.3.11 above.

⁷⁵² See De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* (2003) 433.

⁷⁵³ See Devenish *The South African Constitution* (2005) 146.

⁷⁵⁴ In *Ex parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa* (1996) 10 BCLR 1253 (CC) 77.

having to dictate how the state should allocate the budget.⁷⁵⁵ However, the Constitutional Court held that the socio-economic rights were justiciable and therefore should be included in the Bill of Rights.⁷⁵⁶

5.2.2 Constitutional Principles that underpin Social Security as a Human Right

In order to understand what the right to social security in South Africa entails it is important to first start by discussing the values that underlie the social security system. The South African Constitution of 1996 is regarded as a democratic constitution committed to both social justice and fundamental human rights.⁷⁵⁷ The Constitution makes reference to fundamental values that underpin the aims and objectives of the Constitution.⁷⁵⁸ These values play a crucial role in the interpretation of the rights in the Bill of Rights.⁷⁵⁹ The courts, on the other hand, are required to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁷⁶⁰ These principles, such as

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid paras 76 -78.

⁷⁵⁷ The Preamble to the 1996 Constitution.

⁷⁵⁸ Olivier *et al op cit* note 750, 119. See also Mireku, O. 'The Underlying Values and Spirit of the South African Constitution' in Hinz, MO, Amoo, SK and Van Wyk D (eds) *The Constitution at Work: 10 Years of Namibian Nationhood, Proceedings of the Conference "Ten Years of Namibia Nationhood, 11-13 September 2000, Windhoek Namibia, (2002) at 235-254.*

⁷⁵⁹ On the role to be played by the Courts to make sure that the State give effect to these rights, Justice Yacoob in *Grootboom* said: "I am Conscious that it is an extremely difficult task for the State to meet obligation in the conditions that prevail in our country. This is recognized by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce." *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) para 24.

⁷⁶⁰ Section 39 (1) (b) of the Constitution provides that a court, tribunal or forum tasked with interpreting the Bill of Rights must consider international law. Furthermore section 233 provides that "...when interpreting any legislation, every court must prefer

human dignity, freedom and equality are the foundational values that underpin the democratic South Africa.⁷⁶¹ Human dignity is the most important value in the democratic South Africa. Section 10 of the Constitution⁷⁶² states that 'Everyone has inherent dignity to have their dignity respected and protected'.

The value of respect for human dignity is central to the concept of social security which is in itself regarded as a fundamental human right. It has been stated that in order for everyone to enjoy respect for his/her 'dignity and free personal development', 'is entitled to the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights.'⁷⁶³

Another principle which has been recognized in existing literature and jurisprudence as a constitutional value is the principle of *ubuntu*. For example, Justice Langa describes *ubuntu* as follows:

The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a persons' status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such persons happens to be part of it. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.⁷⁶⁴

any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation of the legislation that is inconsistent with international law."

⁷⁶¹ Section 39 (1) (a) of the Constitution requires Courts, Forums and Tribunals when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

⁷⁶² Section 10 of the Constitution.

⁷⁶³ Art 22 of the UDHR *op cit* note 99.

⁷⁶⁴ In *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) para 224.

On the other hand Mokgoro, J describes *ubuntu* as a “metaphor that describes group solidarity where such group solidarity is central to the survival of communities with scarcity of resources.”⁷⁶⁵ The principle of solidarity is regarded as very important since it entails shared responsibilities.⁷⁶⁶ According to the above views, the principle of *ubuntu* or solidarity means that in a given society one cannot die because of hunger or poverty whilst others survive. With respect to social security and social assistance, this is an assurance of benefits and delivery of services without any delay or disruption. Mentjies van der Walt rightfully agrees that there is no conflict between the principle of *ubuntu* and the “values that underlie an open and democratic society”.⁷⁶⁷

5.2.2 An Integrated Approach to the Protection of the Right to Social Security

In examining the constitutional right to social security it is important that the right is not analysed and examined in isolation from other rights. The Constitution protects a wide range of rights many of which relate to or reinforce the right to social security. These rights should underpin the realization of the right of the elderly people. However, the protection of the right to social security has also been developed with some considerable success through the interdependence approach adopted by the Court whenever rights such as equality, human dignity, just administrative action and access to courts are involved. Liebenberg states

⁷⁶⁵ Mokgoro Y *Ubuntu and the Law in South Africa* (1997) 52.

⁷⁶⁶ ILO *An Introduction to social security* (1984) at 115 the importance of solidarity is enunciated as follows:

“It is a note possible to have social security, worthy of the name, without a consciousness of national solidarity and perhaps tomorrow international solidarity. The effort of developing social security must therefore be accompanied by continuous efforts to promote this crucial sense of share responsibility.”

⁷⁶⁷ Mentjies van der Walt “Comparative method; Comparing legal systems and/or legal cultures?” 2006 (1) *Speculum Juris* 51, 64.

that dignity demands that society does its utmost to ensure that those groups who are unable to gain access to basic economic needs are assisted.⁷⁶⁸

The Constitutional Court recognises the indivisibility, interrelatedness and interdependence of these rights.⁷⁶⁹ It is stated that all human rights are indivisible and interdependent and that no right can be promoted or realised at the expense of other rights.⁷⁷⁰ In other words, the realisation of civil and political rights is indispensable for the realisation of economic, social and cultural rights, and vice versa. The Constitutional Court unequivocally states that realising a particular socio-economic right, such as the right of access to housing, would require that other elements not related to socio-economic rights, such as the right to land must also be in place.⁷⁷¹ This was succinctly spelt out by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*.⁷⁷²

It may be true that giving effect to these rights may have an impact on the extent to which states have to give effect to the other rights, more in particular, to social assistance. In *Grootboom*, the Court noted that if:

⁷⁶⁸ Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 17.

⁷⁶⁹ As affirmed in the UDHR *op cit* note 99.

⁷⁷⁰ Ibid.

⁷⁷¹ *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) para 53; *Khōsa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) para 40. There are other rights which play a big role in social security these are the right to equality, the right to privacy, the right to property and the right to just administrative action.

⁷⁷² (2000) 11 BCLR 1169 (CC) para 35, quoted in Chapter Three above.

[t]he state has in place programmes to provide adequate social assistance to those who are unable to support themselves and their dependence, that would be relevant to the states' obligation in respect of other socio-economic rights.⁷⁷³

The Constitutional Court found that there were breaches of section 9 of the Constitution (equality) in a number of cases. Section 9 of the Constitution provides for the right to equality.⁷⁷⁴ In the case of *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others*,⁷⁷⁵ the Court considered the relationship between the right to equality and the right to social security. This was the first case where the Constitutional Court had to consider the right to social security. The above two cases were concerned with whether non-citizens who were permanent citizens were entitled to social assistance grants. The Court found that the failure to include permanent residents in the legislation providing for these grants was unconstitutional.⁷⁷⁶

In applying the right to equality in section 9 to cases involving the right to social security, Mokgoro J, explained:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.⁷⁷⁷

⁷⁷³ Ibid para 36.

⁷⁷⁴ Section 9 of the 1996 Constitution.

⁷⁷⁵ 2004 (6) BCLR 569 (CC) para 52.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid para 74.

In the above statement, the Court recognizes that the constitutional values of equality, dignity and freedom will strive to shield the needy and the poor in society as a whole. In clarifying this, the Court said “equality in respect of socio-economic rights is implicit in the reference to everyone being entitled to have access to such rights in section in 27.”⁷⁷⁸ Justice Mokgoro went further:

...even where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole.⁷⁷⁹

The Court in the above case found that “everyone” in section 27 includes “all people in our country”.⁷⁸⁰ The Constitutional Court also recognized that non-citizens constitute a vulnerable group in the society. Referring to the case of *Larbi-Odam v Member of the Executive Council for Education (North-West Province) and the Minister of Education*,⁷⁸¹ the Court held that when looking at unfair discrimination:

There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here with intentional, statutory sanctioned unequal treatment of part of the South African community. This has a strong stigmatizing effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent

⁷⁷⁸ Ibid para 42.

⁷⁷⁹ Ibid para 45.

⁷⁸⁰ Ibid para 46-47.

⁷⁸¹ 1997 BCLR 1655 (CC).

residents are in some way inferior to citizens and less worthy of social assistance.⁷⁸²

In *Mashava v President of the Republic of South Africa and others*,⁷⁸³ the Constitutional Court again stated that there is a relationship between equality and social assistance with regard to the effective regulation and performance.⁷⁸⁴

If the law has to come to the assistance of older persons, the right to social security and social assistance must be seen as linked to the right to equality. This is clear when section 9 and 27 of the Constitution are read together. From the above, it is clear that the Constitution requires co-ordinated policies which should focus on bringing within the social security framework the excluded categories of vulnerable people. From the above decisions the Constitutional Court acknowledged the need for the government to develop a policy that would ensure that every effort is made to comply with the realization of the right to social security and social assistance.

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5.2.4 Rights and Duties

The Constitution makes access to social security and social assistance a basic human right. It mandates the government to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.⁷⁸⁵ It also places an obligation on the state to protect, respect, promote and fulfil the rights in the Bill of Rights.⁷⁸⁶ Section 27 of the Constitution provides:

⁷⁸² *Khosa* para 74.

⁷⁸³ *Mashava v President of the Republic of South Africa and others* 2004 (12) BCLR 1234 (CC).

⁷⁸⁴ *Ibid* para 57.

⁷⁸⁵ Section 27 (2) of the Constitution.

⁷⁸⁶ Section 7(2) of the Constitution.

- (1) Everyone has the right to have access to –
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
- (3) No one may be refused emergency medical treatment.

The Constitutional Court has often emphasised that the meaning of the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses and in this respect, the Constitution endeavours to bring about reconciliation and reconstruction.⁷⁸⁷ According to Olivier and Jansen van Vuuren, the wording of the Preamble of the Constitution strengthens and supports the constitutional right of access to social security and also 'implies that the State has the intention of creating a comprehensive social security system.'⁷⁸⁸ This is confirmed by the Welfare White Paper which states as follows:⁷⁸⁹

⁷⁸⁷ See *S v Mhlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 111:

"The introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted a bill of rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction . . . To treat it with the dispassionate attention one might give a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi constitution in Germany".

⁷⁸⁸ Olivier M and Jansen van Vuuren L 'Protection and Enforcement of the Right to Social Security' (2000) 4 *Law, Democracy & Development* at 87.

⁷⁸⁹ White Paper *op cit* note 15, para 45.

The general long-term objective is to have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes. This would be supported by a well-informed public, which is economically self-reliant, in a country which has active labour market policies aiming at work for all, while accepting that all will not necessarily have formal employment. Where these broad goals cannot be met, social assistance should be a reliable and accessible provider of last resort. A comprehensive and integrated social security policy is needed to give effect to the constitutional right to social security.

The concept of social security is one of the difficult areas of socio-economic rights in that it creates benefits that persons are entitled to. The term 'social security' is often understood as being limited to social benefits 'earned' by workers' contributions to insurance schemes and excludes social assistance in the form of non-contributory welfare payments financed by general revenue.⁷⁹⁰ The right to social security is essential when a person does not have the necessary property or is not able to secure his or her adequate standard of living.⁷⁹¹ Thus, the Constitutional provisions of civil and political rights may afford protection for the right to social security. In this regard, the Constitutional Court remarked that:

A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.⁷⁹²

⁷⁹⁰ See Scheinin, M 'The Right to Social Security' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds.) *Social, Economic and Cultural Rights* (2001) 211.

⁷⁹¹ Scheinin *op cit* note 790. It has been stressed that right to social security should not be viewed as a matter of charity but as a unilateral right for the individual concerned.

⁷⁹² *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) para 40.

The right of access to social security in the Constitution includes social assistance measures. It extends to those who are unable to support themselves. The South African Constitution recognises that the state has an important duty to fulfil in order to meet the needs of its citizen. The government's duty to comply with this mandate flows from section 2 of the Constitution, which proclaims the supremacy of the Constitution.⁷⁹³ Furthermore, section 7 (2) compels the state to give effect to all the rights in the Bill of Rights. It also requires the government to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to social security.⁷⁹⁴

The wording of this section 27 of the Constitution is closely related to that of the International Covenant on Economic, Social and Cultural Rights. The Constitution makes access to social security and social assistance a basic human right. The right to social security, like all other socio- economic rights, entails positive and negative duties, a range of public and private duties and obligations, and it can be limited in terms of the "law of general application".⁷⁹⁵ The South African Human Rights Commission views social security as a tool that embraces protection against human damage, which provides an adequate standard of living and social safety net against destitution.⁷⁹⁶

It is undeniable that although the right to social security is enshrined as human right, it is a luxury which is enjoyed by a chosen few.⁷⁹⁷ Social assistance grants

⁷⁹³ In terms of Section 2 of the Constitution, the constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.

⁷⁹⁴ Section 27 of the Constitution.

⁷⁹⁵ Section 36 of the 1996 Constitution.

⁷⁹⁶ South African Human Rights Commission 5th Economic and Social Rights Report Series 2002/2003 Financial Year 'The Right to Social Security' (June 2004) at 6.

⁷⁹⁷ See Cecilia Alemany 'Social Security: Different strategies for a global problem' *Social Watch Report* (2007) at 19. See also the SAHRC Report 2002/2003 where it is states that: "Those not in formal employment are excluded and do not qualify for social assistance.

are available for the elderly but those grants are not accessible to those who do not have Identity documents, widows, and those who have not reach the pensionable age. This is also internationally recognized in that way, for example, the ILO reported that more than half of the population is excluded from any type of social security protection and most of them are only partially covered.⁷⁹⁸ Van Ginneken noted that in less developed countries of Sub-Sahara Africa and East Asia, more than 90% of the people have no coverage whatsoever.⁷⁹⁹ It was established in the conclusions of the Resolution on Social Security of the 89th ILO International Labour Conference that:

There is no single ideal model for social security. It grows and evolves over time. There are social assistance regimes, universal regimes, social insurance regimes and public or private systems. Each society has to choose the best way to guarantee security of income and access to medical care. This choice reflects its social and cultural values, its history, its institutions and its level of economic development. The priority function of the state is to facilitate, promote and extend social security coverage.⁸⁰⁰

All rights require that the state must protect, respect, promote and fulfill the rights in the Bill of Rights.⁸⁰¹ In terms of the Constitution the state has an obligation to protect its citizen against any risks so that they can live a worthy normal life as human beings. This means that the full realisation of any right requires the fulfillment of the state's obligations. There are different bases into which the

People with no social protection easily fall into poverty traps, especially if they are not catered for by the social assistance systems" at 6.

⁷⁹⁸ ILO (2001) Report 4 of the 89th ILO Conference: Social Security: themes, challenges, and perspectives.

⁷⁹⁹ Wouter van Ginneken 'Extending social security: Policies for developing countries' (2003) *ESS Paper No 13 Geneva, International Labour Office*.

⁸⁰⁰ 89th ILO Conference Report of 2001 *op cit* note 798.

⁸⁰¹ Section 7(2) of the Constitution.

state obligation can be divided: the obligation to respect, to protect and fulfill.⁸⁰² The classification of these duties was refined by Eide.⁸⁰³ Brand views that this typology indicates the scope and nature of the entitlements that socio-economic rights can create and it also shows when and how they can be used to advance legal claims.⁸⁰⁴ These terms are analysed below.

The duty to respect is the primary obligation of the state and it requires that it refrains from interfering with the enjoyment of socio-economic rights.⁸⁰⁵ The obligation to respect also refers to the obligation of the state to refrain from acts that could deprive an individual of access to enjoy certain rights.⁸⁰⁶ This entails the duty of non-interference and the obligation not to take any measure that would result in denying or limiting access to the enjoyment of human rights. Thus, in the *Minister of Health v Treatment Action Campaign*⁸⁰⁷ case, the government's restriction of access to nevirapine in public hospitals breached its negative obligation to refrain from preventing or impairing the right of access to health care services. The obligation to respect also entails having due regard to the application of the equality and non-discrimination principle.⁸⁰⁸

⁸⁰² Shue H Basic rights: Subsistence, affluence and US foreign policy (1980) 52.

⁸⁰³ Eide A 'Economic, social and cultural rights as legal rights' in Eide A, Krause C, & Rosas A (eds) *Economic, social and cultural rights: A textbook* (1995) 37. Dordrecht: Martinus Nijhoff Publishers

⁸⁰⁴ Danie Brand 'Textual basis: The Rights and Related provisions' in D Brand and C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 3.

⁸⁰⁵ Brand, D 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale' in Coomans, F (eds) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 213.

⁸⁰⁶ Ibid.

⁸⁰⁷ *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC).

⁸⁰⁸ Liebenburg, S 'The Right to social security: Response' in Band D & Russell S (eds) *Exploring the core content of Socio-economic rights: South African and International perspectives* (2002) 156.

The history of South Africa is alive with examples of state interference with socio-economic rights. For example, during the apartheid era people were forcibly removed from their land, and certain categories of citizens were excluded from accessing social security protection.⁸⁰⁹ Under the new democratic government, new laws were enacted to deal with past discriminatory measures and these resonate with the duty to refrain from interfering with the enjoyment of socio-economic rights. This is largely expressed, in the Social Assistance Act,⁸¹⁰ which makes provisions for accessibility of social assistance and outlines the eligibility criteria for the said social assistance. Another legislation which translates the non-interference element of the duty to respect is the Older Persons Act,⁸¹¹ which protects older persons in need of care by creating an enabling and supporting environment for older persons.⁸¹²

The courts have played a significant role in ensuring the guarantee of socio-economic rights. In *Jaftha v Schoeman; Van Rooyen v Stoltz*,⁸¹³ the Constitutional Court found Section 66(1) (a) of the Magistrates Court Act⁸¹⁴ to be unconstitutional and invalid for failing to provide judicial oversight over sales in execution against immovable property of judgment debtors.⁸¹⁵

With regard to the *duty to protect*, the state has an obligation to protect social rights. This obligation refers to the duty of the state to prevent other individuals

⁸⁰⁹ Sarliem Fakir 'The challenges of addressing poverty and environmental linkages in South Africa' *Policy Think Tank series* no 14 of the World Conservation Union, (2002) *IUCN*. Accessed 24 April 2007.

⁸¹⁰ Social Assistance Act No 13 of 2004.

⁸¹¹ Older Persons Act, No 13 of 2006.

⁸¹² In Chapter 2 of the Act.

⁸¹³ 2005 (1) BCLR 78 (CC).

⁸¹⁴ Magistrates Court Act, of 1944.

⁸¹⁵ *Jaftha* case para 67.

from interfering with the freedom of the individual. It also requires the state to prevent violations of such right by third parties. This means that the state has to provide individuals with protection against the third parties. The state's obligations also extend to the private sector. This would require the state to create a workable environment through designing a legislative framework that would facilitate access to resources.⁸¹⁶

In order to protect the rights in the Bill of Rights, the Courts are obliged to promote the spirit, purport, and objects of the Bill of rights when 'interpreting any legislation, and when developing the common law or customary law.'⁸¹⁷ In *The Permanent Secretary, Department of Welfare Eastern Cape v Ngxuza*,⁸¹⁸ the Court stated that: "The law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the way in which the poorest of the poor are to be permitted access to both."⁸¹⁹

The duty to promote is usually difficult to separate from the duty to fulfill. The duty to fulfill requires the state to adopt appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of the right in question. According to Brand, the state breaches the duty to fulfill "not when it invades existing exercise of socio-economic rights, but when it does nothing, or does not do enough, or does not do the appropriate things fully to realize those

⁸¹⁶ Brand, *op cit* note 804, 219 says: "The state carries out the duty to protect socio-economic rights first by regulating private control of access to land, housing, health care services, food, water and education. Such regulation could aim to open up access to these resources. The state can also protect socio-economic rights through standard setting in respect of safety and quality in the provision of services and products. An example is the Foodstuffs, Cosmetics and disinfectants Act 54 of 1972. The state can finally exercise its duty to protect socio-economic rights by regulating private interference in the existing enjoyment of socio-economic rights."

⁸¹⁷ Section 39 of the Constitution.

⁸¹⁸ 2001 (4) SA 1184 (SCA).

⁸¹⁹ *Ibid.*

rights”.⁸²⁰ Thus, the duty to promote and fulfill entails positive obligation on the state to progressively realize the right of access to social security and social assistance. This means that the failure of the state to provide, for example, essential primary medical care for those in need, may amount to a violation.

The Constitutional Court has rendered a number of decisions that guarantee socio-economic rights. In *Government of the Republic of South Africa v Grootboom and others*,⁸²¹ Justice Yacoob stated that “the state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.”⁸²² In the *TAC*⁸²³ case, the court held that the state’s policy not to provide the anti-retroviral drug nevirapine at all public health facilities as well as the failure to adopt an adequate plan to combat mother to child transmission breached the right to health care.⁸²⁴ Similarly, in *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others*,⁸²⁵ the Court found that the failure of the state to include permanent residents in the legislation providing for these grants was unconstitutional.⁸²⁶ The Court interpreted the Act to include permanent residents in the social assistance scheme and, in so doing, remedied a constitutional defect.⁸²⁷

The typology of obligations reflects the manner in which the State must behave in order to discharge its duties. It also assists to assess the compliance of a state

⁸²⁰ Brand *op cit* note 804, 218.

⁸²¹ *Grootboom*, para 24..

⁸²² *Ibid*, para 24.

⁸²³ *TAC op cit* note 807.

⁸²⁴ *Ibid*, paras 96 and 135.

⁸²⁵ 2004 (6) BCLR 569 (CC) para 52.

⁸²⁶ *Ibid*.

⁸²⁷ *Ibid* paras 77, 85, 89 and 98.

with its commitments under the human rights instruments and to assess whether a State has fulfilled its obligation or violated them and in this regard, establish possible international and domestic accountability. The above decisions should make it clear what are the state's obligations in relation to the right to social security and which of these obligations might be justiciable in international and national frameworks as well as what are the progressive elements of that right.

5.2.5 The Obligation to take Reasonable Measures

5.2.5.1 The Nature of the obligation

The nature of obligations to be undertaken by the government in relation to social security and social assistance is provided in section 27(2) of the Constitution. In accordance with this section, the right to social security and other socio-economic rights must be realized progressively, to the maximum of available resources. This provision determines the obligation of the government in relation to the right to social security. The right to social security and social assistance is guaranteed to everyone and is not restricted to a certain category of citizens. The Constitutional Court has acknowledged that the government has to develop policies in order to ensure compliance with the rights in the Constitution. For example, in *Khoza*,⁸²⁸ Justice Mokgoro said:

The right of access to social security, including social assistance, for those unable to support themselves and their dependents is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A 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.⁸²⁹

⁸²⁸ Ibid.

⁸²⁹ Ibid para 52.

This right guarantees basic necessities of life to the poor and needy citizens. In *Grootboom* case the Court held that:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.⁸³⁰

The above cases provide guidance to the state on what it is expected to do in order to fulfill its constitutional obligations. The rulings in the above cases emphasize the importance of the development and implementation of policies that seek to implement social welfare legislation in line with the Constitution.

5.2.5.2 Reasonable legislative and other measures

The duty to fulfill requires that the state must adopt appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of the right in question.⁸³¹ In *Grootboom* case, the Constitutional Court had to decide whether the state had taken 'reasonable and legislative measures' to realise the right of access to housing. It was held that what constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national, provincial and local. At its best the state must devise a comprehensive and workable plan to meet its obligations, providing for all needs, including short, medium and long term needs as well as crises.⁸³² Thus, in the view of the Court,

⁸³⁰ *Grootboom* para 94.

⁸³¹ See section 27(2) of the Constitution.

⁸³² *Grootboom* para 43.

legislation, policies and programmes that exclude “a significant segment of society” would be unreasonable.⁸³³

The Court noted that “[a]n otherwise reasonable programme that is not implemented reasonably will not constitute compliance with State’s obligation.”⁸³⁴ A reasonable programme, according to the Court, allocates tasks to various spheres of government and ensures that appropriate financial and human resources are available.⁸³⁵ This implies that the states’ programmes with respect to the right must address all aspects pertaining to the realisation of that particular right.⁸³⁶ A particular emphasis is placed on meeting the needs of the most vulnerable, especially the poor, as well as people experiencing particularly urgent and desperate needs.⁸³⁷ This suggests that it would be difficult to justify as reasonable, the failure to address the needs of the elderly population as provided for in social welfare legislation, policy or programmes, particularly where those needs are both urgent and desperate. Programmes should be balanced and flexible, with the national government bearing the responsibility of ensuring sufficient laws and policies to fulfill their obligations.⁸³⁸

In the *TAC* case, the Court found the state’s policy of preventing access to nevirapine in public hospitals outside pilot sites to be unreasonable. The Court

⁸³³ Ibid para 38.

⁸³⁴ Ibid, para 42.

⁸³⁵ Ibid, para 39.

⁸³⁶ Brand op cit note 792, 221.

⁸³⁷ *Grootboom* para 43.

⁸³⁸ In *Grootboom* the Court states in para 43 that: “The States measures must be ‘balanced and flexible’, and make appropriate provision for attention to crises and short, medium and long term needs.”

found that it was a rigid and inflexible policy that denied new born children and their largely poor mother's access to a potentially life-saving drug.⁸³⁹

In the above cases, the Court has laid down principles concerning the requirement that the state must take reasonable legislative and other measures. According to Coomans, a measure taken by the government must be capable of contributing to an effective realization of socio-economic rights.⁸⁴⁰ He asserts that:

Reasonableness...operates as a standard for the government to conduct policy and draft legislation, and as a standard of scrutiny for the courts to assess governmental conduct. It thus includes a consideration of the merits of a case by a court, and not only scrutiny of the way the policy was designed and carried out. Reasonableness review by the courts fits in well with the system of the separation of powers, because it requires a court to defer to the other branches of government if a matter of policy options and choices and decisions about how much to spend comes up.⁸⁴¹

Coomans view the test as a realistic standard of review as it stands as a tool for realizing socio-economic rights.⁸⁴² But the test was criticized for failing to give substantive content to the rights in the Bill of Rights. Coomans argue that the concept of reasonableness as it stands is vague because it can be subjected to different interpretations according to one's own position. In this way the government may refuse to act on its policy relying on reasonableness.⁸⁴³ Commenting on the *TAC* case, Bilchitz also argues that:

⁸³⁹ *TAC*, para 20.

⁸⁴⁰ Coomans, *op cit* note 545.

⁸⁴¹ *Ibid*.

⁸⁴² *Ibid* 186.

⁸⁴³ *Ibid*, 187.

Indeed the judgment is notable for the virtual absence of any analysis of what the right to have access to health care services involves. What are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunization, or treatment for existing diseases, or both? Does the right entitle one to primary, secondary or tertiary health care services, or all of these?⁸⁴⁴

5.2.5.3 Progressive realization

While progressive realization recognises that the full realisation of everyone's right to access social security is not always immediately possible, it clearly places time bound and explicit obligations on the state.⁸⁴⁵ In addition, progressive realization requires that the state must move expeditiously towards the realization of the right. This does not mean that all social rights are progressive in nature. There are a number of rights that require immediate and full implementation such as, for example, the right to non-discrimination.⁸⁴⁶ The measures that the state adopts must not be just on paper but must be implemented effectively.⁸⁴⁷ This means that 'accessibility should be progressively realized with legal, administrative, operational and financial hurdles examined and where possible lowered over time.'⁸⁴⁸ The *TAC* case, in particular

⁸⁴⁴ David Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 SAJHR 1 at 6.

⁸⁴⁵ Sandra Liebenberg says: "Progressive realization is thus both a sword and shield: it imposes an obligation on the state to take steps towards the Constitutional goal of effectively meeting the basic needs of all in our society. These steps must be 'deliberate, concrete and targeted', allowing the state to show measurable progress in meeting this goal. Moreover 'progressive realisation' acts as a brake on measures that reduce access to socio-economic rights. At the same time it allows the state a degree of temporal latitude in the achievement of this goal. Liebenberg S 'The Right to social assistance: The implications of Grootboom for policy reform in South Africa' 2001 (17) *South African Human Rights Journal* 233,253, 257.

⁸⁴⁶ See General Comment no 3.

⁸⁴⁷ See Brand *op cit* note 804, 222.

⁸⁴⁸ *Grootboom* para 45.

emphasized the need for urgent and timely action where people's lives literally depend on timely access to health care services.⁸⁴⁹ The Court in the *TAC* case held that the measures taken by the state which are designed to prevent mother to child transmission of HIV were inconsistent with the Constitutional obligation in that they 'failed to address the needs of mothers and their newborn children who do not have access to the medication.'⁸⁵⁰ While not mentioned in the above court decisions, it is worth to note that section 237 of the Constitution requires that all constitutional obligations must be performed diligently and without delay.

5.2.5.4 Within Available resources

This requirement is often used to justify or to cover up the failure of the state to fulfill its obligations. The availability of resources influences the level of protection provided by the state. Resources are a primary feature of determining reasonableness, and the state is not required to do more than its available resources permit.⁸⁵¹ Resources would therefore govern "the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result."⁸⁵² The ICESCR noted that in assessing whether a state has discharged its obligations, consideration has to be had on the resource constraint of the country concerned. For the state to be found liable for its failure to make resources available, it must

⁸⁴⁹ Ibid.

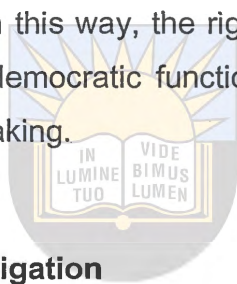
⁸⁵⁰ *TAC* para 67 & 80.

⁸⁵¹ In *Soobramoney v Minister of Health (Kwa-zulu Natal)* 1998 (1) SA 765 (CC), Chaskalson said :
"What is apparent from these provisions 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 on the availability of resources for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources." At para 11. See also Grootboom at para 46.

⁸⁵² Ibid.

demonstrate that every effort has been made to use all resources at its disposal to meet its core minimum obligations.⁸⁵³

If, however, the state is to rely on lack of resources as the basis for refusing a particular health care service, it must provide a clear and compelling justification for doing so particularly where the refusal of social welfare services is for elderly citizens, the poor and those experiencing desperate or urgent needs.⁸⁵⁴ Thus, while social security rights are not regarded as an entitlement for all levels social welfare services claimed, the government should justify its decisions why it refuses to meet such a right. In this way, the right to social security and social assistance plays an important democratic function of ensuring responsiveness and accountability in decision-making.



5.2.5.5 Minimum core obligation

The minimum core is a concept that is widely used in relation to socio-economic rights. In the Maastricht Guidelines, experts stressed that there are certain rights that have to be guaranteed irrespective of the availability of resources or other consideration.⁸⁵⁵ The Guidelines provides as follows:

Violation of the Covenant occurs where a state fails to satisfy what the committee on Economic, Social, and Cultural Rights has referred to as a “minimum core obligation to ensure the satisfaction of, at the very least minimum essential levels of each of the rights ...⁸⁵⁶

⁸⁵³ General Comment 3 para 10 1990 UN doc. E/1991/23.

⁸⁵⁴ TAC, para 80.

⁸⁵⁵ Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4? 1987/17; annexure to 1987 (9) Human Rights Quarterly 122- 235. The Maastricht Guidelines were adopted on the basis of the Limburg framework.

⁸⁵⁶ Ibid, para 9.

The ICESCR Committee is of the view that each right in the Covenant established a core minimum obligation. It noted that:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining states parties' reports the committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.⁸⁵⁷ By the same token it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take into account of resource constraints applying within the country concerned.⁸⁵⁸

The minimum core content is described as the level below which no government can go regardless of the economic situation in a country.⁸⁵⁹ According to Chapman and Russell, this description is problematic for most human rights activists; there is fear that the "floor" will become a "ceiling".⁸⁶⁰ There are different opinions on the relevance and application of the minimum core concept.

⁸⁵⁷ General Comment No 3 para 10. See also Bilchitz at 487, argues that the minimum core should be established in order to ensure that at least minimum requirements for a dignified life are provided to each individual.

⁸⁵⁸ *Ibid*, para 10.

⁸⁵⁹ Kannan K.P. 'Social Security in a globalizing world' (2007) Vol 60, no 2-3 *International Social Security Review* 22.

⁸⁶⁰ Andrey R Chapmant and Sage Russell 'Core Obligations: Building a Framework for Economic, Social and Cultural Rights' (2002) 7.

The danger inherent in the minimum content is the fact that it will reveal to the state parties how little they should do in order to comply with their obligations.⁸⁶¹

The General Comment uses the term obligation and then concentrates on what the state is obliged to do. The Committee is of the opinion that the minimum core obligation entails the availability of basic necessities such as essential foodstuff, essential primary health care, shelter, and housing, or the most basic forms of education. According to the Committee, the minimum core obligation should be provided to everyone unconditionally. Although the minimum core obligations are not defined in the ICESCR, the Committee tried to define them through its General Comments. A good example is found in the General Comment on the right to health.⁸⁶² For example, in General Comment No 14, the Committee view these core obligations to include at least the following six obligations:

- (a) the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- (b) access to the minimum essential food which is nutritionally adequate supply of safe, to ensure freedom from hunger to everyone;
- (c) access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) provision of essential drugs, as from time to time defined under the WHO action Programme on Essential Drugs;
- (e) equitable distribution of all health facilities, goods and services;

⁸⁶¹ See Sage Russell 'Minimum State Obligations: International Dimensions' in Brand D and S Russell *Exploring the core content of Socio-economic rights: South African and International Perspectives* (2002) 15.

⁸⁶² General Comment 14.

- (f) the adoption and implementation of a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.

The minimum core concept has been accepted internationally, but this might not mean that it is the appropriate concept at the domestic level. As the minimum core obligation applies irrespective of the available resources or any other factor concerned, it should be regarded as being immediately justiciable. Bilchitz argues that the minimum core approach is the recognition that 'it is simply unacceptable for human beings to live without sufficient resources to maintain their survival'.⁸⁶³ According to Russell, the minimum core obligation includes non-discrimination, the obligations to respect, protect and the obligation to fulfil.⁸⁶⁴ Accordingly, it is very easy to include all the above duties in the minimum state obligations.⁸⁶⁵ This means that the minimum obligation includes a positive duty on the part of the state to realise socio-economic rights.

5.2.5.6 The minimum core obligation in the South African context

In both the *Grootboom* and *TAC* cases, it was argued before the Court that the latter should adopt the minimum core concept. The minimum core obligations approach has been rejected by the Constitutional Court on the basis of the non-availability of statistical data.⁸⁶⁶ In this case, the Court referring to the ICESCR Committee said that the minimum core obligation in international law 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.⁸⁶⁷ The Court said further

⁸⁶³ Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 SAJHR 1 at 15.

⁸⁶⁴ Russell *op cit* note 861.

⁸⁶⁵ Ibid.

⁸⁶⁶ *Grootboom* para 31.

⁸⁶⁷ Ibid, para 31.

that the ICESCR Committee had developed the concept of minimum core over many years of examining reports by reporting states. It is through these reports that the Committee managed to get information. However, the Court concluded that it does not have such a kind of information. This makes it difficult for the Court to give a definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.⁸⁶⁸

The court in *Treatment Action Campaign* refused to read such an obligation in the Constitution. The Court stated that the socio-economic rights in section 26 and 27 should not be construed as entitling everyone to claim minimum core to be provided to them.⁸⁶⁹ The Court said:

A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.

From the above decisions it is clear that it is impossible to give everyone access to services immediately. In this regard, the Constitutional Court has been criticised by some scholars for failure to hold other branches of government accountable. According to these critics, the Court fails to take due regard to the needs of the poor.⁸⁷⁰ By rejecting the concept of minimum core, the Court has limited the circumstances in which individuals can claim socio-economic services

⁸⁶⁸ Ibid, paras 32-34.

⁸⁶⁹ Ibid paras 34-35.

⁸⁷⁰ Theunis Roux 'Understanding *Grootboom*: A Response to Cass R. Sunstein', 12 CONST Q 41 (2002) (Publication of the Canadian Centre for constitutional Studies).

from the state.⁸⁷¹ Liebenberg argues that accepting the principle of minimum core obligation 'does not require the Court to define in the abstract the precise basket of goods and services that must be provided.'⁸⁷² However, the Court could rightly so define the principles underlying the concept of minimum core obligations and apply these contextually on a case-by-case basis.⁸⁷³ On the other hand, Roux argues that the Court should have said that the government should prioritise the need for shelter ahead of other rights.⁸⁷⁴

To recognise a minimum core is an indication that there is a basic need that should be prioritised. This need places a positive duty on the state to take immediate steps to give priority to those in dire need. Bilchitz argues that "imposing a minimum core obligation would have had the benefit that the state would be provided with a more definite standard against which to judge its behaviour."⁸⁷⁵ Thus, instead of merely being implored to be 'reasonable' the state would have been required to ensure that people have effective protection from basic services, such as toilets and running water."⁸⁷⁶ It is argued further that the minimum core should be established in order to ensure that at least the minimum requirements for a dignified life are provided to each individual.⁸⁷⁷ The Court has tried to avoid making such kind of a decision. Some scholars argue that the court was right in rejecting this approach because it is not an appropriate

⁸⁷¹ Liebenberg 'South Africa's Evolving Jurisprudence on Socio-economic Rights' 2002 (2) 6 *Law Democracy and Development* 159, 189.

⁸⁷² Ibid, 174.

⁸⁷³ Ibid.

⁸⁷⁴ Roux *op cit* note 870, 105.

⁸⁷⁵ David Bilchitz "giving socio-economic rights teeth: The minimum core approach and its importance" (2002) 119 SALJ 484 at 487. See also Russell in Danie Brand and Sage Russell *Exploring the Content of socio-economic Rights: South African and International Perspectives*.

⁸⁷⁶ Ibid, 500.

⁸⁷⁷ Ibid, 487.

tool for decision-making.⁸⁷⁸ It is said that the Court would be taking a substantial risk by treating these rights as justiciable.⁸⁷⁹

It is submitted that for the benefit of the vulnerable and the destitute, more in particular the elderly and widows, the minimum core obligation should be accepted as it applies irrespective of the available resources or any other factor concerned.

5.3 The framework established under legislation

A number of legislative developments occurred during the period 1999–2000, the most important being the Developmental Welfare Governance Bill⁸⁸⁰ and the Status of Older Persons Act.⁸⁸¹ The Developmental Welfare Governance Bill aims to make appropriate arrangements for a relationship between the Ministry of Social Development and the non-governmental welfare sector. The aim is to ensure that the objectives of the White Paper for Social Welfare as regards transformation and equity in welfare services are achieved equally within the government and the broader welfare sector.⁸⁸² The main problem that the measure attempts to address is lack of proper co-ordination between the state and the non-governmental sector that renders welfare services. The main object of the Bill is to make provision for the establishment and regulation of the new

⁸⁷⁸ Lehmann Karin 'In defense of the constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 -1, 163-197.

⁸⁷⁹ Mark S Kende 'The South African Constitutional Court's Construction of Socio-Economic Rights: A response to critics' *Connecticut Journal of International Law* 19:57 (2004) 617, 618.

⁸⁸⁰ Developmental Welfare Governance Bill of 2000 published in Government Gazette No. 21369 of 21 July 2000.

⁸⁸¹ Older Persons Act, No 9 of 2006.

⁸⁸² Developmental Welfare Governance Bill *op cit*.

council that would be known as the South African Developmental Welfare Council (the 'Council').⁸⁸³

The Social Assistance Act (SAA)⁸⁸⁴ provides social assistance to older persons, and the establishment of a national council and welfare organizations. The Act regulates the payment of social assistances grants and social relief programmes.⁸⁸⁵ It provides support in the form of grants, namely, Old Age Pension, the Child Support Grant, the Disability Grant, the Foster Care Grant, the Care Dependency Grant, the War Veterans' Grant and Grant in Aid.⁸⁸⁶

SAA aims at the consolidation of the legal requirements and provisions for social assistance and the creation of uniform norms and standards.⁸⁸⁷ The Act and its regulations⁸⁸⁸ grant individuals statutory entitlement to grants, and everyone applying for a grant must comply with the provisions of the Act. This is an entitlement guaranteed by the legislation, and in terms of the Act, no one may be deprived of benefiting under the Act when he/she meets the necessary provisions of the Act. At the same time, no one can withdraw or suspend the benefit without notifying the relevant recipient.⁸⁸⁹ Regulation 23 provides that the Director-General may take the circumstances of each case into consideration and in this regard, may increase, decrease or suspend a grant. However, the

⁸⁸³ Ibid.

⁸⁸⁴ Social Assistance Act, No 13 of 2004.

⁸⁸⁵ Olivier and Kalula "Legal framework and scope of the coverage" in Olivier *et al* (eds) *Introduction to Social Security* (2004) 38.

⁸⁸⁶ Act No. 13 of 2004.

⁸⁸⁷ The Preamble to the Act.

⁸⁸⁸ The Regulation GN 417 in GG 18771 of 31 March 1998.

⁸⁸⁹ S 5, Social Assistance Act.

beneficiary must be informed of the reasons in writing at least three months before such an increase, decrease or suspension is affected.⁸⁹⁰

The Older Persons Act⁸⁹¹ enshrines the rights of older persons to care and protection from harm whether they are cared for in the home or in residential care facilities. The Act seeks to provide redress for any persons who may require it. More importantly, the Act seeks to prevent the abuse of older persons by providing appropriate mechanisms for public complaint and oversight.⁸⁹²

The legislative measures referred to above aimed at addressing institutional co-operation between the state and organs of civil society while also addressing equity in accessing state financial assistance by previously excluded organs of civil society.⁸⁹³ The other measure is particularly important as it focuses on vulnerable groups, namely, older persons.

Another legislation is the Compensation for Occupational Injury and Diseases Act No. 130 of 1993 (COIDA).⁸⁹⁴ The Act establishes a scheme which provides for the payment of benefits to workers who are injured on the job or who develop occupational diseases. Unfortunately, this legislation does not cover people who are not in the formal employment.

⁸⁹⁰ Regulation 23 *op cit* note 876.

⁸⁹¹ The Older Pensions Act 9 of 2006 [hereinafter OPA or the Act].

⁸⁹² Preamble to the Act.

⁸⁹³ *Ibid.*

⁸⁹⁴ Compensation for Occupational Injury and Diseases Act No. 130 of 1993 [hereinafter COIDA or the Act].

5.4 The Policy Framework

It is undisputable fact that if social security was not available for elderly persons, most of them would have died of hunger and diseases. However, the efficacy of social security in meeting the needs of the poor is dependent on the hands of policy makers. The policy framework on social security is analysed below.

5.4.1 The White Paper on Social Welfare (1997)

The White Paper culminated from a series of events, which were initiated by the government in collaboration with other stakeholders in the field of social security. The White Paper proposed the establishment of a developmental social welfare system that would be equitable, people-centred, democratic, and appropriate.⁸⁹⁵ It also called for an intersectoral response between the government and civil society in order to devise strategies to address the welfare needs of all those who live in poverty, those that are vulnerable, or those with special needs.⁸⁹⁶ The goals of the proposed social welfare system are outlined thus:

- (a) To facilitate the provision of appropriate developmental welfare services to all South Africans, especially those living in poverty, those who are vulnerable and those who have special needs. These services should include rehabilitative, preventative, developmental and protective services and facilities, as well as social security, including social relief programmes, social care programmes, and the enhancement of social functioning.
- (b) To promote and strengthen the partnership between the government, the community and organisations in civil and in the private sector who are involved with the delivery of social services.

⁸⁹⁵ The Preamble to the White Paper *op cit* note 15.

⁸⁹⁶ Ibid.

- (c) To promote intersectoral social development both within the welfare departments and in corroboration with other government departments and non-governmental stakeholders.
- (d) To give effect to international conventions of the United Nations system which have been ratified by the Government, and which are pertinent to developmental social welfare.
- (e) To realise the relevant objectives of the Constitution and those of the Reconstruction and Development Programme (RDP).

The White Paper points out that an effective social security system should include rehabilitative, preventative, developmental and protective measures that will cater for the poor citizens of the country.⁸⁹⁷ It envisages a social security system that is inclusive of all measures that will enhance development. According to Olivier, the kind of measures that should be adopted are those that can prevent human damage and repair or remedy such damage.⁸⁹⁸ All these measures are also inclusive in the description of both social welfare and social security. Social welfare is defined as:

An integrated and comprehensive system of social services, facilities, programmes and social security to promote social development, social justice and social functioning of people. Social welfare is linked to other social service system through which people's needs are met, and through which people strive to achieve their aspirations. Social welfare services and programmes are therefore part of a range of mechanisms to achieve social development, such as health, nutrition, education, employment, recreation, rural and urban development, and land reform.⁸⁹⁹

⁸⁹⁷ White Paper *op cit* note 15, 7.

⁸⁹⁸ Olivier M P 'The Concept of Social Security' in Olivier *et al* (eds) *Introduction to Social Security* (2004) 20.

⁸⁹⁹ White Paper *op cit* note 15, 40.

It also describes the scope of social security to cover:

A wide range of public and private measures that provide cash or in kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty. And secondly, in order to maintain children.⁹⁰⁰

The White Paper recognizes both social welfare and social security as an integral part of the national developmental social welfare strategy.⁹⁰¹

The goals of social security include income replacement (compensation), prevention of exclusion and marginalization, reintegration into the labour market, poverty alleviation, and the maintenance of a basic standard of living.⁹⁰² The fundamental purpose of social security and social assistance is to ensure that persons living in poverty are able to access a minimum level of income to meet their basic needs.⁹⁰³ The White Paper categorises social security into four elements, namely: private savings for those who voluntarily save for unexpected events; social insurance, which is financed through a contribution by employers and employee; social assistance, which is means-tested, non-contributory and provides assistance for elderly persons, disabled persons and children; and lastly, social relief, which is a short term relief used at a particular time.⁹⁰⁴

⁹⁰⁰ Ibid.

⁹⁰¹ Ibid, 1-2.

⁹⁰² Olivier *et al* op cit note 898, 20.

⁹⁰³ Report of the Lund Committee on Child and Family Support (August 1996) 10.

⁹⁰⁴ Olivier *et al* op cit note 898, 20.

Social security has been accepted as a policy imperative throughout the developed and developing nations.⁹⁰⁵ There is agreement that social security is important for poverty prevention, it ensures a basic minimum standard of living for people, and contributes to achieving a more equitable income distribution in society. For these reasons, the White Paper recognizes that social security is an integral part of the national developmental social welfare strategy, and therefore it should be targeted to elderly and disabled people because of their poverty, vulnerability and special needs.

The White Paper sets out the principles that should be followed when designing welfare policies and programmes. Whilst the ICESCR Committee views social security as a measure to protect certain individuals when they are confronted with the harsh realities of life,⁹⁰⁶ it notes that “the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights”.⁹⁰⁷

The basic principles of developmental social welfare policies are stated as: securing basic welfare rights; equity; non-discrimination; democracy; improved quality of life; human rights; people-centered policies; investment in human capital; sustainability; partnership; intersectoral collaboration; decentralization of services delivery; quality services; transparency and accountability; accessibility; appropriateness, and *ubuntu*.⁹⁰⁸ A number of these elements are available in the General Comment No 19 of the ICESCR Committee. When interpreting these aspects, the Committee noted that: “it should be borne in mind that social

⁹⁰⁵ Olivier MP et al *Social Security Law, General Principles* (1999) 7.

⁹⁰⁶ General Comment No. 19, para 1.

⁹⁰⁷ Ibid, para 1.

⁹⁰⁸ White Paper *op cit* note 15.

security should be treated as a social good and not primarily as a mere instrument of economic or financial policy.”⁹⁰⁹

5.4.2 Guiding principles for social welfare policies

5.4.2.1 Securing basic welfare rights

The White Paper implicitly stated the goal of developmental social welfare as a ‘humane, peaceful, just and caring society which will uphold welfare rights, and facilitate the meeting of basic human needs’.⁹¹⁰ The White Paper underlines, as one of its priorities, the security of basic welfare rights. According to this principle, governments should create conditions that would facilitate the progressive achievements of every citizen’s right to social security and social assistance for those who cannot maintain themselves.⁹¹¹ For example, in *‘Khosa & others v The Minister of Social Development & others’*,⁹¹² Mokgoro J observed that:

The right of access to social security, including social assistance for those who are unable to support themselves and their dependents is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A 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.⁹¹³

⁹⁰⁹ General Comment No. 19, para10.

⁹¹⁰ Streak J and Poggenpoel S ‘Towards Social Welfare Services for All Vulnerable Children in South Africa: A Review of policy development, budgeting and service delivery’ 2005 *IDASA Occasional Papers* at 11. According to Streak and Poggenpoel when the White Paper speaks about social welfare services implied that it is composed of facilities, programmes and services that are part of developmental social welfare system and which do not fall within the package of social security.

⁹¹¹ White Paper op cit note 15.

⁹¹² *Khosa & others v The Minister of Social Development & Others; Mahlaule & Others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC).

⁹¹³ Ibid para 52.

Section 27(1) (c) of the Constitution provides that 'everyone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. This section is subject to the qualification contained in s 27(2). The latter provides: '[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'⁹¹⁴

Section 7(2) also places an obligation on the state to protect, respect, promote and fulfill the rights in the Bill of Rights.⁹¹⁵ In terms of the Constitution, the government has an obligation to protect its citizens against any risks so that they can live a normal and dignified life as human beings. This was confirmed by the Constitutional Court in the case of the *Government of the Republic of South Africa and Others v Grootboom and Others*⁹¹⁶ where it stated that "the state is required to take reasonable legislative and other measures. Mere legislation is not enough". This means that the full realisation of any right is a major responsibility of the government which requires not only legislative measures but also implementation strategies, policies and programmes.⁹¹⁷ This sentiment was also expressed by the Committee:

The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy and plan of action to realize the right to social security, unless the State party can clearly show that it has a comprehensive social security system in place and that it reviews it regularly to ensure that it is consistent with the right to social security. The strategy and action plan should be reasonable conceived in the circumstances; take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups; be based upon human rights law and principles; cover all aspects of the right to

⁹¹⁴ The 1996, Constitution.

⁹¹⁵ S 7(2), Constitution.

⁹¹⁶ 2000 11 BCLR 1169 (CC), para 42.

⁹¹⁷ Ibid.

social security; set targets or goals to be achieved and the time –frame for their achievements, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources. When formulating and implementing national strategies on the right to social security, States parties should avail themselves, if necessary, of the technical assistance and cooperation of the United Nations specialized agencies.⁹¹⁸

5.4.2.2 Equity and Non-discrimination

Another principle stipulated in the White Paper is the principle of “equity” followed by non-discrimination. Equity means that resources should be distributed equally to those who are entitled to them, and should address racial, gender, geographic, the urban/rural divide, and sectoral disparities.⁹¹⁹ This includes mainstreaming of the groups with special needs within the society. On the other hand, non-discrimination requires the inclusion of all groups in society for the benefit of social welfare services and programmes. The beneficiary groups include, women, children, the physically and mentally disabled, offenders, people with HIV/AIDS, the elderly, and people with homosexual or bisexual orientations. According to Dr Skweyiya, the principle of equitable access requires that attention is paid to all those who live in remote areas of South Africa.⁹²⁰ The ICESCR Committee noted:

The obligation of States parties to guarantee that the right to social security is enjoyed without discrimination... and equally between men and women (article 3), pervades all of the obligations under Part III of the Covenant. The Covenant

⁹¹⁸ General Comment No.19, para 68.

⁹¹⁹ White Paper *op cit* note 15.

⁹²⁰ Department of Social Development 'Policy Debate: Budget vote speech by the Minister of Social Development, DR Zola Skweyiya, to the National Council of Provinces in Cape Town' (17/05/2006) 2.

thus prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political, or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.⁹²¹

The Constitution enshrines equality and non-discrimination among the core values of the South African social order.⁹²² In section 9(1), it provides for equality before the law. The term 'everyone' clearly ensures that every person is equal before the law.⁹²³ Section 9(2) recognises that equality includes the full and equal enjoyment of all rights and freedoms. The section further provides that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination, should be included within the ambit of this section.⁹²⁴

Although the age for men has been reduced from 64 and 63 in 2008 and 62 to 61 in 2009, age discrimination is still evident in our legislations. With regard to non-national, residence requirement and the inability to receive benefits from the state affect the enjoyment of their rights. The Constitution, the White Paper and the General Comment of the Committee acknowledge that there are categories of persons who are excluded from the social security system in terms of race, age language, etc, and therefore, those inequalities should be removed.⁹²⁵ To

⁹²¹ General Comment No. 19, para 29.

⁹²² S 9, 1996 Constitution

⁹²³ Ibid.

⁹²⁴ Ibid.

⁹²⁵ General Comment No 19 par 30, the Committee notes that:

"States parties should also remove *de facto* discrimination on prohibited grounds, where individuals are unable to access adequate social security. States parties should ensure that legislation, policies, programmes and the allocation of resources facilitate access to social security for all members of society in

supplement this, Article 2(2) of the ICESCR contains an obligation to eliminate non-discrimination whereby States Parties undertake to:

guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹²⁶

In addition, Article 3 of the ICESCR requires states parties to undertake to ensure the equal right of men and woman in the enjoyment of all rights in the ICESCR. The requirement to guarantee the rights to social security and social assistance without discrimination is of paramount importance owing to the immediate nature of the obligation not to discriminate.

5.4.2.3 Improved quality of life

The third principle is concerned with improved quality of life. This means that the social protection framework will be designed to uplift the standard of living, survival and well-being of every individual. The system should be effective to ensure high quality and affordable social services. Appropriate measures will also be designed to address vulnerability and to provide social security to disadvantaged and vulnerable groups within the society.⁹²⁷

It is worth acknowledging that the government has made significant progress in terms of improving the quality of life of many South Africans but still much need to be done. This is evident from the gradual extension of grants beneficiaries,

accordance with Part III. Restrictions on access to social security schemes should also be reviewed to ensure that they do not discriminate in law or in fact.”

⁹²⁶ General Comment No. 3 (1990) on the ‘States Parties’ Obligations’.

⁹²⁷ White Paper *op cit* note 17.

and the equalisation of the qualifying age for the old age pension to 60 for both men and women. It is also worth mentioning the establishment of the South African Social Security Agency (SASSA) to deal with social grants.

5.4.2.4 Human rights

The provision of social welfare services and programmes will be based on respect for human rights and fundamental freedoms as articulated in the Constitution of the Republic of South Africa. The South African Constitution of 1996 is lauded as a democratic constitution committed to both social justice and fundamental human rights.⁹²⁸ The Constitution makes reference to fundamental values that underpin the aims and objectives of the Constitution.⁹²⁹ These values are said to play a crucial role in the interpretation of the rights in the Bill of Rights.⁹³⁰ Principles in the Constitution such as human dignity, freedom and equality are the foundational values of the society.⁹³¹ Access to social services, facilities and programmes is a constitutional right. The White Paper provides that social welfare should be treated as a basic human right of everyone who cannot afford to meet his/her basic needs, and those who are vulnerable should also be

⁹²⁸ The Preamble to the 1996 Constitution.

⁹²⁹ Ibid.

⁹³⁰ On the role to be played by the Courts to make sure that the State give effect to these rights, Justice Yacoob in *Grootboom* said: "I am conscious that it is an extremely difficult task for the State to meet its obligations in the conditions that prevail in our country. This is recognized by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce." *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 24.

⁹³¹ Section 39 (1) (a) of the Constitution requires Courts, Forums and Tribunals when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

treated with dignity.⁹³² Under the Constitution, social security is regarded as a basic human right.

In the same vein, the General Comment notes that the right to social security guarantees to everyone human being the right to dignity when deprived of their capacity to fully realize their rights as provided for in the Covenant.⁹³³ It also includes: "the right not to be subjected to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies".⁹³⁴ It is clear that the right to social security should not be interpreted narrowly but expansively so that it can be understood in a broader context and thus "guarantee all people a minimum enjoyment of this human right".⁹³⁵

Both the General Comment and the White Paper embrace the value of human dignity when it comes to the realization of basic welfare services. This fact is also acknowledged by the South African jurisprudence. In *Government of the Republic of South Africa and others v Grootboom and others*,⁹³⁶ the Constitutional Court stated:

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 the Bill of Rights. The realization of these rights is also critical to the advancement of race and gender equality and the

⁹³² White Paper op cit note 15 1-2.

⁹³³ Ibid para 1.

⁹³⁴ Ibid para 9.

⁹³⁵ Ibid para 4 .

⁹³⁶ *Grootboom* para 23.

evolution of a society in which men and women are equally able to achieve their full potential.⁹³⁷

5.4.2.5 Transparency and Accountability

In order for improved quality of life and respect for human rights to be achieved, the government must be transparent and accountable. Similarly, welfare institutions and organizations are required to be transparent and accountable at all levels, including social service delivery. Section 1 of the Constitution states that the government has to “ensure accountability, responsiveness and openness”.⁹³⁸ In the same vein, the Committee on Social Security notes that qualifying conditions for benefits must be reasonable, proportionate and transparent.⁹³⁹ In addition, when benefits are withdrawn, suspended or reduced proper procedures must be followed and the decision must be based on reasonable grounds that are provided for by law.⁹⁴⁰

Although the Act and its regulation contain provisions protecting individuals to such situations, it does not cure the effect of maladministration. Research shows that the problematic area confronting the government in the process of realising its obligation is in the area of finance and withdrawal of social security grants.⁹⁴¹ On many occasions, the government has been taken to court for withdrawal of

⁹³⁷ Ibid para 23.

⁹³⁸ S 1, 1996 Constitution.

⁹³⁹ General Comment No. 19 para 24.

⁹⁴⁰ Ibid. The Committee in this respect makes reference to the ILO Convention No. 168 (1998) on Employment Promotion and Protection against Unemployment. The Committee notes that under the said Convention withdrawal, suspension and reduction of benefits can only be done in certain circumstances such as: “... the person is in receipt of another income maintenance benefit provided for in the legislation of the relevant State, except a family benefit, provided that the part of the benefit which is suspended does not exceed that other benefit.”

⁹⁴¹ See Community Agency for Social Enquiry (CASE) ‘Monitoring Socio-Economic Rights in South Africa: Public Perceptions (CASE Johannesburg, 2002), 54-56.

grants and failure to meet its obligations. In the Eastern Cape, the social assistance grants applicants took the government to court when the government departments failed to process their applications or discontinued the payment of grants without notifying them.⁹⁴² In the recent case of *Njongi v MEC, Department of Welfare, Eastern Cape*,⁹⁴³ the Court strongly criticised the government officials for unsatisfactory behaviour concerning grants withdrawals and disobeying court orders. The Court stressed the importance of reading judgments of courts and responding to its judgments promptly.⁹⁴⁴ The government's behaviour has been characterised by some as 'lack of respect for human dignity'.⁹⁴⁵

5.4.1.6 Accessibility

The sixth theme addresses accessibility. This requires organisations and institutions to be easily accessible and responsive to all those in need. Barriers that make it difficult or impossible for some people to participate equally in all spheres of life should also be removed. This also requires special training programmes to be provided to facilitate the development of accessible services.⁹⁴⁶

⁹⁴² In *Mahambehla v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E), 2000 (12) BCLR (C) 1322; *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E).

⁹⁴³ 2008 6 BCLR 571 (CC).

⁹⁴⁴ *Njongi*, paras 84 – 87. Yacoob J says:

“....it must be said that judgments of courts in relation to Provincial Government conduct are not meant simply to be filed away without being read. They contain important information that has a bearing on the conduct of the Provincial Government in issue. It is probable that the legal advisors to the Provincial Government did not read the various judgments which are referred to in this judgment with sufficient care. If they did read them however their conduct is worse. Court judgments were ignored by these lawyers. This is unsatisfactory.” Para, 84.

⁹⁴⁵ See de Vos P and Heleba S 'Prescription and right to social security' *ESR Review* (2008) vol. 9 no 3 at 22.

⁹⁴⁶ White Paper *op cit* note 15, 9.

Similarly, in its General Comment No. 19 on Social Security, the ICESCR Committee also provided for the element of accessibility which includes coverage, eligibility, affordability, participation and information, and physical access. According to the General Comment, all persons should be covered by the social security system including the most disadvantaged or marginalized sections of the population, and without discrimination. This means that the state should make provision for a social security system which is not discriminatory in nature on any of the prohibited grounds.⁹⁴⁷ The Committee also noted the necessity of non-contributory schemes that would ensure universal coverage.⁹⁴⁸

In South Africa not everybody is covered under the social security system. The system excludes a number of categories from benefiting from social assistance and social security in a number of ways. First, the social security system caters only for those who are formally employed. For example, social insurance is contributory, which means that it is dependent on the employment and contribution of a particular person. Second, for an applicant to receive a grant s/he must pass the means test. A means-test entails that the institution responsible for the administration of the funds evaluates the income and assets of the person applying for assistance.⁹⁴⁹ This is done in order to check whether the person's means are below the stipulated minimum. The means-test criteria which is used to determine the amount of benefit to be awarded to a particular individual is a strict measure of exclusion, more in particular to the poor and needy individuals.⁹⁵⁰ Third, a child older than 15 years is excluded from

⁹⁴⁷ General Comment No. 19, para 23.

⁹⁴⁸ Ibid.

⁹⁴⁹ Strydom E 'Introduction to Social Security Law' in Strydom *et al* (ed) *Essential Social Security Law* (2005) 8.

⁹⁵⁰ A. H. Dekker and M.P. Olivier 'Informal forms of social security and informal sector social security' in M P Olivier *et al*, *Introduction to Social Security* (2004) 85.

benefiting from child support grant. In previous years, the grant was up to the age of 14. From the 1st of January 2009, it has been extended up to 15 years.⁹⁵¹

5.4.2.7 Appropriateness

The White Paper requires that “social welfare programmes, methods and approaches will be appropriate, will complement and strengthen people’s efforts, enhance their self-respect and independence and will be responsive to the range of social, cultural and economic conditions in communities. The sustainable use of human, material and the earth’s natural resources will be ensured for the benefit of future generations.”⁹⁵²



5.4.2.8 Ubuntu

Lastly, the White Paper provides for *ubuntu* which is stated thus:

The principle of caring for each other’s well-being will be promoted and a spirit of mutual support fostered. Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual’s humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being.⁹⁵³

As discussed above, this principle has been recognised in literature and jurisprudence as a constitutional value.⁹⁵⁴

⁹⁵¹ Regulation 6 (4) of the Regulations: Application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance GG 31356 of 22 August 2008.

⁹⁵² White Paper *op cit* note 15,10.

⁹⁵³ Ibid.

⁹⁵⁴ In *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC), at para 224. For

5.5 Social Welfare Programmes

5.5.1 The Ministers Ten Point Plan

The Minister of Social Welfare, Dr Zola Skweyiya, launched a 10-Point Programme of Action for the Welfare Ministry and Department in June 2000. In launching the programme he said: “despite many courageous and sensitive responses to the challenges that we face, the welfare system has been failing those who most need its support. . . . South Africa is experiencing a deep social crisis” and that “we are sitting on a time bomb of poverty and social disintegration”.⁹⁵⁵

In trying to achieve integration and co-ordination, a Ten-Point Plan was developed; a Committee on Comprehensive Forms of Social Security was appointed; and a Financing Policy was formulated. The Ten-Point Plan, which is a five-year plan, attempts to develop a comprehensive system that could harmonise a range of activities by departments responsible for the delivery of social welfare services.⁹⁵⁶ It aims at developing ethics for the delivery of welfare services, a poverty alleviation strategy, and a reduction of violence against women and children. The Plan also encompasses other aspects such as

example, Justice Langa describes *ubuntu* as follows:

The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a persons' status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such persons happens to be part of it. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

⁹⁵⁵ On 14 January 2000, the Ministers Dr Zola Skweyiya 10-Point Programme of Action for the welfare Ministry and Department.

⁹⁵⁶ The White Paper *op cit* note 15.

HIV/AIDS, youth criminality, equity in service provision, and persons with disabilities.⁹⁵⁷

5.5.2 Integrated Community Registration Outreach Programme (ICROP)

ICROP is an integrated programme which seeks to increase accessibility of government services to the citizens of the country. It includes different stakeholders, such as: Department of Social Development, Department of Home Affairs, Department of Health, Department of Justice, SASSA, South African Police Service, Local Government (Municipalities), Community Based Organisations (CBO's), Traditional Leaders, and Ward Councillors.

5.6 International and Constitutional obligations

The South African government has signed the International Covenant on Economic Social and Cultural Rights, but not yet ratified it. This Covenant contains a set of rights that should be enjoyed by every individual. The term 'right to social security' has been included in the ICESCR.⁹⁵⁸ Article 9 of the ICESCR provides that states parties 'recognize the right of everyone to social security including social insurance'.⁹⁵⁹ According to the Committee on Economic, Social and Cultural Rights people should be protected in situations caused by ill-health, sickness, old-age, unemployment, employment injury, insufficient family, child support, and death of family member, survivors and orphans.⁹⁶⁰

⁹⁵⁷ Ibid.

⁹⁵⁸ ICESCR *op cit* note 97. See Eide A *et al* (eds) *Economic, Social and Cultural Rights* (2001) 3.

⁹⁵⁹ Article 9 of the ICESCR.

⁹⁶⁰ General Comment No. 19, para 2.

The South African Constitution in section 27 of the Bill of Rights guarantees that everyone has the right to have access to: 'social security, including if they are unable to support themselves and their dependents, appropriate social assistance.'⁹⁶¹ The State is obliged to take reasonable and other measures, within its available resources to achieve the progressive realization of this right.⁹⁶² Like all other socio-economic rights, the right to social security and appropriate social assistance places a positive duty on the state to take positive measures to realise these rights.

South Africa is signatory to ICESCR which was adopted in 1966 but today it has not ratified it.⁹⁶³ By signing the Covenant, South Africa has the obligation to refrain from taking steps that would defeat the purpose of treaty.⁹⁶⁴ It is clear that older persons are entitled to enjoy the rights recognized in the ICESCR. According to Article 9 States parties undertake to take appropriate steps to ensure the realization of this right, having regard to the essential importance of international co-operation.

The South African government has failed to meet international obligation. In South Africa not everybody is covered under the social security system. The system excludes a number of categories from benefiting from social assistance and social security in a number of ways. For example, an applicant to receive a grant s/he must pass the means test. The means-test criteria which is used to determine the amount of benefit to be awarded to a particular individual is a strict

⁹⁶¹ S 27(1), Constitution.

⁹⁶² S 27(2), Constitution.

⁹⁶³ ICESCR *op cit* note 97.

⁹⁶⁴ Jansen van Rensburg L and Olivier MP 'International Standards' in Olivier *et al* (eds) *Introduction to Social Security* 2004 at 171. See also Article 18 of the Vienna Convention on the Law of Treaties 1969, *op cit* note 27.

measure of exclusion, more in particular to the poor and needy individuals.⁹⁶⁵ Secondly, old men who are 61 are excluded from benefiting from old age grant. In previous years, the grant was up to the age of 65. It has been reduced from 64-63 in 2008, and 62-61 in 2009.⁹⁶⁶ The exclusion of old men from the old age grant infringes their right to social assistance, human dignity and the right to equality.

The Constitution enshrines equality and non-discrimination among the core values of the South African social order.⁹⁶⁷ In section 9(1), it provides for equality before the law.⁹⁶⁸ Section 9(2) recognises that equality includes the full and equal enjoyment of all rights and freedoms. According to the General Comment, all persons should be covered by the social security system including the most disadvantaged or marginalized sections of the population, and without discrimination.⁹⁶⁹ Article 2(2) of the ICESCR contains an obligation to eliminate non-discrimination whereby States parties undertake to: "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind."⁹⁷⁰ On the same token, Article 3 of the ICESCR requires states parties to undertake to ensure the equal right of men and women in the enjoyment of all rights in the ICESCR.

⁹⁶⁵ A. H. Dekker and M.P. Olivier 'Informal forms of social security and informal sector social security' in M P Olivier et al, *Introduction to Social Security* (2004) 85.

⁹⁶⁶ Regulation 6 (4) of the Regulations: Application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance GG 31356 of 22 August 2008.

⁹⁶⁷ S 9, 1996 Constitution

⁹⁶⁸ Ibid.

⁹⁶⁹ General Comment No. 19, para 23.

⁹⁷⁰ General Comment No. 3 (1990) on the 'States Parties' Obligations'.

The withdrawal and suspension of old age grant by government officials infringes the right to social assistance, human dignity, and the right to life. In the case of *Khosa* the Court remarked that:⁹⁷¹

A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those who are unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.

The Social Assistance Act and its regulations⁹⁷² grant individuals statutory entitlement to grants, and everyone applying for a grant must comply with the provisions of the Act. This is an entitlement guaranteed by the legislation, and in terms of the Act, no one may be deprived from benefiting under the Act when he/she complied with the necessary provisions of the Act. At the same time, no one can withdraw or suspend the benefit without notifying the relevant recipient.⁹⁷³ On many occasions, the government has been taken to court for withdrawal of grants and failure to meet its obligations. In the Eastern Cape, the social assistance grants applicants took the government to court when the government departments failed to process their applications or discontinued the payment of grants without notifying them.⁹⁷⁴ In a number of cases, the courts have found the unlawful suspension or withdrawal of grants to be unlawful and

⁹⁷¹ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) 573A (case head note summary).

⁹⁷² The Regulation GN 417 in GG 18771 of 31 March 1998.

⁹⁷³ Section 5, Social Assistance Act.

⁹⁷⁴ In *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Ngxuzza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E), 2000 (12) BCLR (C) 1322; *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E).

invalid.⁹⁷⁵ In the recent case of *Njongi v MEC, Department of Welfare, Eastern Cape*,⁹⁷⁶ the Court strongly criticised the government officials for unsatisfactory behaviour concerning grants withdrawals and court orders. The Court stressed the importance of reading judgments of courts and responding promptly.⁹⁷⁷ The government's behaviour has been characterised by some as 'lack of respect for human dignity'.⁹⁷⁸

In *Government of South Africa v Grootboom*,⁹⁷⁹ *Minister of Health v Action Campaign and Others*,⁹⁸⁰ and *Khosa v Minister of Social Development*⁹⁸¹ the Court rejected the argument advanced by the State of limited resources. In the *Grootboom* case, the Court stated that "the state must take reasonable and legislative measures, within its available resources to achieve the progressive realization of these rights."⁹⁸² The Court laid down principles on the requirement

⁹⁷⁵ In these cases the court ordered the re-instatement of the grants. In the Eastern Cape the social assistance grants applicants took the government to court when the government departments 'failed to process their applications and discontinued the payment of grants without notifying the beneficiaries'. In *Mahambehala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E), 2000 (12) BCLR (C) 1322; *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E).

⁹⁷⁶ 2008 6 BCLR 571 (CC).

⁹⁷⁷ *Njongi*, paras 84 – 87. Yacoob J says:

"...it must be said that judgments of courts in relation to Provincial Government conduct are not meant simply to be filed away without being read. They contain important information that has a bearing on the conduct of the Provincial Government in issue. It is probable that the legal advisors to the Provincial Government did not read the various judgments which are referred to in this judgment with sufficient care. If they did read them however their conduct is worse. Court judgments were ignored by these lawyers. This is unsatisfactory." Para, 84.

⁹⁷⁸ See de Vos P and Heleba S 'Prescription and right to social security' *ESR Review* (2008) vol. 9 no 3 at 22.

⁹⁷⁹ 2001 (1) SA 46 (CC).

⁹⁸⁰ 2002 (5) SA 703 (CC).

⁹⁸¹ 2004 (6) SA 505 (CC).

⁹⁸² *Grootboom* paras 46, 44.

that the state must take reasonable legislative and other measures.⁹⁸³ The Court considered that:

Reasonableness will not require whether other more desirable or favourable measures could have been adopted, or whether public money could have been spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that 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 that the measures do so, this requirement is met.

Again the withdrawal and suspension of old age grant by government officials infringes the right to social assistance, human dignity, and the right to life. The Maastricht Guidelines stressed that there are certain rights that have to be guaranteed irrespective of the availability of resources or other consideration.⁹⁸⁴

The Guidelines provides as follows:

Violation of the Covenant occurs where a state fails to satisfy what the committee on Economic, Social, and Cultural Rights has referred to as a "minimum core obligation to ensure the satisfaction of, at the very least minimum essential levels of each of the rights ..."⁹⁸⁵

The ICESCR Committee is of the view that each right in the Covenant established a core minimum obligation and should be provided to everyone unconditionally.

⁹⁸³ Ibid, para 41.

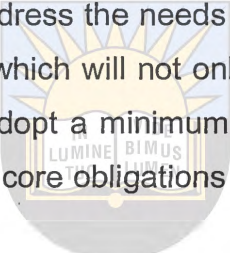
⁹⁸⁴ Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4? 1987/17; annexure to 1987 (9) Human Rights Quarterly 122- 235. The Maastricht Guidelines were built on the Limburg framework.

⁹⁸⁵ Ibid para 9.

5.7 Conclusion

As discussed above, the government of South Africa has failed to fulfill its constitutional or international mandate of protecting the right to social security and social assistance of elderly persons. The failure to protect the rights of its citizens is an infringement of their rights to human dignity, life, equality and social assistance. The differentiation between men and women in terms of accessing social the old age grant is unfair discrimination and it is unconstitutional.

It is submitted that in order to address the needs of the elderly it is necessary to adopt a human rights approach which will not only focus on the reasonableness of measure taken but will also adopt a minimum core obligation concept. The ICESCR Committee views these core obligations to include at least the following six obligations:

- 
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- (a) the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
 - (b) access to the minimum essential food which is nutritionally adequate supply of safe, to ensure freedom from hunger to everyone;
 - (c) access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
 - (d) provision of essential drugs, as from time to time defined under the WHO action Programme on Essential Drugs;
 - (e) equitable distribution of all health facilities, goods and services;

- (f) the adoption and implementation of a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.⁹⁸⁶

In the *Grootboom* case, the Court referring to the ICESCR Committee said that the minimum core obligation in international law 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.⁹⁸⁷ In this respect, we are referring to the protection of older persons, a vulnerable group in the society, which is entitled to social assistance. Therefore the court should make use of the concept of minimum core obligation when dealing with this class of citizens. The Court stated further that the ICESCR Committee had developed the concept of minimum core over many years of examining reports by reporting states. It is through these reports that the Committee managed to get the necessary information. Although the Court concluded that it does not have such a kind of information placed before the ICESCR Committee.⁹⁸⁸ The reliance by the Court on non-statistical information should not serve as an excuse, South African democracy is no longer new, it can make use of the reports of the South African Human Rights Commission, the Gender Commission, reports of the Public Protector and civil society organizations.

⁹⁸⁶ General Comment 14.

⁹⁸⁷ *Grootboom* para 31.

⁹⁸⁸ *Ibid* paras 32-34.

CHAPTER SIX

THE SCOPE OF THE RIGHT TO SOCIAL SECURITY

6.1 Introduction

In the previous chapters it has been shown that the right to social security and appropriate social assistance are fundamental human rights protected both internationally and nationally. Chapter Four discussed a number of international and regional human rights instruments. Chapter Five has showed that the South African government has human rights obligations in international and constitutional law. This Chapter is a continuation of Chapter Five. Its purpose is to investigate the social security system focusing on social assistance. It will examine the structure and coverage of social security system, following by an analysis of social assistance delivery mechanisms.

South Africa has modeled its social security system on social assistance and social insurance. The concept of social security and the obligations of the state to provide social security is relatively new. When social security is considered, the work of the ILO and the standards it has developed serve as the most important source and authoritative interpretation of the right to social security.⁹⁸⁹ The right to social security is the core of several ILO conventions and the latter have been pace maker in the development of this right.⁹⁹⁰ The White Paper defines social security to:

⁹⁸⁹ Van Langendonck says: "one reason why the Declaration and the International Covenant remained vague about the meaning of the right to social security was that a specialised institution under the UN, the International Labour Organisation (ILO) had the explicit mission of establishing international labour Standards, including social security."

⁹⁹⁰ Ibid.

covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are poverty prevention, poverty alleviation, social compensation and income distribution.⁹⁹¹

Social security is viewed as a public measure to address the consequences of sickness, maternity, occupational injury, unemployment, invalidity, old age and death. There are two elements of social security provided in section 27 (1) (c), these are: social insurance and social assistance. The system of social assistance provides means-tested, non-contributory income for those who are unable to support themselves as a result of disability, and old age. Social insurance is contributory and provides income to those who are unable to earn income as a result of age, disability, invalidity, unemployment and sickness.

6.2 Social Security Coverage

South Africa has a social security system which can be categorized as relatively young and with a limited coverage. Overall, there are at least two common forms of social security, namely, social insurance and social assistance. Social assistance and social insurance are provided through various schemes. These are categorized into contributory and non-contributory schemes. A basic understanding of these schemes is essential when considering the right to social security and social assistance.

⁹⁹¹ *The White Paper on Social Welfare* (1997) chapter 7.

6.2.1 Social assistance (non-contributory)

The Constitution provides for a right to have access to appropriate social assistance. It obliges the state to take reasonable legislative and other measures, within available resources, to achieve the progressive realization of these rights. As discussed above, in terms of the Constitution the government is thus obliged to ensure that deserving beneficiaries receives social grants, keeping in mind resources given to the state to provide a conditional grant to all the people with no means to qualify for social grants.

The Government adopted Social Assistance Act⁹⁹² which repealed the Welfare Laws Amendment Act.⁹⁹³ The latter also repealed by the Social Assistance Act.⁹⁹⁴ It established the South African Social Security Agency (SASSA) to administer social grants. Social assistance in South Africa is a state-funded system which is mainly concerned with the payment of grants and is regulated by the Social Assistance Act. The Social Assistance Act⁹⁹⁵ is the major legislation providing that caters for social assistance in South Africa. The objectives of this Act are to-

- (a) provide for the administration of social assistance and payment of social grants;
- (b) make provision for social assistance and to determine the qualification requirements in respect thereof;
- (c) ensure that minimum norms and standards are prescribed for the delivery of social assistance; and

⁹⁹² Act No. 59 of 1992.

⁹⁹³ Act No. 106 of 1997.

⁹⁹⁴ Act No. 13 of 2004.

⁹⁹⁵ Ibid.

(d) provide for the establishment of an inspectorate for social assistance.⁹⁹⁶

Social assistance is non-contributory and financed entirely from government revenue. Non-contributory social security benefits can exist in all nine branches of social security and the entitlement is determined independently of the contributions made.⁹⁹⁷

The social assistance system provides non-contributory support in the form of grants. Section 4 of the Social Assistance Act provides that the Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for that purpose, make available – old age grant, child support grant, disability grant, foster-care grant, care dependency grant, war veterans grants and grant in-aid.⁹⁹⁸

All these grants are subject to eligibility requirement.⁹⁹⁹ A person is entitled to social assistance if he or she;

- (a) is eligible in terms of section 6, 7, 8, 9, 10, 11, 12 or 13;
- (b) subject to section 17, is resident in the Republic;
- (c) is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with concurrence of the Minister of Finance, by notice in the Gazette;
- (d) complies with any additional requirements or conditions prescribed in terms of subsection (2); and
- (e) applies for social assistance in accordance with section 14(1).

⁹⁹⁶ Section 3 of the Social Assistance Act.

⁹⁹⁷ Tooze, J 'The Right to Social Security and Social Assistance' in Baderin A and Mccorquodale R *Economic, Social and Cultural Rights in Action* (2007) 146.

⁹⁹⁸ Section 4 of the Social Assistance Act.

⁹⁹⁹ Section 5 of the Social Assistance Act.

(2) The Minister may prescribe additional requirements or conditions in respect of-

- (a) income thresholds;
- (b) means testing;
- (c) age limits, disabilities and care dependency;
- (d) proof of and measures to establish to verify identity, gender, age, citizenship, family relationships, care dependency, disabilities, foster child and war veterans' status;
- (e) forms, procedures and processes for applications and payments;
- (f) measures to prevent fraud and abuse.”

Two of the grants listed above are elaborated below, namely the old age grant and the disability grant.



6.2.1.1 Old Age Grants

The focus of this thesis is the provision of social security to the elderly. Old age grants form the largest portion of the social security budget. Old age grants have become increasingly important as a means of relieving poverty. One reason why old age pensions play a critical role in relieving poverty is because pension money circulates widely in many poor communities helping to sustain the relatives of the elderly as well as the elderly themselves.¹⁰⁰⁰ The research shows that most of the beneficiaries rely on the OAG as the only source of income and most of the beneficiaries are women. Undoubtedly, lack of money is the most pressing problem. The pensioners were asked whether the amount they receive is sufficient or not. The responses revealed that far from being sufficient, they shoulder other enormous burden in their homes. One pensioner put it as follows:

¹⁰⁰⁰ Van der Berg Issues in South African Social Security (1994) as cited in S Ogunronbi 'Old Age' in Olivier (supra) 107 123.

the money is not enough. When we are asked about our basic needs, food came first followed by money. The money we receive for the grants is not enough to cater for our basic needs. The first thing that is done with the money is buying food, electricity and contributing to burial schemes.

It is submitted that the grant money is inadequate to cater for the needs of older persons. The research shows that other household members benefit from it. The grant therefore serves as an important source of income for food, payment of school fees and medication and therefore it needs to be increased or supplemented by other programmes.

The government fails to protect older persons from abuse by other citizens. One of the problems identified is that of the “Mashonisas” or cash loans money lenders. They take the ID documents of the elderly as security for the money loaned at extortionate interest rates. The only protection offered to the elderly by the government is during pay time, at the pay-point. After that they are left on their own. The blame is shifted between departments. Others feel that the rights and the welfare of older persons should become the responsibility of the social worker:

Historically, the Department of Social Development and more specifically, the programs that dealt with social assistance and more specific social grants were called the Social Security program. The Department of Social Development is a Provincial Department that operates under the Minister for Social Development. The Department of Social Development is mandated through a conditional grant to administer help to those that are needy. This continued until the establishment of the South African Social Security Agency. The Agency is only involved with the management and administration of grants. This Agency started officially to administer grants on their own from the 1st of April, 2006. The conditional grant is still paid to Social Development and they in turn pay the monies for grants over

to the Agency. According to the Strategic Leadership Discussion Document,¹⁰⁰¹ the establishment of SASSA followed a two-pronged process.

In Dec 1997 in Mafikeng (Free State), a decision was taken to look at the possibility of establishing a single institution to take responsibility for the management and administration of social security services;

In October 2002 Cabinet approved the centralization of the social assistance grants function which at that time was a provincial responsibility and the establishment of a new dedicated national agency, the South African Social Security Agency (SASSA).

The failure of the government to protect the elderly violates their right to freedom, to human dignity, the right to privacy and the right to life. The Older Persons Act¹⁰⁰² protects older persons in need of care by creating an enabling and supporting environment for them.¹⁰⁰³ In terms of section 7(2) the state has an obligation to protect social rights. This means that the state has to provide individuals with protection even against the third parties. Therefore, the state's obligations also extend to the private sector. This would require the state to create a workable environment through designing a legislative framework that would facilitate access to resources.¹⁰⁰⁴

¹⁰⁰¹ The Strategic Leadership Discussion Document that were drawn up from the 18th to the 19th of September 2008. Available at www.sassa.gov.za

¹⁰⁰² Older Persons Act, No 9 of 2006.

¹⁰⁰³ In Chapter 2 of the Act.

¹⁰⁰⁴ Brand, *op cit* note 804, 219 says: "The state carries out the duty to protect socio-economic rights first by regulating private control of access to land, housing, health care services, food, water and education. Such regulation could aim to open up access to these resources. The state can also protect socio-economic rights through standard setting in respect of safety and quality in the provision of services and products. An example is the Foodstuffs, Cosmetics and disinfectants Act 54 of 1972. The state can finally exercise its duty to protect socio-economic rights by regulating private interference in the existing enjoyment of socio-economic rights."

In 1991, the UN General Assembly adopted the "United Nations Principles for Older Persons" to ensure that priority attention is given to the situation of older people in the world.¹⁰⁰⁵ According to these principles, older persons should have access to social and legal services to enhance their autonomy, protection and care.¹⁰⁰⁶ Older persons also should be able to live in dignity and security and be free of exploitation and from physical or mental abuse. They should also be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.¹⁰⁰⁷

All things considered, it is essential that the principle of individual freedom and dignity should, on the whole, be enjoyed equally by the elderly and the rest of the population. The Committee stated that although Article 9 of the Covenant does not contain any clear reference to elder persons, it does recognize the right to old-age benefits.¹⁰⁰⁸ The Committee noted that in order to be able to implement the provisions of Article 9 of the Covenant, States parties should, within the limits of available resources, provide non-contributory old age benefits and other assistance for all older persons, who, when they reach the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old age pension or other social security benefit or assistance and have no other source of income.¹⁰⁰⁹ In order to protect the rights in the Bill of Rights, the Courts are obliged to promote the spirit, purport, and objects of the Bill of rights when 'interpreting any legislation, and when developing the common law or customary law.'¹⁰¹⁰

¹⁰⁰⁵ United Nations General assembly 'United nations Principles for Older Persons' (1991) resolution 46/91.

¹⁰⁰⁶ Ibid.

¹⁰⁰⁷ Ibid.

¹⁰⁰⁸ General Comment 6 para 10.

¹⁰⁰⁹ Ibid para 30.

¹⁰¹⁰ Section 39 of the Constitution.

6.2.1.1.1 Eligibility and coverage

In Chapter 1 (2) of the regulations a person is eligible for an old age grant if:

- a) is a person contemplated in section 10 of the Act;
- b) meets the requirements of the financial criteria set out;
- c) subject to regulation 5, does not derive a benefit for himself or herself from any other social grant;
- d) is not maintained in any institution funded by the State; and
- e) is a permanent resident.”

Section 10 of the Social Assistance Act specifies that a person is, subject to section 5, eligible for an older persons grant if- “in the case of a woman, she has attained the age of 60 years; and in the case of a man, he has attained the age of 65 years.” An important feature of old age pension is that it is paid to women from the age of 60 and above and men from 65 and above. But the qualifying age for men has been increased. For example, men who are age 63 and 64 qualified for the grant in 2008. Those aged 62 and 61 were eligible in 2009 and by 2010, both men and women will apply for the grant at the age of 60.¹⁰¹¹ More than 2.2 million people receive this grant.

The difference in age for eligibility of benefits was created by the apartheid government. Little attention was paid to the elderly and other marginalized groups who were discriminated against by the apartheid laws. Means-testing of the elderly for the award of old age pension was introduced in South Africa in 1928 for white and coloured people only. In 1938 a law was adopted which changed little the condition of poor people in South Africa. It was only in the late

¹⁰¹¹ Ibid.

1970s that comprehensive reforms took place.¹⁰¹² Further changes were introduced in 1994, when the government set out a number of specific goals in the area of social policy.¹⁰¹³ These goals included, amongst other things, equitable income distribution, the provision of a reasonable income for old age, and the elimination of poverty.¹⁰¹⁴

Even today Old Age Pension is means-tested and at the time of the study, the amount of the grant was R1,010 per month. Social assistance responds to the need of particular individuals, therefore it is means-tested. The onus is upon those individuals to prove that they are destitute. The system takes the form of regular payments to all persons over the age of 60 for women and 61 for men irrespective of the income and is payable in cash or in-kind. Benefits are only payable to people who are unable to care for themselves due to old age, disability or as war veterans. There are various requirements that have to be met, which include: means-testing; residence in South Africa; proof of applicants and his or her spouse inability to support them; and a proof that he or she is not receiving any grant.

Although it is not enough, the grant received through the social assistance system is the most important means to reduce poverty for the elderly people. On the contrary, the means-testing leads to the exclusion of the majority of the population from the provision of social assistance, in particular, to old age people.¹⁰¹⁵ However, it exacerbates the risk of trapping people in a cycle of poverty. Within it there is an implication of withdrawal of savings and decline of benefits. It is most enduring in families than individuals. Where an individual

¹⁰¹² Strydom *et al* op cit note 34, 19.

¹⁰¹³ African National Congress, "The Reconstruction and Development Programme: A Policy Framework", (1994).

¹⁰¹⁴ Ibid.

¹⁰¹⁵ Olivier *et al* op cit note 15, 127, 142 – 145.

has a savings of less than a certain amount of money in order to qualify for the benefit, any savings may lead to withdrawal or reduction in benefits. On the other hand, savings by a member of a family will give rise to a reduction, which means that no member of the family can save without incurring a loss. Means-testing is not right for those who live below the poverty line.

Old age grants have been identified as the biggest problem in terms of income related problems. Applicants that receive a government pension do not declare their income and in this way get access to this grant illegally. A media statement made by the Minister of Social Development revealed the following in terms of losses incurred and the involvement of government officials in social grants:¹⁰¹⁶

The purpose of today's briefing is to announce the launch of a massive government public awareness campaign against fraud, corruption and mal-administration that continues to afflict our grant administration system and to call on those individuals who are not entitled to receive those grants and are doing so, to come forward and be considered for indemnity.

As I said in 2002, the grants administration system has over the years been afflicted by continuing serious problems of fraud, corruption and mal-administration. These anomalies have been costing the government to the tune of R1, 5 billion per annum.

Ladies and Gentleman, we also have information at our disposal that about 50 500 officials in the employ of government or in receipt of a pension from the government pension fund that also receives grants.

Many articles on fraud and corruption appeared in the media on a regular basis. The Daily Dispatch Newspaper published the following article on Friday the 11th of April 2003:

¹⁰¹⁶ Media Statement made by Minister Skweyiya of Social Development on the 13th of December 2004. Available at www.dsd.gov.za

EAST LONDON – Nineteen people including government officials here and in Port Elizabeth were arrested by the Joint Anti-Corruption Task Team during a crackdown on corruption in the Eastern Cape government.

The unit, established in December, has already brought more than 115 government officials and former civil servants to book. Regions hit in the raid included East London, King William's Town and Stutterheim.

"We can look forward to the number of arrests rising," unit spokesman Sipho Ngwema said. He said the arrested officials were employed by various departments and charged with fraud and theft. Ngwema said among the charges laid against the suspects are fraudulently cashing government cheques, and claiming benefits to which they were not entitled. Some are salaried government school teachers allegedly receiving social pension grants."

This clearly shows that something needs to be done that will deal with fraud and corruption. The government should institute measures to stamp out fraud and corruption by criminal elements both within and without the department.

It is not disputed that the old age pension provided by the government plays a very important role in the lives of many South Africans, more in particular the elderly. The Table below shows the percentage of beneficiaries receiving old age grant in South Africa.

Table 1: Number of beneficiaries by province as at 31 December 2008

Prov ince	OAG	WV	DG	FC	CD	CSG	GIA	AMOUNT
EC	439078	209	215521	90711	19000	1508045	6383	2278947
FS	140725	39	100826	43148	4236	461085	770	750829
GAU	291566	430	142404	58085	12866	992985	688	1499024
KZN	487400	263	399521	123088	31837	2179265	17483	3238857
LP	369082	143	113842	48271	121			
MPU	164822	65	85646	26058	5584	671136	939	954250
NC			48376	14271	3742	189889	3148	320249
NW	199600	44	106567	37403	8836	636712	1968	991130
WC								
Total	2338841	1645	143419	468721	106105	8434399	43975	12749808

Key: The entry under Provinces is elaborated respectively for EC: Eastern Cape; EC; FS: Frystaat; GAU: Gauteng; KZN: Kwazulu-Natal; LP: Limpopo; MPU: Mpumalanga; NC: Northern Cape; NW: North West; and WC: Western Cape. **Source: SOCPEN system (1 December 2008).**

The Table provides a summary of beneficiaries by grant type and province. The Table shows that a total of 12, 749 808 South African people benefited from social grants as at 31 December 2008. Kwazulu-Natal has the highest number of beneficiaries, followed by the Eastern Cape and Limpopo provinces. The Northern Cape has the lowest number of beneficiaries. This suggests that most of the beneficiaries are found in the most rural and populous areas of the community. This indicates that the rural regions need more intervention in eradicating or minimizing poverty.

6.2.1.2 The Disability Grant.

The state provides disability grants to disabled persons (including the blind) from age 18 to retirement age, subject to medical eligibility criteria and the same means-test. The maximum monthly amount is currently R1,010. In addition, the beneficiaries must be: a South African citizen, the resident of South Africa at the time of the application; be a disabled person, the period of disability for all work must either be permanent or for a continuous period of six months or one year; not refuse to undergo medical treatment unless the treatment is life-threatening; the spouse must also comply with the means-test; not be maintained or cared for by a state-run institution, and must not be in receipt of another social grant.

The temporary disability grant will continue to be received by the recipient until it lapses. Since it is a permanent grant it will continue until the recipient of the grant reaches the age of 60 or 65 years at which stage it will be converted into an old age grant.

6.2.1.3 Social Relief

Social relief can thus be contrasted to social assistance, which mainly is made up of the grants available for certain categories of individuals for an extended period of time. The Fund Raising Act defined social relief as the “alleviation of need of persons by means of the temporary rendering of material assistance to them.”¹⁰¹⁷ Social relief programmes are thus principally aimed at the easing of poverty whether chronic or temporary.¹⁰¹⁸ It can also be provided for whole communities.

¹⁰¹⁷ Fund Raising Act 107 of 1978.

¹⁰¹⁸ Olivier *et al op cit* note 15 at 224.

Table 2: Income threshold

ASSET AND INCOME		THRESHOLD: 2008
<u>Asset threshold</u>		<u>22 August 2008</u>
Single person		R451 200
Married person		R902 400
<u>Income threshold</u>		<u>22 August 2008</u>
<u>Social grants</u>		
Single person		R26 928
Married person		R53 856
Child grants:		
Child Support Grant		Single Person: R25 200 Married person: R50 400
Foster Child Grant		
Care Dependency Grant(parent)		Single person: 112 800 Married person: 225 600

Source: www.sassa.gov.za/content

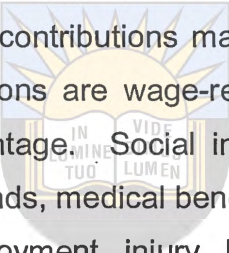
The above Table shows the threshold, in terms of income and assets, upon which eligibility for all grants is based. In 2006 there were over ten million impoverished people receiving social grants.¹⁰¹⁹ These forms of social security are key to people's survival, and are referred to as safety nets.

¹⁰¹⁹ Triegaardt JD 'Transformation of Social security in South Africa: Accomplishments and Challenges for partnerships in Development' (2006) 3.

6.3 The Scope of Social Insurance

6.3.1 Social insurance (Contributory)

Social insurance is seen as support provided to employees and their dependents, through insurance, against contingencies which interrupt income. Social insurance is limited in scope. In South African the social security system is composed of health insurance schemes, retirement schemes, Road Accident Fund, unemployment insurance and workmen's compensation. Social insurance contributions are paid by both the employee and by the employer. Therefore, these schemes exist due to the contributions made by both parties (employers and employees). The contributions are wage-related and employees and the employers agree upon a percentage. Social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, family benefits and survivor's benefits.¹⁰²⁰


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6.3.3 Compensation for Occupational Injury and Diseases.

Compensation for Occupational Injury and Diseases is provided under Act No 131 of 1993. The scheme provides for the payment of benefits to workers who are injured on the job or who developed occupational diseases. Unfortunately this legislation does not cover people who are not in the formal employment.

6.4 Elements of Social Security

The South African Constitution makes provision for social assistance for people without any income. Section 27 (1) (c) provides the right of everyone to access social security and appropriate social assistance if they are unable to support

¹⁰²⁰ ILO Social Security (Minimum Standards) Convention of 1952, (ILO No. 102).

themselves and their dependents. The ICESCR Committee in its General Comment No 19 offers a number of elements of the right to social security and various factors that should be taken into account at any given time. These elements include availability, social risks and contingencies, adequacy, and accessibility. These elements will be employed in this study.

6.4.1 Availability of social security and social assistance

The availability of social security can be analysed by reference to the number of beneficiaries, provisions of benefits, the level of benefits provided, schemes sustainability and effective administration of the system.¹⁰²¹ The work of the ILO and of the ICESCR Committee has provided guidance on this matter. The ILO Convention No 102 requires states to accept at least three of the nine parts of the Convention.¹⁰²² Convention No 102 and 128 is designed to guarantee protected persons who have reached a certain age the means of a decent standard of living for the rest of their life. Because social assistance is designed to alleviate poverty and is targeted to needy communities, the fact that the beneficiary belong to a particular group is sufficient. The Department of Social Development has shown an interest in the most vulnerable groups, such as children, disabled people and the elderly. All individuals falling under these categories receive social assistance in the form of a grant. The Department has, on certain occasions, provided poverty relief packages in the form of food parcels. However, the Department has not been consistent in this regard.

Under ILO Convention No. 102 the beneficiary must attain a certain age in order to qualify for the benefit. ILO Recommendation No 131 indicates that national legislation should fix minimum amounts of old age benefit so as to ensure a

¹⁰²¹ Ibid para 11(1).

¹⁰²² Martine Humblet & Rosinda Silva 'ILO Standards for the XXIst century: Social Security' 2002 at 26-27.

minimum standard of living and that the level of the benefit should be increased in certain circumstances, especially for where beneficiaries require constant help of another person.¹⁰²³

6.4.2 Adequacy of social security and social assistance

The adequacy and availability of social security and social assistance are connected to each other and, in the context of rights-based approach, they should be read together.¹⁰²⁴ The level of benefits provided under various schemes should meet a defined minimum benefit. Adequate social security benefits enable the beneficiary to maintain reasonable income levels. With regard to social assistance, benefits should be sufficient to ensure that recipients do not fall beneath the poverty line and the kind of benefits provided should be appropriate to the kind of risk or contingency faced. Adequate social assistance benefit enables the beneficiary to live out of poverty. A rights-based approach to social security and social assistance would suggest that these objectives should be applied to individuals rather than family units. State parties should be guided by the principle of dignity and the right to non-discrimination which may influence the level of benefits and the form in which they are provided.¹⁰²⁵

6.4.3 Adequacy of social assistance: Poverty alleviation

The role of social security and social assistance is to help people to be able to cope with poverty. Poverty is one of the overarching goal of the Millennium Declaration for which governments committed themselves towards its eradication

¹⁰²³ Ibid

¹⁰²⁴ Tooze *op.cit* note 997, at 342.

¹⁰²⁵ Ibid, 6. According to Langford, adequacy means 'adequate benefits that ensure the rights to family protection and an adequate standard of living and right to health'. Malcom Langford, 'Social Security and Implications for Law, Policy and Practice' in Riedel E (Eds) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2006) 34.

by 2015. Dixon,¹⁰²⁶ notes that “as a mechanism for meeting human needs, social security has achieved nearly a universal acceptance”. Since social assistance aims to alleviate poverty, the existence of poverty is a strong indicator of the availability and adequacy of social assistance. There are number of ways in which poverty is measured. These are relative or statistical poverty, absolute poverty, absolute legal/political poverty, and deprivation indices.¹⁰²⁷

Relative poverty, according to Tooze, constitutes a percentage of a macro economic indicator, such as average wage, national income per capita and the household equivalent income.¹⁰²⁸

Absolute budgetary lines measure poverty by reference to the enjoyment of necessary goods.¹⁰²⁹

Absolute legal/political poverty lines measure poverty by reference to the minimum wage. This assumes that the legal minimum income is sufficient to keep people out of poverty.¹⁰³⁰

Deprivation indices measure poverty by reference to deprivation of a number of goods and services. Tooze suggest that the identification of specific goods and services is a key to the effectiveness of this approach.¹⁰³¹

¹⁰²⁶ Dixon J *Social Security Traditions and their global applications* (1986) 2.

¹⁰²⁷ Tooze op cit note 997, at 343.

¹⁰²⁸ Ibid, 347.

¹⁰²⁹ Ibid.

¹⁰³⁰ Ibid.

¹⁰³¹ Ibid.

6.4.4 Accessibility of social security and social assistance

The attachment of conditions of entitlement to social security and social assistance may raise issues of economic and non-discriminatory accessibility. A key concern is whether the means test which is commonly applied to its provisions is set at such a level as to render assistance inaccessible to people in need.¹⁰³² The White Paper appears to accept means-testing.¹⁰³³

All persons must be covered by the social security system. The social security system as a whole should provide comprehensive coverage against all contingencies and life circumstances that threaten their income-earning ability and the ability to support themselves and their dependants for contingencies such as unemployment, ill-health, disability maternity, old age, child support for impoverished care-givers, death benefits etc. The most disadvantaged or marginalized sections of the population should be included without discrimination. This means that the state should make provision for a social security system which is not discriminatory on any of the prohibited ground. It must also include a positive obligation to eradicate the differences over time.¹⁰³⁴

Qualifying conditions for benefits must be reasonable, proportionate, transparent, and affordable. This means that if a social insurance scheme is used, contributors should be informed in advance of the extent of their liabilities. Cost and charges associated with making the contribution must be affordable and they must not threaten the realization of other rights.¹⁰³⁵

¹⁰³² Ibid, 349.

¹⁰³³ White Paper *op cit* note 15.

¹⁰³⁴ General Comment No 19.

¹⁰³⁵ Ibid.

Beneficiaries of social security schemes must be able to participate in the administration of the system.¹⁰³⁶ The national system must ensure that information on social security is available to everyone in a clear and transparent manner.¹⁰³⁷ Moreover, the benefits should be provided timeously and the beneficiaries should have physical access to social security services in order to access benefits and information.¹⁰³⁸

6.4.5 Non-discriminatory accessibility

A key aspect of the accessibility of social security and social assistance relates to its provision on a non-discriminatory basis. Section 9 of the Constitution enshrines equality¹⁰³⁹ and non-discrimination as a core value of South African democracy.¹⁰⁴⁰ Section 9(2) recognises that equality includes the full and equal enjoyment of all rights and freedoms. The section further provides that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination, has to be adopted. Discrimination is commonly recognised as arising where there is difference in treatment, which may be based on a number of grounds, such as these identified in the above section and elaborated further in PEPUDA.

¹⁰³⁶ Articles 71 and 72 of the ILO Convention 102 contain similar requirements.

¹⁰³⁷ General Comment 19 at 7.

¹⁰³⁸ Ibid.

¹⁰³⁹ In the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another* 1999(1) SA 6 (CC) at Para 32, Justice Albie Sachs stated that:

“Equality should not be confused with uniformity; in fact uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference.”

¹⁰⁴⁰ This aspect has been spelt out above in Chapter 5.

Section 9(3) provides “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” This section protects against both direct and indirect discrimination and therefore covers a difference in outcome that results in failure to treat people fairly. Direct discrimination refers to laws, policies, practices and conduct that is *per se* discriminatory. This means that one set of benefits is extended to one group with the exclusion of the other. Indirect discrimination will arise where a neutral rule affects a group disproportionately. In the context of social security and social assistance, indirect discrimination arises most frequently against women, non-nationals and elderly persons. With regard to women, contributory conditions often fail to take into account breaks in employment during child birth and child rearing. With regard to elderly persons who are less than 65, it fails to take account of inability to get social assistance from the government. With regard to non-national, residence requirement and the inability to get benefits from the state has had a tremendous effect on them.

Under Article 2(2) of the ICESCR, State Parties undertake to ensure that the rights in the Covenant would be realized without discrimination of any kind. In addition, Article 3 of the Covenant requires states parties to ensure the equal right of men and women in the enjoyment of all rights in the Covenant. As stated heretofore, the requirement to guarantee the rights to social security and social assistance without discrimination is of particular importance owing to the immediate nature of the obligation not to discriminate.¹⁰⁴¹

6.5 Conclusion

It can be argued as well that through the provision of social assistance grant, elderly persons are given an opportunity to be protected by the social security

¹⁰⁴¹ Ibid.

system. While it is so, it is important to note that it is not everybody that is covered. South Africa has only one scheme available to the elderly; hence many are still left behind. It can be argued that South Africa has a potential of alleviating poverty through reforming its social security system.

It is clear from the above that South Africa failed to meet the international and constitutional obligation of protecting older persons from violation of their human dignity and freedom. In terms of section 27 of the Constitution 'everyone has the right to have access to social security'. This includes the right to social assistance when one unable to support himself or herself. It is sad to note that the Social Assistance Act does not have any specific provision regarding people classified as vulnerable, particularly the formerly disadvantaged groups, widows and older persons. While social security constitutes a fundamental right, certain categories of people still lack access to adequate levels of social protection. This seems to indicate that assistance through means-tested benefits is not sufficient for the right to social security, but that entitlement without individual assessment of need is required.

The means-testing makes it difficult for older persons to exercise their basic rights. This affects the most vulnerable segments of the population, particularly women. Furthermore, the state is mandated by the Constitution to ensure that social security is accessible to all and in this regard, the government has to ensure that adequate measures exist to protect its citizens against social risks. It is submitted that South Africa should speed up the ratification of International instruments that it has not yet ratified, particularly the International Covenant on Economic, Social and Cultural Rights (1966), and adopt its norms and standards in the national sphere. The research has showed that older persons take care of other members of the household and therefore the old age grant is not enough to buy food and meet the cost of other essentials, such as medication and school fees. It is submitted that the government should encourage and assist the elderly to engage in income generating, as well as self-sufficiency activities, in order for

the latter to be able to meet the increasing burden of having to care and educate grandchildren and orphans, and also care for members of the extended family.



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CHAPTER SEVEN

ANALYSIS OF DATA AND PRESENTATION OF FINDINGS

7.1 Introduction

Chapter Six discussed the structure and coverage of social security system, then analysed in detail the social assistance delivery mechanisms. This Chapter illustrates the problems encountered by older persons in South Africa more particularly in the Nkonkobe Municipality in the Province of the Eastern Cape. It will examine whether the social security system provides adequate protection to the elderly particularly those that live in the rural areas. The purpose of this Chapter is to examine the extent to which the existence or the lack of access to resources or poor service delivery limits the right of older persons to social security.

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South Africa is a developing, lower middle-income country and a relatively young emerging democracy. She became independent in 1994 when apartheid ended and the nominally independent and self-governing states combined to form a single nation, the United Republic of South Africa. Ciskei and Transkei were mostly affected by apartheid and they became nominally independent in 1976 and 1981 respectively.

Most of the population resides in the rural areas and the Eastern Cape is one of them. The proportion of older persons varies considerably between the nine provinces. The lowest proportion (6,2%) is located in Mpumalanga and Gauteng, and the highest proportion, by quite a significant margin, (9,2%) in the Eastern Cape.¹⁰⁴² The 2007 mid-year population was estimated at approximately 47, 9

¹⁰⁴² Follentine, S. *Country Report 'Ageing in South Africa an Overview' Journal of the International Institute on Ageing Vol. 16 No. 4 (2006) 7.*

million of which 24, 3 million of the population is female.¹⁰⁴³ The Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa estimated that between 20 and 28 million South Africans live in poverty.¹⁰⁴⁴

The Eastern Cape has experienced major policy changes over the last sixteen years: the dismantling of apartheid rule; the amalgamation of the two homelands of Ciskei and Transkei into South Africa in 1994; and the creation of the current Eastern Cape Province.¹⁰⁴⁵ Older persons lived under unhealthy conditions during the apartheid era and were further marginalized by the inequality and the imbalances created by the system. During the apartheid era, the aged were excluded from accessing social security protection.¹⁰⁴⁶ In addition, apartheid forced 12, 7 million people (32% of the population) to live on 13% of the most arid and infertile land.¹⁰⁴⁷ These parts of South Africa, otherwise known as 'homelands,' is where the poorest of the South African population is still to be found today.¹⁰⁴⁸

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The Eastern Cape is regarded as one of the poorest provinces in South Africa of which the Nkonkobe Local Municipality is part.¹⁰⁴⁹ The Nkonkobe Municipality has a high level of underdevelopment, a low-income base, inadequate social

¹⁰⁴³ Statistical release 'Mid-year population estimates 2007'.

¹⁰⁴⁴ Ministry for Social Development, *The Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa* (2002) 29.

¹⁰⁴⁵ Sagner, A. 'Ageing and Social Policy in South Africa: Historical Perspectives with Particular Reference to the Eastern Cape' *Journal of Southern African Studies*, Vol 26, Number 3, 2000, 524.

¹⁰⁴⁶ Sarliem Fakir 'The challenges of addressing poverty and environmental linkages in South Africa' *Policy Think Tank series* no 14 of the World Conservation Union, (2002) *IUCN*. Accessed 24 April 2007.

¹⁰⁴⁷ Ibid.

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ Province of the Eastern Cape Department of Social Development, Foreword to the *Strategic Plan* (2007/8-2009/10) and *Annual Performance Plan* (2007/8) 5.

infrastructure, inefficient and corrupt public service, and an enormously huge service delivery backlog.¹⁰⁵⁰ Many households rely solely on pensions as the source of income.

This Chapter is based on fieldwork which carried out in 2007, 2008 and 2009 in the rural and urban areas of Nkonkobe Municipality. It provides an analysis of the plight of older persons in the Municipality. The Chapter begins with a discussion of important features of Nkonkobe Municipality in order to provide a background for the analysis. Drawing on the data from the research, the Chapter proceeds to analyse the age profile of participants focusing on the effects of old age pension on households. Several important variables that may affect the elderly, such as marital status, living arrangements, and the pension system, are examined. The research involves a questionnaire distributed to approximately 180 respondents in 20 villages in the Nkonkobe Municipality. Focus group discussions were held with councillors and both groups were required to answer a questionnaire expressing their views on the situation of old people in their areas.

7.2 The Profile of Nkonkobe Municipality

Nkonkobe Local Municipality falls within the Amathole District Municipality, which is one of the seven district municipalities in the Eastern Cape Province. The Amathole District Municipality has the most population in the province, with an estimated population of R1 657, 373 in 1999. Nkonkobe Municipality was established by the Municipal Demarcation Board in terms of the Local Government Municipal Demarcation Act of 1998.¹⁰⁵¹ The Municipality brings together local government municipalities from what was hitherto part of apartheid South Africa and the Ciskei homeland. Like the Eastern Cape Province, the

¹⁰⁵⁰ Ibid. See also Nkonkobe Municipality IDP Review 08/09, 10.

¹⁰⁵¹ Notice No 22 of 2000 of the Municipal Demarcation Board.

process of amalgamation of different political administrations has been a source of administrative and social service delivery problems. The Nkonkobe municipality covers the following areas: Alice TLC, Fort Beaufort TLC, Hogsback TLC, Middledrift TLC, Seymour TLC, Victoria East TRC, Fort Beaufort TRC, Mpofu TRC and Middledrift TRC.

Nkonkobe Municipality is made up of a large number of Blacks, Coloureds and a small White minority. According to Census 2001, Nkonkobe Municipality has an estimated population of 133 434 and 36 116 households.¹⁰⁵² The majority of the population are Xhosa with few Afrikaans speaking people, largely Coloureds. The concentration of Afrikaans is in the Seymour (Mpofu) area, Alice and Fort Beaufort (Newtown). The average population density is 43 persons per square kilometer.¹⁰⁵³ There are 21 wards and the majority of people (61%) reside in villages.¹⁰⁵⁴ Twenty percent (20%) of the population resides on farms and scattered settlements and only 19 percent of the population resides in urban settlements, mainly in Alice and Fort Beaufort.¹⁰⁵⁵ Therefore, the population of Nkonkobe municipality is largely rural in nature.

Table 3 below presents the number of households and villages in the 21 ward demarcations that constitute the Municipality.

¹⁰⁵² Nkonkobe Local Municipality IDP Review *op cit* note 1050.

¹⁰⁵³ Ibid.

¹⁰⁵⁴ Ibid, section 2.3.1.

¹⁰⁵⁵ Ibid.

Table 3: Situation analysis of Nkonkobe Municipality

Ward	Households	Villages
1	1473	Khulile, Qamdobowa, Mgxotyeni, Ndulini, Qibira, Zigodlo, Ndindwa, Zalaze, Qutubeni
2	1539	Kluklu, Newton, Fort Beaufort Town
3	1419	Tyoks, Zwelitsha, Mpolweni, Takalani
4	1647	Hillside, Ntoleni, Mlalandle, Ndaba, Siyahhlala/Daweti, Kwepileni
5	1431	Hillcrest, Happy Rest, Town Central, Golf Course
6	1398	Ntselamanzi, Fort Hare
7	1443	Tyotyora, Ngwevu, Lamyeni, Nobanda, Mabhele, Rwantsana, Komkhulu, Luzini, Skolweni, Lushington, Hertzog, Tamboksvlei, Mankazana, Herrmest/White Tennis Court, Lundini, Ekuphumleni, Elukhanyisweni, Khayelitsha, Oakdene, Toll Hotel
8	1851	Lower Blink Water, Fairburn, Picardy, Platform, Ntilini, Cimizile, Teba, Dan, Rietfontein, Sparklington, Buxton, Mt. Pleasant, Mtocwa
9	2001	Ekuphumleni, Katberg, Maarsdorp, Jurishoek, Phillipton, Readsdales, Balckwood, Seymour, Balfour
10	3461	Makhuzeni, Gomoro, Mpundu, Gilton, Guquka, Sompondo, Khayaletu, Nothenga, Hala, Hogsback, Cathcartvale, Worburn
11	1326	Binfield, Hopefield, Gcato, MacFarlan, Mazotshweni, Kwezana, Majwareni, Krwakrwa, Lower Ncera, Upper Ncera, Dish, Mkhobeni, Mdlankomo, Mdeni, Mkhuthukeni, Ngwangwane, Komkhulu, Siphingweni, Chamama, Machibini, Mqhayise, Zixinene, Ndlovura
12	1836	Ngcothoyi, Magaleni, Bergplaas, Msobomvu, Woburn, Taylor, Melani, Skhutswana, Lower Gqumashe
13	1284	Nkonkobo, Mavuso, Joji, Lloyd, Phumlani, Khayamnandi, Thembisa, Xolani, Gxwederha, Balura, Lalini, Kwali, Skolweni/Sheshegu, Mpozisa, Igunya, Masakhane, Lower Sheshegu, Joe
14	1893	Washington, Ngcabasa, Ngqolowa, Qhomfo, Dikidikana, Debe Marele, Phewuleni, Perksdale, Farm-B
15	1476	Gubura, Skweyiya-Ncera, Ngqele, Tyutyuzu, Jonini-Frances, Jojozi, Dyamala, Upper Gqumashe
16	2289	Middledrift Town, Lower Regu, Upper Regu/ Nothenga, Mfiki, Zibi, Mabheleni, Ngele, Cildara, Trust no.3
17	1281	Saki, Gqadushe, Mbizana, Njwaxa, Ngwenya, Sityi
18	1164	Debe Nek, Trust no.1, Trust no.2, Tafeni, James Mama, Mxumbu, Qanda, Qawukeni, Cwaru, Annshaw
19	1209	Khukwane, Nonaliti, Mayipase, Ntonga, Zihlahleni
20	1782	Ngwabeni, Ngobe, Mgquba, Gaga/Skolweni, Lenge, Roxeni, Kwezana West, Memela
21	4913	Zwelitsha, Dubu, Gomma Gomma, Gontsi, Nkukwini, Zwide, Daweti

Source: Nkonkobe Local Municipality IDP Review 08/09

7.3 Socio-Economic Conditions

The Nkonkobe Local Municipality, like other municipalities in the province, faces a number of challenges such as unemployment, poverty and inequality. It has been revealed that the Municipality is able to create jobs for only 3, 5% of the economically active population.¹⁰⁵⁶ According to the Integrated Development Plan (IDP) document, unemployment has increased while at the same time there is a drop in employment.¹⁰⁵⁷ The document also showed that 92 274 people in the Municipality have no income at all, of which 6 531 earn between R401 and R800 a month.¹⁰⁵⁸ This includes pensioners as well. In fact the latter accounts for a major stake in the above income range.¹⁰⁵⁹

7.4 Presentation of Research Findings

The study examined the barriers affecting old persons in accessing social services. This was followed by an assessment of the impact of the old age pension on households. A questionnaire was distributed to the elderly. Questionnaire-based interviews were held with officials of the Department of Social Development; SASSA officials (both provincial and national). Focus group discussions were also held with Nkonkobe local Municipality councilors.

Nkonkobe Local Municipality offices are distributed according to administrative districts, such as Fort Beaufort, Middledrift, Alice, Seymour and Hogback. Alice is the legislative centre and the main application point for pensioners. It includes the villages surrounding it and Hogsback. The Alice office houses both the offices of Social Development and SASSA which handle all types of social grants

¹⁰⁵⁶ Fig 2.5 "Occupational Status" IDP 08/09.

¹⁰⁵⁷ Fig 2.6 "Income Levels" IDP 08/09.

¹⁰⁵⁸ Ibid

¹⁰⁵⁹ Ibid.

and welfare matters.¹⁰⁶⁰ Approximately 180 respondents were interviewed in 20 villages in Nkonkobe Municipality. Their ages are represented in **Figure 1** below.

The major effort by the government to alleviate poverty is through the payment of grants to older persons. The number of Old Age Grants (OAG) recipients in the Nkonkobe Municipality has increased as well as in the Eastern Cape as a whole.¹⁰⁶¹ This is largely due to the effort made by SASSA to reach out to those living in remote rural areas.¹⁰⁶²

7.4.1 Demographic information

During the research, a total of 167 respondents were interviewed in the Nkonkobe Municipality. Their ages are represented in **Figure 1** below.

Figure 1 represents the percentage of grant recipients by age groups as at November 2008. The majority of respondents fell in the age group of 65 years (28.5%) while the lowest is in the age group of between 81-85 years (6.7%). There is a noticeable decrease of the number of respondents as the age increases which is due to mortality.

¹⁰⁶⁰ These grants include Child Support Grant (CSG), Care Dependency Grant, (CDG), Foster Care Grant (FCG), and Disability Grant (DG), Old Age grant (OAG), War Veteran's Grant (WVG) and Grant in Aid (GIA).

¹⁰⁶¹ SASSA *Analysis of transfer payment trends in the Eastern Cape Region* 2nd September 2009.

¹⁰⁶² SASSA *Statistical report on Social Grants Report No. 4* (31 March 2008).

Figure 1: Distribution of Respondents by Age

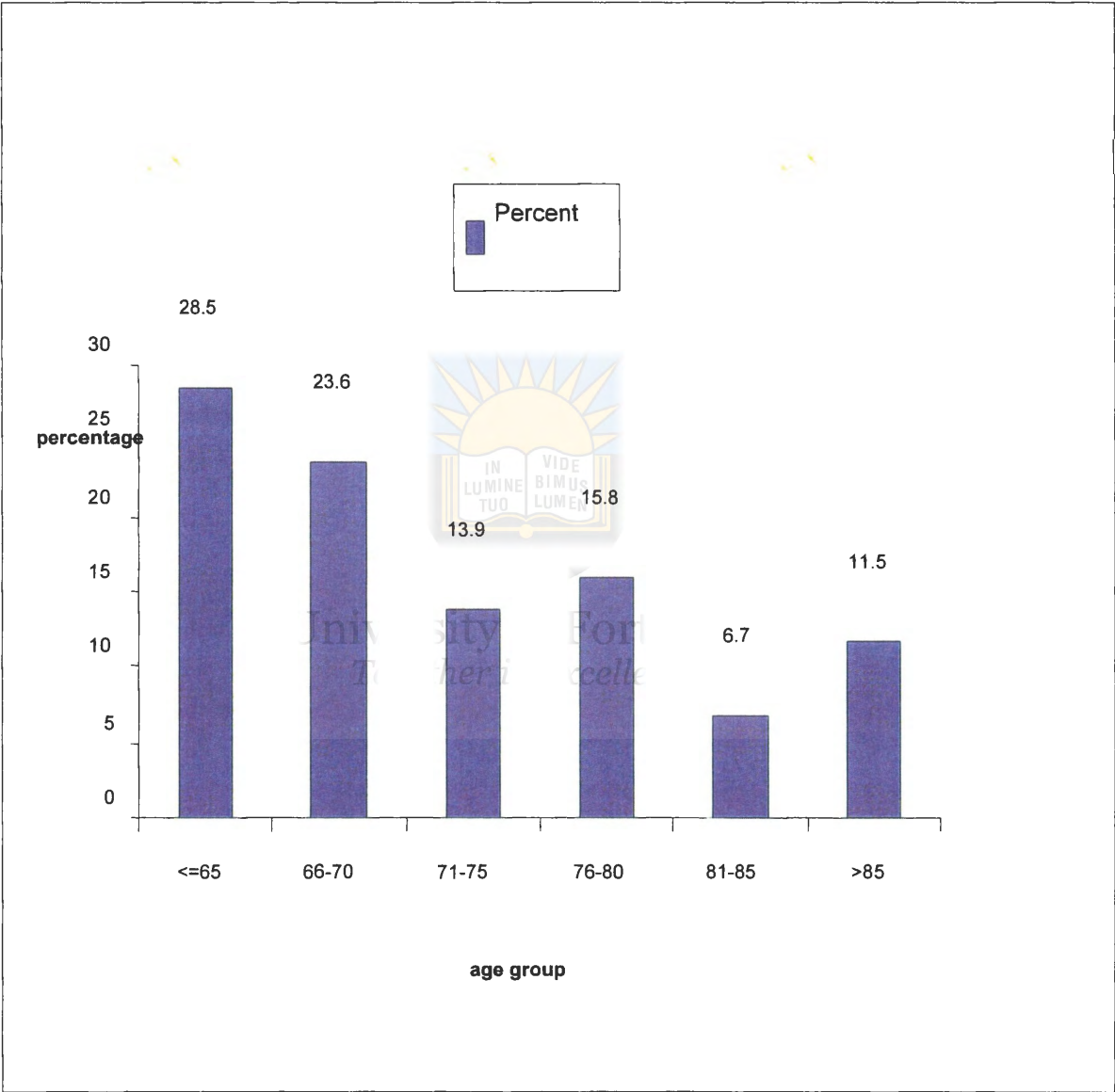
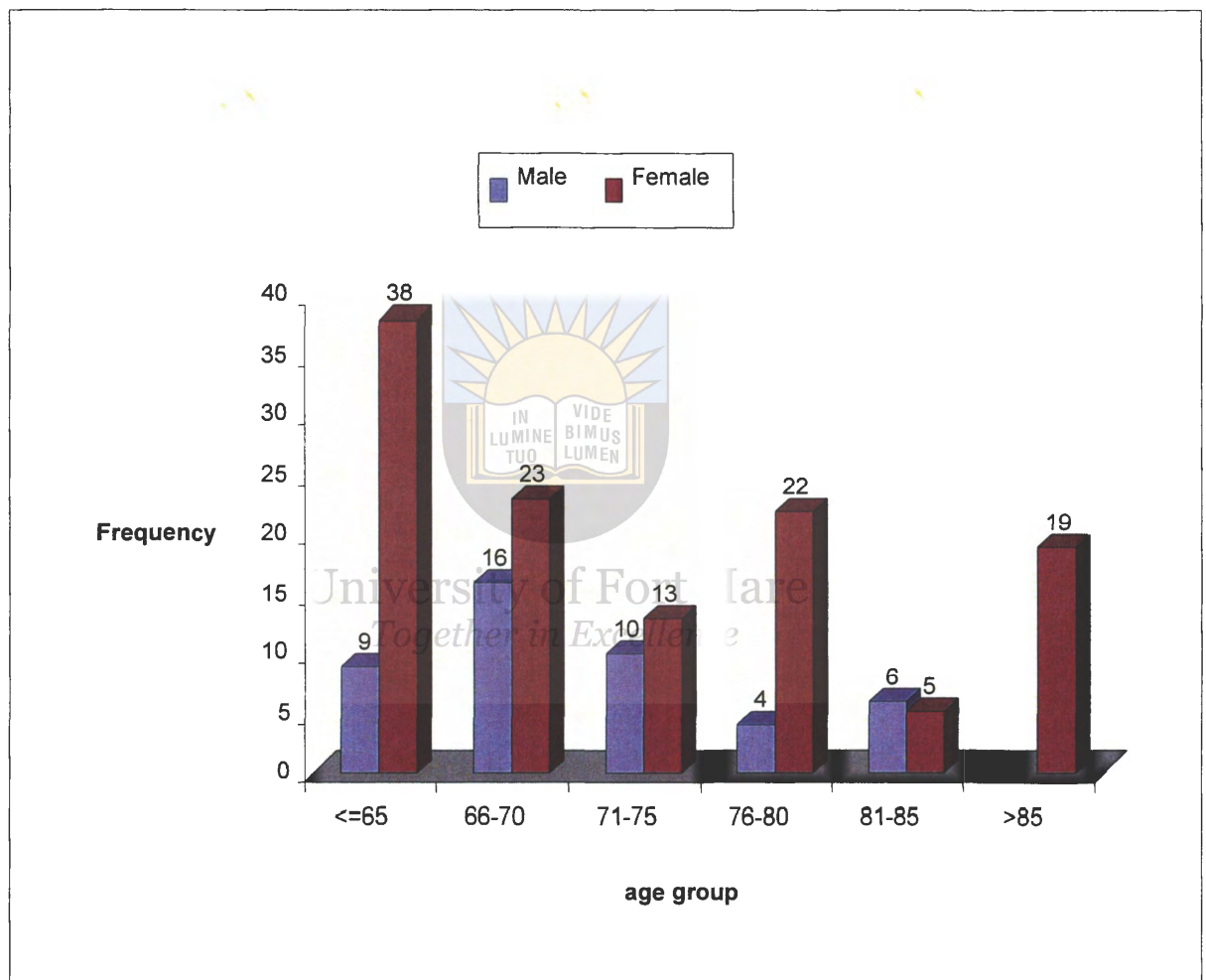


Figure 2 illustrates the distribution of respondents by gender. The majority of old age beneficiaries are female, except for the age group between 81-85 years. For the age group 85 there are no male respondents. This may be due to a high mortality rate for males, which may indicate a lower average life expectancy for males compared to female respondents.

Figure 2 Distribution of respondents by gender



In terms of marital status, the majority of old age beneficiaries are widowed. It is not clear why the distinction with regard to age is made between men and women as this would be an example of unfair discrimination. In some areas the beneficiaries take care of themselves. However, in most areas the beneficiaries are caregivers of other persons.

Figure 3: Distribution of respondent’s household size by marital status

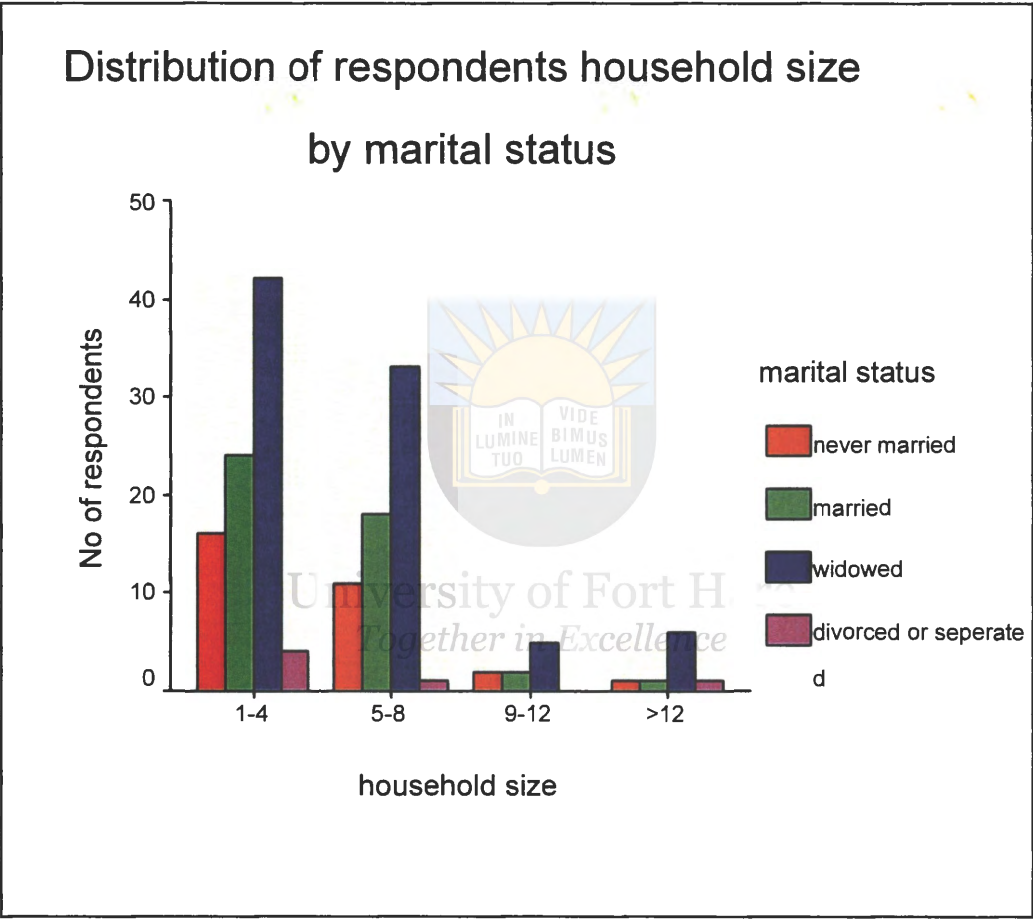


Figure 3 above show the distribution of household size by marital status. This is evident that there are more widows, followed by married couples and singles. Those who are divorced or separate are disproportionately few.

Figure 4: Distribution of Respondents by Marital Status

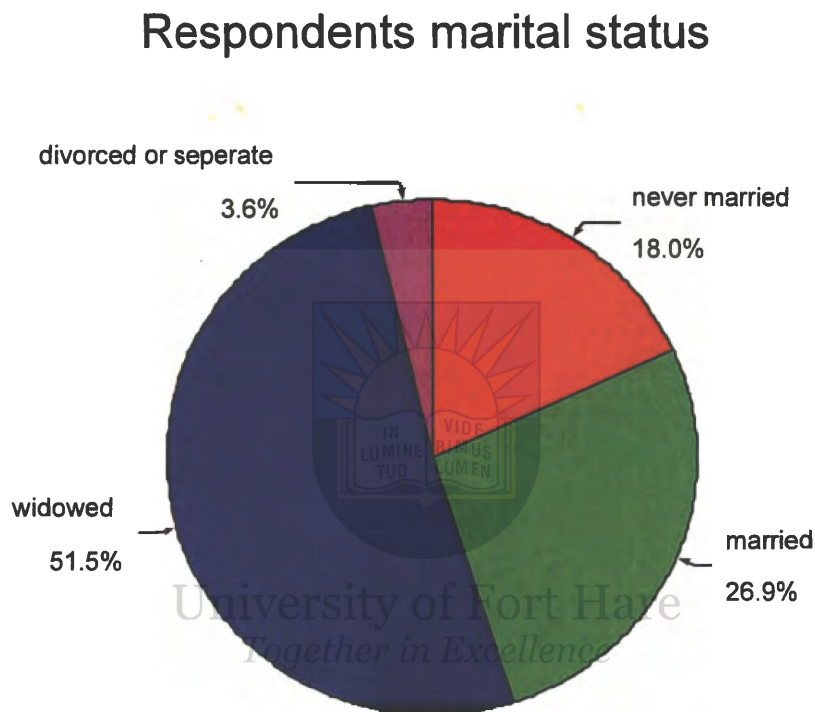


Figure 4 shows the percentage of respondents by marital status. Most respondents are widowed (51.5%), followed by married respondents (26%) and those who are not married (18%). The last category may either be separated or divorced (3.6%).

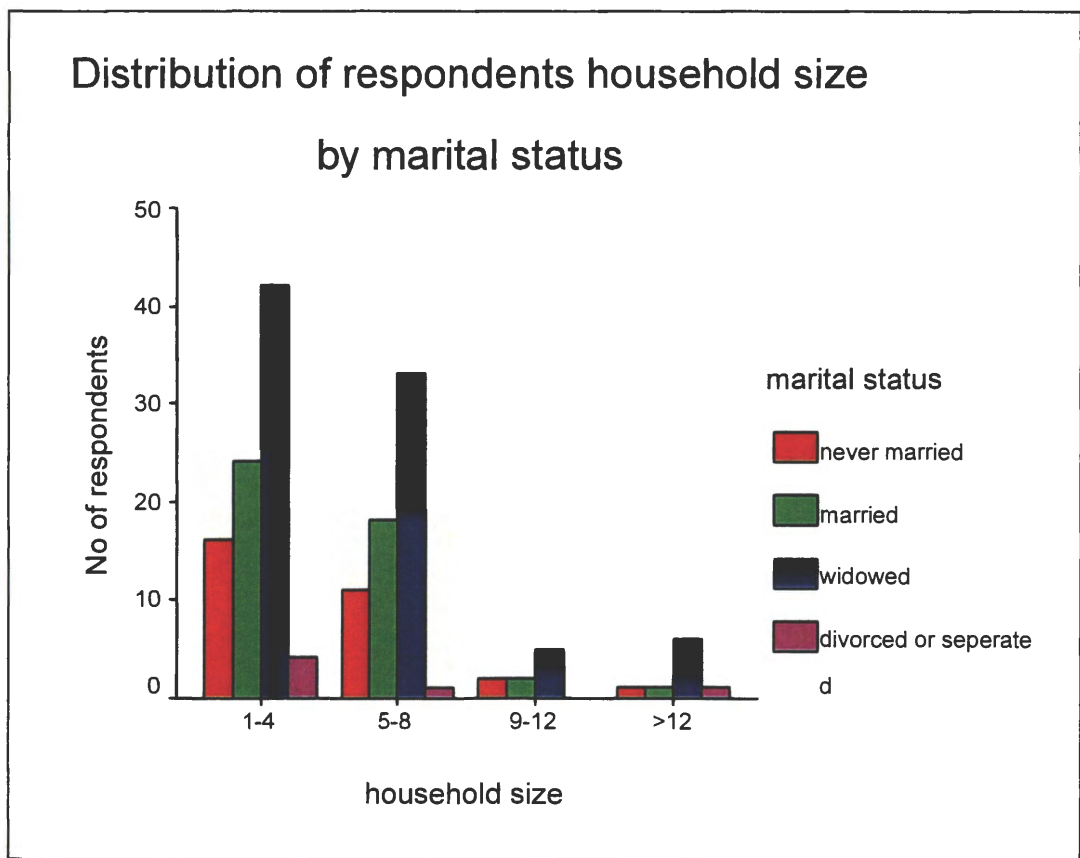
The old age pension in South Africa plays an important role in the lives of many elderly persons. **Figure 3 and 4** demonstrates the importance of pensions in the economic situation of many households in the Eastern Cape. Social grants play a very important role in various households. It guarantees survival for many of the households. However, one misgiving is that the money spent on food is more

than the money spent on other items. This means that most household do not spend the money alone, the food they consume and other expenses cater for a number of people in a particular household.

7.4.2 Living conditions

One important feature of the South African elderly is that most of them live in extended family households. **Figure 5** presents details of the distribution of households by marital status. Those who are widowed represent a significant number of the households. However, each elderly person lives in a household with more than one other person. There is a high dependence on the income of the elderly, as each family/household spends more than what is earned. Across all households, women and widowers are the most dominant.

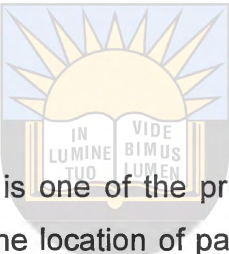
Figure 5: Distribution of respondent’s household size by marital status



7.4.3 Economic situation

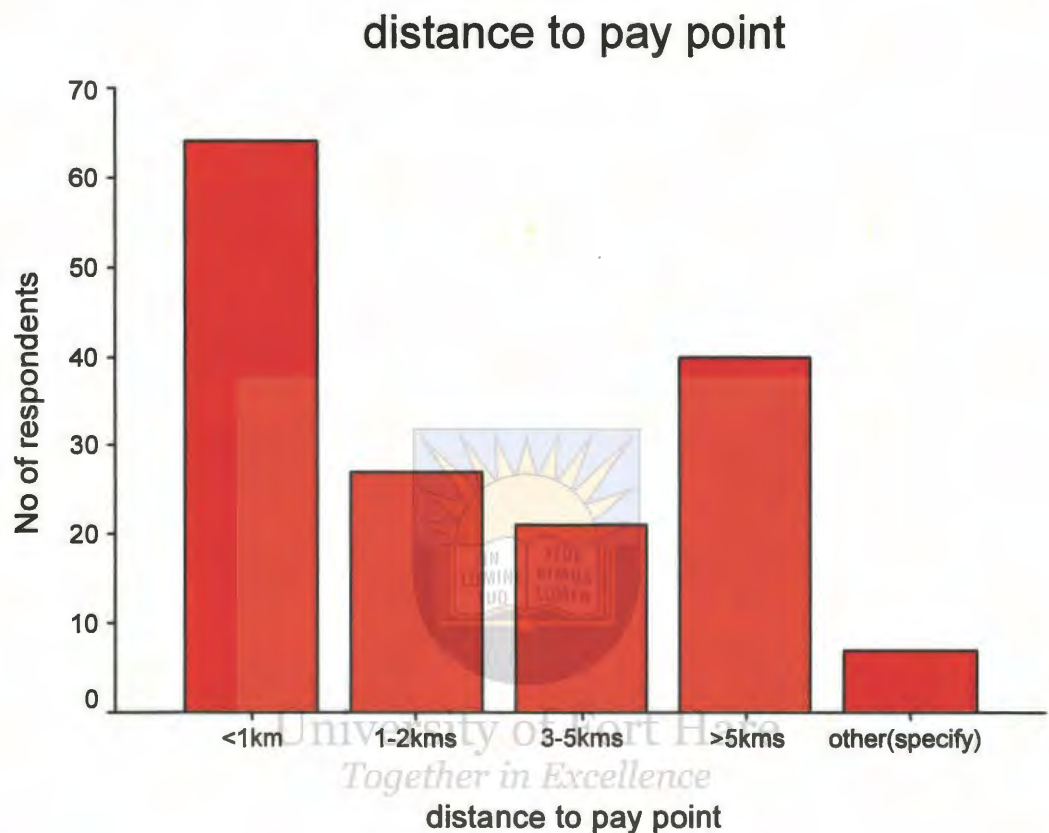
The majority of the beneficiaries in most villages that have been employed the whole of their lifetime never received any benefit after they left employment. This means that they never contributed to any pension or provident fund. Most of them do not receive assistance outside their homes other than the grant they receive from the government. Most of the beneficiaries rely on the OAG as the only source of income and most of them are women. Undoubtedly, lack of money is the most pressing problem.

7.4.4 Access to amenities



Accessibility to social amenities is one of the problems identified particularly in the rural areas. The reason is the location of pay-points from the residences of the respective beneficiaries. Recently, pay points have been established within the reach of elderly homestead. The researcher visited pay points at Mxhelo (Lalini, Skolweni, Memela Sigingqini) in (Ward 20) and Seymour (Ward 8). The Respondents were asked how long it takes them to get to the nearest pay points or to the nearest clinic. Their responses are captured under **Figure 6**.

Figure 6: Distance to the pay point



The elderly in most areas in Nkonkobe reported that it is a walking distance for those who are physically healthy and can walk while others use public transport. In most villages and farms around the Seymour area, the elderly walk although the pay points are far from their homes. On the average, the walking time was between 10–30 minutes while the cost of transport ranged from R15 to R20 for a return journey. Those who are frail used taxi all the time or else a member of their family collected the money for them. There are many villages in the area of Debeneck and Middledrift which fall within Nkonkobe Municipality. Some of them are close to King Williams Town but still fall under the main welfare office that is located at Middledrift where they apply for and receive their grants. Some of the respondents said they have to travel long distances to the pay office.

Although most villages have electricity, they do not have flush toilets, but use pit latrines. There are approximately 1 723 households without electricity, excluding

housing projects that are still under construction.¹⁰⁶³ In most villages around Alice area there is piped water. However, many Seymour villages experience problems with water supply since most of the pipes, which are situated in the streets, are not working. The residents rely on water being delivered on trucks by the Amathole District Municipality. The department is still struggling to provide potable water within the reach of people. During the focus group discussions, some of the councilors indicated that they are still struggling to provide running water in areas such as Mxhelo, Memela, Lalini, Sgingqini, Pumlani, Joji, Loyd and Fort Beaufort locations. The above situation affects mostly the elderly people who find it difficult to access this basic need.

In almost all the villages there are no educational institutions, neither are there old age homes for the elderly. The only registered old-age homes are in Fort Beaufort, within the town and in the location. The one in the town is accessed by Whites only, although it is subsidized by the government. During the focus group discussion it emerged that the government does not sufficiently protect older person neither does it provide them with enough security. Older persons need care in old age homes because they suffer and die from many diseases. Some who are diabetic and have had their limbs amputated are left alone without anybody to take care of them. If they are provided with old age homes they can have the necessary care and visitation from family members and young people. The latter can also benefit from the wealth of wisdom, culture and history that the old people have.

The majority of beneficiaries in all the villages are not involved in income generating activities. Having been bred and grown up in rural locations, many old people engaged in agriculture and are still deeply attached to the land. It was not surprising therefore that they identified agriculture farming implements as being among the essential need for the area. They lamented that in the olden

¹⁰⁶³ These areas are Alice Extensions (790), Mpofu Extensions (643), Lower Blink Water (135), Debe Nek Extensions (143) and Mankazana (12). See IDP Review Document, 2.4.1.

days they were self-reliant and self-sufficient because they ploughed their fields and planted crops and there was no poverty. This is no longer the case, and if these initiatives can be revitalized poverty can be significantly reduced or even eradicated. They singled out, for example, a number of irrigation schemes that have fallen in disuse: Kama Farrow; HACOP; Katriver; Fairburn; Qamdobowa; Zalaze; Debe Nek; and Sityi irrigation schemes. If these schemes can be revived, the livelihoods of the community can improve significantly. Participants also viewed the support and cooperation of the Department of Agriculture as wanting. There is also lack of co-operation and coordination among different government departments that address the welfare of the elderly.¹⁰⁶⁴

The availability, accessibility and communication of information is another major problem that affects the elderly to access their social benefits. The District Manager conferred that the government is not communicating enough to the people and in an effective way. The most common form of communication is through convening community meetings. The latter seems to be the best way of communicating because fifty four percent of the total number of respondents knew about social grants through attending community meetings. However, the problem is that not all people can attend such meetings. Television networks should also run programmes and information specifically targeting the elderly. The radio is particularly a very useful media of communication, and in this regard, use could be made of community radio. There are no local newspapers, and the regular daily papers are in English rather than IsiXhosa.

7.4 Basic Need

7.4.1 Food

Food was identified as the most important item that the elderly need. This shows that there is a high level of destitution and deprivation not only among the elderly,

¹⁰⁶⁴ See IDP Review Document 08/09 at 2.6.4

but within the community as a whole. This was followed by money and land for agriculture. Due to aging, poor physical health and frailty, nutritional foods and medication is even more necessary. As stated heretofore, this also includes potable water.

Figure 7 Distribution of respondents (elderly) needs

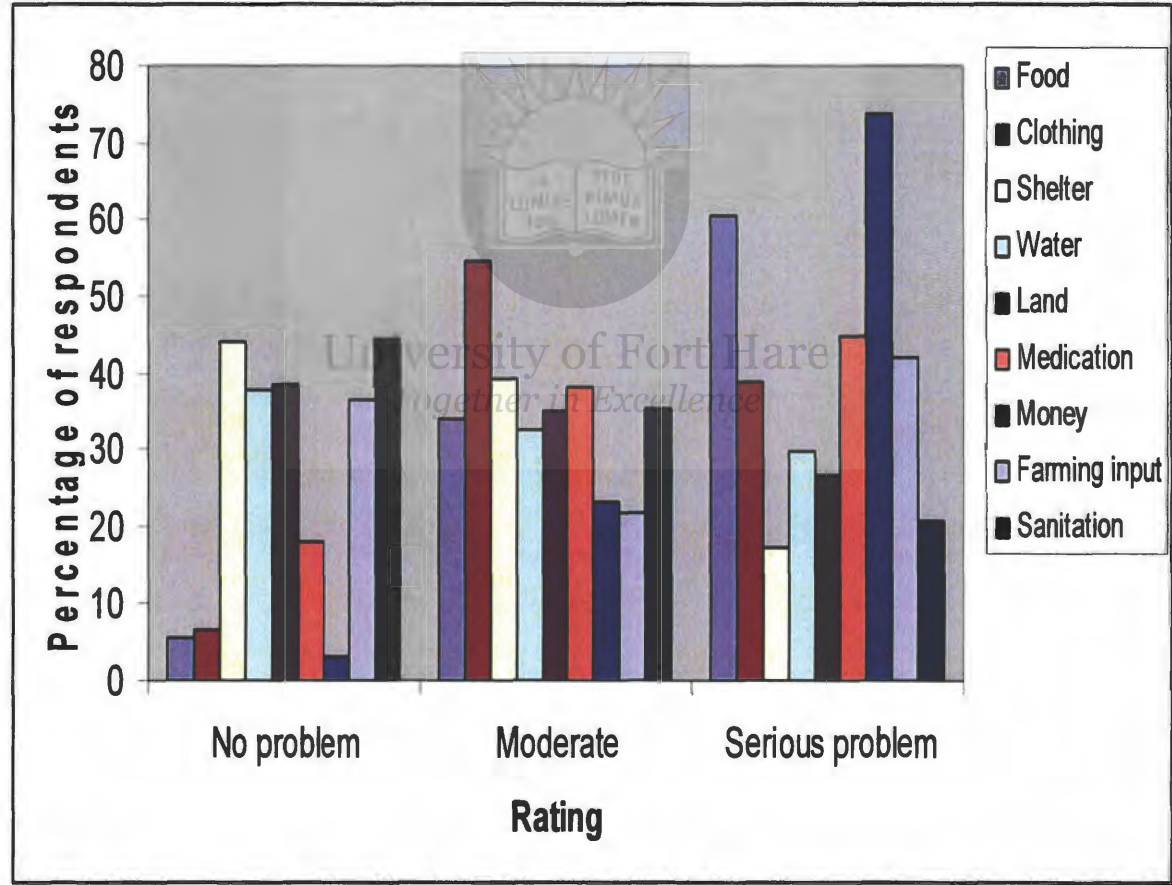
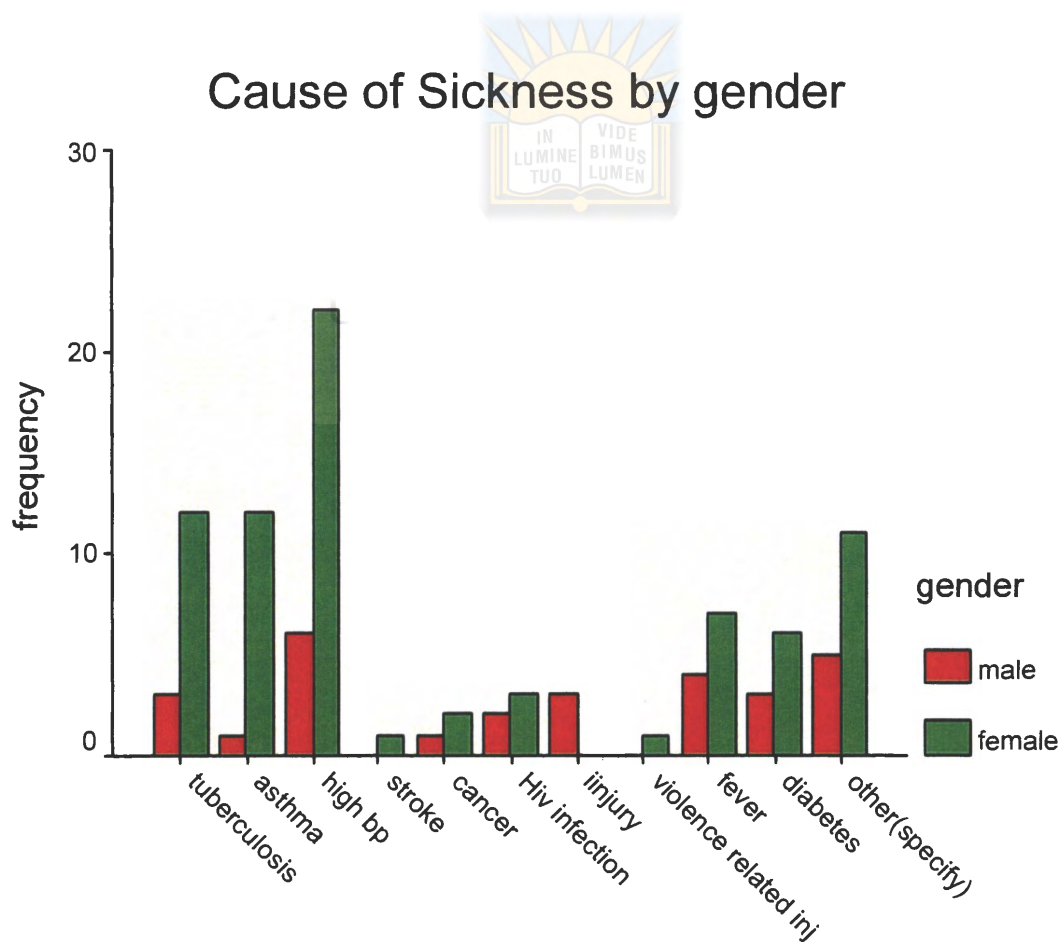


Figure 7 above shows the ratings of elderly needs. Food comes out as the most important need and it rated 3 (most serious problem) with 60.4%, followed by money with 73.7.

7.4.2 Health

The majority of the respondent reported that the most common health problem was high blood pressure (26.7%), followed by tuberculosis (9.0%), asthma (7.8%) and stroke (1%). The distributions of the high blood pressure by gender showed that females were more affected (78.6%) than males. In the case of stroke, males are the least affected group.

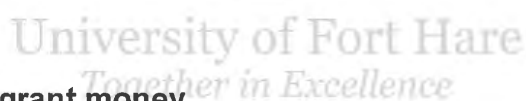
Figure 8 Causes of sickness among the elderly



During the focus group interviews it was apparent that the health care system is not adequately responding to the needs of older persons. A number of problems were identified, among them the non availability of nurses in the clinics. In areas

where there are clinics there is no nursing staff and even if there are, they are not available in the evenings. There are nursing homes but not many old persons like to stay in those homes because of lack of security measures. The distance one has to travel to the clinic presents a problem for the elderly. One respondent had both legs amputated and she is not on a wheelchair. She said one of the neighbours use his donkey “kar” to take her to the nearby clinic. In areas where there are no clinics older persons have to travel or take transport which is very costly, up to +R120.00, depending on the distance traveled.

During the focus group discussions special health services for older people was identified as a priority. There is a mobile clinic (*phelopepha*) which is well equipped with doctors and modern clinical facilities but it comes once in five years. Therefore, participants felt that the health care system is not adequately responding to their special needs.



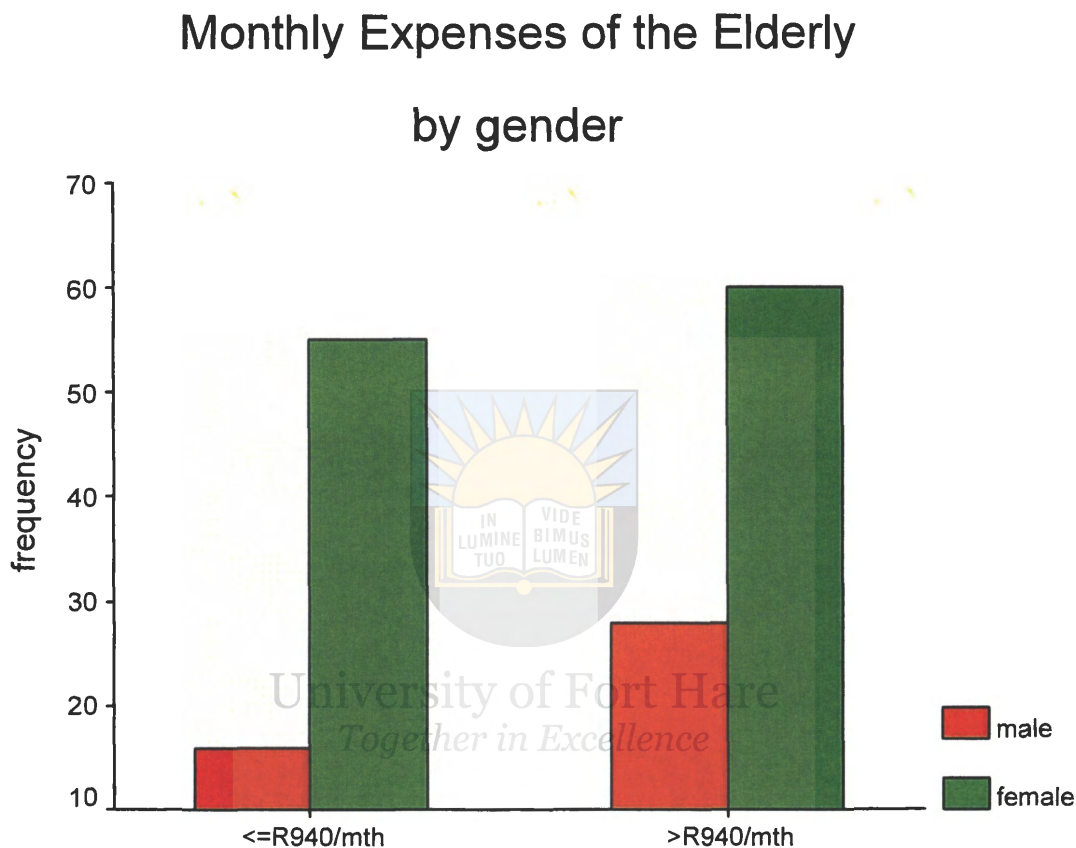
7.4.3 Sufficiency of grant money

The pensioners were asked whether the amount they receive is sufficient or not. The responses revealed that far from being sufficient, they shoulder enormous burden in their homes. One pensioner put it as follows:

the money is not enough. When we are asked about our basic needs, food came first followed by money. The money we receive for the grants is not enough to cater for our basic needs. The first thing that is done with the money is buying food, electricity and contributing to burial schemes.

The results showed that more than half (55.3%) of the respondents spent more than the monthly allowance of R940.00 per month on food out of which (68.2%) were female. This is illustrated in **Figure 9** below.

Figure 9 Monthly expenses of the respondents (elderly) by gender



This shows that not only do they spend more than what they get, they do not, as a consequence, save. This also shows that females have more burdens than males. Part of the expenditure is not just for food but also for paying school fees. With the high number of orphans and other vulnerable children in the area, and due to parents who have passed on or are too sick to be economically active, the responsibility to care children has shifted to grandmothers and grandfathers. Ironically, this is the time when due to old age, grandparents would need most the care of their children and grand children.

Councillors, managers and social welfare officials expressed similar views on the inadequacy of the grant money to cater for the needs of older persons. One manager said:

Depending on the specific situation, you will understand that the grant is intended for that particular person but you will find out that it is supporting many other people. Children are being just dumped to the older persons - this is the situation we come across every day. An older person will come to the office and tell us that this child is left with her and the mother is in Cape Town or Port Elizabeth.

These findings highlight the importance of the old age grant. It further shows that other household members benefit from it. The grant therefore serves as an important source of income for food, school fees and medication.

7.4.4 Problems encountered by the elderly after receipt of the grant

It was revealed that most elderly persons become victims of rape by young people in the community after receiving their social grants. The participants in the focus group discussions described the situation of older persons in the villages as

a shocking experience: an old lady staying alone end up being a target for rape and abuse because she has nowhere to go and she has no support from the government.

In most areas, the municipality/ local government is limited in terms of assisting the elderly, for example, on issues of social security which is relevant to social development. One respondent stated: "There are things that are problematic, we submit everything we need to the province and we wait for a long time for the province to respond". In one of the focus groups, an old lady stated:

Old persons are being raped, but sometimes they can't talk about it, although they know the rapist. There is a need for educational programmes to teach us about issues affecting us. If we can be assisted as old women, we can go and report to the police when we are abused. In most cases in our areas the rape is done by somebody in the family, but once the community is involved the family has a problem with that.

It was acknowledged that councillors fail also to take care of certain issues, although in some of cases, they are restricted by their mandate or capacity. During the interviews, a manager stated that it is public knowledge that older people are being abused. One of the problems she identified is that of the “Mashonisas” or cash loan money lenders. They take the ID documents of the elderly as security for the money loaned and often at extortionate interest rates. The only protection they offer them is during pay time, at the pay-point. She felt that the rights and welfare of older persons should become the responsibility of the social worker:

Maybe if we move to a comprehensive social security system then things will be better. Legislatively we are dealing with social assistance and social security. We don't know if we moved to the direction of social security and whether we will have to deal with these issues.

7.4.5 Lack of co-operation

It emerged from the research that there is lack of coordination among different government departments. One of the participants identified social service delivery as a major challenge that they encounter. Lack of cooperation is another. The problem can be partly attributed to the fact that existing legislation does not provide guidance in terms of building both vertical and horizontal relationships among different government departments and other key local actors. In this respect, one respondent observed:

In Nkonkobe they have intergovernmental interrelation forum, but in terms of cooperation, or delivering that particular mandate, it is a different story. There are certain programmes that need departments to partner with each other, because older persons, all they know is government; SASSA; Social Development; Home Affairs etc. All they want is a friendly and effective government service. The legislation promulgated to look at integrating services was a good one but how we put it in practice really it is not clear.

In the same vein, it emerged from the discussions that there are no proper working relationship between the chiefs and the councillors. It has been said that in certain areas the chiefs reject services being offered to the people by the Municipality. The UNESCO 'Oliver Tambo' Chair of Human Rights at the University of Fort Hare has been implementing a project on democratic governance and social service delivery funded by the Charles Stewart Mott Foundation, under which a Memorandum of Understanding was signed between Councilors and Traditional Leaders. This was intended to enhance cooperation and nurture a spirit of collegiality among these two key actors in the Nkonkobe Municipality. This Memorandum could be a useful stepping stone to alleviating some of the relational problems that exist among key social development partners in the Municipality.

Participants from the focus group discussions suggested that public representatives should work together. Secondly, older persons should be integrated with the youth, so that respect for older persons can start to emerge from young people. Unemployment and sport could be used as an instrument to foster understanding and this is likely to reduce problems such as substance abuse, violence and rape among the youth.

7.4.6 Department of Social Development and SASSA

Interviews were conducted with officials of the Department of Social Development, the National Manager SASSA (Pretoria), District Manager (East London). Questionnaires were distributed to a number of officials of SASSA in Middledrift, Fort Beaufort and Alice. According to statistics from the regional office in East London, the total number of recipients of grants in 2008–2009 is 380 700.

During the interviews in the Eastern Cape, it was revealed that some of the problems that persist in the province are due to lack of cooperation within the government departments and lack of infrastructure for communication. Some offices suffer capacity constraints, more in particular the Middledrift office. The officials interviewed at the Middledrift office said there is a shortage of personnel in their office while at the same time they have to service many villages almost up to the adjoining town of King Williamstown. The wide geographical area of Nkonkobe Municipality coupled with its rugged terrain poses a challenge to the Municipality in respect to social service delivery.

7.4.7 Scope for supplementing the grant

It was apparent that there is very limited scope within the system to supplement the old age grant. Children and grandchildren receive child support grants. However, there have been increases of the grants in the past years. The largest increase occurred in 2008 because it was increased twice in the same year, namely in April and December. There are no immediate plans for these grants to be phased out, neither is it apparent that the government has other alternatives. A constant dependence has been created and the burden will largely be met by the tax-payers' money. According to the budget speech, the amount of social grants paid out of the general revenue is around 3.3 % of the Gross Domestic

Product (GDP) and over 15% of non-interest government expenditure.¹⁰⁶⁵ Thus social assistance programme will continue to provide minimum benefits for many years to come.

7.5 Social security reforms

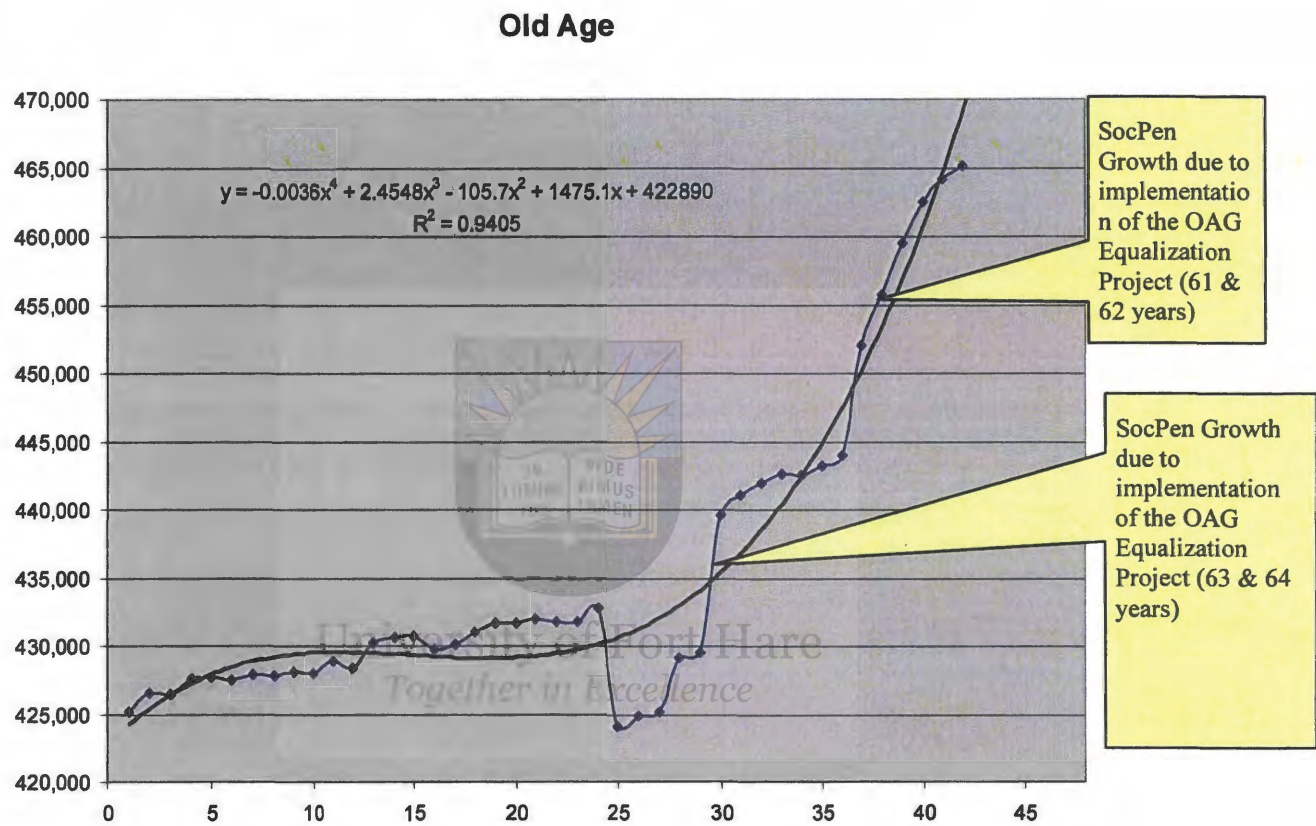
The most important innovation that took place recently is the extension of Child Support Grant first from 14 to 15 year; and currently to 18 years. Another reform is the gradual phasing down of the qualifying age for men to 60 years from 2010. The qualifying age for men was 63-64 from April 2008; and 61-62 from April 2009. However, the government is considering raising the means test for disability and old age grants respectively.¹⁰⁶⁶

The graphical representation below displays the actual number of Old Age beneficiaries that are paid from the system between the periods April 2006 to September 2009. The Table below shows the growth rate of grant recipients in the Eastern Cape during the same period. The most significant growth occurred in the period April 2008 to March 2009, and April to September 2009 compared to the same months in 2006 to 2007.

¹⁰⁶⁵ Ibid.

¹⁰⁶⁶ National Treasury 'Budget 2008: Briefing for the Joint Budget Committee' 22 February 2008.

Figure 10: Old Age Beneficiaries in the Eastern Cape Region from 2006 to 2009



Source: SOCPEN System (02 September 2009)

Table 4: Overall Growth Rate from 2006 to 2009

Period	Overall growth rate
For the period April 2006 to March 2007	0.76%
For the period April 2007 to March 2008	0.58%
For the period April 2008 to March 2009	4.68%
The current growth rate for the period April 2009 to September 2009	2.90%

Source: SOCPEN System (02 September 2009)

7.6 Conclusion

A rights-based approach is discussed with reference to older persons. South Africa entrenched the right to social security and social assistance in the Bill of Rights in the 1996 Constitution. The Constitution recognises the indivisibility, interrelatedness and interdependence of these rights. Most of the social security programmes have a legal basis and others are matters of policy, the problem of which rest with their implementation.

The population of Nkonkobe municipality is largely rural in nature. Therefore, the elderly mainly live in rural areas. Nkonkobe Municipality IDP document revealed that the Nkonkobe Municipality has the highest level of underdevelopment, a low-income base, an inadequate social infrastructure, inefficient and corrupt public service, and an enormously huge service delivery backlog. The research revealed that the elderly are the most poorest in the society, many households rely solely on pensions as the source of income.

The data above shows that elderly in the rural areas encounter problems in terms of accessing social amenities. The lack of accessibility is due to geographical allocation of pay-points, which are far apart. The elderly in most areas walk although the pay points are far from their homes. Many villages experience problems with water supply since most of the pipes, which are situated in the streets, are not working. The department is still struggling to provide potable water within the reach of people. In almost all the villages there are no educational institutions, neither are there old age homes for the elderly. The Older Persons Act¹⁰⁶⁷ enshrines the rights of older persons to care and protection from harm whether they are cared for in the home or in residential care facilities. More importantly, the Act seeks to prevent the abuse of older persons

¹⁰⁶⁷ The Older Persons Act 9 of 2006.

by providing appropriate mechanisms for public complaint and oversight.¹⁰⁶⁸ This is not known and is not used.

Available data shows that health care system is not adequately responding to the needs of older persons. A number of problems were identified, among them the non availability of nurses in the clinics and the long distance one has to travel before she reaches the clinic.

The only programme that currently assists the elderly to get out of the poverty trap is the Old Age Grant. However, due to various constraints this scheme is not properly implemented. The inability to access services due to the geographical spread of households in the rural areas is a major challenge that the elderly face. Lack of capacity and commitment among social service welfare staff is also another problem encountered in the province. Identification documents, such as birth certificates and the South African Identity Document (ID), and a medical assessment certificate are required when applying for a grant. The non availability of these documents and the time it takes to process them has created barriers for the elderly and other grant recipients.

Innovative strategies to eliminate or alleviate poverty still remain a continuing challenge despite the adoption of a number of pro-poor policies.

Thus evident from the above, not a great deal has been done by South Africa to provide a social welfare system for the elderly, the needy and the poor. It has put in place legislation, policy and administrative structures that aim at providing security for different social risks, and also give the individual the capability in continuing normal life when these rights are realised. There are several social risks that have to be covered by the social security system. However, it may be noted that the risks covered by the different instruments differ from one another.

¹⁰⁶⁸ Preamble to the Act.

The nine common risks are: medical care; sickness benefit; unemployment benefit; old age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit, and survivor's benefit. The common denominator of all these risks is that it limits the meaning of the individual and the family to continue to have self-sufficient life. Most of these risks are unexpected.¹⁰⁶⁹

The right of access to social security in the Constitution includes social assistance measures. It extends to those who are unable to support themselves. The South African Constitution recognises that the state has an important duty to fulfil in order to meet the needs of its citizen. Furthermore, section 7 (2) compels the state to give effect to all the rights in the Bill of Rights. It also requires the government to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to social security.¹⁰⁷⁰

In terms of the Constitution, the government has an obligation to protect its citizens against any risks so that they can live a normal and dignified life as human beings. This was confirmed by the Constitutional Court in a number of cases cited above.¹⁰⁷¹ This means that the full realisation of any right is a major responsibility of the government which requires not only legislative measures but also implementation strategies, policies and programmes.¹⁰⁷² The General Comment reads:

The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy and plan of action to realize the right to social security, unless the State party can clearly show that it has a comprehensive social security

¹⁰⁶⁹ Ibid.

¹⁰⁷⁰ Section 27 of the Constitution.

¹⁰⁷¹ See for example, section 3.6 above.

¹⁰⁷² Ibid.

system in place and that it reviews it regularly to ensure that it is consistent with the right to social security. The strategy and action plan should be reasonable conceived in the circumstances; take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups; be based upon human rights law and principles; cover all aspects of the right to social security; set targets or goals to be achieved and the time-frame for their achievements, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources. When formulating and implementing national strategies on the right to social security, States parties should avail themselves, if necessary, of the technical assistance and cooperation of the United Nations specialized agencies.¹⁰⁷³

This right guarantees basic necessities of life to the poor and needy citizens. In *Grootboom* case the Court held that:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that his be done.¹⁰⁷⁴

There are a number of shortfalls in the South African social security system, which clearly indicates a degree of non-compliance by the State with its international and constitutional obligations. As outlined above, these include non-ratification of key instruments, disregard for court orders, hick ups in the implementation process, lack of service-oriented bureaucracy, and growing manifestation of corruption. A human rights approach is aimed to achieve equality and social justice, to enhance the human condition of the rights bearer,

¹⁰⁷³ General Comment No.19, para 68.

¹⁰⁷⁴ *Grootboom* para 94.

their dignity and respect. The provision of social security and social assistance to the poor and particularly the elderly has been an important strategy to address the above concerns. It is evident from the above that a great deal has been done by the South African government to provide a social welfare system of the elderly, the needy and the poor. However, the interventions and strategies that have been deployed to alleviate or eradicate poverty still remain a continuing challenge which the government must address. It is submitted that these shortfalls can be addressed if South Africa can establish and implement a comprehensive social security system.



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CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8.1 Conclusion

The purpose of this Chapter is to highlight some of the central arguments and conclusions of this research. Therefore it presents a summary of the conclusions and recommendations drawn from the study. This thesis examined the current protection offered to older persons in South Africa and in particular, to older persons in the Nkonkobe Municipality of the Eastern Cape Province. It also explores the short-comings experienced by the system. The research questions were: to what extent is lack of access to resources or poor social service delivery a limitation of the right of older persons to access social security and social assistance? Is the right to social security and social assistance adequately protected by the existing laws and programmes? What measures must the government put in place in order to ensure that the elderly fully enjoy their right to social security, or conversely, protect them against the violation of their social security rights?

The thesis commenced with a clear-cut definition of social security. In addressing the nature of this right, the study asserted that the concept of social security encapsulates social assistance, social insurance, social development and social service delivery. This clearly suggests a wide and elaborated definition of social security which will embrace what is stated above.

This study asserted that social security is one of the difficult areas of the provision of socio-economic rights. It creates benefits that individuals are entitled to and obligations on the part of the state to take positive measures in order to realise these rights. Social security and social assistance has received recognition as a human right that should be enjoyed by all regardless of their

social status, geographical or regional location. Without social security, the most deprived, vulnerable and powerless in our midst will remain excluded from the enjoyment of their essential human rights, including socio-economic as well as civil and political rights. What is essential is that all human rights be translated into practice so that their enjoyment becomes a reality.

International law recognizes the right to social security as a human right. The right to social security is provided for in a number of human rights instruments at the international and regional level, some of which South Africa has ratified. It is also provided for in national legislation, including the Constitution. Chapter Four discussed a range of international and regional human rights instruments which include the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966); various International Labour Organisation (ILO) conventions; the African Charter on Human and Peoples' Rights (1981); the Charter of Fundamental Social Rights in the South African Development Community (SADC, 2003); and the SADC Draft Code on Social Security. The jurisprudence generated by various human rights monitoring bodies such as the ICESCR Committee; the European Court of Human Rights and the now defunct European Commission of Human Rights were also highlighted. The provisions of the above instruments, as well as the South African Constitution and legislation are relevant for the promotion and protection of the rights of older persons to access social security and other social benefits and services.

In South Africa, international instruments are an important aid for interpreting the provisions of the Bill of Rights. The study asserted that reference to international law is not a misguided approach but resonates with the imperative of the Constitution, which recognizes that international law must be considered.¹⁰⁷⁵ Therefore, decisions of tribunals and specialized agencies may provide guidance

¹⁰⁷⁵ S 39 (1) (b) and 233.

on the authoritative interpretation of the provisions of the Bill of Rights.¹⁰⁷⁶ This approach has been followed in a number of cases cited in the study.¹⁰⁷⁷ In *S v Makwanyane*¹⁰⁷⁸ the Constitutional Court affirmed that conventions and recommendations by international bodies constitute a major source of South Africa's public international law which includes binding and non-binding law.

International human rights and social security law has developed steadily over the last five decades or so, and has exerted an important influence on the development of national policies, laws and institutions. The introduction of human rights in the international arena has much to offer to strengthen the national social security system. The ILO Convention 102 of 1952 and General Comment No19 of the ICESCR Committee elaborates on, and emphasizes, the importance of social security. This is further illustrated by the Charter of Fundamental Social Rights and the SADC Draft Code which is the driving force of social security in the Southern Africa sub-region.

Poverty and destitution necessitates the provision of social security. International policy and legal frameworks recognize various mechanisms for the reduction of poverty.¹⁰⁷⁹ The Millennium Development Goals underscores poverty as an overarching objective that cuts across all other goals, to which states are committed to eradicate by 2015. A human rights-based approach has been presented as ideal for realizing the human rights related to social security. According to Chinkin:

¹⁰⁷⁶ The decisions of the United Nations Committee on Human Rights Established under Article 28 of the International Covenant on Civil and political Rights of 1966; the European Commission on Human Rights established in terms of Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; and the European Court of Human Rights.

¹⁰⁷⁷ See for example, *Ferreira v Levin* No 1996 (1) SA 984 (CC); *S v Rens* 1996 (1) SA 1218 (CC); in *Re: Gauteng School Education Bill* 1995, 1996 (3) SA 165 (CC); *The Government of the Republic of South Africa v Grootboom & others* (2000) 11 BCLR 1169 (CC) par 26.

¹⁰⁷⁸ 1995 3 SA 391 (CC) para 35.

¹⁰⁷⁹ See ICESCR, *op cit* note 97, UDHR *op cit* note 99.

A rights-based approach allows links to be made between otherwise disparate issues and gives legal weight and content to many of the concepts that are traditionally seen and analysed in terms of development, management and welfare. It thus moves away from the instrumentalist and utilitarian language of development economists to that of the entitlements and obligations enshrined within the formal legal system, which the authority for other approaches lacks.¹⁰⁸⁰

The thesis is based on the understanding that all human rights carry duties and responsibilities. This understanding is supported by a human rights-based approach that the thesis adopted. A human rights-based approach is grounded in freedom, equality and human dignity.¹⁰⁸¹ This approach justifies legitimate claims to such rights based on the fact that their realization is an important goal in itself. One of the most important characteristic of a human rights-based approach is that every human being is a right-holder and that every human right has a corresponding duty-bearer. In a human rights-based approach, human right identifies rights-holders and their entitlements and the corresponding duty bearers and their obligations, and works toward strengthening the capacity of the right holders to make claims, and the duty bearers to meet their obligations.¹⁰⁸²

Identifying the nature and content of the right to social security and the nature of the obligations that it imposes is useful for strengthening the implementation of this right. For this reason, the governments need to know what is it that it is obliged to do, or not to do in order to comply with its duties. A clear understanding of the right will also make it easier to identify and define the violation of rights: Given the fundamental importance of realizing economic,

¹⁰⁸⁰ Chinkin C 'The United Nations Decade for the Elimination of Poverty: What role for International Law? *Current Legal problems* 2001, 564.

¹⁰⁸¹ Declaration of Philadelphia, preamble to ILO official bulletin, 1944. The Declaration proclaims that "all human beings have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."

¹⁰⁸² UNICEF 'The Human Rights Based-Approach: Statement of understanding,' '92, available at www.unicef.org/sowc04/files/AnnexB.pdg

social and cultural rights for the dignity of an individual, all sectors of government have a duty to protect these rights. The full realization of any right requires the fulfillment of correlative duties and obligations. The obligation to respect, to protect, and to fulfill require the state not to violate the rights of individuals, and to protect individuals from violation by third parties; it requires state intervention through appropriate policies and legislation as well as effective legal remedies. The states must act positively in order to provide a service or benefit that would improve rather than worsen the condition of the rights bearer. Therefore, under this human rights framework, the state is a duty bearer and the key role player.

The typology of obligations reflects the manner in which the State must act in order to discharge its duties. It also assists to assess the degree of compliance by the state with its commitments under human rights instruments, that is, whether a state is fulfilling its obligations or violating them, thereby establishing possible international and domestic accountability. The above would make it clear what are states' obligations in relation to the right to social security and which obligations are justifiable under international and national legal and policy frameworks. This is examined below in details.

8.2 Government Compliance with International and Constitutional Obligations

Article 9 of the ICESCR provides that states parties 'recognize the right of everyone to social security, including social insurance'.¹⁰⁸³ The realization of this right is of central importance in ensuring human dignity for persons faced with circumstances that deprive them of their capacity to fully realize their socio-economic rights. In its General Comment No 19, the ICESCR Committee outlined further the normative content of the right, the nature of the obligations

¹⁰⁸³ Article 9 of the ICESCR.

undertaken by state parties and how they should be implemented, including remedies and accountability.¹⁰⁸⁴

The right to social security imposes on states parties the obligation to respect, to protect as well as the obligation to fulfill. Under these obligations, the state is obliged to adopt legislative and other measures with a view to the progressive realisation of the right to social security.¹⁰⁸⁵ Failure by a state party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.¹⁰⁸⁶ A violation occurs when a state fails to satisfy what the CESCR referred to as 'core obligations' that is, 'the satisfaction of, at the very least, minimum essential levels of each right in the Covenant.'¹⁰⁸⁷ The minimum core obligation entails the availability of basic necessities such as essential foodstuff, essential primary health care, shelter, and housing, or the most basic forms of education. In this regard, the minimum core obligation should be provided to everyone unconditionally.¹⁰⁸⁸

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Violation of the right to social security can occur, for example, when a state:

- deliberately adopts retrogressive measures incompatible with the core obligations;
- repeals or suspends legislation that is necessary for the continued enjoyment of the right;
- supports measures adopted by third parties which are inconsistent with the right to social security;
- establishes different eligibility criteria for social assistance benefits for disadvantaged and marginalized individuals; and

¹⁰⁸⁴ General Comment No. 19.

¹⁰⁸⁵ Ibid., paras 43-51.

¹⁰⁸⁶ Limburg Principles para 70.

¹⁰⁸⁷ Maastricht Guidelines para 9.

¹⁰⁸⁸ General Comment No. 19, par 59.

- denies women or particular groups of their rights.

Article 59¹⁰⁸⁹ sets out six minimum obligations that state parties must meet, namely:

- (a) to ensure access to social security scheme that provides a minimum level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.
- (b) to ensure the right of access to social security schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;¹⁰⁹⁰
- (c) to respect existing social security schemes and protect them from unreasonable interference;¹⁰⁹¹
- (d) to adopt and implement a national social security strategy and plan of action;¹⁰⁹²
- (e) to take steps to implement social security schemes, particularly those that protect the disadvantaged and marginalized individuals and groups;¹⁰⁹³ and
- (f) to monitor the extent of the realization of the right to social security.¹⁰⁹⁴

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ Ibid, paras 29-31.

¹⁰⁹¹ Ibid, paras 44-46.

¹⁰⁹² Ibid, paras 68-70.

¹⁰⁹³ Ibid, paras 31-39.

¹⁰⁹⁴ Ibid, par 74.

The South African Constitution provides that everyone has the right to have access to 'social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.'¹⁰⁹⁵ The state is obliged to take reasonable and other measures, within its available resources to achieve the progressive realization of this right.¹⁰⁹⁶ The enactment of the Social Assistance Act¹⁰⁹⁷ and the South African Social Security Agency Act is derivative from the mandate of this provision.¹⁰⁹⁸ The latter established the South African Social Security Agency (SASSA) to administer social grants.

The important feature of the Social Assistance Act is that it make available – old age grant, child support grant, disability grant, foster-care grant, care dependency grant, war veterans grants and grant in-aid.¹⁰⁹⁹ The Agency is only involved with the management and administration of grants. The South African Social Security Agency Act provides that:

The Minister after consultation with the Minister of Finance and the Minister for the Public Service and Administration, and in the spirit of co-operative government envisaged in Chapter 3 of the Constitution, enter into memoranda of understanding with the respective Members of Executive Councils of provinces responsible for the administration of social assistance in terms of the Social Assistance Act, 1992, in so far as it has been assigned to the provincial sphere of government, in order to endure that-

- (a) the payment of social assistance contemplated in the Social Assistance Act, 2004, is in future exclusively performed by the Agency;

¹⁰⁹⁵ S 27(1), Constitution.

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ The Social Assistance Act.

¹⁰⁹⁸ South African Social Security Agency Act No. 9 of 2004.

¹⁰⁹⁹ Section 4 of Social Assistance Act.

- (b) the right to social assistance to recipients thereof in terms of the Social Assistance Act, 1992, is not in any way interrupted, discontinued or decreased;...¹¹⁰⁰

It is clear from the above that the government provides social protection for the poor. The majority of the poor people are provided with grants to sustain their livelihoods. However, due to various constraints these programmes have not been successfully implemented as they should. For example, the Old Age Pension is still means-tested and at the time of undertaking this study, the amount of the grant was R1,010 per month. Social assistance responds to the need of particular individuals, therefore it is means-tested. The onus is upon those individuals to prove that they are destitute. The system takes the form of regular payments to all persons over the age of 60 for women and 61 for men irrespective of the income and is payable in cash or in-kind. Benefits are only payable to people who are unable to care for themselves due to old age, disability or as war veterans. In addition to means-testing, there are various requirements that have to be met, which include: residence in South Africa; proof of applicants' and his or her spouse inability to support them; and a proof that he or she is not receiving any grant.

The manner in which the right has been framed makes it clear that the state is obliged to provide everyone with social security and appropriate social assistance. Section 27 of the Constitution entails that where individuals are unable to support themselves, the government is obliged to provide such service. The White Paper proposed the establishment of a developmental social welfare system that would be equitable, people-centred, democratic, and appropriate.¹¹⁰¹ It also called for an intersectoral response between the government and civil society in order to devise strategies to address the welfare needs of all those

¹¹⁰⁰ Section 24 of SASSA Act.

¹¹⁰¹ The Preamble to the White Paper on Social Welfare (1997).

who live in poverty, those that are vulnerable, or those with special needs.¹¹⁰² The White Paper points out that an effective social security system should include rehabilitative, preventative, developmental and protective measures that will cater for the poor citizens of the country.¹¹⁰³ It envisages a social security system that is inclusive of all measures that will enhance development.

In trying to achieve integration and co-ordination, the Department has developed a Ten-Point Plan; appointed a Committee on Comprehensive Forms of Social Security; and formulated a Financing Policy. The Ten-Point Plan, which is in effect a five-year plan, attempts to develop a comprehensive system that would harmonise a range of activities by the departments responsible for the delivery of social welfare services.¹¹⁰⁴ It aims at developing ethics for the delivery of welfare services, a poverty alleviation strategy, and a reduction of violence against women and children. The Plan also encompasses other aspects such as HIV/AIDS, youth criminality, equity in service provision, and persons with disabilities.¹¹⁰⁵

It is clear from the above that the government has put in place a number of measures designed to ensure that the right to social security is realized. However, some of them fall below the international bench marks. This is evident from fact that the majority of poor people in South Africa need to be provided with basic essentials to sustain their livelihood which the government is still struggling to achieve. The elderly cannot readily access social services due to the geographical spread of households in the rural areas and the long distances they have to travel to pay points. Lack of capacity and commitment among social service welfare staff is also evidence of government's failure to meet its

¹¹⁰² Ibid.

¹¹⁰³ Ibid, 7.

¹¹⁰⁴ Ibid.

¹¹⁰⁵ Ibid.

obligations. The Table below illustrates the level of government compliance or non compliance with some of its obligations.

Table 5 Level of Government Compliance

Compliance	Non-compliance
Social Assistance Act is in line with section 27 of the Constitution	Eligibility criteria
Old Age Grant	• It is subject to the eligibility criteria • It is Means-tested. • Identity document and assessment certificate required on application. • Lengthy process in processing documents. • Terminating social grants (old age, disability and child-support grants) to thousands of beneficiaries or requiring them to re-apply in order to establish their eligibility. • Disregard for court orders and directives of South African Human Rights commission.
Disability Grant	Same as above.

It is evident from the above that the actions of the government are not always consistent with the requirements of the International Covenant on Economic, Social and Cultural Right and also violate domestic law.

As stated above, the ICESCR Committee requires state to ensure access to social security scheme that provides a minimum level of benefits to all individuals and families that will enable them to acquire the minimum essentials. If a state party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the ICESCR Committee recommends that the state party, after a wide process of consultation, select a core group of social risks and contingencies. In this regard the Constitution has granted everyone the right to have access to social security and has enacted various legislations. These have been discussed above. In addition, the Social Assistance Act and its regulations¹¹⁰⁶ grant individuals statutory entitlement to grants, and everyone applying for a grant must comply with the provisions of the Act. This is an entitlement guaranteed by the legislation, and in terms of the Act, no one may be deprived of benefiting under the Act when he/she meets the necessary provisions of the Act. At the same time, no one can withdraw or suspend the benefit without notifying the relevant recipient.¹¹⁰⁷ Regulation 23 provides that the Director-General may take the circumstances of each case into consideration and in this regard, may increase, decrease or suspend a grant. However, the beneficiary must be informed of the reasons in writing at least three months before such an increase, decrease or suspension is affected.¹¹⁰⁸ In a number of cases, the Department has failed to provide the beneficiaries with reasons.

¹¹⁰⁶ The Regulation GN 417 in GG 18771 of 31 March 1998.

¹¹⁰⁷ S 5, Social Assistance Act.

¹¹⁰⁸ Regulation 23 *op cit* note 876.

The Older Persons Act¹¹⁰⁹ enshrines the rights of older persons to care and protection from harm whether they are cared for in the home or in residential care facilities. The Act seeks to provide redress for any persons who may require it. More importantly, the Act seeks to prevent the abuse of older persons by providing appropriate mechanisms for public complaint and oversight.¹¹¹⁰

The legislative measures referred to above aim at addressing institutional co-operation between the state and organs of civil society while also addressing equity in accessing state financial assistance by previously excluded organs of civil society.¹¹¹¹ The other measure is particularly important as it focuses on vulnerable groups, namely, older persons.

The ICESCR Committee also requires the state to ensure the right of access to social security schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups.¹¹¹² Also to respect existing social security schemes and protect them from unreasonable interference; and adopt and implement a national social security strategy and plan of action. The Constitution enshrines equality and non-discrimination among the core values of the South African social order.¹¹¹³ In section 9(1), it provides for equality before the law.¹¹¹⁴ Section 9(2) recognises that equality includes the full and equal enjoyment of all rights and freedoms. Recent government initiatives have focused on the eradication of discrimination and extension of protection to different classes of individuals who were historically disadvantaged.

¹¹⁰⁹ The Older Pensions Act 9 of 2006.

¹¹¹⁰ Preamble to the Act.

¹¹¹¹ Ibid.

¹¹¹² General Comment No. 19, paras 29-31.

¹¹¹³ S 9, 1996 Constitution.

¹¹¹⁴ Ibid.

The ICESCR Committee also requires the state to take steps to implement social security schemes, particularly those that protect the disadvantaged and marginalized individuals and groups.¹¹¹⁵ In the recent case of *Njongi v MEC, Department of Welfare, Eastern Cape*,¹¹¹⁶ the Court strongly criticised the government officials for unsatisfactory behaviour concerning grants withdrawals and disregard for court orders. The Court stressed the importance of reading judgments of courts and responding promptly.¹¹¹⁷ The government's behaviour has been characterised by some as 'lack of respect for human dignity' which runs counter to a human rights-based approach that underpins this study.

The ICESCR Committee requires the State to monitor the extent of the realization of the right to social security.¹¹¹⁸ The Constitution of South Africa provides for the establishment of the South African Human rights Commission. The Commission is tasked with the oversight of socio-economic rights though monitoring government compliance with the Bill of Rights. Section 184 of the Constitution provides that the Commission must:

- (a) promote respect for human rights and a culture of human rights;¹¹¹⁹
- (b) promote the protection, development and attainment of human rights;¹¹²⁰

¹¹¹⁵ General Comment No. 19, paras 31-39.

¹¹¹⁶ 2008 6 BCLR 571 (CC).

¹¹¹⁷ *Njongi*, paras 84 – 87. Yacoob J says:

"....it must be said that judgments of courts in relation to Provincial Government conduct are not meant simply to be filed away without being read. They contain important information that has a bearing on the conduct of the Provincial Government in issue. It is probable that the legal advisors to the Provincial Government did not read the various judgments which are referred to in this judgment with sufficient care. If they did read them however their conduct is worse. Court judgments were ignored by these lawyers. This is unsatisfactory." Para, 84.

¹¹¹⁸ General Comment No. 19, par 74.

¹¹¹⁹ Section 184 (1) (a).

¹¹²⁰ Section 184 (1) (b).

(c) and monitor and evaluate the observance of human rights in the Republic.¹¹²¹

In so doing, the Human Rights Commission, unlike the ICESCR Committee, is vested with the power to investigate and report on the observance of human rights, and to take steps to secure redress where human rights have been violated.¹¹²² Unfortunately many of its recommendations have received deaf ear by the Department of Social Development.

8.3 Future Challenges

The study has shown that although the South African government has tried to do its best to implement the rights to social security, old age pensioners still encounter a number of problems in accessing their social grants. The main challenge that the government faces is one of restructuring the current social security system. The research has demonstrated that the concept of social security in South Africa is not well understood. The adoption of the General Comment No 19 on the Right to Social Security will be of assistance in determining the appropriate standards to be implemented by South Africa.

The Constitution, the White Paper on Social Security, and the Reconstruction and Development Programme (RDP) are documents that express the government's deep commitment to realize the rights of all South Africans so that they can live a qualitatively better life. This creates many aspirations particularly for a population that has been deprived of freedom, equality and social justice for many decades. When the government fails to fulfill these obligations, it violates the rights of individuals, and in this regard, fails its citizens.¹¹²³ The withdrawal of

¹¹²¹ Section 184 (1) (c).

¹¹²² Section 184 (2) (a).

¹¹²³ General Comment No. 19 paras 64-65. Violations of the right to social security can occur through acts of commission, i.e. the direct actions of States parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations outlined in

social grants (old age, disability and child-support grants) from thousands of beneficiaries without justification or notification is a clear violation of their rights. In a number of cases, the courts have found suspension or withdrawal of grants unlawful and invalid.¹¹²⁴ Clearly, these cases indicate failure on the part of the government to meet its obligations under both the Constitution and international law.

Although the South African social security system is still rudimentary, it is striving towards meeting its long term goal, namely, developing a 'comprehensive social security system'. Since South Africa is a new democracy, it should take the opportunity to enlist technical assistance and cooperation of the United Nations and its specialized agencies, such as the ILO. It can receive technical assistance and guidance on how its policies and legislation can be developed in line with international standards and norms. The ratification of the Covenant on Economic, Social and Cultural Rights and ILO Conventions is crucial for the realization of the right to social security, which will benefit the most vulnerable and marginalized groups, particularly the elderly.

The social security system in South Africa is experiencing many challenges. The six areas in the Nkonkobe Municipality investigated revealed a number of

paragraph 42 above; the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to social security; the establishment of different eligibility conditions for social assistance benefits for disadvantaged and marginalized individuals depending on the place of residence; active denial of the rights of women or particular individuals or groups.

Violations through acts of omission can occur when the State party fails to take sufficient and appropriate steps to realize the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realization of everyone's right to social security; the failure to enforce relevant laws or put into effect policies designed to implement the right to social security; the failure to ensure the financial sustainability of State pension schemes..." Paras 64-65.

¹¹²⁴

In these cases the court ordered the re-instatement of the grants. In *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E), 2000 (12) BCLR (C) 1322; *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E) and *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC).

problems. What is clear from the study is that the majority of poor people in South Africa need to be provided with basic essentials to sustain their livelihood. However, the reliance on the provision of this service alone does not enable the poor to move out of the poverty trap. The only programme that currently assists the elderly to get out of the poverty trap is the Old Age Grant. However, due to various constraints this scheme is not properly implemented. The inability to access services due to the geographical spread of households in the rural areas is a major challenge that the elderly people face. Lack of capacity and commitment among social service welfare staff is also another problem encountered in the province. Identification documents, such as birth certificates, the South African Identity Document (ID), and a medical assessment certificate are required when applying for a grant. The non availability of these documents or the time it takes to process them have often created barriers for the elderly and other grant recipients.

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Innovative strategies to eliminate or alleviate poverty still remain a continuing challenge despite the adoption of a number of pro-poor policies. The wave of service delivery protestations that the country has witnessed especially over the last two years or so indicates the deep seated nature and the complexity of the problem and the need for targeted measures towards the poor. As the masses continue to witness the growing affluence among a few South Africans and corruption among government officials amid their own abject poverty, the aspirations created by the formal attainment of freedom and equality can be easily dampen. This can have negative political consequences unless the government marshals more of its resources to support the poor.

8.4 Recommendations

From the research findings a set of recommendations can be made. These can be used to encourage the government to adopt and develop a more efficient and

effective system of social welfare. Although these findings are restricted to a specific case, the recommendations may have general and wider application.

8.4.1 Ratification of International Instruments

South Africa should speed up the ratification of international instruments that it has not yet ratified, particularly the International Covenant on Economic, Social and Cultural Rights (1966), and adopt its norms and standards in the national sphere. South Africa should also seek technical assistance from the United Nations and its specialized agencies, such as the ILO, in establishing and implementing a comprehensive social security system.

8.4.2 Additional Measures for Older Persons

The quality of life of older persons in Nkonkobe municipality is not adequate. It is recommended that special measures be adopted for older persons in addition to those agreed and in place, more in particular in households where there is more than one member. The research has showed that older persons take care of other members of the household and therefore the old age grant is not enough to buy food and meet the cost of other essentials, such as medication and school fees.

8.4.3 Eradication of Fraud and Corruption

The government should institute measures to stamp out fraud and corruption by criminal elements both within and without the department. This requires working closely with the police and the Auditor General. It also requires constant monitoring by the Department of Social Development.

8.4.4 Delivery of efficient and friendly service

The departments' bureaucracy should be sensitized to ensure the delivery of an efficient and friendly service in line with the basic values and principles governing public administration in the Constitution¹¹²⁵ and the "*Batho Pele*" principles (putting People first).

8.4.5 Promoting self-sufficiency for the elderly

The government should encourage and assist the elderly to engage in income generating, as well as self-sufficiency activities, in order for the latter to be able to meet the increasing burden of having to care and educate grandchildren and orphans, and also care for members of the extended family.

8.4.6 Education and Information

Community radio and other media should be used to mobilize, educate and disseminate information to the public and the elderly in particular, on aging, health, social welfare and violence. Similarly, society as a whole and young people in particular, should be exposed to the plight of the elderly and the need to embrace a culture of respect, empathy and solidarity.

8.4.7 Focus on Rural Communities

The research revealed that the majority of older persons reside in rural communities and not in urban centres or in facilities such as old age homes. The government should therefore significantly shift its focus and support for older persons so that more attention is paid to the rural communities. Services such

¹¹²⁵ See Section 195 of the Constitution.

as care and support, including counseling services, should also be provided for the elderly in these areas.

8.4.8 Focused and coordinated effort on the elderly

In order for the rights of older persons to be fully realized, the government should implement the recommendations of the Madrid International Conference on Aging, as well as its own national laws and policies.¹¹²⁶ Since the rights of older persons are diverse and specific to their needs, there should be inter-sectoral collaboration and coordination among various government departments, National Human Rights Institutions, Older Persons National Forum, and NGO's.



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¹¹²⁶ This is first major International Conference on Aging was held in Madrid, Spain, 2002.

9. APPENDICES

9.1 Questionnaire for Nkonkobe Municipality

NKONKOB MUNICIPALITY QUESTIONNAIRE

STRICTLY CONFIDENTIAL

	Visit 1	Visit 2 (if necessary)
Name of interviewer		
Date of this visit	/...../.....	/...../.....
Time interview started		
Time interview ended		

INTRODUCTION

My name isand I am a Doctorate candidate at University of Fort Hare pursuing field research on older persons. The purpose of this study is to examine the rights of older persons to social security and social assistance, focusing on Nkonkobe Municipality in the Eastern Cape Province, and to get possible solutions to these problems. Recommendations will be forwarded to the stakeholders. The information you give us will be kept confidential. Your name or address will not be identified in any of the reports we plan to write.

I would therefore be very grateful if you would give me a few minutes of your time to answer the following questions. Please answer as honestly as possible this will enable the researcher to know exactly what need to be done for your benefit and that for all older persons in your community.

1. Councilors indentifying particulars

Name of the respondent :		
Language		
Geographical Area	Village No	Ward No
How many villages in the area you represent		

2 Gender of the respondent	Male = 1	Female = 2
----------------------------	----------	------------

3. How long have you been elected as a councilor in this Municipality?

More than 10 years	Between 5 to 10 years	Less than 5 years
--------------------	-----------------------	-------------------

Q.1 How satisfied are you with services delivered in your area? / Waneliseke kangakanani kukuhanjiswa kwenkonzo kwingingqi yakho?

Comments :

--

Q.2 How do you feel about the living condition of older persons in your area? / Waneliseke kangakanani yimeko abaphila kuyo abantu abadala kwingingqi yakho?

Any comments:

--

Q.2.1 What conditions are you proposing to be improved in the one listed below? You rate them according to their order of preference.

1	Food	1	2	3	4	5
2	Clothing	1	2	3	4	5
3	Shelter	1	2	3	4	5
4	Water	1	2	3	4	5
5	Sanitation	1	2	3	4	5
6	Farming inputs	1	2	3	4	5
7	Land	1	2	3	4	5
8	Money	1	2	3	4	5
9	Medication	1	2	3	4	5
10	Other	1	2	3	4	5

Q.3 If older persons have access to the following facilities in their community how would you rate the services rendered to these facilities?/ ukuba abantu abadala bafumana ezinkonzo zilandelayo zoluntu lulendawo bahlala kuyo ingaba uceba uziva njani ngazo ezi nkonzo?

	Access / Ukufumaneka		Satisfaction / Ulwaneliseko Comment/Caphula:				
	1. Yes/ Ewe	2. No/ Hayi					
Q3.1 Clinic/ Iklinik	1	2	1	2	3	4	5
Q3.2 Community Hall	1	2	1	2	3	4	5
Q3.3 Transport services	1	2	1	2	3	4	5
Q3.4 Old age care/ Ukhathalelo lwabadala	1	2	1	2	3	4	5
Q3.5	1	2	1	2	3	4	5

Municipal offices / Iiofisi zikamasipala							
Comment:							

Q.4 Are you aware of any programmes that help elderly people in Nkonkobe municipality? Ingaba unalo ulwazi malunga nenkonzo ezifunyanwa luluntu kumasipala wakho?			
1. No, have never heard of it./ Hayi, andikhange ndive nto	2. Yes, have heard something about it./ Ewe, ikho into endiyivileyo	3. Yes, familiar./ ewe, ndinofifi	4. Uncertain./ Awuqinisekanga
Which ones? Zeziphi?			

Q.5 How did you come to know about the programmes/ Ukwazinjani oku (Nceda phawula ibenye nakuba yeyiphina kwezizilandelayo)	
1. Newspaper	
2. Radio	
3. TV	
4. Call Centre	
5. Social Workers	
6. South African Security Agency Office	
7. Other, specify/ Ngokunye, cacisa _____	

Q.6 Are you aware of Poverty Relief Projects for Older persons at Nkonkobe Municipality? Ingaba unalo ulwazi malunga ngeprojekthi ezithile njengenxalenye yenkqubo yokunceda abadala abahluphekileyo ukulwa indlala kuMasiPala uNkonkobe?			
1. No, have never	2. Yes, have heard	3. Yes, familiar./	4. Uncertain./

heard of it./ Hayi, andikhange ndive nto	something about it/ Ewe, ikho into endiyivileyo	ewe, ndinofifi	Awuqinisekanga
---	---	----------------	----------------

Q6. 1 If YES, could you please name the specific projects?/ ukuba ewe nika igama leeprojekthi

1. _____

2. _____

3. _____

4. _____

Q.7 What do you think are the most important needs of older persons? (Tick the most important blocks)/ Ucinga ukuba ziziphi izinto ezisemqoka kubantu abadala? Khetha ezintathu ezibalulekileyo

	Check Three	Rank 1, 2, 3
Transport facilities	1	
Extra Money	2	
Health facilities	3	
Housing	4	
Projects	5	
Food parcels	6	
Old age homes	7	
Basic income grant	8	
Agricultural support	9	
Other 1 (Specify)	10	
Other 2 (Specify)	11	
Other 3 (Specify)	12	

Q.8 Whose responsibilities do you think it is to care for the large numbers of destitute older persons in Nkonkobe in Eastern Cape Province? Ucinga ukuba ngumsebenzi kabani ukunakakekela abantu abadala/ (Tick the two blocks you think they are important)

1. The Government
2. Welfare, Churches and Non-governmental organizations (NGO's);
3. Families of the Older persons concerned
4. Community memebers
5. The Nkonkobe Municipality
6. Other please specify/ Ngokunye cacisa _____

Q.9 The Old age grant, disability grant and the war veteran grant has to cover the costs of food, clothing, transport, special medical care, children education etc. It is currently, R940 per month. Do you think that the grant amount is sufficient to cover for the costs? Ucinga

ukuba I R940 ngenyanga yanele?

Yes

☐ 1

No

☐ 2

Q.10 If you answered 'NO' above, how much money do you think would be required to cover the costs of caring for the aged every month? Xa uphednule ngo hayi ngasentla, ucinga ukuba ingaba yimalimni enokwanela ukunakekela imfuno zomntu omdala ngenyanga?

R_____

Q.11 What services do you think the government should provide for older persons according to you that will improve the quality of life of older persons?/ Luluphi usizo urhulumente ocinga ukuba angalunika abantu abadala baphephe andlalani nemeko abaphila kuyo iphucuke?

Comment/ Phuhlisa _____

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Q.12 What are the most pressing challenges you are faced with every day? Yeyiphi eyona mingeni ebalulekileyo kakhulu ojomgene nayo yonke imihla?

1. _____
2. _____
3. _____
4. _____
5. _____

9.2 Questionnaire for the Elderly

QUESTIONNAIRE FOR THE ELDERLY

STRICTLY CONFIDENTIAL

1. Identifying particulars

Name of the respondent :		
Language		
Geographical Area	Village No	Ward No
Region		
Questionnaire No		

	Visit 1	Visit 2 (if necessary)
Name of interviewer		
Name of the supervisor		
Date of this visit	/...../	/...../
Time interview started		
Time interview ended		

My name isand we are conducting a research for the University of Fort Hare (and show your student no or any identification). We are collecting information on the problems that the elderly people are facing in Nkonkobe Municipality in the Eastern Cape Province. The purpose of this study is to gather views of the elderly group and to get possible solutions to these problems. Recommendations will be forwarded to the stakeholders. The information you give us will be kept confidential. Your name or address will not be identified in any of the reports we plan to write.

I would therefore be very grateful if you would give me a few minutes of your time to answer the following questions. Please answer as honestly as possible this will enable the researcher to know exactly what needs to be done for your benefit and that for all older persons in your community.

It is important for you to know that anything you say will be kept confidential and that nobody will have access to the information given.

Indicate members of the household, their age, sex and their relationship to him or her.

Code	Sex	Age	Relationship with the elderly
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			

Codes for the above table

Sex : 01

Age: 02

SECTION 1 BACKGROUND QUESTIONNAIRE

	Time when started this section (hour : minutes)
--	---

1.1 Age

--	--

1.2 Gender

1	MALE	
2	FEMALE	

1.3 Race

1	African	
2	Indian	
3	Coloured	
4	White	
5	Other	



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1.4 What is your current marital status?

1	Never married	
2	Married	
3	Widowed	
4	Divorced or separated	

1.5 How long have you been living in this area?

More than 40 years		Between 39 and 30		Between 29 to 15 years		Less than 15 years	
--------------------	--	-------------------	--	------------------------	--	--------------------	--

1.6 How many people stay with you in your household?

--	--

1.7 How many children under 18 years depend on you?

--	--

1.8 How many children aged 7 years depended on you?

--	--

1.9 Have you ever attended school?

1	YES	
2	NO	

1.10 What is the highest level of education attained?

1	Junior primary	
2	Primary	
3	Secondary	
4	High school	
5	Tertiary	

1.11 Is your spouse still alive?

1	YES	
2	NO	

1.12 Do you have caring responsibility for anyone in the household/

1	YES	
2	NO	

1.13 If the answer is YES, then who? Name them.

1	Spouse	
---	--------	--

2	Children	
3	Grandchildren	
4	Great grandchildren	
5	Other relatives	

1.14 What do you do for them?

1	Provide money for school fees	
2	Food	
3	Money	
4	Care for them	
5	Any, describe	



1.15 Do any of the people in the family have special responsibility for you?

1	YES	
2	NO	

1.16 If the answer is YES which people?

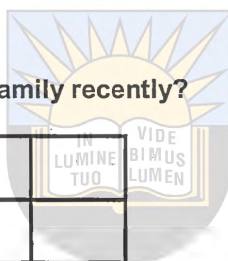
1	Spouse	
2	Children	
3	Grandchildren	
4	Great grandchildren	
5	Other relatives	
6	Extended family	

1.17 What do they do for you?

1	Clean	
2	Cook	
3	Take care	
4	Wash clothes	
5	Stay with	
6	Other (specify)	

1.18 Has anyone been sick in the family recently?

1	YES	
2	NO	



1.19 If the answer is yes, who?

1	Spouse	
2	Children	
3	Grandchildren	
4	Great grandchildren	
5	Other relatives	
6	Extended family	

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1.20 How long have they been sick?

1	A week	
2	2-4 weeks	
3	A month	
4	More than a month? (Specify)	

1.21 Did you have to care for them?

1	YES	
2	NO	

1.22 What was the cause of sickness?

1	Tuberculosis	
2	Asthma	
3	High Blood pressure	
4	Kidney problem	
5	Stroke	
6	Cancer	
7	HIV infections	
8	Injury	
9	Violence related injury	
10	Fever	
11	Diabetes	
12	Other name	

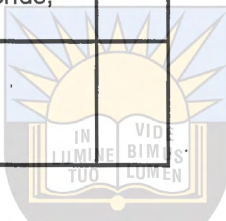
SECTION 2 SOURCE OF INCOME

2.1 Does the household receive income in any of the sources listed below?

1	YES	
2	NO	

2.2 If Yes, which one?

	Source	
1	States grants (Old Age Pension, child support, disability, foster care grant, War Veteran grant)	
2	Private Pension/ Private Provident Fund	
3	Government Civil Servants Pension	
4	Unemployment insurance Fund	
5	Private Maintenance	
6	Interest earnings including dividends, interests from savings	
7	Other (describe)	



2.3 What paid work do you do/ did you do?

1	Domestic worker	
2	Factory worker	
3	Construction	
4	Mining	
5	Other (specify)	
6	Never	

2.4 When last did you do paid work?

1	Last 3 months	
2	Last 6 months	
3	Last year	
4	Two years ago	
5	Five years ago	
6	More than five	

2.5 When you were still working, did you pay into pension/ provident fund?

1	YES	
2	NO	

2.6 If YES when you retired, did you receive income from that fund?

1	YES	
2	NO	

2.8 If YES how much?

--	--



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2.9 For how long did it last?

	Put a realistic period

2.10 Do you/ did you have any private savings

1	YES	
2	NO	

SECTION 3: SECTION 3 SOURCES OF INCOME OTHER THAN FROM WORK

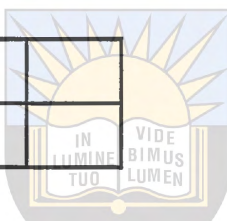
3.1 Do you know any programme that help elderly people?

			If YES, from where?	
	YES	NO	Source	
1	1	2	Here where you live	

2	1	2	In the local area	
3	1	2	Social Workers	
4	1	2	South African Security Agency Office	
5	1	2	Other, (specify) _____	

3.2 Have you yourself ever benefited from such programmes?

1	YES
2	NO



3.3 If YES what kind of assistance do/did you received from any sources listed below?

	Source	Code
1	Food parcels or meal	
2	Government Supplementary Food Scheme	
3	Food from Clinics	
4	Gives clothing	
5	Gives Farming inputs	
6	Poverty Relief food parcels	
7	Old Age Pension	
8	Government Disability Grant	
9	War Veteran Grant	
10	Grant in Aid	
11	Money	

3.4 If you received money such for example in a form of (old age pension) how much was it?

--	--

3.5 How often did you get it?

1	Once a month	
2	Once in two months	
3	Once in three months	
4	Once a year	
5	Other (specify)	

3.6 Do you think the grant amount is sufficient to cover all your living costs?

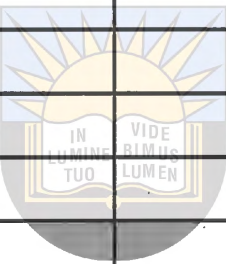
1	YES	
2	NO	

3.7 How did you come to know about the programme?

1	Newspapers
2	Radio
3	TV
4	Community meetings
5	Relative
6	Social Workers
7	South African Security Agency Office
8	Other, specify/ _____

3.8 How do you get access to the assistance?

3.9 If you receive state grants how do you get the money?

1	Through the bank	
2	Where you stay	
3	Community hall	
4	Social welfare offices	
5	Any specify	

3.10 About how long does it usually take to get to the pay points?

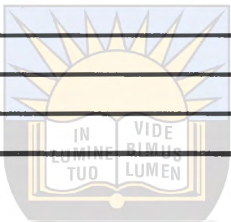
Code	Distance	
1	Less than 1 kilometer	
2	1.– 2 Kilometers	
3	3– 5 kilometers	
4	5 and above	
5	Specify	

3.11 What kind of transport do you use to get to and from the place? /pay point

1	Bus	
2	Taxi	
3	Car	
4	Walk	

5	Other (specify)	
---	-----------------	--

3.12 What are the problems encountered when getting assistance. PROBE for:
 Transport
 Time taken to process
 Having to get documents



3.13 Could these programmes/ forms of assistance be improved?
 PROBE for:
 Eligibility
 Delivery

3.14 IF you do/ did not received any of the sources of support stated above, have you applied for any of the following social assistance listed below?				If yes, which one?
	Source	YES	N0	CODE
1	Old Age Pension	1	2	
2	Government Disability Grant	1	2	
3	War Veteran Grant	1	2	
4	Grant in Aid	1	2	
5	5. other (specify)	1	2	

3.15 If the answer is YES how long have you applied for this assistance?

1	1 to 4 weeks	
2	1 Month	
3	1 – ½ -	
4	1½ - 2 months	
5	2½ - 3 months	
4	3½ - 4 months	
5	4 months and above	

3.16 If the answer is NO why you have not applied for the assistance?

1	Not reached pensionable age	
2	Male age 60	
3	Female 59-60	
4	Male below 65	
5	Any specify:	
6	Do not have ID	
7	Do not know where to apply	
8	The place is far	
9	Do not have money for transport	

3.17 Taking everything into account, how satisfied are with the way you live these days?

1	Very satisfied	
2	Satisfied	
3	Neither satisfied nor dissatisfied	

4	Dissatisfied	
5	Very dissatisfied	
6	Explain:	

3.18 Which of these things is a problem to you? Rate them as if it is a serious problem, 2 if it is moderate and 1 if it is not a problem?

Code	Source	1	2	3
1	Food			
2	Clothing			
3	Shelter			
4	Water			
5	Sanitation			
6	Farming inputs			
7	Land			
8	Money			
9	Medication			
10	Other			

3.19 What in your opinion do you think the government should do to improve the social welfare of the elderly in South Africa? In other words, what do you need most?

3. 20 How much do you spend on average each month on the following items?

Code	Item	Rand per month	Rand per week
1	Housing (e.g. rent, bond)		
2	Food		
3	Water, rates, sanitation		
4	Electricity, paraffin, gas, wood		
5	Bus fees		
6	Taxi fees		
7	Own car		
8	Education (school, crèche. Etc)		
9	Medical expenses (clinic/Doctor)		
10	Child support		
11	Clothing		
12	Accounts		
13	Other expenses, specify		

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