

Pertinent social security issues in South Africa

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2008



**Socio-Economic Rights Project
COMMUNITY LAW CENTRE
University of the Western Cape**



Published by the Community Law Centre, University of the Western
Cape, Private Bag X17, Bellville 7535, South Africa
Tel: 021 959 2950; Fax: 021 959 2411
Internet: www.communitylawcentre.org.za

ISBN: 9781868086900

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Editing, design and layout: Page Arts, Cape Town
Printing: Mega Digital



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ACKNOWLEDGEMENTS

This paper was prepared with financial support from the Norwegian Embassy through the Norwegian Centre for Human Rights and with supplementary funding from the Ford Foundation. The views expressed do not necessarily represent the official views of the Norwegian Embassy, the Norwegian Centre for Human Rights or the Ford Foundation.

While I am responsible for the final version of this paper, I wish to express my gratitude to the Socio-Economic Rights Project of the Community Law Centre for the opportunity to conduct this research on its behalf. I wish to thank Lilian Chenwi and the external reviewer for their constructive comments on earlier drafts. I would also like to convey my heartfelt gratitude for the research assistance received from my student assistant, Thato Mokhele.



EXECUTIVE SUMMARY

This paper provides some perspectives on the South African social security system, including the South African Social Security Agency (SASSA). Its overall aim is to promote and advocate the effective and reasonable implementation of social security in South Africa. Furthermore, it highlights the importance of social security for poverty alleviation and the enjoyment of socio-economic rights in general.

South Africa has a fairly evolved system of social security for a developing country. Despite that, its system remains seriously deficient in a number of respects. This is particularly clear when one considers the socio-economic challenges (such as poverty and inequality, HIV/AIDS and unemployment) facing the country. In addition, a closer examination of specific components of the social security system (that is, legislative framework, institutional and administration structure, scope of coverage and adjudication and enforcement mechanisms) leads one to the conclusion that it needs an urgent overhaul.

1. *Legislative framework:* The legislation governing social security in South Africa is haphazard and scattered in a number of acts. These laws have been enacted, amended and, in some instances, repealed over the years in an unsystematic manner. As a result, there is great uncertainty as to which laws or regulations are actually applicable in a given case. To address this problem, it is recommended that South African social security laws be systematised



under one comprehensive Act. The law must also specifically oblige social security institutions to raise people's awareness about social security laws and procedures for claiming benefits and enforcing their rights. In addition, the law must make provision for legal assistance for poor people who want to enforce their social security rights.

2. *Institutional and administrative framework:* The social security institutional and administration framework is still plagued by problems such as poor levels of service, fraud and corruption. To deal with these problems SASSA should be developed into a one-stop shop as was proposed by the Taylor Committee. This would ensure coordination and cooperation of all state organs and other stakeholders involved in the provision of social security. The establishment of SASSA is a step in this direction. However, the state must make firm commitments with specified time frames for the development of SASSA into a one-stop shop. Meanwhile, SASSA should prepare by training its staff adequately and consolidating the databases of all social security networks.
3. *Scope of coverage:* The scope of coverage of the South African social security system is limited. To improve access to social security, a number of schemes that will cater for the specific needs of identified groups or categories of excluded people need to be introduced. These include social insurance-type schemes to provide for, among others, the self-employed and those in the informal sector; commercial insurance products targeting specific categories of excluded people; and the welfare fund to cater for the needs of informal sector employees. Excluded people should be brought into existing schemes as well as the new programmes. Provision should also be made for social security for South African citizens living abroad.
4. *Adjudication and enforcement:* There is no clear procedure or mechanism for enforcing social security rights. Consequently, complainants follow different routes, which lead to a lack of uniformity in the adjudication and enforcement of these rights. To remedy this problem, a uniform adjudication system is needed, which would serve as a first stop before judicial remedies. Such a mechanism would provide for an independent internal review or appeal institution. The advantages are that it would be cheap, fast and more convenient to most beneficiaries and potential beneficiaries of social security, the majority of whom are poor and illiterate. The recently



established Social Assistance Tribunal will significantly improve compliance with the laws on social security by the state. However, this tribunal must be regulated by statute. The Social Assistance Act should be amended to make provision for such things as the composition of the tribunal, tenure of its officers, and its procedure and remedies.

Despite the preceding pronouncements, several crucial issues need to be kept in mind when revamping the present social security system. First, the Constitution of the Republic of South Africa is the supreme law of the land. Not only does it recognise the rule of law, it also entrenches certain constitutional values and a range of socio-economic rights. These values and rights must underpin all measures aimed at providing and transforming social security in this country. Second, social security strategies (in respect of both social assistance and social insurance) should go beyond compensation. Accordingly, they must provide for both preventative and remedial measures. Furthermore, informal social security and indirect social security should form an integral part of social security. Lastly, reform efforts must be made with the overall aim of progressively realising the right to social security. This means that, on one hand, social security should be extended to more people and, on the other hand, the level of individual benefit from social security measures should also be increased.



ABBREVIATIONS

ACCESS	Alliance for Children's Entitlement to Social Security
COIDA	Compensation for Occupational Injuries and Diseases Act
GEPF	Government Employment Pension Fund
ICROP	Integrated Community Registrations Outreach Programme
ILO	International Labour Organisation
PAYE	Pay As You Earn
PERSAL	Personnel and Salary System
RAF	Road Accident Fund
SADC	Southern African Development Community
SASSA	South African Social Security Agency
SOCPEN	Social Security Pension System
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UIA	Unemployment Insurance Act
UIB	Unemployment Insurance Board
UIF	Unemployment Insurance Fund





1 INTRODUCTION

The object of this paper is to provide some perspectives on the South African social security system, including the South African Social Security Agency (SASSA). The overall aim is to promote and advocate for the effective and reasonable implementation of social security in South Africa and highlight its importance to poverty reduction and the enjoyment of socio-economic rights in general. To achieve these objectives, the paper first analyses the social and political context of poverty in South Africa. It then proceeds with a theoretical discussion of the concepts of *social security* and *comprehensive social protection*. This is followed by an exploration of the South African social security framework, paying particular attention to the legal context (including relevant constitutional provisions pertaining to social security, especially the obligation to provide social security); the institutional and administrative framework; the scope of social security coverage; and social security adjudication and enforcement. Finally, the paper identifies gaps and challenges within the social security system, assesses the opportunities for developing a comprehensive social security system in South Africa, and provides some recommendations as to how the social security system might be improved.

1.1 *Socio-economic background*



As is the case in most developing countries, South Africa faces a variety of socio-economic challenges in its efforts to provide social security to deserving members of its population. These challenges include poverty,¹ inequality², unemployment³ and HIV/AIDS.

1.1.1 Poverty and inequality

South Africa is ranked as an upper middle-income country.⁴ Despite this status, high levels of poverty and inequality, which are part of the apartheid legacy,⁵ continue to be a serious source of concern⁶ (see Table 1). Blacks (particularly women and youth),⁷ who comprise the majority of the population, are the most affected.⁸ Furthermore, poverty and inequality are more stark in rural than in urban areas.⁹ This is so largely because “rural areas are, generally, isolated from urban areas where there are industries (and supposedly job opportunities). In addition, people who are unemployed, illiterate, and excluded and marginalized by the formal social protection system are, in most instances, concentrated in rural areas.”¹⁰

Table 1: Incidences of human poverty in South Africa

Country	% newborns not expected to live beyond 40 years (2000-2005)	Life expectancy at birth (years) 2005	Children under weight for age (% under age 5) 1996-2005	% population below income poverty line – US\$1 a day (1990-2005)	% population below income poverty line – US\$2 a day (1990-2005)
South Africa	31.7	50.8	12	10.7	34.1

Source: United Nations Development Programme (2007).

1.1.2 Unemployment

South Africa, like many other developing countries, is facing a grave unemployment problem.¹¹ The unemployment rate in South Africa, based on the official estimates, is 23%.¹² Furthermore, the unemployment problem in South Africa is not evenly spread between provinces, population groups, gender and age:

1. *Unemployment rate by province:* In September 2007, provinces such as KwaZulu-Natal, Eastern Cape, Free State and Limpopo



had higher unemployment rates than elsewhere, while the Western Cape had the lowest over the same period.¹³ These disparities can be traced back to the old South Africa. Poor performing provinces, such as the Eastern Cape and Limpopo, inherited the biggest proportion of the former homelands or Bantustans.¹⁴ Homelands were characterised by deep-rooted social and economic problems including poverty and inequality, unemployment, poorly developed welfare services and infrastructure, authoritarian regimes and prevalence of male migrant labour.¹⁵

2. *Unemployment rate by population group*: As shown in Table 2, blacks had the highest unemployment rate in South Africa over the period between September 2001 and September 2007.

Table 2: *Unemployment rate by population group and sex, September 2001 to September 2007*

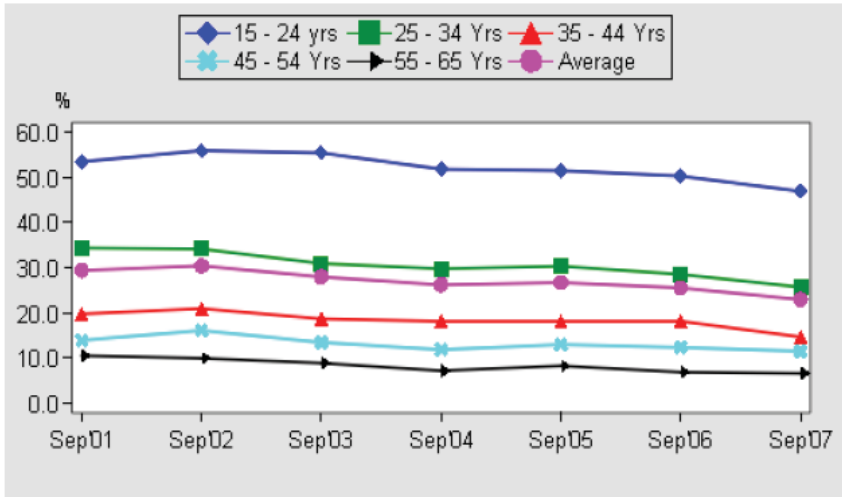
Population group	September						
	2001	2002	2003	2004	2005	2006	2007
Male							
Black	31.5	31.5	30.0	27.6	26.6	25.3	23.1
Coloured	19.5	19.9	18.8	19.7	20.6	16.6	20.0
Indian/Asian	15.7	15.6	15.5	12.4	14.0	6.6	8.6
White	4.7	5.0	4.0	5.1	3.6	4.6	3.5
Average	25.8	25.9	24.7	23.1	22.6	21.2	20.0
Female							
Black	40.7	42.3	38.7	36.0	37.1	36.4	31.2
Coloured	23.1	26.6	23.6	24.1	24.6	22.6	21.5
Indian/Asian	23.5	27.1	18.4	15.4	18.6	14.3	11.0
White	7.4	7.4	6.2	5.8	6.9	4.4	4.5
Average	33.8	35.9	32.0	30.2	31.7	30.7	26.7

Source: *Statistics South Africa (2007: xvii).*

3. *Unemployment rate by gender*: The female unemployment rate in 2007 was 26.7% while the male unemployment rate was 20% over the same period.¹⁶
4. *Unemployment rate by age*: As shown below, the official unemployment rate is still high among the youth.¹⁷



Figure 1: Unemployment rate by age, September 2001 to September 2007



Source: *Statistics South Africa (2007: xix).*

The preceding discussion of unemployment in South Africa, apart from revealing the immense challenge faced by South Africa, reveals the areas (at provincial level and in terms of population group, gender and age) which could be the focus of projects to eradicate unemployment.

1.1.3 HIV/AIDS

The high prevalence of HIV/AIDS (see Table 3) exacerbates poverty¹⁸ and inequality in the country. HIV/AIDS is gradually and silently eroding the hopes, dreams, survival opportunities, survival structures and the livelihood of the poor. The result is poverty and severe destitution. HIV/AIDS strikes at the lives of not only those living with it but also those close to them.¹⁹ A family may be ripped apart if the breadwinner dies of AIDS. When one parent is sick, the likelihood of the other parent being infected as well is very high. The death of both parents leaves children in desperate circumstances where they have to fend for themselves. The chances of going to school are extremely slim.²⁰ In some instances, grandparents and other relatives look af-



ter the orphans.²¹ For those with no relatives to care for them, the oldest sibling assumes the role of a parent and heads the household. Orphans lacking parental care are often lost to child labour and child prostitution or reduced to street beggars.

HIV/AIDS attacks rich and poor, young and old, economically active and inactive. Yet, the situation of the rural and urban poor is worse because HIV develops into AIDS faster if the living conditions of the infected person are bad.²² A large portion of those who are classified as living below the poverty line are unemployed and operate in the informal economy where there is little or no social protection. Most of these people are sidelined by the formal social security system. South Africa has a large informal sector,²³ which contributes about 20% of all employment, excluding domestic workers.²⁴ Women comprise the larger share of the informal sector.²⁵ The likelihood of informal workers suffering, directly or indirectly, from HIV/AIDS is very high.²⁶

Table 3: HIV/AIDS prevalence rate in South Africa (2007)

Country	Estimated number of adults and children living with HIV	HIV prevalence in adults (15+)	Children (0-17) orphaned by AIDS	AIDS deaths in adults and children
South Africa	5 700 000	5 400 000	1 400 000	350 000

Source: UNAIDS (2008).

1.2 Theoretical and definitional issues

1.2.1 Social security

1.2.1.1 Defining social security

The term “social security” does not yet have a universally accepted and precise meaning.²⁷ This is because social security is elastic and varies from one country to another.²⁸ Nevertheless, the most common definition follows the International Labour Organisation’s (ILO) approach, and defines social security on the basis of the so-called nine classical risks (namely, sickness, maternity, employment injury, unemployment, invalidity, old age, death, medical care and family) embodied in the Social Security (Minimum) Standards Convention 102 of 1952. Consequently, social security is perceived as:



*the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be covered by the stoppage or reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, death, provision of medical care and provision of subsidies for families with children.*²⁹

The preceding definition is problematic in a number of ways:

*Firstly, it associates itself strongly with formal employment – something which is not readily available for millions of South Africans. Secondly, social security as conceptualised in the Social Security (Minimum) Standards Convention is too narrow for a developing country's context. Social security in developing countries, such as South Africa, should also strive towards the provision of basic needs such as shelter, nutrition, adequate health care, clean water and not only be concerned with cash benefits. Thirdly, the traditional approach does not capture particular risks to which many people in the developing world are exposed – such as political and natural disasters and calamities. These needs and risks extend beyond the initial ILO's nine classical risks which are generally catered for by means of social insurance and social assistance. Another oversight in this definition is that it only refers to 'public measures' and, therefore, excludes informal and private measures. Finally, social security is not merely curative (in the sense of providing compensation) but also preventative and remedial in nature.*³⁰

What is clear from the ILO's approach is that it stresses “the statutory nature of the concept of social security, and the payment of monetary benefits as a means of ensuring the maintenance of income when certain contingencies arise.”³¹

1.2.1.2 Social security strategies

There are three main social security strategies:³²

1. Social assistance, as defined by the Taylor Committee, is “state provided basic minimum protection to relieve poverty, essentially subject to qualifying criteria on a non-contributory basis.”³³ The primary goal of this strategy is to alleviate poverty and it is financed mainly through public revenue.³⁴ Its scope of coverage is extended either to the entire population or to designated categories of the population.³⁵



2. Social insurance is 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.”³⁶ It is normally aimed at poverty prevention and generally financed through contributions from covered employees, their employers and the government.³⁷ The scope of coverage of social insurance schemes, as a rule, extends to employees in designated categories and their dependants.³⁸
3. Social allowance is different from social assistance and social insurance in the sense that its primary goal is social compensation.³⁹ Like social assistance, social allowance is financed through public revenue and generally provided to the entire population or designated categories of the population.⁴⁰

The South African social security system has to a large extent been constructed around social assistance and social insurance. It is for this reason that this paper focuses mainly on these two strategies.

1.2.2 Social protection

The restrictive nature of the concept of social security has resulted in calls for a broader concept, “social protection”.⁴¹ Social protection embraces social security and entails “policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people’s exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income”.⁴² Its goal is to avert or minimise social risks and human damage by increasing capabilities and opportunities.⁴³

1.2.3 Comprehensive social protection

The Taylor Committee widened the concept of social protection by adding the word “comprehensive.” It stated:

Comprehensive social protection seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes



*designed to ensure, collectively, at least a minimum acceptable living 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.*⁴⁴

1.2.4 Other related concepts

Indirect social security refers to “those services [such as those relating to the provision of food and nutrition, water and sanitation, housing, basic education and energy] that are not part of direct or traditional social security, but are nonetheless crucial in preventing human damage and imperative in aiding human beings in living dignified lives.”⁴⁵

Informal social security, on the other hand, comprises those self-organised informal safety-nets which are based on membership of a particular social group or community, including, but not limited to, family, kinship, age group, neighbourhood, profession, nationality and ethnic group.⁴⁶ Informal social security, as pointed out by Gsänger, predominantly rests on the following security pillars:

- individual provisions based on individual economic activities (eg self-employment, subsistence farming or casual wage labour);
- membership of traditional solidarity networks (family, kinship, neighbourhood, etc);
- membership of cooperative or social welfare associations [self-help groups, rotating savings and credit clubs (ROSCAs), cultural associations, etc]; and
- access to (non-governmental) public benefit systems (targeted transfers, donations, social services provided by voluntary organisations, churches, trade unions, etc).⁴⁷

2 LEGAL CONTEXT

Social security provisioning is, irrespective of whether it is at a national, regional or international level, a complex undertaking. It requires efficient administrative systems, institutions and resources (eg human and financial resources). In addition, there are *rights* to be respected,



protected, promoted and fulfilled by various parties which include the state as well as juristic and natural persons. Closely linked to rights are *duties* which have to be complied with. These duties could be in the form of an *act* (eg to pay social insurance contributions to (the) relevant social insurance institution(s) regularly) or an *omission* (eg to refrain from defrauding social security institutions). Furthermore, the failure to comply with the rights bestowed and obligations imposed should or may be followed by a *sanction* imposed by a *competent authority* and in a *fair manner*. As a result, social security provisioning endeavours need to be governed by a body of enforceable rules. These rules are, at a country level, contained in national primary and secondary legislation. In a nutshell, efficient social security provisioning requires a comprehensive legislative framework. Thus, legislation is an essential ingredient of the foundations on which comprehensive social security systems are – or should be – built.

Painting a complete picture of the South African social security legislative framework would be a tedious task. In essence, South African social security provisioning endeavours are built on a plethora of legal instruments. These instruments draw largely from social legislation:⁴⁸ for example, pure social security law (ie social insurance and social assistance laws), labour law, administrative law, international law and, most importantly, constitutional law. This section of the report outlines the legislative framework of the South African social security system. It focuses primarily on national social security laws. Particular attention is paid to *social assistance* and *social insurance law*. In addition, it refers to the Constitution of the Republic of South Africa (1996) and, where necessary, the relevant International Labour Organization (ILO) instruments.

2.1 The Constitution

2.1.1 Constitutional supremacy and the rule of law

The Constitution is, for the first time in the history of South Africa, the supreme law of the country.⁴⁹ By adopting constitutional supremacy,⁵⁰ South Africa broke away from the doctrine of parliamentary sovereignty. This doctrine meant that the South African parliament was at liberty to enact any law(s) it deemed fit.⁵¹ This is why many laws which encroached upon the fundamental rights of millions of South Africans



could not be invalidated.⁵² By discarding parliamentary sovereignty, South Africa achieved a “formal shift of power from the legislature and the executive to the judiciary.”⁵³ In accordance with constitutional supremacy, law or conduct which is in conflict with the Constitution is invalid. Furthermore, the obligations imposed by the Constitution must be fulfilled.⁵⁴ As well as the supremacy of the Constitution, the Constitution also provides that South Africa is founded on the rule of law.⁵⁵ Both these principles mean that the government must always act in compliance with the Constitution and the law.

2.1.2 Constitutional values

In accordance with the founding provisions of the Constitution:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
- (b) Non-racialism and non-sexism.*
- (c) Supremacy of the Constitution and the rule of law.*
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*⁵⁶

The South African Constitution follows a value-based approach to service delivery because it embraces, as Chaskalson⁵⁷ points out, a normative value system which is intimately linked to the goal of transformation. These values, which encompass human dignity, the achievement of equality and the advancement of human rights and freedoms, form the basis of values that guide governance and inter-governmental relations in the country. Constitutional values often reflect the goals and aspirations of the Constitution as well as those of society. Most importantly, they give meaning to socio-economic rights entrenched in the Constitution.⁵⁸ As pointed out by the Constitutional Court:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of Rights. The realisation of these rights is also critical



*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.*⁵⁹

Constitutional values – as contained in the founding provisions and other parts of the Constitution⁶⁰ – are important for, among other things, social security. They form the conceptual basis on which efforts to provide, transform, and develop social security in this country should be based.

2.1.3 Human rights culture

The Constitution, for the first time in the history of South Africa, has a Bill of Rights.⁶¹ It is the cornerstone of democracy, enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.⁶² It protects the rights of everyone against infringement. The state has the constitutional obligation to *protect, promote* and *fulfil* the rights entrenched in the Bill of Rights.⁶³ In addition, the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.⁶⁴ It also binds natural as well as juristic persons.⁶⁵

Moreover, the Bill of Rights entrenches a variety of rights which relate to social security and are all judicially enforceable:⁶⁶ the right to equality,⁶⁷ the right to life,⁶⁸ the right to human dignity,⁶⁹ the right to have access to social security,⁷⁰ the right to have access to housing⁷¹ and shelter,⁷² the right to have access to food and nutrition,⁷³ the right to have access to water,⁷⁴ and the right to just administrative action.⁷⁵

Although not absolute,⁷⁶ these rights have proved instrumental in the development of social security in South Africa. For example, they have been invoked successfully on a number of occasions to challenge unfair and unjustifiable discriminatory practices,⁷⁷ administrative injustice or unfairness,⁷⁸ and the failure by the state to implement social security measures.⁷⁹

2.1.4 International and comparative law

South African courts are now obliged to consider international law,⁸⁰ which includes binding and non-binding law.⁸¹ The Constitution also empowers the courts to consider foreign law.⁸² These provisions are



important given that South Africa emerged from an oppressive regime and therefore needs to learn from the constitutional jurisprudence of other countries. The Court has, as a matter of fact, exercised its discretion on a number of occasions and has referred to foreign laws and court decisions.⁸³ Nonetheless, it has cautioned that courts must be mindful of the “different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being”.⁸⁴

2.2 Social assistance

Several laws make provision for tax-financed benefits in South Africa. Collectively referred to as social assistance statutes or laws in this study, they include:

1. *The Social Assistance Act*:⁸⁵ This Act was promulgated mainly to provide for social assistance, the mechanism for the provision of such assistance and for the establishment of an inspectorate for social assistance.⁸⁶ It is supported by the South African Social Security Agency Act,⁸⁷ *Regulations*⁸⁸ and *Notices*⁸⁹ issued by the Minister of Social Development. It should be noted that the Social Assistance Act repealed the Social Assistance Act 59 of 1992 to consolidate the law in this area.⁹⁰ Since it came into operation on 1 April 2006, the current Social Assistance Act has been amended twice.⁹¹
2. *The Military Pensions Act*:⁹² The primary objective of this Act is to provide for the payment of pensions and gratuities to people disabled or whose disabilities were aggravated by military service. It also provides for the medical treatment of such people.⁹³ This Act came into force on 30 June 1976. Since then it has been amended no fewer than 14 times.
3. *The Special Pensions Act*:⁹⁴ This Act is mainly concerned with the payment of special pensions to people who made sacrifices or served in the public interest in the fight for democratic change in South Africa.⁹⁵ It has been amended four times since it came into force on 1 December 1996.



2.3 Social insurance

Social insurance is provided for by a number of laws. Chief among these are:

1. *The Compensation for Occupational Injuries and Diseases Act (COIDA)*:⁹⁶ The principal goal of this Act is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.⁹⁷
2. *The Unemployment Insurance Act (UIA)*⁹⁸ and the *Unemployment Insurance Contributions Act (UICA)*:⁹⁹ These Acts deal specifically with unemployment insurance in South Africa. The UIA has been enacted, *inter alia*, to establish the Unemployment Insurance Fund (UIF); provide for the payment from the fund of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependants' benefits related to the temporary unemployment of such employees; and provide for the establishment of the Unemployment Insurance Board (UIB), the functions of the board and the designation of the Unemployment Insurance Commissioner.¹⁰⁰ The UICA, on the other hand, was enacted to provide for the imposition and collection of contributions for the benefit of the UIF and to provide for procedures for the collection of such contributions.¹⁰¹
3. *The Pension Funds Act*:¹⁰² The primary aim of this legislation is to provide for the registration, incorporation, regulation and dissolution of pension funds. It has been amended more than 40 times since 1958.
4. *The Medical Schemes Act*:¹⁰³ The main purpose of this Act is to consolidate the laws relating to registered medical schemes; to provide for the establishment of the Council for Medical Schemes as a juristic person; to provide for the appointment of the Registrar of Medical Schemes; to make provision for the registration and control of certain activities of medical schemes; to protect the interests of members of medical schemes and to provide for measures for the coordination of medical schemes.¹⁰⁴
5. *The Road Accident Fund Act*:¹⁰⁵ This Act provides for the establishment of the Road Accident Fund. It has been amended no fewer than five times since its commencement on 1 May 1997.¹⁰⁶



2.4 Social assistance and social insurance laws: Preliminary observations

The following preliminary observations can be made regarding the laws listed above:

1. Legal provisions regarding social security are not contained in a single piece of legislation. Instead, they are contained in several statutes which have been enacted at different times.
2. The social assistance laws provide the legal framework fulfilling the constitutional obligation¹⁰⁷ to provide access to social assistance to those individuals who are unable to support themselves and their dependents.¹⁰⁸ The statutes set out financial, administrative, and adjudication and enforcement mechanisms for social assistance.
3. These laws need to be revisited and amended or repealed so that they reflect changing social needs. However, to avoid the proliferation of laws, comprehensive legislation is needed to deal with social security in a holistic manner.

2.5 Legislative framework: Some key challenges

2.5.1 Influx of new (social security) laws

As has been noted above, many new social security laws, rules and regulations have been adopted in South Africa in the last decade. Most of these laws remain unknown to the people. As some of these laws are in the form of amendments, it is at times difficult to know what version of the law is in force.¹⁰⁹ This problem was noted in *Cele v South African Social Security Agency and 22 Related Cases (Cele case)*:¹¹⁰

[In] the field of social assistance in South Africa the primary and secondary legislations is as labyrinthine as it apparently is in the United Kingdom and the entitlement of any applicant to relief flowing from a failure on the part of the Minister of Social Development or SASSA may well be complex. All this can only serve to emphasise the necessity for those lawyers who practise in this area of the law to be thoroughly familiar with the applicable legislation, both primary and secondary and to ensure that it is properly placed before the Court in a coherent form when the need for litigation arises.



2.5.2 Conflicts between various laws

A plurality of laws dealing with one field normally raises the problem of conflicts in the provisions of the law. This has been experienced in the field of social security. The successful constitutional challenge of the exclusion and marginalisation of non-citizens with permanent residence status and their children from social assistance benefits is a case in point.¹¹¹ There is therefore a need to systematise the various laws governing the social security framework.

2.5.3 Access to information

Although the Constitution and Promotion of Access to Information Act 2 of 2000 recognise the right of access to information,¹¹² there is no (direct) legal obligation in the social security legislation on any specific organ of state to inform the public about their rights and obligations concerning social security, the available benefits and the qualifications for accessing those benefits. Because of the absence of such an obligation, social security institutions have undertaken awareness campaigns on a discretionary and piecemeal basis.¹¹³ Without such awareness, deserving potential beneficiaries cannot know about their rights and how to enforce them. Thus, it is important that social security institutions be legally obliged to inform citizens of their rights and obligations. They could do so by means of fact sheets, brochures or awareness campaigns.

2.5.4 Legal and financial resources

Although the law provides ways and mechanisms through which individuals can challenge the legality of their exclusion from certain social security schemes, ordinary people find it difficult to navigate through the complex social security legislative framework. They need guidance from experts, whose services require resources which are not readily available to the poor. Alternatively, they could enlist the assistance of non-governmental organisations such as the Legal Resource Centre and paralegals. To this end, it is important that the social security system is simplified and made more accessible to people and administrators alike. In addition, the mechanisms for resolving disputes and complaints about social security should be made more accessible by simplifying the procedures and providing legal aid to the indigent.¹¹⁴



2.6 Interim conclusion

As shown in the preceding discussion, the South African social security legislative framework is haphazard. It has to be systematised and harmonised in one comprehensive Act. This is important because it will avoid inconsistencies, improve administration of the social security system and, most importantly, contribute to the expansion of access to social security.

3 INSTITUTIONAL AND ADMINISTRATIVE FRAMEWORK

The institutions responsible for the administration of social security in South Africa are divided between the government and the private sector.¹¹⁵ The government is responsible for the administration of both statutory social assistance and several social insurance schemes, while private institutions are involved in the administration of private social insurance schemes.¹¹⁶ This section deals mainly with the administration of social assistance and social insurance schemes by the government.

3.1 Social assistance

3.1.1 The administration of social assistance by provincial governments

Before the establishment of the South African Social Security Agency (SASSA),¹¹⁷ social assistance benefits were administered by the provincial departments responsible for social development¹¹⁸ in each of the nine provinces.¹¹⁹ These benefits were financed by the provincial legislatures.¹²⁰ The responsibility for provincial governments to administer social assistance schemes arose from a proclamation by the then State President¹²¹ assigning the administration of (almost the whole of) the Social Assistance Act 59 of 1992 to provincial governments. However, this proclamation was declared unconstitutional and invalid by the Court in *Mashavha v President of the Republic of South Africa and Others*.¹²²

Provincial departments are directly supervised and controlled by specific ministries; they are staffed by civil servants who can be trans-



ferred to other departments; and, since they are not incorporated, they do not invest funds in their own name.¹²³

The administration of social assistance schemes in most provinces was fraught with problems. Chief among them were the following:

1. *The failure to observe the rules of administrative law*: Some provincial departments responsible for the administration of social assistance incurred substantial financial losses due to a string of court cases¹²⁴ which found them responsible for the failure to observe the fundamental rules of administrative justice.¹²⁵
2. *Inefficiency*: The levels of service rendered by some of the provincial social services departments were appalling.¹²⁶ Staff were accused of rude and abusive behaviour, lacking customer-service skills and showing no serious commitment to their work.¹²⁷ Applications for grants also took inordinately long to be processed.¹²⁸
3. *Corruption and fraud*: This is one of the most enduring problems that has faced the administration of social assistance benefits. Any beneficiaries who did not qualify were receiving the social grants because of fraud and corruption. In some provinces there were reported cases of officials receiving social assistance benefits on behalf of deceased beneficiaries.¹²⁹
4. *Fragmentation of services*: The fragmentation of services was not a new problem because it had already been highlighted in 1997.¹³⁰ Fragmentation of services has a negative effect on service delivery.¹³¹

3.1.2 The administration of social assistance by the South African Social Security Agency

SASSA, which became operational in 2006, is the institution currently entrusted with the administration of the South African social assistance programme.¹³² The national Department of Social Development performs a regulatory role. It also sets the policy framework for who qualifies for social assistance grants and the norms and standards for social assistance grants administration.¹³³

As it is a creature of statute,¹³⁴ SASSA is a *juristic person*. It is headed by a Chief Executive Officer¹³⁵ who reports directly to the Minister of Social Development.¹³⁶

SASSA is a relatively new institution. However, it has already taken steps to eliminate the administrative problems referred to above.



For example, SASSA reports that the turnaround for grant applications has been reduced: between April 2007 and March 2008 the Eastern Cape reduced its average turnaround from 29 to 12 days, while the Western Cape has already introduced a one-day turnaround for grant applications in eight of the 16 local offices.¹³⁷ According to SASSA:

*21 588 ineligible public servants [were] removed from the social grants system; 7 195 of these public servants [were] prosecuted and convicted; 1 948 private individuals [were] also prosecuted and convicted; [and] 15 081 public servants signed acknowledgement of debts totalling 83 million.*¹³⁸

Notwithstanding these notable achievements, some problems have proved hard to eradicate.¹³⁹ These include:

1. *Corruption and fraud:* Corruption and fraud rank high among the concerns of SASSA. There are reports that syndicates which previously targeted provincial departments responsible for social assistance have simply transferred their activities to SASSA.¹⁴⁰ The problem of corruption and fraud is compounded because the finance department responsible for detecting social grant fraud has “an alarming vacancy rate of 49.2% – out of 366 vacancies only 186 are filled”.¹⁴¹
2. *Litigation:* Although not as many as during the pre-SASSA days, law suits are still filed by potential social assistance beneficiaries against SASSA.¹⁴² There are also reports of unscrupulous lawyers in some provinces (eg KwaZulu-Natal) who take advantage of the situation.¹⁴³ According to the Minister of Social Development, there has been a decline in litigation by prospective beneficiaries.¹⁴⁴ This development is to be welcomed. On one hand, the mere fact that cases are filed against SASSA to enforce social security entitlements suggests that (some) prospective beneficiaries know their rights.¹⁴⁵ On the other hand, litigation is costly for both the beneficiaries and prospective beneficiaries of the social grants and the state. This is because the money spent on litigation by the state could be deployed to social assistance programmes. Moreover, poor people do not have the resources to maintain law suits. It therefore follows that litigation should as far as possible be avoided by improving the efficiency and effectiveness of the social security system.



3. *Poor levels of service:* Inefficiency is still endemic in the administration of social assistance.¹⁴⁶ This is most pronounced in the former Bantustans, where officials are particularly lacking in skills.¹⁴⁷
4. *Abuse of the social grant payment system by some of the service providers:* Some beneficiaries have been victims of the payment system. The system whereby the social grants recipients are given payslips which they cash at certain shops is the case in point. Some shop owners have abused this system. For example, recent reports have revealed that some shopkeepers in the Northwest Province compel pensioners to spend part of their grant in their stores if they wish them to cash their payslips.¹⁴⁸ SASSA has to act promptly and decisively against such service providers. In the past some provincial departments took legal action against third parties contracted to pay grants who violated their contractual obligations.¹⁴⁹ These third parties have an obligation to ensure the effective payment of social grants to beneficiaries.¹⁵⁰ If they fail in this obligation, they should be fined.¹⁵¹

3.2 Social insurance

Social insurance is chiefly administered by public institutions. Some of these institutions were created by an Act of Parliament and are directly supervised by the responsible ministry.¹⁵² They include the Road Accident Fund (RAF), the Compensation Fund and the Unemployment Insurance Fund (UIF).¹⁵³ These institutions are run as though they are part of the conventional civil service structure.¹⁵⁴ This is unfortunate because these institutions require “a high degree of operational flexibility”¹⁵⁵ for them to discharge their functions effectively and efficiently.

3.2.1 Operational direction

Social insurance schemes are administered by a commissioner or chief executive officer (CEO), appointed by the applicable minister. They report directly to the director-general of the relevant government department. In addition, social insurance schemes have boards. The role of these boards is normally spelled out in the laws that establish them. For instance, the duties of the Unemployment Insurance Board (UIB) are stipulated in the UIA. The UIB has a duty to advise the



minister on unemployment insurance policy, policies arising out of the application of the UIA, policies for minimising unemployment, and the creation of schemes to alleviate the effects of unemployment.¹⁵⁶ It also has an obligation to make recommendations to the minister on changes to legislation concerning unemployment policy or unemployment insurance policy.¹⁵⁷

3.2.2 Administrative problems experienced by social security institutions

Although the South African social insurance system is one of the better developed social insurance systems in Africa, there are several administrative challenges that have to be addressed. These challenges include:

1. *Insolvency*: Some of the social insurance schemes have recovered their solvency, whereas others would have long been declared insolvent had they not been public entities. The UIF which was “technically insolvent” is now in the black. Likewise, the liabilities of the RAF exceed its assets.¹⁵⁸ The National Treasury rightly conceded that the RAF’s “accumulated deficit of R20.2 billion in 2006/07 is a clear indication that further reforms are needed.”¹⁵⁹
2. *Fraud and corruption*: Most social insurance schemes are plagued by problems such as fraud and corruption. The RAF is arguably the worst affected.¹⁶⁰
3. *Fragmented policy-making*: As shown above, policy-making in the social insurance sphere is fragmented, which is not conducive to the development of a coherent policy framework.¹⁶¹

3.3 Developing an integrated social security institutional and administrative framework

3.3.1 The purpose of the South African Social Security Agency

The objects of SASSA are threefold: “to act, eventually, as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance; serve as an agent for the prospective administration and payment of social security; and render services relating to such payments.”¹⁶² The Taylor Committee envisioned that SASSA would have the following functions:



- to manage the non-contributory social assistance fund, including budget determination and grant administration;
- to oversee all social insurance funds operating in South Africa; and
- to serve as an intermediary between the general public and all areas of the social security system, including all relevant government departments (for example, Home Affairs) or social assistance and social insurance institutions (for example, UIF and COIDA).¹⁶³

3.3.2 Advantages of an integrated agency

In light of the proposed functions, it could be argued that the Taylor Committee envisaged that SASSA would be the hub of the social security system. However, SASSA is yet to incorporate social insurance and intermediary services in its activities. This is the case despite the use of the concept “social security” in the name of SASSA and in its enabling statute, the South African Social Security Agency Act.¹⁶⁴ “Social security”, as acknowledged by the Act,¹⁶⁵ encompasses both “social assistance” and “social insurance”.¹⁶⁶

Entrusting SASSA with the overall responsibility of coordinating and administering the social security system in South Africa has a number of advantages. First, this idea dovetails with the government’s structurally differentiated but unified public sector approach to service delivery.¹⁶⁷ Second, it “should significantly enhance overall efficiency, effectiveness and service delivery to the poor.”¹⁶⁸ Third, it will minimise the overall costs associated with the administration of the social security system.¹⁶⁹ Fourth, the consolidation of the present institutional and administrative capability (that is, by integrating current capacities and human resources) will contribute to “higher levels of operational management and standards in service delivery.”¹⁷⁰ Fifth, an integrated system will promote improved cooperation and partnership between government departments involved in the provision of social security services.

It therefore follows that in its quest to develop an integrated institutional and administration framework in South Africa, the state must make firm commitments to specified time frames and develop SASSA into a one-stop shop as envisaged by the Taylor Committee.



3.3.3 Some operational observations

The one-stop shop model presupposes that the front-desk or point-of-contact personnel are fully conversant with all the services and/or benefits on offer and have access to the database of all the schemes administered. It is therefore crucial that SASSA develops comprehensive and integrated databases and trains its employees so that they have thorough knowledge of public relations and in-depth knowledge of the social security system.¹⁷¹ One of the benefits of an integrated database is fraud detection.¹⁷² It must be acknowledged that an integrated database may pose threats to the right to privacy and violate the principle of confidentiality.¹⁷³ However, this issue is adequately covered in social security laws. For example, the UIA makes provision for the maintenance of a database¹⁷⁴ as well as data protection.¹⁷⁵ In addition, the South Africa Social Security Agency Act makes provision for the security of confidential information held by SASSA.¹⁷⁶

It is important for the operational efficiency and accountability of SASSA that employers and workers are represented on its board.¹⁷⁷ As the Taylor Committee recommended:

*The existing social insurance funds require a reconsideration of their governance structure to ensure operational efficiency. It is recommended that new decentralised governance structures be introduced for existing and future social insurance structures, and that they ultimately report to the Social Security Board (although policy responsibility for particular funds will remain with designated ministers, e.g. the policy environment for the Unemployment Insurance Fund will be determined by the Minister of Labour).*¹⁷⁸

4 SCOPE OF COVERAGE

This section deals specifically with the extent to which protection is provided by the social security schemes or programmes. It spells out which groups and categories of people qualify for social security benefits and which do not. The discussion will focus on both social assistance and social insurance. The unemployment insurance scheme and employment injuries and diseases scheme are used to illustrate certain points made in connection with access to social insurance. It



should be noted that these schemes are employment-based public insurance schemes. At the end of this section are some thoughts on how access to social security may be enhanced in South Africa.

4.1 Social assistance

Social assistance in South Africa is financed from the general government revenues and is available to those who fail a means test and/or meet certain age requirements.¹⁷⁹ Social assistance grants are paid to war veterans, certain categories of aged persons, persons with disabilities and certain children. These grants are normally called: old age grant, disability grant, war veterans' grant, child support grant, care dependency grant, foster child grant and grant-in-aid. Apart from these grants, a social relief of distress may be payable to certain qualifying individuals.

4.1.1 Territorial field of application

Access to social assistance benefits is uneven among provinces in South Africa. As shown in Table 4, in June 2008 provinces such as KwaZulu-Natal, the Eastern Cape and Limpopo had higher numbers of social assistance recipients than other provinces. These disparities can be traced back to the old South Africa. As pointed out earlier, provinces such as the Eastern Cape and Limpopo were the most neglected by the old regime. They still have enormous socio-economic problems, including poverty, high levels of unemployment, poor infrastructure, and lack of skilled labour, which will take time to be resolved completely.¹⁸⁰

4.1.2 Beneficiaries

As a rule, entitlement to social assistance benefits, as provided for in the Social Assistance Act, is restricted to citizens¹⁸¹ and permanent residents.¹⁸² A non-citizen who is resident in South Africa may claim a benefit under this Act if the country of his or her citizenship concludes an agreement¹⁸³ with South Africa making provision for such a claim.¹⁸⁴ Although the Social Assistance Act does not expressly say so, such a bilateral agreement could be based on reciprocity.¹⁸⁵ Alternatively, the agreement may provide for the financial arrangements



necessary for the provision of such grants and how the states will reimburse each other.

4.1.3 Limited scope of coverage

Access to social assistance is limited in a number of ways. First, the applicant must pass the means test. The major challenge with the means test is that it has to be properly administered. If not, it could dissuade people from accessing the social assistance benefits, discourage individuals from saving, and serve as a disincentive to work.¹⁸⁶ Thus, the Department of Social Development has proposed that the “old age grant should be reconstituted from a means-tested social assistance programme to a universal non-contributory benefit available to all citizens and qualifying residents”.¹⁸⁷ Such a universal scheme would extend to everyone “regardless of their employment status and work history”.¹⁸⁸ The National Treasury has acknowledged the problems associated with the means test. However, it has noted that the costs of fully eliminating the means test would be very high. To deal with this, it has proposed a phased adjustment of means test to narrow the gap between “the grant exclusion levels and the thresholds applicable to personal income tax”.¹⁸⁹

Second, prospective beneficiaries have to comply with the age requirement. For instance, a qualifying child must be under 14 years to access the child support grant. This requirement effectively marginalises indigent children above the age of 14 years.

There are, however, some positive developments concerning the child support grant. It will be extended to children up to their fifteenth birthday with effect from 1 January 2009.¹⁹⁰ This is a positive step towards the ultimate goal of expanding the child support grant to all children under 18, as was recommended by the Taylor Committee.¹⁹¹

In terms of the old age grant, a female applicant must be at least 60 to qualify. Until recently, male applicants had to be older than 65 to qualify. The government will relax the age requirement for men in phases: from 65 to 63 in 2008, from 63 to 61 in 2009 and from 61 to 60 by 2010.¹⁹² This reduction is part of the government’s quest to equalise the eligibility requirements for both male and female applicants for the old age grant. It comes after years of criticism of the sex and gender based discrimination caused by this disparity and also a court challenge whose judgment is yet to be delivered.¹⁹³



Another point is that the effect of the old age grant on the intended beneficiaries is diluted because it is usually used for the welfare of the entire family.¹⁹⁴ To resolve these problems, the Basic Income Grant,¹⁹⁵ “workfare” programmes¹⁹⁶ or unemployment assistance¹⁹⁷ are necessary because they cater for those needy unemployed individuals who are currently excluded from the social assistance scheme. Accordingly, social security reforms must attempt to reinforce and encourage labour market participation and not social security dependency.¹⁹⁸

Social grants are more accessible in urban areas than in rural areas mainly because of the lack of infrastructure in the rural areas for administering these grants. This invariably results in the exclusion and marginalisation of those who do not have the means to travel to urban areas to apply for the grants. The situation is exacerbated by illiteracy and the lack of information in rural areas.¹⁹⁹ To resolve this problem, SASSA launched the Integrated Community Registrations Outreach Programme (ICROP) which entails “the deployment of 40 mobile offices in the rural and deep rural areas of [South Africa]”.²⁰⁰ However, this is a temporary solution, and even so, it leads to “the depletion of human resource capacity at local offices, as some of the existing staff members [are] deployed to mobile offices”.²⁰¹ A longer term solution would be to establish permanent offices in rural areas and employ more personnel to support the ICROP.

One of the main problems applicants for social grants face relates to the prescribed documentation which must accompany their applications. Many applicants cannot access social grants because of delays experienced when obtaining birth certificates and identity documents from the Department of Home Affairs. To its credit, SASSA has, as of 1 June 2008, accepted social grants applications from eligible individuals experiencing difficulties in obtaining the requisite identity documents and birth certificates. This development is a result of the High Court judgment in *Alliance for Children’s Entitlement to Social Security (ACCESS) v Minister of Social Development*,²⁰² where the High Court ordered the Minister of Social Development to implement regulation 10(6) of the Regulations in terms of the Social Assistance Act, 2004 immediately.²⁰³ This regulation empowers SASSA to accept alternative proof of identification of the applicants for social grants. Although this regulation may be abused by fraudsters, it will help many South Africans who could not access the social grants because of the lack of identity documents.



4.1.4 Sustainability of the social assistance programme

The number of social assistance beneficiaries had grown from 3.6 million beneficiaries in April 2001²⁰⁴ to 12.5 million beneficiaries by the end of June 2008.²⁰⁵ In addition, the expenditure on social assistance is predicted to rise to R75.3 billion in 2009.²⁰⁶ Although some commentators have argued that the monetary value of each social grant is low,²⁰⁷ the social grants' value increased consecutively on an annual basis in the preceding years.²⁰⁸ These statistics clearly demonstrate that more people are now accessing the social grants, particularly the old age grant,²⁰⁹ in South Africa.²¹⁰ The concomitant increase in expenditure, however, raises the problem of the sustainability of the social assistance scheme. To ensure sustainability, "a better balance needs to be struck between fighting poverty through cash transfers, and broad-based development and opportunities for the poor to participate productively in the mainstream economy".²¹¹

Table 4: Number of grants by grant type and province, as at 30 June 2008

Province	Grant type							
	Care dependency	Child support	Foster care	Disability	Older persons	War veterans	Grant-in-aid	Total
E. Cape	19 274	1 488 704	90 356	224 877	425 882	228	5 938	2 255 259
Free State	4 164	457 571	48 326	114 167	136 121	45	744	761 138
Gauteng	12 780	966 876	58 605	151 109	279 655	477	635	1 470 137
Kwa Zulu-Natal	30 640	2 122 079	108 065	424 224	468 628	294	15 159	3 169 089
Limpopo	11 912	1 278 162	49 739	122 472	359 786	159	4 379	1 826 609
Mpumalanga	5 396	660 385	24 990	84 769	159 650	69	865	936 124
N. Cape	3 628	183 767	15 086	49 374	57 550	72	3 061	312 538
North West	8 474	637 609	37 680	100 956	191 836	69	1 866	978 490
W. Cape	7 526	478 706	28 726	144 893	176 363	443	7 349	844 006
Total	103 794	8 273 859	461 573	1 416 841	2 255 471	1 856	39 996	12 553 390

Source: South African Social Security Agency Statistical Report on Social Grants: Report 7 (30 June 2008) (South African Social Security Agency (2008)) 5.



Table 5: Value of social grants by type of grant, July 1998 to April 2008

Type of grant	Rand value of grants, per month, with effect from											
	Jul '98	Oct '98	Jul '99	Jul '00	Jul '01	Oct '02	Apr '03	Apr '04	Apr '05	Apr '06	Apr '07	Apr '08
Older persons	490	500	520	540	570	640	700	740	780	820	870	940
War veterans	508	518	538	558	588	658	718	758	798	838	890	960
Disability	490	500	520	540	570	640	700	740	780	820	870	940
Grant-in-aid	90	90	94	100	110	130	150	170	180	820	200	210
Foster child	350	360	374	390	410	460	500	560	590	590	620	650
Care dependency	490	500	520	540	570	640	700	740	780	180	870	940
Child support	100	100	100	100	110	140	160	170	180	190	200	210/ 220*

Sources: *National Treasury of South Africa (2005: 55); National Treasury of South Africa (2004: 72); Social Assistance Act 59 of 1992: Increase in respect of social grants, GG 28672, 31 March 2006 and Social Assistance Act 13 of 2004: Increase in respect of social grants, GG 30934, 1 April 2008.*

Note: The old age grant, child support grant, disability grant and care dependency grant were all increased by R20 pursuant to the Medium Term Budget Policy Statement of 21 October 2008.

* The child support grant was, prior to the Medium Term Budget Policy Statement, increased by a further R10 on 1 October 2008 to R220.

4.2 Social insurance

4.2.1 Territorial field of application

The South African social insurance laws apply within the geographical borders of South Africa. For example, in *Unemployment Insurance Board v Dietrich*,²¹² a case decided under the previous Unemployment Insurance Act, the Court held that a contributor who is unemployed by reason of illness is not entitled to an illness allowance during the time he or she is outside the Republic of South Africa.²¹³ However, the unemployment insurance laws (UIA and UICA) could apply to the benefit of non-citizens who are resident in South Africa, in terms of the Unemployment Convention 2 of 1919.²¹⁴ This Convention requires



member states to treat non-citizens on the same basis as citizens regarding access to unemployment insurance. Although South Africa is a party to the Convention, it has not yet entered into bilateral or multilateral agreements to facilitate the payment of unemployment insurance to non-citizens of the contracting states.

The Compensation for Occupational Injuries and Diseases Act does, however, make provision for compensation for accidents that took place outside South Africa. COIDA applies to employees who are ordinarily employed in South Africa but are employed outside the country on a temporary basis by an employer who carries on business chiefly in South Africa.²¹⁵ The employees must not be employed outside South Africa for a continuous period of more than 12 months unless the employee, employer and commissioner reach an agreement to the contrary.²¹⁶ Compensation is awarded as if the accident occurred in South Africa and is calculated on the basis of the earnings the employee would have received in South Africa.²¹⁷ An employee entitled to compensation in terms of the COIDA and in terms of the law of the country in which he or she was employed is free to choose the law under which he or she institutes a claim. He or she may claim compensation under the COIDA or the law of the other country. Nevertheless, he or she is required by law to give the commissioner written notice of his or her decision.²¹⁸

4.2.2 Personal field of application

The personal field of application of social insurance schemes is largely regulated by individual social insurance laws. For instance, the UIA and UICB do not apply to persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any agreement or undertaking that such persons must leave the country, or that such persons be repatriated upon termination of the contract. At the same time, COIDA permits an employer who carries on business chiefly outside South Africa to make arrangements with the Compensation Commissioner to cover their employees who are temporarily engaged in work in South Africa.²¹⁹ After 12 months' continuous employment in South Africa, these employees are regarded as being ordinarily employed in South Africa.²²⁰



4.2.3 Main areas of concern

4.2.3.1 Limited scope of coverage

Social insurance schemes (such as the unemployment insurance scheme and workers' compensation scheme) cover individuals (and their families) employed in the formal sector. Consequently, informal sector workers, part-time workers, casual and temporary workers are often excluded. In addition, these schemes are not consistent in their coverage. For example, domestic workers are covered under the unemployment insurance scheme but excluded from the workers' compensation scheme.

The following factors influence the extent of the coverage of social insurance schemes:

1. *Employer-employee relationship*: Access to most social insurance schemes (eg unemployment insurance) is often dependent on the existence of an employer-employee relationship. One needs to be an "employee" to be eligible for these schemes. Consequently, self-employed people and independent workers, for example, are not covered by most social insurance schemes.
2. *Lack of compulsory affiliation*: In South Africa there is no statutory duty to belong to contributory schemes such as pensions and provident funds. This is unfortunate because "in the long run, individuals who could have financially secured themselves against old age will eventually require state-provided old age social assistance".²²¹ Consequently, the Taylor Committee recommended that "all people employed in the formal sector (including all casual and part-time workers) be required to contribute a prescribed minimum percentage of their income for retirement saving".²²² The benefits of compulsory contribution are two pronged:

*First, where the financing of minimum anti-poverty pensions relies on the revenue collected by the general pension scheme, there must be no possibility for individuals to opt out to avoid their share if supporting those on low incomes: the burden must be equitably spread over a large non-poor population. Second, and perhaps more important, is the fear that a large part of the population are myopic. There is substantial evidence that, left to themselves, many individuals will be too short-sighted to save enough for their retirement and will become a burden on the State when, given a push, they could have contributed sufficiently for their retirement.*²²³



3. *Restricted family concept*: The notion of “family” in its narrowest sense includes the father, the mother and the children.²²⁴ South African social security laws (for example, the Unemployment Insurance Act 63 of 2001) tend to use this nuclear conception of the family.²²⁵ In Africa, the term “family” has a broader meaning. According to Isizoh:

*It comprises a whole group of persons: the head of the family with his wives and his children, and grandchildren, and also his brothers and his sisters with their wives and children, his nephews and nieces, in a word, all those persons who descend from a common ancestor.*²²⁶

This definition means that dependants of a deceased contributor may be considered as part of the family of a contributor or an employee. However, most social insurance schemes in South Africa only cover the immediate or nuclear family and exclude other dependants.

4. *Limited notion of work*: The problem with the limited concept of work has been summarised by Olivier and Mpedi as follows:

*One of the major concerns regarding the definition of ‘work’ is the inherent prejudice it carries towards women. Women perform various forms of unpaid labour in order to sustain the household. However, these forms of labour are not recognised as ‘work’ for social security purposes. Some writers argue that the (social security) value placed on the productive and reproductive roles fulfilled by women should be increased. This will be possible only once the formal economy recognises that reproductive and unpaid work performed by women is also economic activity, albeit in the ‘care economy’.*²²⁷

4.2.3.2 (In)adequacy of benefits

The monetary value of the benefits provided under social insurance schemes is generally low,²²⁸ mainly because the government set low contribution rates.²²⁹ This was done because of meagre wages paid to workers.²³⁰ To increase the benefits, the government would need to increase the contribution rates. As Kaseke has argued:

Unrealistically low contribution rates often result in inadequate benefits. The harsh economic climate also makes governments reluctant to review the contribution rates not necessarily out of



*concern for the negative impact on disposable incomes but out of consideration of possible political ramifications. Furthermore ... the ceiling for insurable earnings is very low This is despite the fact that a state of hyper inflation has been pushing up salaries on a yearly basis. Consequently, the contributions will not purchase any meaningful benefits and this is likely to condemn many of the beneficiaries to a life of poverty.*²³¹

4.2.3.3 Duration of benefits

The benefits provided by some of the social insurance schemes are available for a short period because they are premised on the assumption that certain social risks they cover are transient. The South African unemployment insurance scheme is a case in point.²³² As Natrass and Seekings assert:

*South Africa's current welfare state regime is premised on the belief that people need support through the state or market only when too young or too old to work, or during brief periods of unemployment (in between long periods of employment when they are able to contribute to unemployment insurance). Similar assumptions in the advanced capitalist economies prior to the 1970s were rooted in the fact that full employment could be maintained, and the life cycle therefore took people from dependence as children to secure employment, to dependence again after retirement. Under apartheid, a similar situation was maintained for white citizens through racial discrimination. In contemporary South Africa, by contrast, many poor citizens spend much of their adult lives outside of formal employment (or formal "self-employment"). Most South Africans of working age outside of formal employment have therefore not been supported by the state or market-based welfare systems. Many have received limited earnings from casual employment and informal sector activity.*²³³

4.3 Coverage: The way forward

4.3.1 Options for extending social security coverage

The people currently excluded from social insurance schemes belong to different groups and categories (for example, unemployed youth, informal sector workers, self-employed people and independent contractors).²³⁴ The reasons for exclusion also vary. Some are excluded



because of lack of skills or job opportunities others, for example, because of physical disability. Accordingly, a one-size-fits-all strategy may not be appropriate. Instead, a multi-pronged approach using different social security strategies (for instance, social assistance and social insurance) is required.

Social security must not only focus on compensation. Social security schemes must endeavour to prevent social risks from occurring.²³⁵ However, social risks are not always preventable. In such a case, compensation is necessary. Nevertheless, compensation must be linked to or followed by measures to (re)integrate the social security beneficiaries into the labour market. As Olivier has explained:

This implies that measures aimed at preventing human damage (such as employment-creation policies; health and safety regulation; preventative health-care) and remedying or repairing damage (e.g. re-skilling or re-training; labour market and social integration) should be adopted as an integral part of the social security system, alongside compensatory measures. In fact, one could only speak of comprehensive coverage and true indemnification, firstly – as part of social security – where reasonable measures have been taken to prevent human damage or to keep such damage to a minimum; secondly, where reasonable steps have been put in place to repair such damage; and thirdly, where reasonable compensation is provided if and to the extent that the damage appears to be irreparable.²³⁶

Regrettably, the prevention and reintegration measures are limited in the South African social security system.²³⁷

To improve the current social security measures,²³⁸ policy-makers need to establish special schemes that cater for specific needs of identified groups or categories of excluded people. Such schemes could include:

1. *Social insurance-type schemes* for, among others, the self-employed and those employed in the informal sector.
2. *Commercial insurance products* targeted at specific categories of the excluded people. These products should be tailored to suit the social needs and the economic situation of the targeted group.
3. *Welfare funds*. This is an innovative way of extending social security to the marginalised (such as the unorganised sector) which



evolved in India. These funds are largely financed by means of earmarked tax levied on the production, sale or export of specified goods. The fund is set up to cater for the needs of those employed in the informal sector (eg self-employed artists). The welfare fund model bypasses, to some extent, the difficulties associated with the extension of “contribution-oriented” or “employer-liability-oriented” social security schemes to the excluded, mainly because it operates outside the employer-employee relationship.

In addition, the existing schemes should be expanded to accommodate the excluded people. This could be done gradually, in the same way as the government has extended the old age grant and child support grant. In the case of the social assistance scheme, the eligibility age could be adjusted to cover those currently excluded. As regards social insurance, one way of integrating excluded groups, such as the self-employed and informal sector workers, into existing social insurance schemes is by introducing voluntary participation (as has been done in such developing countries as Belize and Seychelles). According to Beattie, voluntary coverage may be done through

*subsidization of individual contributions, through tax concessions or matching contributions; support for voluntary schemes, e.g. provision of training for administrators, help with set-up costs, etc; creation of legislative and regulatory framework within which such schemes may operate.*²³⁹

However, the meagre income of many self-employed people and informal sector workers may make it impossible for them to contribute to voluntary social insurance schemes. One way of dealing with this may be to require voluntary (the self-employed or informal sector) contributors to contribute a portion of the employee’s monthly income (eg 1% of the self-employed person’s or informal sector worker’s income in the case of the unemployment insurance scheme). Alternatively, voluntary contributors may be obliged to contribute the employee’s and employer’s portions of the premium: for instance, in the case of unemployment insurance schemes, 2% of the self-employed person’s income may be declared the premium. This option may not appeal to self-employed people and informal sector workers with low incomes.



4.3.2 Extra-territorialisation of social security laws

As pointed out above, the South African social security laws are largely applicable within the South African borders. This may have negative consequences for South Africans residing or posted abroad, particularly in other African countries. The increasing economic presence of South African business in other African countries, where more and more South Africans work, makes the extra-territorialisation of social security laws a pressing matter. The South African social insurance laws should be amended to extend social security coverage against risks such as sickness, maternity, invalidity, old age, employment injury and occupational diseases to South African workers posted abroad, irrespective of whether their stay is temporary or permanent. The question remains whether, in light of the under-developed or un-developed state of social security systems in other developing countries (particularly on the African continent), the South African social security laws can successfully be made applicable in these countries. This is not a serious problem because the application of national social security laws abroad could be achieved unilaterally. In this case the South African laws would operate without reference to the *lex loci laboris* (legislation of the place of employment).

At bilateral level, the few known social security agreements that South Africa has entered into have not yielded any satisfactory results. The labour agreements entered into by South Africa and its neighbours are examples of this. These agreements often made provision for the awarding of compensation for occupational injuries and diseases. Article XXII of the *Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal* made provision for remittance of workers' compensation to the Mozambican government, which would in turn pay the worker concerned. This arrangement has, over the years, proved to be flawed.²⁴⁰ In Mozambique, for example, it has been reported that workers often did not receive their workers' compensation despite the remittal of the funds.²⁴¹ There are also instances in which the amounts paid to workers were lower than those remitted.²⁴² A variety of other difficulties in obtaining compensation for migrants has been documented. These problems include: *delayed payments*, difficulties in *establishing a causal link between an injury or illness and a worker's employment* and difficulty in *determining how benefits are calculated*.²⁴³



5 ADJUDICATION AND ENFORCEMENT

Adjudication and enforcement mechanisms are a fundamental component of any social security system. This is mainly because social security institutions (public or private) play an important role in ascertaining whether an individual should access social security benefits under their jurisdiction or not. In fulfilling this task they are guided by laws (particularly social security laws) and rules and regulations which provide broad discretion. Some administrators succumb to corruption and fraud. As a result, challenges to the decisions made by the administrators are unavoidable. Adjudication institutions, monitoring and enforcement mechanisms have been created to deal with such challenges. Without them, people aggrieved at the system or particular decisions would not be able to enforce their social security rights; corruption and fraud could increase, which might lead to severe financial ruin and, as a consequence, the collapse of the whole security system.

In this section of the paper adjudication and enforcement mechanisms in the South African social security system are discussed.

5.1 Constitutional guarantees

The Constitution protects several rights which are directly relevant to the enforcement of the right to social security. These include the right of access to information,²⁴⁴ the right of access to courts, the right to enforce rights,²⁴⁵ and the rights of arrested, detained and accused persons.²⁴⁶ The Constitution provides every person with a right of access to any information held by the state and any information held by another person required for the exercise or protection of any rights.²⁴⁷ In addition, the Constitution recognises the right to have any dispute that can be resolved by the *application of law* to be decided in a *fair public hearing* before a *court* or, where appropriate, another *independent and impartial tribunal or forum*.²⁴⁸ Every person has the right to approach a competent court to enforce and protect their rights as entrenched in the Bill of Rights whenever they are violated or threatened.²⁴⁹

The following persons may approach a court: anyone acting in their *own interest*; anyone acting *on behalf of another* person who cannot act in their own name; anyone acting in the *public interest*; and an



association acting in the *interest of its members*.²⁵⁰ Furthermore, the Constitution also recognises the right to a fair trial.²⁵¹ This right is relevant to social security adjudication and enforcement when administrators or members of the public are accused of crimes related to social security.²⁵²

5.2 Adjudication and enforcement procedures and institutions

The institutions that can be approached to enforce social security rights and/or duties include the following: *Courts* – Constitutional Court, High Court, Labour Courts and Magistrates Courts;²⁵³ *Boards* – Special Pensions Board, Special Pensions Review Board and Appeals Committee of the Unemployment Insurance Board; *Tribunals* – Pensions Fund Adjudicator and Independent Tribunal in terms of the Social Assistance Act; *Offices* – Public Protector and Auditor General;²⁵⁴ and *Commissions* – Commission for Conciliation, Mediation and Arbitration, and the South African Human Rights Commission.

5.3 The Social Assistance Tribunal

Complaints regarding social security can now be lodged with the Social Assistance Tribunal. Any individual or group of individuals aggrieved by any decision of the SASSA can register such a complaint. The tribunal commenced with its work on 15 May 2008 when the initial members²⁵⁵ were appointed.²⁵⁶ This was long overdue.²⁵⁷

Before the establishment of this tribunal, many commentators argued for a uniform enforcement mechanism for social security. For example, the Taylor Committee proposed that:

*a uniform adjudication system be established to deal conclusively with all social security claims. It should, in the first instance, involve an independent internal review or appeal institution. It should, in the second place, involve a court (which could be a specialised court) which has the power to finally adjudicate all social security matters, and that this court has the power to determine cases on the basis of law and fairness. The jurisdiction of this court should cover all social security claims.*²⁵⁸

However, this tribunal has not been established properly. It has been created pursuant to subsidiary legislation instead of the Social Assist-



ance Act itself.²⁵⁹ Normally, tribunals in South Africa are regulated by statute.²⁶⁰ For example, sections 30B-30X of the Pensions Funds Act 24 of 1956 provide for the office of the pension funds adjudicator.²⁶¹ It is, therefore, recommended that a chapter be incorporated in the Social Assistance Act to provide for the establishment, composition, jurisdiction, procedures and remedies of the tribunal.

Social security tribunals have their pros and cons. According to Nyenti:

*The system of adjudication through independent tribunals separates the administration of social security appeals from the system of court-based justice whilst still maintaining the judicial gravity of courts through legal expertise and the right of final appeal to courts. Criticisms about tribunals centre on the fear that they may provide a lower standard of justice than the courts because they are not required to apply the rules of evidence and there is a reduced use of representation and adversarial procedures. Tribunal members may have less expertise than judges and magistrates, and the high volume and fast turnover of matters may limit the amount of consideration given to each case. The appointment of tribunal members for limited terms may reduce the independence of tribunal members from the executive arm of government.*²⁶²

6 CONCLUSION AND RECOMMENDATIONS

The broad picture that emerges from this paper is that South Africa has a fairly evolved system of social security for a developing country. Even so, its social security provisioning endeavours are inadequate considering the worsening socio-economic challenges such as poverty and inequality, HIV/AIDS and unemployment. A closer examination of specific components of the social security system leads one to the conclusion that it needs an urgent overhaul. Unless this is done, poverty will remain intractable and many will continue to have no access to socio-economic rights in South Africa.

As this paper has shown, those reforming the social security system will need to consider:

1. The Constitution of South Africa is the supreme law of the land. Not only does it recognise the rule of law, it also entrenches certain constitutional values and a range of socio-economic rights. These



- values and rights must underpin all measures aimed at providing and transforming social security in this country.
2. Social security strategies (in respect of both social assistance and social insurance) should go beyond compensation. Accordingly, they must provide for both preventative and remedial measures.
 3. Informal social security and indirect social security should form an integral part of social security.
 4. Reform efforts must be made with the overall aim of progressively realising the right to social security. This means that, on the one hand, social security should be extended to more people and, on the other hand, the level of individual benefit from social security measures should also be increased.

6.1 Recommendations

6.1.1 Law reform

The legislation governing social security in South Africa is haphazard and scattered in a number of Acts. These laws have been enacted, amended and, in some instances, repealed over the years in an unsystematic manner. As a result, there is great uncertainty as to which laws or regulations are actually applicable in a given case. To address this problem, this paper makes the following recommendations:

1. The South African social security laws need to be systematised under one comprehensive Act.
2. The law must specifically oblige social security institutions to raise people's awareness about social security laws and procedures for claiming benefits and enforcing their rights.
3. The law must make provision for legal assistance for poor people who want to enforce their social security rights.

6.1.2 Institutional reform

To address the problems of poor service, fraud and corruption currently facing the South African administrative framework for social security, this paper recommends that SASSA be developed into a one-stop shop, as was proposed by the Taylor Committee. This would ensure coordination and cooperation of all state organs and other stakeholders involved in the provision of social security. The establishment of



SASSA is a step in this direction. However, the state must make firm commitments with specified time frames to develop SASSA into a one-stop shop. Meanwhile, SASSA should prepare by training staff and consolidating the databases of all social security networks.

6.1.3 Coverage

To improve access to social security, a number of new schemes that will cater for the specific needs of identified groups or categories of excluded people need to be introduced. These include social insurance-type schemes to provide for, among others, the self-employed and those in the informal sector; commercial insurance products targeting specific categories of excluded people; and the welfare fund to cater for the needs of informal sector employees.

Excluded people should be brought into existing schemes as well as the new programmes. Provision should also be made for social security for South African citizens living abroad.

6.1.4 Adjudication and enforcement

There is no clear procedure or mechanism for enforcing social security rights. Consequently, complainants follow different routes, which lead to a lack of uniformity in the adjudication and enforcement of these rights.²⁶³ To remedy this problem, a uniform adjudication system is needed which would serve as a first stop before judicial remedies. Such a mechanism would provide for an independent internal review or appeal institution. The advantages are that it would be cheap, fast and more convenient to most beneficiaries and potential beneficiaries of social security, the majority of whom are poor and illiterate.

The recently established Social Assistance Tribunal will significantly improve compliance with the laws on social security by the state. However, this tribunal must be regulated by statute. The Social Assistance Act should be amended to make provision for such things as the composition of the tribunal, tenure of its officers, and its procedure and remedies.



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Notes

- 1 The Committee of Inquiry into a Comprehensive System of Social Security for South Africa [Taylor Committee] (2002a: 15) explains the meaning of “poverty” as follows: “Poverty is usually defined either in absolute or relative terms. In absolute terms, poverty reflects an inability to afford an adequate standard of consumption. In this event, one would use a poverty line, reflecting an income level sufficient to afford adequate consumption, as a point to determine who is poor and who is not. This definition overlooks the distribution of resources in society that often underpins absolute poverty. Thus “relative poverty” refers to the individual’s or group’s lack of resources when compared to that of other members of that society.”
- 2 According to the Taylor Committee (2002a: 16): “Inequality refers to the unequal benefits or opportunities for individuals or groups within a society. Inequality applies both to economic and social aspects, and to conditions of opportunity and outcome. Social class, gender, ethnicity, and locality generally influence inequality.”
- 3 Two definitions of unemployment are identifiable, namely the narrow (or official) definition of unemployment and the expanded definition of unemployment. Statistics South Africa (Statistics South Africa *Labour Force Survey: September 2007* (2007 Statistics South Africa) xxiv) describes the narrow definition of unemployment (sometimes referred to as the strict or official definition of unemployment) as involving a condition (being without employment), an attitude (a desire for employment) and an activity (searching for employment). In accordance with the narrow definition, the “unemployed” are described as those people within the economically active population who did not work during the seven days prior to the interview; want to work and are available for work within two weeks of the interview; and have taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview. The expanded definition of unemployment, unlike the narrow definition, excludes the criterion that an unemployed person must have taken active steps to look for work or to start some form of self-employment in the four weeks prior



to the interview. Accordingly, the expanded definition includes the so-called discouraged work-seekers.

- 4 Frye (2006: 1).
- 5 See Mubangizi and Mubangizi (2005: 278); Noyoo (2004: 362-363) and Woolard (2002).
- 6 Hoogeveen and Özler (2006: 59); Frye (2006: 1) and May (1998).
- 7 See generally Triegaardt (2006).
- 8 *White Paper for Social Welfare* GG 18166 of 8 August 1997, Chapter 1.
- 9 Triegaardt (2006).
- 10 Mpedi (2004a: 248).
- 11 South Africa's unemployment is structural and systemic in nature.
- 12 Statistics South Africa (2007: ii).
- 13 Official unemployment rate by province, September 2007: Western Cape (17.0%); Eastern Cape (23.1%); Northern Cape (25.7%); Free State (24.3%); KwaZulu-Natal (29.1%); North West (24.1%); Gauteng (19.5%); Mpumalanga (22.9%) and Limpopo (27.3%) (Statistics South Africa *Labour Force Survey: September 2007* (Statistics South Africa (2007)) xvii).
- 14 There were ten Bantustan-Homelands in South Africa: Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, QwaQwa, Transkei and Venda. These homelands were established as quasi-sovereign nations under the 1951 Bantu Authorities Act.
- 15 See generally Lahiff (1997).
- 16 Statistics South Africa (2007: xviii).
- 17 The term "youth", in line with the standard ILO definition, "comprises the age-group between fifteen and twenty-four inclusive". See O'Higgins (1997: 1).
- 18 Booyesen and Bachmann (2002).
- 19 See, for example, International Labour Office (2000a: 5-7).
- 20 See, for example, Deininger (2002).
- 21 International Labour Office (2000b: 9).
- 22 See Cohen "Poverty and HIV/AIDS in Sub-Saharan Africa" UNDP Issue Paper No 27. Available at <http://www.undp.org/hiv/publications/issues/english/issue27e.html> (accessed: 28 October 2008).



- 23 See, generally, Valodia (2001) and Valodia (2000).
24 Dekker (2001: 250).
25 See Lund and Sarvinas (2000: 4).
26 See International Labour Office (2001: 25).
27 See, for example, Van Rensburg and Lamarche (2005: 209-212); Olivier (2003: 24-29) and Olivier and Smit (2002: para 15-16).
28 Olivier and Mpedi (2008: 1).
29 International Labour Organization (2000: 29).
30 M Olivier and G Mpedi “Access to social security” in A Govindjee and P Vrancken (eds) *Introduction to Human Rights* (forthcoming, LexisNexis).
31 Midgley (1996: 3).
32 Dixon (1999: 4)
33 Taylor Committee (2002a: 36).
34 Dixon (1999: 6).
35 *Ibid.*
36 Taylor Committee (2002a: 36). Although the Taylor Committee’s definition includes private schemes, in this study particular attention is paid to public schemes.
37 Dixon (1999: 6).
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*
41 See, for example, Jenkins (1993: 4).
42 Asian Development Bank (2008).
43 See, for example, United Nations (2000).
44 *Ibid* 41.
45 Mpedi (2003: 537).
46 See, for further reading on the concept, Olivier *et al* (2004a).
47 See H Gsänger “Linking informal and formal social security systems”. Available at <http://www.inwent.org/ef-texte/social/gsaenger.htm> (accessed: 28 October 2008).
48 Ross and Zacher explain the concept “social legislation” as follows: “Social legislation is law which is characterised by its socio-political aim. In this connection, “socio-political” means in particular: the assurance of a life of human dignity for everyone, the reduction of differing levels of material conditions and the relief or control of economically determined dependence.



However, this concept of social legislation is vague and, in individual cases, doubt remains as to the legal areas it covers. The key area social legislation is *social security law*. Modern thinking identifies social legislation in the main as the right to social benefits, services and payment in kind, granted by the state and local authorities, as well as those responsible for social insurance” (italics in the original). See Ross and Zacher (1982: 9).

- 49 See the Preamble, sections 1(c) and 2 of the Constitution.
- 50 See, for further reading, about the notion of constitutional supremacy, Limbach (2001).
- 51 See, for further reading, about the concept of parliamentary sovereignty, Cowen (1952); Cowen (1953) and Gray (1953).
- 52 Cockrell (1997: 513).
- 53 Corder (1994: 526).
- 54 Section 2 of the Constitution.
- 55 Section 1(c) of the Constitution. De Waal *et al* (2001: 14-15) explain the value of the “rule of law” as follows: “The rule of law ... means the value-neutral principle of legality. It also has implications for the content of law and government conduct. In this regard it has both procedural and substantive components. The procedural component forbids arbitrary decision-making The substantive component dictates that the government must respect the individual’s basic rights. It is not clear what kinds of basic rights will qualify for protection under the rule of law.” See *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85 and *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC). See also Hahlo and Maisels (1966) and Chanock (1987: 271).
- 56 Section 1 of the Constitution.
- 57 Chaskalson (2002: 7).
- 58 Olivier (2003: 61).
- 59 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 23.
- 60 See, for example, section 195(1) of the Constitution.
- 61 Chapter 2 of the Constitution.
- 62 Section 7(1) of the Constitution.
- 63 Section 7(2) of the Constitution.



- 64 Section 8(1) of the Constitution. The Constitution (section 239) defines an “organ of state” as: “(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) performing a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”
- 65 Section 8(2) of the Constitution.
- 66 See section 38 of the Constitution. See De Vos (1997) and De Vos (1995). Also see, for a discussion on who may approach a court in the Constitution, *Ferreira v Levin* 1996 (1) BCLR 1 (CC).
- 67 Section 9 of the Constitution.
- 68 Section 11 of the Constitution. See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). Also see De Waal (2001: 238-245).
- 69 Section 10 of the Constitution. See Chaskalson (2000); De Waal (2001: 230-237) and Davis (1997: 70).
- 70 Section 27(1)(c) of the Constitution.
- 71 Section 26 of the Constitution.
- 72 Section 28(1) of the Constitution.
- 73 Section 27(1) of the Constitution.
- 74 Section 27(1) of the Constitution.
- 75 Section 33 of the Constitution.
- 76 See section 36 of the Constitution.
- 77 See, for example, *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC); *Du Plessis v Road Accident Fund* [2003] JOL 11582 (SCA), *Satchwell v The President of the Republic of South Africa* 2002 (6) SA 1 (CC), *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T), *Martin v Beka Provident Fund* [2000] 2 BPLR 196 (PFA) and *Muir v Mutual & Federal Pension Fund* [2002] 9 BPLR 3864 (PFA).
- 78 See, for example, *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA); *Maluleke v MEC, Health and Welfare, Northern Province* 1994 (4) SA 367



(T); *Rangani v Superintendent General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T); *Mpofu v Member of the Executive Committee for the Department of Welfare and Development in Gauteng Provincial Government* (case no 2848/99, WLD, 18 February 2000) and *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E).

- 79 See, for example, *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) and *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
- 80 The Court has – on a number of occasions – made reference to international instruments in its judgments. See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) (constitutionality of death penalty), *S v Williams* 1995 (5) SACR 125 (CC) (constitutionality of corporal punishment), *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) (constitutionality of imprisonment for judgment debts), *S v Rens* 1996 (1) SA 1218 (CC) (right of appeal), *Ex Parte Gauteng v Provincial Legislature In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 42 (C) (language and religious rights of minorities) and *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (access to housing).
- 81 In addition to section 39(1)(b), section 233 of the Constitution directs every court, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Customary international law is, in terms of section 232 of the Constitution, applicable in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. For further reading, see Van Rensburg and Malan (2001a: 74-87); Van Rensburg (2001b: 114); Dugard (1997); Devine (1995) and Dugard (1994).
- 82 Section 39(1)(c) of the Constitution.
- 83 See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).
- 84 *Park-Ross v Director, Office of Serious Economic Offences* 1995 (2) SA 148 (CC) at 160.



- 85 13 of 2004.
- 86 Preamble of the South African Social Assistance Act. Also see section 3 of the Social Assistance Act.
- 87 9 of 2004. The South African Social Security Agency Act was enacted to “provide for the establishment of the South African Social Security Agency as an agent for the administration and payment of social assistance; to provide for the prospective administration and payment of social security by the Agency and the provision of services related thereto” (Preamble of the South African Social Security Agency Act. Also see section 3 of the South African Social Security Agency Act).
- 88 See, for instance, Regulations in terms of the Social Assistance Act *13 of 2004* GG 27316, 22 February 2005.
- 89 See, for example, Social Assistance Act (59/1992): *Increase in respect of social grants* GG 28672, 31 March 2006 and Social Assistance Act *13 of 2004: Increase in respect of social grants* GG 30934, 1 April 2008.
- 90 Preamble of the Social Assistance Act.
- 91 By the Public Service Amendment Act 30 of 2007 and Social Assistance Amendment Act 6 of 2008.
- 92 84 of 1976.
- 93 Preamble of the Military Pensions Act.
- 94 69 of 1996.
- 95 Preamble of the Special Pensions Act.
- 96 130 of 1993.
- 97 Preamble of the COIDA.
- 98 63 of 2001. By 7 February 2007, the UIA had been amended three times since coming into force on 1 April 2002.
- 99 4 of 2002.
- 100 Preamble and section 2 of the UIA.
- 101 Preamble and section 2 of the UICA.
- 102 24 of 1956.
- 103 131 of 1998.
- 104 Preamble of the Medical Schemes Act.
- 105 56 of 1996.
- 106 Preamble of the Road Accident Fund Act. Also see section 3 of the Road Accident Fund Act.
- 107 See the preambles of the Social Assistance Act and the South African Social Security Agency Act which acknowledge the



constitutional duty imposed on the state to provide access to social security, including social assistance (section 27(1)(c) of the Constitution).

- 108 See section 27(1)(c) and section 27(2) of the Constitution.
- 109 *Ibid.*
- 110 2008 (7) BCLR 734 (D) para 11.
- 111 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC).
- 112 Section 32 of the Constitution and the *Promotion of Access to Information Act* 2 of 2000. For further reading on the Promotion of Access to Information Act, see Currie and Klaaren (2002).
- 113 Schulte (2008: 117).
- 114 See Mpedi *et al* (2003: 128).
- 115 It must be noted, however, that the “informal welfare sector” also plays some role in social security. See item 2 in chapter 3 of the *White Paper for Social Welfare* (GN 1108 in GG 18166 of 8 August 1997).
- 116 For example, medical aid schemes and retirement schemes.
- 117 The South African Social Security Agency (SASSA) was established in terms of the South African Social Security Agency Act 9 of 2004.
- 118 See Mpedi and Kuppan (2004: 228).
- 119 Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, North West, Northern Cape and Western Cape.
- 120 Section 2 of the Social Assistance Act 59 of 1992. This act has been repealed by section 33 of the Social Assistance of Act 13 of 2004.
- 121 GG 16992 of 23 February 1996.
- 122 2004 (12) BCLR 1243 (CC).
- 123 Instead, funds are usually invested on their behalf in the name of the Treasury (thereby giving the Treasury strong influence over investment and supply of funds to government). See Sylva (1989: 43-44).
- 124 See, for instance, C Rickard “Attorney makes a million from welfare department’s blunders” *Sunday Times* 27 August 2000. Available at <http://www.sundaytimes.co.za/2000/08/27/politics/pol12.htm> (accessed: 28 October 2008).
- 125 See *Bacela v MEC for Welfare (Eastern Cape Provincial Gov-*



- ernment) [1998] 1 All SA 525 (E); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); *Rangani v Superintendent General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T); *Mpofu v Member of the Executive Committee for the Department of Welfare and Development in Gauteng Provincial Government* (case 2848/99, WLD, 18 February 2000); *Boshula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E) and *Ngxuza and others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E).
- 126 Mpedi (2004b: 67).
- 127 *Ibid.*
- 128 *Report of the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons*. See *Mothers and Fathers of the Nation: The Forgotten People* Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons (2001) Vol. 2. Available at <http://www.polity.org.za/govdocs/reports/welfare/2001/elderprov.htm> (accessed: 28 October 2008). This problem has been noted by judges in a number of cases. See, for example, *Ngxuza v Permanent Secretary for Welfare* 2002 (1) SA 609 (E) (at 1194G-1195A); *Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* 2005 (6) SA 229 (SE) (para 18); and *Jayiya v MEC for Welfare* 2004 (2) SA 611 (SCA) (para 18), where the Court referred to “the laziness and incompetence which is at the root of the malaise in the Eastern Cape Department of Welfare”.
- 129 South African Human Rights Commission (2004: 30).
- 130 See the *White Paper for Social Welfare*.
- 131 See Mpedi (2004b: 68).
- 132 See sections 3 and 4 of the South African Social Security Agency Act and the Memorandum on the Objects of the South African Social Security Agency Bill B51B – 2003.
- 133 National Treasury of South Africa (2008: 48).
- 134 South African Social Security Agency Act 9 of 2004.
- 135 Section 5 of the South African Social Security Agency.
- 136 Section 6 of the South African Social Security Agency.
- 137 South African Social Security Agency (2008a: 18).
- 138 South African Social Security Agency (2008b).



- 139 In the *Cele* case (paras 16-17), the Court remarked that “the administrative problems that previously existed at provincial level have now been transferred to SASSA at national level. Sadly an examination of the written argument in *Mashavha v President of the Republic of South Africa and Others* 2004 (3) BCLR 292 (T) reveals that this was predicted.”
- 140 “SASSA ‘has not stopped fraud’” *News24*, 27 March 2008. Available at <http://www.news24.com> (accessed: 28 October 2008).
- 141 Semple (2008).
- 142 See, for example, *Motsage v The Chief Executive Officer of the South African Social Security Agency* (case no 1026/08) [2008] ZANWHC 27 (28 August 2008). It should be noted that most of these cases are “hangovers from the former regime” (*Cele* case para 26).
- 143 Parliamentary Monitoring Group (2008). Also see *Cele* case paras 12-14.
- 144 Skweyiya (2007).
- 145 For example, the fundamental right of access to courts (section 34 of the Constitution).
- 146 Parliamentary Monitoring Group (2008).
- 147 *Ibid.*
- 148 M Magome “Some shopkeepers rip off pensioners” *Pretoria News* 3 September 2008, 5.
- 149 See *Cash Paymaster Services (Eastern Cape) (Pty) Ltd v MEC responsible for Social Development* [2007] JOL 20403 (Tk) where the court upheld an order to the effect that Cash Paymaster Services (Eastern Cape) (Pty) Ltd “be interdicted and restrained from: 1.1. using or allowing the pay-points of the Eastern Cape Department of Social Development ... to be used by money-lenders or other vendors ... and 1.2. deducting amounts of money from beneficiaries’ social grant payments at the pay-point(s)”. The court held that it “is in the public interest that the political head of the department responsible for the social welfare of the poor and the people in need act on their behalf when their right to social assistance has been infringed The beneficiaries had a right to social assistance. Their application for social assistance was approved. The Department of Social Development was obliged to pay the full amount



- approved to them. The actual payment was sourced out to the appellant. The sourcing out to the appellant did not affect the right beneficiaries had to be paid the full amount. Any deduction from the full amount amounts to an infringement of the right of the beneficiary.”
- 150 Section 4(3) of the South African Social Security Agency Act.
151 *Ibid.*
152 The UIF is answerable to the Department of Labour; the Compensation Fund to the Department of Labour; and the RAF to the Department of Transport.
153 The UIF was established by the Unemployment Insurance Act, the Compensation Fund by the Compensation for Occupational Injuries and Diseases Act and the RAF by the Road Accident Fund Act.
154 Taylor Committee (2002a: 121).
155 *Ibid.*
156 Section 48(1)(a) of the UIA.
157 Section 48(1)(b) of the UIA.
158 According to the UIF Annual Report, the UIF had an accumulated surplus of R15 430 million as at 31 March 2008 (Department of Labour (2008: 15)).
159 National Treasury of South Africa (2008: 99).
160 See, for example, *The Report of the Road Accident Fund Commission 2002*. Available at <http://www.raf.co.za> (accessed: 28 October 2008).
161 Taylor Committee (2002b: 492).
162 Section 3 of the South African Social Security Agency Act. Also see the Preamble of the South African Social Security Agency Act.
163 Taylor Committee (2002b: 503).
164 See section 2(1) of the South African Social Security Agency Act.
165 Section 1 of the South African Social Security Agency Act.
166 Social insurance, as defined by section 1 of the South African Social Security Agency Act, means “contribution based benefit payments aimed at income maintenance”.
167 Taylor Committee (2002b: 500).
168 *Ibid.*
169 *Ibid.*



- 170 *Ibid.*
- 171 Olivier (2008: 199).
- 172 This is self-evident from the following report by SASSA: “A Memorandum of Understanding (MoU) was signed with the Unemployment Insurance Fund (UIF). The MoU focused on data exchange in order to identify beneficiaries who were receiving grants unlawfully. Data interrogation between Social Security Pension System (SOCPEN) and other institutions like Government Employment Pension Fund (GEPF) and Personnel and Salary System (PERSAL) were conducted and a number of illegal beneficiaries were identified and removed from the system” (South African Social Security Agency (2007: 31)).
- 173 On the protection of personal privacy and of fundamental freedoms in a social security system, see Pieters (2006: 121-124).
- 174 Section 57 of the UIA.
- 175 Section 63 of the UIA.
- 176 Section 16 of the South African Social Security Agency Act.
- 177 See, for example, section 49 of the UIA which deals with the composition of the Unemployment Insurance Board.
- 178 Taylor Committee (2002b: 504).
- 179 The legal framework for social assistance is set out in the Social Assistance Act 13 of 2004.
- 180 See Lahiff (1997).
- 181 Section 1 of the Social Assistance Act defines a “South African citizen’ [as] a person who has acquired citizenship in terms of Chapter 2 of the South African Citizenship Act, 1995 (Act No. 88 of 1995), and includes any person who is (a) not a South African citizen and who prior to 1 March 1996 was in receipt of a benefit similar to a grant in terms of any law repealed by section 20 of the Social Assistance Act, 1992 (Act No. 59 of 1992); or (b) a member of a group or category of persons determined by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*.” It should be borne in mind that chapter 2 of this Act refers to the various ways in which a person can acquire citizenship such as by birth or decent.
- 182 In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) the Court was called upon to decide whether the exclusion of all non-citi-



zens from the social assistance scheme was consistent with the Constitution – particularly the right of access to social security. The Court held that the right of access to social security is a right bestowed by the Constitution on “everyone”. Hence, permanent residents were bearers of this right. The Court ruled that the exclusion of permanent residents from the social assistance scheme was neither reasonable nor justifiable. In addition, it held that the exclusion of non-citizens with permanent residence status from the social assistance scheme unfairly and unjustifiably limited the right to equality. Thus, the Court ordered that the words “or permanent residents” after “South African citizens” be read into the relevant legislative provisions (para 89).

- 183 In accordance with section 231 of the Constitution: “(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic [of South Africa] when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”
- 184 Section 2(1) of the Social Assistance Act.
- 185 Olivier and Smit (2004: 164).
- 186 Mpedi (2008a: 4). Also see National Treasury of South Africa (2008: 94); Johnson and Williamson (2006: 53-55); Alcock (1997: 227-230); and TenBroek and Wilson (1954: 265-266).
- 187 Department of Social Development (2007: 12).
- 188 International Labour Office (2005: 65).
- 189 National Treasury of South Africa (2008: 9).



- 190 Reg. 6(4) of the *Regulations: Application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance* GG 31356 of 22 August 2008.
- 191 Taylor Committee (2002a: 81).
- 192 See section 1 of the Social Assistance Amendment Act 6 of 2008.
- 193 *Christian Roberts v Minister for Social Development and Others*, Case No 32838/05 (TPD).
- 194 Mpedi and Darimont (2007: 18).
- 195 According to the Taylor Committee (2002a: 16 a), the “Basic Income Grant is provided as an entitlement and without a means test that will more readily reach the poorest population”. Also see Mpedi and Fourie (2008: 294-295).
- 196 “Workfare”, which literally means “work for your welfare” and is sometimes referred to as “work for welfare”, started in the United States (Kildal (2001: 3)). Workfare programmes, according to Kildal, “oblige able-bodied recipients to work in return for their benefits on terms inferior to comparative work in the labour market, and are essentially linked to the lowest tier of public income maintenance systems” (Kildal (2001: 3)).
- 197 Unemployment assistance (UA) refers to means-tested and/or asset-tested support which is provided to unemployed persons by the state. This form of assistance, financed from the general government revenue, normally kicks in immediately after an unemployed person has exhausted his or her unemployment insurance benefits. Unemployment assistance is completely different from unemployment insurance benefits: “Payments of UI benefits are intended to smooth income by replacing a portion of an eligible worker’s lost wages attributable to unemployment. Payments of UA benefits are intended to eliminate or reduce poverty among low income families when unemployment occurs. Thus while both make payments occasioned by unemployment, UI goes to persons as a matter of right while UA is paid ... only to [unemployed persons] whose income and assets fall below designed thresholds specified by a means test ... From a macro perspective, UI and UA both make cash payments that respond strongly to cyclical developments. Both undertake activities of payments administration, eg decisions



- about eligibility and payment levels, and these activities are often similar. Internationally, UI is by far the more common of the two". See Vroman (2002: 1-2).
- 198 National Treasury of South Africa (2008: 101).
- 199 *Ibid* at 17.
- 200 South African Social Security Agency (2008a: 8).
- 201 *Ibid* at 17
- 202 Case no 5251/2005, Transvaal Provincial Division, 19 March 2008.
- 203 GNR 162 of 22 February 2005. These regulations will remain in force until 31 December 2008. (Reg 38(2) of the *Regulations: Application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance* GG 31356 of 22 August 2008).
- 204 National Treasury of South Africa (2005: 47).
- 205 South African Social Security Agency (2008c: 5).
- 206 Manuel (2008: 9).
- 207 See Mpedi and Darimont (2007: 17).
- 208 According to the National Treasury, the annual increment of the social grants' value is in line with inflation and is aimed mainly at protecting the purchasing power of these grants (National Treasury of South Africa (2005: 55)). Also see Manuel (2008: 9).
- 209 According to the Taylor Committee (2002b: 459): "Poor households that include pensioners are on average significantly less poor than households without pensioners. 'Skip generation' households (comprising child and grandparent), on average, have their poverty gap closed by over 60 per cent. For three-generation households the poverty gap is closed by less than 50 per cent due to the burden of the working age members. For the average poor household without a pension-eligible member, however, social security's impact is almost negligible. For households with no pensioners, the reduction is less than 10 per cent." Also see Mpedi and Darimont (2007: 16-17).
- 210 See South African Social Security Agency (2008: 6).
- 211 National Treasury South Africa (2005: 56).
- 212 1968 (4) SA 572 (T).
- 213 In so doing, it rejected the submission that "a person who is unemployed by reason of illness is deemed to be 'capable and



available for work', and that, because of the speed of modern air travel, there is no reason why a person who is unemployed by reason of illness should be deemed to be 'capable of and available for work' only when he is in the Republic, and not also when he is not in the Republic" (at 574-5).

214 Article 3 of this Convention requires members of the ILO which have ratified it to "make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter." The equal treatment referred to under this Convention is based on the principle of reciprocity. South Africa, which is one of the countries which have ratified this Convention, is yet to be covered by a network of bilateral agreements envisaged by this instrument. In addition, its unemployment insurance laws exclude non-citizen fixed-term contract workers from the unemployment insurance scheme.

215 Section 23(1)(a) of COIDA.

216 Section 23(1)(c) of COIDA.

217 Section 23(1)(b) of COIDA.

218 Section 23(4) of COIDA.

219 Section 23(3)(a) of COIDA.

220 Section 23(3)(b) of COIDA.

221 Mpedi and Darimont (2007: 21).

222 Taylor Committee (2002a: 94).

223 *Ibid.*

224 Songuemas (1967: 20) and Isizoh (2003).

225 Folbre (1993: 6).

226 Isizoh (2003).

227 Olivier and Mpedi (2003).

228 The South African unemployment insurance scheme, for example, applies the graduated scale of benefits. In accordance with Schedule 3 of the Unemployment Insurance Act, a contributor who earned R10 000 per month will be entitled to a maximum of 30.78% of the previous earnings (ie R3 077.62) and a contributor who earned R 150 per month will be entitled to a maximum of 58.64% of the previous earnings (ie R87.96 per month). See Van Kerken and Olivier (2003: 429).

229 In South Africa the unemployment insurance is financed



- through proportional employer (1% of the remuneration) and employee (1% of the remuneration) contributions.
- 230 Kaseke (2000).
- 231 *Ibid.*
- 232 Section 13(3) of the Unemployment Insurance Act sets the rate of accrual of entitlement to benefits at one day's benefit for every completed six days of employment as a contributor, subject to a maximum accrual of 238 days' benefit in the four-year period immediately preceding the date of application for benefits.
- 233 Natrass and Seekings (1997: 467-468).
- 234 It should also be noted that each group is not homogeneous. For example, the self-employed people are diverse. They cover a wide array of economic activities in both formal self-employment (eg doctors, lawyers and accountants in private practice) and informal self-employment (eg street vendors).
- 235 McKinnon (2007: 158-163).
- 236 Olivier (2008: 52).
- 237 See Olivier (2004: 22-23).
- 238 This section is largely based on Mpedi (2008a: 5-6).
- 239 Beattie (2000: 139).
- 240 Mpedi (2008b: 9).
- 241 Fultz and Pieris (1997).
- 242 *Ibid.*
- 243 *Ibid.*
- 244 Section 32 of the Constitution.
- 245 Section 34 of the Constitution.
- 246 Section 35 of the Constitution.
- 247 Section 32(1) of the Constitution. National legislation, namely the Promotion of Access to Information Act 2 of 2000, has been enacted to give effect to this right. See, for further reading on this right, Currie and De Waal (2005: 683).
- 248 See, for further reading on this right, Currie and De Waal (2005: 703).
- 249 Section 38 of the Constitution.
- 250 *Ibid.* In *Ngxuzza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E) (upheld on appeal in *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and another v*



- Ngxuza* 2001 (4) SA 1184 (SCA) the applicants affected by a unilateral withdrawal of disability grants in the Eastern Cape province were permitted to institute a class action.
- 251 Section 35(3) of the Constitution.
- 252 For example, corruption, fraud and failure to comply with a duty imposed by (a) social security law(s).
- 253 It should be recalled that South Africa, unlike countries such as Germany, has no specialised social security courts or administrative tribunals. See Nierhaus (2005: 106-107); and Eichenhofer (1995/1996).
- 254 The Public Protector, South African Human Rights Commission, Commission for Gender Equality and Auditor-General form part of the so-called state institutions supporting constitutional democracy (Chapter 9 of the Constitution). These institutions, which are independent and impartial, can act on their own initiative, or after being approached by an interested party, to investigate a complaint in their areas of jurisdiction and, in some instances, order that remedial action be taken (see, for example, sections 182 and 184 of the Constitution).
- 255 Members of the independent tribunal are drawn from the legal fraternity, the medical fraternity and civil society. As at 28 July 2008, there was a backlog of 45 000 cases, with 12 000 being from KwaZulu-Natal (Department of Social Development (2008)).
- 256 Department of Social Development (2008).
- 257 Section 18(2)(b) of the Social Assistance Act 13 of 2004 (which has now been amended by section 2(a) of the Social Assistance Amendment Act 6 of 2008) empowered the Minister of Social Development to appoint an independent tribunal to hear appeals against the decisions of SASSA.
- 258 Taylor Committee (2002a: 124). The Taylor Committee's proposal does not refer to criminal matters – which are, in any event, dealt with by the criminal justice system of the country.
- 259 See section 18(2) of the Social Assistance Act.
- 260 Olivier and Smit (2004: 166).
- 261 *Ibid.*
- 262 Nyenti (2008: 71-72).
- 263 Olivier *et al* (2004b: 525).