The impact of HIV and AIDS on households in the context of social security in South Africa

by

ITUMELENG CLARENCE TSHOOSE

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SUPERVISORS:
PROFESSOR M.L.M MBAO AND PROFESSOR M.P OLIVIER

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DECLARATION OF ITUMELENG CLARENCE TSHOOSE

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

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Itumeleng Clarence Tshoose

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I hereby recommend that this Dissertation by candidate No. 16490568 Itumeleng Clarence Tshoose entitled The impact of HIV and AIDS in the context of social security in South Africa, for the degree of Masters of Laws in the Department of Mercantile Law, be accepted for examination.

_____

Professor Melvin Mbao

Supervisor

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AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
AsgiSA	Accelerated and Shared Growth Initiative - South Africa
BCA	Bargaining Council
BCLR	Butterworths Constitutional Law Report
BCEA	Basic Conditions of Employment Act
BGBl	*Bundesgesetzblatt* (Federal Law Gazette)
BIG	Basic Income Grant
CBPWP	Community Based Public Works Programme
CC	Constitutional Court (South Africa)
COSATU	Congress of South African Trade Unions
ed	edition
ed (s)	editor(s)

e.g.	*exempli gratia* (for instance)
etc	*et cetera*
EEA	Employment Equity Act
EU	European Union
GEAR	Growth Employment and Redistribution
GDP	Gross Domestic Products
Op cit	*"opus citatum"* meaning from the cited work
Ibid	*"ibidem"* meaning the same place
ILJ	Industrial Law Journal (South Africa)
ILO	International Labour Organisation
HCBC	Home Community Based Care
HIV	Human Immune Deficiency Virus
LC	Labour Court
LAC	Labour Appeal Court

LAWSA	Law of South Africa
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
NGO	Non-Governmental Organisation
No	Number
RDP	Reconstruction and Development Programme
SADC	Southern African Development Community
SAFAIDS	Southern Africa HIV/AIDS Information Dissemination Service
SARS	South African Revenue Services
SASSA	South African Social Security Agency
SDA	Skills Development Act
SETA	Sector Education and Training Authorities
S	Section
SMME	Small, Medium and Micro Enterprises

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TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UIA	Unemployment Insurance Act
UICA	Unemployment Insurance Contributors Act
UIF	Unemployment Insurance Fund

TABLE OF CASES

AECI Explosives Ltd Zomerveld v Mambalu (1996) 1 LLD 58 (LAC)

Government of the Republic of South Africa & Others v Grootboom & others 2000 11 BCLR 1169 (CC); SA 46 (CC)

Hoffmann v South African Airways 2001 (1) SA 1 (CC)

Ex parte Chairperson of Constitutional Assembly: In re: Certification of the Republic of South Africa 1996 1996 4 SA 744 (CC)

Khoza & Others v Minister of Social Development & Others 2004(6) SA 504(CC)

Minister of Health & others v Treatment Action Campaign & Others 2002 (4) BCLR

National Union of Metal Workers of South Africa obo Ivasen and Whirlpool SA (Pty) Ltd (2005) 26 ILJ 985 (BCA)

President of Republic of South Africa v Hugo 1997 (1) BCLR 708 (CC)

S v Makwanyane & Another 1995 3 SA 391 (CC)

Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 (CC)

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Basic Conditions of Employment Act No.75 of 1997

Compensation for Occupational Injuries and Diseases Act No.130 of 1993

Labour Relations Act No.66 of 1997

Occupational Diseases in Mines and Works Act No.78 of 1977

Social Assistance Act No.13 of 2004

South Africa Constitution Act No.108 of 1996

South African Social Security Agency Act No.9 of 2004

The German Basic Law of 1949

Unemployment Insurance Act No.63 of 2001

CONVENTIONS

International Guidelines on HIV/AIDS and Human Rights 1997

Social Security Convention Concerning Minimum Standards of Social Security, ILO 1995

The African Charter on Human and Peoples Rights 1981

The African Charter on the Rights and Welfare of the Child 1990

The Convention of the Rights of the Child 1995

The Convention on the Elimination of All Forms of Discrimination Against Women1995

The European Social Charter 1996

The International Covenant on Economic, Social, and Cultural Rights 1976

The International Labour Organisation Convention 102 of 1952

The Universal Declaration of Human Rights 1948

UN Standard Rules on the Equalisation of Opportunities for People with Disabilities (1993)

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ABSTRACT

This study describes the social security system in South Africa with a special focus on the exclusion and marginalisation of people living with HIV and AIDS from its coverage. The study observes that the most pertinent concerns are the narrow coverage of the contributory social security, which effectively excludes HIV and AIDS persons and their families, in particular destitute orphans.

That the medical model which is currently used to determine eligibility of accessing Disability Grant is inefficient, as it results in number of people being marginalised from social assistance, in particular the Disability Grant. The study analyses the underlying conditions that exacerbates the spread of HIV and AIDS in South Africa. Secondly that the lack of a specific scheme catering for HIV and AIDS people, and the institutional capacity to deliver the social assistance programmes effectively must be strengthened.

The study ends by addressing the proposed reforms which are aimed at achieving a better integrated system where measures aimed at preventing human damage, for example employment creation policies, health, safety regulation, preventative health care, and remedying or repairing damage, for example reskilling/retraining, labour market and social integration, should be adopted as an integral part of the social security system, alongside compensatory measures

The underlying objectives are to limit the growing dependence on social assistance from the state, and at the same time to increase the effectiveness of the social assistance scheme for the target population.

CHAPTER ONE

1. Introduction

This dissertation is an analysis in social security terms, of the impact of HIV/AIDS in South Africa. In particular, the study focuses on the lack of adequate legal and policy intervention, as factors that effectively deal with the pandemic on households. Insightful comparisons are also drawn from other jurisdictions, notably Germany. In addition, the study is backed by statistical data and information on HIV/AIDS in South Africa.

1.2 Statement of the problem

The AIDS pandemic in South Africa is not only a major public health crisis but also a threat to economic development, social security, and households.[1] It has been a decade since South Africa has past away from apartheid. Nonetheless, poverty and inequality continue to wreak havoc on the society and its social protection system.[2] This, as a result, renders many poor South Africans vulnerable to HIV/AIDS.

It is estimated that over the next ten years, the impact of HIV/AIDS on the poverty situation in South Africa will be dramatic. By 2011, over half of the population will live in households affected by HIV infection and full-blown AIDS deaths.[3] The impact on households affected by HIV/AIDS is twofold. First, an increase in the numbers of AIDS orphans, and secondly loss in productivity, as the households lose breadwinners.[4]

It follows that the burden of AIDS will thus continue to be borne unevenly in South Africa, this is largely because of South Africa's high unemployment rate and the strong connection between unemployment and poverty.[5] It is against this background that the impact of HIV/AIDS continue to cause a major threat to households that are poor.[6]

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1 Lori B and John S "The Impact of AIDS in South Africa" The Center for Development and Population Activities - 1999, 4 -13 /accessed at http://www.policyproject.com.

2 Mpedi LG "HIV/AIDS in South Africa: Towards Comprehensive Social Protection" *Zeitschrift Fur auslandisches und internationals Arbeits - und Sozialrecht (ZIAS)*, 2004, 247.

3 Carel AV "AIDS to Kill," *AIDS Focus News 24 - Special Report* 20 October 2004/accessed at http://www.news24.com.

4 Haarman C "Social Assistance in South Africa: It's Potential Impact on Poverty" 2000/accessed at www.cdhaarmann.com.phd.pdf.

5 Van Donk M "HIV/AIDS and Urban Poverty in South Africa" 2002, 4/accessed at http://www.isandla.org.za/papers/AIDS%20and%20urban%20poverty%20in%20South%20Africapdf/Booysen F and Dingie VR "The Socio-Economic impact of HIV/AIDS in South Africa"*AIDS Bulletin*, March 2002 vol.11, No.1.

6 Booysen F *et al* "The Socio-Economic Impact of HIV/AIDS on Households in South Africa" *AIDS Bulletin*, March 2002 Vol.11, No. 1.

In August 2003, after many years of resistance, the South African Government announced its support for public sector provision of anti-retroviral therapy.[7] Such improvements cannot be dismissed as too little too late. However the social assistance programmes offered by government should be made accessible to the vast majority of poor people living with HIV/AIDS in South Africa.

Against this background, the study attempts to highlight some of the problems that are inherent in South African system of social security, particularly the exclusion of HIV/AIDS people and their families from social assistance schemes that are offered by government. The study argues that although they benefit from the disability grant system, that *per se* is not adequate to cater for their basic needs. Secondly the criteria used to determine eligibility is not effective, as large number of people living with HIV/AIDS are excluded from the Disability Grant. Furthermore the study observes that HIV/AIDS has not been adequately integrated into the social protection system in South Africa and that people infected by HIV/AIDS do not enjoy any meaningful social protection.

1.3 The problem defined

The challenges facing the South African government include redressing the social and economic imbalances of the past. This may appear as a minor challenge, which might be tackled and won through the passage of time. Another challenge facing South Africa is the impact of HIV/AIDS on households and the social security system.[8] This challenge includes addressing the plight of HIV/AIDS, unemployment, poverty, and providing comprehensive social protection to orphans living with HIV/AIDS. The South African social assistance programme provides relatively generous support for the elderly, the young and disabled.[9] However, it is premised on full employment and provides limited social assistance to the people living with HIV/AIDS and their families.

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[7] Speech presented by Minister of Health, Dr Manto Tshabalala-Msimang Issued by: Government Communications (GCIS) 19 November 2003 /accessed at http://www.gov.za/.

[8] Mpedi LG "HIV/AIDS in South Africa: Towards Comprehensive Social Protection" 2004, 246, Helen J "AIDS Africa: Continent in crisis" published by *SAFAIDS (Southern Africa HIV/AIDS Information Dissemination Survive*, 2002, 1. Acquired Immunodeficiency Syndrome (AIDS) was first observed in South Africa during the 1980's and by 1983 the Human Immunodeficiency Virus (HIV) that was believed to cause AIDS was identified. Thus when HIV antibodies are detected in a person's body, it is said that a person is HIV positive. It, is however, more difficult to define and identify AIDS. CD4 counts and viral loads can be measured to indicate the level of health and fitness of a person. When the CD4 count falls below 200 and viral load increases, a person may be regarded as having AIDS. T-Cells or Lymphocytes are white blood cells that play an important role in the immune system (sometimes known as the soldiers of the body, as they fight viruses on the person's body). There are two main types of T- cells. One type has molecules called CD4 on its surface. The other T-cells, which have a molecule called CD8, destroy cells that are infected and produce antiviral substances. HIV is able to attach itself to this CD4 molecule, allowing the virus to enter and infect these cells. The CD4 count is a reflection of how many T- cells are circulating in the blood /accessed at http://www.aidsabout.com.

[9] Social Assistance Act 13 of 2004.

1.4 Rationale and objectives of the study

The study attempts to address the mechanism of extending coverage of social assistance to people living with HIV/AIDS and their families. The study will also focus on constitutional comparisons of social rights in two countries namely, South Africa and Germany with a view of contributing to a greater understanding of the different approaches adopted by the two countries in the course of internalising those values and principles which are internationally accepted as benchmarks.

The study will also address the South African government's response to its international obligations and constitutional imperatives, which require the government to respect their international law obligations with regard to the rights in International Treaties to which South Africa is a state party.[10] The rights entrenched in the Constitution are directly and indirectly important for addressing the HIV/AIDS pandemic in South Africa.

1.5 Data collection and methodology

Because of the diversity and nature of the topic, the study relied heavily on library resources such as articles, books, publications, decided cases, and statutes. Literature regarding the social security provisioning from the German perspective was also obtained during a study visit to Germany in 2005.

An innovative and modern tool used in this study was the internet. Due to its being one of the easiest means of access to the rest of the world, the internet was of much help in locating current information on the socio-economic impact of the HIV/AIDS pandemic on the South African social security system.

1.6 Scope and limitations of the study

The study focuses on the South African social security system in coping with the effect and the impact of HIV/AIDS. The study proceeds by examining the approach adopted by the current social protection system in the fight against HIV/AIDS in South Africa. It pays particular attention to challenges facing the social protection system and considers the impact of the Constitution on the social security system.[11]

The study argues that the current social protection framework provides inadequate protection for people living with HIV/AIDS, as well as their families. It concludes by arguing that while recent

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[10] Act 108 of 1996.
[11] *Ibid* No 10.

policy developments are to be welcomed, more still remains to be done in order to provide a comprehensive social security system for the excluded and marginalised people who are living with HIV/AIDS.[12]

1.7 Major concepts defined -

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

1.7.1 The concept of social security

It is instructive to start by defining and explaining what is exactly meant by the concept of social security. Determining the ambit of the concept of social security is extremely important not only for the purpose of understanding the constitutional right to access to social security, but also for the purpose of obtaining a broader understanding of what social security system in the South African context entails. The traditional western orientated concept of social security may also not be able to capture the characteristics of the African context sufficiently.[13]

It has been accepted that social security is not a fixed concept.[14] To define social security with regard to the content of intended scheme, may leave insufficient room for the development of social security, and to provide for new answers to any new social problems that may arise. Within the South African context the concept of social security is viewed as an umbrella concept, encapsulating amongst other aspects, the notion of social assistance, social insurance, and a wide variety of private and public measures that provide cash or in kind benefits or both, in the event of an individual's earning power permanently ceasing or being interrupted.[15]

The glossary in the Social Welfare White Paper,[16] defines social security as the policies, which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, disability and old age, etc, by means of contributory and non-contributory schemes providing for their basic needs.[17] From a constitutional rights perspective, it is clear that there is a close interrelationship between the concept of social security and several other related concepts which constitute the basis of specific fundamental rights, such as the right to have access to

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[12] Olivier MP and Mpedi LG "Extending social protection to families in the African context: The complementary role of formal and informal social security" Paper presented at the 4th ISSA International Research Conference on Social Security, Antwerp, 5 - 7 May 2003.

[13] Olivier *et al Social Security: A Legal Analysis*, 1st edition, Durban: Lexis Nexis, Butterworths, 2003, 24.

[14] Olivier *et al The Extension of Social Security Protection in South Africa: A Legal Inquiry* Zebra publications, Cape Town, 2001, 23.

[15] Olivier *et al. Social Security: A Legal Analysis*, Durban, Butterworths, 2003, 23 - 24.

[16] White Paper for Social Welfare GN 1108 in Government Gazette 18166 August 1997/accessed at www.gov.za.

[17] *Ibid* No 16, Chapter 7, Social Welfare White Paper.

land,[18] to housing, [19] to health care services, and to sufficient food and water.[20] In a nutshell, social security denotes programmes that ensure that people have a safety net in the case whereby their earning capacity ceases to exist. In South Africa social security is build by the following pillars, social assistance, social insurance, private savings, social relief, and social allowance.

1.7.2 Social assistance

The concept of social assistance is defined as state provided basic minimum protection to relieve poverty, subject to qualifying criteria of a non-contributory basis.[21] Social assistance, which is comprised of means-tested grants,[22] payable to certain needy members of the community who comply with a predetermined set of requirements, has proved to be the main source of survival for the poorest of the poor in South Africa.[23] Similarly, social security is a form of social safety net which provides assistance in cash or in kind to persons who lack the means to support themselves and their dependants. Social assistance is funded from government revenues. Its main objective is to alleviate poverty through, amongst other things, the provision of minimum income support. Social assistance is categorical in nature, in that it covers certain risks, for example disability, old age, etc. Several types of grants aimed at needy children, ranging from the Child Support Grant,[24] Care Dependency Grant,[25] and Foster Care Grant,[26]to people with disabilities (Disability Grant[27]) and the (Elderly Aged Grant and War Veterans Grant[28], are available.[29] Based on the numbers of beneficiaries, the Elderly Aged Grant, the Disability Grant and the Child Support Grant are reported

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[18] S 25 of the South African Constitution Act 108 of 1996.

[19] *Ibid* No 18, S 26.

[20] *Ibid* No 18, S 27.

[21] Department of Social Development Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present - Protecting the Future Draft Consolidated Report Pretoria 2002,36/accessed at www.welfare.gov.za/documents/2002/May/pdf.

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

[23] Samson M *et al* "The Social and Economic Impact of South Africa's Social Security System" Department of Social Development, 30 September 2004, 30 - accessed http://www.sarpn.org.za/documents/d0001041/Full_Report.pdf.

[24] S 6 (a) Act No 13 of 2004, the qualifying conditions for the Child Support Grant are as follows: (a) primary care giver who cares for a child or children, children under the age of 18 who comply with other qualifying criteria), (c) the care giver must not be in receipt of income in respect of the child or children, (d) residence in South Africa at the time of application (both the primary care giver and the child).

[25] S 9 of the Social Assistance Act No 13 of 2004). A Disability Grant is payable subject to the following conditions: (a) residence in South Africa at the time of application (both the foster parent and the child), (b) South Africa Citizenship (in the case of the parent and his or her child and (c) if a person has attained the prescribed age, (d) is owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

[26] S 8 of the Social Assistance Act 13 of 2004. The qualifying conditions for a Foster Care Grant are residence in South Africa at the time of application (both faster parent and the child), if the foster child is in need of care, and he or she satisfies the requirements of the Child Care Act No 74 of 1983.

[27] S 9 of the Social Assistance Act 13 of 2004.

[28] S 11 Social Assistance Act 13 of 2004. War Veterans grant is a grant payable to an aged person, (a) Which is 60 years of age or older, (b) is unable to provide for himself due to a physical or mental disability, (c) once served in the South African. Defence force during certain wars, (d) can provide proof that he/she was in the defence force during one of the specified wars.

to be the largest social assistance programmes within the Government funded social security system.[30] Social assistance in South Africa is mainly concerned with the payment of grants and is regulated by the Social Assistance Act. [31] Furthermore the Constitution does cover the right to social security, and this would include, *inter alia,* the right to appropriate social assistance, for those who are unable to support themselves and their dependants.

1.7.3 Social insurance

Social insurance is defined as a mandatory contributory system of one kind or another, regulated by private sector provision, concerned with the spreading of income over the life cycle or the pooling of risks.[32]Social insurance is thus a form of social security designed to protect income-earners and their families against a reduction or loss of income as a result of exposure to risks. The contribution to social insurance, are paid by employers, employees, self-employed persons, sometimes also the state. It is aimed at achieving a reasonable level of income maintenance. Based on insurance principles, the insurance is obligatory, with the main aim of achieving social solidarity.

The South African social security system has no specific social insurance schemes for HIV/AIDS related risks that may befall individuals as well as their families. There are, however, schemes which (directly or indirectly) play a significant role in assisting individuals and their dependants in coping with HIV/AIDS and its effects. Most of them are contributory based. Employees and their employers often carry the burden of contributing to these schemes. Medical aid schemes are the most notable due to their significance in the area of health care for those living with HIV. Other social insurance schemes, such as the unemployment insurance scheme, retirement schemes and the compensation for occupational injuries and diseases scheme, play a pivotal role through survivors' benefits upon the death of the breadwinner.[33] However the problem with social insurance is that, it is based on full employment, which implies that people who are unemployed cannot benefit under such schemes.

1.7.4 Social protection

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Social protection includes society's responses to certain levels of either risk or deprivation. These include secure access to income, livelihood, employment, health, education, social services, nutrition and shelter.[34]According to the Asian Development Bank, social protection consists of policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets,

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[29] Social Assistance Act 13 of 2004.
[30] *Op Cit* No 21, 58.
[31] Social Assistance Act 13 of 2004.
[32] *Op Cit* No 21, 36.
[33] Mpedi G. *Zeitschrift Für ausländisches und internationals Arbeits - und Sozialrecht* (ZIAS), 2003/2004,C.F. Muller.
[34] *Op Cit* No 21, 40.

diminishing people's exposure to risks, enhancing their capacity to protect themselves against hazards and interruptions or loss of income.[35] The aim of social protection is to minimize social risks.[36]

1.7.5 Comprehensive social protection

Comprehensive social protection seeks to provide the basic means for all people living in South Africa to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.[37] The Committee of Inquiry into a Comprehensive System of Social Security defines the concept Comprehensive Social Protection in these terms:

> Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through integrated policy-approach, including the developmental initiatives undertaken by the State.[38]

Comprehensive social protection is a system geared towards the provision of a national integrated and sustainable social security system, with universal access, the ultimate goal being to ensure that all South Africans have a minimum income, sufficient to meet basic subsistence needs and should not have to live below minimum acceptable standards.[39]

Comprehensive social protection consists of certain core elements such as measures to address *income poverty, measures to address capability and asset poverty* as well as measures to address specific needs.[40]

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[35] Asian Development Bank "Social Protection: Reducing risks, increasing opportunities"/accessed at http:// www.adb.org/Social Protection/ default. asp.

[36] Mpedi LG and Olivier MP "Extending Social Protection to families in the African context: The complementary role of Formal and Informal Social Security, South Africa" Paper presented at the 4th International Conference or Social Security, 5 - 7 May 2003, 3.

[37] *Op Cit* No 21, 2002.

[38] *Op Cit* No, 41.

[39] White Paper on Social Welfare, chapter 7, par 27.

[40] Op Cit No 21, 42. Measures to address income poverty are measures that ensure people have adequate incomes throughout their life cycle, from childhood through working age to old age. The Committee of Inquiry proposed that although income poverty can be addressed through a range of measures, a comprehensive social protection package should comprise at least one primary income transfer which ensures that all South Africans have some income to mitigate or eradicate destitution and starvation; measures to address, capability poverty are measures providing certain basic services deemed crucial to enable a person to live and function in society. This includes the provision of basic water and electricity, free and adequate healthcare, free education, food security, and affordable housing and transport; measures to address asset poverty shall consist of income-generating assets, such as land, and social capital such as community infrastructure.

1.7.6 Informal social security

Informal social security refers to those self organised family, community or informal sector coping mechanisms.[41]Informal social security represents a way of life within communities, and it incorporates values that promote togetherness and a sense of belonging. Within communities, usually informal social security is distinguished by informal social arrangements, which can be divided into, traditional support systems, and self-organised systems. Normally the self-organised informal social security comprises a particular group of people within the community, including families, even neighbours. Example of self-organised informal social security include *stokvels*, societies, rotation rnoney schemes.[42] On the other hand, the traditional support system is based on the principle of solidarity and reciprocity. Under the traditional support system, the family serves as the line of defence to members who are unable to provide for themselves. Support provided may be in the form of cash or kind. These informal safety nets have proved to play a significant role in mitigating the impact of HIV/AIDS at family as well as community level.

The role played by family as a safety net, is the most effective community response to the HIV/AIDS crisis in South Africa. As affected households in need of food send their children to live with relatives. In most instances relatives are then responsible for meeting the children's needs and other requirements.[43] The problems experienced by extended families in taking care of the children relate to lack of knowledge about the available social grants; in other cases children become caregivers themselves or even head of households. In many cases, such children become increasingly vulnerable to malnutrition, ill-health, abuse and exploitation.[44] Secondly, in cases where older persons are care-givers of young children, sometimes they are not aware of the availability of other grants such as the Child Support Grant, the Care Dependency Grant for Disabled Children and the Foster Care Grant.[45]

It is clear that the role of informal social security cannot be dismissed as inappropriate, nonetheless its effect diminishes as the impact of HIV/AIDS intensifies. The rising numbers of child headed households clearly indicate the extent to which informal safety nets have been stretched. When parents die or are too weak to do anything due to AIDS, the trend in most poor families is that

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[41] 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 Centre) Johannesburg South Africa,* 17-19 October 2001, 245.

[42] Olivier MP and Kaseke E "Informal Social Security and Formal Social Security: Developing an Integrative Approach" paper presented at the SADC Core Group of Social Security Specialists Regional Conference on "Social Security in the Making: Developments in the Informal Economy and Informal Social Security" September 2004, 3- 6.

[43] International Labour Office HIV/AIDS: A Threat to Decent Work, Productivity and Development (International Labour Office) 2000, 9.

[44] Gillespie S "Child Vulnerability and HIV/AIDS in Sub-Saharan Africa: What We Know and What Can Be Done" International Food Policy Research Institute, 17 October 2005, 2 – 6/accessed at http://www.ifpri.org.pdf.

[45] National Report on "The Status of Older Persons Report to the Second World Assembly on Ageing: South Africa" Madrid, Spain, and April 2002, 23.

relatives take care of the orphans.[46] Grandparents with their meagre social assistance grants, play an important role in looking after their grandchildren.[47] In the event that there are no relatives, the eldest child often assumes the role of a caregiver for her/his parents (if they are still alive) as well as its younger siblings.

In a nutshell this contribution clearly shows the significant role played by the families, extended families, and even informal social arrangements in curbing the plight of HIV/AIDS in communities. From the above discussion it follows that informal social security in South Africa has developed to such an extent that poor families are able to earn a living using coping self organised mechanisms, secondly, that it forms a safety net for people excluded and marginalised in terms of the formal social security. Informal social security cannot, conceptually be separated from the formal social security.

1.7.7 The role of solidarity in the social security system

Solidarity is necessary for the effective functioning of every social security system. The social security system cannot function properly without a consciousness of national solidarity. The effort of developing social security must therefore be accompanied by efforts to promote the crucial sense of solidarity.[48]

Solidarity recognises that each of us, as human beings, have the same human dignity which must be equally protected. That, each of us is seen as an individual within a society of other individuals, linked together by the bonding of our humanity.[49] The philosophy of solidarity requires that all social structures established in the community ought to be inclusive rather than exclusive. They should offer every person proper access to essential services such as health care, education and welfare on the basis of a right.[50]

Solidarity is one of the ultimate aims of social security, and enables the development of a sense of shared responsibility and the adoption of redistributive policies. Solidarity is especially relevant in the South African context considering the huge disparities in the social security system.[51]

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[46] Foster G "Safety Nets for Children affected by HIV/AIDS in Southern Africa: A Generation at Risk" Monograph No 109, December 2004/accessed at 11 April 2006/ http://www.iss.co.za/pubs/Monographs/No109/Chap4.htm, *Supra* No 44, Gillespie S, 17 October 2005, 5.

[47] Quigley H "The South African Old Age Pension: Exploring the Role on Poverty Alleviation in Households affected by HIV/AIDS" Paper presented at the 4th International Research Conference on Social Security, 5 - 7 May 2003.

[48] ILO *Into the 21st Century: The Development of Social Security* Geneva 1984, 115.

[49] *Sollicitudo Rei Socialis*, Encyclical Letter from Pope John Paul II, 1988, St. Paul Publications, Homebush para 38.

[50] O'Connor T and Sacco M "Market Principles and Welfare"/accessed at http://www.aifs.gov.au /institute/pubs/fm1/ fm36to.html.

[51] Olivier MP "The Concept of Social Security" in Olivier MP *et al Social Security: A Legal Analysis* Butterworths: Durban 2003, 38.

The ideology of social security entails that society is responsible for the social security of the needy.[52] Solidarity is important as a form of mutual co-operation.[53]

Solidarity then assists in diminishing social and economic discrimination and inequality. It enables the provision of a minimum level of protection to the socially deprived. This can be achieved through the careful construction of the contribution and benefit structure of public insurance funds or by employing tax and budget mechanisms. Examples in the South African system consist of the inclusion of high-income earners as contributors to the Unemployment Insurance Fund.

The Unemployment Insurance Act also introduces a graduated or sliding scale of benefits. This implies that the percentage of benefits differs according to the rate of income of the contributor. Lower income earners receive a higher rate of benefits than higher income earners. The provision of social assistance grants further illustrates an example of solidarity in the South African system. These grants are non-contributory, and funded from government revenues (taxes).

1.7.8 The right to health

The right to health is one of the fundamental rights in the South African Constitution. The intention here is to discuss the right to health care in tandem to HIV/AIDS pandemic. The right to have access to health care is entrenched in South Africa's Constitution, [54]as one of the fundamental rights.

The Constitution provides that the state must take reasonable legislative and other measures, within the available resources, to achieve the progressive realisation of these rights.[55] The right to health and medical care can be included as the components of the right to have adequate standard of living, including food, clothing, housing, medical care, and necessary social services.[56] Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1996, the right to health is extended to the underlying conditions for health such as nutrition, and access to water.[57] This is important bearing in mind that access to medicine alone may not be sufficient to ensure good health. As the HIV/AIDS pandemic has shown, for example, access to adequate nutrition is critical to prolonging life of infected people living with HIV/AIDS.

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[52] Von Benda and Beckmann K "An inclusive Approach to Social Security: Changing Circles of Solidarity" Paper presented at the Conference on South - North Debates on Socia Security Relationships and Gender, Ouagadougou, Burkina Faso, 15-16 December 2003, 3.

[53] Accessed at http://www2.rgu.ac.uk/publicpolicy/introduction/socialsecurity.htm.

[54] Constitution of the Republic of South Africa Act 108 of 1996. In this regard, sections 27 (1) (a), 27 (2) are relevant. Section 27(1), states that everyone has the right to have access to health care services, including reproductive health care.

[55] *Ibid* No 54, Section 27 (2).

[56] Article 12 of the *International Convention on Economic and Cultural Rights*: A Perspective on its Development, Clarendon, 1995.

[57] International Covenant on Economic, Social and Cultural Rights (CESCR) General Comment 14, The Right to the Highest Attainable Standard of Health (Art 12 of the ICESCR) (22nd Session, 2000) para 4.

1.7.9 Disability

There is no general statutory definition of the concept of disability and much depends on the context within which it is used.[58]The ILO concludes that a distinction may be drawn between three concepts of disability, namely:

i. Physical disability, which means the total or partial loss of any part of the body, or any physical or mental faculty, irrespective of the economic or occupational consequences of that loss;
ii. Occupational disability refers to the loss of earning capacity resulting from the inability to follow the occupation previously exercised by the person concerned;
iii. General disability which means the loss of earning capacity resulting from the inability to take up any of the possibilities open to the person concerned in the general labour market, even those which might involve a change in occupation and possibly some sacrifice of professional or social status.[59]

What follows from this definition is that disability is dependent upon the theoretical construct that one uses to understand disability.[60]It can be viewed within the medical model, which looks purely at the physical or mental impairment and views the degree of severity as the extent to which certain activities of daily living cannot be undertaken.[61]

This raises numerous practical and administrative problems. Currently within the South African social assistance system, disability is measured and defined entirely and only by the medical profession.[62] Their interpretation determines qualification to receive a grant or not. Hence South Africa seems to have opted to integrate HIV/AIDS in existing safety nets, instead of creating new ones.

The South African social assistance system is sometimes vague and characterised by inconsistent definitions. This is evident from the definition of disability,[63] as it is defined as a physical or mental

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[58] Olivier *et al Social Insurance and Social Assistance: Towards a Coherent Approach*, A Report to the Department of Welfare, South Africa, 1999, 80.
[59] ILO *Introduction to Social Security* 74.
[60] Hardy C and Hlaba M "Choosing Anti - Retroviral or Choosing Grants: Preliminary Research on HIV and Social Security" October 2004 - January 2005, 8.
[61] *Ibid* No 58, *Olivier* Social Security: A Legal Analysis, 2003, 312-318.
[62] S 9 of South African Social Assistance Act No 13 of 2004. A person is, subject to the provisions of s 5, eligible for a disability grant, if he or she (a) has attained the prescribed age: and (b) is owing to a physical or mental disabilities, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.
[63] *Ibid* No 61, at 338 - 339.

impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such impairment.[64]

It is clear that a person suffering from HIV/AIDS cannot be classified as a handicapped person. By definition a handicapped person is defined as including a blind person, a permanently disabled person, a person with artificial limb and a person suffering from mental illness.[65] The only status that might include a person suffering from HIV/AIDS will be permanently disabled.

1.8 Summary

This chapter has attempted to introduce the study by looking at the impact of HIV/AIDS in the context of social security in South Africa. The study argues that the exclusion and marginalisation of people who are infected by HIV/AIDS is an issue which needs to be tackled immediately.

Secondly the chapter addressed the impact of HIV/AIDS on the households in South Africa. That HIV/AIDS virus destabilises society and the state in various ways (as the economically active people succumb to AIDS related illness, families, households, workplaces, and communities are disrupted, income levels are reduced, the social fabric is undermined, and economies are weaken.[66]

The traditional extended family network is also being destroyed by AIDS. It also impacts negatively on the state's liability to secure food, shelter, and health for them. As adults fall ill and die, not only are the children left behind, but also families face declining agricultural productivity. This is also compounded by the fact that many urban dwellers return to their original villages when they fall ill.

In order for the South African Government to effectively address the HIV/AIDS pandemic, it must look into the socio-economic factors which exacerbate the spread of the pandemic. Secondly the role that the extended families plays in taking care of the AIDS orphans, and that of the informal social security in mitigating the impact of HIV/AIDS amongst the Africa communities must be recognised.

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[64] Social Assistance Act 13 of 2004, Section 9 (b).

[65] Joyce M The South African Oxford School Dictionary, 1996, 203.

[66] Dixon - Fyle K and Mulanga C "Responding to HIV/AIDS in the World of Work in Africa: The role of Social Protection" ILO Programme on HIV/AIDS and the World of Work Geneva, June 2004, 1-10. The Virus HIV (Human Immunodeficiency Virus) is closely related to retroviruses that invade T-helper lymphocytes and are responsible for AIDS. HIV is responsible for the vast majority of AIDS in South Africa. There are many strains of the virus as it, mutates rapidly in the persons immune system. In many cases, a person immune system will fight off the invasion of HIV for many years, producing billions of CD4 cells daily (helper cells which helps in activating the cellular immune response), always trying to keep up with the HIV's mutations, before it succumbs and permits the well known signs of AIDS to develop. HIV is especially lethal because it attacks the very immune system cells (variously called T4, CD4, or T-helper lymphocytes) that fight off such a viral infection – Helsen J et al "AIDS Africa: Continent in Crisis" SAFAIDS (Southern Africa HIV/AIDS Information Dissemination Service) 2002.

To this end, therefore, the rest of the chapters are divided into six sections. *Chapter one* provides introductory framework to the study envisaged. *Chapter two* addresses the socio-economic legacy, demographic structure and trends, demographic composition of the South African population, education levels, labour market trends, unemployment, employment, income inequality, expenditures, access to assets, access to social services, poverty, and gender inequalities. *Chapter three* discusses the South African framework of social security, while *Chapter four* looks at the Constitutional framework. *Chapter five* considers international law perspectives. By way of conclusion the study will end by *Chapter six*, which focuses on conclusions and recommendations.

CHAPTER TWO: THE SOCIO - ECONOMIC CONTEXT AND ASPECTS OF SOCIAL SECURITY IN SOUTH AFRICA

2.1 Introduction

In order to understand the nature of the subject matter envisaged in the study, it is necessary to first attempt to delineate the potential universe of beneficiaries of economic and social policy.[67] This can be achieved by reviewing the socio-economic data, poverty, unemployment and employment, income inequalities, labour market status, demographic structure and trends, and the composition of South African population. The abovementioned factors are important if we are to win the battle against HIV/AIDS, because we must not only fight the disease itself, but also underlying conditions that contribute to its spread.[68]

2.2 The socio-economic legacy

The single most significant factor distinguishing South Africa from other countries is its experience of colonialism and apartheid.[69]This was an era associated by political relations of domination, and economic system which excluded and marginalised the majority of the African population from participating in the opportunities it offered.[70] In describing the impact of apartheid, the proponents of apartheid ensured that such policies of deliberate impoverishment, distinguished the experience and dynamics of poverty in South Africa. As such, apartheid legislation was implemented to produce persistent poverty and extreme inequality.[71]Within the context of social security, the system of apartheid was implemented to exclude Africans from benefiting, social security was only reserved for the minority class.

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[67] South Africa's social security system constitutes the government's most effective programme for reducing poverty, directly benefiting over eight million South Africans while supporting household development and socio-economic progress, see Samson M and Van Niekerk I "Draft Report for the Inter-Regional Inequality Facility, Addressing inequality: Policies for Inclusive Development - A Case Study of social security in South Africa," *Economic Policy Research Institute* (EPRI), 2005, 1-10.

[68] One of greatest assault to human dignity is poverty, where you wake up not knowing where you are going, where you cannot have decent shelter, food to eat, and that is why we should pay attention to the poor, and those whose immune system is not capable of resisting this terminal disease, see Mandela N Closing Statement at the XIV International AIDS Conference, Barcelona Spain, 12 July 2002, Eaton J and Etue K *The Awake Project* "Uniting Against the African AIDS Crisis" A Thomas Nelson Company, 2002, 21.

[69] Aliber M "Study of the Incidence and Nature of Chronic Poverty and Development Policy in South Africa: An overview" May 2001, 6.

[70] Official apartheid began with the National Party's election in 1948, although elements existed before. At its root was the legal segregation of South Africa by race (white, black, coloured and Indian) and, under guise of separate development, the maintenance of white supremacy. Politically, this meant that non-whites, the large majority, lacked those democratic freedoms enjoyed by whites. Geographically, it meant that for non-whites, residency was restricted to the Bantustans (homelands) or to townships within urban or industrial zones, see Donnelly E and Dunn S "Ten Years after: South African Employment Relations since the Negotiated Revolution" *British Journal of Industrial Relations*, 1 March 2006, 1-10.

[71] Hunter N and May J Third Meeting of the African Learning Group on "The Poverty Reduction Strategy: Lessons for Poverty Reduction Strategies in South Africa" Addis Ababa, Ethiopia, 3-5 December 2003, 3.

The first inclusive democratic elections in 1994 marked a peaceful transition from apartheid to democracy. This introduced an era of racial and gender equality, multi-party democracy, freedom of movement. The democratic government intended to ensure that the backlog of social needs would be addressed, by introducing programmes aimed at socio-economic reform. These programmes included, *inter alia*, the Reconstruction and Development Programme (RDP), Growth, Employment and Redistribution (GEAR), Accelerated and Shared Growth Initiative - South Africa (AsgiSA).[72]

2.3 Demographic structure and trends

The Republic of South Africa is a comparatively large country, covering 1,221,042 square kilometres and with an estimated population of about 47.4 million.[73] About 28 percent of people living in South Africa have been affected by HIV/AIDS epidemic.[74] According to UNAIDS there are 38 million adults and 2.3 million children living with HIV, and during 2005, 4.9 million people became newly infected with the virus.[75] Due largely to AIDS South African population growth rate has been declining and the death rate has been rising.[76]It is estimated that about 600 people in South Africa die each day of HIV/AIDS.[77]

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The HIV/AIDS pandemic in South Africa is silently spreading and the virus itself takes time before it renders the victim disabled.[78] Its consequences are devastating when it transforms into full-blown AIDS. The devastating impact of HIV/AIDS cuts through almost every facet of life from the economy, right through social development.

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[72] Mpedi LG "HIV/AIDS in South Africa: Towards Comprehensive Social Protection" 2004, 1/Malherbe R A "New Beginning: Introducing the South African Constitution and the Bill of Rights" 2000, 1. The programs that preceded RDP, include Gear, Land Reform program, Asgisa.The objective of land reform is to redress the injustices caused by the apartheid policy of dispossession of land, the promotion of a policy of affirmative action within a viable economic development to ensure amongst other things, access to land with secure rights for residential settlement, as well as access to good agricultural land, which will create new opportunities/Didiza T Minister for Agriculture and Land Affairs, "Land and Agrarian reform in South Africa: 1994 - 2006" presentation made at the International Conference Reform and Rural Development, Brazil, March 2006, 5. In 1996 the government adopted a macroeconomic policy called the Growth, Employment and Redistribution (GEAR), aimed at strengthening economic development, broadening employment and redistributing income and socioeconomic opportunities in favour of the poor. AsgiSA, which aims at reducing unemployment and poverty before the year 2014. Nevertheless, up to now GEAR, even AsgiSA have failed to deliver the promised economic and job growth or significant redistribution of income and socio-economic opportunities in favour of the poor/Richard K South Africa Delegation Briefing Paper, "South Africa: Challenges for the Future" November 2006, 5 – 8/accessed at http://richard knight.homestead.com/South Africa 2006 - Challenges for the future.pdf.

[73] Statistics South Africa 1999.

[74] Department of Health, "National HIV and Syphilis Antenatal Sero-Prevalence Survey in South Africa" 2004.Recent Statistics/Knight R Population and HIV/AIDS in South Africa: Challenges for the Future, South African Delegation Briefing paper, November 2006, 1 – 2.

[75] Accessed at http://www.avert.org/worldaid.htm.

[76] Knight R Population and HIV/AIDS in South Africa: Challenges for the Future, South African Delegation Briefing paper, November 2006, 1 – 2.

[77] Steve Berry - Avert.org.September/accessed at www.saarf.co.za.

[78] Mpedi G *Zeitschrift für ausslandisches und Internationales Arbeits – und Sozialrecht* (ZIAS) 2004,18.Jahrgang Seiten 201-334.C: F: Muller. It is generally reported that on average an HIV positive person can live for up to 10 years without life prolonging medication. The number of years may be more depending on, for example, the life style and nutritional status of the victim. See Arndt and Lewis J "The Macro Implications of HIV/AIDS in South Africa: A preliminary Assessment" (Africa Region Working Paper Service no.9 (2000) 2, Garnett GP *et al* "AIDS the Makings of a Development Disaster" *Journal of International Development*, 2001, Vol 13, 391-392.

First, it reverses development gains, which were achieved over a long period of time. Secondly, it slows the economic growth of a country, and families, the public health service and private sector firms, are also feeling its effect. [79]

It destroys families and leave orphans with uncertain future.[80] Moreover, it poses a serious threat to the continued viability of a country's social security scheme (both social assistance and social insurance schemes, not forgetting informal social arrangements, which are common in South African societies.[81] The sad part of this pandemic is that, while it is impartial in the sense that it attacks both the rich and the poor, young and old, economically active and inactive, black or white and so forth, its impact is severe on the poor households with weaker safety nets. The main problem is that the poor households have limited and often weak safety nets to cope with HIV/AIDS pandemic.[82]

This clearly constitutes a challenge for South African government to deal with. Such a challenge includes the controversial issue of the use of expensive anti-retroviral drugs to treat patients with HIV/AIDS. This debate has brought into sharp focus on the prohibitive cost of health care and the difficulty of giving effect to the constitutional right of all South Africans to have access to health care and social security. However, before such a challenge can be fought the must be an effort on the part of government, to address the underlying social and economic imbalances of the past.

This has been witnessed recently, when South Africa celebrated ten years of democracy. Following the advent of democracy much has been achieved in transforming our society to provide equal opportunity to all, and move towards a non-sexist, non-racist society. It is true that strides have been made to achieve the promotion of socio-economic conditions of the majority of people in South Africa, nevertheless, unemployment, poverty levels continue to be major challenges facing our government.

The intention of the first democratically elected government of South Africa was clearly, from its inception in 1994, to create a National Health System that would accommodate the concept of equitable health care and delivery of services for all.[83]

However the high poverty levels and poor nutrition and living conditions, continues to aid the spread of HIV/AIDS in South Africa.[84] The time for denial or ignoring the seriousness of the pandemic

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[79] Quattek K "The Economic Impact of Aids in South Africa: A Dark cloud on the horizon"/accessed at http: // www.kas.org.za/ publications/ occasional/ papers/ Aids/pdf.

[80] Burman S "The best interests of the South African Child" *International Journal of Law*, 2003, 17.

[81] Helen J "AIDS in Africa: Continent in crisis," Southern Africa HIV/AIDS information association service (SAFAIDS) 2002, 3.

[82] *Ibid* No 81, 4 -5.

[83] A Summary Report - *Poverty and Inequality* 13 May 1998/accessed at www.gov.za/reports.

could result in catastrophe, defining the crisis is essential and extra-ordinary efforts will be required to ensure the peaceful transformation of our society. Dealing with HIV/AIDS will require a major effort and an exceptional response. It is critical to be cognisant of the fact that HIV/AIDS will continue to challenge the capability of existing social security programmes to address the increased impoverishment and vulnerability of people.[85]

As South Africa's AIDS epidemic is one of the worst in the world, based on its extensive antenatal clinic surveillance system, as well as national surveys with HIV testing and mortality data from its civil registration system, an estimated 5.5 million people were living with HIV in 2006.[86] An estimated 18.8 percent of adults (between 15 - 49 years) were living with HIV in 2005. Almost one in three pregnant women attending public antenatal clinics were living with HIV in 2004 and trends over time show a gradual increase in HIV prevalence.[87]

2.4 Unemployment and employment

The unemployment rate in South Africa is increasingly growing, and proving to be the worst enemy of social protection. As more people join the ranks of being unemployed, the continued financial viability of many formal social security schemes for example, the unemployment insurance fund and the continued existence of informal schemes (for example burial societies and *stokvels*) and other informal transfers arrangements (e.g. Kinship based transfers etc) turn out to be uncertain, in dealing with the impact of HIV/AIDS.[88] As this schemes focus only on the risk associated with the virus, they fail to address issues pertaining to the integration of people living with HIV/AIDS into the labour market, so that they can sustain their lives.

The rate of unemployment in South Africa is very high, the reasons for such are two-fold. First, economic growth has been too low to absorb the ever-rising number of young men and women entering the labour market, due to demographic growth and rising participation rates.[89] Secondly, the policies and actions of government, organised labour and business have together resulted in a growth path that has been skewed in favour of joblessness, in that employment has fallen despite economic

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[84] Bhadra R *HIV/AIDS and its Impact on Children in South Africa*" Paper presented at the 4th World Congress on Family Law and Children's rights, Cape Town, South Africa, 20- 23 March 2005.

[85] Committee of Inquiry into a Comprehensive System of Social Security for South Africa.

[86] Report on the Global AIDS epidemic; Executive Summary A UNAIDS 10th Anniversary special edition 2006, 7-9/ accessed at http://data.unaids.org/pub/GlobalReport/2006/GR_Executive Summary_en.pdf.

[87] *Ibid* No 86, 9-12.

[88] Mpedi LG and Olivier MP "Extending Social Protection to Families on the African context: The Complementary role of Formal and Informal Social Security in South Africa" paper presented at the 4th International Research Conference on Social Security, 5 - 7 May 2003, 13.

[89] Seekings J "Do South Africa's Unemployed Constitute an Underclass" Centre for Social Science Research, Working paper No.32, University of Cape Town, 2003, 8.

growth. Crucially, the growth path has entailed rising productivity and rising wages for an ever-smaller pool of workers, with rapid shrinkage in, especially, unskilled employment opportunities.[90]

Indeed, South Africa is characterised by unemployment rates amongst the highest in the world, with the most ferocious rates of up to 45 percent amongst black South Africans.[91] More recent official unemployment figures, using a narrow definition of unemployment (including only those who are willing to work and actively searching), stood at 27 percent in 2007. Secondly using a broad definition (which includes those who are willing to work but are not searching), the unemployment rate stood at about 40 percent.[92]According to Statistics South Africa unemployment rate in 2005 stood at 26, 7 percent.[93] This clearly indicates the high rate of social backlog that South Africa faces.

2.5 Poverty and inequalities

There is no accepted official definition of poverty in South Africa, a range of commentators outline the complex interaction of methodological and ideological factors in disagreements about the nature and scale of poverty.[94] In measuring poverty on households in South Africa some studies use the $1 and $2 a day methodology,[95] whilst others look at the minimum income required by a household.

Across definitions and methodologies, it is accepted that between 45 percent and 55 percent of South African population is poor, and between 20 and 25 percent live in extreme poverty.[96] The Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa discovered that, 45 percent of the population live on less than $ 2 per day, as measured by the World Bank, 25 percent of African children are stunted (that is, short for their age), 10 percent of Africans are malnourished (that is, underweight for their age), and 60 percent of the poor do not receive social security transfers.

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[90] *Ibid* No 89, page 9 - 10.

[91] Cornwell K "Language and Labour in South Africa A New Approach for a New South Africa" February 2006, 1-5 /accessed at http:// www.buseco.monash.edu.au/depts/ebs/pubs.

[92] Klasen S and Woolard I "Surviving Unemployment without State Support: Unemployment and Household Formation in South Africa" May 10, 2005, 2 - accessed at www.csae.ox.ac.uk/2006/pdf. In South Africa, two different concepts of unemployment are used routinely: the strict (narrow) and the expanded (broad) definition. The narrow definition applies a job-search test, it includes those individuals who are willing to work and actively searching for work. Whereas broad definition includes individuals who did not search for work in a 4-week reference period but who report being available for work and say they would accept if a suitable job were offered. In the expanded definition of unemployment discouraged jobseekers are included/Kingdom G and Knight J "Unemployment in South Africa Causes, Problems and Policies" Centre for the Study of African Economies University of Oxford and Department of Economics University of Oxford October 2005,9/accessed at http://www.csae.ox.ac.uk/conferences/2006-EOI-RPI/papers/csae/Kingdon.pdf

[93] Statistics South Africa Labour force survey September 2005/accessed at www.statssa.gov.za/2005.pdf.

[94] Akoojee S and McGrath SI "Post - Basic Education, Training and Poverty Reduction in South Africa: Progress to 2004 and Vision to 2014" Working Paper Series N 2, Centre of African Studies, University of Edinburgh, October 2005, 10/accessed at http://www.cas.ed.uk/research.pdf.

[95] Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa/accessed at http://www.welfare.gov.za/documents/2002/May/chap2/pdf.

[96] Seekings J and Nattrass N "Distribution and Redistribution in Post - Apartheid South Africa, Transformation" 2002, 1-30.

It is clear that many South Africans live below the breadline. Similarly in many developing countries, poverty is more rife in rural areas than in urban areas.[97] This is mainly because rural areas are, generally, isolated from urban areas where there are industries or job opportunities. In addition, people who are unemployed, illiterate, and marginalised by the formal social security system are, in most instances, concentrated in rural areas.[98]

The extent of poverty is illustrated by the fact that, around 45 percent of the informally employed in rural areas receive an income which is below the minimum living level.[99]It is also estimated that 45 percent of South African population live in abject poverty. They are mostly African females and children that live in rural areas.[100] The informal employment activities amongst the poor are increasing rapidly,[101] and are often aimed at economic survival.[102]

Similarly, access to resources such as housing, water, land and electricity, still remains a problem for many South Africans.[103] The programmes that ensure people have access to these basic services are often not well co-ordinated, and comprehensive enough.[104] In general terms sources of income for households in South Africa differ substantially, the poorest households tend to rely heavily on sources such as pensions and social grants, while the other households tend to rely on wage-income and other sources for income-generation.[105]

This is an important consideration for social policy, bearing in mind that many low wage earners in urban areas and even families who are affected by HIV/AIDS pandemic have to maintain their poorer relatives. In doing so, these families are thus effectively assuming some of the social responsibilities which should ideally be taken up by the state.[106]

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97 Olivier MP and Mpedi LG "Extending Social Protection to Families in the African Context: The Complementary Role of Formal and Informal Social Security" Paper presented at the 4th International Research Conference on Social Security, 5 - 7 May 2003, 10.

98 *Op cit* No 97, 11 - 15.

99 Poverty and Inequality Report of 1998, 80.

100 Poverty and Inequality Report 1998, 45. It is estimated that about 10 million people live in households earning less than R 193,77 per month: UNDP (2000) 55.

101 According to the estimates based on the 1999 October Household Survey, about 1, 8 to 1, 9 million people are employed in the informal sector.

102 For example, in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC), the Court found that while the state's housing policy programme has had some success, one of the most deprived groups, notably those who have no shelter at all, have effectively been sidelined by the programme. Also in *Minister of Health & others v Treatment Action Campaign & others* 2002 10 BCLR 1033 (CC), the Court criticised government for not having made available Nevaripine, a drug targeted at preventing mother to child transmission of HIV/AIDS, on a country-wide basis to expecting mothers. A declaratory and mandatory order to this effect was granted.

103 South Africa - Operation Blessing - Medical Care, Water Wells and Job Training Help Poor South Africans/accessed at www.ob.org/where_we_work/africa/news/2005_05_South Africa.

104 *Ibid* No 51, Olivier Social Security: A Legal Analysis, 2003, 99 – 100.

105 Olivier *et al Introduction to Social Security*, LexisNexis Butterworths, Durban, 2004, 7.

106 *Ibid* No 105, page 7 – 8.

2.5.1 Gender inequalities

It is estimated that there were about 2.7 million women, who were HIV positive at the end of 2001 in South Africa, and that their total number exceeds that of men.[107]This clearly reflects the precarious position of most women in South African society. Women in South Africa are more vulnerable to HIV/AIDS than men and children for a variety of reasons. Above all, most women (particularly African women) have been socially, politically, and economically marginalised.[108]Their right to choose and to make their own decisions was traditionally curtailed by traditional and cultural practices. This, in the end, resulted in gender inequality and high financial dependency on men.[109]

2.5.2 HIV/AIDS and gender

The Gender dimension of HIV/AIDS epidemic is defined as the array of societal beliefs, norms, customs and practices that define masculine and feminine attributes and behavioural role in determining an individual's vulnerability to infection, his or her ability to access care, support or treatment, and the ability to cope when infected or affected.[110]

Gender is also important factor in determining the level and quality of care, treatment, and support that HIV- positive men and women receive, the burden of care is taken largely by women, and the negative economic and social consequences of AIDS. Recent studies has revealed that, 13.3 percent females, were HIV positive at the end of 2005 in South Africa, and that their total number exceeds that of men, which stood at 8.2 percent[111] Women in South Africa are more vulnerable to HIV/AIDS than men and children for a variety of reasons. Above all, most women (particularly African women) have been socially, politically, and economically marginalised.[112]

Secondly HIV prevalence amongst persons aged two years and older is estimated to be 10.8 percent. In South Africa HIV/AIDS increases with age, this is evident from statistics issued by the South African National HIV prevalence,[113] accordingly there is a high rate of HIV amongst children at the age of 2 - 14 years, which stood at 3.3 percent, and among adults between 15 - 49 years HIV

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[107] Mpedi LG "HIV/AIDS in South Africa: Towards Comprehensive Social Protection" 2004,249.

[108] Lee S "The Vulnerability of Women Street Traders to HIV/AIDS: Local Government Opportunities for Action" Durban, University of Kwazulu Natal, 2004, 3-10.

[109] The danger of economic dependency is that women's economic dependency increases their vulnerability to HIV. Their vulnerability makes them more likely to exchange sex for money, and that per se expose them to HIV/AIDS, see Gupta GR "Gender, Sexuality and HIV/AIDS: The what, the why and the how" Plenary address at the 13th International AIDS Conference, Durban, South Africa 9- 14 July 2000/accessed at http://www.icrw.org.

[110] World Health Organization "Integrating Gender into HIV/AIDS Programme" A Review Paper, Department of Gender and Women's Health Family and Community Health, 2003,5.

[111] Mpedi LG "HIV/AIDS in South Africa: Towards Comprehensive Social Protection" 2004,249.

[112] Lee S "The Vulnerability of Women Street Traders to HIV/AIDS: Local Government Opportunities for Action" Durban, University of Kwazulu Natal, 2004, 3-10.

[113] South African National HIV Prevalence, HIV Incidence, Behavioural and Communication Survey, 2005, 33- 34.

prevalence stood at 16.2 percent. In people who are 50 years and older, HIV prevalence is estimated to be 5.7 percent.[114]

In Sub-Saharan Africa it is estimated that there are more than 60 percent of people living with HIV/AIDS. In 2005, an estimated 3.2 million people in the region became newly infected, while 2.4 million adults and children died of AIDS. An estimated 4.6 percent of women and 1.7 percent of men were living with HIV.[115]

Against this background, it is clear that, HIV/AIDS is no longer restricted to cities. The disease is now rapidly spreading with alarming speed into rural areas and affects the farming population, especially people in their most productive years (ages 15 to 45).[116] UNAIDS estimates that over half of the 28 million people living with HIV/AIDS in Sub-Saharan Africa live in rural areas. According to UNAIDS, it is estimated that HIV/AIDS has killed around 7 million agricultural workers since 1985, and as a result it could also kill 16 million more before 2020.[117]

2.5.3 Labour market profile

The labour market represents a key arena for socio-economic empowerment. In this respect the labour force participation rate, which measures the percentage of those between the ages of 15 years and 65 years who are available for and seek to be employed, gives an indication of those that are able to earn income in the labour market. Women are in many respects the most vulnerable citizens in South Africa. Statistics South Africa labour force study of 2003, showed that women had lower income, and less access to assets than men. Women who are employed find themselves in the worst paid sectors of the labour market, notably in domestic and retail work. In 2003, 96 percent of domestic workers were black (for example African, Indian and Coloured) women and 93 percent of these workers earned under R1000.[118]

The rate of employment of women in the formal economy is generally lower than that of men. This is evident from the participation of women in the informal sector, employment in this sector has proved to be larger source of employment for women than for men.[119]As a result of that, they are more likely to lose employment in the formal sector (in fact, self-employment can have positive advantages in

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[114] South African National HIV Prevalence, HIV Incidence Behaviour and Communication Survey, 2005, 35 - 36.

[115] UNAIDS, WHO (World Health Organisation) "AIDS Epidemic Update 2005" Sub - Saharan Africa, 17/accessed at www.who.int/epi-update2005.

[116] http://www.fao.org/documents/show_cdr.asp? Url_file=/DOCREP/x0259e/x0259e01.htm.

[117] AIDS hitting African Farm Sector Hard, 10 - 13 June 2002/accessed at www.fao.org/htm.

[118] Hassim S "Gender Welfare and the Developmental State in South Africa" School of Social Sciences, University of Witwatersrand, May 2005, 4.

[119] Matlin S and Spence N "The Gender Aspects of the HIV/AIDS Pandemic" London, United Kingdom, 16 October 2000/accessed at www.un.org/womenwatch/htm l. At present, there are about 2, 3 million workers in the South African informal economy/Robinson V Cosatu to Launch New Union, Mail and Guardian 15 July 2005.

resilience for women who become infected) and to suffer social ostracism and expulsion from their homes. When they are forced to become the main breadwinner due to their partner becoming infected, women lacking education and skills may be forced into hazardous occupations, including sex work, that further increase their vulnerability.[120] Positive strategies to assist women who are infected by HIV/AIDS, might include the encouragement of informal sector entrepreneurship and micro-credits, as well as community action groups and social welfare support mechanisms.

2.5.4 Protection afforded to females (Labour law and social security)

The South African Constitution guarantees the right of everyone, to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.[121] Section 9 (3) and (4) further prohibits the state and non-state actors from unfairly discriminating directly or indirectly against anyone on one or more grounds, including gender, sex, pregnancy and marital status.

In accordance with the Constitution, access to social insurance schemes is extended to all employees, irrespective of gender. The Unemployment Insurance Act[122] regulates the payment of benefits to contributors and their dependants in the event of unemployment, illness, maternity, and adoption. Except where expressly excluded by the Act, protection is extended to all persons who are considered employees. Domestic and seasonal workers, who are predominantly female, are also included within the ambit of the Act. Female employees are entitled to maternity benefits under the Unemployment Insurance Act. The right of female employees is protected, as their entitlement to unemployment benefits is not affected by the payment of maternity benefits.[123]

In addition, compensation for employment injuries and diseases is paid to all employees and their dependants in terms of the Compensation for Occupational Injuries and Diseases Act.[124] Although there is no direct gender discrimination in respective of occupational injury protection, there is indirect discrimination against females, as protection does not extend to workers employed in private households.[125] This implies that domestic employees who are mostly females are excluded from COIDA. It can be said that in terms of social insurance there is indirect discrimination against females, as social insurance protection is not extended to workers in the informal sectors, which is predominantly dominated by females.

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120 *Ibid* No 119.
121 Section 27 (1) (c) of the Constitution Act 108 of 1996.
122 Unemployment Insurance Act 63 of 2001.
123 Compensation for Occupational Injuries and Diseases Act 130 of 1993.
124 *Ibid* No 123.
125 Occupational Diseases in Mines and Works Act (ODMWA) 78 of 1977.

Social assistance is provided for in terms of the Social Assistance Act.[126] The Act regulates the payment of categorical and means-tested social assistance grants and other relief measures. The social grants include the Old Age Grant, War Veterans Grant, Disability Grant, Child Support Grant, Care Dependency Grant and Foster Care Grant. With the exception of the Old Age Grant, all other grants are provided on a gender neutral basis. The Social Assistance Act makes a distinction between males and females relating to the age eligibility criterion for the Old Age Grant. Males are eligible for the old age grant from 65 years of age while females are eligible from the age of 60.[127]

In as far Disability Grant is concerned, according to the Social Assistance Act,[128] individuals are eligible for a Disability Grant if they pass a means test and, if as a result of mental or physical disability, they are unable to provide for themselves through employment.[129] The grant is designed for working-aged adults,[130] under the expectation that those who are capable of working should not be eligible.

Given South Africa's high unemployment rate and relatively generous Disability Grants,[131] illness has itself become an important source of income to people living with HIV/AIDS.[132] Notwithstanding the availability of foregoing Grants, South Africa has no specific social assistance programme which caters for people with HIV/AIDS. The criteria which is used to access Disability Grant is based on standardised medical model which restricts Disability Grants to those who have HIV/AIDS. Individuals who are HIV positive may benefit from the Disability Grant only when their CD4[133] cell count is below 200.[134] This means that being HIV positive is not enough, people must be deemed to be suffering from AIDS. The main problem with this approach, as pointed out by the South African Human Rights Commission, is that persons infected with HIV/AIDS who do not have an income, cannot be assisted by the State grants, unless their CD4 cell count is below 200.

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126 Social Assistance act 13 of 2004.

127 Section 10 (a) and (b) of the Social Assistance Act 13 of 2004.

128 South African Social Assistance Act 13 of 2004.

129 Section 9 of Social Assistance Act 13 of 2004.

130 Disabled individuals below the age 18 are eligible for child support grants (through their care-givers), and those who have reached pensionable age (60 for women, 65 for men receive the old age pension rather than disability grant.

131 Maximum amount payable for Disability Grant in South Africa is R820 per month/accessed at www.sarpn.org.za/documents/d0001875/SA_budget-speech_2006.pdf/Budget Speech 2006 Trevor A Manuel Minister of Finance 15 February 2006.

132 Nattrass N "Disability and Welfare in South Africa's Era of Unemployment and AIDS" Centre for Social Science Research Working Paper No 147, University of Cape Town, 2006, 7.

133 T-cells are white blood cells that play important role in the immune system. There are two main types of T-cells. One type has molecules called CD4 on its surface, these helper cells helps the body's response to certain micro-organisms such as viruses. The other T-cells have a molecule called CD8, these cells destroy cells that are infected and produce antiviral substances. The CD4 count is a reflection of how many CD4 T-cells are circulating in the blood /accessed at http://aids.about.com/blcd4.htm.

134 *Op cit* No 132, Nattrass N 2006, 8. The CD4 count has proved to be unreliable to a large extend in determining the capabilities of a person living with the virus. Some people would have a CD4 count of less than 200 and not have any significant limitation on their daily activities but still be able to continue with their normal jobs, Chloe H and Richter M "Disability grants or antiretroviral: A Quandary for people with HIV/AIDS in South Africa" *African Journal of AIDS* Research, 2006, 85 - 89.

While in fact the harsh reality is that people infected with HIV/AIDS are from poverty-stricken, vulnerable and marginalised communities, where the rate of unemployment is very high.

This reinforces the precarious position of people who are infected by HI/AIDS, in particular women, who carry the main burden of taking care of family members with HIV/AIDS. However according to the criterion used for accessing disability grant, females who are HIV/AIDS positive cannot access the grant, unless their CD 4 cell count is below 200. This in essence, would imply that females, whose CD 4 cell count is below 200, would be denied access to the anti-retroviral treatment.

2.5.5 Social security protection for females in the formal labour market

The South African social security system excludes and marginalises various categories of persons. Some of these include the unemployed, specifically excluded include, self employed, the informally employed and many other atypically employed categories of workers. Social security laws extend protection only to those who qualify as employees.[135] Social Security laws do not extend protection to categories of persons who do not fit the definition of "employee." For example, occupational injury and disease protection under COIDA is not extended to domestic employees employed in private households.[136]

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In addition, the Unemployment Insurance Act further excludes employees who are remunerated on a commission basis and casual employees working less than eight hours *per* week. It is clear, as indicated above, that female participation in the labour force plays a key role in ensuring access to social insurance schemes. Female employees therefore have a higher unemployment rate, but lower labour market absorption and participation rates. Gender disparities are also discernible within the formal and informal sectors of the labour market. The proportion of males in the formal sector outweighs the proportion of females.

Furthermore, male employment in the formal sector is concentrated in wholesale and retail trade, while females are mostly concentrated in community, social and personal services and private households sectors.[137] Moreover, within these sectors, females are employed in a narrow set of low-wage, low skill female-dominated occupations like clerical, sales, service work in waitresses, beauty, and cleaning services. This can result in low female earnings for similar educational attainment.[138] This state of affairs is worsened by statutory exclusion of certain female dominated sectors such as

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[135] The Unemployment Insurance Act uses the term contributor. Section 1 (1) defines a contributor as a natural person who is or was employed, to whom the Act apples, and who can satisfy the Commissioner that he or she has made contributions for purposes of the Act. The Act applies to all employees and employers.

[136] Section 1 of COIDA.

[137] Statistics South Africa Labour Force Survey September 2005, 15.

[138] Altman M Wage "Trends and Dynamics in South Africa" Human Sciences Research Councils, October 2005, 23 - 24.

domestic, casual and seasonal workers, from certain social insurance schemes, with the categorical nature and urban bias of the social assistance system,[139]

Being employed in the formal sector does not necessary mean having full and adequate employment. May people are employed in low-quality jobs that are associated with low individual and household income.[140]Africans are more represented among the underemployed, and more women than men are underemployed, as they are more heavily represented in part-time work. Low quality jobs also portray the usual demographic patters that are the legacy of apartheid, as such jobs are disproportionately held by women in rural areas.

2.6 Education level

Education plays a vital role in addressing the plight of HIV/AIDS in South Africa. According to the Research Survey conducted in 2006,[141]it was estimated that one adult in seven, had no formal education, and that, one in ten had completed primary school, with no higher education or tertiary education. Almost four in ten have had some high school education, whilst thirty percent had matriculated but went no further. One in ten adults had gone beyond matric, while two percent had completed university and six percent had other post-matric qualifications.[142]

This clearly indicates that, great discrepancies still exist within the South African education system, as reminders of the by gone apartheid era. Although schools have been desegregated since 1994, large differences in the quality and level of facilities between schools still exist. Large portions of the budget are spent on upgrading educational facilities, but according to the political risk yearbook,[143] it would require one third of the budget for the next decade to upgrade black education to white levels. The challenge is to create a single, non-discriminatory system that offers the same level of education to all pupils.

Since the apartheid era, many policy changes have occurred within education to try to address educational inequalities. Integration has occurred in the school system, and schooling is compulsory for nine years for all races. Although Bantu education ideology has been officially left behind, schools are still under *de facto* segregation. Whites have moved to private schools, and suburban

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[139] Mpedi LG and Kuppan GY Social *Assistance and Legal Aid*, in Olivier *et al* Introduction to Social Security LexisNexis Butterworths, Durban, 2004, 230.
[140] United Nations Development Programme South African Human Development Report 2003, 21.
[141] "South Africa's State of mind as we enter 2006"/accessed at bizcommunity.com.
[142] *Ibid* No141.
[143] *South Africa Yearbook 2003/04*, 540 -552.

schools have a majority of Coloured students, while township schools are overwhelmingly Black, and rural schools tend to have Black and Coloured students[144]

It is evident that the backlogs from so many years of apartheid education are immense. Illiteracy rates are high at around 30% of adults over 15 years old, it is estimated that about 6-8 million adults are not functionally literate.[145]

2.7 Access to basic social services

Many of the poor in South Africa live in rural areas, where there is an acute lack of basic social services and the infrastructure necessary to sustain basic human capabilities.[146] The provision of basic services will go a long way in fulfilling the state's obligation to realise the right of access to appropriate social assistance. A lack of access to basic services aggravates human poverty, and condemns the poor to a life without equality, human dignity and freedom. Inequality of access to social services leads to a further widening of the gap between the capabilities and opportunities of social groups.[147]

The targeting of basic social services in urban areas will have an impact on the reasonableness of the state's action. The United Nations Development Programme uses a Service Deprivation Index, to measure the backlog regarding deprivation and lack of access to basic services. It showed that the number of households that were considered deprived of access to quality basic services increased between 1996 and 2003.[148]

2.8 Impact of HIV/AIDS on households

HIV/AIDS pandemic has a profound impact on the level of poverty and vulnerability of most South Africans. HIV/AIDS contributes to a rise in poverty, while poverty reduces the ability of the poor living with HIV/AIDS to cope with the disease. AIDS generates new poverty as people lose employment and housing tenure. Household incomes fall due the loss of wage earners and the high spending, particularly on medical care and funerals.[149] According to a Department of Health Report on the HIV/AIDS situation, about 5.58 million or 12.6 per cent of the South African population are

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144 Ocampo M L "A Brief History of Educational Inequality from Apartheid to the Present, 19 September 2004/ accessed at www.stanford.edu.Inequity.html, see also Mailquardian Newspaper, 15 November 2006, "Apartheid legacy haunts SA's schools"/accessed at www.mg.co.za.

145 Garson P "Education in South Africa" 16 May 2006/accessed at www.southafrica.info/education.

146 "South Africa's state of mind as we enter 2006"/accessed at www.bizcommunity.com.

147 *South African Human Development Report* 2003, 8/accessed at www.undp.org.za.

148 *Ibid* No 147. 8 - 9

149 *South African Human Development Report* 2003, 7.

currently infected with the disease. HIV/AIDS has a disproportionate impact on poor communities, permanently locking many of its sufferers in poverty. The Human Development Report quotes a study which indicates that of the 700 HIV/AIDS-affected households sampled, more than half of the affected families did not have enough food to starve off starvation. Two-thirds of them reported a loss of income as a result of the disease and larger proportions of household income being spent on health care and funeral costs.[150]

In the absence of direct state intervention, the socio-economic situation in the country will deteriorate due to the impact of HIV/AIDS. Analysts predict that by 2011, more than half of the population will live in households that will be affected by HIV/AIDS. The pandemic will lead to a situation where many households that would otherwise live close to, but above, the poverty line will be pushed under the basic subsistence level.

They will be faced with destitution, if not assisted by the state.[151] As it stands, only about 30 per cent of the poor were eligible to receive state social assistance grants. This indicates that more than 16 million poor people fall out of the social security support system.[152] This is so despite the contention that an appropriate social security system is expected to prioritise the needs of people without any, or with insufficient income and must encompass those engaged in the informal sector.

Another challenge includes the extension of the present social assistance framework to children between the ages of 15 and 18, the provision of income support to poor adults aged 18-59 and 64, as well as assistance to households where no person is employed.[153] This will go a long way in realising the socio-economic and other rights of millions of people caught in cycles of poverty and need. It may also satisfy the state's obligation to adopt reasonable legislative and other measures, within its available resources, to progressively realise the right.

The Department of Social Development and the Government seems to appreciate the urgency of the situation as, among its priorities envisaged in the 2000-2005 five year plan, is the development and implementation of an integrated poverty eradication strategy that provides direct benefits to those who are in need, as well as developing a comprehensive social security system that links contributory and non-contributory schemes, prioritising the most vulnerable households.[154] Secondly the Minister of finance in his budget speech indicated that the Department of Social Development has initiated measures to curb fraud in our social grants system.[155]

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150 *South African Human Development Report* 2003, 84.
151 Haarmann C "Social assistance in South Africa: Its potential impact on poverty" Unpublished PhD Thesis, University of Cape Town 2000, 105.
152 *South African Human Development Report* 2003, 89.
153 *South African Human Development Report* 2003, 91.
154 *South Africa Yearbook* 2003/04, 549.
155 Trevor A Manuel Budget Speech 21 February 2007.

The efforts of government in addressing the plight of poverty are clearly spelt out in the speech of President Thabo Mbeki during the official opening of Parliament:

> That the government aims to continue with programmes to build a social security net to meet the objectives of poverty alleviation; to expand access to such services as water, electricity and sanitation; to improve the health profile of the nation as a whole; to intensify the housing programme.[156]

2.9 Summary

This chapter has attempted to show that South Africa is faced with huge backlogs of social needs and demands. In addressing the plight of HIV/AIDS, the study argues that the underlying conditions that exacerbate the spread of HIV/AIDS need to be addressed, secondly the need for a comprehensive social policy that would uplift the majority of the people who find themselves unemployed should be adopted. The study argues that there is a need for a comprehensive social security safety net that would cater for the needs of people and families infected by HIV/AIDS pandemic in South Africa.

What emerges from this contribution is that major gaps remains between the vision of adequately paid full employment and the current state of the South African labour market. The extent of the gap is reflected in the extremely large numbers of unemployed, the scope and magnitude of under-employment in the formal and informal economies, the persistence of labour market inequalities, inadequate wages and salaries.

An approach to address individual's vulnerability in the HIV/AIDS epidemic reinforces the conclusion that success is contingent upon integrating gender considerations. Clearly, if gender issues are ignored, programmes run the risk of minimising their effectiveness or even causing harm. However, it is also clear that there is no single way to addressing gender, nor is there one approach that can guarantee success. Programmes must address individuals' vulnerability in a variety of ways within both short and long term time frames. In the short term, modern trends reveal that the male is not necessarily the breadwinner, the extended family and community are influential, and there are growing numbers of women-headed and even child-headed households.[157]

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[156] State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, February 9, 2007/Accessed at www.dfa.gov.za/docs/speeches/2007/mbek0209.htm.

[157] Lund F "Gender and Social Security Reform in Africa" in Padayache V (ed) The Development Decade? Economic and Social Change in South Africa, 1994-2004, (Human Science Research Council) HSRC Press, April 2006,161.

The decrease in formal employment that ensures social security benefits such as pension provision, health insurance, implies a reduction of social security protection for many vulnerable workers. This *per se* affects women in particular due to their dominance in the informal economy. Therefore we must continue to address female vulnerability by continually adapting to and meeting women's needs.

CHAPTER THREE: THE SOUTH AFRICAN SOCIAL SECURITY SYSTEM

3.1 Introduction

One of the mechanisms that enables people to escape destitution is social security. It meets people's basic needs when their income stream has stopped, been disrupted or has never adequately developed.[158] Social security comprises both social insurance and social assistance. Social insurance, which is contributory based usually, protects the income of those who are vulnerable to certain contingencies which threaten their income-earning capacity, for example, pregnancy, illness, old age etc, whereas social assistance aims at ensuring that those who are poor at least gain access to a minimum income in order to satisfy their basic needs.[159]

3.1.1 Conceptual definition of social security: A legal analysis

The current concept of social security in South Africa is based on the traditional western oriented approach.[160] This traditional approach is characterised by its risk-based approach as well as by the clear distinction between social assistance and social insurance. Presently there is no uniform international definition of social security. Thus social security is either defined with reference to the risks covered, in terms of the involvement or non-involvement of the state, or in terms of the overall aims served by social security.[161]

The International Labour Organisation (ILO) views social security as the protection that society provides for its members, through a series of public measures, against the economic and social distress that will be caused by the stoppage or substantial reduction of earnings resulting from -

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

159 *Ibid* No 138.

160 The roots of exclusion in social security can be traced to the introduction of social security in Europe and North America, it was orientated towards protecting workers in formal employment/Olivier MP and Kalula ER "Social Protection in SADC: Developing an Integrated and Inclusive Framework," 2004, 1. In South Africa the history of racial discrimination in the provision of welfare dates back from the origins of social assistance soon after the Union in 1910.Under apartheid, welfare state was erected to protect specific race group against various contingencies, as a results Africans were excluded from the state welfare system/Okpaluba C *Law and Contemporary South African Society*, 1st edition, New Africa Books (Pty) Ltd, South Africa, 2004, 180 - 185.

161 Olivier MP *et al Social Security: A Legal Analysis* Butterworths: Durban 2003, 25.

sickness, maternity, employment injury, unemployment, invalidity, old age, and death, the provision of medical care, and the provision of subsidies for families and children.[162]

The South African White Paper on Social Welfare,[163] however, considers social security to be policies that ensure adequate economic and social protection during unemployment, ill health, maternity, child bearing, widowhood, disability, old age; social assistance in relation to old age, disability, child and family care and poverty relief.[164] Social insurance and assistance cover a variety of an individual's earning capacity permanently ceasing, being interrupted, never developing public and private measures that provide cash and in-kind benefits or both, first, in the event or being exercised only at unacceptable social cost and such a person being unable to avoid poverty, and, secondly, in order to maintain children.[165] It is as such aimed at poverty prevention, poverty alleviation, social compensation and income distribution.

The traditional definition proposed by the ILO, based on employment-related social insurance and targeted and means-tested social assistance has come under severe criticism from scholars as being too restrictive and narrow for the problems faced by developing countries like South Africa.[166] The ILO definition fails to capture the characteristics of a developing country for a number of reasons. Some of these include the level of poverty and deprivation in developing countries and the lack of social security coverage, increasing informal sector employment and the exclusion of the informally employed.[167] Thus the ILO applies a universal definition to social security, it fails, to look at each country's specific socio-economic, political, and cultural factors, which play a key role in moulding the umbrella concept of social security.

This conceptualisation of social security fails to portray the fact that in Africa, it merely covers a small proportion of the population mainly those in formal employment and reflects the traditional male-breadwinner and female-dependent and nuclear family model.[168] However, the reality on the continent is the situation where the breadwinner is not necessarily the man, where the extended family is prominent and influential, and where there is a recent trend of women-headed and even child-headed households. Therefore, any definitional approach to social security in Africa must seek to address some of these issues.[169]

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[162] *ILO Social Security (Minimum Standards) Convention* 102 of 1952.
[163] *White Paper on Social Welfare1997*/accessed at www.gov.za/whitepaper/97/htm.
[164] *White Paper on Social Welfare, Government Gazette* 18166 GN 1108 of August 1997, chapter 7.
[165] *Ibid* No 164, chapter 5.
[166] *Ibid* No 161, 457 - 458.
[167] Olivier MP *The Concept of Social Security* in Olivier MP *et al Social Security: A Legal Analysis* LexisNexis: Butterworths, Durban 2003, 4.
[168] Kasente D "Gender and Social Security Reform in Africa" 1996 *ISSR* 30.
[169] Folbre N "Women and Social Security in Latin America, the Caribbean and Sub - Saharan Africa" ILO: Geneva, 1993.

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

While the traditional risk categories may be helpful in identifying more common life experiences and situations to which human beings are generally exposed, they may not reflect the particular risk-creating conditions which people on the African continent, for example, may be exposed to such as natural disasters, the impact of HIV/AIDS and crop failure.[170]

It is difficult to formulate a standard, universally acceptable definition of social security, considering that social security approaches often reflect differences in history, tradition, level of development and ideological orientations,[171] and other issues, such as structural and cultural factors that may determine the content of a social security system at any given period.[172] These all point to the difficulty of formulating a standard definition, and approaches that seek to overlook this difficulty, by proposing broad sweeping definitions, only worsen the situation.

It is also insufficient to describe social security merely with reference to the contingencies covered by the concept. It is considered that, an overall aim, which directs and informs the social security concept and the areas it covers must serve as a point of departure. It is only within the context of such an overall aim that a distinct social security paradigm can be developed, without being restricted to a mere contingency or risk-based approach.[173]

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The social security concept has therefore increasingly been broadened from the income situation to include basic needs in general and also widened the range of contingencies. This is in the belief that it is necessary to link traditional social security with social and economic mechanisms. Social security is thus defined as any kind of collective measures or activities designed to ensure that members of society meet their basic needs, such as adequate nutrition, shelter, health care and clean water supply, as well as being protected from contingencies – such as illness, disability, death, unemployment and old age, and to enable them to maintain a standard of living consistent with social norms.[174]

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[170] *Ibid No* 169.

[171] Kaseke E "Rural Social Security needs" the Case of Zimbabwe Harare: School of Social Work, 1993 (Unpublished Paper).

[172] Berghman J "Basic Concepts of Social Security in Social Security in Europe" Bruylant/Maklu, Brussel/Antwerp 1991, 10.

[173] Olivier MP *The Concept of Social Security* in Olivier MP *et al Social Security: A Legal Analysis* LexisNexis: Butterworths, Durban 2003, 35.

[174] Getubig IP and Schmidt S (Eds.) "Rethinking Social Security: Reaching Out to the Poor" UN Asia and Pacific Development Centre Kuala Lumpur 1992, chap 1.

Similarly, the average experience of poorer populations understates the precarious nature of their existence, since a certain proportion of them undergo an often sudden dispossession, and the threat of such a thing being ever-present in the lives of many more.[175] Van Ginneken, on his part, regards social security as the provision of benefits to households and individuals, through public or collective arrangements, to protect against low or declining living standards arising from a number of basic risks and needs.[176] This definition consists of four elements.

The first element is that people derive individual rights from social security. The second outlines the social aspect of social security - it is provided through public or collective mechanisms. The third is that it is not for promotional purposes, but only for protection and does not only consist of cash benefits and medical care, but is also concerned with benefits in kind and other basic need areas such as housing. The fourth element stresses that contingencies and needs are not to be considered narrowly as they should include some basic risks and needs.

Social security is also defined as the sum of all regulations within a society that aim to guarantee the individual or group, not only physical survival but also general protection against unforeseeable risks which would entail a deterioration of the situation and consequences that could be borne by the individual or group without external assistance.[177] In Africa, apart from the formal state or private sector mechanisms, there are also non-formal social security instruments such as traditional and informal systems. Traditional social security refers to the form of security with close links to social tradition that is binding on members of the community on the basis of custom. Informal systems are those that develop independently from tradition and are based on principles of reciprocity and solidarity arising from socio-economic circumstances.[178]

3.2 South African social security framework

According to the Department of Social Development, South African social security comprises of four elements or pillars,[179] namely social assistance, social insurance, social relief, and private savings. Social assistance in its current form is not aimed at meeting the total needs of the recipients but to enable them to have a minimum standard of living. The Social Assistance Act[180] makes provision for the payment of social assistance grants to people who are unable to care for themselves.

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175 *Ibid* No 174.

176 Van Ginneken W "Social Security for the Informal Sector: Issues, Options and Tasks Ahead" ILO: Geneva (1996) /accessed at www.ilo.org/public/english/protection/socsec/publ/wouter2/htm.

177 Schmidt S "Social Security in Developing Countries: Basic Tenets and Fields of State Intervention" *International Social Work* vol. 38, sage publications, London 1995.

178 Fuchs M "Social Security in Third World Countries" in Von Benda-Beckman K *et al* "Between Kinship and the State" Dordrecht. Providence RI USA 1988.

179 Chapter 2 of 1999/2000 Annual Report.

180 Social Assistance Act 13 of 2004.

These grants are usually subject to a means test and are allocated on a strictly categorical basis. They range from children, elder people, disabled who do not have sufficient means. The White Paper on Social Welfare,[181] defines South African social assistance as, an integrated and comprehensive system of social services, facilities, programmes and social security to promote social development, social justice and the social functioning of people.

The current South African social assistance framework comprises of the following social assistance grants, first we have social assistance grants for children, this include Care-Dependency Grant, Foster Child Grant, and Child Support Grant, and secondly, social grants for the elderly, and special pensions, for military pensions, gratuities and financial reparation for individuals who have suffered because of political conflict (this include among others, War Veterans Grant, Grant-in-aid, and supplementary grants, grants to people with disabilities (Disability Grant).[182] A detailed discussion of these grants is given below.

3.3 Social assistance grants

Currently South African social security programme offers the following social assistance grants:

3.3.1 Child Support Grant

A person is eligible for a child support if he or she is the primary caregiver of that child.[183] The primary care giver must comply with the following conditions, he or she should continue to be the primary care-giver of the child, the child should have accommodation, be fed and clothed and designated officers should have access to the child and dwelling where the child resides and the primary care-giver must ensure that the child receives immunisation and other health services.[184]However in terms of Social Assistance Act, a person has to comply with residency and citizenship requirements.[185] By virtue of recent constitutional case law, permanent residents could also apply for this grant.[186] The amount payable to the beneficiaries of the Child Support Grant is R190 per month.[187] The purpose of the grant is to target children in poor households.[188] The age limit of 14 years, is not in line with the definition of a child as provided in the Constitution. As the definition of a child in the Constitution is a person under 18 years of age.

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181 GNR.1108 of 8 August 1997 at 15.

182 Olivier *et al Introduction to Social Security*, LexisNexis, Butterworths, Durban, 2004, 229.

183 Section 6 of Social Assistance Act 13 of 2004.

184 *Ibid* No 183, regulation 20.

185 *Ibid* No 184, Section 5 (b) and (c).

186 *Khosa and Others v the Minister of Social Development and Others; Mahlaule and Others v the Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

187 Budget Speech 2006 Trevor.A.Manuel Minister of Finance 15 February 2006.

188 Lim Hye -Young "Alleviating Child Poverty in South Africa: The role of Social Assistance Grants" *ESR Review*, 2006 3.

3.3.2 Care Dependency Grant

A parent, primary care giver or foster parent of a child who requires and receives permanent care or support due to a physical or mental disability will be eligible, if the criteria mentioned in the Act is met.[189] The grant of R 820 per month is available to a parent, primary care giver or foster parent of a child who requires and receives permanent care due to his or her physical or mental disability.[190] This grant is also subject to a means test and will be given to the applicant where the combined annual income of the applicant and his or her spouse, after permissible deductions does not exceed R 48 000, or such higher amount as the Minister may determine from time to time.[191]Eligibility of this grant is dependent on a medical report from a medical officer confirming that the child complies with the definition of a care dependant child.[192]

3.3.3 Foster Child Grant

A foster parent is, subject to the provisions of section 5,[193] eligible if the foster child is in need of care and he or she satisfies the requirements of the Child Care Act of 1983. Social Assistance Act requires the foster parent to be a South African citizen. The grant of R 590 is available to a foster parent of a child who is under 18 years of age and if the child is in need of care.[194] This grant is important in the context of increasing number of orphans and child-headed households caused by the HIV/AIDS pandemic, as government encourages relatives to take care of these orphans and apply for this grant. This appears to be the position under the Old Social Assistance Act.[195] Nevertheless according, the recent judgment of the Constitutional Court in the *Khosa* case, one should assume that this grant is also available to permanent residents

3.3.4 Older Persons Grant

The position in as far as this grant is that beneficiaries are in the case of a woman, if she has attained the age of 60 years and in the case of a man, if he has attained the age of 65 years. Residency and citizenship are qualifying conditions.[196] The beneficiaries will also include permanent residents, subject to the criteria outlined in the Social Assistance Act.[197]

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189 Section 5 of Social Assistance Act 13 0f 2004. This includes amongst others, citizenship and residency) are met. By virtue of recent constitutional judgement, permanent could also apply for this grant.

190 *Ibid* No 189, S 7.

191 *Ibid* No 189, Regulation 5 (1).

192 *Ibid* No 189, a parent or foster parent receiving this grant must comply with the following requirements: the child must remain in the care of the parent or foster parent who applied for the grant; the child mast have accommodation and be properly cared for and receive the necessary care, and medical care.

193 Social Assistance Act 13 of 2004.

194 S 8 of Social Assistance Act of 2004.

195 Section 4 (A) which required residency only was inserted into the Social Assistance Act 59 of 1992 by the provisions of the Welfare Laws Amendment Act 106 of 1997.

196 Section 5 (b) and S 5 (c) of the Social Assistance Act 13 of 2004.

3.3.5 War Veterans Grant

This Grant is payable to citizens and residents of the Republic of South Africa, only if they meet the criteria mentioned in the Social Assistance Act.[198]

3.3.6 Grant in Aid

This grant is payable in respect of a person who is in such a physical or mental condition that he or she requires regular attendance by another person. This grant requires a beneficiary to be a South African citizen and resident in the Republic, permanent residents could also apply for this grant *(Khosa case)*

3.3.7 Social Relief of Distress

Social relief is defined in the Fund-Raising Act,[199] as the alleviation of need of persons by means of the temporary rendering of material assistance to them. Social relief entails short-term measures undertaken by the state and other private organisations to assist persons during individual or community crises that have caused the affected persons or communities to be unable to meet their most basic needs. Social relief is also regulated by the Social Assistance Act financed through taxation. Social relief programmes are aimed at the alleviation of both chronic and transient poverty.[200]

3.3.8 Disability Grant

According to the Social Assistance Act individuals are eligible for a Disability Grant, if they pass a means test, and if as a result of mental or physical disability, they are unable to provide for themselves through employment.[201] Given South Africa's high unemployment rate and relatively generous disability grants,[202] illness has itself become an important source of income.[203]

Notwithstanding the availability of foregoing grants, South Africa has no specific social assistance grant for people with HIV/AIDS. The criteria which is used to access the grants is based on standardised medical model which restricts disability grants to people who have HIV/AIDS.

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197 *Ibid* No 196, S 5.
198 *Ibid* No 196, S 11.
199 Act 107 of 1978.
200 Olivier *et al Introduction to Social Security*, 2004, 224.
201 Section 9 of Social Assistance Act 13 of 2004.
202 Maximum amount payable for Disability Grant in South Africa isR820 per month. Trevor A Manuel Minister of Finance, Budget Speech, 15 February 2006/accessed at www.sarpn.org.za/documents/SA budget - speech 2006.
203 Nattrass N "Disability and Welfare in South Africa's Era of Unemployment and AIDS" Centre for Social Science Research Working Paper No 147, University of Cape Town, 2006, 7.

3.4 System of social insurance in South Africa

Social insurance usually refers to earned benefits of workers and their families. It is most often linked to formal employment. There is a direct connection between the amount paid and the benefit received. On the other hand, earnings related benefits often also have non-contributory elements (e.g. the state may supplement the contributions). There is an overlap between these benefits and needs-based social assistance.[204]

3.5 Social insurance and economic security

Social insurance is intended to enhance economic security. According to O' Connell, during the past century these economic security devices have proliferated rapidly, and both private employers and legislatures have created multiple sets and complex roles to govern their distribution.[205] O' Connell suggests that for most Americans, access to economic security is closely linked to participation in the paid labour force:

> The greatest security belongs to those whose attachment to paid work is lengthy, uninterrupted and highly remunerative. Those who earn a low wage, or whose labour force participation is interrupted or less than life-long, may glean access to some economic security devices, but their share is markedly poorer than that garnered by the preferred worker - the highly paid long term employee.[206]

The pattern is similar in South Africa. Those who do not have access to work and work related benefits rely in most cases, on the social assistance schemes. Even when beneficiaries are able to access social insurance there are frequently many limitations and they are inappropriately targeted.

This also has major gender implications. Access to contributory social insurance is usually tied to a stable, uninterrupted job in the formal sector. Many women are indirectly excluded because of their higher unemployment rates, their prevalence in less secure, informal sector jobs, and because of the fact that their employment record is much more likely to be interrupted due to child care and other domestic responsibilities.[207]

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[204] Krause C "Lowering of Social Security Standards Under International Human Rights Law" Unpublished LLM Thesis, 1994, 3 - 4.

[205] O'Connell ME "On the Fringe: Rethinking the Link between Wages and Benefits" *Tulane Law Review* Vol 67, No.5, 1993.

[206] *Op cit* No 205, O'Connell.

[207] Key Indicators of Poverty in SA note 16, 4, the 1995 October Household Survey estimates that 75% of African workers in the informal sector are women, see also Budlender D (ed), "the second women's budget" Idasa, 1997, 26.

3.6 The main types of social insurance available

3.6.1 Unemployment insurance

The main form of social insurance in South Africa is provided for under the Unemployment Insurance Act.[208] It is a fairly typical example of social insurance legislation found in countries in which the labour force has not been fully absorbed into wage-earning employment.[209]

The main features of such social insurance schemes are, costs that are met by contributions shared between employers and employees, with sometimes the supplementary contribution from the state out of general revenue, participation is compulsory for prescribed areas of employment, contributions are accumulated in a special fund from which benefits are paid, surplus contributions that are not required for the payment of benefits are invested to earn supplementary income for the fund, the contributor's right to benefits is related to his or her contribution record, contribution and benefit rates are usually earnings-related.[210]

The Unemployment Insurance Fund which was established in 1946 provides a limited number of categories of benefit. In 1946 the state' concern was limited to alleviating poverty among whites. A major part of the work force including agricultural workers, African gold and coal mining workers and domestic workers were excluded.[211]

The five categories of benefits provided under the UIF Act are, *Unemployment benefits*; *Maternity benefits*; *Illness benefits*; *Adoption benefits*; and *Survivor's benefits* in the event of the contributor's death.

Benefits are calculated at 45 percent of the wages earned by the contributor immediately prior to the cessation of employment. The normal maximum entitlement is 26 weeks within any period of 52 weeks.[212] The following groups are excluded from coverage: casual workers, piece workers, seasonal workers. However, major improvement includes the extension of UIF to domestic workers.[213]

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[208] Unemployment Insurance Act No. 30 of 1996.

[209] John Limbrick and Associates "Extended the Provisions of the Workman's Compensation Act and the Unemployment Insurance Act to Domestic workers" A Report to the Department of Manpower July 1993.

[210] *Op cit* No 20, Limbrick and Associates.

[211] Meth C and Naidoo R "Unemployment Insurance and Related Coverage Issues" Interim Report of the Task Team, October 1996, Adriette HD "Informal Social Security: A Legal Analysis" University of South Africa, unpublished PhD Thesis, 2005, 22-25.

[212] *Op cit* No 209, Limbrick and Associates.

[213] On the 1st April 2003/accessed at http://www.labour.gov.za/media/statement.

3.6.2 Occupational injuries and diseases

The Compensation for Occupational Injuries and Diseases Act[214] is also a typical example of social insurance legislation found in many countries. The Act requires all employers of workman as defined, to pay annual premiums related to the amount of wages paid, and the assessed risk of accidents in the particular sector of industry in which the employer carries on a business. Workers are not required to contribute to the fund nor does the state make any contribution to the fund.

Workmen (as defined in the legislation) are entitled to benefits under the Act regardless of whether the employers have paid the necessary premiums. The COIDA provides that if workers are injured at work or get a disease caused by their work (occupational disease), they get benefits from the Compensation Fund.[215]

The COIDA benefit structure covers five contingencies:

a) Medical and hospital costs arising from occupational injuries and diseases;
b) Temporary incapacity which may be either total or partial. Compensation is 75 percent of the worker's monthly wage;
c) Permanent total incapacity. Compensation is a monthly pension;
d) Permanent partial incapacity. Compensation is a proportional monthly pension or a lump sum, depending on the extent of the disability;
e) Compensation is paid to the worker's dependants.[216] When a fatal injury happens, and the worker is killed or dies as a result of the injury his or her dependents (widow or widower, children or perhaps mother) will get a pension. The dependent widow or widower will get a pension for life. Children (up to 3 children) under 18 years of age will get a pension (included as part of the parent/guardian's pension) which will stop when they reach 18 years, unless they are still studying at school or University.

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Compensation under this legislation replaces the normal civil remedies a worker would have against his or her employer e.g. for the negligent causing of injury or disease.

Those excluded from coverage under the Act, include members of the Defence and Police Forces, independent contractors, and domestic workers in private households. It is estimated that there are approximately 860 000 domestic workers in paid employment in South Africa, servicing roughly one

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[214] COIDA No.130, 1993.
[215] Industrial Health Research Group, "Guide to the Compensation for Occupational Injuries and Diseases Act" (1996).
[216] *Op cit* No 215, Industrial Health Research Group/*Op cit* No 209 Limbrick & Associates.

million households. [217] The majority of these workers are black women. Despite the size of the sector, domestic workers are excluded from the provisions of the Compensation for Occupational Injuries and Diseases Act.[218] Due to their exclusion from these provisions, if a domestic worker is injured, contracts an occupational disease, or has a fatal accident during the course of her duties, she or her dependants are not able to claim any of the above benefits from the Compensation Fund.

The only other partial option available to a domestic worker who is injured or who contracts an occupational disease is to sue the employer for the wrongful causing of harm. This is only possible if the domestic worker is injured as a result of an employer's negligence or specific instruction. However, an employer is not liable if it can be proved that all reasonable steps were taken to prevent the accident which caused the injury; that the actions leading to the accident were outside the normal scope of the domestic worker's duties or that the action was done without the employer's knowledge or permission.[219] This option is hardly feasible, given the expense of such legal action.

It is clear that compensation in terms of COIDA is limited to certain categories of people as COIDA serves to protect those who became disabled as a result of an occupational injury or disease. As a result COIDA is silent on HIV/AIDS contracted by employees in their employment.

3.6.3 Occupational retirement insurance

Many governments, particularly in the north, are concerned with the ageing of their populations. There is much emphasis world wide on looking at how people can be encouraged to start making personal provisions for their retirement. Governments hope that by introducing tax benefits and other incentives, personal provision will increase and reduce the financial strain placed on government in the area of old age social assistance.

Private insurance companies find that the challenge that faces them is to devise new and innovative schemes to extend coverage to people who are not in permanent formal employment.

The large insurance industry in South Africa plays a crucial role in mobilising contractual savings for investment, much of it is occupational retirement insurance. Assets of retirement funds alone amounted to 73 percent of GDP in 1993.[220] Occupational retirement insurance has expanded its coverage to most industries, and it is usually mandatory for employees in such industries to join their pension or provident fund. Organised labour's involvement in this sector is a healthy challenge to management's power in this area. Workers and employers typically contribute 7.5 percent of the

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217 *Op Cit* No 211, Meth, Naidoo and Shipman.
218 COIDA1993.
219 Gilfillan in *Masisebenzisane* - Let Us Work Together, 1990.
220 Smith Committee, 1995: D2.16.

monthly wage to a retirement fund, and workers can then claim benefits upon retirement. The retirement funds are regulated through the Pensions Funds Act of 1956 with the aim of safeguarding members' interests.

Van der Berg notes that:

> Coverage is still low in agriculture, trade, catering and accommodation (mainly employees of small traders and shopkeepers), and domestic service. Coverage amongst men is probably much higher than among women, who are disproportionately present in services, including both trade and domestic service.[221]

Although coverage of those in formal employment is high (about 73 percent), the large extent of unemployment means that only some 40 percent of the labour force is covered.[222]

3.6.4 Private insurance

People also make provision against certain contingencies such as retirement, ill health, death and unemployment through private insurance schemes. The proper regulation of the private insurance industry to prevent abuses and forms of unfair discrimination is clearly warranted - for example, the exclusion of persons with HIV/AIDS from many medical aid schemes.[223] The Bill of Rights specifically prohibits private individuals and institutions from discriminating unfairly on grounds such as race, gender, sexual orientation, and disability etc.[224]

It is evident that the of concept social insurance has been defined as a mandatory contributory system of one kind or another or regulated private sector provision, concerned with the spreading of income over the life cycle or the pooling of risks regulated by private sector provision.[225]

The South African social security system has no specific social insurance schemes for HIV/AIDS related risks that may befall individuals as well as their families. Nevertheless, there are schemes which (directly or indirectly) play a significant role in assisting individuals and their dependants in coping with HV/AIDS and its effects.

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[221] Van der Berg, note 9, 489.

[222] *Ibid* No 221/Promotion of Equality and Prevention of Discrimination Act 4 of 2000.

[223] "AIDS patients' rights may be tested in court" *Business* Day, 4 May 1998.

[224] Section 9 (4) Act 108 of 1996.

[225] Mpedi G *Zeitschrift Für ausländisches und internationales Arbeit - und Sozialrecht* (ZIAS); 3/2004; 18 Jahrgang, Seiten 201-204, C.F. Muller. 256, Olivier M.P *et al, Social Security: A Legal Analysis*, 1st edition, Butterworths, Durban, 2003, 597598, Committee of Enquiry into a Comprehensive System for South Africa Transforming the Present - Protecting the Future: Consolidated Report. 2002, 36.

Most of them are contributory based. Employees and employers often carry the burden of contributing to these schemes. Medical aid schemes are the most notable due to their significance in the area of health care for those living with HIV.

On the other hand, other social insurance schemes, such as the employment insurance scheme, retirement schemes and the compensation for occupational injuries and diseases scheme, play a pivotal role through survivor's benefits upon the death of the breadwinner. It is clear, that several points of criticism may be advanced against the South African social insurance schemes, that it is closely tied to formal employment, as a result many people are excluded from participating in social insurance schemes such as retirement schemes which offer survivors benefits upon the death of the breadwinner.[226]

Secondly, lack of statutory obligation to participate in the health insurance system. Often employees neglect to contribute to health insurance schemes. As a result it becomes difficult for them to afford life-prolonging treatment in the event of HIV/AIDS related sickness. This, in long run, means that they will require state - provided social assistance.[227] To remedy this situation, it is argued that the state should step in and compel people to protect themselves.[228] Thirdly participation in these schemes often depends on whether one fits within the limited definition of 'employee'. The end result is exclusion and marginalisation of those who are not involved in formal employment or those who do not fall within the notion of 'employee' as defined in various social insurance statutes.

3.7 Informal social security

Against this background, it is also imperative in this study to briefly discuss non-formal social security (sometimes known as informal social arrangements). The importance attached to informal social security is that it provides a safety net, for those who are excluded from the formal social security (which is based on formal employment).

3.7.1 Role of informal social security

Informal social security as part of social protection plays an important role as a social protection instrument. The concept itself encompasses informal forms of social security, for example support granted by family and community members.[229]

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[226] *Ibid* No 225.

[227] Olivier MP *Social Security: A Legal Analysis*, 2003, 123 -135.

[228] Mpedi G *Zeitschrift Für ausländisches und internationals Arbeit und Sozialrecht* (ZIAS) C.F. Muller, 3/2004, 18, Jahrgang, Seiten 201-334,259, Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present Protecting the Future; Consolidated Report, 2002, 46.

[229] Kaseke "Social Security in Eastern and Southern Africa" Paper presented at the SADC Social Security Conference 2000.

The development of informal social security is largely linked to the problem of poverty and the vast number of people excluded in terms of the present formal social security framework.[230] It originated from the family context, where support was given to family members. Eventually it expanded owing to the increased need in poor communities. The family acted as the first line of defence against basic risks and contingencies (in African societies it is this family which cares for people living with HIV/AIDS).

The role of informal social security cannot be ignored, as it covers large sector of our population who are excluded from the formal social security. Recent studies, estimates that nearly half (45 percent) of South Africa's population is considered to be poor and living below the poverty line.[231] Almost half of the poor are people classified as living in absolute poverty. The majority of the poor, almost 70 percent live in rural areas, and African people constitute the majority of the poor in the country, although poverty is not confined to any particular race group.[232]It is clear that the traditional or informal social security mechanisms based on solidarity cannot offer complete protection against poverty and other contingencies, since they are facing tremendous problems, relating to poverty and HIV/AIDS.

Therefore, it would be extremely inappropriate to implement social security system without having proper regard to existing informal social security mechanisms present in traditional communities and informal employment context. In the process of transforming the South African social security system the challenge would be to develop, transform and strengthen existing informal social security system.[233]

It is evident that for the continual existence of informal social security in South Africa, effort must be made towards providing training to members of mutual support schemes (e.g. Burial Societies, *Stokvel*), and to improve the management of these schemes. Secondly, provision of financial assistance by governments and non governmental organisations in order to improve their financial base and thereby enhance their capacity to provide better social protection. Thirdly, widening the scope of non- formal social security systems in order to enhance social protection. Lastly introducing linkages with formal social security systems so as to improve social protection.

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230 Dekker AH and Olivier MP *Social Security; A Legal Analysis*, 1st edition Butterworths, Durban, 2003, 560.

231 May J and Woolard I "The Nature and Measurement of Poverty and Inequalities in May J (ed) Poverty and Inequality in South Africa" Meeting the Challenge, 1998/UNDP Transformation for Human Development. South Africa 2000, chapter 2. According to the World Bank these 45 percent live on less than $2 a day.

232 Van der Waal K and Malan M "A Developmental Perspective on Social Security for The Urban and Rural Poor and the Informally Employed in South Africa" Paper Presented at SANPAD Seminar (Pretoria 20 November 2000) 8.

233 Kaseke "The challenges of Extending Social Security To The Poor In Africa Perspective" Paper Presented at International Council on Social Welfare Biennial Conference Cape Town 23-27 October 2000/Olivier MP *et al* "Social Security" A legal Analysis, 1st edition, Butterworth's, Durban 2003,588.

This would make it possible for non-formal social security schemes to incorporate the social insurance principle of risk sharing.[234]

3.8 Indirect social security

The indirect social security refers to certain forms of social security, which are generally not listed as part of direct social security measures. Nevertheless it follows that indirect social security and direct social security are closely interrelated. Indirect social security refers to those services that do not form part of direct or traditional social security, but are nonetheless crucial in preventing human damage, in the prevention of social exclusion, and in aiding human beings to be able to live dignified lives.[235]

The Primary School Nutrition Programme (PSNP) is a good example of indirect social security measure aimed at ensuring access to food and nutrition, as the constitution endows every child in South Africa with the right to basic nutrition.[236] The PSNP, which is a school feeding programme, was implemented throughout South Africa on 1 September 1994, with the Department of Health acting as a primary implementation agency on a national level. It is estimated that a total number of 15 000 schools and 4.9 million learners are benefiting from this scheme.[237]

3.9 Summary

South Africa seems to have opted to integrate HIV/AIDS in existing safety nets instead of creating new ones. While such approach cannot be dismissed as inappropriate, South African safety nets are likely to play an important role in mitigating the impact of HIV/AIDS, given the fact that eligibility for these grants are driven largely by their categorical nature, the increasing burden of chronic illness, the mounting orphan crisis and the impoverishment of households associated with the epidemic.[238]

There is often no connection between traditional, indirect and informal social security interventions in dealing with HIV/AIDS pandemic. It is for this reason that Comprehensive Social Protection proposed by the Committee of Enquiry into a Comprehensive System of Social Security for South Africa (hereafter the Committee) is highly recommendable when dealing with the HIV/AIDS crisis in South Africa.

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234 *Op cit* No 229, Kaseke "Social Security in Eastern and Southern Africa"2002.

235 Olivier *et al Social Security: A Legal Analysis*, 2003, 537.

236 Section 28 (1) (c) provides that every child has the right to basic nutrition, shelter, health care services and social services. Sub sec 3 provides that a child means a person under the age of 18 years. This definition is in line with the UN Convention on the Rights of the Child 1998.

237 Department of Health, 2004, 26.

238 Mpedi LG "HIV/AIDS in South *Africa*: Towards a Comprehensive Social Protection" 2003/4.

The Committee defines Comprehensive Social Protection as follows:

> Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state.[239]

The Comprehensive Social Protection concept operates through a built in package of social protection interventions and measures to address, 'income poverty' (provision of minimum income), measures to address 'capability poverty' (provision of certain basic services), measures to address 'special needs' (for example HIV/AIDS). The advantage of this 'package' approach is that it enables one to achieve a degree of balance between measures focused on reducing income, services (capability) and asset poverty.[240]

In conclusion, it is important to note that social security will remain a dream for the poor people living with HIV/AIDS, who cannot afford proper nutrition for their immune systems, to cope with the adverse effects of the disease, even to access the government social assistance programmes, unless efforts are taken to expand and strengthen non - formal social security schemes. Confining government's efforts to formal social security will only serve to exacerbate existing inequalities between the rich and the poor.

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It is clear that the system of social assistance in South Africa is compensatory in nature, however we need to see more integration and preventative measures being introduced. Secondly, these programmes need to be structured in a way that they are accessible to those who are poor, as administrative obstacles and corruption on the officials administering these programmes, makes it difficult for beneficiaries to access them.

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[239] Committee of Enquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present - Protecting the Future, 2002, 41.

[240] *Ibid* No 238, 40 - 48.

CHAPTER FOUR: CONSTITUTIONAL FRAMEWORK OF SOCIAL SECURITY

4.1 Introduction

The Constitution of the Republic of South Africa[241] has had a major impact on social security in South Africa. The Constitution makes it clear, that it is the supreme law of the country,[242] while the Bill of Rights applies to all and binds the legislature, the executive, the judiciary, and all of organs of state.[243]

The Constitution also enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.[244] Section 27(1) (c) of the Constitution guarantees the right to have access to social security.[245] There are also other fundamental rights that play a significant role in the context of social security.[246] The state is obliged to respect, protect, promote and fulfil these fundamental rights.[247]

The Constitution provides a baseline framework for the protection of social security rights and other related rights in the sense that it attempts to provide for minimum standard of living or a safety net, to those who are poor and vulnerable in our society. When considering the purpose of providing access to social security to those in need, the Constitutional Court,[248] remarked that:

> A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the South Africa values human beings and wanted to ensure that people were afforded their basic needs.[249]

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[241] Act 108 of 1996.
[242] *Ibid* No 241, Section 2.
[243] Section 8 (1) of The Bill of Rights contained in Chapter 2 of the Constitution.
[244] *Ibid* No 241, S 7 (2).
[245] Section 27 (1) (c) reads as follows; everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
[246] Such as the right to housing (Section 26), right to equality (S 9), the right to administrative justice (Section 33).
[247] *Ibid* No 241, Section 7 (2).
[248] *Khosa & others v The Minister of Social Development & others; Mahlaule & other v The Minister of Social Development & others* 2004 6 BCLR 569 (CC) 573 A.
[249] Olivier MP "Access to Justice in Welfare Law and Litigation: Judicial Reform in South Africa" paper presented at the Commonwealth Legal Education Association Regional Conference 2006, Delhi, 28-30 July 2006, 9.

4.2 Constitutional scope of the right to social security

The Constitution refers to the right to have access to social security, and not purely to the right to social security.[250] The question must therefore be asked whether the term "access to" can be interpreted as qualifying the right to social security. Initially the distinction was understood as an attempt to avoid an interpretation that sections 26 (2) and 27 (2) create unqualified obligations on the state to guarantee the direct provision of social goods to everyone.[251]

In the *Grooboom* judgment,[252] the Court remarked that:

> The right delineated in Section 26 (1) was a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant.[253] This difference is significant because it requires that housing entails more than bricks and mortar. It requires available land, appropriate services, such as the provision of water, the removal of sewage, and the financing of all of these, including the building of the house itself. The Court *in casu* reached a different conclusion, holding that the "right to have access to housing" can be interpreted broader than the "right to housing.[254]

Section 7(2) places positive and negative obligations on the state to realise socio-economic rights. The duty to respect (negative duty) requires the state and other relevant actors, on a primary level, to refrain from infringing the right, while the positive duty requires the state to enact legislation and policies that will ensure realisation of these rights. The rights in the Bill of Rights may also place a duty on the state to act rationally and in good faith, and require the state to justify its failure to fulfil its obligations.[255] It may therefore be expected to provide valid reasons for its failure to respect, protect, promote and fulfil the right of access to social assistance.[256]

In the most comprehensive judgment on social security-related rights, *Government of RSA v Grootboon and others*,[257] the case concerned the forcible removal of a large number of children and their families occupying land illegally, without making available to them alternative facilities.

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[250] Section 27 1 (c) reads as follows; Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
[251] Davis D *et al* "Fundamental Rights in the Constitution: Commentary andCases" 1997, 345.
[252] Government of South Africa v Grootboom 2000 (11) BCLR 1169 (CC), para 35,*per* Yacoob J.
[253] *The International Covenant on Economic, Social, and Cultural Rights of* 1966, 1976.
[254] *Ibid* No 252, para 345, *per* Yacoob J.
[255] O'Regan K "Introducing socio-economic rights" *ESR Review*, 1999, 2.
[256] Section 33 (1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedural fair, in section 2, the Constitution further provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
[257] 2000 (11) BCLR 1169 (CC).

The Constitutional Court provided explicit guidance on the principles applicable to the interpretation of the socio-economic right of access to adequate housing.[258] In particular the Court commented on the states obligations under s 26, which gives everyone the right of access to adequate housing, and s 28(1)(c), which affords children the right to shelter. In a nutshell the court commented on the invisibility and interrelation of fundamental rights. That socio-economic rights are mutually supportive. That the right to access to housing cannot be in isolation to other fundamental rights such as, health care, sufficient food and water, electricity.

4.3 Entrenching socio-economic rights in the Constitution

The Bill of Rights not only entrenches first-generation rights (civil and political rights) but also second and the third-generation rights (socio-economic and environmental rights). The Constitution places a specific duty on the state to take positive measures in order to give effect to certain constitutional rights, particularly the second and third-generation rights.[259]

In the Bill of Rights, the Constitution introduces a constitutional imperative in terms of which the government is compelled to ensure the "progressive realisation" of the right to social security. It also imposes obligation on the state to implement appropriate measures in this regard as follows; *the state must take reasonable legislative* and other measures, *within its available resources*, to *achieve the progressive realisation of each of these rights*.[260]For the purpose of the study it is important to briefly analyse these three internal limitations imposed by section 27 (2) of the Constitution.

4.4 Internal limitations

4.4.1 Reasonable legislative and other measures

The Courts in South Africa, particularly in the Grootboom judgment have stated that the real question in terms of the South African Constitution is whether the measures taken by the state to realise social rights are reasonable.[261] The court *in casu* went further and interpreted the relevant limitation by considering reasonableness. First of all, the Court stated that it would enquire whether the measures adopted to realise social rights are reasonable, secondly the Court will look, at the social security system as a whole and different measures to address the states obligations.

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258 S 26, of the South African Constitution Act 108 of 1996.
259 De Wet *South African Journal of Human Rights*, 1995, 36.
260 *Ibid* No 241, Section 27 (2).
261 Chris Nagel B.A The Journal of Contemporary Roman– Dutch Law, Tydskrif vir Hedendaagste Romeins-Hollandse Reg, February 2007, 99 – 100.

For example, in the context of social security, the Court will enquire whether is there a safety net for the most needy in society, by way of social assistance measures.

4.4.2 Within the available resources

The meaning of the phrase "available resource" was interpreted in the case of *Soobramoney v Minister of Health (Kwazulu-Natal),* [262] to mean that the provisions of section 27(1) (c) entitles everyone the right to have access to social security impose an obligation on the state to realise these rights depending on the resources available.

The Court remarked further, that given the lack of resources and the significant demands on them, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. In Grootboom judgment the Court emphasised that there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively, but the availability of resources is an important factor in determining what is reasonable.[263]

4.4.3 Progressive realisation

The Constitutional Court in *Grootboom* case, interpreted the phrase "progressive realisation" with reference to the interpretation given by the United Nations Committee on Economic, Social and Cultural Rights.[264] The Court interpreted the phrase to mean that the right could not be realised immediately, but over time.[265] The Court further remarked that the phrase mean that accessibility should be progressively facilitated, legal, administrative, operational and financial hurdles should be examined, and where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but also to a wider range of people as time progresses.[266]

This constitutes a clear undertaking by the drafters of the Constitution to develop a comprehensive social security system, based on *inter alia*, the right of access to social security for everyone, subject to availability of resources.

What follows from the *Grootboom judgment* is that the Court placed a positive duty on the state, in as far as the implementation of legislation and policy (in the area of social security). The Court remarked that, it is not enough to devise reasonable policy and legislative measures aimed at realising socio-economic rights, these must also be reasonably implemented, that a reasonable

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[262] 1997 12 BCLR 1696 (CC) par 11.
[263] *Ibid* Olivier 2002, 21.
[264] *Ibid* No 13, 74.
[265] *Ibid* Grootboom case *para* 45, per Yacoob J.
[266] *Grootboom* case *para* 45, *per* Yacoob J.

programme that is not implemented reasonably will not constitute compliance with the state's obligations.[267]

In assessing the reasonableness of the measures adopted by the State, according to the Court, the following would have to be taken into consideration, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced, flexible, and make appropriate provision for attention to housing crises, and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. That the conditions do not remain static and therefore the programme will require continuous review. Reasonableness must also be understood in the context of the Bill of Rights as a whole.[268]

4.5 Inter-relation and interdependence of social rights

The Constitution provides for a *right to have access to*, as oppose *to the right to social assistance.* The right to have access to social assistance is a much wider concept than the right to social assistance. The Constitutional Court in Grootboom drew the difference between the words, *a right to* and *a right to have access*, as follows:

> The right delineated in section 26 (1) is a right of "access to adequate housing" as distinct from the right to adequate housing .... This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met. There must be land, there must be services, and there must be a dwelling. Access to land for the purposes of housing is therefore included in the right. [269]

The right of access to social assistance cannot be interpreted in isolation, as there is a close correlation between it and the other socio-economic rights. The rights are interrelated, interdependent and mutually supporting. As pointed out in the *Grootboom* case,[270] socio-economic rights must all be read together in the setting of the Constitution as a whole and their indivisibility needs to be taken into account when interpreting socio-economic rights, and in determining whether the state has met its obligations in terms of one of them.

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[267] *Ibid* No 263, *para* 42, *per* Yacoob J.
[268] *Ibid* No 263, para 44, *per* Yacoob J.
[269] *Ibid* No 263, *Grootboom para* 35.
[270] *Ibid* No 263, *Grootboom para* 24.

The Court remarked that:

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of Rights.[271] The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[272]

Fulfilling the right of access of social assistance could have an impact on the extent to or way in which the other rights have to be fulfilled. The Constitutional Court further remarked that:

> The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants that would be relevant to the state's obligations in respect of other socio-economic rights.[273]

The provision of social assistance may therefore enable the poor and destitute to have access to other socio-economic rights, such as land, adequate housing, healthcare, food and water. It will also assist in realising their rights to human dignity, equality and freedom. The right to social security can thus be viewed broadly as guaranteeing the material conditions for an adequate standard of living. It serves to protect human beings from the life threatening and degrading conditions of poverty and material insecurity.[274] From a constitutional rights perspective it is clear that there is a close interrelationship between the concept of social security and several other related concepts or rights, which constitute the basis of fundamental rights, such as the right to have access to land,[275] housing,[276] to health care services, and sufficient food and water.[277]

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The inter-relatedness of these rights has been emphasised by the Constitutional Court in the Grootboom judgment.[278]

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271 This relate to the right to housing (Section 26), health care, food, water, and social security (S 27).
272 *Ibid* No 263, *Grootboom para* 23.
273 *Ibid No 263, Grootboom* case *para* 36, per Yacoob.
274 Social security as a human right http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/ htm.
275 S 25 (5) of South African Constitution (1996).
276 *Ibid* No 272, S 26 (1).
277 *Ibid* No 272, S 27.
278 *Ibid* No 263, Grootboom at *para* 35, *per* Yacoob J.

The Court has affirmed that realising a particular socio-economic right, such as the right of access to housing, would require that other elements which form the basis of other socio-economic rights, such as access to land, must be in place as well.

Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life.[279] Similarly, in a judgment,[280] drawing on both the rights to equality, and the right to social security,[281] Mokgoro J, in writing for the majority, emphasised the interdependence and interconnectedness of these rights and observed that the right to equality was implicit in the section 27 entitlement of everyone to have access to social security, [282] secondly, that when civil and political rights are implicated by a socio-economic rights, compliance with those other implicated rights will be important in evaluating whether the measures taken by the state in fulfilling the socio-economic right are reasonable within the meaning of section 27(2).[283]

4.6 Limitation of fundamental rights

Fundamental rights including the rights to social security are not absolute, they may be subject to limitations of a reasonable nature. Section 7 (3) of the Constitution confirms this by stating that the rights in the Bill of Rights are subject to the limitations contained in section 36. It is important, to establish the extent of the possible limitations on the right to access to social security. Two forms of limitation must be considered. First, the limitation must comply with the requirements contained in the general limitation clause (sometimes referred to as external limitation),[284] bearing in mind all relevant factors, some of which are explicitly mentioned in the Constitution.[285]

Secondly, the limitation can also be justified on the basis of specific qualifications pertaining to a specific right (sometimes referred to as internal limitation).[286] For instance, in the case of the right to access to adequate housing or social security, the state is required to take reasonable measures, bearing in mind its available resources, to achieve the progressive realisation of the said right.[287]

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279 *Government of the Republic of South Africa v Grootboom* (2000) 11*BCLR* 1169 (CC) *para* 35.

280 *Ibid* No 248, *Khosa Case*. See also section 9 of the 1996 Constitution.

281 Section 27 of the 1996 Constitution.

282 *Khosa* case *paras* 42, 44.

283 *Ibid* No 279, *para* 49.

284 Section 36 entails a three-fold test, in terms of which the limitation of a fundamental right must be; (a) in terms of a law of general application; (b) reasonable; and (c) justifiable in an open and democratic society based on human dignity, equality and freedom.

285 The relevant factors referred to in section 36 (1) (a) - (e) are: (a) the nature of the right;(b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.

286 See page 48 of the Dissertation for detailed discussion on internal limitations.

287 Section 27 7(2), In *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC), Chaskalson P pronounced that the obligations imposed on the state by section 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources.

With regard to the external limitation, the Constitutional Court in *S v Zuma*,[288] stated that constitutional analysis contains two phases. First, the applicant must show that there was an infringement of the duty to respect, protect, promote and fulfil the right in the Bill of Rights. Secondly, the respondent must show that the infringement was justifiable and that the right was legitimately restricted in accordance with the general limitation clause contained in section 36 of the Bill of Rights.

4.7 Interpretation of fundamental rights

Social security rights like any other rights entrenched in the Constitution also have to be interpreted in such a way as to promote constitutional values, and consider international law (both binding and non-binding), any foreign law may be considered.[289]

In interpreting the right to access to social security, in most cases a purposive approach is required. This would entail that the underlying rationale and purpose of the right to access to social security as entrenched in the Constitution has to be followed. This would include providing adequate standard of living to those who are unable to support themselves and their dependants.[290]

4.8 Enforcement, adjudication and monitoring of socio-economic rights

The extent of the enforcement and protection of socio-economic rights has been and is source of controversy and debate.[291] Secondly that they are inconsistent with the separation of powers doctrine, because the judiciary would encroach upon the terrain of the legislature and executive. Thirdly, being positive rights socio-economic rights were not justiciable, in particular because of the budgetary implications involved in enforcing them.[292]

It is argued that the protection of such rights should be a task for the legislature and executive.[293] Constitutionalising them has the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy necessary to make decisions concerning allocations of social and economic resources.

In South Africa the position is that the socio-economic rights are enforceable. The socio-economic rights place a positive obligation on the state towards the realisation of these rights.[294]

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288 1995 4 BCLR 401 (CC) 414.
289 Section 9 South African Constitution Act 108 of 1996.
290 *Ibid* No 287, Section 27 (1).
291 *Ibid* 259 (THRHR), at page 87.
292 *In Re: Certification of the Republic of South Africa of* 1996 4 SA 765 (CC).
293 *Ibid* No 290.
294 *Ibid* No 263, *Grootboom case* of 2000 11 BCLR 1169 (CC).

The Courts, in particular the Constitutional Court, play a crucial role in the enforcement and adjudication of fundamental rights. The court may include a mandatory order when granting appropriate relief this was evident in the case of *Minister of Health and Others v Treatment Action Campaign and Others*, where the court ordered the government to devise and implement appropriate policies, to ensure nevirapine to pregnant mother-to-child transmission of HIV was accessible to all mother. The Court however made it clear that such requirement imposed on government implies that the programme must be realised progressively within the available resources.[295]

It is clear that the Courts have the power to interfere whenever fundamental rights (social security rights) have been infringed, secondly they are empowered to prescribe remedies in the event of such infringement. Wide-ranging remedies are at the disposal of the courts in this regard. This may result in courts making orders, which have direct implications on budgetary matters.[296]

In addition to the role of the Court, the Constitution grants a particular important role of promoting and monitoring the implementation of fundamental rights to the South African Human Rights Commission (HRC).[297]One of the most significant functions of the HRC is the evaluation of the annual reports received from organs of state, in order to determine the extent to which these organs have taken measures to realise the socio-economic rights enshrined in the Constitution.[298]

4.9 A Human rights approach

The Constitution favours a human-rights friendly approach by giving special protection to certain fundamental rights. The Constitution, in my submission, recognises the entitlement that people have, by virtue of conferring rights to them, which means that individuals have a ground of claim against the state,[299] however such a claim is subject to limitations.[300] It is clear that the drafters of the Constitution intended that the right of access to social security should be realised subject to both the internal (provided by the section 27), and external limitation (provided by section 36).

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295 This clearly indicates that the Courts will more readily come to the assistance of historically deprived and disadvantaged groups than will be the case in respect of an individual seeking judicial intervention, see *Grootboom case.*

296 *In re the Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) *para* 77.

297 Section 184 of South Africa Constitution Act 108 of 1996.

298 *Ibid* No 295, Section 184 (3).

299 Benn S "The Meaning of a Right" *The Encyclopedia of philosophy Vol vii,* a right is defined as the power or liberty to which a person or a group is justly entitled or a thing to which they have a moral/legal claim/accessed at www.philosophical society.com

300 There are two limitations in this regard. The first one is imposed by section 27, internal limitation (for example, progressive realisation, available resources, and reasonable legislative and other measures. Secondly section 36 (sometimes known as the general limitation clause) imposes external limitation of fundamental rights subject to other relevant factors, this include the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

4.9.1 A right based approach

At its simplest a rights-based approach means locating the needs of those infected and affected by HIV/AIDS, in such a way that their human rights can be claimed and asserted, whatever an individual's community or a government's view on AIDS might be. It means using the language of rights to name and to understand certain practices. It also entails identifying the mechanisms in existing law that can be exploited to this end, and creating new mechanisms to deal with the limitations or shortcomings.[301]

By affording protection to fundamental rights, the Constitution therefore adopts a rights-based approach. All rights protected as fundamental rights require certain core elements that form the basis of any rights-based perspective. In the case of the right to have access to appropriate social assistance, this should include,[302] comprehensive coverage against all contingencies and life circumstances that threaten the income-earning ability of persons and their ability to maintain an adequate standard of living. Universality, that all those in need of social security should be able to gain access to it.

Adequacy and appropriateness would include the level of benefits provided under the various schemes, that they should be adequate and appropriate. The benefits payable will depend on the type of scheme and its rules. However, benefits provided under needs-based social assistance programmes should at least be sufficient to ensure that the recipient does not fall below a clearly defined minimum subsistence or poverty level. The benefits should therefore be appropriate to the kind of risk or contingency. Equally, social security programmes should not discriminate unfairly against anyone on any grounds. This includes both direct and indirect discrimination. Respect for procedural rights, the rules and procedures governing eligibility for social programmes must be reasonable and fair.[303]

The rights-based approach facilitates and enhances implementing and testing government policy against these rights, where such policies exist, and where they do not, it means using these rights to force governments to establish and implement effective policies.[304] The rights-based approach seeks out those mechanisms whereby these rights can be translated into a concrete form and given status and recognition on both the international and national law. As such the rights-based discourse has the potential to be a powerful and empowering tool to address the realisation of socio-economic rights.[305]

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301 Olivier *et al Social Security*: A legal Analysis, 2003.
302 *Social Security as a Human Right*/accessed at http://www.umn.edu/humanrts/htm.
303 *Op cit* No 300, *Social Security as a Human Right.*
304 *Ibid* No 301.
305 Kisoon C *et al* "Whose Right" Centre for the study of AIDS, *AIDS Review* 2002.

4.10 The role and importance of constitutional values

The Constitution provides that some of South Africa's foundational values are human dignity, the achievement of equality and the advancement of human rights and freedoms.[306] The Constitution aims to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens.[307] Constitutional values are important in the interpretation and enforcement of the rights entrenched in the Bill of Rights.

When interpreting the right to have access to social assistance, section 39 of the Constitution enjoins every court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Human dignity informs constitutional interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all rights. It is not only a value but also a justiciable and enforceable human right that must be respected and protected.[308]

Equality is another foundational value that informs constitutional interpretation. Equality in respect of social assistance is implicit in the reference to everyone being entitled to have access to the rights in section 27.Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.[309] Considering that social assistance serves the fundamental purpose of enabling all persons in need of support to enjoy a dignified existence as free and equal citizens, this sanctions the adoption of an interpretation that proceeds from an assumption in favour of every indigent person.[310]

The right of access to social security and social assistance for those unable to support themselves and their dependants is entrenched because South Africa is a society that values human beings and wants to ensure that people are afforded their basic needs. In addition to fundamental rights entrenched in the South African Constitution, the values of *ubuntu*, human dignity, freedom and equality are also foundational.[311]

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306 Act 108 of 1996, S 1 (a).

307 Preamble of the Constitution.

308 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minster of Home Affairs and Others; Thomans and Another v Minster of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) *para* 15.

309 *Khosa & Others v The Minister of Social Development & Others; Mahlaule & Another v The Minister of Social Development & Others* 2004 (6) BCLR 569 (CC) *para* 41.

310 Van der Merwe D "Social Welfare Law in the South African Social Security System" Centre for International and Comparative Labour Law (CICLASS) Publication Series 1/99, 5.

311 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) *para* 44, *Louis Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC), *para* 52.

Within social security context, *ubuntu* as a constitutional value plays a crucial role in supporting the existence of social security in Africa. *Ubuntu* or shared solidarity has been recognised as a Constitutional value. In *S v Makwanyane*,[312] Mokgoro described *ubuntu* as follows:

> That the concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community where such person happens to be part of it. It also entails that the person has the corresponding duty, to give the same respect, dignity, value and acceptance to each member of that community.

The concept *ubuntu* is certainly not foreign in South African society. Mokgoro describes *ubuntu* as a metaphor for group solidarity, where the group is dependant on limited resources. That the people are willing to pool community resources to help an individual in need.[313] It follows that the principle of *ubuntu* can contribute to the success of a comprehensive social security system and other measures aimed at the alleviation of poverty and social exclusion in South Africa.

4.11 Multi sector responsibility

In a modern economy, non-state actors have come to occupy central positions in the provision of key services and goods essential for individuals. Thus government alone cannot realise the socio-economic rights enshrined in the Constitution.[314] In essence multi-actor responsibility denotes that the realisation of the right to have access to appropriate social assistance as enshrined in the Constitution is not the exclusive responsibility of the state.

The *Grootboom* case emphasised that the Constitution does not require the state to be the sole provider of socio-economic rights. The state's duty differs according to whether persons have the ability to realise their rights or not.

In relation to the right of access to adequate housing, the Constitutional Court remarked that:

> A right of access to adequate housing also suggests that it is not only the state that is responsible for the provision of houses, but

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[312] *S v Makwanyane and Another* 1995 3 SA 391 (CC), *para* 224, *per* Mokgoro.
[313] *Ibid* No 310 at *para* 224, *per* Mokgoro Y.
[314] *Op Cit* No 51, Olivier et *al Social Security: A Legal Analysis*, 2003, 85.

> that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.[315]

The approach taken by the Court in relation to socio-economic rights indicates that for those with the ability to support themselves and their dependants, the state's duty is not that of direct provider, but only of unlocking the system and providing a legislative framework to facilitate access to social security.[316] Multi-actor responsibility may also indicate that it is not only the state that is responsible for the provision of social assistance, but that other agents, such as private companies, charities and non-governmental organisations, and even individuals themselves must be enabled by legislative and other measures to realise the right of access to social security.[317]

4.12 International obligations

South Africa has both constitutional and international obligations to comply with the standards set out in the International Treaties with regard to the social security rights of all vulnerable children, including those children living without an adult caregiver.

Furthermore, South Africa has ratified the United Nations Convention on the Rights of the Child (CRC).[318] The Convention contains a set of rights and freedoms to be enjoyed by all children, all over the world. A child, as defined in this Convention, is any human being under the age of 18 years, unless a particular nation's law set an earlier age for the attaining of majority status. Article 26 (1) explicitly states that every child has the right to benefit from social security, including social insurance, and that the state should take the necessary measures to achieve the full realisation of this right in accordance with national law. According to the United Nations Committee on the Rights of the Child,[319] the current child support grant is not satisfactory and recommends that it must be expanded to include children up to the age of 18 years, who are still in school.

Therefore it is clear that a significant problem facing South African children at present concerns the availability of financial support for children orphaned by HIV/AIDS, and especially those living in child headed households.

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[315] *Ibid* No 263, *Grootboom para* 35, *per* Yacoob Y.
[316] *Ibid No 313, para* 36.
[317] *Ibid No 313, para* 35.
[318] Ratified by South Africa on 16 June 1995.
[319] Committee on the Rights of the Child Concluding Observations 2000.

Unless they are aged under 14 years, and living with a primary caregiver who can apply for the child support grant. It is critical for the government to provide social assistance to poor children, child-headed households, and children living on the streets.

This is first because of the high level of poverty, including child poverty. The Committee of Inquiry into a Comprehensive System of Social Security for South Africa found that approximately 18 million people lived on less than R 450 per month. Children made up roughly 70% of this group. Secondly, government programme to realise the right to social assistance is further made critical by the fact that South Africa is suffering from a structural unemployment crisis with little prospects for millions of unskilled workers to find employment in the market economy.

The South African government regards its social security programmes as its most successful fight against poverty.[320] South Africa has seven (statutory) social security grants. These are the State Old Age Pension, War Veterans Grant, Care Dependency Grant, Disability Grant, Foster Care Grant, Grant in Aid, and Child Support Grant. Despite the availability of these grants, coverage of social security remains a highly contentious area of government's response to extensive poverty and poverty-related problems in South Africa. The Committee on the Rights of the Child (CRC),[321] made the following observations regarding socio-economic rights of children and the failures in the current system. It criticised the South African government on, among others issues:

- Inadequate levels of benefit of the Child Support Grant (which the Committee recommended must be expanded to include children up to the age of 18 years who are still in school);
- Insufficient state provision to large numbers of child-headed households;
- The lack of co-ordination between institutions implementing UN Convention on the Rights of the Children and Member States.

What emerges from the study is that, there is a need for greater clarity about what exactly children are entitled to by virtue of their right to social services and social assistance. It is clear that children, along with everyone, have a qualified right to social assistance under the Constitution. At the same time, the Constitution appears to give children an unqualified right to social services.

4.13 Reform of social security

The developments which the Courts have introduced in the past decade include the comprehensive and integrated approach towards social security rights. This includes extending coverage of social security to the poor, who traditionally and typically had been excluded from the formal sector social

[320] Trevor A Manuel Budget Speech of 2007, 28.
[321] Committee on the Rights of the Child 2000: *paras* 12, 15, 22, 24, 29 and 32.

insurance system. Secondly other reforms include the extension of social security coverage, particularly the UIF to certain category of atypical workers, this include domestic workers.[322]

Secondly reforms include the extension of social security to non-citizens, as evident in *Khosa case*.[323] In short the case was concerned with the Constitutional validity of the provisions of the old Social Assistance Act,[324] which denied non-citizens, but permanent residents living in South Africa access to welfare grants.

The Constitutional Court has affirmed that all the rights contained in the Bill of Rights are interrelated and mutually supporting.[325] It is, therefore, not sufficient to attempt to adopt measures which give effect to the right of access to social security in isolation. In concrete terms this implies that when developing the social security system the State must ensure that, all related constitutional values and rights, such as human dignity, freedom and equality, are given effect to, and access to resources which are necessary for the realisation of the right to access to social security and other related rights, with particular reference to food, clothing, and shelter and, where appropriate, land. Provision of adequate (which could be basic) support must be made available to those in need as a matter of priority.

While the Courts will be hesitant to interfere in budgetary provision in the area of social security, the Constitutional Court indicated in its certification judgment, that Courts could grant orders, which may have budgetary implications. In *Grootboom* the Constitutional Court stressed, within the context of the right to access to housing, that effective implementation requires at least adequate budgetary support by the national government.[326] It emphasised that it is essential that a reasonable part of the national housing budget be devoted to granting relief to those in desperate need, but that the precise allocation is for the national government to decide in the first instance.[327] Guidelines drawn up in the wake of budget constraints have to be reasonable.[328]

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4.14 Main reform areas

One of the crucial areas in social assistance has been service delivery. The inability of provincial governments to render a consistent and quality service led to the establishment of the South African

322 As of April 2003 all domestic workers who work more than 24 hours a month need to be registered for UIF. This includes part - time and full time domestic workers.

323 *Khoza & Others v Minister of Social Development & Others* 2004 (6) SA 504 (CC). The Court *in casu* held that the constitutional right to social security vested in everyone and that permanent residents were bearers of this right that the exclusion of permanent residents from the scheme was discriminatory and unfair, as it infringed their right to equality. The court reached the conclusion that permanent residents were also entitled to social welfare grants.

324 Social Assistance Act 59 of 1992 (as amended by the Social Assistance 13 of 2004).

325 *Ibid* No 263, Grootboom, *para* 53.

326 *Ibid* No 263, *Grootboom*, *para* 68, *per* Yacoob J.

327 *Ibid* No 263, *Grootboom*, *para* 66, *per* Yacoob J.

328 *Ibid* No 324, *para* 25, *per* Yacoob J.

Social Security Agency (SASSA). This institution is tasked with ensuring proper service delivery. As a result two new Laws underpin the operations of the Agency, namely Social Assistance Act 13 of 2004 and the South African Social Security Agency Act 9 of 2004.

Innovative areas of social assistance service delivery reform relate to the introduction of anti-corruption and fraud mechanisms, and a set of basic rights to which beneficiaries are entitled and which can be exercised against the state.[329] Other reforms include the extension of coverage of Unemployment Insurance Fund to Domestic workers.

It is clear that the courts have embarked upon the route of developing constitutional jurisprudence in the area of socio-economic rights. This should result in enhanced human dignity and improvement in

the quality of life of people who are marginalised and impoverished. It would appear that the major challenge facing the reform of social security relates to the exclusionary nature of the South African social security system.

4.15 Existing labour law protection

Certain labour law rights are protected as fundamental rights, including the right to fair labour practices.[330] Another fundamental right, which is also relevant for labour law is the right to equality.[331] The right to equality ensures that an employer may not unfairly discriminate against an employee, for example, because of the employee's disability. The Employment Equity Act 55 of 1998 is especially important in this regard. The appropriate provisions in the Employment Equity Act (EEA) have been in effect from 9 August 1999.

The Act provides that it is unfair discrimination to discriminate, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility, pregnancy and *HIV status*. For this purpose "employee" includes an applicant for employment.[332]

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329 Olivier MP "Reform of Social Legislation in Developing and Transition Countries: Experiences and Challenges" *South African Country Report*, FES - ILO Conference, Berlin, 15 - 16 May 2006, 18.

330 Act 108 of 1996, S 23 (1).

331 *Ibid* No 328, S 9.

332 *Ibid* No 329.

4.15.1 Employment Equity

The purpose of the Employment Equity Act is twofold,[333] promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups (blacks, women and the disabled). Chapter 2 (Prohibition on Unfair Discrimination) applies to all employers, while Chapter 3 (Affirmative Action) applies, except where otherwise provided, only to designated employers. The Labour Court[334] has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where the Act provides otherwise. Section 50(2) provides that where the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable.

4.15.2 Code of Good Practice

A draft Code on Disability in the Workplace, to a certain extent provides protection for people with disabilities in employment, particularly on the effect of a disability on the person in relation to the working environment, and not on the diagnosis of the impairment. Only people who satisfy all the criteria in the definition,[335] (i) long-term or recurring disability; (ii) having a physical or mental impairment; (iii) which substantially limits their ability, are considered as persons with disabilities. It is an open question whether and when a HIV/AIDS infected person could be said to comply with this definition at a particular stage of his/her illness. It is provided that employers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job. Special attention is bestowed on recruitment and selection.[336]The object of the Code is to set out guidelines for employers and trade unions to ensure individuals with HIV infection are not unfairly discriminated against in the workplace.[337]

4.15. 3 The Labour Relations Act 66 of 1995

In accordance with section 187(1) (f) of the Labour Relations Act (LRA), neither an employee with HIV/AIDS nor a disabled employee may be dismissed simply because of such fact. This would

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333 S 2 of the Employment Equity Act of 1998

334 Established as a Court with the status of a High Court, Section 151 of the Labour Relations Act 66 of 1995.

335 *Ibid* No 331, see the definition of "people with disabilities" in section 1 of the EEA.

336 Code of Good Practice, 330.

337 *Ibid* No 334.

constitute a discriminatory dismissal, which would be classified as automatically unfair dismissal.[338] However, whenever a dismissal is based on the inherent requirements of a job, such a dismissal will be deemed to be fair, only if a proper procedure was followed in dismissing an employee[339] The primary remedies, are reinstatement or re-employment but compensation of not more than 24 months' wages is also available as a remedy.[340]

4.15. 4 The Basic Conditions of Employment Act 75 of 1997

This Act accords every employee the right to a minimum number of days paid sick leave[341] An employee will be entitled to use his/her paid sick leave, annual leave and unpaid sick leave during periods of illness and an employer will only be able to dismiss due to incapacity if and when the absence of the employee becomes unreasonably long. Although it has been held that an employee may be dismissed for incapacity even though his/her sick leave entitlement is not exhausted, it has been submitted that dismissal should be reserved for cases in which an element of abuse of sick leave is present or when the employee's illness will clearly exceed the statutory or contractual entitlement.[342] Special consideration must be given to employees who are suffering from a work-related illness/injury.

4.15. 5 The Medical Schemes Act 131 of 1998

The amended Act now provides that a registered medical aid scheme may not unfairly discriminate, directly or indirectly, against its members on the basis of their disability (or HIV status).[343] The Act provides that no medical scheme shall be registered under this Act unless the Council is satisfied that the medical scheme does not or will not unfairly discriminate, directly or indirectly, against any person on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health.

4.15. 6 Occupational - based and private insurance schemes

In principle, those who can afford insurance cover based on incapacity or disability can obtain the same. The very real possibility of discrimination with regard to coverage lies in respect of a person's status, particularly those infected by HIV/AIDS. However, since the Bill of Rights applies both

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338 The primary remedies, in terms of section 193 of the LRA, are reinstatement or re-employment but compensation of not more than 24 months' wages is also available as a remedy.

339 S 187(2) of Labour Relations Act of 1995. Proper procedure would entail complies with both the substantive and procedural fairness before dismissing employee/Grogan J Workplace Law, 8th ed, South Africa, 2004, 119.

340 S 193 of LRA.

341 S 22 of the BCEA of 1997.

342 Grogan J *Workplace Law* (2000) 173, See also *AECI Explosive Ltd Zomerveld v Mambalu* (1996) 1LLD 58 (LC)/*National Union of Metal Workers of SA obo Ivasen and Whirlpool SA (Pty) Ltd* (2005) 26 ILJ985 (BCA).

343 S 24 (2) (e) of the Medical Schemes Act No 131 of 1998.

vertically and horizontally, and in terms of section 9 of the Constitution. On this bases, the private insurance schemes cannot discriminate against people who are HIV infected or disabled.[344]

4.16 Summary

The extension of social security coverage to the excluded and marginalised groups remains crucial in attempts to ease the impact and effect of HIV/AIDS on individuals and their families. The conceptual widening of certain concepts such as that of "dependants" and appreciation of certain circumstances which prevail within the South African society (such as the role of extended families and that of the child headed households in taking care of HIV/AIDS affected individuals) could be an important step towards saving them from the trap of poverty which they find themselves in.

Thus, according to the Constitutional Court, in the case of the *Government of South Africa v Grootboom*, a programme aimed at fulfilling a right must not exclude people who are in desperate need. Therefore, the government will be violating its obligation to fulfil the realisation of social security rights, if there is no programme that covers a particularly vulnerable group, the existing programme is inadequate in addressing hunger and malnutrition, the existing programme is implemented in a discriminatory manner so that certain groups do not access food while others in the same position do. A good example of this is the Disability Grant, which does not cater for other group people in need of care, particularly people living with HIV/AIDS.

It is against this background that the Comprehensive Social Protection approach suggested by the Committee of Inquiry has an important role to play in dealing with the HIV/AIDS challenge. This is due to the fact that (*CSP*) operates through a built in package of social protection interventions and measures, which address income poverty, capacity poverty, asset poverty, and special needs of the vulnerable members of society. Last, but not least, HIV/AIDS requires a holistic approach an approach, which recognises and blends traditional, indirect and informal social security interventions.[345] In the next chapter, we propose to deal with the position under the German Law, in which their social security will be discussed.

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[344] S 24 of the Medical Schemes Act of 1998. It is now accepted that the Bill of Rights and, accordingly, section 9 has both horizontal and vertical effect..

[345] Report by Committee of Inquiry into a Comprehensive System of Social Security 2002.

CHAPTER FIVE: INTERNATIONAL LAW PERSPECTIVE

5.1 Introduction

A variety of social security policy options and systems have been implemented internationally, with differing purposes, targeting, accessibility and administrative structures, and which have had varying degrees of effectiveness. Many lessons can be learned from the experiences of other countries and these could inform the development of a holistic, and comprehensive social security system for the South African situation.

In the process of developing a viable and comprehensive social security system for South Africa it is useful to examine the existing systems and laws of other countries. Under South African law, the Constitution specifically provides that Customary International Law is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[346] Furthermore the Constitution compels every court, tribunal, or forum, when interpreting the Bill of Rights, to consider international law.[347] This is known as "international law friendly approach" and has been followed in number of constitutional and other court cases.

This chapter provides a brief description of the relevant aspects of social security system of the Federal Republic of Germany; secondly the chapter focuses on a constitutional comparison between South Africa and Germany constitution, specifically on the area of social rights.

5.2 European Union

The nature of European Union legal system,[348] is based on the following, major characteristics. Firstly, the legal system of the EU does not distinguish between the executive and legislative powers. Secondly, the EU law comprises three parts, for example the primary legislation (treaties), secondary legislation (e.g. regulations, directives, recommendations and opinions of the EU's institutions in accordance with the treaties) and decisions of the European Court of Justice. In addition, the EU law comprises of binding and non-binding rules. All treaty law, regulations and directives are binding on Member States.[349]

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346 Section 232 of Act 108 of 1996 Constitution of the Republic of South Africa.

347 *Ibid* No 344, Section 39 (1) (b) of the Constitution.

348 Accessed at http://en.wikipedia.org/wiki/European-Union, at page 21.

349 Duncan E European Union Legal Materials, 2004, at 5 – 55/accessed at http:// www.aallnet.org/pdf. Also Introduction to the European Legal System/accessed at www.nuigalway.ie/aw/2006/Mpedi L.G "Redesigning the South African Unemployment Protection System: A Socio-Legal Inquiry" University of Johannesburg, unpublished PHD Thesis, 2006, 148.

On the other hand, recommendations and opinions have no binding force. Fourthly, a provision of the EU law may be directly applicable or directly effective or both. 'Direct applicability' means that "a provision of Union law takes effect in the legal orders of the Member States without the need for national or union implementation and as such is automatically binding throughout the European Union from the time of its entry into force. 'Direct effect', on the other hand, "refers to the capacity of a provision of Union law to create rights for natural or legal persons that can be enforced by national courts." Another important characteristic of the EU law is that it (in the area(s) of EU law competence) takes precedence over national law.[350]

The European Union is a supranational arrangement in that it takes precedence over the Member States national law and also establishes direct rights and obligations of the Member States citizens, who are at the same time citizens of the Union.[351] Secondly the Member States have transferred their legislative, judicial and executive powers to the Union.

Provisions relating to social security protection in the EU can, in principle, be found in the primary legislation as well as secondary legislation. Social security protection provisions contained in the primary legislation of the EU include those that deal with free movement of persons, employment policy and social policy. This secondary legislation includes social security coordination instruments,[352] social security discrimination instruments and employment protection instruments.

5.3 European Social Charter

The European Social Charter of 1969 list the following fundamental rights, that impact largely on social security, the right to protection of health, the right to social security, the right to social and medical assistance, and benefit from social welfare services. The Charter contains a specific chapter of fundamental social rights under the title "solidarity". The Charter includes a whole set of fundamental rights of utmost importance in the social context. The rights of the European Social Charter (ESC) are guaranteed only to nationals of contracting States.[353]

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350 *Ibid* No 347, *Mpedi* "Redesigning the South African Unemployment Protection System: A Socio-Legal Inquiry" University of Johannesburg, unpublished PHD Thesis, 2006, 148.

351 Olivier *et al Social Security: A Legal Analysis*, 2003,160.

352 Adema WD and Kahl S "Social Assistance in Germany" OECD Labour Market and Social Policy Occasional Papers, No. 58, OECD Publishing, 2003, 22.

353 A Dent J "Research Paper on the Social and Economic Rights, European Council on Refugees and Exiles" (ECRE) / accessed at http://www.ecre.org/files.

Article 12 includes the right to social security. With a view to ensuring the effective exercise of the right to social security, the Charter encourages member states, to establish or maintain a system of social security; to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; to endeavour to raise progressively the system of social security to a higher level; to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure equal treatment with their own nationals of the nationals of other Member States in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Member States.

In the area of the right to social and medical assistance, the Charter,[354] encourages Member States to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; to ensure that persons receiving such assistance shall not suffer from a diminution of their political or social rights; to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want[355]

The right to benefit from social welfare services is also provided for in the Charter.[356] In terms of which Member States undertake to provide services, which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment, to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

The right of persons with disabilities is also captured in the Charter.[357] It encourages social integration and participation in the life of the community. That Member States undertake measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible, or where this is not possible,

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354 Article 13.
355 Signed at Paris on 1 December 1953.
356 Article 14.
357 European Social Charter Article 15.

through specialised bodies, public or private; to promote their access to employment through all measures or creating sheltered employment according to the level of disability.

In certain cases, such measures may require recourse to specialised placement and support services; to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

The enforcement of the Charter is largely premised on the submission of national reports by the contracting parties.[358] Two types of reports are identifiable, namely: reports on accepted provisions and reports on unaccepted provisions. Contracting parties are required to submit reports at two-yearly intervals on the implementation of the provisions of the European Social Charter they have accepted.[359]

This requirement is analogous to that contained in article 19(5)(e) of the ILO Constitution requiring member states to submit reports on Conventions they have not accepted. The advantage of this provision is that it reminds Member States of "the existence and need for ratification of the conventions concerned and [points the] difficulties standing in the way of acceptance that [may] be taken into account in the revision of convention texts and in the drafting on new conventions in the same area."[360]

5.4 Germany

The German welfare state is fairly comprehensive. In 1998, public social expenditure amounted to 27.3 percent. However, when taxation of benefits, but not publicly paid benefits (for example employer-provided sick pay) is accounted for, then Germany has the highest amount of publicly mandated social spending at 28 percent of GDP at factor costs.[361]Social insurance is the main pillar of the German social protection system, and covers all major social policy contingencies such as unemployment, illness, invalidity, occupational injuries, long-term care and old age, while family support is mainly provided through the tax system.[362]

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[358] Part IV of the European Social Charter of 1969.
[359] *Ibid* No 356, Article 21.
[360] Harris D The European Social Charter (University Press of Virginia) 1984, 213.
[361] Adema WD and Kahl S "Social Assistance in Germany" OECD Labour Market and Social Policy Occasional Papers, No. 58, OECD Publishing, 2003, 22.
[362] *Ibid* No 359.

The Federal Ministry of Labour and Social Affairs regulates the entire social insurance system, but only bears a limited portion of costs, and participates mainly in the financing of pensions and unemployment insurance.[363] Almost two-thirds of all benefits are financed out of employer and employee contributions while the remainder of social benefits are financed out of general tax revenue by federal, state and municipal governments. The introduction of social assistance in Germany was intended to serve as a last resort programme for those without a direct social insurance entitlement (workers) or without an indirect insurance benefits entitlement (housewives or widows). However, changing patterns of family formation and dissolution have led to a growing incidence of lone parent families for whom social assistance is the main safety net.

The German social system includes both unemployment insurance (UI) and unemployment assistance (UA) and Social Assistance. However, UI and UA programmes no longer cover all unemployed persons; increased unemployment duration has led to social assistance becoming an important benefit for the long-term unemployed. Unemployment is the main reason for social assistance receipt in almost half of the cases, while about 1 in 6 of the unemployment assistance claimants also receives a regular social assistance payment.

5.4.1 Overview of German social security system

The German security system is divided into social insurance and social assistance (public assistance). The social assistance benefits are based on the subsistence principle (*Bedarfsprinzip*), a universal and unlimited right to support at a minimum standard of living that guarantees a life according to human dignity for persons who cannot support themselves. At the same time, the social assistance programme aims to promote the autonomy of individuals, where possible through labour market participation.[364] Access to social assistance is means tested, and the means test considers assets and income of the applicants, and the other household members.

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Social assistance policy objectives in Germany simultaneously aim to support beneficiaries to achieve personal independence through labour market participation, whilst guaranteeing an income that enables beneficiaries to live in conditions reflecting human dignity. The former objective requires the programme structure (including payment rates) to provide ample

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363 Throughout the text refers to the BMA - the Ministry of Labour and Social Affairs. At the time of preparing the draft the BMA was the Federal institution responsible for labour market and social policy. However, in October 2002, the BMA was dissolved. The Ministry of Economics and Labour (*Bundesministerium für Wirtschaft und Arbeit*) now covers labour market policy, while social protection is within the remit of the newly created Ministry of Health and Social Security (*Bundesministerium für Gesundheit und Soziale Sicherung*).

364 Adema WD and Kahl S "Social Assistance in Germany" OECD Labour Market and Social Policy Occasional Papers No. 58 OECD Publishing 2003. 269

(financial) incentives to work, whereas the latter objective leads to more or less guaranteed minimum income payments.[365]

5.4.2 Constitutional framework

The current German Federal Constitution (Basic Law) does not embrace an elaborate system of social and economic rights, however in Article 20 and 28 it provides the social state principles. These articles stipulate, respectively, that the Federal Republic of Germany is a democratic and social federal republic and that the constitutional order in federated states must comply with the principles of the republican, democratic and social law-based state, as defined in the Constitution.[366] The concept social law base state *(Soziale Rechtsstaat)* refers to the balance which German law pursues in order to protect socio-economic interests on the one hand and civil and political rights on the other. The social state component of this constitutional compact comprises the basis of comprehensive legislation directed at the protection of social and economic interests.

The social state principle is a typical example of a directive principle of state policy.[367] The notion of a state objective *(Staatszielbestimmung)* derives from Hans-Peter Ipsen, who applied this notion to define the principle of the social law-based state. Scheuner later defined the term as a constitutional norm offering general or specific guidelines for the state activities. By means of instructions, orientations and obligations state activities are channelled in a specific direction.

The South African Constitution is unique in the extent to which it protects socio-economic rights. Few other national constitutions provide for judicial enforcement of the same extensive list of socio-economic rights as our Bill of Rights.

Similarly, if we speak about social rights on the international plane, we must bear in mind that, in addition to national legal provisions, there are international legal norms that deal with

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365 *Ibid* No 362.

366 Art 20 (I): *Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.* Art 28 (I);*Die verassungamabige ordnung in den landern mub den Grundsatzen des repulikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen.* Translation Art 20 (1), "The Federal Republic of Germany is a democratic and social federal state" and Art 28 (1) states that "The constitutional order in the Lander must conform to the principles of republican, (2) democratic and social government base on the rule of law." Thus the Basic Law defines the Federal state and a state based on the rule of law and in this way normatively establishes the social state principle (*Sozialstaatlichkeit*).

367 U Scheuner in R Schnur Festschrift fur Ernst Forsthoff (1972) 337/U Scheuner Normative *Gewahrleistungen und Bezugnahme auf Fakten im Verfassungstext* (1973) 32, 333/G Lucke *Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufrage* (1982) 107 Aor 22: stipulations in the constitutions of the separate German states concerning the rights to education, housing, principles of state policy.

social law issues and social rights.[368] Two international instruments that immediately come to mind here are the United Nations Universal Declaration of Human Rights of 1948, which in Article 22 lays down the right to social security and in Article 25 the right to social care, and the United Nations International Covenant on Economic, Social and Cultural Rights.[369] The Committee on Economic, Social and Cultural Rights is responsible for the enforcement of Economic, Social, and Cultural Rights.

Both of these legal instruments apply only to the member states of the United Nations, and secondly, they are obliged to structure their national laws in compliance with the given provisions. The United Nation Declaration of Human Rights does not required ratification. The individual citizen, however, cannot derive any claims from these instruments of international law. The same applies to the Conventions framed by the International Labour Organization (ILO), which sets minimum standards for particular sub-areas of labour and social law. Compliance with these Conventions also presupposes their ratification by the Member States.[370] Only in exceptional cases can the individual derive rights and obligations from these ILO instruments.[371]

Furthermore the right to social security or social assistance is also recognised and protected in various international law instruments. Some of these include the International Covenant on the Elimination of all Forms of Discrimination (1966),[372] the Convention on the Rights of the Child (1989),[373] the European Social Charter (1961),[374] the African Charter on Human and Peoples Rights (1981),[375] and the Charter of Fundamental Social Rights in the SADC (2003).[376]

5.5 Public assistance benefits

The public system of means and income-tested tested benefits (public assistance) includes four different benefits: unemployment assistance, housing benefit, social assistance (general social assistance and assistance in special situations) and the asylum seekers benefit. The

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368 Däubler W *et al Internationales Sozialrecht,* Köln 1991; Zacher, H. (ed.), *Internationales und Europäisches Sozialrecht,* Percha 1976/*Eichenhofer, E, Internationales Sozialrecht,* Munich 1994/*Von* Maydell, *B. Internationales Sozialrecht*, in: ibid. (ed.), *Lexikon des Rechts. Sozialrecht*,2nd ed, Neuwied 1994, 130.

369 *Bundesgesetzblatt* (BGBl.) 1973 II, 1569. United Nations International Convetion on Economic, Social and Cultural Rights of 1976.

370 Haase, W *Die Internationale Arbeitsorganisation, in: Hauff, von/Pfister-Gaspary (eds.),Internationale Sozialpolitik,* Stuttgart 1982, 133.

371 ILO Convention on compensation for accidents at work (No.19), which lays down foreign workers right to the same treatment as national workers.

372 Art 5(e) (i).

373 *Ibid* No 370, Art 26 and 27.

374 *Ibid* No 370, Art 12.

375 *Ibid* No 370, Art 18.

376 *Ibid* No 370. Art 9.

general housing benefit is available to all low-income households except those for whom social assistance is the primary source of income.[377]

In 2000, there were 2.8 million recipients of housing support in Germany, 1.5 million received the general housing benefit, while about 1.3 million households received housing support under social assistance programme rules. General housing benefit payment rates also vary with (local) rent levels, age of the dwelling and household composition. Furthermore, social assistance includes "Assistance in Special Situations".

This type of support consists mainly of institutional care support for elderly and integration support for disabled persons *(Eingliederungshilfe für Behinderte),* and medical support for people without health insurance, but also includes support for family, old-age pensioners, and blind people and covers exceptional circumstances (as employable clients of working age are not the main client group of assistance in special situations. Because more than half of the beneficiaries of assistance in special situations receive support within institutions,[378] relevant programme expenditure was just over 1% of GDP in 2000. By comparison, spending on the general social assistance programme was almost 0.8% of GDP in 2000, while the number of clients was twice as high as the number of people claiming assistance in special situations.[379] Beneficiaries who receive a social assistance top-up payment to their, for example, unemployment insurance entitlement are served by the general housing benefit, and are not covered by the housing support rules for social assistance claimants.

5.6 Social insurance

The social network in the Federal Republic of Germany is one of the most powerful social systems in the world. Together with public services and national assistance, social insurance plays a major role in this network. Over 90 percent of the German population is covered by social insurance and is thus protected from life risks that can affect any of us.

5.6.1 Pillars of social insurance

Social insurance represents a wide-ranging source of protection for employees in particular and guarantees the social security of our society. This key area of social security rests on five pillars; Statutory unemployment insurance insures employees' livelihood in case of unemployment, Statutory pension insurance insures members in old age as well as in case of

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377 *Ibid* No 362, 2003, 21- 25.
378 Information provided by Stat.BA, *Daten aus der Sozialhilfestatistik*, Stat.BA, 2002.
379 Statistics South Africa, 2002, 10.

reduced earning incapacity and upon an employees' death insures his survivors as well as statutory supports maintenance and restoration of good health and eases the financial consequences of illness, Statutory accident insurance helps an employee regain his earning ability after a (work-related) accident.[380]

The social insurance schemes are primarily financed through contributions paid by employees and employers, usually in equal amounts. Contribution rates are established either by the self-governing funds (in the case of health and accident insurance) or through legislation (for pension, unemployment and long-term care insurance). Contribution rates are based on the wage or salary of the employee. In Germany nearly 90% of the population is covered by either compulsory or voluntary social insurance.[381] The system of social insurance is widely accepted as the core of social security.

5.7 International Covenant on Economic, Social and Cultural Rights (1966)

South Africa has signed but is yet to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. The Covenant is monitored and implemented by the United Nations Committee on Economic, Social and Cultural Rights (CESCR). The CESCR issues General Comments, which provide guidelines to the meaning and scope of the provisions of the ICESCR. The General Comments of the CESCR are relevant to the interpretation of the Constitution, due to the fact that the Covenant formed the basis for the inclusion of socio-economic rights in the Constitution. In addition, there are similarities between the wordings of the provisions of the Covenant and the South African Constitution. In addition, being a signatory, South Africa may not undertake steps in disregard of the provisions of the Covenant.[382]

The ICESCR provides that 'the state parties to the present Covenant recognise the right of everyone to social security including social insurance.'[383] The obligation on State Parties is provided in article 2(1), which specifically stipulates that each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.

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380 www.deutschesozialversicherung.
381 http://www.deutschesozialversicherung.de/en/europe/europe_is_converging.html.
382 Vienna Convention on the Law of Treatise of 1969.
383 *Ibid* No 367. Article 9.

The States parties to the Covenant must recognise the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The CESCR has concluded that the right to an adequate standard of living is not limited to food, clothing and housing, but essentially concerned with the human person's rights to certain fundamental freedoms, including freedoms to avoid hunger, disease and illiteracy.[384] This approach fits in with the interrelated, interdependent and mutually supporting nature of the rights in the Bill of Rights of the South African Constitution.

The right to an adequate standard of living may require the setting of baseline standards. As the Constitutional Court stated, evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable.[385]

The CESCR is also of the view that the "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie* failing to discharge its obligations under the Covenant."[386] The Constitutional Court has attempted to outline what minimum core obligations entails. According to the Court it is the floor beneath which the conduct of the State must not drop if there is to be compliance with the obligation.[387] Each right has a "minimum essential level" that must be satisfied by the state parties, that the minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.[388]

The state may, therefore, have an obligation to ensure, at least, the minimum essential level of the right of access to appropriate social assistance. As held by the Constitutional Court, if under section 27 the state must put in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, which would be relevant to the state's obligations in respect of other socio-economic rights.[389]

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384 *General Comment.*
385 *Grootboom, para* 33, *per* Yacoob.
386 *General Comment* 3 (1990) *para* 10.
387 *Ibid* No 383, at *para* 31 *per* Yacoob.
388 *Grootboom, para* 31, *per* Yacoob.
389 *Ibid No 385, para* 36.

The ICESCR further prohibits State Parties from limiting a fundamental right by adopting 'deliberately retrogressive measures.'[390] Deliberately retrogressive measures are measures that deny citizens access to rights to satisfy their basic needs. Law or conduct that leads to a decline, rather that improvement in living conditions is contrary to the objects of these obligations.[391]

The Limburg Principles[392] proclaimed that given the significance of the development of the progressive realisation of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups.[393] State parties to the Covenant are also obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.[394] More importantly, *de facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.[395] The Maastricht Guidelines,[396] on their part, consider as a violation the failure to reform or repeal legislation, which is manifestly inconsistent with an obligation of the Covenant.[397]

5.8 Convention on the Rights of the Child (CRC) 1989

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South Africa ratified the CRC in 1995, and is thus bound to implement the provisions of the Covenant. In addition to civil and political rights, the Covenant also provides for socio-economic rights of all children. According to article 26, State Parties recognise for every child the right to benefit from social security, including social insurance. This article further requires that benefits take into account the resources and circumstances of the child and persons responsible for maintaining the child, as well as any other consideration relevant to an application for benefits made by, or on behalf of the child.[398]

Article 4 provides that Member states are bound to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the

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390 *General Comment No 3* (1990) *para* 9.

391 *General Comment No 4* (1991) *para* 11.

392 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights were formulated by a group of 29 distinguished experts in international law who met at a symposium held in *Maastricht*, the Netherlands in June 1986 and agreed upon guidelines for the implementation of the ICESCR, which became known as the Limburg Principles.

393 *Ibid* No 389,Limburg Principles, *para* 14.

394 *Ibid* No 390, *para* 25.

395 *Op cit* No 389, the Limburg Principles, *para* 38.

396 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997). A group of more than thirty experts met in Maastricht on the 10th anniversary of the Limburg Principles, from 22 - 26 January 1997 to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

397 *Ibid* No 393, *Maastricht Guidelines para* 15 (b).

398 Convention on the Rights of the Child of 1989, Article 26 (2).

Covenant. Secondly that they must undertake all appropriate measures to the maximum extent of their available resources in the implementation of socio-economic rights.

In terms of Article 27, state parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual and social development. Although parents have the primary responsibility to secure, within their abilities and financial capacities the conditions for the child's development, state parties are required, within their means, to take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

In its concluding observations and comments on South Africa's observation of the Covenant, the Committee on the Rights of the Child noted the institution of the Child Support Grant, which aims to provide greater financial support to children from the most economically disadvantaged families. It however recommended that:

> The State party expand its Child Support Grant programme or develop alternative programmes to include support to children up to the age of 18 years, who are still in school. The Committee encourages the State Party to take effective measures to ensure the continuation of support programmes for economically disadvantaged families.[399]

5.9 Summary

The comparative analyses of South African and German Legal systems, particular in the area of social rights is very much problematic. Nonetheless, the South African Constitution, in contrast to the German Basic Law explicitly provides for the protection of social rights whereas the social rights under the German law are implied in the concept of social state.

The German Social Assistance *(Sozialhilfe)* programme offers integration assistance for people with disabilities. Integration assistance takes the form of medical rehabilitation assistance, occupational integration assistance and social integration assistance, provided that no insurance provider is responsible for the required rehabilitation assistance. Secondly assistance for persons in need of nursing care at home or in a nursing home. When the beneficiaries receive care at home, various benefits (compensation for expenses,

[399] Committee on the Rights of the Child *Concluding Observations of the Committee on the Rights of the Child: South Africa 28/01/2000. CRC/C/15/Add.122 (Concluding Observations/Comments)* para 24.

supplementary allowances, and monthly nursing care allowances) are granted depending on the amount of care needed.[400]

In my submission, the South African government, in providing social assistance to people who are infected by HIV/AIDS people (particularly the indigents), should complement that with living expenses and other necessities of living, to enable them to live a better life. In other words it must provide comprehensive social protection, and integrating them in job market. In the next chapter we propose to synthesis and conclude this study.

[400] *Ibid* No 396.

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The aim of this chapter is to give the general conclusion of the study and recommendations. Against this background, the study emphasis that policy issues surrounding the subject of HIV/AIDS, in particular the position of people with HIV/AIDS, should be strengthened. As these groups of people remain most vulnerable and marginalised from the South African system of social security.

It is clear that the HIV/AIDS epidemic has an adverse social and economic impact on South African society, with economically active members of the society being affected and families losing their breadwinners. Poverty also exacerbates the HIV epidemic. People whose daily lives are focused on survival are unlikely to prioritise the more distant threat of HIV, and for many women in situations of poverty, sex work becomes their only means of securing an income for themselves and their families, as a results this makes them vulnerable to HIV/AIDS.

This study confirms what perhaps is already obvious, that poor people in South Africa are the most adversely affected by HIV/AIDS, that the public health service is struggling to satisfy the medical needs of AIDS patients, and support to AIDS affected households is limited, the available government grants are not getting through. The study also points out, some of the more profound longer-term ramifications of the HIV epidemic, which are deepening poverty among the already poor, disruption and premature termination of schooling for children, increasing early childhood malnutrition, and increasing strain on extended family networks.

6.2 Disability grant policy

The study concludes that the extension of disability grants to people with chronic illnesses has its historical roots in the state's tuberculosis treatment programme. Grants were made available to people who were unable to work during their TB treatment, and then gradually extended to people living with other illnesses, including HIV.[401] As the National Department of Social Development did not provide specific guidelines on the criteria for eligibility regarding people living with HIV, the various Provincial Departments developed their own

[401] Pooe D and Mahlobo T, National Department of Social Development, by way of intervention on personal communication, December 2004.

criteria, generally based on a CD 4 count of under 200. In terms of this criterion, large numbers of people living with HIV are excluded from benefiting under the Disability Grant. It is truism that South Africa's HIV/AIDS Prevention and Treatment Policy has been widely criticised at home and abroad for prevarication and confusion.[402]

Confronting an HIV positive population estimated at five million, government policy has, according to one account, been 'a sorry tale of missed opportunities,' inadequate analysis, bureaucratic failure and political mismanagement.[403] In 1994 the government developed a comprehensive national AIDS plan. The National Aids Plan was insufficiently informed by the institutional and social realities of South Africa. This AIDS plan was designated a Presidential Lead Project, and also was situated in a National Department of Health. However due to competing claims on resources in the poorer provinces, the demands of administrative reconfiguration, and very uneven provincial capacity undermined its implementation.[404]

In addition the government also introduced a wider use of ARVs to prevent mother-to -child transmission (MTCT) of HIV. The care, support and treatment of HIV-infected persons is now recognised as both a human right and as important components of strategies to slow the spread of the epidemic. The care, support and treatment encompass not only the provision of medical therapies to reduce viral loads on infected persons but also social care, including protection from discrimination and stigmatisation.

6.3 Challenges of social security

The challenges encountered by government and other actors in providing social protection to affected and infected HIV/AIDS patients include the following:

- Lack of human resources capacity to implement programmes. For example, people infected by HIV/AIDS wait for a long time to get treatment, as a result some of them die whilst waiting for antiretroviral drugs for treating their immune system;
- There is inadequate infrastructure to implement ARV treatment programme;
- More counsellors are needed to make sure that every woman visiting the health care facilities have access to quality PMTCT counselling;
- People are not coming forward to receive services as a result of stigma and discrimination attached to HIV/AIDS. Women in particular are not coming

[402] Cameron "The Dead Hand of Denial" *Weekly Mail and Guardian*, (Johannesburg), 17 April 2002.
[403] Nattrass N "The Moral Economy of Aids in South Africa" *Cambridge University Press*, 2004, 41.
[404] *Ibid* No 402, 43.

forward in large numbers to enrol in the PMTCT programme due to fear of cultural expectations to breastfeed and lack of support from partners;

- Unemployment and poverty exacerbates the spread of HIV/AIDS.
- Accessing ARV treatment in the public hospitals remains to be the problem for many people infected by HIV/AIDS;
- Political challenge – requires political will and commitment;
- Policy challenge – difficulty moving out of the current envelope of policies;
- Institutional and implementation challenges – resources required for these processes;
- Measurement, monitoring and evaluation – this is a continuous process, and requires fine-tuning.

A major challenge is South Africa's unemployment situation. Using the expanded definition of the unemployment rate is currently 26% in 2007.[405] Clearly this figure shows that the economy is not creating sufficient jobs for job seekers. As much as there is a supply side to the job market, there is also a demand side. The job market requires skilled jobs, and the figures indicate that unskilled jobs are being shed. The majority of the unemployed are unskilled workers. Thus, there are policy implications for people entering the work force because the growing sectors of the economy require certain skill characteristics.

The challenge for South Africa is to offer the poor a safety net. Social security transfers do not cover 60 percent of the poor, or 11 million people.[406] From the period 1996 to 2001, the informal sector grew from 1 million to 2.7 million. This growing sector poses a socio-economic challenge for South Africa. The fact that South Africa has to effectively deal with structural unemployment poses an additional challenge. The Constitution obliges government to work towards progressive expansion of social security.

Other forms of social security, that is, the reciprocal and mutual aid systems which have existed for many years, particularly in rural areas, should be considered as part and parcel of the umbrella of social security. *Stokvels*, burial societies and other forms of communal savings are all components of the rich fabric of social security.

6.4 Ways of financing the extension of social assistance

The state could attribute its inability to realise the right of access to appropriate social

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[405] Malome R. "Enterprise Development and Employment Experiences in South Africa and South Eastern Europe," 29 January 2007, accessed at http://www.whythawk.com.

[406] *Op Cit* No 21. Committee of Inquiry into a Comprehensive system of social security, 2002.

assistance to all those unable to support themselves to fiscal and macro-economic constraints.[407] The *Committee of Inquiry* recognised that resources are not infinite and an efficient allocation of resources to suit the presenting needs of the population is required.[408] In response to such possible claim by the state regarding its inability to realise the right of access to appropriate social assistance due to the availability of resources, this section presents possible options towards the financing of social assistance extensions, within the prevailing macroeconomic context, to provide for the basic needs of indigent persons.

6.4.1 Budget deficit financing

A budget deficit is the amount by which a government, company, or individual's spending exceeds its income over a particular period of time. It is the difference between government spending and taxes, in which expenditures are greater than revenues. In some instances, a budget deficit raises aggregate demand, the government's purchases of goods and services inject more spending power into the economy than the government's net taxes are withdrawing from the economy. Yet in others, a budget deficit lowers national saving and investment, money that would otherwise have been borrowed by businesses and used to finance investment in new plant and equipment is borrowed by the government instead.[409]

In the 2005 - 06 annual budget, revenue after tax proposals increases by 9.4 per cent to R370 billion. This translates to a budget deficit at 3.1 per cent of GDP, representing an increase from the 2004 - 05 deficit of 2.3 per cent. The Government is aiming towards a deficit reduction of 3 per cent in 2006 - 07 financial year and 2.7 per cent in 2007-08.[410] The government could increase the budget deficit target, so as to raise additional revenue. Assessments of the impact of this approach vary. The private sector contends that this will lead to crowding out - that higher government spending inevitably reduces private investment, leading to economic stagnation.

There is, however, no historical evidence of crowding out in South Africa. On the contrary, virtually all studies show a close positive correlation between government spending, especially on infrastructure, and private investment.[411] Some analysts point out that increased government spending, if targeted effectively at reducing poverty, is associated with increased economic activity and investment. As a result, the initial increase in the deficit to GDP ratio

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407 See the discussion on requirement of available resources - in section 27(2) in page 48 - 49 of the study.

408 *Op cit* No 403.

409 www. j-bradord-delong.net/macro_online/display_glossary.htmlf

410 Manuel TA "Longer-term Fiscal policy issues in South Africa" Bureau for Economic Research Anniversary Conference, Somerset West, 18 November 2004, 7.

411 Accessed at www.cosatu.org.za/shop/shop1002/shops1002-10.htm

reverses quite soon, as the economy grows more rapidly.[412] The Committee of Inquiry believes that self-imposed fiscal constraints (particularly tax to GDP ratios and deficit targets) translate into sub-optimal levels of public spending. Not only will substantially increased spending on social security directly alleviate poverty and improve income distribution (and so satisfy constitutional mandates), it will also have dynamic benefits leading to higher growth and increased socio-economic stability.[413]

6.4.2 Reduction of tax relief

Each financial year, the government grants substantial tax relief to individuals and corporations. The 2007 budget speech by Minister of Finance contained income tax relief of R8.4 billion, which no income tax is levied for people under the age of 65 to R43 000. Secondly the Minister announced the increase of tax in certain products for example, cigarettes, and alcohol, which brings the changes to the excise taxes to R1, 5 billion. These amounts could have been used to provide a basic subsistence to a large number of very desperate people living in deplorable conditions.

The Minister of Finance has pointed out that the social security system gives fiscal expression to a nation's sense of solidarity, provides an important vehicle for both savings and financing income security, promotes social stability and mitigates several categories of individual and household risk.[414] Employing all surplus funds destined for tax relief towards the extension of social assistance benefits to the millions vulnerable people in this country is one of the best ways of expressing this nation's sense of solidarity.[415]

6.4.3 Increase in tax

Increased government expenditure on social assistance can be financed through changes in the tax system. The Committee of Inquiry suggested that government increase sales taxes in order to raise the necessary revenue, although others are opposed to increases in sales taxes due to their regressive structure. It further suggests that the current structure of direct taxes in SA is such that personal and corporate taxes could be raised. Because current direct taxes are

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[412] Economic Policy Research Institute *Submission to the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* 2001.

[413] *Op cit* No 21, Committee of Inquiry *Transforming the Present - Protecting the Future,* 132.

[414] Manuel T "Longer - term fiscal policy issues in South Africa" Bureau for Economic Research 60th Anniversary Conference, Somerset West, 18 November 2004, 7.

[415] Nyenti M "Means Testing and Targeting in South African Social Security: Justification, prospects and Challenges" University of Johannesburg unpublished LLM Dissertation, 2006.

progressive in nature, low-income households are subject to substantially lower income tax rates relative to those faced by higher income households.[416]

In order to finance social assistance extensions, while still maintaining the progressive structure of direct taxes, it may be necessary for income tax rates on higher income households to be raised considerably. Furthermore, a large portion of the additional tax revenue may be acquired through higher corporate taxation (which is effectively a tax on capital income). This negatively impacts on higher income households since they are largely the indirect beneficiaries of returns to capital. Ultimately, to generate the needed income, the overall average direct tax rate would have to increase.

The impact of this financing option is more progressive, since the poorer households largely avoid the burden of higher direct tax rates.[417] However, this might not be possible at the moment because although it is justifiable that direct taxes be used in place of sales taxes as a means of financing social assistance extensions, it should be noted that the current trend within national policy is to reduce income taxes. Thus the raising of direct tax rates would require a substantial shift in the approach adopted by the National Treasury. Furthermore, additional consideration would have to be paid to the impact of increased tax rates on financial and human capital flight, and on the incidence of tax avoidance.[418]

6.4.4 Decrease in government consumption spending

A further option for the funding of social assistance extension might involve a compositional shift in current government spending away from consumption expenditure on goods and services and towards increased transfers to households.[419] A shift of this nature could allow for a reduction in specific items of government expenditure, such as military spending. However, this option has the effect of reducing lower income households' consumption levels, since the now reduced government consumption spending is one of the largest employers of unskilled and semi-skilled labour.

6.5 Conclusions

In conclusion, it is respectfully submitted that various options of financing an expanded social assistance system that could provide basic protection to the millions of people

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[416] *Op cit* No 21, *Transforming the Present - Protecting the Future* Committee of Inquiry *into A Comprehensive system of social security* 140.

[417] Thurlow J "Can South Africa Afford to Become Africa's First Welfare State" USBIG Discussion Paper No. 43, November 2002, 16 - 18.

[418] *Ibid* No 411.

[419] *Op cit* No 414 / *Ibid* No 416 Thurlow, 2002, 18 - 19.

excluded through categorical targeting are available. The availability of these fiscal and macro-economic strategies may be useful in determining the reasonableness of a targeted approach to social assistance in South Africa. Although the state may seek to justify its inability to extend social assistance due to lack of resources and macroeconomic constraints, the Committee of Inquiry proposed a package of financing options for comprehensive social security that is affordable when viewed from a long-term perspective.[420]

This is due to the fact that all the Committee's proposed improvements in the social security system occur broadly within current macroeconomic constraints. No significant changes occur in the proportion of the Gross Domestic Product allocated to social security if its proposed scenarios were implemented. In particular, the implementation of a universal system of social assistance in the key areas becomes both feasible and affordable. Importantly, the restructured social security system removes gaps in coverage that exist within the present system. When phased in over a long period, the strategic reforms of the social security system involves a significant shift towards social security funding allocated to sources that incorporate social solidarity principles with little net effect on the fiscal framework.

In a context of pervasive absolute poverty and inequality, the consideration of poverty alleviation measures is of critical importance. However, the successful addressing of poverty in South Africa depends on the ability of policy-makers to construct sustainable and appropriately targeted interventions, which in turn are able to elicit consensus in a country typified by conflicting political and social objectives.[421]

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The lessons that can be learned from the German system of social assistance and social insurance. Is that their social assistance provides comprehensive social assistance programme. Secondly their social assistance system is more or less similar to that of South Africa, the only difference is that it includes, housing benefit, social assistance (general social assistance and assistance in special situations) and the asylum seekers benefit. The general housing benefit is available to all low-income households except those for whom social assistance is the primary source of income.[422]

In 2000, there were 2.8 million recipients of housing support in Germany: 1.5 million received the general housing benefit, while about 1.3 million households received housing support under social assistance programme rules. General housing benefit payment rates also

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[420] *Op cit* No 21, *Taylor Report (Report of the Committee of Inquiry)* 149.
[421] *Op cit* No 414, Thurlow J 23.
[422] Adema WD and Kahl S "Social Assistance in Germany" OECD Labour Market and Social Policy Occasional Papers No 58 OECD Publishing 2003 22

vary with (local) rent levels, age of the dwelling and household composition. Furthermore, social assistance includes "Assistance in Special Situations". This type of support consists mainly of institutional care support for elderly and integration support for disabled persons *(Eingliederungshilfe für Behinderte),* and medical support for people without health insurance, but also includes support for family, old-age pensioners, and blind people and covers exceptional circumstances.[423]

In the area of social insurance, the German system of social insurance is compulsory, which means that Unemployment insurance is a compulsory form of insurance. All persons who have a paid job above the insignificance limit are insured. This goes for blue-collar as well as white-collar workers and also includes trainees. Special groups of people, for example civil servants, soldiers or those aged 65 and over are exempt from paying unemployment insurance contributions.[424] The system does not place a burden on social security, because individuals contribute in the event that their earning capacity ceases to exist.

On the other hand, the South African Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Thus the right to social security includes both social insurance and social assistance. Secondly, the Constitution imposes a duty on the state, subject to the availability of resources, to give effect to the right of access to social security. In an attempt to satisfy this duty, South African government provides social assistance grants, aimed at people who are vulnerable and poor.

Similarly, the current social assistance grants are largely categorical by nature, as they are only available to those who are (apart form being poor) young enough, disabled enough, or are not able to work. In the context of the study, the implication is that those who CD4 count is below 200 and are not disabled enough, are left at the mercy of poverty, as there are no universal benefits or state financed benefits specifically targeted at people who are excluded from Disability grant itself.

6.6 Recommendations

The Constitution guarantees everyone the right to have access to social security and appropriate social assistance for all those unable to support themselves and their dependants. The Social Assistance Act, however, only provides social assistance to certain defined categories of persons. The Constitution also requires that accessibility should be

[423] Information provided by Stat.BA, *Daten aus der Sozialhilfestatistik*, Stat.BA, 2002.

[424] Source: http://www.deutschesozialversicherung.de/en/europe/europe_is_converging.html

progressively facilitated, legal, administrative, operational and financial hurdles should be examined and, where possible be lowered, and that rights must be made more accessible not only to a larger number of people but to a wider range of people as time progresses; and the state must ensure that people are afforded their basic needs.

In addition, the government expenditure on social welfare, particularly the extension of social assistance to people who are excluded, can be improved by increasing the fiscal space of government. Fiscal space refers to the ability of government to make budgetary resources available for desired purposes.[425] Thus there are several ways to create fiscal space for additional social security spending. This includes, *inter alia,* mobilisation of domestic revenues, government can raise additional revenues by increasing tax rates, creating new taxes and levies and strengthening tax collection reallocation of expenditure between sectors would include increasing the budget allocated to the Department of Social Development, increase borrowing, government can also finance social security by borrowing from domestic and foreign creditors. However, there are costs in terms of future debt service obligations. Therefore a sound fiscal policy is that over economic cycle government borrow only to invest rather to finance recurrent expenditure (for example creating employment).[426]

6.6.1 Prevention and reintegration

One should understand that social security, and in particular social insurance, should manifest itself as a continuous process of social inclusion and, therefore, the very opposite of exclusion.[427] Loss of income is but one, if not the most important, factor which causes social exclusion. If the possibility to find work does not materialise (unemployment), or if the employee has lost the ability to do work as a result of illness, injury, invalidity or old age, social exclusion of both the individual concerned and his/her family is a reality. The need, therefore, arises to restore (where possible) the individual to the position in which s/he was before or to another position (by assisting him/her to return to work). Social security as an income replacement or adjustment system therefore refers to a variety of policy instruments that are set up to compensate for the financial consequences of a number of social contingencies.[428]

The inability of most social security systems to provide comprehensive compensation is one of the factors, which have increasingly, together with considerations of policy and principle,

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[425] Fiscal Space and Sustainability from the Perspective of the Health Sector, Paris, 14-15 November 2005, 2.
[426] *Ibid* No 422.
[427] Olivier MP "Towards a Coherent Approach to Social Protection, Labour Market Policies and Financing of Social Security: A new Paradigm for South Africa" International Social Security Association Research Programme, 2000, 10.
[428] Op cit No 424 Olivier 2000 9-11

led to a radical rethinking of social security goals and policies. It is now generally accepted in social security thinking and policy-making that social security is not merely curative (in the sense of providing compensation), but also preventative and remedial in nature.[429] The focus should be on the causes of social insecurity (in the form of, amongst others, social exclusion or marginalisation), rather than on (merely dealing with) the effects. This implies that measures aimed at preventing human damage, for example employment creation policies; health and safety regulation, preventative health care) and remedying or repairing damage, for example reskilling/retraining, labour market and social integration, should be adopted as an integral part of the social security system, alongside compensatory measures.[430]

6.7 Summary

In conclusion, the following broad conclusions and recommendations are pertinent. For the past decade South Africa has been successful in developing policies and passing legislation that is progressive in scope, and in relation to people with disabilities. The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, provide for a general anti-discrimination framework while specific anti-discrimination provisions exist in labour and education legislation. The accessibility legislation has been qualified as *"deficient"* by the South African Human Rights Commission

In addition, the Department of Social Development has embarked on efforts to put comprehensive legislation in place that would adequately protect the rights of children in South Africa. The Department introduced the Children's Amendment Bill in 2006. The Bill effectively makes provision for the protection of children, and recognition of the needs of children with disabilities.[431]

The Bill also addresses the plight of child-headed households. That the child-headed households must function under the general supervision of an adult designated by a children's Court, organisation of state, and non-governmental organisation (NGO), determined by the provincial head of the Department of Social Development.

Furthermore, the Bill introduces a better reporting mechanism by social workers, teachers, medical practitioners, and psychologist etc, to report incidents of child abuse or neglected children. To the Director General or Provincial head of Social Development, who on written application may summon a designated organisation to perform.

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[429] Olivier *et al Social Security A Legal Analyses,* LexisNexis, Butterworths, Durban, 2004, 31- 32.
[430] *Ibid* No 426.
[431] Dr Zola Skweyiya Minister of Social Development, Speech addressed at the National Council of Province: Children Amendment Bill Debate, 27 May 2007/accessed at www.polity.org.za.

The main policy area where disability has not yet been mainstreamed is the HIV/AIDS policy, although people with disabilities are represented in the National AIDS Council. The need to specifically target disabled persons with HIV/AIDS is paramount. Despite great progress in adopting progressive laws and policies aiming to decrease the dependence of people with disabilities on social assistance and enabling them to move towards meaningful employment and full participation in society, implementation is slow.

Policies which are pro-poor must be supported by research evidence with monitoring and evaluation included in the conceptualisation and planning stages. We need to begin to conceptualise long-term strategies to reduce dependency on social grants because the consequence will be that we trap the poor in a cycle of poverty. The poor and unemployed are to be encouraged to take ownership of processes and decisions, and thus enhance social and human capital.

Without policies that encourage the growth of low wage jobs for the unskilled unemployed, and promote the more efficient use of public spending on education, inequality is unlikely to diminish significantly, if at all.

BIBLIOGRAPHY

Books

Davel CJ *et al Introduction to Child Law in South Africa* 1st edition, Juta & Co, Durban, 2000.

Davis C *et al Fundamental Rights in the Constitution of Republic of South Africa: commentary and Cases* 1st edition, Juta & Co, Durban, 1997.

Du Tuiot D *et al Labour Relations Law A Comprehensive Guide*, 3rd edition, Butterworth's, Durban, 1999.

Dugard J *International Law; A South African Perspective* 2nd edition, Juta & Co Durban, 2000.

Mubangizi J C *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 1st edition, Juta & Co, Durban, 2004.

Olivier *et al Introduction to Social Security*, LexisNexis, Butterworths, Durban, 2004.

Okpaluba C *Law and Contemporary South African Society*, 1st edition, New Africa Books (Pty) Ltd, South Africa, 2004.

Sahara J and Kalula E *Equality Law Reflections from South Africa and Elsewhere* 1st edition, Juta & Co, Durban, 2001.

Strydom *et al Essential Social Security Law*, 1st edition, Juta & Co, Durban, 2001.

Williams L *et al Law and Poverty the Legal System and Poverty Reduction* 1st edition Zed Books Ltd, New York, USA, 2003.

Articles

Adema WD and Kahl S "Social Assistance in Germany" OECD Labour Market and Social Policy Occasional Papers, No. 58, *OECD Publishing*, 2003.

Altman M Wage "Trends and Dynamics in South Africa, Human Sciences Research Councils, October 2005.

Booysen F "Social Grants As A Safety For HIV and AIDS - Affected Households in South Africa." *A Journal of Social Aspects of* HIV and AIDS *Research Alliance*, Vol 1, No 1, 2004.

Carol W and Susan C "Defining Disability in Theory and Practice; A Critique of the British Disability Discrimination Act 1995" *Journal of Social Policy*. Vol 32, Part 1, 2003.

Channing A and Jeffrey D "The HIV and AIDS Pandemic in South Africa; Sectoral

Impacts ands Unemployment" *Journal of International Development* 2001.

Chloe H and Richter M "Disability grants or antiretroviral: A Quandary for people with HIV/AIDS in South Africa" *African Journal of AIDS Research*, 2006.

Coetzee E and Streak J *Monitoring Child Socio - Economic Rights In South Africa: Achievements and Challenges* 1st edition, Idasa, Cape Town, 2004.

Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future Draft Consolidated Report Pretoria (2002) – Committee of Inquiry into a Comprehensive System of Social Security for South Africa.

Costa E and Duncan G *Why We Need a New Welfare State* 1st edition, Oxford University Press, New York, 2002.

Erika De Wet "Can the Social State Principle in Germany Guide State Action in South Africa in the field of Social and Economic Rights" *South African Journal on Human Rights,* Vol 11, 1995.

Erika De Wet "The Constitutional Enforceability of Economic and Social Rights: The meaning of the German Constitutional model for South Africa" Vol 13, 1997.

Fiscal Space and Sustainability from the Perspective of the Health Sector, Paris, 14-15 November 2005.

NWU LIBRARY

Geoff PG and Nicholas CG "AIDS the Makings of A Development Disaster" *Journal of International Development,* 2001.

Hadeland L and Gillespie S "Effective Food and Nutrition Policy Responses to HIV/AIDS; What We Know and What We Need to Know" *Journal of International Development,* 2001.

Hardy C and Richter M "Disability Grants or Antiretrovirals: A Quandary for people with HIV/AIDS in South Africa" *African Journal of AIDS Research*, 2006, 5 (1).

ILO, EAMAT, 1995 "The impact of HIV/AIDS on the productive labour force in Africa" Working Paper No. 1 (Addis Ababa: ILO).

Jansen van Rensburg L and Horsten D "The inadequacy of the Social Grant System available to children in South Africa" *Journal for Juridical Science* 29 (3), 2004.

Johan de Waal "A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights" *South African Journal on Human Rights*, Vol 11, 1995.

Johnson S and Ndegwa D "A Survey of Households Affected by HIV/AIDS in South Africa" University of Cape Town, Aids and Social Research Unit, 2002.

Jolene S and Nicoli N "Paying to Waste Lives; The Affordability of Reducing Mother to Child Transmission of HIV in South Africa," *Journal of Health Economics*, 21, 2002.

Kalanidhi S and Diane C *Reaching to Africa's Orphans" Africa Region Human Development Series: The International Bank for Reconstruction and Development,*

2004.

Kaseke "Social Security in Eastern and Southern Africa" Paper presented at the SADC Social Security Conference (2000).

Kaseke E "HIV/AIDS and Social Protection in Zimbabwe; Paper for the SADC Social Security Experts Conference "HIV/AIDS and Social Protection: Towards Socio – Economic Integration and Development in Southern African Development Community" Lusaka, 1- 2 December 2003.

Kisoon *et al* "Whose Right" Centre for the Study of AIDS, AIDS Review, 2002.

Lisk F "Labour market and employment implications of HIV/AIDS" Working Paper 1: ILO Programme on HIV/AIDS and the World of Work, Geneva, June 2002.

Matlin S and Spence N "The Gender Aspects of the HIV/AIDS Pandemic" London, United Kingdom, 16 October 2000.

May J and Woolard I "The Nature and Measurement of Poverty and Inequalities in May J (ed) Poverty and Inequality in South Africa Meeting the Challenge" 1998/UNDP.

Mostert H "Efforts at Constitutional Comparison: The German-South African Experience" (A Partial Review), *German Law Journal no* 2, 2003.

Mpedi LG "HIV/AIDS in South Africa: Towards Comprehensive Social Protection" 2004.

Mpedi LG "HIV/AIDS in South Africa; Towards Comprehensive Social Protection" Zeitschrift Für ausländisches und internationals Arbeits und Sozialrecht, 18 Jahrgang, C.Muller, 3/2004.

Mpedi LG and Kuppan GY *Social Assistance and Legal Aid, in Olivier et al Introduction to Social* Security LexisNexis Butterworths, Durban, 2004.

Nattrass N "Disability and Welfare in South Africa's Era of Unemployment and AIDS" Centre for Social Science Research Working Paper No 147, University of Cape Town, 2006.

Nattrass N "Unemployment and Aids - the Social Democratic Challenge for South Africa" *Journal of the Development in South Africa* Vol 1, No 1, 2004.

Nicoli N *The Moral Economy of AIDS in South Africa" School of Economics and the Centre for Social Science Research* University of Cape Town, 2004.

Olivier *et al* "Gender and Social Security in SADC" South African Country Report, paper presented for the Southern Africa Development Community Social Security Specialist Conference on Gender and Social Security in SADC, Windhoek, Namibia, 6 - 7 July 2006.

Olivier MP "Constitutional Perspective on the Enforcement of Socio - economic Rights: Recent South African Experience" paper presented to the New Zealand Association for Comparative Law in Willington on 7 February 2002.

Olivier MP "Realising Social Security as a Human Right in South Africa: Some Critical

Perspectives," paper presented at a conference on Social Security as a Human Right in Brussels, Belgium 17-18 February 2006.

Olivier MP "Towards A Coherent Approach to Social Protection, Labour Market Policies and Financing of Social Security: A New Paradigm for South Africa" International Social Security Association Research Programme, 2000.

Olivier MP and Kaseke E "Informal Social Security and Formal Social Security: Developing an Integrative Approach," paper presented for the SADC Core Group of Social Security Specialists Regional Conference on Social Security in the Making: Developments in the Informal Economy and Informal Social Security, Helsinki, 17-18 September 2004.

UNAIDS /WHO *AIDS Epidemic Update, Sub - Saharan Africa*, December 2005, 17.

United Nations Development Programme South African Human Development Report

Van der Waal K and Malan M "A Developmental Perspective on Social Security for the Urban and Rural Poor and the Informally Employed in South Africa" paper presented at SANPAD Seminar (Pretoria 20 November 2000) 8.

World Health Organization "Integrating Gender into HIV/AIDS: Programmes" A review paper, Department of Gender and Women's Health Family and Community Health, 2003.

Unpublished Thesis and Dissertations

Adriette HD "Informal Social Security: A Legal Analysis" University of South Africa, unpublished PhD Thesis, 2005.

Mpedi L.G "Redesigning the South African Unemployment Protection System: A Socio-Legal Inquiry" University of Johannesburg, unpublished PhD Thesis, 2006.

Nyenti M "Means Testing and Targeting in South African Social Security: Justification, prospects and Challenges" University of Johannesburg, unpublished LLM Dissertation, 2006.

Krause C "Lowering of Social Security Standards Under International Human Rights Law" Unpublished LLM Thesis, 1994.

Case Law

Government of the Republic of South Africa & Others v Grootboom & others 2000 11 BCLR 1169 (CC); SA 46 (CC).

Hoffmann v South African Airways 2001 (1) SA 1 (CC).

In Re. Certification of the Republic of South Africa of 1996 4 SA 744 (CC).

Khoza & Others v Minister of Social Development & Others 2004(6) SA 504(CC).

Minister of Health & others v Treatment Action Campaign & Others 2002 (4) BCLR.

President of Republic of South Africa v Hugo 1997 (1) BCLR 708 (CC).

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

Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 (CC).

Conventions

International Guidelines on HIV/AIDS and Human Rights 1997.

Social Security Convention Concerning Minimum Standards of Social Security, ILO 1995.

The African Charter on Human and Peoples Rights 1981.

The African Charter on the Rights and Welfare of the Child 1990.

The Convention of the Rights of the Child 1995.

The Convention on the Elimination of All Forms of Discrimination Against Women1995.

The European Social Charter 1996.

The International Covenant on Economic, Social, and Cultural Rights 1976.

The International Labour Organisation Convention 102 of 1952.

The Universal Declaration of Human Rights 1948.

UN Standard Rules on the Equalisation of Opportunities for People with Disabilities (1993).

Official Publications

Statistics South Africa Labour Force Survey September 2005.

Statistics South Africa Labour Force Survey 2006/07.

Trevor Manuel, Minister of Finance, Budget Speech made on the 15 February 2006.

Trevor Manuel, Minister of Finance, Budget Speech 2007.

President Thabo Mbeki, Speech made at the official of Parliament Speech 2007.

Zola Skweyiya Minister of Social Development, Speech addressed at the National Council of Province: Children Amendment Bill Debate, 27 May 2007.

Legislation

Basic Conditions of Employment Act 75 of 1997.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Labour Relations Act 66 of 1997.

Occupational Diseases in Mines and Works Act 78 of 1977.

Social Assistance Act 13 0f 2004.

South African Social Security Agency Act 9 of 2004.

South Africa Constitution Act 108 of 1996.

The German Basic Law of 1949.

Unemployment Insurance Act 63 of 2001.

Internet Web sites

http://www.africa.com.

http://www.aidsabout.com.

http://www.avert.org/worldaid.htm.

http://www.cdhaarmann.co./publication/phd.pdf.

http://www.elsevier/lovate/socscimed.

http://www.gov.za/reports.

http://www.kas.org.za.

http://www.quardianmail.co.uk.

http://www.saarf.co.za.

http://www.sarpn.org.za/documents/SA_budget-speech_2006.pdf.

http://www.un.org/womenwatch/html.

http://www.un.org/womenwatch/html.

http://www.welfare.gov.za.