

THE INFORMAL SOCIAL SECURITY SECTOR: A CASE FOR
STATUTORY REGULATION IN SOUTH AFRICA



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A mini-dissertation submitted in partial fulfilment of the requirements for
the Degree of Master of Laws (Labour and Social Security Law) in the
School of Post-Graduate Studies and Research in the Faculty of Law at the
North West University, Mafikeng Campus.

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NOVEMBER 2008

CANDIDATE'S DECLARATION

I, MABULU NKEPE,

Declare that the dissertation for the degree of Master of Laws in Labour and Social Security Law at the Mafikeng Campus of the North West University, hereby submitted, has not been submitted by me for a degree at this or any other institution or University, that it is my own work in design and execution and that all material contained herein has been duly acknowledged.

SIGNED.....

DATED THIS 26th DAY OF NOVEMBER 2008 AT MMABATHO, IN
THE NORTH WEST PROVINCE OF THE REPUBLIC OF SOUTH AFRICA.

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DEDICATION

To all those who are marginalized in terms of the current social security system of South Africa, the poor, the hungry, the disabled and all who need social assistance including those who are unable to provide for themselves.



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Writing a continuous, logical and coherent piece of work of this nature is not an easy task at all. As far as I can imagine it cannot be a solo task due to its magnitude and critical nature. I would like to thank all who contributed to this work. Those who gave me all sorts of support from all corners of the world, It be emotional, intellectual, spiritual or otherwise. Without that support I would not have done this work. Firstly, to Prof Mahao Nqosa, who encouraged and motivated my pursuing the Masters Degree in particular labour and social security law. His support and mentoring was massive. I sincerely thank him. Secondly, to Miss Nkoti Mosae (as she then was) now Mrs Mabula, I thank her for her great support and the welcome she gave me when I first came to Mmabatho. Most importantly the critical and crucial role she played in the conceptualization and infancy of the topic for this study. I thank her too. My mentor, instructor and promoter Prof Philip Iya, was very instrumental for making this work a success it is today. His mentorship and guidance gave a clear direction towards completion of this work. During the most difficult times when comrades Njuo Fuo, Ramabolu and I were drowning in “*a heavy debt*” and could not register for this academic year, he played a parental role, counselor and a true friend indeed. I deeply thank you too Prof.

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GLORY BE TO THE DEVINE POWERS.

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LIST OF ACRONYMES

ANC	African National Congress
BBBEE	Broad Based Black Economic Empowerment
BIG	Basic Income Grant
COIDA	Compensation for Occupational Injuries and Diseases Act
DSD	Department of Social Development
EEA	Employment Equity Act
GDP	Gross Domestic Product
HIV/AIDS	Human Immune Virus/Acquired Immune Deficiency Syndrome
ILO	International Labour Organization
ILJ	International Labour Journal
NAD	Native Affairs Department
NT	National Treasury
NP	National Party
OECD	Organization for Economic Cooperation and Development
RDP	Reconstruction and Development Programme
SA	South Africa
SADC	South African Development Community
SAHRC	South African Human Rights Commission
SASSA	South African Social Security Agency
SIDA	Swedish International Development Office
UK	United Kingdom
UN	United Nations
US	United States
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme

ABSTRACT

The study commences with the background and statement of the problem essentially highlighting the need for statutory regulation of the informal social security paradigm and the problem of the dual approach to social security in South Africa. By dual approach is meant two categories or branches of social security, being formal and informal social security systems. Each system will be dealt with in detail in the study. The study reveals that the dual approach is problematic in that the majority of the people are left outside the ambit of the social security. A comparison of the existing statutory framework in South Africa is made in order to serve as a reference point for the informal social security statutory regulation. Another notable submission to be made herein is that informal social security should be defined within a broader concept of social security. At the policy level, the existing policies on social security still do not cover the majority of the people living in absolute poverty. It is also a significant finding in the study that there is a need for a close cooperation between the formal and informal social security much as they have the same noble goal of alleviating poverty. It will be argued however that the two should be kept separate and regulation of the informal social security is necessary. The relationship between the two will be explored with the view of examining the differences and similarities.

It is hoped that the jurisprudence canvassed herein will inspire policy makers and governments in particular to use policies and law to ensure protection of the poor and the marginalized.

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

South Africa is a democratic sovereign state founded on Constitutional values such as human dignity, the achievement of equality and the advancement of human rights and freedoms as well as the supremacy of the Constitution and the rule of law¹. South African democracy is rather still at an infant stage. Though at this early stage of democracy, South Africa has achieved a lot in terms of upholding the Constitutional values through the courts of law and legislation.

The adoption of the Constitution of South Africa of 1996 marked the beginning of the new South Africa and an end to an era which was seen by the world as having little or no respect for human rights. The adoption of the new constitution was the beginning of the democratic transformation process, which sought to redress the past and encouraged reconciliation and unity².

The Constitution of South Africa, which is the supreme law,³ came with a host of socio economic rights and duties, which signaled the dawn for the new era⁴. The critical and crucial role of the judiciary in defending and protecting the fundamental law has remained remarkable. The liberal approach that the courts of South Africa, more particularly the Constitutional Court, have adopted in dealing with the rights contained in the Bill of Rights has brought more meaning and attached sufficient recognition and

¹ The Constitution of the Republic of South Africa of 1996, Section 1 (a) and (c).

² See Mpedi, L.G Redesigning the South African Unemployment protection system: Associo-Legal Inquiry, LLD thesis submitted in University of Johannesburg 2006.

³ Refer to Section 2 of the Constitution of South Africa 1996 supra.

⁴ Mpedi, L.G *ibid*.

respect for human rights. This aspect notwithstanding, the majority of South Africans who had been poor remains still very poor and are living at the mercy of poverty.

The South African communities have, however, since time immemorial known that livelihood is not only a matter of today alone but extends to the future. That is, while living today, it must not be forgotten that tomorrow is also nearby and may come with its own misfortunes that may threaten the very existence of mankind. They knew that there was a need to get prepared for any future risks that may strike their communities.

This deep-rooted passion to provide for social protection safety nets will not cease to exist in the African communities. In support of this proposition, Olivier and Mpedi had the following to say,

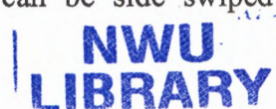
African families have-despite all the hardships life threw at them-long devised means and strategies to ease prevent or cope with socio-risks (as recognized by the western concepts of social security) and other social hardships. These survival strategies, which are commonly referred to as informal, traditional or indigenous social security, are still used in Southern Africa and the rest of Africa⁵

To a very large extent, the above is true in South Africa. There exist a number of these traditional or indigenous social security systems within the South African communities. These include among others burial societies and *stokvels*.⁶ In simple words, *stokvels* may

⁵ Olivier M.P and Mpedi. L.G “*Extending Social Protection to Families in the African context: The Complementary Role of Formal and Informal Social Security.*” A paper presented at the International Research Conference in Belgium 2003 at page 18.

⁶ *Stockve,l* also *stockfel* is a South African terminology which refers to a club or syndicate normally of black women for pooling of funds, mutual support entertainment, often organized through parties held at

be briefly explained as an informal saving scheme by members of a given community. It is a homegrown solution to the fact that banks are expensive and complicated to the black ordinary members of the community more so because there are no extra charges such as high interests rates ordinarily found at the banks or other financial institutions⁷. They grew out of the fact that under the discriminatory policies of apartheid, there were no banks in the few, overcrowded black occupied areas, and could only be found in the cities where Blacks were ordinarily not allowed. Almost a decade and a half after the demise of the apartheid era banks still fail to cater for the needs of South Africa's poor majority and *stokvels* thrive. There are different types of *stokvels*. Some members donate money every month which is shared out at the end of the year. While others are rotating savings scheme where everyone contributes and members run turns in receiving the money every month. A more fundamental limit is that most *stokvels* save for obvious upcoming events and needs. For instance, a Christmas come together party, erecting tombstone for a late parent and so on. What *stokvels* fail to do is to help people cope with the events that they do not expect like when a cluster of relatives come begging for donations for funerals because someone is dead, as a result conscientious savers can be side swiped by unforeseen developments.⁸



A burial society, on the other hand, provides informal insurance to pay funeral expenses but usually compels its members to help the aggrieved family in different practical ways.

members' homes in rotation. Stockvel is a world wide phenomenon and seem to have flourished and still flourish wherever people are poor and have a sudden need for a larger sum of money or regular need for collective services, and wherever saving is difficult unless turned into a personal human obligation. See Brundel, M S. 1962. Black woman in search of gold cited in *A Dictionary of South African English* by Jean Branford and William Branford. Oxford University Press 1978 at page 319.

⁷ See www.geocities.com for a more elaborative discussion on the nature and form of *stokvels*.

⁸ See Scott. 2005. Finance South Africa: Rare Insight into Poor Peoples Bank at www.ipsterraviva.net.

All members are expected to visit the aggrieved family to offer condolences and consolation to attend the funeral.⁹

As opposed to what Olivier and Mpedi¹⁰ have said above, Franziska and Behrandt¹¹ have moved away from the indigenous social security as a mere practice to provide social protection to the community but to a phenomenon of a right¹². In their discussion on social protection issues, they point out that, in most African States the human right to social security is still a dream far from being a reality for the majority of the population. This movement has been of magnificent significance towards the way the concept of social protection is approached and understood today in our jurisdiction. This is manifested in the constitutional embodiment in the Bill of Rights of a right of access to social security¹³.

Social security provisioning in South Africa, as will be shown hereunder is embodied in a dual-social security system, that is, social security system whereby informal coping mechanisms (hereinafter informal social security) operate alongside modern social security (formal social security).

This background seeks to justify the serious need for legislative intervention within the informal social security sector. Given the characteristics and the nature of the manner in which the informal social security mechanisms operate there was indeed an outstanding

⁹ See Legal City: You and Your Rights at www.legalcity.net.

¹⁰ Olivier. M.P and Mpedi. L.G. supra.

¹¹ International Labour Organisation, Social Security Department Cash Benefit in Low Income Countries: Simulating the effect on Poverty reduction for Senegal and Tanzania. Issues in Social Protection, Discussion Paper 15, Geneva 2006 at page 24.

¹² Social Security protection is also regarded by the United Nations as a basic human right-albeit one that a small proportion of the people on our planet actually enjoy-accessed at www.ilog.org. This right is also upheld in the UDHR 1948 and the International Covenant on Economic, Social and Cultural Rights 1966.

¹³ Section 27(1) (c) of the Constitution of South Africa 1996.

need for the choice of this topic which will seek to emphasise the need to regulate the informal social security in South Africa.

1.2. PROBLEM STATEMENT AND SUBSTANTIATION

The *lacuna* in the South African social security law arises from the dual approach to social security system currently prevalent in the country. There are a number of research questions that immediately arise out of this statement. The first question is what is the problem brought about by the dual approach to social security? The second question is, what are the problems and challenges of non-regulation of the informal social security in South Africa? It is the aim of the study to provide answers to the above stated questions.

1.2.1 The Dual Approach to Social Security

The major problem with the dual approach to the social security system in South Africa is that it creates disparities between the two forms of social security; that is, formal and informal social securities. The South African law recognizes the right of access to social security as a whole.¹⁴ The abovementioned approach seeks to break down this right into two aspects, thereby dividing it into formal and informal social security, hence leaving the latter unregulated. According to the most recent statistics, there are at least eight hundred thousand active *stokvels* in South Africa with a total membership of approximately ten million people.¹⁵ This seeks to demonstrate how large the informal

¹⁴ See the Constitution of South Africa: Sections 27 (1) (c)

¹⁵ See the statistics at www.legalcity.net

social security measures are; yet, they receive so little or no attention at all from the government spheres.

The *stokvels* are, of course, not only the informal social security groupings found in South Africa. There are still many more other arrangements available within this jurisdiction. The majorities of the people in South Africa are black and poor and are the ones that are left at the mercy of poverty and are resorting to the statutorily unregulated informal social security arrangements which expose them to very high risks of losses.¹⁶

There are several hurdles and problems that one comes across on a daily basis. To mention but a few, the problem of poverty and unemployment are the most common of these hurdles and problems. Indeed some of these problems are but simple challenges that do not require anyone to crack his/her head about. They are so minor that one can almost ignore and survive with or without. On the other hand, there are those that are so serious that they require immediate attention and solution, such as poverty, unemployment and the HIV/AIDS pandemic issues. The case is the same with the legal hurdles or problems. Some problems in law are so minor that they may be considered as *de minimis* and really insignificant. While on the other hand, other problems are really so significant- such as the current problem of non regulation of the informal social security system- that something will have to be done about them, otherwise serious consequences would result,

¹⁶ For example, in the informal social security arrangements, cash is normally not banked and members stay in townships in which there are very high risks of robberies and theft and the only money may be stolen just over night hence a need to establish some legal framework to curb the problems that may defeat the purpose of these schemes, such as moneys disappearing.

which would hamper seriously on the economic aspects, socio-political and governance of the country entirely.

The critical and thought provoking question at this stage therefore is whether the current problems of non-regulation by statute of the informal social security are of such a nature and magnitude that makes this study purposeful.

The area of social security law in South Africa has been growing fairly fast and has so far been well developed through legislation and case law as well as writings of prominent scholars in the field of labour and social security law. The importance of social security in the eradication of poverty is well appreciated in both the developing and the developed nations. This signifies the importance that must be attached to all mechanisms that advance and contribute towards advancing this noble goal of eradicating poverty- that is through social security arrangements.¹⁷

The study seeks to address the current problem of dual social security herein canvassed by providing a clear legislative model for the informal social security and a way of extending coverage for the formal social security.

1.2.2 Non-regulation of the Informal Social Security

The magnitude of the problem (s) of non-regulation of the informal social security system cannot be over emphasized. This is so given the important and critical role that social security measures play in poverty alleviation. Moreover, the implications, effects and consequences of non-regulation of informal social security negate the very intention of

¹⁷ See for example Olivier, M.P et al. 2003 Social Security: A Legal Analysis.

these arrangements which is poverty eradication. Indeed the after effects or poverty are well known, to name but a few, corruption, high rates of crime, high levels of HIV/AIDS and so forth. Non-regulation of the informal social security measures renders it open to inconsistent and dishonest practices (such as pyramid schemes and others) and the community has no recourse or remedies. This research paper will suggest the most workable approach towards the problem of non-regulation of informal social security systems. This we submit will be the ground breaking approach.

1.3. AIMS AND OBJECTIVES OF THE STUDY

1.3.1 Broad Aims



The study intends to contribute to the on-going academic discourse on the integration of formal and informal social security in an attempt to discover if such integration shall be of importance in the measures towards regulation and provisioning of the informal social security. It must be acknowledged that, informal social security measures play a very crucial role in the provision of social security protection because of the exclusionary and categorical approach inherent in the formal social security system. This is the approach of having two categories of social security provisioning, that is formal and informal social security systems. The benefit of this study therefore, is to find ways to strengthen the informal social schemes, possible law reform and comprehensive policy review.

Over and above this, the study aims to critically reflect on the dualist approach to social security currently prevalent in South Africa. It however, places more emphasis on the

informal social security system. It extends to the exploration of the various forms of informal social security. The other purpose of this study is also to critically analyze the disparities (at least as far as regulatory measures are concerned) that exist between the informal and formal social security systems. Ultimately, the study hopes to bring into the jurisprudence the most workable approach to be used by the legislators when interfering with the social security sector or law.

The result will be adequate social security to the masses living on the margins of the current social security system. In this manner, a minimum level of social protection for everyone will be ensured. Consequently there will be an acceptable standard of living for all. The study is intended to benefit parliamentarians, policy makers, law students, law lecturers and most importantly the majority of citizens surviving on the informal sector of the South African economy.

1.3.2 Specific Objectives

Over and above the already discussed broad aims of the study, it also has the specific objectives. First of all, it specifically aims at finding out exactly how to move towards a statutory regulation of the informal social security system. Focus shall be on the advantages and disadvantages of informal social security provisioning in South Africa. Secondly, it will examine whether the statutory regulation of the informal social security system will not have the negative implications on the self-regulating system and whether the statutory regulation will not bring unnecessary complications that would affect the

effectiveness and operation of these systems. Thirdly and lastly, the study specifically aims at proving a rather appropriate statutory framework that would be put in place for the purposes of regulation of informal social security. The target is that this framework should not be seen to be interfering with the already existing operation of the system, but to be bringing in the protective mechanisms to the masses who rely on these arrangements.

1.4. METHOD OF INVESTIGATION

Bailey¹⁸ defines research methodology as the philosophy of the research and the standards or criteria the researcher uses for interpreting data and reaching conclusions. Now that an explanation of a research methodology has been laid down, focus now shifts to unpacking the available types of these methodologies and see which of the available methodologies shall be suitable for the study and why such will be suitable.

Generally speaking, there exist two main methods of research. These are the qualitative and quantitative methods of research. There is a continuing debate over whether these two methods of research can be complementary. Some researchers have argued that combining the two methods can be advantageous and can actually assist build a more complete and comprehensive picture of the social world,¹⁹ while on the other hand, others have argued that the epistemologies that underpin each of the two approaches are so

¹⁸ Bailey, K.D *Methods of Social Research*; The Free Press, New York page 33.

¹⁹ See Bansell, R. B. 1991. *Advanced Research Methodology : An annotated guide to sources*; Metuchen, NJ; Scarecrow Press at page 34.

divergent that they cannot be reconciled within a research project.²⁰ Before taking a position on the application of the different types, it is necessary to understand what each model of research entails.

1.4.1 Conceptual Research Issues

(a) The Quantitative Research Method

This is the systematic scientific investigation of quantitative properties and phenomena and their relationship. The objective of this method of research is to develop and employ the mathematical models and theories and/or hypothesis pertaining to natural phenomena.²¹ The process of measuring is central to this method due to its nature to provide the empirical observation and mathematical expression of quantitative relationships. In this method, evidence is evaluated and theories and hypothesis are refined, technical advances are made and so on.²² Moreover, the quantitative method is defined as the numerical representation and manipulation of observations for the purpose of describing and explaining the phenomena that those observations reflect.²³

²⁰ Stern, P. C & Kalof, L. 1996. *Evaluating Social Sciences* (2nd edition) Boston : Allyn and Bacon at pages 3-4.

²¹ Stern, P. C & Kalof, L *ibid* at 10.

²² Stern, P. C & Kalof, L *ibid* at 10-11.

²³ Masaule, PR *The Constitutional Protection of Freedom of Speech and the Prohibition of Hate Speech in South Africa: Promises and Pitfalls*, 2004 LLM Dissertation, North West University (unpublished) cited in Phaza, J.N *The Role and Impact of the Judiciary in the Law making Process in South Africa*, 2006, LLM Dissertation, North West University (Unpublished).

(b) The Qualitative Research Method

This method of research is widely used in both the natural and social sciences. It is the examination, analysis and interpretation of the observations for the sole purpose of discovering underlying meanings and patterns of relationships including classifications of types of phenomena and entities in a manner that does not involve mathematical models.²⁴ In this method of research reliance is on the reasons behind various aspects of behaviour. In other words, it investigates the why and the how of the decision making, and not just the what, where and when aspects.

1.4.2 Choice of Method-Qualitative method

The research methodology in this study is qualitative. The qualitative method is a non-numerical examination and interpretation of observation for the purpose of discovering underlying meanings and patterns of relationships as already discussed above. The major advantage of the qualitative method is that it is efficient in that it is time saving and cost effective as opposed to quantitative method.

According to Wolcott H.R.²⁵ qualitative analysis has two main advantages. Firstly, it produces more in-depth, comprehensive information. Secondly, it uses subjective information and participant observation to describe the context, or natural setting, or of

²⁴ See Denzin, N. K & Lincoln, Y. S. 2005. *The Sage Handbook of Qualitative Research*. Sage Publications accessed at www.wikipedia.org on 15 July 2008.

²⁵ Wolcott H.R (1990) *Qualitative Inquiry in Education: The Continuing Debate*. www.okstate.edu/ag/agedcm4h/academic/aged5980a/5980/newpage21.htm.

variables under consideration, as well as the interaction of the various variables in the context. It seeks a wide understanding of the entire situation.

Despite these advantages, Wolcott outlines three main disadvantages of qualitative research methods. He argues that such research is subjective in nature and leads to difficulties in establishing the reliability and validity of the approaches and information. Furthermore, it is very difficult to prevent or detect researcher-induced bias. Finally, he contends that, the scope of such research is limited due to the in-depth, comprehensive data gathering approaches required. Despite these drawbacks, the qualitative method of research is the most appropriate for our topic under investigation.

In a nutshell, the research in the study is based on analysis of writings of prominent scholars on the subject matter. This it is submitted is an important aspect of the qualitative method of research. An attempt will be made to analyze the existing literature. Library research will be relied on for it is accessible and provides most of the relevant materials needed for the study. The library provides both primary and secondary materials in a very efficient and time saving manner hence a major information provider in the study. Frequent debate and analysis of legal issues during seminars will give the researcher an opportunity to interact with different scholars' thereby expanding knowledge which in turn will be useful herein. An analysis of journals, periodicals and case law will also be of great assistance in formulating this research document. The internet materials will also be used in the study.

1.4.3. Analysis of the Literature

The main problem facing our social security system is the fact that informal social security system is not regulated. The Social security laws do not statutorily protect citizens in the informal sectors of the economy. However, those who are in the formal sector, or those formally employed, enjoy adequate statutory protection under the formal social system. The non-regulation of the informal social security poses serious problems to the future of the system, which is so noble and important to the lives of millions who depend on it, who happens to be a larger portion of the citizenry. The entry point of this study is the concentration on the dualist approach to social security South Africa.

This approach has brought some tension between these two forms of social security. This is the case despite the fact that the two are equally important. The tension, which results in the unattended gap, is caused by the fact that formal social security is government driven and statutorily regulated while the informal social security remains unregulated and unprovided for. Nevertheless, it is driven by market forces.



Two lines of argument dominate the literature. The first line of the argument proposes integration of formal and informal social security while the other proposes strengthening of informal social security²⁶. There are some scholars²⁷ who are of the opinion that because there exist the phenomenon that many African households survive on the basis of a combination of formal social security and informal coping mechanisms, then the best

²⁶ See for example, Oliver MP and Mpedi, LG 2003 op cit.

²⁷ See for example, Oliver MP et al 2004. "*Formulating an integrated Social Security Response-Perspective on Developing links between Informal and Formal Social Security in the SADC Region*" A paper prepared for EGDl-WIDER Conference on Unlocking Human Potential Linking the Informal and Formal Sectors; Helsinki Finland 2004.

way out is to form a combined system of both the formal and informal social security. This is a very comprehensive and groundbreaking argument. One however, regrets to disagree. Due to foreseeable problems of integration, *inter alia* the inequality, it would seem desirable to rather regulate and strengthen informal social security through legislative processes as mandated by the Constitution.²⁸

The above position is precipitated by the fact that the formal social security system in African context is unable on its own to expand protection to families generally. This state of affairs is caused by obvious related factors such as, the formal employment basis of the formal social security arrangement. Furthermore, the urban bias of the formal social security is yet another factor contributing to the above state of affairs. Much as this failure of the formal social security system to extend protection generally to the non-formal sector is argued may be remedied by intergrading it with informal social security system, one may submit that it cannot be wholly correct. The reason for this failure is due to the already identified factors inherent in the system itself.

The importance of the informal social security can neither be denied nor disputed. This, however, does not make it the all good-concept. The informal social security coping mechanisms are still subject to some limitations as is evident from their limited effectiveness, reach and sustainability²⁹. Olivier and Mpedi³⁰ therefore suggest that because each system has its own limitations and shortcomings, an integrated and coordinated approach (as opposed to dual approach) towards social protection for families in African context need to adopt both elements. This too, is a noble idea.

²⁸ *The Constitution of the Republic of South Africa supra* Section 27 (1) (c).

²⁹ Olivier & Mpedi *supra*.

³⁰ Olivier & Mpedi *ibid*.

However, the problem remains unsolved. We are still confronted with the challenge of non-regulation of the informal social security system, which provides assistance to the majority of the population. The point of departure in this study as opposed to the already existing works is to move for the regulation of the informal social security sector so that those who depend on it also get adequate protection and guidance of the law.

As already indicated, the right to social security is a universal human right fully recognized and protected by the Constitution of the Republic of South Africa.³¹ The Constitution further obliges the state to take all measures necessary, reasonable and within its available resources to achieve the progressive realization of each of the socio economic rights.³²

In the Government of the Republic of South Africa and Others v. Grootboom and Others,³³ the enforceability of the socio-economic rights has been confirmed. This case concerned the right of access to housing but principles highlighted therein are applicable to all socio-economic rights. This includes the right of access to social security. This judgment should therefore be applied to the social security position in the Republic especially as far as informal social security is concerned. As Dekker³⁴ correctly pointed out, from the above case, it can therefore be deducted that in the same manner social assistance should be supervised in order to bring relief to those in desperate need.

³¹ Section 27 (1) (c).

³² Section 27(2) of the Constitution.

³³ 2000 13 CLR 1109.

³⁴ Dekker op cit.

From the above discussion, it can be seen that the available and existing literature focuses mainly on the strengthening mechanism, which according to the proponents is integration.

The only logical conclusion that one is inclined to come up with at this stage is the fact that informal social security provides valuable support to our societies and communities and should be strengthened and statutorily regulated, hence a point of departure of this study.

1.5. SCOPE AND LIMITATION OF THE STUDY

1.5.1 Scope

Much has been written on social security in South Africa. Bearing this in mind, it is of paramount importance at this stage to set out clearly the scope of this study. This study will confine itself to the problem brought by the dual approach to social security in South Africa and also the problems of non-regulation of the informal social security systems. More emphasis will be on the need to regulate. In short, the study is confined to examining the need to regulate informal social security by the statute. To achieve this, the study is divided into five related chapters

Chapter one is basically an introductory chapter. It introduces the subject matter and outlines precisely what the study is about. It also, explains the purpose and importance of the study, literature review, scope and limitations of the study. The particulars of the problem studied forms part of this chapter as well.

In the second chapter, the study will make an analysis of the formal and informal social security as applied in South Africa. It will make a clear distinction between these two forms of social security. It will achieve this by looking at the historical developments of the concept of social security from the pre-colonial era, during the colonial era and apartheid regime to the new democratic dispensation. The current legal framework of social security as well as the emerging challenges for both formal and informal will be dealt with in this chapter.

The third chapter will look closely and critically at the nature of the relationship between informal and formal society security systems. It will set out the similarities and differences between the two systems.

The fourth chapter will be analysis of the global trends in the development of social security. Possible options for integration and regulation will be discussed under the chapter, and lastly the suitable model for South Africa will be provided in the chapter.

The fifth and last chapter will carry the broad conclusions and recommendations. It is in this chapter that a description of the main lessons to be learned from this study will be outlined and discussed.

1.5.2 Limitation

The social security law jurisprudence fastly developing in South Africa. This means the debate is on going and a lot to be done in order to enhance, develop and contribute to this area of law. In this study, one would have loved to go an extra mile and touch even on

many other important aspects of the social security system in South Africa. However, due to unavailability of time, the limited nature and scope of this study that will not be done. In the first place, there is a serious limitation on time as indicated above, due to the nature and duration of the programme that demands this study. Secondly, as indicated already, this is relatively a new area and there is really not much that has been written on the subject matter. Indeed there are up to so far fairly a number of conferences and presentation papers as well as few text books, but all these seem to be by almost same authors who focus around the same issues in their several papers and text books. This therefore leaves more room for discussion and more room for further and richer research and study.

1.6. DEFINITION OF MAJOR TERMS

1.6.1 Social Security

In law, it is often very difficult to give one correct or accurate definition of any given concept. There will always be different definitions depending on various aspects and perspectives that one would be looking at. The same applies in an attempt to define social security. Different scholars on the subject of social security have given several meanings and definitions of the concept. Due to many definitions given to this concept the, the International Labour Organization, in an attempt to promote uniformity in the conceptualization of social security provided the following definition which is accepted throughout the developing and the developed nations, therefore social security is defined as:

The protection that society provides for its members, through a series of public measures, against the economic and public distress that otherwise will be caused by the stoppage or substantial reduction of earning resulting from sickness, maternity, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children³⁵

Notwithstanding this noble and well-accepted definition of the concepts, Olivier and others³⁶ continue to argue that, neither South Africa law nor international literature reveals any clear definition of the concept. What has been generally accepted, however, is that the concept is not fixed a one. It therefore remains open as to how exactly to define this concept. For the purposes of this study as well as consistency, we shall rely on the definition given by the International Labour Organization which defines social security as,

The protection that society provides for its members, through a series of public measures, against the economic and public distress that otherwise will be caused by the stoppage or substantial reduction of earning resulting from sickness, maternity, unemployment, invalidity, old age, and death; the provision of medical care; and the provision of subsidies for families with children³⁷

³⁵ ILO. 1984. Introduction to Social Security. At page 3

³⁶ Olivier, MP et al 2003. Social Security: A Legal Analysis. Butterworths, Durban at page 23

³⁷ ILO.1984. Introduction to Social Security. At page 3.

1.6.2 Social Protection

There is confusion among academics as to whether there is any distinction or similarities between social security and social protection or whether the two are basically the same. It is argued that the two must be distinguished. The argument is that, social protection is a wider concept, which embraces the concept of social security. Von Maydell³⁸ argues that,

Internationally, this concept is increasingly used alongside, as an alternative to, and/or as a wider concept than the notion of social security..., social protection denotes a general system of basic social support which is no longer linked to regular employment relationship.

On the contrary, it is argued that the term social protection also includes rights related and ancillary to social security itself. This line of argument therefore submits that the two concepts interrelate and cannot be distinguished. For the purpose of this study, the latter approach will be adopted.

1.6.3 Social Assistance

As indicated already, that it is often difficult to give terms an overall or even an internationally accepted definition, social assistance may simply be defined or better explained by its synonym “social welfare”.³⁹

³⁸ Von Maydall, B. “Fundamental Approaches and Concepts of Social Security” in Blanpain, R. Law in Motion.

³⁹ Strydom, E.M.L et al. 2001. Essential Social Security Law. Juta & co at page 7.

Social assistance is usually regulated by the state and it is the sole responsibility of the state to provide the social assistance. Examples of social assistance benefits would be the child support grant, the disability grant, old age grants and so on. In a nutshell, social assistance can be defined as the help or assistance given by the government to a certain group of citizenry using a particular criterion. This is technically referred to as means-tested social assistance because it is granted only to persons who qualify in terms of the criterion or means test. Social assistance would ordinarily be expected to fill the gap where and/or when social insurance runs short of expectations.⁴⁰

1.6.4 Social Insurance

Social insurance in simple terms can be defined as another form of insurance. The nature and characteristics of insurance were laid down in the case of *Prudential Insurance Co. v. Inland Revenue Commissioner*⁴¹ where the court outlined in detail the crucial elements of insurance. The honorable court showed that there should be a premium which is paid by the insured to the insurer. In return, the insurer promises or undertakes to indemnify the insured upon the happening of a particular event that result in the loss by the insured.⁴²

To come back to the previous point, social assistance though has features of insurance ordinarily; it has some other special features. First of all, it is at times compulsory and state regulated. It is only available to employees and in some instances to their dependants. In social insurance, the arrangement is that employees and sometimes even

⁴⁰ See Olivier, M.P et al. 2001. The Extension of Social Security in South Africa- A Legal Enquiry. SiberInk at page 25.

⁴¹ 1904 (2) KB 658 cited in Gorden & Getz. 1983. The South African Law of Insurance. 3rd ed at page 73.

⁴² See Gorden & Getz op cit pages 73-75.

employers contribute a certain percentage of money in return for these payments the employee is entitled to certain benefits.

1.6.5 Formal Social Security

This is another form of social security more concerned with the formally employed individuals and those who qualify in terms of the means test as provided for under the social welfare policy. It is statutorily regulated, funded from the revenue of the state and wholly state operated.

1.6.6 Informal Social Security

This, in short is a counterpart of formal social security. As opposed to the formal social security system, the informal is not state-funded and or operated. It is funded by the contributions from the members. It is normally referred to as the contributory form of social safety net, as against its counterpart which is non-contributory. The typical example of the informal social security arrangements is a burial society in which the members of the community put together their resources either cash or services to assist fellow members of the community when a need arises (death of a relative). It is important to note that the kinship-based informal coping mechanisms form part of the informal social security system.

The above given definition of terms and concepts shall be relevant for the purpose of this discussion unless the context otherwise indicates or a clear departure is expressed herein.

1.7. SUMMARY

This has been an introductory chapter, a chapter that forms the basis of the entire study and quite obviously, it is from this chapter that the general idea about the entire study is supposed to be laid down. Has this been really done? Has this chapter lived up to its expectations? These critical questions are hereunder attended to.

Firstly, the chapter, managed to give out the brief background, which sought to highlight the nature of the jurisprudence entered into. That is, the democratic values of South Africa as envisaged in the Constitution, the importance of the rule of law and supremacy of the Constitution and the basis from which the social and economic rights emanate. Secondly, the chapter brought into light the nature of the problem brought by the South African dual approach to social security system and non-regulation of the informal social security system. In doing this, emphasis was made on the magnitude of the problem and the serious need to address the identified problems and also that these are not just problems but current problems troubling the community. Thirdly, the chapter highlighted the objectives of the entire study, both general and specific. Other than that, it managed to capture how the research will be conducted herein and what method of research will be used and for what reason. This led to the analysis of the current existing literature on the subject matter under investigation. Given the limited nature of this study an attempt has been made to cover all important parts for the purposes of an introduction in a brief manner whilst at the same time ensuring quality work.



The chapter would not be complete without a proper classification and definition of major terms and concepts used herein. Hence a brief overview of the definition of terms to give a clear picture of what the terms mean for the purposes of present study.

In conclusion, one can only point out that it is hoped the chapter has served its purpose, which is to introduce the subject and at least highlight the entire purpose and the need for the study, which is to come up with a workable approach towards informal social security provisioning within the South African social security system.

CHAPTER TWO

UNDERSTANDING FORMAL AND INFORMAL SOCIAL SECURITY SYSTEM AS APPLIED IN SOUTH AFRICA: DEVELOPMENTAL PERSPECTIVES

2.1. INTRODUCTION

Having set out in the previous chapter, the background and purpose of study, this chapter concentrates on social security as a concept. It will distinguish formal from informal social security. Then it will give a detailed historical development of social security in South Africa from the pre-colonial era, colonial and apartheid regimes to the transitional democratic dispensation. The current legal framework of social security will also be put into picture, as well as the emerging challenges of formal and informal social security systems. This will be an inroad to the core of this study, which is an in-depth analysis of the informal social security provisioning in South Africa.

2.2 DISTINGUISHING FORMAL AND INFORMAL SOCIAL SECURITY SYSTEMS

In this section, as the sub-heading suggests, focus is on distinguishing formal from informal social security arrangements. Before making this distinction, however, it is important at this level to determine the ambit of the concept of social security in the context of South Africa.

It is generally accepted that the concept of social security is not a fixed one. This is due to the fact that there are different countries' context and models of social security. The different models are largely influenced by many different factors such as political forces and ideology, structural and cultural factors and other peculiar circumstances of individual nations.⁴³

Social Security was established as a basic human right in the International Labour Organization's (ILO) Declaration of Philadelphia (1944) and its Incomes Security Recommendation of the year 1944.

The concept has been so widely defined to an extent that even the ILO gives it different meanings. It has been argued that this is due to the fact that the concept may be defined differently depending on country to country or region. For example, the definition in the African countries perspectives will differ from the European perspectives. A clear example; ILO in some of its works has defined social security as,

the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security particularly in case of old age, unemployment sickness, work injury, maternity or loss of breadwinner.⁴⁴

⁴³ For example, in United States, social security refers to the social federal insurance system and social welfare benefits, ensuring not only against loss of income but also against new costs incurred such as child rearing; taken from ILO "Introduction to Social Security" 3-4. See also Berghman *Basic Concepts of Social Security* 10-11 in Olivier, M.P et al. 2003. *Social Security: A legal Analysis*. At page 28.

⁴⁴ ILO *Facts on Social Security in Africa* accessed at www.ilo.org

This definition on the face of it is all encompassing. It has almost all the essential elements of the social security arrangement for the developing and the developed countries. This definition does not also, have any bearing on either the economic or political situations. The important aspects of it are the protective nature of the members of the community to individuals in certain circumstances such as old age, unemployment and so on. It has the important element of making it clear as to who is entitled or may be covered by the social security and in what circumstances.

The closer look at the above definition reveals that it focuses on employment related social insurance and a means tested social assistance system. However, social security in South Africa not only covers formal and state systems but also community, informal, traditional, kinship based coping mechanisms and non governmental schemes.⁴⁵ In its structure and purpose, the South African social security system is presently largely risk or contingency- based. Public social insurance exists to deal with particular contingencies, namely employment injuries, and diseases, unemployment and death. Private insurance schemes bear a large part of the responsibility to cater for the public contingencies of old age and health in the area of social assistance, a system of a means-tested grants ensures that support is given to the needy, children and people with disabilities.⁴⁶

The above approach to the concept of social security in the South African context covers two most crucial aspects of our social security system. That is, the social assistance and social insurance aspects. From this approach, we can also add that social security is

⁴⁵ Olivier, M.P & Kalula, E. 2005. *The Future of Social Security in SADC: Some Critical Elements*. IRASA Conference, Stellenbosch, 4-6 September 2005.

⁴⁶ Olivier, M.P et al. *The Future of Social Security in SADC : Some Critical Elements* ibid at page 31

regarded as one of the most important income replacement or an adjustment system which is intended to indemnify for the financial consequences of a number of social contingencies.

It is common cause that the concept of social security is capable of too many definitions depending on the number of factors. It is therefore agreeable that any attempt to try to completely unpack this concept will be a mammoth task requiring a lot of time and resources. Due to the fact that this concept does not have a consistent definition, it has been identified by its special features or characteristics. That is, it is conceptualized in terms of the social contingencies or risks such as those relating to health, unemployment, old age, and disability and employment injuries and so on. Therefore this approach looks at social security in terms of social assistance and social insurance. One may say this approach can be seen as being coupled with the risk or contingency based approach save to say the later approach proposes that the concept should not only be based on the existing schemes covering the contingencies but should again focus on the aims for which these schemes are intended.

Furthermore, there also exists a further conceptual widening of the concept. This approach argues that the concept of social security should be remedial and preventive in nature. A further argument is put forth by Olivier and another for this approach and argue that the focus should be on the causes of social insecurity (in the form of, amongst others, social exclusion or marginalization), rather than on (merely dealing with) the effects.⁴⁷

Having thus illustrated, it is evident that indeed there is a lot involved within the concept of social security. From the above discussions it is clear that this concept is a flexible one as earlier indicated.

⁴⁷ Olivier et al. *The Future of Social Security in SADC: Some Critical Reflection* at page 32.

From the previous chapter, and from the above overview of the concept of social security, it has been shown that within the broader concept of social security there exist formal and informal social security arrangements. Now some reflections and distinctions are made on these two forms of social security

2.2.1 Formal Social Security



Generally speaking social security is divided into two major components namely formal and informal social security systems. There is still no clearly and adequately defined meaning of formal social security, save to say it is a social protection system which, in most instances, is state operated. It focuses on those who are involved in formal employment. Rather than defining the concept as it is, most scholars go into explaining what it does, that is, what it seeks to achieve or remedy. Olivier and Mpedi, writes, that, formal social security extends schemes coverage only to those who fit into rather limited definition of 'employee.'⁴⁸ Other than the formally employed individuals, the formal social security system also refers to those state funded and operated social welfare services such as the social grants given to those who qualify in terms of the means test. Therefore, the formal social security has two broad components. These are the social insurance for the formally employed and social assistance for the destitute who qualify in terms of the means test.

In short, therefore, formal social security can be described as a form of social security system which focuses mainly on the formally employed individuals and extremely poor

⁴⁸ Olivier MP & Mpedi LG. "*Extending Social Protection to families in Africa context: The Complementary role of formal and informal social security*"- A paper prepared for the 4th International Research Conference on Social Security. May 2003.

in terms of the means test. Much shall not be said on the formal social security much as focus is on the informal social security provisioning in South Africa. More attention will be on the up-coming informal social security.

2.2.2 Informal Social Security

Informal social security is part and parcel of social security as indicated already. It plays a very important role as a social protection instrument. The phenomenon of informal social security is not exclusive to developing countries as it may be thought or imagined. It is also found more frequently in the developed countries although the form it takes may be different from the experiences in the developing countries.⁴⁹

Informal social security should not be seen as a concept distinct from formal social security. In order to grasp comprehensively the concept of informal social security, it is imperative to define informal social security within the broader concept of social security since it forms part of the social safety net alongside the formal social security.

It is vital therefore, to look at the existing definitions of social security which attempt to encapsulate the informal social security arrangement. There are several definitions proposed, for instance, Kaseke has defined informal social security within the context of social security as thus,

Social security can be seen as to comprise of a complex and interrelated set of systems (for example. governmental, non

⁴⁹ For further illustration see, Olivier, M.P, Mpedi, L.G & Dekker, A.H “*Accommodating Informal Social Security within Social Security Systems: Observations from a Southern African perspective*”; a paper presented in 2002 at a conference on social values, social values, social policies; Normative Foundations of changing social policies in European Countries (Tilburg 29-31 August 2002) at page 2.

governmental, semi-formal, traditional and so on) which operate and are mobilized to provide in varying degrees for the social security needs of people in various contingencies

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This is a groundbreaking attempt to try to encapsulate the concept of informal social security within the definition of a larger concept of social security. This clearly takes away the impression that informal social security is not part of the social security system simply because it is not state controlled and or statutorily regulated. There are other suggested definitions that seek to embrace the notion of informal social security, we shall however not dwell on these for want of time.⁵¹

The concept of informal social security may be defined as a form of social security system that focuses on those informally employed individuals. Olivier and Dekker⁵² defined more easily this concept as the counterpart of formal social security, forming part of formal social security paradigm.⁵³ It refers to all forms of social security outside the formal or the governmental social security framework. To be more precise, informal social security can also be defined as those self-organized social protection arrangements which are based on membership of a particular social group or community including family, age, group, nationality, profession and so on.

⁵⁰ Kaseke, E. 2000. "The challenges of extending social security to the poor: An African perspectives" A paper presented at the international council on social welfare Biennial conference Cape Town at page 10

⁵¹ See also, Van Ginneken, *Social Security for the Informal Sector : Investigating the Feasibility of Pilot Projects in Benin, India and El Salvador and Tanzania*, ILO discussion paper (1997) at pages 3-5

⁵² Olivier MP & Dekker AH. "Informal Social Security" in Olivier et al. *Social Security: A Legal Analysis*. (Butterworths 2003) page 562.

⁵³ See Olivier, M.P et al. 2001. *The Extension of Social Security Protection in South Africa- A Legal Enquiry* at pages 34-35.

2.2.3 Forms of Informal Social Security

Other than the typical unemployment protection mechanisms such as those provided for under the social insurance in the form of unemployment insurance and unemployment assistance in the formal social security, there are other coping mechanisms commonly referred to as the informal social security arrangements. These mechanisms provide safety nets to victims of unemployment and the destitute generally. The informal social security arrangements include those informal self organized measures by individuals, families and community members to cushion the effects and the consequences of unemployment and other social risks.



Informal social security has two forms. These are private-household based systems and member organization based systems. The former is normally referred to as kinship based system and focuses on specific needs of its members. This form of informal social security is build around certain social values, such as African values which require a particular way of life. This is a way of life characterized by solidarity, unity, collective responsibility, humanity, compassion and equality. The latter on the other hand is commonly referred to as non-kinship based system of informal social security.⁵⁴ These are the member based informal safety nets which are non-kin based mutual aid arrangements which respond to specific social needs of their members.⁵⁵ It is generally problematic and impossible to attempt a clear distinction between the two forms of

⁵⁴ Kaseke.E. 2003 '*Informal Social Security in Eastern and Southern Africa*' In towards the development of social security systems in SADC Region.

⁵⁵ Kaseke, E "*Informal social security in eastern and southern Africa*" in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of the Conference Held at the Helderfontein Conference Center, Johannesburg, South Africa, 17-19 October 2001 (2002) 245.

informal social security, since they often interrelate, co-exist and overlap. In this study, therefore, the term informal social security will be used to make reference to both.

The informal social security arrangements have only recently been identified as a new strand of the traditional concept of social security and can further be described as networks which can be “strong links” or “weak links.”⁵⁶ Strong links are formed by reciprocity and solidarity binding people of the same clan or tribe while the weak links develop when people from different clans and tribes trust one another, pool resources and work towards the same goal. These weak links are beneficial since they reduce the pressure on the strong links and enrich social exchange. This also helps the marginalized groups to become integrated in the main stream economy.⁵⁷

The informal social security system developed as those marginalized in terms of the formal social security systems created other mechanisms to provide protection against the social contingencies and risks that threatened their existence and security. So there was a serious need on the part of the marginalized groups to get up and consider their own mechanisms to combat the social risks, otherwise they would be completely left outside to anguish and disposed to hardships that life may bring with it or at least be left at the mercy of poverty, destitution, vulnerability and social exclusion.

One of the critical and crucial features of the informal social security arrangement is the fact that it is characterized by a support network based on the strong sense of solidarity

⁵⁶ See Olivier et al.2000. *Social Security Law-General Principles* at page 4.

⁵⁷ See Dixon-Fyle K, *Social Policy with Respect to Care : A perspective for Sub-Saharan Africa*, A paper published by the ILO, Geneva in 2002 at page 9.

and on the premise of reciprocity and *ubuntu*.⁵⁸ The informal social protection schemes are based on the existence of an association built on utmost trust and on an administration that is capable of collecting contributions and paying out benefits.

The formal and informal social security systems often co-exist. Many families base their means of support and survival strategies on neighborhood based, kinship based and the formal social assistance.

2.3 HISTORICAL DEVELOPMENT OF SOCIAL SECURITY IN SOUTH AFRICA

2.3.1 Pre-Colonial Era

For the modern notion of social security to be relevant to an economically challenged people and community, it needs to have a link with and be rooted in their culture, traditions and values. These are deeply expressed in their traditional socio-political systems. The African communities have generally passed through different transitional stages. These are the communal stage, political and advanced political stages. These different stages have influenced to a very large extent the manner in which the African communities lived their community lives. This historical process has been experienced across the continent from the pre-colonial to the post-colonial stages. At communal stage, civil society remained mainly inchoate, informal and socio economic in focus. The

⁵⁸ This phrase is commonly used in South African native languages and it means humanity or that a human being is a human being through other human beings. It actually comes from the African proverb that says human beings are human being through other human beings. See also Olivier, MP et al. *General Principles of Social security*. ibid at page 14 where this word or phrase is further explained.

principal goal was to help overcome the obstacles to develop the community and the manner and style of living of the said community.

The processes of forming and maintaining the communal life style in Africa existed prior to the arrival of the forces of European colonialism. The African communities have long devised means and strategies to ease, prevent or cope with the social risks and contingencies.

In an ideal African community before the arrival of the colonial masters, the African communities were largely agrarian. The work at the fields for example was shared by the entire community. The owner of the field would normally provide only food and traditional brew and the fellow villagers would provide labour. This was common during cultivation, hoeing and harvesting. These groupings were generally known as *matsema*⁵⁹

As a general rule members of the family and the community at large bore the primary moral duty to protect members of their members against destitution. The social security mechanisms have long existed in the African communities. In fact, it has always been the way of life of these communities.

In summary, before introduction of formal social security in Africa, the extended family system served as a source of social protection and a cohesive unit that provided security for vulnerable groups. The advent of colonization changed this traditional system as men moved into employment centers to work in the mines, farms or the civil service. Women

⁵⁹ This is a Sesotho phrase which means collectiveness and togetherness.

were virtually left on their own to engage in food production to sustain household members.⁶⁰

2.3.2 Colonial and Apartheid Eras

The pre-apartheid colonial government of South Africa had engaged in state paternalism through its establishment of the Native Affairs Department (NAD) an agency that was charged with overseeing the African reserves, and therefore, with intervening in rural with overseeing the African reserves, and therefore, with intervening in rural crises like famine.⁶¹ Historian Diana Wylie has examined poverty and destitution in the contexts of both colonial and apartheid South Africa. Wylie characterizes the development of NAD as a colonial state's attempt to mesh principles of free market with aims of providing relief and uplifting Black people⁶²

The violence and official racism that accompanied the National Party's (NP) rise to power in 1948 foreshadowed the state's departure from the paternalist food relief structure of the pre-apartheid colonial regime. The NP regime acts undermined the necessary provision for social security especially food in the segregated townships.⁶³

After the NP assumed control, it undertook studies to determine which state relief programmes it could eliminate, particularly aiming to cut allocations of government aid

⁶⁰ For further illustrations see Kumedo, K & Gockel, A. 2003. Social Security in Ghana accessed at www.ghanaweb.com/ghanahomepage/education/artikel.php.

⁶¹ Amartya, S. 1982. *Poverty and Famines: An Essay on Entitlement and Deprivation*. Oxford University Press of Virginia at page 61.

⁶² Diana, W. 2001 *Starving on a Full Stomach: Hunger and the Triumph of Cultural Racism in Modern South Africa*: Charlottesville; University Press London at page 70.

⁶³ 1999/2000 Chapter 4 *The Right to Food in Third Economic and Social Rights Report*. A SAHRC Report accessed at www.sahrc.org.za/chapter_4.pdf.

for non white population. These studies were successful and all the social security programmes that were directed at the Black population were cut. The resulting and widespread poverty among this Black population compelled the apartheid government to engage in vestiges of paternalism to avoid projecting internationally the images of crises conditions. There was serious hunger, poverty and destitution, yet the apartheid government ignored them as if they were non-existent.

The arrival of the colonial masters, industrial revolution and the rise of capitalism destroyed the existing networks of social support in the African communities. Individuals had to sell their labour on the labour markets. The people completely depended on the regular payment of wages.⁶⁴ Large numbers of black labourers were frequently unemployed for long periods without any form of unemployment insurance against the risks of work injuries or sickness or even unemployment. This obviously had a serious impact on the manner in which the community members lived their lives. More time was spend in industries and less in community engagements. Social protection measures were seriously affected by the new dispensation of labour and oppression by the colonial and apartheid regimes. To a large extent states social protection measures were put in place to humanize the ravages inflicted by capitalism on the working white class.

The origins of the concept of social security are not so hard to trace. Perhaps, one may say from the realization that poverty is a serious factor threatening the very existence of man emerged the concept of social security. Sandy and Alison on the other hand argue

⁶⁴ 2000/2002 "Chapter 5: *"The Right to Have Access to Sufficient Food"* in Fourth Economic and Social Rights Report. A South African Human Rights Commission Report accessed at www.sahrc.or.za/5th_esr_chap_5.pdf

that history of racial discrimination on welfare provision dates from the very origins of social assistance in South Africa soon after the Union in 1910⁶⁵.

The main features of the social security system namely short-term benefit for workers which are financed by contribution and social assistance for the disabled, elderly and the children, financed by the state, started as early as 1910 as already mentioned above. Formal social security schemes first introduced benefits for workers and maintenance for children. The *Workers Compensation Act* and the *Children's Protection Act*⁶⁶ regulated these benefits.⁶⁷ Workers could claim income support in the case of illness and injuries sustained at work. Parents could also receive maintenance grants. After 1910, there was statutory intervention and development of social assistance or measures of social protection. Among others was the most significant *Children's Act*, which provided for maintenance grants for children.



These grants however fell short of expectations because very limited portion thereof reached African parents and none of them were given to the so called rural Africans(as the natives were then called)⁶⁸. The other significant and worth mentioning legislation at the infancy of the social security arrangement was the *Old Age Pensions Act*⁶⁹. This Act made provisions for the old age⁷⁰ entitlement to pensions. There were still however, in

⁶⁵ Sandy, L and Ailson ibid at page 3.

⁶⁶ Acts of 1913.

⁶⁷ Act of 1913.

⁶⁸ See Bhorat, H ibid at pages 595-595.

⁶⁹ Act of 1928.

⁷⁰ Old age was construed to cover only coloured and white men over 65 years and women over 60 years.

terms of this legislation some dissimilar treatment between the whites and other races that were entitled to it.

The whites received much more a higher amount than the coloureds. The blacks were totally excluded within the ambit of the statute. It is worth mentioning that the black population was divided into two, namely urban black people and rural black people. The reason for this exclusion was said to be that rural black people could be covered by the indigenous rural kinship arrangement to assist them in old age. On the other hand, the then called urban black people were excluded because they could not be distinguished from the rural blacks.⁷¹ Also in picture was the *Unemployment Benefit Act*⁷². This law made provision for the social safety net when one was no longer employed. The statute covered 88 000 workers but excluded all blacks, agricultural, domestic and mining workers⁷³. It made provision for the social safety net when one was no longer employed and covered about 88 000 workers but excluded all blacks, agricultural, domestic and mining workers.⁷⁴

The introduction of means-tested state pension and disability schemes from 1937 was a noticeable building block towards the establishment and construction of a basic social security arrangement in South Africa. An initiative was also made in 1994 and blind and old age pensions were also extended to Africans and Indians. There was again introduction of *Disability Grant Act*⁷⁵, which came up with the serious effort to extent

⁷¹Bhorat,H.1995. The South African Social Security Safety Net;Pollak, State Social Pensions, Grants and Social Welfare in S.T van der Horst and J, Reid. 1998.

⁷² Act of 1937.

⁷³ Act of 1937.

⁷⁴ Meth,C & Piper, S. Social Security in Historical perspective, second Carnegie inquiry into poverty and Development in South Africa. No 250 SALDRU, UCT.

⁷⁵ Act of 1947.

disability grants to all racial groups.⁷⁶ There were also other significant statutes that contributed to a very large extent to the development and evolution of our social security law as it stands today. There were *inter alia*, *War Veterans Pension Act*⁷⁷ and *The Workmen's Compensation Act*.⁷⁸ In 1946, *Unemployment Insurance Act* replaced the *Unemployment Benefit Act*. There were many attempts to bring change to the social security system by the then United Party which were described by Schneider and Marshall⁷⁹ as rudimentary, imperfect attempts at extending social security to all races.

When the National Party came into power in 1948 it reversed even those imperfect attempts and instead tried to protect white mineworkers from the rapidly urbanizing African workforce.⁸⁰ National Party through its government (as it then was) introduced a minimum income level of Africans to qualify for the Unemployment Insurance Fund, and by doing so effectively excluded them.

Surveying the history of social security in South Africa one can realize that it had a number of problems in actually achieving its main objective, that of alleviating poverty. The social security benefits were enjoyed by a few minorities thereby leaving the majority outside its application⁸¹. This was so until the end of the apartheid era. By the end of this era, South Africa had a system of public welfare that was exceptional in the Southern region in terms of reach, generosity and redistributive financing. At the core of

⁷⁶ Act of 1947.

⁷⁷ Act of 1941.

⁷⁸ Act of 1914.

⁷⁹ Schneider *et al.* 1998. Social Security for people with Disabilities. A paper researched for the Department of Welfare, Johannesburg, Community Agency for social enquiry (CASE).

⁸⁰ For further illustrations See Bhorat, H. 1995. The South African Social Security Safety Net, Past, Present and Future Development South Africa. *supra*.

⁸¹ Even at the time of extension of these benefits, when urban African were included in the maintenance system the system was still ineffective since still very few of the grant reached African parents and none were given to rural Africans; See Bhorat *supra* at page 595 for further discussions on this subject.

this system are non-contributory old age pensions introduced for whites and coloured people in 1927 and extended to the African and Indian population in 1944⁸²

Employing these historical considerations it is clear that there was a need for the South African democratic government to support vulnerable groups as they had been neglected by both the preceding regimes.

2.3.3 Transition to the new Dispensation

Endeavoring to avoid the social insecurity and state violence that had characterized conditions during apartheid in South Africa, the writers of the new Constitution established for all South Africans the right of access to the socio-economic rights and other fundamental human rights.⁸³

The adoption of this new Constitution in 1996 signaled the beginning of the new era characterized by high respect for human rights, equality before the law, supremacy of the Constitution and the independent and impartial judiciary. This adoption of the Constitution also marked the enactment of one of the world's most liberal Constitutions. Establishing conditions for the enforcement of human rights, the Republic of South Africa affirmed its commitment to the achievement of national unity and lasting peace. South Africans cheered the new government as it signed into law the Constitution during the momentous event that signaled the end of roughly 350 years struggle to achieve human freedom for all South Africans regardless of race. Among the liberal provisions

⁸² Seekings, J. 200. The Origins Social Citizenship in Pre-Apartheid South Africa: *South African Journal of Philosophy* at page 386.

⁸³ Section 27 (1) (c) of Constitution of the Republic of South Africa ,1996.

secured under the Constitution are rights aimed at ensuring the physical well being and health of all South Africans. Section 27 of the Constitutions enumerates four essential elements of well being⁸⁴.

The pre-democratic conditions of social security system in South Africa have influenced to a very large extent the inclusion of rights contained in section 27 in the Constitution. Having examined briefly the conditions of social security under both the colonial and apartheid rule, it is easy to appreciate and acknowledge the motive for the strong constitutional protection of the socio-economic rights in South Africa⁸⁵.

Whereas, the colonial state had provided minimal subsistence and the apartheid state had refused relief for non-whites, the newly elected democratic regime implemented measures to address immediate and long term social security needs.⁸⁶

Over and above the existing constitutional protections and guarantees of the socio-economic rights, the Constitution does not only end there, rather, proceeds to establish institutions charged with the sole responsibility of ensuring that these rights are indeed realized and put into practice. The Constitution categorically mandates the South African Human Rights Commission (SAHRC) monitor the provisions of the social and economic rights, including the right of access to social security under the constitutional frame work.

⁸⁴ See Love, KG. 2003. "The Constitutional Right to Food in the Republic of South Africa: A Critical Examination of the History of Section 27 and an Evaluation of its Enforcement" accessed at www.sahrc.org.za/socio/econo_rights.pdf.

⁸⁵ Liebenberg, S. 2000. Human Development and Human Rights: SA Country Study. Human Development Report Office Occational Paper for the United Nations Development Programme(UNDP) available at www.undp.org/hdro.hdrs.2000.english.liendenberg.

⁸⁶ See SAHRC 3rd Economic and Social Rights Report at page 144; accessed at www.sahrc.org.za.

It is imperative at this juncture to point out that South Africa has inherited a social security system, which is remarkably comprehensive by a middle-income developing country standard.⁸⁷ However, due to historical reasons, some of the traditional social security system contingencies are not regulated on a public insurance fund basis but covered in terms of essentially private mechanisms in particular health.

It is clear therefore that the new government was faced with the task of developing an approach that transformed the existing system in two ways; it had to be able to use and build on the positive aspect of the current system. Secondly, it had to change current programmes and develop new features and benefits in such a way that they serve the population as a whole and are based on the circumstances and needs in South Africa. It is indeed these values that have led to current trends of our social security law.

South Africa today has adopted the human rights approach to social protection.⁸⁸ The Bill of Rights in the Constitution mandates the provision of certain primary services to respond to the basic needs of people namely, nutrition, education, health and social security including social assistance.

2.4 THE CURRENT LEGAL FRAMEWORK OF SOCIAL SECURITY IN SOUTH AFRICA

⁸⁷ Olivier, M.P and Kalula E.R “Scope of Coverage” in Olivier et al 2003. A Legal Analysis, Butterworths, Durban At page 127; compare this submission with the earlier observation on the similar issue by the World Bank/SALDRU, key indicators of poverty in South Africa (October 1995) at pages 3-4 and pages 5-7.

⁸⁸ Social Security protection is also regarded by the United Nations as a basic human right-albeit one that a small proportion of the people on our planet actually enjoy-accessed at www.ilo.org. This right is also upheld in the UDHR 1948 and the International Convent on Economic, Social and Cultural Rights 1966.

The South African legislative arm of government has up to so far played its role in terms of enacting laws that seek to bring into life the socio-economic right of access to social security. The parliament has brought into life the Acts that brings regulative and protective aspects of the formal social security. It has however, failed dismally as far as the informal social security schemes are concerned. This continues to be the case despite the growing interest both nationally and internationally in ways and means of social security protection of the marginalized categories of people such as the rural poor, the urban poor, self employed, informally employed the atypically employed and so on and so forth. The existing traditional and informal (mostly community-based) forms and mechanisms of social security coverage on the basis of risk and/or need are seriously being investigated.⁸⁹



It is generally acknowledged that the apartheid era was a serious setback to the development of social security law in South Africa. This was clearly due to the exclusionary nature and effect of the apartheid system. Since the year 1994 the position has changed dramatically. This change was brought about by the constitutionalization of the socio-economic rights thereby making them justiciable.

Other than the constitutional provision of the right of access to social security, a vast range of statutory measures provide the legal framework for formal social security regulation in the Republic.

⁸⁹ Olivier, M P et al. 2001. "The extension of social security protection in South Africa; A legal enquiry. SiberInk at page 71.

2.4.1 The Social Assistance Act⁹⁰

Firstly, and most fundamentally, we have the *Social Assistance Act*. This piece of legislation provides for the rendering of social assistance to persons who qualify. The statute also makes provision for the mechanisms for the rendering of such assistance and the establishment of an inspectorate for social assistance.⁹¹ It will be remembered that the formal social security system in South Africa is largely and wholly characterized in terms of social insurance for those formally employed and falls within the *Labour Relations Act*⁹² definition of an employee. On the other hand we have the social assistance for those who qualify in terms of the means-test. The *Social Assistance Act* forms the foundation of this second leg of the formal social security.

2.4.2 The Social Security Agency Act⁹³

Secondly, another important piece of legislation relevant to the regulation of the formal social security is the *Social Security Agency Act*. This legislation makes provision for the establishment of the South African Social Security Agency as a body agent for the administration and payment of social assistance as well as the prospective administration and payment of social security.⁹⁴ The Agency Act further empowers the Agency to provide further services that are related to the provision and administration of social assistance and any other related matters connected thereto.

⁹⁰ Act 13 of 2004.

⁹¹ See the South African Social Security Agency Annual report 2006/2007 at page 18.

⁹² Act 75 of 1995.

⁹³ Act 9 of 2004 (herein after referred to as the Agency Act).

⁹⁴ See the Agency Annual Report *ibid* at page 18-19.

Also, important to note is that, the *Agency Act* outlines the objectives and functions of the Agency.⁹⁵ The Constitution and the *Batho Pele*⁹⁶ principles underpin the value system of the Agency. This is solely due to the fact that the constitution sets high standards for the public service that is developmental and people centered and required that confidentiality, integrity, fairness, transparency and equitability are promoted and safeguarded.

In line with the *Agency Act*, the Agency must administer quality social security services, in a cost effective manner and timorously employing proper and best practices by developing and implementing policies, programmes and procedures for an effective and efficient social grants administration system promoting and protecting human dignity⁹⁷ and delivering innovative and effective services to the people.⁹⁸

2.4.3 The Welfare Law Amendment Act⁹⁹

Thirdly, there is in place the *Welfare Law Amendment Act*. In the year 1997, this Act amended the *Social Assistance Act of 1992*. The idea and purpose of the amendment was to make a provision for uniformity, equality of access to, and effective regulation of social assistance throughout the entire Republic. It is this statute that for the first time introduced the child support grant. It is again this act that abolished maintenance grants over a period not exceeding three years. It is also this piece of legislation which abolished the capitation grants. Most importantly, the same statute made provision for the

⁹⁵ See sections 4 and 5 of the Act.

⁹⁶ This is both a Sotho and Tswana phrase which literally translated means 'people first' which means that the first priority in service delivery should be a due consideration of the people.

⁹⁷ Article 22 of the UN Declaration of Human Rights 1948 emphasizes the relationship and linkage of the right to social security with dignity and personality. See also, International Covenant on Economic, Social and Cultural Rights 1966 in its Article 9 which provides for Right to Social Security and Social Insurance.

⁹⁸ Refer to the Agency-Strategic Plan Document 2008/09, 2010-11. 1st Draft at pages 7-8.

⁹⁹ Act No 106 of 1997.

delegation of certain powers and extended the application of the provisions of the Act to all areas in the Republic.

2.4.4 The Aged Persons Act of 1967.¹⁰⁰

Besides, the above Acts of parliament, we also have the *Aged Persons Act of 1967*. This statute provides for the protection and welfare of certain aged and debilitated persons. Moreover, it makes a provision for social security entitlements for older persons for the care of their interests, for the establishment and registration of certain institutions and for the accommodation and the care of such persons in such institutions. This statute was later on amended by the *Older Persons Amendment Act of 1998*¹⁰¹ which repealed certain discriminatory provisions in order to provide for the establishment of management committees for homes for the aged, required reporting on the abuse of the aged persons and the regulation of prevention of the abuse of the aged persons.

2.4.5 The Children's Act of 2005¹⁰²

The *Children's Act* is yet another comprehensive piece of legislation which makes provision for the families to be preserved and strengthened to give effect to the constitutional rights of children to family care or parental care or appropriate alternative care when removed from family environment, social services, protection from

¹⁰⁰ Act 81 of 1967.

¹⁰¹ Act 100 of 1998.

¹⁰² Act 38 of 2005.

maltreatment, neglect, abuse or degradation and to ensure that the best interest of the child are of paramount importance in every matter concerning a child.

This statute stipulates the states' legal and political obligations with reference to the well being of children in line with the international instruments binding on South Africa. The statute also provides for structures, services and means to promote and monitor the sound physical, psychological, intellectual, emotional and social development of children. Furthermore, it concentrates on the mechanisms and strategies to strengthen and develop community structures that can assist in providing care and protection for children and provide methods to eradicate child discrimination, exploitation and any other physical, emotional or moral harm or hazards. Finally, it addresses issues on protection and care of children in need, as well as recognition of special needs that children with disabilities may have and generally to promote the protection, development and well being of children¹⁰³

It is imperative to note at this juncture that formal social security legislation in the Republic is vast and comprehensive¹⁰⁴. In this study, however, we only managed to direct our focus on the few of these laws but those which in our opinion are the most important aspects of the plethora of statutes available. Also due to the limited nature of this study, we could not manage to cover all the statutes in this area. We only highlighted a few for the purposes of illustration and advancement of authoritative arguments. In a nutshell, it is relatively save to argue that the role played by legislation in the general administration

¹⁰³ The Agency Annual Report OpCit at page 19.

¹⁰⁴ For example, we have the following statutes for social assistance; *Child Care Act* 74 of 1983, *Special Pensions Act* 69 of 1996, *Aged Persons Act* 81 of 1967, *Military Pensions Act* 84 of 1976 and for social insurance we also have the following; *Compensation for Occupational Injuries and Diseases Act* 130 of 1993, *Unemployment Insurance Act* 63 of 2001, *Pension Fund Act* 24 of 1956, *Medical Schemes Act* 131 of 1998, *Occupational Health and Safety Act* 85 of 1993, *Occupational Diseases in Mines and Works Act* 78 of 1973, *Mines, Health and Safety Act* 29 of 1996 and the *Road Accident Fund Act* 56 of 1996.

and realization of the formal social security in South Africa is tremendous, albeit, to a limited extent as multitudes of the people are still left outside the application of these laws.

2.5 EMERGING CHALLENGES OF FORMAL AND INFORMAL SOCIAL SECURITY

It is clear that the legislative framework of the formal social security is quite comprehensive in South Africa. On the one hand, the informal social security system, unregulated as it is, its importance in aiding vulnerable members of the community can no more be over-emphasized. The informal safety nets should be acknowledged and be seen as the ultimate safety nets for the marginalized. There are however some areas of deficiency within the informal social security system which require attention in order to maintain and help these schemes to play their role.

One of the major challenges attributed to the informal social security systems is that they provide insufficient protection, are unreliable, inconsistent and unstable and are susceptible to external shocks.¹⁰⁵ This to a large extent is correct. The informal social security arrangements in practice are open to a number of challenges such as the obvious Acquired Immune Deficiency Syndrome (HIV/AIDS), urbanization and migration. It will be remembered that these systems depend so much on the membership of the community members. If these community members begin to migrate to the urban areas these links are

¹⁰⁵ Refer to Morduch J and Sharma M *Strengthening Public Safety Nets from the Bottom Up* (World Bank Institute (2002) 7, Ahmad E “ Protecting the vulnerable: Social Security and public policy” in Lipton M and Van der Gaag J (eds) *Including the Poor* (World Bank (1993) 359 at 366 in Mpedi LG. 2006. *Redesigning the South African unemployment protection system: A socio-legal enquiry*. LLD Thesis submitted, University of Johannesburg) at page 46-47.

weakened and leaves gaps in the system. This is also where the unreliability of these schemes comes into place. Due to the increasing unemployment and poverty levels, people are always on the move, seeking greener pastures; as a result it is unknown as to who will be there to assist when there is a need to do so. Moreover, the role of the extended family within the kinship-based arrangements is central to the system. However the increasing scale of need largely due to the above mentioned challenges inter alia urbanization and migration, is increasingly eroding the ability of these schemes to provide support and assistance to the vulnerable members of the family. There is a steady weakening of these systems due to the above mentioned deficiencies.

The other challenge facing the informal social security system is the issue of dishonesty and corruption. These systems are torn apart by dishonest and corrupt individuals who divert the member's funds towards their own personal gains. This situation is made worse by the limited availability of the legal aid in social welfare matters.

Development of these schemes is also seriously affected by the lack of expertise and leadership skills. This is clearly manifested in poor financial management, poor leadership without proper direction as well as poor record keeping and accountability.

Due to the earlier mentioned problem of the HIV/AIDS, the informal social security arrangements loose their membership at an alarming rate. This has more impact on the burial societies since benefits are paid more frequently due to high death rates. There is therefore a serious mismatch between the inflow and outflow of resources which compels the system to reduce drastically the benefits that are due to members.

From the previous discussions, the legislative framework of the formal social security system was put into picture. It cannot be denied that the statutory provisioning for this

system is quite comprehensive and extensive. Despite this extensive legal protection available to welfare recipients in terms of the social assistance grant system there are still some challenges too in this area.

To start, the problem remains that the majority of South Africans are poor, unemployed and in the informal employment sector, they cannot access private measures. Ignorance and illiteracy among beneficiaries appear to be rife. This state of affairs makes it difficult for these groups to access the services. The above situation is made worse by the poor service delivery. Normally, beneficiaries take too long to access their grants mainly due to the inefficient system. The other practical and real challenge relates to a limited availability of the legal aid in social welfare matters. The national legal aid system in South Africa makes little provision, if at all, for legal aid to be granted for social assistance cases¹⁰⁶.



Dispute resolution in the South African social assistance system is regulated by means of both the statutory law and common law. In certain cases such as where the suspension of a grant is suspected or contemplated, the *Social Assistance Act* and its Regulations do not provide for an opportunity to make representations, as required by the constitutional, statutory, and common law framework of administrative justice. The final review or appeal decision is taken by a Minister who can vary or set aside the decision. This is unusual, inappropriate and incoherent.

Also, the exclusionary nature of social security in South Africa remains one of the major challenges. Apart from certain exceptions made for foreigners with permanent residence status, non-nationals are generally excluded from social security protection, in particular

¹⁰⁶ See for example, *Mashava v The President of the Republic of South Africa* 2004 12 BCLR 1243 (CC).

social assistance.¹⁰⁷ In terms of the *Social Assistance Act*¹⁰⁸ one of the eligibility criteria for accessing almost all social assistance benefits is South African citizenship. This applies to certain branches of social insurance as well, such as the unemployment insurance scheme, since non-citizens are excluded from the operation of the *Unemployment Insurance Act* if they have to be repatriated upon termination of their services.¹⁰⁹ Other than this exclusion which is attributed to the non-citizens, citizens are also facing the same predicament.

Despite the large numbers of welfare recipients who are entitled to and receive the social assistance, millions of the impoverished South Africans and the destitute are left outside the framework of social security and in particular social assistance support in South Africa. This flows from the formal employment basis required by the social insurance part of the social security system and the means testing. Consequently large numbers of people who work atypically and/or informally are excluded from the ambit of the social safety nets.

Currently the different pieces of legislation regarding the various schemes of social security are fragmented, sometimes contradictory, and provide for gaps in provisioning. Hence the attempt to arrive at a comprehensive system might necessitate one overriding piece of legislation, such as a "Social Security Act", which would incorporate the concept

¹⁰⁷ Olivier MP, Khoza JF, Jansen van Rensburg L & Klinck E "Constitutional Issues" in Olivier M et al *Social Security: A Legal Analysis* (Butterworths/Lexis Nexis Durban 2003) 98.

¹⁰⁸ 13 of 2004: see section 5(c).

¹⁰⁹ Section 3(1)(d) of the *Unemployment Insurance Act* 63 of 2001.

of social security, its aims and objectives, as well as highlighting the purposes and eligibility criteria of each scheme, including the social assistance programmes.

There may still be need for separate legislation and regulations to guide each of these schemes, but these must be consistent with the fundamental principles embodied in the Act. There needs to be some 'linking' and cohesiveness between the different social security legislation. For example, at present the *Employment Equity Act* (EEA)¹¹⁰ calls for the employment of persons with disabilities, while re-integration into the labour market is not a goal of *Compensation for Occupational Injuries and Diseases Act* (COIDA)¹¹¹. This mix of policy and legislation should ensure that the guidelines set out in the various policies are achieved and enforced through the necessary legislation and regulations.

2.6 SUMMARY

It is clear that there was indeed a pressing need for the democratic government of South Africa to take all reasonable and possible measures to heal the wounds that were inflicted on the peoples of the Republic by both the colonial and apartheid regimes. Hence today there exist a strong and extensive rights-based framework which supports the extension of social protection to welfare beneficiaries in South Africa.

In the current chapter, a clear distinction between formal and informal social security measures has been made. That exercise has brought more light to the subject on social protection and what exactly is entailed within the social security system of South Africa.

¹¹⁰ Act 55 of 1998.

¹¹¹ Act 85 of 1993.

Besides, the chapter made reference to the historical developments of social security by looking at the pre-colonial social security arrangements, the colonial and apartheid to the transitional democratic regime. That has made it possible to understand the trends that have led to the current social security system. Without these historical perspectives, it would not be easy to fully appreciate the current social security system. The section that dealt with the current legal framework of social security was of magnificent importance for it now linked the history with the current position. That section exposed vividly the deficiencies that were inherent in the past systems of social security. The analysis of the current framework led to the examination of the emerging challenges of both the formal and informal social security.

The challenges explored the various forms of informal social security. That has been done by defining the concept of informal social security within the larger scope of social security. The chapter has shown the relevance and the role of the informal social security arrangements in the South African context. We have also managed to explore the two main categories or divisions of informal social security to wit, kinship based and neighborhood based social security systems. On top of that, we have in this chapter outlined the reasons for the reliance on and the continued existence of the informal social security as well as its importance.

In conclusion, the current social security system in South Africa is still wanting in a number of respects. Most critically, the lack of a coherent approach to social security system is obviously an agenda on its own and needs serious attention. The informal social security system on the other hand should not be over-idealised. Although it provides

social security support, it suffers from increasing strain and can provide only low levels of benefits. It does provide a safety net albeit a weak one. Moreover, the informal social security, it cannot be denied, requires reinforcement given the crucial role it plays in protecting the multitudes of the citizenry who rely fully and wholly on it.

CHAPTER THREE
THE RELATIONSHIP BETWEEN FORMAL AND INFORMAL SOCIAL
SECURITY-OPTIONS FOR INTEGRATION

3.1 INTRODUCTION

The deeply troubling issue of poverty has recently become not only the economic issue but also a serious health issue. The sky rocketing inflation rates, raising prices of oil and the trembling world economy are a clear indication that poverty levels are also increasing. The middle class families move down to the class of the poor and the poor sink to the bottom making their situation even worse. It is upon this backdrop that poverty alleviation mechanisms and strategies must be enhanced and strengthened in order to ensure at least a standard living for everybody living in the Republic. For the purposes of the study, it has been recognized that there is a dire need to provide and ensure a comprehensive social security services against vulnerability and poverty within the legislative framework of South Africa.

The legal obligation of the Republic to provide for social security services to its citizens is even becoming more serious in the prevailing economic circumstances. The chapter focuses on the nature and the relationship between the formal and informal social security systems in South Africa.

To achieve this, the chapter will examine closely the relationship between the formal and informal social security as well as the ambit or scope of coverage of these two forms of social security. From this examination, it will be noticed that there are similarities and differences between the two forms of social security. The chapter will further discuss the options for the integration of these two models of social security. Moreover, it will become evident that the imperatives of the present social security dispensation and the given socio-economic milieu warrant a new role for the legislature and the policy makers in the field of social security and social welfare. This is due to the fact that the current social security arrangement is failing to some extent to live up to its expectations of providing full coverage to all members of the community who are in need of social security. Justice will not have been done to the chapter without the necessary conclusion at the end.

3.2 THE CONTENT AND APPLICATION OF FORMAL SOCIAL SECURITY FRAMEWORK: SOCIO-LEGAL PERSPECTIVES

It is true that much has been said on the formal social security system in the preceding chapters, though in brief. It is critical and vital therefore to go deep into the concept and see exactly what it entails. In doing so, it is also equally important to highlight in brief what has already been alluded to earlier for the purposes of logic and easy reference. As indicated in the previous chapter, there is apparently no single correct definition of formal social security, except that it is a social protection arrangement which is state operated

and focuses only on those formally employed.¹¹² To be more precise, formal social security extends schemes coverage only to those who fit into a rather limited definition of an employee¹¹³. Having thus given a brief overview of the definition of formal social security, it is imperative to now turn and take a look at the content and application of the formal social security within the socio-legal perspectives.

3.2.1 Legislative Framework

(a) The Constitutional Framework-Overview

To begin with, chapter two of the Constitution¹¹⁴ guarantees a host of fundamental human rights and freedoms. Among these rights are the socio-economic rights which encompass the right of access to social security and assistance.¹¹⁵ Several human rights instruments invariably impose three types of obligations on the state parties. Namely, the obligation to respect, protect and fulfill the right.¹¹⁶ Some scholars add a further dimension, namely, the obligation to promote the right.¹¹⁷ The South African Constitutional Assembly introduced these obligations in Section 7 (2) of the Constitution which categorically

¹¹² This implies that the informally employed individuals such as the atypically employed, self employed, temporary employee etc are not entitled to the formal social security benefits such as the unemployment insurance benefits and other social insurance schemes that are offered by the state. Basically all those who fall outside of the definition of the *Labour Relations Act* of the employee.

¹¹³ Olivier, M P & Mpedi, L G “*Extending Social Protection to Families in African Context; The complementary role of formal and informal social security*” A paper prepared for the 4th International Research conference on social security- May 2003.

¹¹⁴ Constitution of the Republic of South Africa of 1996 (herein after referred to as ‘the Constitution’)

¹¹⁵ See Section 27 of the Constitution.

¹¹⁶ See General Comment 14 on the International Covenant on Economic, Social and Cultural rights, General Assembly Resolution 2200A (XXI) 21 UNGAOR SUPP (N0; 16) at 49 United Nations Declaration, A6316 (1966 993 UNTS3) entered into force on 3rd June 1976.

¹¹⁷ For example, Craven, M.C.R; *The International Covenant on Economic, Social and Cultural Rights*; Clarendon Oxford 1995 at page 109.

states that the state must respect, protect, promote and fulfill the rights in the Bill of Rights¹¹⁸. Over and above these obligations, the Constitution further puts on the State an obligation to take reasonable legislative and other measures, within its available resources to achieve the progressive realization of the social security rights as embodied in the Bill of Rights¹¹⁹.



This constitutional background, together with a detailed statutory framework set out in the previous chapter gives a wide appreciation of the content and application of the formal social security in South Africa. From the above constitutional framework and provisioning of the social security it is not difficult to find the scope of coverage of the formal social security in South Africa. The various acts of parliament especially the *Social Assistance Act*¹²⁰ simply manifests in itself the promise that has been constitutionally guaranteed, to provide for social assistance to the members of the community. In its preamble, this act provides *inter alia* that since the constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights¹²¹. This is nothing other than the clear intension of South African government to assist in securing the well being of the people and to provide an effective, transparent and be an accountable and coherent welfare state which brings into fruition social assistance for the entire Republic. The

¹¹⁸ This was illustrated and expanded in the cases of : *Minister of Health & Others v. TAC & Others* 2002 (5) SA 721 and *Soobramoney v. Minister of Health KwaZulu Natal* 1998 (1) SA 765 (CC).

¹¹⁹ Liffman. R. "Social Security as a Constitutional Imperative: An Analysis and comparative perspectives with an emphasis on the effects of globalization on marginalization" in Olivier, M P et al. *Social Security : A Legal Analysis* at page 125.

¹²⁰ Act 13 of 2004.

¹²¹ See para 1 of the preamble of the *Social Assistance Act* 2004.

interpretation of Section 27 (c) of the constitution is by now clear. This has been done with in several judgments of the Constitutional Court. The judgments of *Grootboom*, *Khosa and Soobramoney*¹²² managed to set out clearly how the section is to be applied within the socio-legal context of South Africa. Several issues were raised in these judgments ranging from the application and implementation of the relevant section (s) on social security to the meaning of each and every single word in the section such as ‘progressive realization of the right, states available resources’ and so on. From all these judgments one makes a comprehensive single conclusion that there is a serious attempt by both the courts and the current government policy to expand and understand the content and application of this right. Given the already cited relevant provisions of the constitution as well as the *Social Assistance Act*, plus the classical judgments of the Constitutional Court, it is realized that to a very large extent there is an effective application of the right of access to social security and social assistance.

(b) The Social Assistance Act and Different Strands of Social Security Legislation

As indicated earlier in this study, the Social Assistance Act¹²³ makes a clear provision for the national framework for the provision of different types of social grants, social relief distress and the delivery of social assistance grants by a national social security agency plus the establishment of the inspectorate for social security. The social security agency is a specialized body charged with the delivery of social grants to the poorest of the poor in

¹²² Full citations are as thus; *Grootboom*; *Government of the Republic of South Africa v. Grootboom & Others* 2001 1 SA 46 (CC), *Khoza; Khoza & others v. The Minister of Social Development & Others* 2004 6 BCLR 569 (CC) and *Soobramoney* *ibid*.

¹²³ Act 13 of 2004.

South Africa. In essence, the agency is mandated by the government to deal comprehensively with the complex issues of guaranteeing and ensuring effective and efficient delivery of services of high quality with regard to management and administration of social grants. The desired result being that the entire process and system from application to receipt of social grants by beneficiaries is done in a manner that is sensitive, caring and restore dignity of beneficiaries as well as the integrity of the entire system.¹²⁴

3.3 PRACTICAL APPLICATION OF FORMAL SOCIAL SECURITY IN SOUTH AFRICA

In order to foster its mandate, which is to ensure the provision of comprehensive social security services against vulnerability and poverty within the constitutional framework and creating an enabling environment for sustainable development as well as to deliver an integrated, sustainable and quality services, the agency is mandated to manage and administer the following type of grants;

(a) Old Age Grant- this grant forms an integral part of the social assistance component of the South African social security system. It is said to be the largest current social transfer in the country and for those elderly persons who receive it, the grant is an important poverty alleviation means in the entire household. From the foregoing, it is clear that this grant is offered to the old aged persons. These persons in order to qualify for this

¹²⁴ See presentation about establishment of the South African Social Security Agency at page 1 accessed at www.sassa.gov.za on 30 May 2008.

grant must be South African citizens or permanent residents in the Republic. They should be resident in the Republic at the time of the application of the grant. Traditionally, and until recently, if the applicant is a male he would qualify if 65 years of age or older and 60 years old or older if a female.¹²⁵ In both instances the spouse must comply with the means test and the applicant must not be maintained or cared for in a state institution. This grant plays a crucial role in combating poverty in South Africa, not only because many pensioners would otherwise be amongst the poorest but also because pension money circulates widely in many poor communities.¹²⁶

(b) The Disability Grant- this is another type of social grant that the South African government through its department of Social Development offers. This grant is specifically for the disabled people who are unable to provide for themselves because of their disabilities. In order to qualify for this grant the applicant must satisfy certain requirements and these are as follows; firstly, he or she must be a South African citizen or a permanent resident of the Republic. At the time of application the applicant is required to be living within South Africa.

On top of these requirements, the applicant must be between 18 and 59 years old if a female and 18 to 64 if a male. This position is also undergoing development and change as far as this requirement is concerned. Also, there should be a proof of medical examination and assessment confirming the disability. If married, a spouse must meet the demands of the means test. If not married the guardian or parents must meet the

¹²⁵ There is a new development in our law that both men and women should qualify at the same age-60. this however does not apply retrospectively. That is, in four years from now-2008 the qualifying age will be the same.

¹²⁶ See Van der Berg. "Issues in South African Social Security at page 27 in Olivier, M P. et al.1999. Social Security-general principles. At page 202.

requirements of the means test. Further, the applicant must not be maintained or cared for in a state institution and must not be in possession of any other social grant. This grant is a *de facto* poverty grant since 70% of its recipients are also in serious poverty.

(c) The War Veterans Grant- this is a social grant given to all the war veterans of the Republic. These are the former soldiers who must have fought in the Second World War or the Korean War or served in the war that began in 1939. For the applicant to qualify for this grant, he must be a South African citizen of a permanent resident. At the time of the application, the applicant must still be residing in the Republic. The applicant must be sixty years of age or older or must be disabled. Also, the spouse of the applicant must meet the requirements of the means test, must not be cared for in a states institution and must not be in possession of any other states social grant. Most of our war veterans are no longer alive, but the few that are still alive by grace of God still receive this grant.

(d) Child Grants- there are several child grants that are available for the children in need in South Africa. They are as follows;

(e) Foster Grant- for the child to qualify for the foster child grant, there must be an order of court indicating foster care status and a foster child must pass the means test. The other important factors are that the applicant of this grant must be a South African citizen or permanent resident and must actually be resident within the republic at the time of application for the grant.

(f) Care Dependency Grant- this is a grant for parents or guardians of the disabled children who requires care at home by others. The grant is to provide for the needs of the child. As a general rule, to qualify for all the social grants one needs to be a South African citizen or a permanent resident. Therefore, even with the care dependency grant, a child must be a citizen or must have a permanent residence status. The child must be of the age between one and eighteen years. There must also be a medical or assessment report submitted as evidence of disability. Like is the case with other grants, applicant, spouse and the child must satisfy the requirements of the means test. The child must also not be cared for by or in any states' institutions. It is also required that a child's birth certificate be produced as evidence of place and date of birth of the child. Note should however be taken that the income of foster parent is not taken into consideration.

(g) Child Support Grant- as indicated above already, as a rule, for a child to qualify for this grant, it must be a South African or have the permanent resident status in the Republic. This rule applies even to the primary care giver of the child or children concerned. The applicant must be de facto primary care giver of the child or children in issue. The child must be under the age of fourteen to qualify for this grant. It is again the requirement of the law that the child, spouse or the primary care giver satisfies the requirements of the means test. Note should be taken that this grant cannot apply for more than six non biological children

(h) The Grant in Aid-As far as this grant is concerned, the applicant must require full time attendance by another person owing to his or her physical or mental disabilities.

Furthermore, he or she must not be cared for in an institution that is government subsidized for the care housing of such beneficiary. In essence, a grant in aid is an additional grant awarded to persons who are in receipt of an old age/ disability/war veterans grant and who are unable to care for themselves.

(i) Social Relief Distress.- besides the above eight social grants listed above and offered by the formal social security paradigm in South Africa, there is again the social relief distress. This means the alleviation of the need of persons by means of the temporary and immediate rendering of material assistance to them.¹²⁷ Social Assistance Act provides that the director general may subject to the provisions of the Act make a financial award to a person if he or she is satisfied that such a person is in need of social relief distress.¹²⁸ The following persons are eligible for social relief distress; the person awaiting permanent aid. Permanent aid does not only include grants but also any form of permanent aid such as the Road Accident Fund, Unemployment Insurance Fund, Compensation for Occupational Injuries and Diseases and so on.

The second category is/are persons or person who has for a period of less than six months, been found to be medically unfit to undertake remunerative work. Besides these, for the applicant to qualify for this grant, there must have been no maintenance received from a person who is in law obliged to pay such maintenance. There must be proof that efforts have been made to trace such a person or that efforts to obtain maintenance were unsuccessful.

¹²⁷ See Regulation 2 (k) of 2001.

¹²⁸ See Section 5 (2) of Act 59 of 1992.

Also, where the breadwinner is deceased and there is insufficient means of support available. Or the breadwinner has been admitted to an institution run by the state such as a correctional institute, state home for aged and so on for less than six months.

Moreover if a person has been affected by the natural disaster he or she qualifies for this grant. This is the case despite the fact that the area from which a person comes from or lives has not yet been declared a disaster area.

Also, where a person is not receiving assistance from any other organization, the type of assistance that is being rendered by another organization must be determined and if the assistance received does not include food, then this grant must be invoked to address the issue nutrition. Again, where ones grant has been suspended, a person can qualify for this grant pending the appeal of the suspended grant.

The above are the nine social grants or a social security service that falls within the four corners of the social assistance provisioning in South Africa. Because the formal social security system in South Africa is two legged, social assistance being the other leg and social insurance being the other we now turn into the content of the latter.

Unlike the social assistance, the social insurance is a contributory form of social security. Both employers and the employees contribute towards the insurance. It is a scheme entirely developed for the protection of workers and their dependants against unemployment arising from termination of services, illness, maternity and so on.”

Employers and employees contribute on an equal basis to the fund with practically no state contribution.”¹²⁹

From the fund, benefits are paid out to contributors and their dependants.¹³⁰ On top of the *Unemployment Insurance Act*, there is also the *Compensation for Occupational Injuries and Diseases Act*¹³¹ which makes provision for compensation for employment injuries and diseases. The compensation is paid to the employees and their dependants out of the compensation fund to each employee contribute on the basis of industry- based risk assessment.¹³²

There are other laws that seek to provide for the preventive measures at the work place such as the *Occupational Health and Safety Act*.

The above discussion has attempted to unpack the formal social security system in South Africa by looking into its legislative framework and what it really entails. We now turn to examine the content and coverage of the informal social security system with the ultimate goal of examining the relationship between the two forms of social security, the need for statutory regulation and provisioning of the latter in South Africa.

¹²⁹ Olivier, M P. et al. Introduction to Social Security at page 36.

¹³⁰ The Fund is established in terms of the *Unemployment Insurance Act* 30 of 1966 see now the Chapter 2 of the *Unemployment Insurance Act* 63 of 2001.

¹³¹ Act 130 of 1993.

¹³² This Fund is established in terms of COIDA.

3.4 THE CONTENT AND APPLICATION OF INFORMAL FORMS OF SOCIAL SECURITY

“Informal social security is conceptually part and parcel of social security, as it could and in many developing countries does play an important role as social protection instrument”¹³³ the White Paper for Social Welfare¹³⁴ on the other hand, states that the formal welfare sector is in general accepted to consist of welfare organization that are government subsidized. The informal welfare sector consists of organizations that are currently not government subsidized and these informal social networks are entities such as family, friends, neighbors and indigenous helping system.



The development of informal social security is largely linked to the problem of poverty and to the vast number of people excluded in terms of the present formal social security framework, in order to address social exclusion, informal social security was (and is still is) looked upon as a means of overcoming the problem of marginalization of the poor¹³⁵.

Indeed the inability of the present formal social security system to provide and cater for all categories of the poor and the needy coupled with the inaccessibility of the services provided by the system largely and wholly necessitated the birth and development of a system that would close up the huge gaps that are left unclosed by the formal social security system. The increase in the atypical employment, informal employment, self employment and so on and the inability of the existing formal system of social security to

¹³³ Dekker, A H & Olivier, M P in *Introduction to Social Security* at page 83.

¹³⁴ GN 1108 in GG 1816 of August 1997 in Chapter 3 item 2.

¹³⁵ Dekker, A H & Olivier, M P. in Olivier et al.2005. *Social Security: A Legal Analysis* at page 560.

deal with the social security needs of the changing society and its exclusionary nature have necessitated an alternative approach to cover for the basic risks and contingencies. In essence in formal social security operates side by side with the informal social security. Olivier and Dekker put it as thus;

Informal social security can firstly (and most easily) be defined as the counterpart of formal social security covering social protection mechanisms outside the formal social security paradigm¹³⁶

Of cause at this stage, the critical role that is played by the informal social security can no more be over emphasized or undermined, in the recognition of the links between economic wellbeing, social and economic development. Hence a need to ensure that general social security policies, economic development policies as well as the social development policies are formulated on a complementary, integrated and mutually reinforcing manner. This submission has a direct relationship with what the SADC community in the code on social security in the SADC has expressed under the provision on social protection framework.¹³⁷ The code further provides that;

Members states should recognize the existence of informal modes of social security and should seek to strengthen and rationalize them (by for example providing skill, training

¹³⁶ Oliveir *et al.* *Introduction to Social Security* ibid at page 82.

¹³⁷ See Article 19 of the Code.

and relevant forms of support) and to integrate them with formal mode of social security¹³⁸

Moreover, the code further encourages members of the SADC community to aim at developing integrated and comprehensive social security protection which encompasses coordinated formal and non formal types, direct and indirect forms of social support¹³⁹.

We have already discussed in the previous chapter and it is now a matter of common cause that the informal social security paradigm has two forms. To wit, private household based systems and member organization based systems.

The critical question therefore is what service do these systems provide to the members of the community?

First of all, the private household based systems or kinship based system as is commonly known provides both services and monetary support to its members. This we would refer to it as a grant in the formal system. These services came through in organized groupings such as stokvels, burial societies and rotating credit societies. A typical example in South African context is the care taken by the family members of children where the parents have died or are too poor to support the children.¹⁴⁰

¹³⁸ See Article 19.3 of the code.

¹³⁹ See Article 19.4 of the Code.

¹⁴⁰ Olivier, M. P et al. Introduction to Social Security at page 91.

Another good example would be where grand parents support children and their grand children and in return the children and grand children will look after the elderly when they can no longer take care of themselves.¹⁴¹

From the above examples, two important things are noticed, one is the element of reciprocity and, two, the element of utmost good faith and trust. The underlying idea is that social risks are unplanned and occur to every one, so, to guard against their harsh effects, the communities help the one facing the problem at the time the problem exist. The expectation is that he or she will do the same when another member faces the similar problem.

The other leg of the informal social security arrangement is the neighborhood based informal social security system. Unlike in the kinship based informal social security arrangements the neighborhood and the informal based social security schemes are normally fairly organized and structured. It would seem therefore that the neighborhood and informal sector based social security measures have been “relatively successful in developing and penetrating markets for products and forging links financial institutions and with service providers such as the medical professionals”¹⁴² Some of the characteristics of this system have a sense of a formalized system because issues of registration involves the government to an extent of the government even financing them.

Members of these schemes are entitled to many benefits which are at the heart of poverty alleviation and eradication. For example, members of the Self Employed Workers Union

¹⁴¹ See Note N0:38 supra at 91.

¹⁴² Olivier, M. P et al ibid at page 90-91.

obtain leadership skills for poor women to make a living.¹⁴³ In brief, members of a particular informal sector such as the atypically employed, self employed and so, can come together and make their own social security arrangements to cover for their social contingencies and risks.

From the previous discussions, we have at least so far managed to address and outline the legislative framework of the formal social security arrangement as well as a detailed outline of the services that this system offers. We have also seen how comprehensive the legislation regulating the formal social security is. On the other hand, and in like manner, we have examined the informal social security. In doing this examination especially on the informal social security, we have had an opportunity to also examine the services it offers and also observed that there is no single law or statute that is attributed to this system. Hence this study seeks to move for the statutory regulation and provisioning of the informal social security in South Africa.

It is the unchallenged truth that the informal social security schemes do not have the same capacity as the formal social security schemes owing to their weak resource base.¹⁴⁴ The consequence of this is the dismal failure on the part of the system to cover members from social risks and contingencies they face. However, the informal social security arrangements still remain advantageous in some respects. In the first instance, they are able to respond timorously to the perceived needs and provide for the most appropriate forms of social assistance such services or even monetary assistance. Secondly, the

¹⁴³ See Baden, S et al.1998. "Country Gender Profile": South Africa's report prepared for the Swedish International Development Office (SIDA) at page 111.

¹⁴⁴ Oliveir, M. P & Kaseke, E. " Informal Social Security: Developing an Integrative approach- Draft working paper at page 4.

informal social security system unlike the formal one provides for both immediate and future needs. Indeed this is a special feature peculiar thereto.

By their nature, the informal social security arrangements are haphazard and self regulatory. This has made these arrangements *prima facie* unreliable, unstable and susceptible to external shocks.¹⁴⁵ To a very large extent, this argument holds water. These are some of the major setbacks of the informal social security systems. We continue to argue that these setbacks have a serious potential of weakening these systems hence opening a huge gap in the poverty alleviation and eradication mechanisms present today. We further submit and argue that to stabilize and organize these systems, there must be legislative regulation and provision of the informal social security. The issues of finances, administration, recognition and registration must be provided for in the statute. This should be so, given the important nature of the system, the rapidly growing informal sector and the raising levels of corruption in our societies.



From the above arguments and discussions, it will be noted that the relationship between formal and informal social security systems is quite close. Hence a submission that, informal social security arrangements function either as independent schemes or as unofficial subsidiary schemes to the formal ones. The reasons for the reliance on these subsidiary schemes have already been discussed earlier.

To note the importance and the realities behind the relationship between both the informal and formal social security systems in South Africa, an example is given with regard to the old age grant. This grant is the largest social assistance programme and the only form of formal income of families and house holds which often comprise three

¹⁴⁵ Olivier and Kaseke, *ibid* at page 10.

generations.¹⁴⁶ This fact alone symbolizes the need for the relationship between the formal and informal social security systems. This has also been stressed and emphasized in the report of the committee of inquiry into a comprehensive system of social security in South Africa in the following words;

The SOAP [State Old Age Pension] reduces the poverty gap for pensioners by 94 per cent. Poor households that include pensioners are on average significantly less poor than households without pensioners. 'Skip generation households (comprising child and grandparent), on average have their poverty gap closed by over 60 per cent. For three-generation households the poverty gap is closed by less than 50 per cent due to the burden of the working age members. For the average poor household without a pension-eligible member, however, social securities impact is almost negligible. For households with no pensioners, the reduction is less than 10 per cent¹⁴⁷.

The foregoing reflects vividly that these two systems operate side by side, more so because where the formal systems fall short the informal systems are resorted to. Also that participation in the informal system is not limited to those who are working. Any member of the community can participate in these schemes. In this way they operate side by side. However, it is trite that only the poor families base their means of survival on the

¹⁴⁶ See Transforming the present- protecting the future: Draft consolidated report (Report of the Committee of enquiry into a comprehensive social security for South Africa (2002) 59, Samson, M et al. Social Security Reform and the Basic Income Grant for South African Economic Policy Institute Report 31 (2002) 7 and Alderman, H. Safety Nets and Income Transfers in South Africa (World Bank informal discussion paper series 1999 in Olivier M, P et al. Introduction to Social Security. Op cit page 11.

¹⁴⁷ Taken from Olivier, M P & Kaseke, E. "Informal Social Security and Formal Social Security: Developing an Integrative Approach- Draft Working Paper at page 11.

informal forms as well as the formal forms of social security. Yet the converse is not the case. The participation in the informal social security is not linked to formal employment or means-test¹⁴⁸. That is to say, both the poor, middle income class and rich families can participate in these forms.

3.5 COMPARING AND CONTRASTING FORMAL AND INFORMAL SOCIAL SECURITY SYSTEMS

It is again of paramount importance to provide an overview of the relationship between the two forms of social security in South Africa. Here the examination of the similarities and differences both in theory and application of these two forms is made. Most of the differences and similarities have already been dealt with at the conceptualization level of terms. The first and the most obvious difference is that the informal social security arrangements are those self organized informal safety nets which are based on membership of a particular social group or community including family, neighborhood, ethnic group or nationality. While the formal social security arrangements are those government organized mechanisms or safety nets which are base on the formal employment status of individuals normally known as social insurance and those who qualify in terms of the means test, normally referred to as social protection. This is the major difference between the tow forms of social security. The rest of the differences mainly flow from the above. From the way these two forms are classified and designed, the formal social security is commonly referred to as the non-contributory form of social

¹⁴⁸ See Gerder, V. "Precursors of modern social security in indigenous African Institutions" (1975) 13 Journal of Modern African Studies at 209-222.

security while the informal is known as a contributory form of social security. Besides this major difference, there is again a major common area for the two. This is the fact that the two are the social protection mechanisms and are intended to prevent destitution. In principle, informal social security has been defined as a counterpart of the formal social security. One can further add that the informal social security comes into play when the formal social security becomes inadequate.

Other than the above, the distinction between the two forms of social security can be derived from the following key aspects of social security arrangements, to wit, coverage, benefits financing and administration.¹⁴⁹

As far as coverage is concerned, opposite to formal social security arrangements, informal social security arrangements generally have a wide scope of coverage due to its participation requirements. In these schemes everybody can participate unlike in the formal schemes where only a certain group participates. Almost all the people who may be excluded in terms of the formal social security may participate in the informal ones.

Relating to benefits, few critical elements are present which makes the two really distinct. In the formal social security systems payment of benefits is made on certain qualifying conditions. These conditions include but not limited to contributions and qualifying period in terms of the social insurance benefits and on the other hand the means test, age, citizenship or residence, disability and so on in terms of the social assistance benefits. In the informal social security systems as well, in order for benefits to be paid there are still

¹⁴⁹ See Olivier, M & Kaseke, E. *Informal Social Security and Formal Social Security: Developing an Integrative Approach*. Draft Working paper prepared for SADC Core Group of Social Security Specialists Regional Conference on “Social Security in the Making: Developments in the Informal Economy and Informal Social Security” at page 11.

some conditions such as waiting periods and contributions which must be satisfied before payment is effected.

These benefits differ depending on the type of arrangement that one is in. In the informal systems, the benefits can be in cash or in kind. Due to its resource base, the cash benefits in the informal social security system are lower than in the formal social security. The informal social security members therefore would compliment the little cash benefits with in kind benefits such as labour and other services such as lending the beneficiary the equipment to be used in whatever the activity may be. Gerder made the following remarks with regard to informal social security financing in Ethiopia;

under traditional arrangements, each member contributes according to either a predetermined share or on the basis of his resources. On the other hand, participation on a non-monetary basis is very common, with each being able to contribute such as he can, even though it may be nothing more sophisticated than hauling water, gathering firewood, tending cattle, preparing food, or helping to dig a grave...¹⁵⁰

Much as the above quotation referred to the Ethiopian case study, this assertion is also true and relevant in the South African context.

In line with the previous discussions and arguments in relation to the statutory provisioning of the informal social security and now in line with the current discussions

¹⁵⁰ Ibid at 221.

on the administration of the entire social security spectrum as one of the differences of the two, the SADC Code¹⁵¹ provides that;

Members states should endeavor to establish proper administrative and regulatory framework in order to ensure effective and efficient delivery of social security benefits¹⁵²

It is obvious from the provisions of the Code that in order to have a proper administration of social security, it is important to establish and introduce regulatory mechanisms and strategies for the purposes of ensuring efficiency and effectiveness in the delivery of the social security services. The importance of proper administration and a need for regulatory system cannot at this particular point be overemphasized.

Generally speaking, social security administration is almost similar across the globe. That is to say, the general administration of social security must have certain features and characteristics which are common for any given social security system. These are registration collection and recording of contributions and lastly the payment of benefits to the beneficiaries. These are the three cardinal characteristics at the heart of the administration of social security, either formal or informal. They are further expanded and explained below;

¹⁵¹ Code on Social Security in the SADC- Draft Text (herein after referred to as the Code).

¹⁵² Article 20.1 of the Code.

(a) Registration of Members of the Scheme

It is very important for social security schemes to have knowledge of the exact number of members they have. The rationale behind this is to ensure that proper and adequate control is exercised on who the benefits are paid and from who the contributions are expected. Registration also helps to regulate and monitor the intake of the new members and also helps to keep track of the old members.

(b) Collection and Recording of Contributions

The collection and recording of the contributions is at the heart of the existence and well being of the schemes. Without the collection of contributions from the members it will be difficult to run and operate the scheme. Indeed there is also an element of contributions by way of services (in kind contribution, especially in the informal social security systems) as earlier seen, these are also important because they assist in the assessment of who actually does what for the other members of the scheme. The recording of the contributions is also ideal for the purposes of accountability. This aspect is peculiar to the informal social security while at the same time having certain aspects of the formal systems.

(c) Awarding and Payment of Benefits

This is the ultimate goal of the social security schemes. It is the function and task of every social security system to administer, without any discrimination, the awarding or payment of the benefits to members when these become payable. This is another similarity common to both.

These as indicated earlier are the general characteristics of the social security administration. There are obviously some few major differences in the administration of the two existing forms of social security. Often, the administrative and institutional framework of the formal social security is characterized by complex beurocratic arrangements which are often unnecessary in the informal social security system. The underpinning factor is that informal social security arrangements in their nature have;

few accounting requirements, statistics are of little importance in the operation of the scheme, and no elaborate plan for inspection is needed to ensure the compliance of members. Nor being wage-related, as are most modern social security schemes, records of employer contributions and problems associated with workers' responses are absent..., Expensive record keeping and office equipment is unnecessary, and there is little need for skilled personnel¹⁵³.

¹⁵³ Gerder V “ *Precursors of modern social security in indigenous African institutions*” (1975) 13 Journal of Modern African Studies 209 at 225.

From the above quotation, a good number of truths are revealed about the administration of the informal social security system. These truths are apparently the setbacks pulling the system backwards and downwards instead of it developing.

The first is the accounting requirements and procedures that the informal system operates with. Due to the few accounting requirements, there is a high risk of financial mismanagement. This is so, also given the fact that there exist in most cases little or no inspection or auditing to ensure good financial management.



Secondly, these schemes are based on trust and reciprocity and there are no formalities such as signing of contracts. Due to the high levels of trust that members have for each other precipitated by the driving force of *ubuntu*, no member of these schemes would normally have courage to breach the trust accorded to him or her by other fellow members. This is because of the serious sanctions that the community may impose on such a member.

The sanction may include exclusion from the activities and the marginalization from the socio-economic life of the entire community. The resultant effect of this setback is the weak enforcement and compliance mechanisms which in turn make the informal social security schemes open to abuse.

Moreover, these informal social security mechanisms almost always lack legal personality as opposed to the formal arrangements. The aggrieved member(s) can only have recourse against other members of the informal scheme.¹⁵⁴

¹⁵⁴ Ibid at 15.

Olivier and Kaseke, allude to the fact that the governance of the informal social security systems is generally good because the groups are small and composed of people who know each other. This is a sound and groundbreaking argument. One however, regrettably disagrees. It is argued that the very fact that these groups are build up of people who know each other is a serious problem in many respects. In the first instance, this makes the accounting very difficult if not impossible. Normally those in the management are the most respected and vocal members of the community, who are also influential and feared (in the sense of being mostly unchallenged and the people believe in such a person perhaps due to the persons age, royal decendancy or any other factor). The effect is the management team not accounting to the membership. In the second instance, given the African community structures, one finds that almost the entire village comprises of the blood relatives and very close friends. This results in other members being shy to enforce and assert the schemes proper administration because a close relative or friend is directly involved. In brief, the inability to separate business with close family ties and friendship is a serious draw back for these schemes too. In their own words, Oliver and Kaseke, argue that there are no checks and balances for moral hazards¹⁵⁵. Hence it is argued that there be statutory regulation and recognition by the government of the informal social security system.

3.6. SUMMARY

From the above critical analysis of the social security paradigm in South Africa, few important lessons are noted. The first one is that several categories and groups of the

¹⁵⁵ Oliveir and Kaseke ibid at 15.

the social insurance schemes and in the second instance do not fall within one of the categories in respect of whom social assistance grants are made available.

CHAPTER FOUR

GLOBAL TRENDS IN THE DEVELOPMENT OF SOCIAL SECURITY

4.1. INTRODUCTION

Despite the end of the apartheid, severe poverty and huge socio-economic inequality still remain in South Africa. Poverty eradication is claimed to be the key priority for the government, and social security is one of the key policy areas in this context. This assertion must not only be heard but must also be seen in practical terms.¹⁵⁷

South African democracy promises the resolution of many disabilities faced by those who have suffered under the previous regimes. Since the year 1994, tremendous changes have taken place in many aspects of the South African life. There can be little or no doubt that there have been enormous enhancements of citizenship for the great majority of the people, and that in many cases access to some basic services has also improved to a very large extent. Yet, as in many other countries, difficult problems remain unresolved. Among those is the question of insecurity of the people against the social risks and contingencies that still confronts them even today.



The brief for this chapter is to examine realities and practical implications of the research result obtained from the analysis in the previous chapters. What is clear though is that the advent of democratization in South Africa exerts significant inputs on the social security

¹⁵⁷ Kumiko Makino.2003. *Social Security Policy Reform in Post-Apartheid South Africa, A Focus on the Basic Income Grant*, Center for Civil Research Report N0: 11. The paper was first presented at 19th IPSA World Congress in Durban in July 2003.

paradigm inherited from the past. The removal of the discriminatory laws and enshrining of the right of access to social security has opened the opportunities for people to live better lives free of poverty.

The upshot is that large population driven by poverty and unemployment are forced into the informal social security schemes. This again puts more pressure far beyond what the existing formal social security can carry. Hence the chapter's examination of possible enhancement mechanisms of the existing system of social security.

Implicit is the supposition that major changes are occurring in the relationship between formal and informal social security leading to new social security arrangements and that both are having diverse effects on individuals and collectives.

The ultimate interest is to find out whether the newly proposed system of statutory regulation of the informal social security will succeed or not and to what extent.

4.2 DEVELOPMENT OF SOCIAL SECURITY IN THE DEVELOPED NATIONS: EUROPE AS A CASE STUDY.

The government of the German Chancellor Bismarck was responsible for the establishment of the first broad system of social insurance between the years 1883 and 1889. The system was a compulsory one for all wage earners and was financed by contributions from workers and employers. Workers, employers and the state played an important role in managing these schemes. Thus workers were protected from stigma of poverty and destitution. Other European states followed this trend after the German

government had set an example. By 1930's social assistance has spread to the America and Canada¹⁵⁸

The development of social security systems in Britain and the United States and other countries must be viewed against the backdrop of a political commitment to the market mechanism for resolving unemployment problems and poverty coupled with a deep suspicion of state intervention in market dynamics for social purposes.¹⁵⁹

For the very first time, social security was recognized as a fundamental human right by the United Nations (UN) in the Universal Declaration of Human Rights 1948 (UDHR), albeit the one that a limited number of the people actually enjoy. The earliest principles governing social security legislation are embodied in the ILO Convention 102 of 1952. This is a *locus classicus* instrument in the arena of international social security. This convention covers the nine classical risks and contingencies that individuals should be covered and protected against in social security provisioning.¹⁶⁰

The term social security has internationally attracted a wide range of meanings. It was indicated earlier that this concept is generally a flexible one and has no one correct and precise definition. However, at this level what have become important and central to this

¹⁵⁸ On June 8 1934, President Franklin D Roosevelt of the United States of America in a message to the US Congress announced his government's intention to provide a programme for social security. On the 14th August 1935 the Social Security Act was signed into law in the United States of America. See a Brief History of Social Security, Issued on Social Security's 65th Anniversary in 2000 accessed at www.ssa.gov/history.

¹⁵⁹ See Langan, M. 1998. *The Contested Concept of need in Welfare: Need, Rights and Risks*: London & New York : Rastledge at page 27-28

¹⁶⁰ These are risks relating to medical/health services, sickness, unemployment, old age, employment injuries, family (i.e. maintenance of children), maternity (i.e. pregnancy, confinement and suspension of earnings), invalidity either permanent or long-term inability to engage in any gainful employment or activity and lastly the survivors benefits i.e. loss of support suffered by a spouse or child as a result of a breadwinner.

concept is a protective nature and or aspect it has against the social calamities and risks that confront the communities.

In the developed nations from which the developing learns, social security has been construed to refer mainly to social assistance and social insurance. This is the definition and characteristics of the concept as defined by its European origins and has developed as a complement to the formal employment relationship in the European countries and their rich counterparts.¹⁶¹

Within the context of the developed nations such as the Western Europe and the United States of the America, social security covers employees and their dependants against old age, unemployment, health and other risks as indicated above. The formal sector workers in these countries have access to social insurance and the very poor and destitute have some access to social assistance and health services. However, these countries like the entire developing are faced with a problem of social security coverage in which large population groups are not covered.¹⁶² In order to address this problem these countries have adopted an approach in which they delink social security benefits and the labour market status. What this means is that new institutions are created in order to cover the currently uncovered, marginalized or excluded groups. Also financing these new institutions or programmes through general taxation is central and critical. This is by improving the tax collection and reducing the costs of the formal sector benefits whilst on the other hand they increase the cost of the informal sector benefits.¹⁶³

¹⁶¹ See the Report of the Taylor Committee at page 37.

¹⁶² This is illustrated in the 2020 Focus Brief on Worlds Poor and Hungry People paper by Jean-J Dethier at page 1 accessed at www.ifpri.org.

¹⁶³ See Dethier, JJ in 2020 Focus Brief on Worlds Poor and Hungry People *ibid* at page 1.

There are other policy instruments especially in the United Kingdom (UK) in particular, the progressive taxation and various regulations such as the minimum wage laws and other labour market policies help to a very large extent support social security. It is argued that in the context of the developed countries the above programmes, their institutions and effectiveness should ideally be evaluated together with pension and health insurance systems and social safety net programmes.

Social insurance in the context of the developed countries is regarded as a substitute for the market mechanism when such mechanisms are not economically viable or tend to exclude part of the population. As a general rule, it cannot and does not operate in the same manner as the standard private insurance and cannot be financed actuarially fair contributions.

Social security just like in the developing countries is partly financed through taxes levied on the people irrespective of their exposure to the risks that are covered. This really means there is substantial income redistribution across individual citizens. It is through this redistribution that the public coverage of the old age and health risks in the UK is truly social as opposed to actuarially neutral substitute for the market mechanism.

The notion of social security in the developed nations developed massively after the Second World War. Some thirty years down after the scourge of war that twice brought untold sorrow to mankind, many countries began to introduce measures in unemployment benefits and social assistance to re-build the individual incentives considered to have been threatened by the then existing policies.

Social security systems in these countries are relatively large and complex ranging from 31 percent of the gross domestic product (GDP) in Sweden to 16 percent in the US.

There is also a great deal of institutional differences between the countries due to their different historical backgrounds and ideologies as far as the role of both the private and public sectors of the re concerned in relation to insurable risks.

Despite the high development levels, the developed countries still feel the pinch of the costs of social security but at the same time acknowledge the major social benefits that it provides to the communities, which arise from gains in efficiency and from a more harmonious and cohesive society. The costs of social security arise from the distortions generated on both the tax and the benefit sides with additional distortions generated by factors such as reducing the incentive to supply labour. Other than these high costs, social security has generated massive benefits in terms of income maintenance, poverty reduction and economic stability in the developed countries.¹⁶⁴



Of course encouraged by their economic muscle, the developed nations have the most comprehensive social security arrangements in the world. Their pension systems for example cover more than ninety percent of the labour force. All these countries have a compulsory pension schemes. Despite the different approaches that are adopted by these

¹⁶⁴ The cross-country studies of income distribution that examine the coverage of low-income risks by government programmes shows that social security has helped reduce poverty drastically by at least 40 per cent in Europe, in heavily insured countries such as Belgium, and Sweden by more than 70 per cent and by 28 per cent in the US. See Smeeding "*Government Programmes and Social Outcomes: Comparison of the US with other Rich Nations*" in *Public Policy and Income Distribution*. Auerbuch, A *et al* (New York; Russel Sage Foundation.

countries, basically the Organization for Economic Cooperation and Development (OECD) countries all older persons are guaranteed at least a minimum standard of living. Other than the pension schemes for the old, all these states provide a comprehensive universal health insurance scheme except the US.

4.3 MEASURING THE SOUTH AFRICAN SYSTEM AGAINST INTERNATIONAL TRENDS.

Since many African countries do not collect data on the informal sector it is difficult to make a sound and strict comparison within and between the African states as far as the informal social security mechanisms are concerned. In like manner, it is not going to be fruitful to make again a comparative study among the African states in relation to the formal social security since the South African jurisprudence on the subject on social security is one of the leading in Africa. Therefore the European position will be put into perspectives in order to obtain illuminating lessons for South Africa.

4.4 TOWARDS ADOPTING THE OECD MODEL?

Since a strong demand for a comprehensive social security and better social protection exist in many emerging economies such as South Africa, policymakers must consider emulating some of the models adopted by the developed nations the ultimate goal being a universal system in which all citizens have access to adequate social protection. But before this can be done, a number of important questions must be answered. Inter alia is

whether the models of the OECD countries are suitable for the purposes of the developing. It is important also to ask how these countries attained their current strong and comprehensive social security systems and why the developing cannot attain the same. There are several factors attributed to the current position relating to the above situation. The first and probably the most important factor, is that social security is largely if not wholly influenced by the social or local influences pushed by the local needs. Therefore having this in mind, there was a serious need for the developed to enhance their systems in order to cover their systems. While on the other hand the current social risks that confront the communities in the developing especially in the African context are not or were not initially the risks per se. for example the question of food security was never a problem due to the fact that the African communities were highly agrarian. The point here is that, the local influences and backgrounds of the two set of nations, to wit, developed and developing are too different and distinct to expect similarities.

There is the point in ignoring what the developed countries do or did in developing their systems much as this may not be relevant in the African context. There are other important factors which are serious hurdles for the developing nations, which is marching their systems with those of the developed.

In principle, developing countries differ in structure from the developed in several respects. For instance there is huge gap in the income levels. To put more light upon, the per capita income levels are way to different¹⁶⁵ it goes without saying that the poverty

¹⁶⁵ As at 2007, the *per capita* income level was \$1,750 against \$35,000 on average for the developing and the developed respectively.

levels alarmingly high in the developing hence low levels of income. As already low as it is, income is not equally distributed and this exacerbates the situation.

The other critical and crucial factor is the nature of the labour market in the developing states which is by and large fragmented with a very large informal sector.¹⁶⁶ It is now common cause that the social security system in the developing countries (and South Africa) is largely formal employment based, leaving the informal economy outside the coverage of the social security benefits. With the increasing levels of the informal employment the current status is likely to worsen the already critical position. The existing fragmented systems of social protection makes it possible for the richest population group with access to the formal social insurance and at the same time the poor have some access to the social assistance and health services. It is also common cause that large population groups are not covered by formal sector social security institutions and receive no social assistance.

All the developed nations as opposed to the developing devote the public resources to the social security services such as the health care, social assistance and for some privileged groups pensions.¹⁶⁷ In the developing countries, there exist very few with social insurance. Even where it exists coverage is limited to wage workers in the formal sector of the economy.

The developing countries are experiencing major difficulties in extending coverage to the informal sector poor populations and raising contributions from non-poor, informal-

¹⁶⁶ See Baeza, C & Packard, T. 2006. *Beyond Survival: Protecting Households from Health Shocks in Latin America*. (World Bank 2006) accessed at www.worldbank.org.

¹⁶⁷ Wagstaff, A. 2007. *Social Health Insurance Re-examined, Policy Working Paper N0: 4111* (World Bank, 2007)

sector workers for several reasons as already indicated. The fiscal constraints are also some of these reasons.¹⁶⁸ This is coupled with the administrative constraints which are normally characterized by lack of official records of income and corruption and misuse of public funds and therefore difficulty in collecting taxes.¹⁶⁹ The scale of poverty and lack of the proper and adequate administrative capacity, debt burden and structural adjustment policies imposed by the international monetary agencies add to the already present problems of social security coverage and development.¹⁷⁰

An effective and equitable social security system cannot exist in the context in which government is corrupt and the avenues of public protests and participation in the policy making are non-existent.¹⁷¹

4.5 POSSIBLE OPTIONS FOR INTEGRATION

The discussion in the previous chapter, so far has been able *inter alia* to bring into picture an analysis of the relationship between the formal and informal social security paradigms. It also provided a detailed content or services that are available within the two interrelated forms of social security. The study further discussed and outlined the legislative regulatory framework within which the formal social security exists. At the same time it has indicated the absence of the legislative provisioning for the informal

¹⁶⁸ It is important to note that the universal social insurance requires very strong tax base. Without which it is very difficult if not impossible to finance the social insurance schemes.

¹⁶⁹ Refer to Detheir, JJ. 2007. *Social Security: What can Developing Countries learn from Developed Countries? 2020 Focus Brief on the Worlds Poor and Hungry People*. Washington ,DC IFPRI accessed at www.ifpri.org .

¹⁷⁰ Langan, M. 1982. *The Contested Concept of Need, in Welfare: Need, Rights and Risks*; London and New York: Routledge, 1998 at page 28.

¹⁷¹ See ILO, *Introduction to Social Security* (Geneva, International Labour Office, 1984) at page 2.

social security. It is therefore, important at this stage to turn to the possible enhancement mechanisms of the informal social security. Perhaps even the possible accommodation of the informal social security within the broader social security arrangement in South Africa.

As a general rule, the informal social security schemes are currently not recognized within the formal regulatory system. However, similar notions thereto such as the non-profit making organizations,¹⁷² friendly societies¹⁷³ and social investments are to a large extent covered and accommodated within the legislative framework in South Africa. If at all the reasons or reason for non regulation of informal social security is the how question of the structure of the statute, the lessons can be learned form these similar systems. Clear examples can be obtained from various legislations concerned with the statutory regulation of formally unregulated areas, such as the earlier mentioned non-profit making organizations, the famous Black Economic Empowerment policy¹⁷⁴ and many similar areas.¹⁷⁵

Dekker made the following critical observations:

an analysis of present policy will also indicate if the time is ripe to seek greater recognition for, and the incorporation of informal social security within the wider social security

¹⁷² Regulated by the *Non Profit Organisations Act* 71 of 1997.

¹⁷³ Friendly Societies Act 25 of 1956.

¹⁷⁴ Governed by the *Broad Based Black Economic Empowerment Act* 53 of 2001.

¹⁷⁵ See also, *National Small Business Act*, *National Welfare Act* 100 of 1978.

dispensation..., overall policy will dictate specific legislation, regulation or sectoral policies..”¹⁷⁶

Dekker has explicitly emphasized the importance of a government policy which sought to consider recognition and regulation of informal social security. This approach has set a basis upon which moves towards regulation should be based. Policy formulation and consideration is an important building block towards the final ultimate destination which is regulation of the informal social security schemes. As pointed out already, such policy will be a clear reflection of the governments’ commitment and intention to foster a particular goal which is the regulation of the informal social security in this case. It is this and or that policy that will later be translated into law.

It would seem that at present, there is no existing clear policy that seeks to enhance or develop the existing social security system. The only existing policies are embodied in the two most important policy documents, relatively old, namely, the Welfare White Paper and the report of the Taylor Committee. Other important policy documents on social security are the RDP¹⁷⁷ and the Gear. These documents are however more concerned with the formal social security systems.

In addition to what has been said by Dekker above, regarding the policy formulation as a pathway towards regulation of the informal social security, which will later be translated into law, Kaseke also, draws the following, also important and critical, conclusion with regard to the strengthening of the informal social security schemes;

¹⁷⁶ Dekker, A. H.2005. *Informal Social Security: A Legal Analysis*; A PhD thesis submitted at the University of South Africa at 196.

¹⁷⁷ See the *Reconstruction and Development Programme. A policy framework*- ANC-1994 at pages 52-57.

the starting point in efforts to strengthen non-formal social security systems and schemes, is recognition by governments that non-formal social security schemes are providing social protection to the majority of the people. Governments also need to accept that formal social security system as currently conceptualized and designed do not capture the poor who constitute the majority of the [poor] population¹⁷⁸

There are indeed many thought provoking ideas and suggestions in relation to the enhancement and enforcement of the informal social security schemes. For example, recent thinking particularly from the African scholars in the area of informal social security support the idea that social protection must be extended to families in an African context, strengthening informal social security schemes and linking the informal and the formal systems.¹⁷⁹

Many have argued for the integrated approach so that even the poor can take part in the formal social security arrangements.¹⁸⁰



¹⁷⁸ Kaseke, E, "Informal Social Security in Eastern and Southern Africa" Towards, the Development of Social Protection in the SADC Region; Proceedings and outcomes of the Conference held the Helderfontein Conference Center, Johannesburg South Africa. 17 to 19 October 2001 in Olivier, M. P and Kaseke, E, "Extending Social Protection to facilities in the African context: the complementary role of formal and informal social security- 4th International Conference on Social Security. May 2003 at page 28.

¹⁷⁹ See Kaseke ibid at page 28.

¹⁸⁰ See Van Ginneken, Social Security for the Informal Sector at page 17.

4.6 TOWARDS A SUITABLE MODEL FOR SOUTH AFRICA

Much as the majority of the population is excluded by the social security paradigm in South Africa for some who are covered the social grants are vital source of income and play a pivotal role in the alleviation of poverty. Since the year 2006, rapid increase in the government expenditure on social security have further enhanced the contributions of welfare grants to the income of the poor households and thus been important in the fight against poverty. Given the apparent successes and probably failures, many are calling for further expansion in the social security provisioning.¹⁸¹ However, the budgetary and service delivery constraints present a strong argument against the expansion of social welfare system in the immediate future¹⁸². To a large extent this argument is sustainable and sound. Lots of efforts and finances which may not be available given the economic growth and development in South Africa are required to maintain and sustain stable and expanded social protection coverage.

South Africa faces large budget constraints to expanding fiscal spending. As priorities change, there is sometimes a need to increase spending in certain areas. However, this comes at the expense of other governmental functions. The affordability issue is critical for the future path of social security in the Republic. To put more emphasis on this point,

¹⁸¹ The United Nations Economic Commission for Africa has suggested that in order to extend social protection it is important that additional institutions be developed for the informal sector workers, which are able to spread the benefits and protection afforded to those in the formal sector. See the Commissions work titled, *"The Globalization of Labour Markets, Challenges, Adjustments, and Policy Response for the Informal Sector in Africa"* published by the Poverty and Social Policy Team Economic and Social Policy Division. December 2005 at page 30.

¹⁸² See Kalie, A & Liberty M. *"Expanding the Social Security Net in South Africa"* Opportunities, Challenges and Constraints: A country study published by The International Poverty Center (IPC).

the National Treasury (NT) noted earlier in 2006 that the poor could not be taken care of on the basis of the tax overruns since this could be unsustainable.¹⁸³

That is not the only implication if the expansion road is adopted with regard to social protection in South Africa. It is further argued that, any expansion of the social security provisioning will have serious negative implications on the service delivery. In South Africa, the Department of Social Development (DSD) is responsible for the administration and disbursing welfare grants through its subsidiary, the South African Social Security Agency (SASSA) as earlier shown in the previous chapters. If the current welfare system is changed or adopted in any of the variety of possible ways this Department will have to play a central role.

It must be clear as to what exactly is been referred to by the expansion and extension of the current social security system. Options for expansion include extending current grants to a greater number of beneficiaries by relaxing the eligibility criteria or by introducing additional programmes. In the case of additional grants the implementation and monitoring as well as the evaluation processes to ensure that the beneficiaries comply with the conditions attached to grants would be cumbersome.¹⁸⁴ It would seem therefore that leaving the system as it is and rather putting in the regulatory framework for the informal social security has less complex implications which are more workable and have an immediate practical solution to the current deficiencies in the current social security system.

¹⁸³ See the National Treasury's website at www.dof.gov.za/nationaltreasury/2006.

¹⁸⁴ See Kalie & Liberty "Expanding the Social Security Net in South Africa" at pages 19-22.

According to Dekker, in South Africa, formal social security plays a limited role in providing social protection and informal social security systems have been developed in order to attempt to patch those holes in the social safety net¹⁸⁵. From the foregoing, it is vivid that these two forms of social security in one way or the other supplement one another to some extent. This is due to the fact that, where the formal systems fall short, the informal system comes into play. It would seem that the converse is also true. It has been observed however that much as the above position exist, these two systems are quite different and distinct as seen from the previous chapter.

On further evaluation of the research results obtained, it is incumbent upon the study to point out that the proposed integration proposed by most scholars is most likely to be a cumbersome and unpractical process. This is premised on the good number of factors. The first factor is the fact that by design the formal social security is for certain categories of people, to wit, the working class who are covered by the social insurance and the destitute who qualify under the means-test and are covered by the social assistance.

The second factor is based on the culture and tradition. The cultural reasons and traditional informal mechanisms are a way of life for African families and communities. This again has a direct impact on the manner in which the integrated system of social security will function. It will take some time before the communities in the African context can no more do with these informal coping mechanisms of social security. Therefore it is maintained that these systems be left on their own much as they are premised on different backgrounds and different modes of operation. The prevailing two-

¹⁸⁵ Dekker, AH *"The Role of Informal Social Security in an Inter-generational society"* A paper submitted for the International Social Security Association at the 4th International Research Conference on Social Security in May 2003.

fold approach to social security in South Africa is proper and relevant given the life style and social factors.

Also, it is observed that it would be quite burdensome on the formal social security system if all the people were to be covered by it in the economically challenged environment such as South Africa. The economically stable countries are the ones perhaps which can sustain this approach as will be shown hereunder. In the South African case, given the already given overview on the issues of budget and general finances and economic development, it is clear that this cannot be sustained and maintained.

It is again apparent that the formal social security schemes often tend to be wearisome for the poor and the disadvantaged in terms of the educational background. In the majority of cases, there are delays that are associated with these schemes' bureaucracy such as protracted paper work and traveling costs to the large cities where these schemes are based can be problematic at almost all the times. With the informal schemes there is a great deal of flexibility due to their manageable sizes. These distinctions and or different features of these systems will make it a tough task to try to coordinate them and make them one comprehensive system of social security. Leaving each scheme on its own and enhancing it on its own accord seems the best approach towards the enhancement of the social security paradigm. In this case, it is strongly argued that the statutory regulation of the informal social security system as it is, without invoking the formal system seems the best approach. This is so given the nature and characteristics of these two systems as discussed earlier. Regulating informal social security means nothing other than bringing in just regulatory mechanisms which intends to protect interests of individual members and the entire collective. Regulation would seek to enhance this system so that, proper

administration of the entire schemes in different communities is realized and encouraged. Particularly with regard to proper financial management and other related issues of proper administration.

The fundamental question that must be considered in adopting this approach is whether, statutory regulation of the informal social security systems will not bring the unnecessary barriers to the free and flexible system. Is this not going to take these systems to the problem faced by the formal system where bureaucracy stands at the heart of deficiency? This question has been partly addressed in chapter two, in which the already existing similar statutory frame work has been discussed and a proposal made that the features of these statutes such as the Broad Based Black Economic Empowerment Act (BBBEE) be adopted for the regulation of the informal social security. The regulation of the informal social security shall only impose some sense of responsibility to the members as far as financing and administration of these schemes are concerned. It will also be more protective in that it will clearly stipulate the manner of dealing with the resources of the associations and societies.

Indeed an in-depth analysis of the formal and informal social security has revealed a lot of important aspects of the two. This has made it easy and possible to come out with the most workable approach in moving towards the statutory regulation of the informal social security.

It is generally agreed amongst scholars and states that social security has grown to become an essential facet of modern life. The need therefore to ensure and guarantee the

best social security arrangement is also growing and this puts more pressure on the governments to foster this requirement.

In south Africa, the governments efforts to attempt to bring into fruition the right of access to social security as promised by the constitution is evident from the number of government policies such as the RDP and the Gear as well as the positive role played by the legislative arm of government in various judgments. This notwithstanding, it is still obvious that the social security system in South Africa is still insufficient in terms of coverage and cannot live up to the socio-economic needs and expectations of the majority of South Africans who are currently not covered by the ambit of the system.

From the emerging challenges of the social security paradigm in South Africa, it is also obvious that they are both insufficient if separated. This is so, more so because they overlap, interrelate and in most cases co-exist the logic therefore dictates that a lot more is left to be done in an effort to make a more comprehensive social security.

Several shortcomings and deficiencies can be deduced from the previous analysis in the study. In relation to the non-contributory social assistance for example, the existing large gaps resulting in a large proportion of the poor being excluded, and those not covered are often not given any support. From the comprehensive and impressive statutory framework of the formal social security that South Africa has, only a portion of the population is covered. *Inter alia* are the old aged, the disabled and children. Despite this, still substantial amounts of people who are covered by the social assistance Act remain

poor whilst others cannot access these services¹⁸⁶. This is a combination of both the ineffectiveness and poor service delivery problems facing the social security system. These are some of the large gaps and inadequacies that are evident and self-exposing in the social assistance system. The problem does not only lie with the social assistance but also with the contributory social insurance as well. The social insurance schemes also cover a very limited number of people¹⁸⁷.

Given an alarming increase in the informal sector employees, more people remain uncovered by this arrangement too¹⁸⁸. This fact undermines the scope of social insurance's contribution base, thereby limiting the system even more. In addition, to this problem, even those members within the social insurance system are seriously confronted with the internal inadequacies within the system which provides the most vulnerable workers with a smaller share of benefits.¹⁸⁹ In the majority of cases most vulnerable workers become victims of the situation. As already alluded to above, there is an alarming increase in the informally employed and the temporary employees. There is also an outstanding unemployment rate in South Africa. These categories, that is, the informally employed, the temporary employees and a wide range of the atypical have no access to these benefits due to clear statutory exclusion.¹⁹⁰ The current legal framework

¹⁸⁶ For example, 75% of poor children below 7 years do not get the child support grant. Also those with incomes below the poverty line, including the working poor are without social security transfers and this is about 60% of all the poor, put differently about 11 million people uncovered. See the Report of the Taylor Commission at pages 35-37.

¹⁸⁷ The Unemployment Insurance Fund covers only 5% of the unemployed. See the Report of the Taylor Commission *ibid*.

¹⁸⁸ The informal employment in the developing regions such as Africa is characterized by a number of traits (see for example Avirgan, T *et al.* 2005. *Good Jobs, Bad Jobs, No Jobs- Labour Markets and Informal Sector in Egypt, El Salvador, India, Russia and South Africa* .Economic Policy Institute Washington, accessed at www.ilo.org/avirgan_labormrks.pdf) and self employment, low education levels, low wages, and hence poverty and overall poor employment conditions and lack of decent work.

¹⁸⁹ For example see the observation made by the Taylor Committee in its final Report at page 31

¹⁹⁰ This exclusion is sometimes associated with the fact that workers in the informal sector do not pay taxes or contributions which in turn leaves them ineligible for social security benefits.

which cannot accommodate the changing forms of employment makes the above situation even more open to criticism.

These deficiencies in the formal social security have been so much dealt with throughout the study and can be stressed no more. The two-fold or dual nature of the social security in South Africa suggests that the system that is more comprehensive is needed. As shown earlier, there is a serious need for the statutory regulation of the informal social security system. It is added that after having done this, more gaps in the formal system would be closed and more coverage would be realized. This system as comprehensive as it would be must be able to address all aspects of the needs of the people of the Republic in all sectors of the economy. Indeed, the increased mobility of labour, growing unemployment and the increase in the atypical forms of employment, including casual labour, temporary work and the self employment have necessitated a need for new forms of social protection and or new mechanisms to ensure an all embracing system of social security.

The evaluation of the two-fold social security system in South Africa reveals that there is a dire need for the enhanced system. A number of proposals have been put forward in an attempt to bring up how to enhance the current system, however as seen from the above discussion, there are problems that are facing those proposed strategies. That is, integration has proved itself to be a dream not to be realized anytime soon. The remaining option is to move towards statutory regulation of the informal social security in order to organize it, thereby reducing burden on the formal system. Regulation will also, make these schemes more reliable and stable.



Dekker has alluded to the fact that nowhere in the third world are state systems of social security so developed that they provide adequate protection for the majority of the population.

The above analysis in the study indicates that indeed there is a lot to be learned from the developed nations as far as the social security paradigm of those states is concerned. Revealed also is the fact that, much as there are good lessons for south Africa form these nations, there are different factors that have influenced the current social security system in the developed. In view of the fact that there is no uniform system of social; security that is generally applicable across countries and that one can infer that a countries social security system needs to address its own challenges in a manner that best reflects its social values and resource base. South Africa has to adopt a rout different from that adopted in the developed states for the obvious reasons already outlined above.

Given the nature and content of the social security provisioning in the developed nations, South Africa will have to establish a very strong tax base in order to be able to maintain and sustain its social security system. Much more will have to be done to eliminate corruption and fraud and measures must be put in place to introduce powerful administrative tools in the arena of social security. Indeed a lot has been picked from the developed yet the remaining question is whether that is relevant for our purposes.

4.7 SUMMARY

This chapter as the sub-heading suggests, has been very instrumental in establishing the global trends in the development of social security. The outline of the historical development of social security in the developed nations was a catalyst towards achieving the objectives of the chapter as contained in the introduction. The history made it clear how the concept of social security is taken to mean and regarded by the developed nations and how its practical implications are relevant for the purposes of the developing in particular South Africa. From the foregoing, a critical role played by the economy in the provisioning of a comprehensive social security system in these nations. The idea was and still is, to attempt to see if the model for social security adopted by the developed can be suitable for South Africa. Few structural hurdles and problems were apparent and highlighted which would confront the developing nations. Furthermore, the chapter provided a critical analysis of the options that are possible and available for South Africa, which for the purposes of this study has been the statutory regulation of the informal social security. Most importantly the chapter provided a clear and what has been regarded as a suitable model for overcoming the inherent problems in the South African social security system.

In conclusion, it is hoped that the chapter has been detailed enough to serve its purpose of evaluating the research results obtained and proving a way forward.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

Debates and discourses surrounding the establishment of a comprehensive social security system in South Africa have increasingly given the socio-economic rights an important space in healthy democracies. As a human rights conviction, comprehensive social security provisioning is regarded as bedrock of a blooming social welfare state, bridging the space between the poor and rich members of the community. Vibrant and balanced social security provisioning is therefore preferred and seen as ideal role on poverty eradication on thriving democracies. This is even more so, in contexts such as South Africa where the majority of the members of society can arguably be considered as poor and destitute.

A number of questions arise from the above observation and key among these are to do with how the informal social security system in South Africa have managed the space it occupies, how it has responded to the dynamics of socio-economic and national levels especially the partly changing political economic and social realities and more importantly how the social security provisioning as it exist today has shaped and influenced the progress on the poverty reduction programmes.

The key question explored in the study has been whether the social security provisioning in South Africa is responsive enough to the increasing poverty levels or whether there is a need to move towards a reformed informal social security system.

5.2 CONCLUSION

In order to arrive at a logical, sound and founded conclusion, reference shall be made from time to time to the arguments previously raised in the respective components or chapters of the study. In the first chapter, which is an introductory chapter, several issues were raised, *inter alia* the problem statement and literature review. These two it is submitted formed an integral part of the study. It was argued that there is a serious problem caused by the dual approach to social security system in South Africa. The adverse consequence of this approach as argued is leaving the informal social security outside the statutory regulation which renders the system unreliable and subject to several challenges due to non-regulation. People in the informal sector of the economy are not protected by the law and are not covered by the formal social security system. Several groundbreaking arguments have already been advanced showing how negatively this affects the poor population. Given this the conclusion is that indeed a problem exists with the current approach to social security and it is of such a nature and magnitude that deserves attention and state intervention. The existing literature on the subject matter under study is dominated by two lines of arguments. One which advocates for the integration of informal and formal systems and the other one advocate for the strengthening of the informal system. The conclusion arrived at in the current study is that the two approaches are insufficient and have problems as indicated earlier. Therefore the study has departed from these two into another approach of regulating statutorily the informal social security.

From the second chapter, where an understanding of the informal and formal systems as applied in South Africa was canvassed, several arguments were also raised. *Inter alia* that, these two systems are distinct yet they interrelate and advance similar goals. The two however have different *modus operandi*, and cater for different contingencies. Therefore, the conclusion is that they must be maintained separately whilst ensuring the equal recognition of both systems.

In the analysis of the relationship between the two, with a view of assessing options for integration, the analysis revealed that the content and application of the formal social security is different from that of the informal social security. The formal system has a comprehensive statutory framework, including constitutional and different strands of social security legislation while this is not the case with the informal system. It has been argued that the relationship between the two is quite close yet the informal is not regulated despite that there is a less difference between the two. The conclusion therefore is that informal social security should function as independent and be regulated like the formal schemes.

Ever since the advent of democracy, and the establishment of the poverty reduction and alleviation policies by the government of South Africa, poverty levels still show no significant signs of abating. Social security system in South Africa has bred unprecedented divisions in the South African communities resulting in the majority of the people living below the poverty line and being excluded from the ambit of the social security system.

It is hoped that the examination of the legislative and existing policy framework of the current system of social security in South Africa along side the relevant international legal instruments and existing laws of South Africa will act as a useful reference point that can aid the development of a proposed regulatory framework for the informal social security.

The fundamental and critical theme that has run throughout the work has been the importance of formulating an appropriate legislative and policy framework for a comprehensive social security system. The work recognizes that the most workable solution to attain this demand is through statutory regulation of the informal social security system. In a way, the disadvantaged position of the majority of the people in the informal sector or those who rely on the informal social security arrangements has been put into the spot light.

The study has made a case for the statutory regulation of the informal social security system. Central to the study is the firm assertion that the formal social security system is inadequate and cannot cater for the needs and demands of the communities hence the existence of the informal social system. The study showed beyond doubt the critical and important role played by the informal social security system in alleviating poverty and ensuring a decent life for all South Africans living in poverty.



It is now common cause that, formal and informal social security systems in South Africa are parallel. Though advancing the same cause, suggestions have been put forward regarding the merger of the two. As Dekker pointed out that

Since both roads lead to the same destination, and run along more or less the same cause, it is time to consider whether they should not both form part of the greater road planning project.¹⁹¹

Inter alia the goal of the study has been to consider the above proposal and analyze its viability. It has been found among others that there are structural or model problems in integrating the formal with informal social security. It has been argued throughout the discourse that all the alternatives have been taken into consideration in attempting to enhance the system except treating the two systems as independent and statutorily regulating the informal one. Indeed extending coverage of the formal social security can be seen as yet another available option. However, it has also been shown that it cannot be realized overnight. The international organizations and writers have realized the momentous role of informal social security as a manner of expanding social security to those who are excluded by the formal security system.

The study has paved a way for the implementation of an appropriate approach towards enhancing social security system in South Africa. Looking at the current legislative paramount of South Africa one observes that there are legislative tools which suggest that the time is ripe for greater cooperation between formal and informal social systems. The specific examples have been referred to earlier on the discussion giving a model used by the South African parliament in other statutes in dealing with similar notions such as the informal social security regulation.

¹⁹¹ The two are parallel in the sense that they operate differently in terms of administration, financing and general operation. See Dekker A H. "*The Role of Informal Social Security in an Inter-generational society*" A paper presented and submitted for the International Social Security Association at the 4th International Research Conference on Social Security in May 2003.

It is generally believed that regulation weakens rather than strengthening the informal sector. It is further believed or feared that regulation will bring along unnecessary barriers and formalities into a liberal system thereby complicating it. These arguments notwithstanding, it is important to have a degree of order and as such a proper statutory framework is a necessary condition for a sound and comprehensive social security.¹⁹² Whilst ensuring a cooperative relationship between the formal and informal social security systems, it is important to put in place legislative measures that complement the two.

5.3 SPECIFIC RECOMMENDATIONS

In the light of the foregoing discussions and observations and in respect of the unchallenged role played by the informal social security systems the on-coming recommendations shall suggest propositions as for what can be done in future.

In the first instance, it is crystal clear that there is a limited coverage on social security system in South Africa. Therefore the current social security system does not live up to the constitutional expectations and guarantees of ensuring and affording everybody the right of access to social assistance and protection. In order that there is blanket coverage of social security the current system must be expanded and extended. One of the ways proposed is by ensuring a legal order and statutory framework of the informal social security. This measure, it is proposed would remove the unnecessary exclusions in the formal social security system.

¹⁹² See Maes, A. "*Informal Economic and Social Security in Sub-Saharan Africa*" International Social Security Review (ISSR) Vol 56 No 3-4 (Jun-Dec 2003) at 53 in Dekker, A H. 2005 Informal Social Security: A Legal Analysis; A PhD thesis submitted at the University of South Africa.

It is again proposed that the informal social security paradigm needs to be investigated thoroughly in order to find out explicitly how the statutory framework regulating it would be framed for the purposes of a better understanding of the concept of informal social security. It is equally important to bring in a consistent and comprehensive definition of a broader concept of social security that encapsulate all important components of social security as understood internationally regionally and nationally. The legislation which is developed as proposed earlier for the informal social security schemes pay attention to certain important aspects of formalization or regulation. Firstly, the legislation should not bring unnecessary complexities into the system so as not to further exclude certain groups of people especially the illiterate. The formalities should be made as simple as possible in order to cater for everyone. The second critical factor that must be borne in mind in bringing on such legislation is the issue of affordability. The new law should not be seen to be imposing high fees on members. It should take into consideration the socio-economic position of those who rely on the informal social security. Other than the affordability, there must be assurance that one will indeed receive benefits as and when a need so arise. Again fewer formalities must be seen in accessing these benefits, as well as an element of flexibility. The new law must ensure that the benefits are paid on time whilst at the same time adhering to the rules as spelled out in that law.

Also critical is the fact of accessibility of services. In the informal arrangement of social security, services are obtained from an elected committed which often meets at one of the members place. In the new financial arrangements the law must also consider this aspect of accessibility. It minimizes transport costs to towns to access services.¹⁹³ In brief, the law should be used only as a mechanism to lay down procedure for registration of the

¹⁹³ See Midgely, J. 1984. Social Security Inequality and the 3rd World. At page 204.

system. The new law should be produced in simple language and should be made accessible to the concerned groups.

5.4 GENERAL RECOMMENDATIONS

The Taylor committee has come out very clear that South Africa is on a desperate need for a comprehensive social security system. This implies that there is a call for a move towards a more universal form of social security.

South Africa would require undertaking the following measures in order to attain this goal. In this instance, there must be an increase in financing the social security programmes from the general taxation. This move would decouple social security from labour market status. When coverage is based on residence or citizenship, not on labour market or employment related issues the difference between formal and informal worker becomes irrelevant. This option has worked very well for the developed nations.

In addition to the above point, South Africa must at least improve income collection capacity and more effectively and seriously punish tax avoidance and evasion. This would enlarge the tax base so that the social security system could be financed from a rich tax base as much as possible.

Lastly there is a serious and lucid need to create new programmes and institutions to cover population groups excluded from the existing social security system.

At the end of the study, it can be said that indeed comprehensive social security provisioning cannot be realized overnight. A lot of factors are involved ranging from

socio-economical, political and institutional spheres. Therefore the purpose of the study has been to bring in what has not yet been tested approach to the informal social security provisioning which is statutory regulation of informal social security with the ultimate aim of ensuring that even those who rely on this system are protected from the sharp jaws of poverty and destitution.

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