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## TABLE OF CONTENTS

<b>CHAPTER 1: GENERAL INTRODUCTION.....</b>	<b>1</b>
1    BACKGROUND.....	1
2    OBJECTIVES.....	7
3    METHODOLOGY AND OUTLINE.....	8
3.1 <i>Statement of the problem</i> .....	8
3.2 <i>Approach</i> .....	10
3.2.1    The development of social security in South Africa.....	11
3.2.2    The South African regulatory framework and the possible accommodation of informal social security within the formal South African social security regulatory framework.....	12
3.2.3    The concept of informal social security.....	13
3.2.4    The historical development of social security in Western Europe.....	14
3.2.5    Mutual health insurance schemes as a model for bridging the divide between formal and informal social security.....	16
3.2.6    A model for policy recommendations.....	16
4    CONCLUSION.....	18
<b>CHAPTER 2: THE DEVELOPMENT OF SOCIAL SECURITY IN SOUTH AFRICA.....</b>	<b>20</b>
1    EXECUTIVE SUMMARY.....	20
2    INTRODUCTION.....	22
3    HISTORICAL DEVELOPMENT OF SOCIAL SECURITY IN SOUTH AFRICA.....	25
3.1 <i>Early civilisation</i> .....	25
3.2 <i>Early Colonialism</i> .....	27
3.3 <i>The Gold and Diamond Rush</i> .....	29
3.4 <i>Apartheid</i> .....	35
3.5 <i>Democracy</i> .....	38
3.5.1    Reconstruction and Development Programme.....	40
3.5.2    GEAR.....	42
3.5.3    The Welfare White Paper.....	43
3.5.4    The Taylor Report.....	44
4    CONCLUSION.....	45
<b>CHAPTER 3: THE SOUTH AFRICAN REGULATORY FRAMEWORK FOR SOCIAL SECURITY.....</b>	<b>50</b>
1    EXECUTIVE SUMMARY.....	50
2    INTRODUCTION.....	53

3	OUTLINE OF THE PRESENT FORMAL SOCIAL SECURITY STRUCTURE IN SOUTH AFRICA.....	54
3.1	<i>Social insurance</i> .....	56
3.1.1	Unemployment insurance.....	57
3.1.2	Pensions .....	59
3.1.3	Health care .....	60
3.1.4	Occupational injuries and diseases .....	60
3.1.5	Summary .....	62
3.2	<i>Social assistance</i> .....	62
3.2.1	Social assistance grants .....	63
3.2.2	Old-age grant.....	64
3.2.3	Disability grant.....	64
3.2.4	Child grants .....	65
3.2.5	Financial awards to individuals for the social relief of distress .....	65
3.2.6	Special pensions, military pensions, gratuities and financial reparation for individuals who have suffered because of political confrontation.....	66
3.2.7	Financial awards to welfare organisations.....	66
3.2.8	State-sponsored provision of social services, facilities and programmes .....	67
3.3	<i>Shortcomings in the present formal social security system</i> .....	67
3.3.1	General .....	67
3.3.1.1	<i>Khosa and others v The Minister of Social Development and others; Mahlaule and others v The Minister of Social Development and others</i> .....	68
3.3.2	Risk-based approach .....	70
3.3.3	Exclusionary nature of the present formal social security system .....	72
3.3.4	Categorical approach of the social assistance system.....	74
3.3.4.1	<i>Mashava v The President of the Republic of South Africa and others</i> .....	75
3.3.5	Fragmented nature of the administration of formal social security .....	79
3.4	<i>Summary</i> .....	82
4	CONSTITUTIONAL IMPERATIVE FOR CHANGE.....	82
4.1	<i>General</i> .....	82
4.2	<i>A right of access to social security in terms of section 27</i> .....	83
4.2.1	<i>Soobramoney v Minister of Health, KwaZulu-Natal</i> .....	85
4.2.2	<i>Government of the Republic of South Africa and others v Grootboom and others</i> .....	87
4.2.3	<i>Minister of Health v Treatment Action Campaign and others</i> .....	89
4.2.4	“progressively realise” .....	90
4.2.5	“reasonable legislative and other measures” .....	92
4.2.6	“within available resources” .....	94
4.2.7	“separation of powers doctrine” .....	96
4.2.8	“minimum, core obligation” .....	97
4.2.9	Analysis of limitation of socio-economic rights for purposes of informal social security.....	99
5	CONCLUSION .....	103

<b>CHAPTER 4: THE CONCEPT OF INFORMAL SOCIAL SECURITY .....</b>	<b>105</b>
1 EXECUTIVE SUMMARY.....	105
2 INTRODUCTION .....	108
3 “TO CALL A SPADE A SPADE” .....	110
3.1 <i>General</i> .....	110
3.2 <i>Problematic terminology</i> .....	111
3.3 <i>Approach in this thesis</i> .....	114
4 DEFINING INFORMAL SOCIAL SECURITY .....	116
4.1 <i>General</i> .....	116
4.2 <i>Defining informal social security within the context of social security</i> .....	117
4.2.1 Social security defined in terms of risks covered .....	118
4.2.2 Social security defined within the formal employment framework.....	119
4.3 <i>Suggested broadening of definition of social security</i> .....	120
4.3.1 State involvement and non-state actors .....	121
4.3.2 Defining risk in a non-restrictive manner.....	122
4.3.3 Recipients of social security.....	123
4.3.4 Suggested definition.....	123
4.3.5 Social protection.....	124
5 WHAT IS INFORMAL SOCIAL SECURITY? .....	126
5.1 <i>General</i> .....	126
5.2 <i>Mutual characteristics</i> .....	128
5.2.1 Introductory example .....	130
5.3 <i>Neighbourhood-based social security</i> .....	133
5.3.1 Examples of neighbourhood-based social security.....	133
5.3.2 The informal sector .....	136
5.3.2.1 The emergence of the informal sector.....	137
5.3.2.2 Regulation of the informal sector.....	138
5.4 <i>Kinship-based support</i> .....	139
5.4.1 Examples of kinship-based support.....	140
5.5 <i>Shortcomings of informal social security</i> .....	141
6 CONCLUSION .....	142
<b>CHAPTER 5: THE TRANSFORMATION FROM INFORMAL TO FORMAL: THE HISTORICAL DEVELOPMENT OF SOCIAL SECURITY IN WESTERN EUROPE.....</b>	<b>145</b>
1 EXECUTIVE SUMMARY.....	145
2 INTRODUCTION .....	148
3 SOCIAL SECURITY IN ANCIENT SOCIETIES.....	150
3.1 <i>Primitive societies</i> .....	150
3.2 <i>The Roman Empire</i> .....	151

3.3	<i>The emergence of social security in medieval times</i> .....	153
4	SOCIAL SECURITY IN MORE DEVELOPED SOCIETIES.....	154
4.1	<i>The development of social security during Napoleonic and early Victorian times</i> .....	154
4.2	<i>Social security during the Industrial Revolution</i> .....	156
4.2.1	General.....	156
4.2.2	Different reactions in Britain and Germany to the Industrial Revolution.....	157
4.2.2.1	General.....	157
4.2.2.2	Germany.....	159
4.2.2.3	Britain.....	166
4.2.2.4	Conclusion.....	169
5	THE PROTECTION AFFORDED BY THE STATE IN MODERN SOCIETY.....	172
5.1	<i>The era after World War I</i> .....	172
5.1.1	Germany.....	172
5.1.2	Britain.....	173
5.1.3	International organisations.....	174
5.2	<i>The era after World War II</i> .....	175
5.2.1	General.....	175
5.2.2	Germany.....	176
5.2.2.1	Modern applications of the welfare state and the crisis of the welfare state.....	179
5.2.3	Britain.....	180
5.2.4	International organisations.....	184
5.2.5	The meaning of “welfare state”.....	185
6	CONCLUSION.....	190
<b>CHAPTER 6: THE POSSIBLE ACCOMMODATION OF INFORMAL SOCIAL SECURITY</b>		
<b>WITHIN THE FORMAL SOUTH AFRICAN SOCIAL SECURITY REGULATORY</b>		
<b>FRAMEWORK..... 195</b>		
1	EXECUTIVE SUMMARY.....	195
2	INTRODUCTION.....	197
3	PRESENT LEGISLATIVE TOOLS RELEVANT TO INFORMAL SOCIAL SECURITY.....	199
3.1	<i>Legislation regulating fields of law similar to informal social security</i> .....	199
3.1.1	The National Welfare Act.....	199
3.1.1.1	Discussion of the Act.....	199
3.1.1.2	Lessons to be learnt for informal social security.....	202
3.1.2	The Friendly Societies Act.....	203
3.1.2.1	Discussion of the Act.....	203
3.1.2.2	Lessons to be learnt for informal social security.....	207
3.1.3	Nonprofit Organisations Act.....	208
3.1.3.1	Discussion of the Act.....	208
3.1.3.2	Lessons to be learnt for informal social security.....	212

3.2	<i>Other legislation impacting on informal social security</i> .....	214
3.2.1	The Lotteries Act.....	214
3.2.1.1	Discussion of the Act.....	214
3.2.1.2	Lessons to be learnt for informal social security.....	217
3.2.2	Black Economic Empowerment .....	217
3.2.2.1	Discussion of the Act.....	217
3.2.2.2	Lessons to be learnt for informal social security.....	219
3.2.3	National Small Business Act.....	221
3.2.3.1	Discussion of the Act.....	221
3.2.3.2	Lessons to be learnt for informal social security.....	223
3.2.4	Skills Development Act.....	224
3.2.4.1	Discussion of the Act.....	224
3.2.4.2	Lessons to be learnt for informal social security.....	225
4	POLICY RELATING TO INFORMAL SOCIAL SECURITY .....	226
4.1	<i>Introduction</i> .....	226
4.2	<i>General policy</i> .....	227
4.3	<i>The White Paper on Social Welfare</i> .....	229
4.3.1	Discussion of the White Paper .....	229
4.3.2	Comments on the White Paper .....	232
4.4	<i>The Taylor Committee Report</i> .....	233
4.4.1	Discussion of the Taylor Committee Report .....	233
4.4.2	Comments on the Taylor Committee Report.....	237
5	CONCLUSION .....	238
<b>CHAPTER 7: MUTUAL HEALTH INSURANCE AS A MODEL FOR BRIDGING THE DIVIDE BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY..... 241</b>		
1	EXECUTIVE SUMMARY.....	241
2	INTRODUCTION .....	242
3	MUTUAL HEALTH INSURANCE.....	249
3.1	<i>General characteristics</i> .....	249
3.2	<i>Examples of models of mutual health insurance</i> .....	251
3.2.1	Community cost-sharing .....	252
3.2.1.1	The example of the Women’s Public Health Service Cooperative Ltd SEWA (India).....	252
3.2.2	Community-based pre-payment schemes/mutual health organisations .....	253
3.2.2.1	The Msimbazi Private Health Insurance Model (Tanzania).....	253
3.2.2.2	The Ghana Social Trust .....	255
3.2.3	Provider-based health insurance.....	259
3.2.3.1	The Bwamanda Hospital Scheme (Democratic Republic of the Congo) .....	260
3.2.4	Government- or social insurance-supported community-driven scheme.....	262
3.2.4.1	CareCross (South Africa).....	263

4	IMPORTANT FEATURES OF MUTUAL HEALTH INSURANCE .....	264
4.1	<i>Common characteristics</i> .....	264
4.2	<i>Risk pool</i> .....	265
4.3	<i>Referral service</i> .....	265
4.4	<i>Investment strategy</i> .....	266
4.5	<i>Enrolment period</i> .....	266
4.6	<i>Preventative strategy</i> .....	266
4.7	<i>Community involvement</i> .....	266
4.8	<i>Traditional leadership</i> .....	267
4.9	<i>Establishing links</i> .....	268
5	POSITIVE AND NEGATIVE ASPECTS OF MUTUAL HEALTH INSURANCE.....	268
5.1	<i>Positive aspects</i> .....	268
5.2	<i>Negative aspects</i> .....	269
6	LESSONS LEARNT FROM MUTUAL HEALTH INSURANCE FOR INFORMAL SOCIAL SECURITY.....	271
7	CONCLUSION .....	273
	<b>CHAPTER 8: A MODEL FOR POLICY RECOMMENDATIONS.....</b>	<b>277</b>
1	THE ROAD AHEAD.....	277
2	WHY IS COOPERATION BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY NECESSARY? .....	284
3	THE MAIN PROPOSALS TO BRIDGE THE DIVIDE BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY.....	289
3.1	<i>The role of government</i> .....	289
3.2	<i>Policy</i> .....	293
3.3	<i>Legislative changes</i> .....	296
3.4	<i>When intervention should take place</i> .....	298
3.5	<i>Financial access</i> .....	300
3.6	<i>Training</i> .....	300
3.7	<i>Research</i> .....	301
3.8	<i>Awareness</i> .....	302
3.9	<i>Linkages</i> .....	302
3.10	<i>The role of social insurance</i> .....	303
3.11	<i>Gradual implementation</i> .....	304
3.12	<i>Restructuring of benefits according to the needs of the poor</i> .....	306
3.13	<i>Marketing</i> .....	306
4	PROPOSALS AND RECOMMENDATIONS EXTRACTED FROM THESIS .....	307

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5	RECOMMENDED MODEL FOR FUTURE DIRECTION OF FORMAL AND INFORMAL SOCIAL SECURITY.....	311
5.1	<i>STEP 1: Combine social security with overall poverty policy and involve all role players in the fight against poverty .....</i>	<i>315</i>
5.2	<i>STEP 2: Continue and improve social assistance (non-contributory benefits) .....</i>	<i>318</i>
5.3	<i>STEP 3: Social insurance system to be expanded in two directions, namely to cover larger groups of people and to cover a broader range of risks.....</i>	<i>319</i>
5.3.1	To cover larger groups of people.....	319
5.3.1.1	Unemployment insurance .....	320
5.3.1.2	Retirement provisioning .....	320
5.3.1.3	Occupational injuries and diseases .....	321
5.3.2	To cover a broader range of risks .....	322
5.4	<i>STEP 4: Expand, improve, strengthen and link informal social security systems .....</i>	<i>323</i>
5.5	<i>STEP 5: Create innovative schemes which combine formal and informal social security. ....</i>	<i>325</i>
6	CONCLUSION .....	328
	<b>BIBLIOGRAPHY .....</b>	<b>330</b>
	<b>TABLE OF STATUTES.....</b>	<b>341</b>
	<b>TABLE OF CASES.....</b>	<b>343</b>
	<b>INDEX.....</b>	<b>344</b>

## **LIST OF TABLES**

TABLE 1: STAGES OF DEVELOPMENT OF THE SOCIAL SECURITY SYSTEM IN SOUTH AFRICA .....	25
TABLE 2: THE THREE STRANDS OF SOCIAL SECURITY .....	55
TABLE 3: OUTLINE OF PRESENT SOCIAL SECURITY ADMINISTRATIVE FRAMEWORK .....	81
TABLE 4: GENERAL STAGES OF DEVELOPMENT OF SOCIAL SECURITY IN WESTERN EUROPE.....	149
TABLE 5: SUGGESTED COMPONENTS OF A COMPREHENSIVE SOCIAL PROTECTION PACKAGE.....	281

## **LIST OF FIGURES**

FIGURE 1: ILLUSTRATION OF GHANA SOCIAL TRUST .....	258
FIGURE 2: MODEL FOR COOPERATION BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY .....	314



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## CHAPTER 1: GENERAL INTRODUCTION

Social exclusion in terms of the present South African social security system is one of the biggest concerns in South Africa today. There is a growing interest internationally in ways and means of social security protection for these marginalised categories of people. Existing traditional and informal (mostly community-based) forms and mechanisms of social security coverage on the basis of risk and/or need, are increasingly being investigated.<sup>1</sup>

### 1 BACKGROUND

The South African Constitution<sup>2</sup> guarantees everyone a right to equality<sup>3</sup> and the right of access to social security.<sup>4</sup> In terms of s 27(1) of the Constitution, everyone has a right of access to social security, including social assistance, if they are unable to support themselves and their dependants. The state is compelled to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>5</sup>

Although South Africa has a fairly well-developed social security system for a developing country,<sup>6</sup> the system suffers from many deficiencies. It is in fact not comprehensive and many categories of people are excluded from its protective scope.<sup>7</sup> Not only must the South African social security system rid itself of past discrimination and exclusion, but it must also be transformed to make it more effective and inclusive.<sup>8</sup>

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<sup>1</sup> Olivier MP & Kalula E “Introduction” in Olivier MP, Kalula ER, Van Steenberge J, Jorens Y & Van Eeckhoutte W (eds) *The Extension of Social Security Protection in South Africa – A Legal Enquiry* (2001) at 1. (Hereafter Olivier et al *The Extension of Social Security Protection in South Africa*).

<sup>2</sup> Constitution of the Republic of South Africa, 108 of 1996.

<sup>3</sup> Section 9.

<sup>4</sup> Section 27.

<sup>5</sup> Section 27(2).

<sup>6</sup> Van den Berg S “South African Social Security under Apartheid and Beyond” *Development Southern Africa* Vol 14 (1997) at 481. Olivier MP & Kalula ER “Scope of Coverage” in Olivier MP, Smit N, Kalula ER *Social Security: A Legal Analysis* (2003) at 123-124. (Hereafter Olivier et al *Social Security: A Legal Analysis*).

<sup>7</sup> Par 3.3.3, ch 3.

<sup>8</sup> See ch 3 & 8 in general.

The current formal South African social security system developed mainly as a result of Western European influence imported through Colonialism and as a result of the influx of foreigners during the early twentieth century with the Gold and Diamond Rush.<sup>9</sup> With the transplanting of this “safety net” onto African soil, the “safety net” lost some of its effectiveness. This resulted in many people falling through the gaps in the “safety net”.<sup>10</sup> The people thus excluded and marginalised (in terms of the formal social security system) therefore created other (informal) mechanisms to provide protection against certain risks threatening their existence and security.<sup>11</sup>

The exclusionary nature of the present formal social security system can, inter alia, be attributed to the historical development of the system with its strong emphasis on racial disparity as far as social protection is concerned.<sup>12</sup> Discrimination resulted in a welfare state for White people as opposed to African people.<sup>13</sup> The latter group comprising Black, Indian and Coloured people had very little access to formal social security protection for almost a decade.<sup>14</sup>

The influence of the Western European social security model also influenced the social security system dramatically. The “transferability” of legal rules and institutions is always a controversial topic.<sup>15</sup> Nowhere is this more clearly illustrated than in the “transplanting” of the traditional Western European social security model on South African soil almost a century ago.<sup>16</sup> The model as such was sufficient for the development of better social protection in Western Europe, but failed to provide adequate social protection in South Africa owing to the specific political and social climate within

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<sup>9</sup> See pars 3.2 & 3.3, ch 2.

<sup>10</sup> See ch 2 in general and par 3.3, ch 3.

<sup>11</sup> Kaseke “Informal Social Security in Eastern and Southern Africa” Paper presented at the SADC Social Security Conference Johannesburg (17-19 October 2001) at 1-5. (Hereafter Kaseke “Informal Social Security in Eastern and Southern Africa”).

<sup>12</sup> See ch 2 in general. Specific examples can be found in footnote 168, ch 2.

<sup>13</sup> The term “African” will be used to include Black, Coloured and Indian people.

<sup>14</sup> See par 3, ch 2.

<sup>15</sup> Kahn-Freund O “On Uses and Misuses of Comparative Law” *The Modern Law Review* Vol 37, No. 1 (1974) at 1-27. “(W)e cannot take for granted that rules or institutions are transplantable” at 27. (Hereafter Kahn-Freund).

<sup>16</sup> See pars 3.2 & 3.3, ch 2.

which it was transplanted.<sup>17</sup> A foreign legal system or rules can be successfully transplanted only if there is an appropriate understanding of the social and political context of the country within which it is transplanted.<sup>18</sup> The traditional Western European social security model, when transplanted onto South African soil, served only a limited portion of the population and left the majority without social protection.<sup>19</sup>

In the traditional Western European social security model, social insurance has a formal-employment bias, which means that social insurance is linked mostly to the concept “employee”. In South Africa, the concept “employee” has a restricted application and refers only to people in formal employment, who do not constitute the majority of the population. The result is that a large number of people in informal employment are excluded from formal social security protection.<sup>20</sup>

The transplanted Western European social security system also has a risk-based approach covering risks typically found in developed countries. It is not suitable to apply unchanged in a developing country such as South Africa with a large number of people living in rural areas and working in the informal sector, and with the extent of poverty that prevails in the country.<sup>21</sup>

The traditional Western European social security model also assumes (or used to) the existence of a nuclear family, that is, a family headed by a male breadwinner with one wife and children.<sup>22</sup> This concept of the nuclear family does not accurately reflect the family context in South Africa. Poor people function in households which comprise a

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<sup>17</sup> See pars 3.3, 3.4 & 4, ch 2.

<sup>18</sup> Kahn-Freund op cit note 15 at 1-27.

<sup>19</sup> See ch 2 in general. Kahn-Freund idem at 11. “*Problems such as those of housing, of town planning, of pollution may be different in Russia or Spain or South Africa from what they are in this country (Britain) or in the United States, but the procedure of arriving at a solution, the form of discussion, the role of the individual in that discussion are different.*”

<sup>20</sup> See par 5.3.2, ch 4.

<sup>21</sup> See par 3.3.2, ch 3.

<sup>22</sup> Kasente “Gender and Social Security Reform in Africa” *International Social Security Review (ISSR)* Vol 53 No 3 (July 2000) at 30. (Hereafter Kasente). This concept has been changed and in Western Europe today the nuclear family can also include same-sex couples as well as single-parent households.

number of extended family members from various generations.<sup>23</sup> In South Africa, the number of households headed up by women is increasing, the extended family continues to play a substantial role<sup>24</sup> and households headed up by children are becoming a reality, especially with the increasing number of adults dying of HIV/AIDS.<sup>25</sup> The boundaries of the family, and even the direct household, are fluid in nature. Families (and the household as a smaller economic unit)<sup>26</sup> play an important role in poor communities, since they regulate access to productive and reproductive resources.<sup>27</sup>

In the traditional Western European social security model, social assistance is seen as a temporary aid for assisting people until they find formal employment and receive social insurance protection.<sup>28</sup> The underlying assumption of the traditional Western European model took on a different emphasis in South Africa, since social assistance benefits have become the very means of survival for a large number of people.<sup>29</sup> Social assistance benefits are no longer a temporary support mechanism until people get back into the social insurance system, or until they are protected under the guise of formal employment.<sup>30</sup> The present social assistance system is not without its shortcomings.

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<sup>23</sup> Vorster JH “Getting Social Security into Gear: Reflections on Welfare Reform in South Africa” Paper presented at The Year 2000 International Research Conference on Social Security *Social Security in the Global Village* (Helsinki, 25-27 Spt 2000) at 14, 16 & 26. (Hereafter Vorster). Also see Liebenberg S “Equalisation at What Cost? A Case Study on the New Child Support Benefit” *Development Update* Vol 1 (1997). (Hereafter Liebenberg S “Equalisation at What Cost?”).

<sup>24</sup> Kasente op cit note 22 at 2.

<sup>25</sup> Mpedi LG “HIV/Aids in South Africa: Towards Comprehensive Social Protection?” *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)* Vol 18 (2004) at 243-249. (Hereafter Mpedi “HIV/Aids in South Africa”).

<sup>26</sup> Van der Waal K & Malan N “A Developmental Perspective on Social Security for the Urban and Rural Poor and the Informally Employed in South Africa” Paper presented at CICLASS/SANPAD Seminar *Social Security for the Excluded and Marginalised* Seminar (Pretoria, 20 November 2000) at 5. (Hereafter Van der Waal & Malan).

<sup>27</sup> Hirtz “Managing Insecurity - State Social Policy and Family Networks in the Rural Philippines” *Spektrum* 42 (1995) at 112-113. (Hereafter Hirtz). The notion of “dependant” is also too restricted. It should provide for cases where, for example, grandparents look after grandchildren and polygamy, for example where civil and customary wives have to compete for survivor’s benefits.

<sup>28</sup> Van Ginneken W *Social Security for the Excluded Majority – Case Studies for Developing Countries* (1999) at 3. (Hereafter Van Ginneken *Social Security for the Excluded Majority*).

<sup>29</sup> International Labour Organisation (ILO) *World Labour Report* (2000) at 179. Also see Van der Merwe D “Social Welfare Law in the South African Social Security System” Centre for International and Comparative Labour Law (CICLA) Publication Series 1/99 (1999) at 4-5. (Hereafter Van der Merwe).

<sup>30</sup> See par 3.2, ch 3.

Social assistance provides very low levels of benefits,<sup>31</sup> is means-tested<sup>32</sup> and is based on a categorical approach.<sup>33</sup> This leads to the exclusion of a large number of people from the protective ambit of the social assistance paradigm.<sup>34</sup>

There is increasing pressure on government to reform and improve the present social security system.<sup>35</sup> Changes and improvements to the system in recent years have focused on removing racial disparities<sup>36</sup> but did not result in a complete or dramatic overhaul of the system.<sup>37</sup> Various committees have been appointed in the past ten years to consider reforms to the present formal social security dispensation.<sup>38</sup> Most recently, the Taylor Committee was appointed to consider reforms in order to extend the scope of protection of the present system.<sup>39</sup> However, reforms have so far been haphazard and piecemeal.

In discussing the reform of the system, the focus should however also shift to the excluded majority and to an investigation of how they have survived and protected themselves against insecurity. In South Africa, African people were, for almost a decade,

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<sup>31</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 127 & 142-145.

<sup>32</sup> Ibid. To determine the nature of the benefits awarded.

<sup>33</sup> Benefits and services are restricted to particular categories of the poor and needy, namely children (under 12 years), the disabled and old people, men over 65 years and women over 60 years. Also see par 3.2, ch 3.

<sup>34</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 142-145.

<sup>35</sup> See pars 3 & 4, ch 3.

<sup>36</sup> For example, in 1993 parity was established between White and African recipients of the old-age grant. The child-support grant also replaced the state maintenance grant and is currently available to all children under 14 years of age. See Olivier & Kalula op cit note 1 in Olivier et al *The Extension of Social Security Protection in South Africa* op cit note 1 at 2.

<sup>37</sup> A new Social Security Agency has been appointed in terms of the South African Social Security Agency Act, 9 of 2004, which must still come into effect. Also, the South African Social Assistance Act, 13 of 2004 has been enacted, which must also still come into effect. See par 3, ch 3.

<sup>38</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 146. See *inter alia*: Lund Committee on Child and Family Support (1996), Smith Committee *Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa* (1995), Committee for Restructuring of Social Security (Chikane Committee), 1996, Mouton Committee *Report of the Committee of the Investigation into a Retirement Provision System for South Africa* (1992), *Mothers and Fathers of the Nation: the Forgotten People?* (Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons, Feb 2001). A comprehensive review of road accident legislation was also undertaken by a Commission of Enquiry under the chairpersonship of Judge Satchwell.

<sup>39</sup> The Committee was appointed in 2000 by Cabinet (Committee of Inquiry into a Comprehensive Social Security System) under the chairpersonship of Prof Vivienne Taylor. A report was delivered to Cabinet. *Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future (Draft Consolidated Report)* March 2002. (Hereafter Taylor Report & Taylor Committee). Very few of the recommendations of the Committee have up to date, however, been addressed by policy and changes to the system.

excluded from adequate social protection. In order to financially sustain themselves, those not covered by formal social security have developed their own survival strategies. These survival strategies can be labelled as informal social security and exhibit elements of, and reveal similarities to, concepts such as social assistance and social insurance. It can therefore be stated that, in South Africa, formal social security and informal social security are both systems which provide social protection. Social security is currently defined and treated as comprising only the formal social security system.<sup>40</sup> It is submitted that this is not a correct approach. Social protection in the country should be viewed as a combination of formal, informal and indirect social security.<sup>41</sup>

Informal social security has only recently been identified in South Africa as a “new strand” to the traditional concept of social security. It is, however, still not formally recognised as such if one considers the present regulatory and policy framework. For example, the recently appointed Taylor Committee refers, in its report, to informal social security, but only to a very limited extent. The Taylor Committee makes extensive recommendations regarding reform of the social security system, but, in doing so, refers only briefly to the phenomenon of informal social security. The report is silent about the co-existence of formal and informal social security.<sup>42</sup>

Informal social security arrangements rely heavily on principles of reciprocity and solidarity. Such social security does not only manifest itself in the form of monetary transfers, but can also assume the form of support and services unique to a particular group or community. Informal social security is always delivered in a specific context in which people have something in common, reflecting the principles of solidarity (*ubuntu*) and reciprocity. The most common examples of informal social security mechanisms in South Africa are *stokvels* and burial societies.

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<sup>40</sup> See par 3, ch 3.

<sup>41</sup> Also see Olivier MP “The Concept of Social Security” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 26-28 and Dekker AH & Olivier MP “Informal Social Security” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 569-573.

<sup>42</sup> See the discussion of the Taylor Committee in par 3.5.4, ch 2, & par 4.4, ch 6. In the Key Recommendations made by the Taylor Committee in par iv, appreciation is expressed for the role of informal social security, and the need to develop links between informal social security and the formal system is stressed.

The present informal social security system in South Africa is not perfect and should not be over-romanticised. In fact, it is uncertain if the informal social security system can be classified as a “safety net” at all. It provides protection against certain risks, but, owing to the poor environment within which it functions, it can only provide low levels of benefits. It is also not sufficiently geared to provide protection against large and long-term risks, for example old age, HIV/AIDS or long-term unemployment. The result of this is that informal social security is, despite its important role, not a sustainable source that can continue to function on its own.<sup>43</sup>

South Africa is therefore faced with the challenge of a dualistic social security system that presently functions in the country.<sup>44</sup> The formal system is in need of transformation and must be extended, while informal social security should be supported and linked with the formal social security system in the overall social security paradigm in the country. In the reform of the present formal system it is inconceivable that the “second” social security system, namely informal social security, can be ignored. However, this seems to be the case if one considers the scant recognition afforded to the subject.

It is against this background that informal social security will be analysed and that recommendations will be made regarding its future role in the South African social security system.

## **2 OBJECTIVES**

This thesis develops a model in which the present formal and informal social security systems in South Africa can co-exist. In South Africa, where a substantial part of the population lives in poverty, the provision of social security by the state has been considerably problematic. In Western Europe, the trend remains one of attempting to

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<sup>43</sup> See par 5.5, ch 4.

<sup>44</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 559-562.

extend the formal social security system to include more people within its protective ambit. A mere extension of the existing formal social security system might not be the solution in South Africa, especially in view of the fact that the country has limited economic resources and that the marginalised have special needs and a contributory capacity that cannot always be measured in monetary terms.<sup>45</sup> Rather, the solution is to redesign the social security system to accommodate the excluded by taking into account their particular needs as well as their contributory capacity.<sup>46</sup>

The existence of informal social security cannot be denied. The future of informal social security within the broader social security paradigm in the country is, however, uncertain. Informal social security can help the present formal social security system to extend social security coverage. The object of this thesis is therefore to make policy recommendations which can assist in changing the present social security system. This must be done by acknowledging informal social security and by building on the positive aspects of both systems in order to provide everyone in the country with comprehensive social protection.

### **3      METHODODOLOGY AND OUTLINE**

#### **3.1    Statement of the problem**

The main question which this thesis attempts to address relates to the future role of informal social security within the South African social security framework.

The first hurdle which informal social security should overcome is recognition as an integral part and separate strand of the social security system. Once it has received the recognition it deserves, it can work together with formal and indirect social security to provide comprehensive social protection.

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<sup>45</sup> Van Ginneken *Social Security for the Excluded Majority* op cit note 28 at 3.

<sup>46</sup> *Idem* at 24. Also see ch 8 in general.



The second question which should be addressed relates to regulation. What form of regulation (and under what conditions) will be necessary to facilitate cooperation between formal and informal social security, thus affording better and far more comprehensive social protection? The answer is linked to what the future role of informal social security should be in a closer relationship between the different strands of social security. It should be remembered that regulation is also a relative term. For example, does regulation entail registering of informal social security schemes? Or does it mean that the informal sector should pay taxes? Or does it mean an obligation on the state to allocate space to trade, provide permits and other benefits? Or does it mean access to loans and information? Does it also include regulation and self-regulation?<sup>47</sup>

In order to address these questions, this study develops a model to guide policy recommendations on the future role of informal social security within the broad social security paradigm. The model is based on the premise that formal and informal social security should combine their positive strengths to combat weaknesses in the fibres of the social safety net. The model contains five steps and, in every step, there is room for regulation. However, making proposals regarding regulation does not mean that informal social security should be formalised. Regulation can, in each one of the five steps, take on a different form. For example, in step 1, regulation can assume the form of rules to better support and strengthen informal social security schemes, or of rules to improve formal social security in order to alleviate the burden on informal social security systems. In step 4, regulation can, for example, be used to compel informal social security schemes to register in order to improve monitoring of these schemes and to improve the channelling of resources to them. Regulation should therefore occur within a very specific context and does not imply blanket “formalisation” of informal social security schemes.

Informality and formality can co-exist in each of the five steps discussed in the model, but most notably with regard to service delivery, regulation of the system and/or

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<sup>47</sup> Lund F “A Framework for the Comparative Analysis of Social Protection for Workers in the Informal Economy” A Background Paper for Women in Informal Employment (WIEGO): Globalising and Organising (December 2001) at 11. (Hereafter Lund).

collection and distribution of benefits.<sup>48</sup> For example the state can act as regulator and financier of benefits while informal social security systems can be responsible for the collection or distribution of benefits. This interaction between formal and informal social security on different levels is accommodated in the suggested model in chapter 8. It also confirms the difficulties with linking and comparing these two systems. Formal and informal social security are not two opposites and are not always parallel. Sometimes they are mirror-images of each other and sometimes not.

In order to facilitate implementation, the policy recommendations are set out in five steps in the proposed model. Implementation of the five steps can be staggered, or some stages can be implemented simultaneously. Although the model touches on implementation, it should be kept in mind that it is aimed primarily at guiding policy with regard to the better accommodation of informal social security within the broader social security paradigm. The recommendations, and not the implementation strategy, therefore form the main topic of discussion.

### **3.2 Approach**

The thesis comprises a literature study. Various sources from different disciplines have been consulted and analysed to complete this research.

In an analysis of informal social security, various approaches, or angles of discussion, could have been followed. It was, however, decided to focus the discussion on the following aspects:

- The development of social security in South Africa<sup>49</sup>

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<sup>48</sup> See par 3.2, ch 4.

<sup>49</sup> Ch 2.

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- The South African regulatory framework<sup>50</sup> and the possible accommodation of informal social security within the formal South African social security regulatory framework<sup>51</sup>
  - The concept of informal social security<sup>52</sup>
  - The historical development of social security in Western Europe<sup>53</sup>
  - Mutual health insurance schemes as a model for bridging the divide between formal and informal social security<sup>54</sup>
  - A model for policy recommendations<sup>55</sup>

### ***3.2.1 The development of social security in South Africa***<sup>56</sup>

The thesis starts from the premise that the historical development of the South African social security system reinforced the separation of formal and informal social security. The present South African social security system is based largely on the traditional Western European model of social security. However, the application of the system within the local political context resulted in exclusion instead of inclusion. This led to welfare pluralism, that is, to the existence of formal and informal social security.

Whereas formal social security in Western Europe absorbed informal social security (and made it redundant), in South Africa formal social security was used to afford protection, mainly to White employees. Social security was provided along racial lines and in the context of formal employment. The result was that African people, and people outside the formal-employment sector (who also happened to comprise mostly African people), were

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<sup>50</sup> Ch 3.

<sup>51</sup> Ch 6.

<sup>52</sup> Ch 4.

<sup>53</sup> Ch 5.

<sup>54</sup> Ch 7.

<sup>55</sup> Ch 8.

<sup>56</sup> Ch 2.

excluded from formal social security protection. As a result, they had to continue to rely on informal social security support to provide protection against social security risks. The long period of time during which people were excluded from formal protection (almost a century) resulted in an increase in the number and extent of informal social security mechanisms providing social security support. The historical development of social security in South Africa, which is discussed in chapter 2, illustrates why a dualistic social security system developed in the country and sets the social security landscape for further discussions.

### ***3.2.2 The South African regulatory framework and the possible accommodation of informal social security within the formal South African social security regulatory framework***

The division between formal and informal social security is still evident in the present South African social security system. The regulatory framework only relates to, and reinforces, formal social security. It does not leave room for informal social security.

The formal social security system is discussed in chapter 3 to give the reader an outline of the formal social security system in South Africa. The discussion also shows that, in its present form, the formal system (and its regulatory structure) leaves very little room for the accommodation of informal social security. The system can therefore not be reformed through extensions and inclusions here and there.<sup>57</sup> Certain parts of the regulatory framework (set out in chapter 6) do share some common ground with informal social security, but still appear to be inappropriate to apply, unchanged, to informal social security, or to be incorporated in, or strengthen, informal social security.<sup>58</sup>

In chapter 3 the legitimacy of the present exclusionary social security system in South Africa is also examined. Social security as a socio-economic right is guaranteed in the Constitution. The enforceability of a number of related socio-economic rights has come

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<sup>57</sup> Ch 3.

<sup>58</sup> Ch 6.

under the spotlight of the Constitutional Court in recent years.<sup>59</sup> In the judgments of such court, the responsibility of the state to take “reasonable legislative and other measures” to “progressively realise” a right of access to social security has been confirmed. The state will therefore have to take measures to ensure that it has tried to shoulder its responsibility in this regard. In chapter 3, the present South African regulatory landscape for social security is sketched, with the focus being on the shortcomings of the present formal social security system and on the constitutional obligation as a driving force in discussions on reform.

In chapter 6, the South African regulatory landscape is further explored to determine if it is ready for greater accommodation of a concept such as informal social security. Various legislative tools are also examined to determine if they can accommodate informal social security within their regulatory framework and scope. Policy is also examined to see if there is greater awareness of the need to incorporate informal social security in the future social security paradigm. It will appear from the discussion that there is indeed a greater awareness of informal social security, but that it still does not enjoy the recognition and support it requires as a future role player in the social security arena.

### ***3.2.3 The concept of informal social security***

The concept of informal social security is discussed in detail in chapter 4. Since the main topic of the thesis deals with informal social security, it is important to understand what is regarded as part of this phenomenon and what it entails. Various examples are also discussed to further illustrate the concept.

Chapter 4 focuses on the concept and definition of informal social security. Informal social security should be regarded as part of social security. It exhibits features similar to those of social insurance and social assistance and relies heavily on principles of solidarity and reciprocity. Informal social security can manifest itself in the form of neighbourhood-based or kinship-based social security. This chapter also points to the

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<sup>59</sup> Pars 3.3.1.1, 3.3.4.1 & 4.2, ch 3.

shortcomings in the present definition of social security. The present definition of social security is a narrow one and does not allow room for recognition of informal social security. It has a restrictive approach to risks covered and social security is furthermore defined within the context of the formal-employment framework. A definition of social security is therefore also suggested. This definition, it is submitted, will broaden the scope of social security so as to accommodate informal social security as well.

### ***3.2.4 The historical development of social security in Western Europe***

The influence of the traditional Western European social security model on South Africa is also discussed.<sup>60</sup> This discussion serves mainly to illustrate where the South African social security system originated from and how transplanting of the system was inappropriate with regard to the needs of the country. It also shows that, in much the same way as in South Africa, informal social security was once an important source of social protection in Western Europe. It confirms the relevance of informal social security as a concept which is not relevant only to the African continent. In Western Europe, informal social security was absorbed into the formal system through greater economic development, which never happened in South Africa.

Owing to the important influence of the traditional Western European social security model on the South African system, the origins of the former are traced and its development is described. From its historical development, it is clear that many Western European social security systems were also transformed from informal to formal ones. This process of evolution took place over a couple of centuries. The move towards better social protection was necessary to combat the enormous levels of poverty and the exploitation of workers as a result of the Industrial Revolution. Most of these developments started from the premise of worker protection and expanded to a system based on social insurance as well as social assistance principles. In Western Europe, two significant development paths originated, resulting in a German model of social insurance and a British model of social assistance. These two models followed divergent routes as

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<sup>60</sup> Ch 5.

far as the development of social security was concerned. Therefore the development of the German and British social security systems has been chosen as an example of the historical development of social security in Western Europe. These models are discussed in chapter 5.

The analysis of the historical development of social security in Western Europe is important in order to illustrate that social security systems in developed countries also have their roots in informality. Informal social security is therefore not a concept unique to developing countries. The difference between developed and developing countries is that, in the former, informal social security has been transformed into “social solidarity” in a triangle of state, employers and employees, with the former system providing sufficient and comprehensive coverage to make informal social security redundant. In developing countries, the formal system has not developed sufficiently to nullify informal social security. Therefore, informal social security still plays an important role as social security provider in developing countries such as South Africa.

The valuable lessons which can be learned from the Western European social security system’s historical development will be highlighted in chapter 5. At the same time, it must be reiterated that, although lessons can be learned from this process which took place in Western Europe over a few decades, the situation in South Africa is very different in many respects from that in Western Europe. First, the South African economy is not as strong as that of developed Western European countries; hence the final product or aim of the South African welfare system is not necessarily a complete welfare state. Also, the process in South Africa of transforming the social security system should be fast-tracked in order to comply with the constitutional imperative and to satisfy the pressing socio-economic needs of the country. The Western European example has, however, highlighted the importance of social insurance as a measure for extending social protection and social security to those who are presently excluded. These two principles will be applied in chapter 8 in the model setting out recommendations.

### ***3.2.5 Mutual health insurance schemes as a model for bridging the divide between formal and informal social security***

Mutual health insurance schemes are discussed as an interesting example of the importance attached to informal social security in other developing countries.<sup>61</sup> International organisations promote this model for extending informal social security to the marginalised and indigent. Any other example could also have been chosen, but mutual health insurance schemes were chosen because their application in other developing countries in Southern Africa is interesting and because they have the potential to be extended so as to constitute a bigger cluster of support. The risk (namely health care protection) these schemes aim to address is also important. If people are in good health, they are able to work, to better provide for their own needs, to participate in informal social security schemes and to better address other social security risks.<sup>62</sup>

The example of mutual health insurance schemes provides valuable guidelines for the model created in chapter 8 for determining how to better integrate formal and informal social security.

### ***3.2.6 A model for policy recommendations***

Chapter 8, the final chapter, contains the model for policy recommendations as to how to bridge the divide between formal and informal social security. Greater cooperation between formal and informal social security is necessary if the South African social security system is to comply with its constitutional obligation. The goal which should be aspired to is comprehensive social protection.<sup>63</sup> A complete overhaul of the system solely by means of reforms to the formal social security system will not achieve this goal. Informal social security, because of the important function it currently fulfils in the country, can be, and should be, used to strengthen the overall social safety net. The model

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<sup>61</sup> Ch 7.

<sup>62</sup> See pars 2 & 3, ch 7.

<sup>63</sup> See par 3.3, ch 3 & par 5.1, ch 8.



suggests five steps to reach the goal of comprehensive social protection by combining formal and informal social security. These five steps are:

- STEP 1: Combine social security with overall poverty policy and involve all role players in the fight against poverty.<sup>64</sup>
- STEP 2: Continue and improve social assistance (non-contributory) benefits.<sup>65</sup>
- STEP 3: The social insurance system should be expanded in two directions, namely to cover larger groups of people and to cover a broader range of risks.<sup>66</sup>
- STEP 4: Expand, improve, strengthen and link informal social security systems.<sup>67</sup>
- STEP 5: Create innovative schemes which combine formal and informal social security.<sup>68</sup>

The model entails different forms and degrees of regulation in each step. The five steps also guide implementation in five stages. These stages can run simultaneously, or in phases. The model should be used to guide policy, since its aim is to guide the future direction of both formal and informal social security to ensure that they do not take divergent paths. It is also aimed at strengthening the overall social safety net in the country.

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<sup>64</sup> Par 5.1, ch 8.

<sup>65</sup> Par 5.2, ch 8.

<sup>66</sup> Par 5.3, ch 8.

<sup>67</sup> Par 5.4, ch 8.

<sup>68</sup> Par 5.5, ch 8.

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## 4 CONCLUSION

Currently, the position as regards formal and informal social security in South Africa can be described as one where each is travelling along a road parallel to the other. Formal social security is on a single, tarred carriage-way. This road is in the process of being improved and is being transformed into a dual carriage-way. Informal social security is travelling on a road parallel to this road, and to the same destination, but its road is only a small dirt road with potholes. Since both roads lead to the same destination, and run along more or less the same course, it is time to consider whether they should not both form part of the greater road-planning project for the area.<sup>69</sup>

Informal and formal social security currently exist as two separate social security networks.<sup>70</sup> Informal social security, despite the important role it is fulfilling, is only starting to be recognised in South Africa as a separate strand to social security.<sup>71</sup>

In contrast to the situation in Western Europe where the present formal social security system also originated from informality,<sup>72</sup> in South Africa informal social security was never absorbed into formal social security.<sup>73</sup> The future of these two systems has, however, now come under the spotlight, since the South African regulatory landscape has been influenced by the constitutional guarantee of access by everyone to social security.<sup>74</sup>

The ultimate goal of the recommendations made in this thesis is to achieve greater cooperation between formal and informal social security. In order to bring about such cooperation, it will be necessary to consider changes to both systems so as to increase their capacity to provide social protection. Greater cooperation between formal and informal social security should therefore form the cornerstone of the social security system if better social protection is to be achieved, and, to achieve better social protection, a holistic view of social security is necessary, without the present compartmentalisation of the indigenous and statutory systems.

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<sup>69</sup> Own analogy.

<sup>70</sup> Pars 3.4 & 3.5, ch 2, and par 3.3, ch 3.

<sup>71</sup> Par 2, ch 4.

<sup>72</sup> See ch 5 in general.

<sup>73</sup> See ch 2 in general and also par 3.3, ch 3.

<sup>74</sup> Par 4, ch 3.

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Informal social security should not (and cannot) indefinitely remain conceptually separate from formal social security. Informal social security should be recognised as an important strand in the social security system.<sup>75</sup> The continuing growth of the informal sector is also an important reason for reform of the present system. The informal sector is expanding and will not disappear or be absorbed by the formal sector. The informal sector is in great need of social security protection, especially because people in the informal sector are even more exposed to social security risks than their counterparts in the formal economy. Informal social security schemes cannot, on their own, provide adequate social protection.<sup>76</sup>

Although the potential of informal social security schemes should not be overestimated,<sup>77</sup> they could provide the urgently required link with people at grassroots level, since they do have the ability to provide social protection at a micro-level. Policy should therefore encourage and support the role of informal social security organisations.<sup>78</sup>

In order to accommodate informal social security within the South African social security system, innovative thinking will be necessary. The importance of informal social security will have to be recognised. The main idea is therefore not to formalise informal social schemes, but to use them innovatively to extend comprehensive social protection to those currently outside the protective net of the formal system. Informal social security should not be absorbed into formal social security, but should remain a separate safety net that enjoys the support of the formal social security system. The proposed model will, it is hoped, serve as a baseline for stimulating debate and introducing innovative ideas as to how to improve the present social security system in South Africa.

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<sup>75</sup> Pars 2 & 4.3, ch 4.

<sup>76</sup> Par 5.5, ch 4.

<sup>77</sup> Chen MA, Jhabvala R & Lund F “Supporting Workers in the Informal Economy: A Policy Framework” Working Paper on the Informal Economy prepared for the ILO (Employment Sector) (2002/2) at 41. (Hereafter Chen et al “Supporting Workers in the Informal Economy”).

<sup>78</sup> Von Benda-Beckmann F & Kirsch R “Informal Security Systems in Southern Africa and Approaches to Strengthen them through Policy Measures” in Freiburg-Strauß J & Meyer K *The Real World of Social Policy* (1999) at 36. Also see pars 4.4.4 & 6, ch 4. (Hereafter Von Benda-Beckman & Kirsch “Informal Security Systems in Southern Africa”).

## CHAPTER 2: THE DEVELOPMENT OF SOCIAL SECURITY IN SOUTH AFRICA

Social exclusion under the present South African social security system is one of the greatest concerns in South Africa today.<sup>79</sup>

### 1 EXECUTIVE SUMMARY

In this chapter, the historical development of social security in South Africa will be outlined. It is important for purposes of this thesis to consider the historical development of social security in South Africa for the following reasons:

- It illustrates how the transplanting of the traditional Western European social security model led to the development of a welfare state, but, for a very long time, only for the White population in South Africa.<sup>80</sup>
- It also illustrates that expansion of the present social security system had a very specific racial element in that it excluded Africans<sup>81</sup> from adequate, formal social security protection for almost a decade. This laid the foundations for the exclusionary nature of the present system.<sup>82</sup>
- It also illustrates that the focus on racial segregation in the social security system shifted the focus away from expansion and improvement of the social security system, thereby setting the country's social security mechanism back at least a century.<sup>83</sup>

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<sup>79</sup> Olivier & Kalula op cit note 1 in Olivier et al *The Extension of Social Security Protection in South Africa* op cit note 1 at 1.

<sup>80</sup> Makino K "Social Security Policy Reform in Post-Apartheid South Africa: A Focus on the Basic Income Grant" *Centre for Civil Society Research Report No. 11* at 8. Accessed at [www.nu.ac.za/ccs/files/Report%2011.pdf](http://www.nu.ac.za/ccs/files/Report%2011.pdf) on 11 Oct 2004. (Hereafter Makino). Also see par 3, ch 2.

<sup>81</sup> Africans will be used as the collective term to refer to Black, Coloured and Indian people.

<sup>82</sup> See the discussion in general in pars 3.2 & 3.3, ch 2.

<sup>83</sup> See the discussion in par 3.4, ch 2.

- It also indicates that there was very little leadership and no real social security development plan during the course of the last century. Social insurance was implemented, but in a very haphazard way. As a result, no culture of employer and employee contributions based on solidarity was created, because protection was afforded mainly by the employer.<sup>84</sup> During the early days of development of the system, the state was seldom seen as a partner in providing social security protection. Only in the sphere of social assistance grants was the state involved. These grants were however based on a categorical approach that benefited only the aged, the disabled and young children. Again, benefits were distributed along racial lines.<sup>85</sup>
- It illustrates that the people in power (mostly White Afrikaner men) seemed preoccupied, first, with excluding the British, and, at the same time, excluding African people and women from political and social privileges. Solidarity was therefore never able to develop, because so many people were excluded from the very foundations of solidarity. This resulted in a strong focus on who should be excluded, to such an extent that the concept of a “safety net” or system was distorted and actually did not exist for the majority of the population. The “safety net” which developed was never able to accommodate the increased pressure put on it owing to integration. The net has proved to be particularly insufficient in the light of the Constitution, which dictates that benefits be open to everyone regardless of race and gender.<sup>86</sup>
- It also explains how the exclusionary nature of the formal social security system led to the continuing existence and expansion of informal social security, eventually culminating in the dual system of social security existing in the country today.<sup>87</sup>

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<sup>84</sup> Pars 3.2 & 3.3, ch 2.

<sup>85</sup> Ibid.

<sup>86</sup> Par 3.4, ch 2 & par 4, ch 3.

<sup>87</sup> See ch 2 in general.

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## 2 INTRODUCTION

The Western European social security system influenced the South African formal social security system through colonisation<sup>88</sup> and through the influx of foreigners from all over Europe during the Gold and Diamond Rush.<sup>89</sup> South Africa never had an industrial revolution to stimulate economic growth and expansion of the workforce to the same extent as in Western Europe.<sup>90</sup> The Gold and Diamond Rush at the end of the nineteenth century served as the catalyst for creating a wage-based workforce. The rise of industry in South Africa also resulted in the exploitation of workers, dangerous working conditions and a resultant need for protective social security legislation.<sup>91</sup> The social security system, however, never culminated in a welfare state comparable with that of Western Europe. Whereas the Western European system expanded to protect the population, the South African system expanded to protect the (minority) White population. This resulted in a welfare state for the minority of the population (Whites) and in social insecurity for the majority of the African population.<sup>92</sup>

The development of both formal and informal social security is intrinsically linked to the troubled past of the country as manifested in Colonialism,<sup>93</sup> the Gold and Diamond Rush<sup>94</sup> and the legacy of Apartheid.<sup>95</sup>

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<sup>88</sup> South Africa is a former British colony. The British Empire facilitated the spread of British technology, commerce, language and government around much of the globe. From Britain, the colonies received the English language, an administrative and legal framework based on the British model, and technological and economic development. During decolonisation, Britain sought to pass parliamentary democracy and the rule of law to its colonies, with varying degrees of success. Accessed at [http://www.wordiq.com/definition/British\\_Empire#Africa](http://www.wordiq.com/definition/British_Empire#Africa) on 11 Oct 2004. Our common law is mainly Roman-Dutch law, but English law has, by means of precedent, influenced the common law. There is increasing disagreement on the content of the common law. The most popular view is that the whole of Western European common law (*ius commune*), of which Roman-Dutch and English law form part, forms part of our common law. Kleyn D & Viljoen F *Beginner's Guide for Law Students* (2002) at 82.

<sup>89</sup> See par 3.3, ch 2.

<sup>90</sup> See par 4.2, ch 5.

<sup>91</sup> See par 3.3, ch 2.

<sup>92</sup> Haarman C *Social Assistance in South Africa: Its Potential Impact on Poverty* (2000) at 12-14. Accessed at [http://www.cdhaarmann.com/Publications/C\\_PhD\\_w.pdf](http://www.cdhaarmann.com/Publications/C_PhD_w.pdf) on 27 Jul 2004. (Hereafter Haarman).

<sup>93</sup> Rwezuara BA "The Changing Role of the Extended Family in Providing Economic Support for an Individual in Africa" in Meulder-Klein MT & Eeklaar J *Family, State and Individual Economic Security (Vol 1 – Family)* (1988) at 168. (Hereafter Rwezuara).

<sup>94</sup> See par 3.3, ch 2.

<sup>95</sup> Par 3.4, ch 2.

The copying of certain elements of the Western European social security model indirectly contributed to racial inequalities. For example, the Western European social security model had an inherent employment bias, protecting only workers in the formal sector.<sup>96</sup> This employment bias was copied in South Africa in an environment where African workers were mostly unskilled and marginalised owing to the policy of job reservation for White South Africans.<sup>97</sup> This resulted indirectly in the exclusion of Africans from formal employment and therefore from social security protection. Africans were often specifically excluded from the definition of “employee”<sup>98</sup> and separate labour legislation was created for African and White workers.<sup>99</sup> This resulted in a large number of people being excluded from formal employment and formal social security protection.<sup>100</sup>

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<sup>96</sup> Typically, the European Union stands for four welfare state models: (a) The corporate, continental European model, which is characterised by a work-orientated, social insurance scheme implemented by public professional institutions. This model is found mainly in Belgium, Germany, France, Italy and Austria. (b) The liberal Anglican model, which refers to a model in which the role of the state has decreased and is confined to guaranteeing everyone a minimum level of subsistence and where benefits are usually means-tested. These systems are found in the United Kingdom and Ireland. (c) The socio-democratic, Scandinavian type with an extensive public social protection system in which social protection is considered as a basic human right. This system is found in Scandinavian countries. (d) The Southern European welfare state model found in Greece, Spain and Portugal. The system is employment-orientated, lacks a sufficient minimum level of subsistence for all, has a high level of expenditure on old-age benefits and has a service-orientated social policy in the field of health care. Von Steenberge J & Jorens Y “New Challenges for European Social Security” in Oliver et al *The Extension of Social Security Protection in South Africa* op cit note 1 at 12. The Western European model referred to in the present thesis is therefore actually a combination of the corporate, continental European model and the Southern European welfare state model. For purposes of this thesis, however, it will be called the traditional Western European model of social security.

<sup>97</sup> See par 3.4, ch 2.

<sup>98</sup> For example, in terms of s 1 of the Miners’ Phthisis Act, 19 of 1912 a “miner” was defined as any person of European descent who worked below the surface of a mine, as opposed to a “native labourer”, who was a Black worker. In terms of s 21, only a “miner” was entitled to claim benefits. In terms of s 30, a native labourer who contracted miners’ phthisis was regarded as sustaining a personal injury and had to claim compensation in terms of the Black Labour Regulations Act, 15 of 1911, which had inferior benefits to those provided for “miners”.

<sup>99</sup> For example, Black people were excluded from the Miners’ Phthisis Act, 19 of 1912 and the Workmen’s Compensation Act, 25 of 1914. Protection afforded in terms of the Black Labour Regulations Act, 15 of 1911 was inferior to that provided for by legislation for Whites.

<sup>100</sup> Liffman R “Social Security as a Constitutional Imperative: An Analysis and Comparative Perspective with Emphasis on the Effect of Globalisation on Marginalisation” in Olivier et al *The Extension of Social Security Protection in South Africa* op cit note 1 at 31. Also see pars 3.3 & 3.4, ch 2.

There is very little documentation and evidence to indicate how the large number of people (mainly African) faced with insecurity, survived.<sup>101</sup> In order to overcome insecurity, those excluded from formal social security protection developed informal social security support mechanisms.<sup>102</sup> These informal schemes were never incorporated in the formal system and, owing to a number of factors (discussed below),<sup>103</sup> never made the transition from informal to formal, as was the case in Western Europe.<sup>104</sup> This resulted in a two-tier system of social security in South Africa, namely a formal and informal system of social protection.<sup>105</sup> The informal leg of the system has only recently been recognised as such, and it is still not clear what the future of informal social security within the broader South African social security framework will be.<sup>106</sup>

The existence of the informal leg of social security served, ironically enough, in the past as an excuse to justify the lack of inclusion of African people in the formal social security paradigm. For example, the old-age grant initially did not include African people, because it was believed that they had their own mechanisms of care (informal social security) for the elderly.<sup>107</sup>

The following major phases in South African history can be distinguished as the stages that had a severe effect on the development of social security in the country:

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<sup>101</sup> This could be due to political beliefs and the isolation of the country as a result of Apartheid. Accordingly, very little research into “African” topics took place.

<sup>102</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 566 (par 19.2.3).

<sup>103</sup> Par 3.4, ch 2 & par 2, ch 4.

<sup>104</sup> Par 3, ch 2 & par 4, ch 5.

<sup>105</sup> If indirect social security is added, it can be described as a three-tier system. Although the existence of a three-tier system is recognised and supported, in this thesis, the focus will remain on the tension between formal and informal social security.

<sup>106</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 560-561 (par 19.1).

<sup>107</sup> Haarman op cit note 92 at 12.



**Table 1: Stages of Development of the Social Security System in South Africa**

<b>Phase</b>	<b>Major effect on development of formal social security support</b>
Pre-Colonialism	Family and community support constituted social security support.
Early Colonialism	Transplanting of Western European social values and social security mechanisms.
Gold & Diamond Rush	Beginning of worker-based social security programmes focused mainly on protective legislative instruments. Beginning of differentiation and discrimination between African and White workers.
1910 – Apartheid	Racial segregation marked by social security provisioning.
Democracy	Reform and extension of social security system.

### **3 HISTORICAL DEVELOPMENT OF SOCIAL SECURITY IN SOUTH AFRICA**

#### **3.1 Early civilisation**

People have lived in South Africa since early civilisation, mostly in an agrarian setting in tribes and clans.<sup>108</sup> The tribe or clan provided protection against insecurity, and indigenous law governed social security rights and responsibilities.<sup>109</sup> The situation soon changed with the dawn of Colonialism.

A hundred years ago, the economic and social organisation of most traditional African families was such that individual economic needs were seen as part of the needs of the wider community. The pre-colonial extended family was the centre of production,

<sup>108</sup> There is evidence of San rock paintings in present-day Namibia dating back 26 000 years. The estimated date is determined through radiocarbon techniques.

Accessed at <http://www.sahistory.org.za/pages/mainframe.htm> on 26 Jul 2004.

<sup>109</sup> Accessed at <http://www.swp.ie/resources/How%20Africa%20was%20underdeveloped.htm> on 26 Jul 2004. In traditional African law, a person's legal status, rights and obligations are determined by tribal membership, political status, gender, age, marriage and legitimacy. The dynamics within the tribe provided social security protection. Olivier NJJ et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) at 2-8. (Hereafter Olivier NJJ). Although tribes have mostly ceased to exist in modern society, there is still a strong reciprocal responsibility among family members to care for one another. Also see Rwezuaru op cit note 93 at 170.

distribution and consumption. The extended family was organised and managed within a strong kinship framework.<sup>110</sup> The extended family<sup>111</sup> provided a social safety net for individual family members. The extended family normally consisted of three to four generations living together. Mutual support played a fundamental role in the preservation of traditional family units, commencing with care for young children and ending in reciprocal care for the elderly.<sup>112</sup>

Kinship influenced every form of economic and social relationship, and relations were created and maintained by the continued and reciprocal transfer of property as well as services.<sup>113</sup>

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<sup>110</sup> Rwezuara idem at 168.

<sup>111</sup> The term “extended family” is used in this thesis to refer to a traditional (mostly) African social unit consisting of people who are genealogically related as well as those who are related to them through marriage. Traditionally, such a unit was often located in a single geographical area referred to as a homestead and headed by a senior male relative who directed important economic, religious and political activities for the unit. The extended family still plays an important role in social security protection. In the modern context, it often comprises a female-headed household and 3 to 4 generations living together. The word “extended family” is therefore used as a convenient label to describe a group of individuals whose social and economic welfare is closely associated. Idem at 169.

<sup>112</sup> Ibid. Labour was divided along gender lines. Women mostly performed duties related to food production, storage, processing and child care. Men and their sons were assigned functions such as house-building, clearing of land for cultivation, hunting, animal husbandry and defence. Land was the major source of subsistence and was jointly owned by the tribe, of which the homestead group was a part. Each head of the extended family was assigned adequate land. In African communities, children played a very important role. They were the ones who would ensure the continuity of the family and society. It had always been the responsibility of the whole community to see that children were raised properly, the expectation being that, when they grew into adulthood, they would provide for the older members of the community. The elderly also played a very important role in traditional African communities. In African communities, the elderly had sacred status. Children and grandchildren were expected to provide the elderly with company and to meet their material needs, and also to help with tasks forming part of daily living which the elderly could no longer perform themselves. The younger generations also had to nurse the elderly when they were sick and give them the assurance that they would get a proper burial when they died. The control the elders had over productive assets ensured their autonomy until death. Dixon-Fyle K “Social Policy with Respect to Care: A Perspective for Sub-Saharan Africa” Paper published by the ILO Geneva (June 2002) at 11-16. (Hereafter Dixon-Fyle).

<sup>113</sup> Rwezuara idem at 170. By providing for a system of rights and duties between family members (for example parents and children), traditional law ensured the economic security of the individual. These rights and duties were such that parents and children could make socially recognised claims upon each other’s property and labour at different stages of their lives. It was expected (and children were taught and socialised to recognise and respect their lawful obligation towards parents and other relatives) of parents to carry a heavier burden towards their children when they grew up. As the children grew, the burden eased. In return, the children’s burden and duties towards their parents increased as they grew older. In this way, parents could expect reasonable security during old age. Economic security and traditional law cannot be distinguished from each other. The law of property in traditional Africa is intertwined with the law of status. Only when status relationships have been investigated can the role of property be better understood. Most traditional African laws protect the wife and children. The status of wife among many African

### 3.2 Early Colonialism

The Europeans were slow to seize black Africa, ruthless in doing so, harsh when they had done it – but by no means doers only of harm.<sup>114</sup>

The role of Colonialism in the development of South Africa evokes mixed emotions. It cannot be denied that Colonialism left an imprint on the history of the country, especially as far as the development of the social security system is concerned. Colonialism provided a particular framework for the further development of the country and its social security dispensation.<sup>115</sup> Most significant was the impact on traditional relations.<sup>116</sup> The extended family's role as provider of individual economic support declined, and, unfortunately, the gap left by the wider family was not filled by the state, as was the case in many developed European countries.<sup>117</sup> Colonialism weakened traditional law and custom to such an extent that these became unresponsive to the pressing economic needs of individual family members.<sup>118</sup>

In South Africa, the first contact with the Western world was made with the discovery of the Cape of Good Hope by the Portuguese.<sup>119</sup> The second and more permanent exposure

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societies entitled a woman under traditional law to use her husband's property and other properties. This entitlement could not be taken away from her as long as she stayed married or resident in her husband's homestead. Upon the death of the husband, there was also a system of extending the original marriage beyond the life of the husband and generally guaranteeing reasonable economic security to widows. This system guaranteed economic security for the woman and children. Also see Olivier NJJ op cit note 108 at 1-8 & 519-543.

<sup>114</sup> "The Scramble for Africa (Somalia Watch) 3 Feb 2000".

Accessed at <http://www.somaliawatch.org/archive/000203101.htm> on 26 Jul 2004.

<sup>115</sup> Liffman op cit note 100 in Olivier et al *The Extension of Social Security Protection in South Africa* op cit note 1 at 31. Kaufmann O "Legal Problems relating to Social Security in African Countries" *Social Security in Africa: Proceedings of the International Conference held in Berlin 1993* (1994) at 43.

<sup>116</sup> In traditional law there is a duty of care imposed on family members which is reciprocal in nature. Dekker AH "Social Security for those who Work Informally, and Informal (Community- and Family-Based) Solutions to Social Protection" in Olivier et al *The Extension of Social Security Protection in South Africa* op cit note 1 at 251-252. Also see par 3.2, ch 2.

<sup>117</sup> Rwezura op cit note 93 at 168.

<sup>118</sup> Ibid.

<sup>119</sup> Harrison G "The Republic of South Africa in the Postcolonial Literature and Culture Web" accessed at <http://www.postcolonialweb.org/sa/sachron.html> on 24 Jul 2004. (Hereafter Harrison). Also see <http://www.sahistory.org.za/pages/mainframe.htm> (24 Jul 2004). First Bartholomeu Dias and later Vasco da Gama.

to the Western world occurred with the Dutch invasion of the Cape when Jan van Riebeeck established a settlement in Cape Town on behalf of the Dutch East India Company in 1652. The Dutch occupation of the Cape lasted until 1795, when the first British occupation of the Cape took place.<sup>120</sup> This can be labelled as the period of early Colonialism.<sup>121</sup>

The Colonialism of South Africa lasted from 1652 until 1963, when South Africa gained independence. Ironically, the end of Colonialism was marked by the beginning of Apartheid, which continued as a form of “colonialism” through domination of the majority by the White minority.<sup>122</sup>

Under Colonialism, socio-economic structures familiar to the colonialists (mostly from Europe) were imposed upon traditional communities. These structures did not acknowledge the intergenerational family, but rather chose to deal with individuals (mostly men) instead of with communities. The main purpose of the dealings with local communities was not really an interest in the wellbeing of the family, but to make money.<sup>123</sup> Under Colonialism, and (later) after independence, decision-making was taken away from the traditional structures. New economic arrangements incorporating the

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<sup>120</sup> From 1803-1806 Dutch rule of the Cape was reintroduced. Such rule continued until 1806, when the Second British Occupation of the Cape took place.

<sup>121</sup> In 1884, at the request of Portugal, Bismarck called together all major Western powers to end the confusion regarding control over Africa and, during the Berlin Conference in 1884-1885, European countries plotted the complete colonialism of Africa. At the time of the Conference, 80 percent of Africa was still under local and traditional rule. Geometric boundaries were created to divide Africa into fifty irregular countries. *“This new map of the continent was superimposed over the thousand indigenous cultures and regions of Africa. The new countries lacked rhyme or reason and divided coherent groups of people and merged together disparate groups who really did not get along.”* Rosenburg M “Berlin Conference of 1884-1885 to Divide Africa” accessed at <http://geography.about.com/cs/politicalgeog/a/berlinconference.html> on 24 Jul 2004.

<sup>122</sup> Most British colonies experienced a period of de-colonialism after the Second World War. This was due to a number of factors, for example America’s desire to end European imperialism, the rise of socialism, which advanced the principle of self-rule, and an increase in political and philosophical pressure to end slavery, racism and economic exploitation. De-colonialism was supposed to end White minority domination of the colonies, for example in India and Rhodesia. In South Africa, White minority domination continued even after de-colonialism and was in fact replaced by Apartheid. The latter was seen as the Afrikaner-Nationalist instrument for ensuring oppression of the majority by the White minority. Van Zyl Slabbert F “The Dynamics of Reform and Revolt in Current South Africa” The Tanner Lectures on Human Values, (Brasenose College, Oxford University, Oct 27&29 & Nov 5, 1987) at 6-8. Accessed at <http://www.tannerlectures.utah.edu/lectures/Slabbert88.pdf> on 26 Jul 2004.

<sup>123</sup> Dixon-Fyle op cit note 112 at 6.

values, norms and social relations associated with European cultures were introduced, such as employment-related benefits, as opposed to family-related benefits, and the designation of a male breadwinner as the head of a nuclear family, as opposed to every member of an extended family having a social and economic place.<sup>124</sup>

The social welfare system developed under the influence of the European colonialists was linked to salaried employment. Those outside this framework were excluded.<sup>125</sup>

### 3.3 The Gold and Diamond Rush

The Gold and Diamond Rush marked the beginning of industrialisation and the introduction of waged labour in South Africa. An industrial revolution never took place in South Africa, but the discovery of gold and diamonds led to a shift in the economy away from that of an agrarian society.<sup>126</sup>

In 1866, massive diamond deposits were discovered in Kimberly in the Northern Cape. In 1879, early gold rushes to Pilgrim's Rest and Barberton took place. In 1886, gold was discovered<sup>127</sup> on the outskirts of present-day Johannesburg.<sup>128</sup> Only in 1905 was the Cullinan Diamond discovered near Pretoria.<sup>129</sup>

Slavery, Colonialism, industrialisation, urbanisation and poverty have made inroads into traditional family support networks.<sup>130</sup> Migration and urbanisation have considerably

<sup>124</sup> Ibid.

<sup>125</sup> Which just happened to be the majority of the population living off farming, the growing number of workers in the informal economy, and women and the elderly who cared for children.

<sup>126</sup> "The History of Labour Law" accessed at

<http://www.ilo.org/public/english/dialogue/ifpdial/II/observatory/profiles/sa.htm> on 25 Jul 2004. (Hereafter "The History of Labour Law").

<sup>127</sup> Harrison op cit note 119.

<sup>128</sup> By 1892 there were more than 40 000 foreigners living in Johannesburg, a number that exceeded the entire Afrikaner population of the then Transvaal Republic.

<sup>129</sup> Harrison op cit note 119.

<sup>130</sup> Dixon-Fyle op cit note 112 at 18. Also see Dekker AH "General and Regional Poverty Alleviation" in Olivier MP, Smit N, Kalula ER & Mhone GCZ *Introduction to Social Security* (2004) at 211. (Hereafter Olivier et al *Introduction to Social Security*).

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affected the extended family, weakening traditional ties.<sup>131</sup> Through migration, many people were uprooted from traditional family networks. The physical distances between places, a lack of opportunities to visit regularly because of limited financial resources, and the withdrawal, owing to unemployment, from traditional arrangements on the part of the migrant in terms of meeting familial obligations to forward remittances, were all factors contributing to such uprooting as a result of migration. As a result, people started to seek new support networks and engaged with their neighbourhood and non-kin friends.<sup>132</sup>

The success of the mining industry depended from the outset on the availability of abundant, cheap and unskilled labour, which, historically, came from the African population.<sup>133</sup> Africans were used as labourers and had to work in the mines under deplorable conditions, especially after the start of “deep-level” mining in 1896.<sup>134</sup> In order to “force” Africans to want to earn a wage, they were taxed. Consequently, they had to earn a wage to pay the necessary taxes.<sup>135</sup> This led to migration and, as traditional arrangements disintegrated, semi-formal arrangements started to evolve. There is evidence that, in Kimberley during this period, African kinsmen paid for a sick man's food and his medical costs. On death, kinsmen paid the burial fees. If relatives were not available, companions from the same village shouldered the financial responsibility.<sup>136</sup>

After the discovery of gold and diamonds, mining activity in the country rapidly increased, with a resultant major increase in the number of foreigners and labourers from other countries.<sup>137</sup> This also resulted in the introduction of Western European values and ideas, for example trade unionism and workers demanding protection against injuries.<sup>138</sup>

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<sup>131</sup> Children and grandchildren have gone to work in the towns and cities, leaving the elderly behind. The elderly have lost their status, self-esteem and their public decision-making role under colonialism. Dixon-Fyle op cit note 112 at 18.

<sup>132</sup> Zwanecki D *Social Security Arrangements in sub-Saharan* (2001) at 17. (Hereafter Zwanecki).

<sup>133</sup> Accessed at <http://www.sacp.org.za/docs/stratconf/sa%20economy.html> on 26 Jul 2004.

<sup>134</sup> Ibid.

<sup>135</sup> Harrison op cit note 119. “The History of Labour Law” op cit note 126.

<sup>136</sup> Accessed at <http://www.sahistory.org.za/pages/classroom/pages/projects/grade8/lesson1/unit3.htm#early> on 26 Jul 2004.

<sup>137</sup> The Gold and Diamond Rush led to the creation of the mining industry, which became the main economic role player at that time. Initially, gold and diamonds were alluvial, but later on, in 1869,

In 1910, after the Anglo-Boer War, the Union of South Africa was founded and South Africa was allowed to function as a semi-autonomous state under British colonial rule.<sup>139</sup> Before 1910, social security and workers' safety legislation was enacted in, and for, each of the four provinces that existed at that stage, namely the Transvaal, the Cape of Good Hope, the Orange Free State and Natal. All legislation introduced after unification was aimed at the consolidation of these various legislative tools of the four provinces.<sup>140</sup>

As was the case in Western Europe during the first decade of the twentieth century, various social security measures were introduced by legislation to protect workers in growing industries (mostly mining). The first legislation related to the protection of workers against occupational injuries.<sup>141</sup> Owing to the influence of foreigners during this period, and because South Africa was a British colony with strong British influences after

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diamonds were found in yellow earth and below in hard rock called blue ground (Kimberlite), which necessitated "deep mining". Accessed at <http://www.amnh.org/exhibitions/diamonds/Africa.html> on 26 Jul 2004.

<sup>138</sup> In 1881 the first trade union, the Carpenters' and Joiners' Union, was formed in South Africa to protect the interests of skilled foreign workers working on the mines. "The History of Labour Law" op cit note 126.

<sup>139</sup> After unification, the first foundation of Apartheid was laid and African political rights were oppressed, for example by way of the Natives Land Bill, 27 of 1913. In terms of the Natives Land Bill, it became illegal for Africans to purchase or lease land from Whites, except in reserves. Boody-Evans A "Apartheid Legislation in South Africa" accessed at <http://africanhistory.about.com/library/bl/blsalaws.htm> on 24 Jul 2004. (Hereafter Boody-Evans). The result was that Black occupancy was restricted to less than 8 percent of the country's land. This legislation was followed by the Natives (Urban Areas) Act, 21 of 1923, which was the first law imposing residential segregation in urban areas. In 1924 the African National Congress (ANC) was formed (initially known as the South African Native National Congress (SANNC)). In order to "replace" the family structures that have disintegrated, informal social security has evolved as a result of people having developed new forms of social solidarity so as to create networks with a semi-formal status. Membership of these networks is generally not based on kinship but on the fulfillment of mutually agreed obligations regarding contributions and assistance. This has led to the development of a number of savings associations, self-help organisations and cooperatives. These have developed as a result of people struggling to reinvent a set of social and economic relations that meet their needs. Dixon-Fyle op cit note 112 at 7.

<sup>140</sup> This is reflected in the preambles of a number of acts enacted after unification; see, for example, the Children's Protection Act, 25 of 1913, the Mines and Works Act, 12 of 1911, the Workmen's Compensation Act, 25 of 1914.

<sup>141</sup> The racial struggle was echoed in all labour and social security legislation. For example, in terms of the 1911 Mines and Works Act, various types of work were reserved for White workers only. In addition, the Act contained safety regulations pertaining to the operation of mines, works and machinery, for example in sections 4, 5, 8, and 9. This can be described as the first Health and Occupational Safety Act. The Factories Act, 28 of 1918 provided for basic employment conditions and was the forerunner of the Basic Conditions of Employment Act, although it also contained some safety regulations.

the Boer War, social security legislation also found its way into South Africa. However, such legislation was never really based on a comprehensive strategy and it seems the legislation was randomly created, with the focus being the protection of White workers. African labour was seen as necessary and dispensable. Social insurance was only introduced for occupational injuries<sup>142</sup> and unemployment insurance.<sup>143</sup> Interestingly enough, the system tended to favour social assistance instead of social insurance.

The initial occupational injury legislation<sup>144</sup> was not based on social insurance. In fact, it was merely a codification of the common law duty of the employer to pay for occupational injuries. It did however provide monetary limits in the form of fixed amounts that could be claimed. Later, occupational diseases were also brought under the protective scope of the legislation.<sup>145</sup> From 1934,<sup>146</sup> Africans (Natives) were also covered in terms of the scope of application of the Act. They were, however, entitled to less benefits and were subject to separate regulation. Only in 1934 was a social insurance fund created for workmen's compensation.<sup>147</sup>

As was the case in Western Europe, the first social security legislation that was introduced related to the protection of workers.<sup>148</sup> The first social assistance legislation was the Miners' Phthisis Allowances Act.<sup>149</sup> This Act provided for allowances to be paid to mineworkers who had contracted miners' phthisis. The Act was introduced in order to

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<sup>142</sup> The first health and safety regulations related to miners' phthisis. In 1902 a Commission Report on Miners Phthisis (by H Weldon) was delivered to Lord Milner. This resulted in 1907 in the Miner's Phthisis Act, which provided for death benefits for White miners' widows. In 1912 the Miners' Phthisis Act introduced compensation for miners. This Act was later amended to include prevention. In 1911, the Mines and Works Act was enacted, which controlled working conditions in mines. The first pensions legislation was introduced in 1913 (Act 36 of 1913) and the first Workmen's Compensation Act was enacted in 1914 (Act 25 of 1914).

<sup>143</sup> Unemployment Benefit Act, 25 of 1937.

<sup>144</sup> Workmen's Compensation Act, 13 of 1917.

<sup>145</sup> Act 13 of 1917 amended the 1914 Workmen's Compensation Act and added industrial diseases to occupational injuries as areas of protection.

<sup>146</sup> Act 59 of 1934.

<sup>147</sup> Before 1934 compensation for African people was dealt with in terms of the Black Labour Regulation Act, 15 of 1911.

<sup>148</sup> Haarman op cit note 92 at 12. The Workmen's Compensation Act of 1914, in terms of which parents could claim monetary support in cases of illness and injuries, and the Children's Protection Act of 1913, in terms of which parents could receive maintenance grants for children.

<sup>149</sup> Act 34 of 1911.



lay the foundation for the creation of a fund for granting allowances to persons who had contracted the disease. It was intended that the fund be funded from money appropriated by Parliament and the owners of mines. This culminated in the Miners' Phthisis Act,<sup>150</sup> which paid allowances to miners who had contracted miners' phthisis. The Miners' Phthisis Compensation Fund was created, to which government, employers and employees contributed. However, the definition of "miner" only included persons of European decent.<sup>151</sup> A "native labourer" who contracted the disease was deemed to have sustained a personal injury and had to claim in terms of the Native Labour Regulation Act.<sup>152</sup>

The Western European model of social insurance was however not replicated in any other social security legislation. The first unemployment insurance was introduced only in 1937.<sup>153</sup> Unemployment benefit funds were created per industry.<sup>154</sup> Only in 1946 was a national fund based on sound social insurance principles created.<sup>155</sup>

Pension and health care provision originated in the private domain and was never brought into the realm of public protection. Long before unification, pension funds (and life insurance) were created per industry. Separate legislative instruments were created per province. For example, in the Cape of Good Hope, a pension fund for railway workers was created in 1888.<sup>156</sup> Similar funds were also established in all the other provinces for railway workers.<sup>157</sup>

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<sup>150</sup> Act 19 of 1912.

<sup>151</sup> Section 1 distinguished a "miner" from a "native labourer".

<sup>152</sup> Section 30 of Act 19 of 1912. Black Labour Regulation Act, 15 of 1911.

<sup>153</sup> The Unemployment Benefit Act, 25 of 1937.

<sup>154</sup> Section 4(1). Again Black labourers were excluded (s 2(h)). Also excluded were persons employed in agriculture (s 2(i)).

<sup>155</sup> The Unemployment Insurance Act, 53 of 1946.

<sup>156</sup> Act 6 of 1888 Cape of Good Hope.

<sup>157</sup> In the Transvaal, by way of the Railway Service and Pension Act of Transvaal, Act 20 of 1908; in the Free State by way of Act 41 of 1909; and in Natal by way of Act 1 of 1910. The first traces of a Civil Service Pension Fund can also be found in 1895 in the Cape of Good Hope.

The first social assistance pensions were created in 1916 by the War Special Pensions Act<sup>158</sup> to make provision for war veterans who had served in the First World War and who had contracted a disease or who suffered from permanent ill health. Provision was also made for payments to dependants of a war veteran who was killed. The enactment of this statute can probably be attributed to British influence, which sought to ensure continued support for the war.

Social assistance followed a categorical approach and a system was devised for old-age grants,<sup>159</sup> child grants<sup>160</sup> and disability grants.<sup>161</sup> Benefits were, however, distributed along racial lines.<sup>162</sup>

In 1937, the Unemployment Benefit Act was also passed and covered almost 88 000 workers. However, agricultural and domestic workers and mineworkers were excluded, as well as Black workers earning less than 78 pounds per year.<sup>163</sup> In 1946, the Unemployment Insurance Act was introduced which removed the 78-pound restriction but retained the other exclusions, resulting in the majority of African workers being excluded from unemployment insurance.<sup>164</sup>

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<sup>158</sup> Act 29 of 1916.

<sup>159</sup> Legislation regarding old-age pensions was introduced in 1928 (Act 22 of 1928), in terms of which every White and Coloured person was entitled to receive an old-age pension (s 1). Coloureds were initially included, but were later excluded. Later, they were again included, along with Africans and Indians. The level of benefits however remained lower than that for Whites.

<sup>160</sup> Child grants were introduced in 1937. Benefits in terms of the Children's Protection Act could be granted to urban Africans, although very few received the grants in practice and rural Africans were excluded.

<sup>161</sup> Act 11 of 1936 provided for grants for blind persons in terms of the Blind Persons Act, 48 of 1944. Indians and Natives were added. Disability grants were introduced by the Disability Grants Act, 36 of 1946 for Coloureds, Indians and Natives, but also with a lower level of benefits than for Whites.

<sup>162</sup> In 1928 the Old Age Pension Act was introduced, which made provision for old-age grants payable to Whites and Coloureds. African people were excluded because kinship support for the elderly was common amongst Africans. In 1937 disability grants were introduced for Whites and Coloureds. Only in 1944 were pensions and, in 1947, disability grants extended to Black and Indian people. Inequality existed with regard to the amount payable, for example the amount received by White people was almost five times more than the amount received by Black people. Coloured and Indian people were paid half of what White people received. The provision for child grants developed in the same manner. In the 1937 Children's Act, grants were extended to Black people, but White children still received more money than Black children, and more White than African children benefited. Haarman op cit note 92 at 12.

<sup>163</sup> *Idem* at 13.

<sup>164</sup> *Ibid.*

This legacy of exclusion of certain groups, of racial and social inequality, as well as of social insurance and social assistance, laid the foundations of the current system and provided the framework within which reform must take place.<sup>165</sup> People excluded from social security also received very little protection from labour legislation. The first comprehensive piece of labour legislation was enacted in 1924.<sup>166</sup>

### 3.4 Apartheid

In 1948, the National Party came to power and, in a very systematic way, introduced legislative measures to gradually enforce the legacy of Apartheid.<sup>167</sup> In particular, Apartheid legislation pertaining to separate living areas and conditions permanently influenced the social security system.<sup>168</sup> This, in turn, influenced population distribution

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<sup>165</sup> Makino op cit note 80 at 9-12. Also see Liebenberg S & Tilley A “Poverty and Social Security in South Africa” *Poverty Hearing Background Paper Johannesburg* (1998). Liebenberg “Equalisation at What Cost?” op cit note 23 at 1-2.

<sup>166</sup> It provided for the registration of employer organisations and trade unions and also provided a framework for collective bargaining, for the settlement of disputes, and for strikes and lock-outs. However, pass-bearing African workers could not join trade unions. A pass-bearing African worker was, in terms of the Act, excluded from the definition of “employee” and, as a result, from social security protection. This also led to a big gap in wages and working conditions between Black and White workers. The Industrial Conciliation Act, 28 of 1956 further entrenched the racial division of workers by allowing for the reservation of certain positions for White workers and by prohibiting the establishment of “mixed” trade unions (with White and Coloured workers). The excluded majority of Black workers could however not be oppressed forever. By the 1970s, there was increasing uprising on the part of trade unions as well as militant collective action. In 1977, the Wiehahn Commission of Inquiry into Labour Legislation was appointed. It was recommended by the Commission that African workers be allowed to join registered trade unions and be represented on industrial councils and conciliation boards. The Industrial Court was also established and had far-reaching powers as far as unfair labour practices were concerned. Government made an attempt to address the issue by amending the Bantu Labour (Settlement of Disputes) Act, 48 of 1953, which had created liaison and work committees to restrict the organisation of Black workers into unions. These committees and structures were however ignored and Black workers continued to join trade unions in large numbers. Du Toit D et al *Labour Relations Law* (2003) at 6-10. (Hereafter Du Toit).

<sup>167</sup> Boddy-Evans op cit note 139 at 2-3. Apartheid was formalised through the law. For example, when the National Party came into power in 1948, it moved towards better protection for White workers and set a minimum level for African workers who wished to qualify for unemployment benefits, and, by doing so, effectively excluded them. Haarman op cit note 92 at 13.

<sup>168</sup> For example the Group Areas Act, 41 of 1950, the Bantu Building Works Act, 27 of 1951, the Prevention of Illegal Squatting Act, 52 of 1951, the Bantu Authorities Act, 68 of 1951, the Natives Law Amendment Act, 54 of 1952, the Bantu Education Act, 47 of 1953, the Reservation of Separate Amenities Act, 49 of 1953, the Natives Resettlement Act, 19 of 1954, the Group Areas Development Act, 69 of 1956, the Natives (Prohibition of Interdicts) Act, 64 of 1956, the Extension of University Education Act, 45 of 1959, the Promotion of Bantu Self-Government Act, 46 of 1959, the Coloured Persons Communal Reserves Act, 3 of 1961, the Preservation of Coloured Areas Act, 31 of 1961, the Urban Bantu Councils

and affected the relevant, indirect social security measures, for example housing, water, electricity, etcetera. Access to these, and the quality of the services provided, was based on racial preference, resulting in inferior facilities for African people and also in increased poverty amongst them. This affected the development of the social security system.<sup>169</sup>

The creation of homelands led to increased segregation. This, in turn, resulted in poorer indirect social security facilities for Black people and in exclusion from the formal sector. Homelands, and legislation to reinforce links with the homelands, led to the reinforcement of “traditional” ties within the extended family and therefore could also have led to the reinforcement of informal social security measures. The progress of urbanisation was forcefully stopped by Apartheid and led to closer relations in the traditional setting, which resulted in greater informal social security support. Even in urban areas, people were forced to have links with their homelands. This created a link between the rural and urban areas for purposes of informal social security.<sup>170</sup>

Social assistance grants for Whites were gradually increased, while grants for Blacks were slowly decreased to the extent that the gap between these two types of grants gradually increased.<sup>171</sup>

The era from 1972 to 1990 was characterised by a trend towards reincorporation and reduced inequality.<sup>172</sup> Although the levels of grants for Africans were gradually increased, they remained much lower than those for Whites.<sup>173</sup> Discrimination also

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Act, 79 of 1961, the Bantu Homelands Citizens Act, 26 of 1970 were all aimed at creating a division between the various population groups in the country.

<sup>169</sup> Makino op cit note 80 at 7.

<sup>170</sup> For example through the Promotion of Bantu Self-Government Act, 46 of 1959, the Urban Bantu Councils Act, 79 of 1961, and the Bantu Homelands Citizens Act, 26 of 1970.

<sup>171</sup> Haarman op cit note 92 at 13.

<sup>172</sup> Ibid. Some argue that the National Party realised the need to integrate Black people into the economy and that this included reform of the social security system. In 1977, racial differentiation in the unemployment insurance system was removed, but the income restriction remained the same. The level of the old-age pension for Blacks was also increased, so that, by 1993, it had reached the level of 86 percent of the White pension.

<sup>173</sup> Ibid. For example, only in 1993 did the benefit level in respect of the old-age grant become the same for all races. Also see Makino op cit note 80 at 3 & 14. When the Lund Committee on Child and Family

occurred as a result of poor administration. Most Africans were excluded by means of inefficiency and maladministration.<sup>174</sup>

The social security system was intended to benefit a White minority. Since social assistance (which was quite advanced for a developing country) was aimed only at covering a minority, such assistance was financially feasible.<sup>175</sup> Social insurance was connected to formal employment, with Whites making up the majority of this sector owing to policies of job reservation for Whites. The social security system created for the White population was therefore similar to that found in Western Europe and feasible as such. It made provision for social insurance based on unemployment and sickness benefits, as well as for insurance against employment injuries. A social assistance system was created that allowed for old-age, disability and child benefits. This may, for example, explain the short period of coverage with regard to unemployment insurance benefits. A White person would (in the light of the job reservation policies existing in the country at that time) have found it possible to find a job in a relatively short period.<sup>176</sup>

The effect was that “two social security systems” developed. For the White minority there was the protection afforded by the formal social security system. For the majority of the population (which was non-White) there was effectively no protection afforded under the formal system and own means of social protection against social insecurity were devised. The effect of this was that only from the 1970s (and then only to a limited extent) and from the 1990s were African people in the country for the first time afforded social protection through the formal system. The formal system, however, still had many racial trends that had to be removed, which was mostly done in the early 1990s. The biggest legacy, however, of the Apartheid system as far as social security was concerned

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Support was established in 1996, the state maintenance grant was still mainly paid to non-Africans, with 48 out of 1 000 Coloured children, 49 out of 1 000 Indian children, 15 out of 1 000 White children and 2 out of 1 000 African children receiving the grant. Lund Committee *Lund Committee Report on Child and Family Support* (1996) at ch 1, s.4.

<sup>174</sup> Haarman *ibid.*

<sup>175</sup> Haarman *idem* at 14. The extensive benefits for Whites can also be seen as a way of “buying” votes and loyalty for the system of oppression of Blacks.

<sup>176</sup> *Ibid.* Also see Makino *op cit* note 80 at 8 and Dekker & Olivier *op cit* note 41 in Olivier *et al Social Security: A Legal Analysis* *op cit* note 6 at 561-562.

is that a system was created for a minority, which must now cover the whole population without inequality. The oppression and poverty brought about by Apartheid must now be addressed by a system that is not necessarily equipped to do so. This is one of the reasons why the system needs to be changed.<sup>177</sup> The new government is thus faced with two challenges in reforming the system: first, to build on the positive aspects of the present system (for example its extensive benefits in the form of social assistance), and, secondly, to develop new programmes and benefits for the population as a whole and customise these for South Africa with its unique political and social situation.<sup>178</sup>

### 3.5 Democracy

The year 2004 marked ten years of democracy in South Africa.<sup>179</sup> In the past ten years, government has launched new programmes to address poverty and to remove racial inequalities in social security legislation.<sup>180</sup> There has also been an increase in social security expenditure in order to further fight poverty.<sup>181</sup>

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<sup>177</sup> Taylor Report op cit note 39 at 16, 22-23.

<sup>178</sup> Haarman op cit note 92 at 14. Also see ch 8 in general.

<sup>179</sup> The first democratic elections on 26 April 1994 marked the end of Apartheid and the beginning of South Africa's transition to democracy. Accessed at <http://www.cato.org/events/040512pf.html> on 26 Jul 2004.

<sup>180</sup> Taylor Report op cit note 39 at par 5.2, ch 5.

<sup>181</sup> Accessed at [http://www.safrica.info/ess\\_info/sa\\_glance/social\\_delivery/social\\_grants.htm](http://www.safrica.info/ess_info/sa_glance/social_delivery/social_grants.htm) on 26 Jul 2004. The provision of social grants is the government's most effective programme for addressing income poverty in the country. Over R2,5 billion a month is paid out in the form of social security grants. These provide support to over seven million South Africans. This number will increase as the drive to register eligible recipients gains momentum. Annual expenditure on grants increased 3,5 times between 1994 and 2003, from R10 billion to R34,8 billion. During the same period, the number of South Africans receiving social grants increased from 2,6 million to over seven million. In the last four years alone, this number increased by 128 percent, from 3,2 million in April 2000 to over seven million in November 2003. The child support, care dependency and foster care grants contributed significantly to this increase. The number of children receiving grants grew from 349 000 in April 2000 to roughly 3,9 million in November 2003. Over the same period, the number of old-age pension beneficiaries increased by 7,7 percent, from 1,8 million to more than two million. The government is progressively extending the child support grant to cover children up to the age of 14. Children aged between 10 and 11 will qualify in the 2004/05 financial year, while children between the ages of 12 and 14 will come on board in 2005/06. The Department of Social Development estimates that this will take in an additional 900 000 children in 2004/05 and an additional 3,2 million children in 2005/06, bringing the total number of South African children receiving grants to roughly seven million. Old-age and disability grants went up to R780 a month in April 2005 (from R740 in April 2004, R700 in April 2003, and R570 in April 2002), while child support grants went up to R180 a month in April 2005 (from R170 in 2004, R160 in 2003, and R110 in 2002).

There are also plans to improve service delivery and administration with regard to social assistance. The South Africa Social Security Agency Act, 9 of 2004 is due to be up and running by the end of 2005. It is envisaged that it will speed up delivery of social grants, cut down on corruption, and lift the burden of administration from the country's nine provinces.<sup>182</sup> Government recognised that the payment of grants on their own was inadequate for the purpose of addressing the huge challenges facing poor families and communities and therefore adopted a multi-pronged approach to poverty alleviation, which should also include the implementation of a comprehensive social security system.<sup>183</sup> To address the issue of extending social security protection in the country, the Taylor Committee was appointed to look at ways in which a comprehensive social security system in the country could be developed.<sup>184</sup> Government also implemented various programmes such as the Reconstruction and Development Programme (RDP) and the Growth, Employment and Redistribution Strategy (GEAR) to address the economic transformation of the country.<sup>185</sup> These are discussed below.

The present social security system is outlined in chapter 3 and will not be discussed here. The present system with all its shortcomings (and positive aspects) is the basis from which the government must commence with its reform of the social security dispensation.<sup>186</sup>

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> The recommendations of the Taylor Committee will be discussed in more detail in par 4.4, ch 6. It will suffice to say at this point that the recommendations of the Committee were mainly aimed at improving the present social insurance and social assistance system. Increased protection will mainly be provided through extension of the social insurance system. Although the Committee recognises informal social security, it does not include it as part of the solution to extend the social security system. Also see ch 8 in general.

<sup>185</sup> See pars 3.5.1 & 3.5.2, ch 2.

<sup>186</sup> In his 2004 State of the Nation Address, President Thabo Mbeki stated that the government would continue to build a social security net to alleviate poverty in the country, and would implement other social security initiatives, such as a school nutrition programme and the provision of free, basic water and electricity services. Mbeki stated, however, that a society in which large sections of the population depended on social welfare could not sustain its development. *"Our comprehensive programme to grow the economy, including interventions in both the first and second economies, improving sustainable livelihoods and creating work, is meant to ensure that, over time, a smaller proportion of society, in particular the most vulnerable, subsists solely on social grants."*

Accessed at [http://www.safrika.info/ess\\_info/sa\\_glance/social\\_delivery/social\\_grants.htm](http://www.safrika.info/ess_info/sa_glance/social_delivery/social_grants.htm) on 26 Jul 2004. Lesser dependence on social assistance is a long-term goal, but it should be kept in mind that public transfers fulfil an extremely important role in poor households. Taylor Report op cit note 39 at par. 2.5.3 & par. 24. This view of lesser dependence on social assistance transfers was to some extent reflected in the

### 3.5.1 *Reconstruction and Development Programme*<sup>187</sup>

The Reconstruction and Development Programme (RDP) was the ANC's first democratic election manifesto and, up until 1995, the public face of the ANC government's development approach. The RDP planned to address the many social and economic problems facing the country as a result of years of Apartheid. The first priority of the RDP related to indirect social security measures and was to "begin to meet the basic needs of people", namely jobs, land, housing, water, electricity, telecommunications and transport.<sup>188</sup> The RDP was vague and did not give clear guidance on the future of social security. It provided for a new social security and welfare system for all people regardless of race, gender or physical disability. The system would be just, fair and easily accessible to all. There would be no unnecessary bureaucracy. Workers would be able to retire at 60 or 65 and would be entitled to a state pension from the age of 60. The pension system would be restructured to meet the needs of workers in the formal and informal sectors as well as unemployed people and would link with non-government pensions, provident funds and other schemes.<sup>189</sup>

Social security would firstly focus on those groups that have been disadvantaged the most, such as domestic workers, farm workers, seasonal workers, disabled workers,

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White Paper for Social Welfare (Notice 1108 of 1997 (GG No. 18166) 8 Aug 1997) (hereafter Welfare White Paper), which incorporated "developmental social welfare". Makino op cit note 80 at 13-14. Also see Vorster op cit note 23.

<sup>187</sup> University of Pennsylvania African Studies Centre "ANC's Reconstruction and Development Programme" accessed at [http://www.sas.upenn.edu/African\\_Studies/Govern\\_Political/ANC\\_Recon.html](http://www.sas.upenn.edu/African_Studies/Govern_Political/ANC_Recon.html) on 27 Jul 2004. Also see Development Resource Centre, June 1999 "Government – NGO Partnerships: Some emerging lessons and insights) accessed at <http://www.drc.org.za> on 25 Mar 2004. (Hereafter "Government – NGO Partnerships").

<sup>188</sup> Kingsnorth P "The Globalisation of South Africa" (29 Apr 2004) accessed at <http://www.oneworld.net/article/view/84889/1/> on 11 Oct 2004.

<sup>189</sup> "The Reconstruction and Development Programme: A Policy Framework" accessed at <http://www.polity.org.za/html/govdocs/rdp/rdpall.html> on 15 Oct 2004 at par. 2.13.10.1-1.13.10.3. (Hereafter RDP Programme). Also see "Introduction to the Reconstruction and Development Programme" accessed at <http://www.polity.org.za/html/govdocs/rdp/rdp1.html> on 15 Oct 2004.



women and child victims of violence in the home, street children and other young people who have been affected by various forms of substance abuse.<sup>190</sup>

The rights of children would be protected and centres would be provided for children who needed care.<sup>191</sup> Immediate steps would be taken to remove children from prisons and police cells. The social security system would involve community and non-governmental organisations, the private sector, religious organisations, traditional healers, trade unions and so on.<sup>192</sup> It recognised that role players in the informal sector should also be recognised in the social security safety network.<sup>193</sup> The RDP specifically talked about civil society. The success of the RDP would also depend on the active involvement of all groups in society – such as trade unions, civics, women’s groups and youth movements.<sup>194</sup>

The RDP also talked about labour rights and worker rights. Worker rights were recognised as central to building the economy. The new government would ratify, recognise and support the International Conventions of the International Labour Organisation (ILO). It also recognised that there would be consultation on the restructuring of the (then) Department of Manpower (currently Department of Trade and Industry), the Unemployment Insurance Board, the Workers’ Compensation Commission and other such bodies.<sup>195</sup>

The RDP was unfortunately not successful. By 1996, most of its targets were unmet and the ministry set up to oversee it had closed down.<sup>196</sup>

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<sup>190</sup> RDP Programme idem at par 2.13.13.

<sup>191</sup> Idem at par.2.13.17.

<sup>192</sup> Idem at par 2.13.4.3-2.13.4.4.

<sup>193</sup> Idem at par 2.13.4.4, 2.13.12, 2.13.16.

<sup>194</sup> Which are called “civil society” by the RDP. In the past, these groups played a leading role in opposing Apartheid and they need to play an important role in reconstruction and development. Ibid.

<sup>195</sup> Idem at par. 2.13.2, 2.13.7.4, 2.13.7.3.

<sup>196</sup> Kingsnorth op cit note 188 at 2.

### 3.5.2 GEAR

After failure of the RDP, a new macroeconomic team was put together comprising 15 economists (two of them from the World Bank) and the fruits of their labour gave rise to the Growth, Employment and Redistribution Strategy (popularly known as GEAR). GEAR did not contain much as far as social security was concerned, but was rather a clear indication to foreign and local financial markets that the country was serious about macro-stability.<sup>197</sup>

The policy was aimed at economic growth. GEAR promised 120 000 new formal-sector jobs in the first year of implementation, but, by the end of GEAR's first year, South Africa had lost more than 100 000 formal-sector jobs.<sup>198</sup>

GEAR remained an economic programme with very little relevance to social security. It had implications for structural and indirect social security reforms. For example, GEAR recognised that cash transfers through social grants were playing a vital role in poverty alleviation, but it also tried to restrain expenditure in order to reduce the fiscal deficit. It is believed that these fiscal constraints under the GEAR strategy effectively defined the substance of the "available resources" restriction of the social security policy foreseen in the Constitution.<sup>199</sup> GEAR was also heavily criticised owing to its focus on public-private sector partnerships based on cost recovery which would increase water, electricity and rent bills for poor South Africans.<sup>200</sup>

As a programme to effect large-scale economic change in the country, GEAR also appeared to be unsuccessful.

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<sup>197</sup> "Government – NGO Partnerships" op cit note 187.

<sup>198</sup> Ibid.

<sup>199</sup> Makino op cit note 80 at 14. See how courts interpreted "available resources" in par 4.2.6, ch 3.

<sup>200</sup> Kingsnorth op cit note 188 at 2. Also see "GEAR will make the poor poorer" *Sowetan* (Jul, 30, 1998) accessed at <http://www.cosatu.org.za/samwu/30jul98.htm> on 11 Oct 2004.

### 3.5.3 *The Welfare White Paper*

The first move towards reform of the previous welfare dispensation came with the publication of the Welfare White Paper in 1997.<sup>201</sup> It set very vague and broad goals, aims and guidelines as far as the reform of the welfare dispensation was concerned.

The White Paper for Social Welfare focused on “developmental” aspects of social welfare. One of the main features of developmental social welfare is the fact that social development and economic development are mutually reinforceable and interdependent.<sup>202</sup> The constitutional obligation contained in the interim Constitution<sup>203</sup> was seen as the first important step in pushing back the notion of developmental social welfare, thereby entailing a shift away from cash transfers through social grants.<sup>204</sup> The aim of developmental social welfare is to serve and build a self-reliant national partnership with all stakeholders through an integrated social welfare system which maximises its existing potential and which is equitable, sustainable, accessible, people-centred and developmental.<sup>205</sup> The focus is on how social and economic interventions can be harmonised to have a positive impact on people’s welfare without hampering economic growth.<sup>206</sup> One of the aims of developmental social welfare is to reduce the number of South Africans relying on social security as their main source of support.<sup>207</sup> Although developmental social welfare is appreciated by many, some feel that unemployment and destitution in the country have taken on such proportions that developmental initiatives will only be able to reach a few in need.<sup>208</sup> During drafting of the Welfare White Paper, COSATU called for quantified targets and goals to prevent social security and welfare priorities from being limited by strict budget deficits.<sup>209</sup>

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<sup>201</sup> Welfare White Paper op cit note 186.

<sup>202</sup> Makino op cit note 80 at 12.

<sup>203</sup> Act 200 of 1993.

<sup>204</sup> Makino op cit note 80 at 14.

<sup>205</sup> Ibid.

<sup>206</sup> Vorster op cit note 23 at 5.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

The White Paper for Social Welfare has been criticised for being strong on rhetoric and principle, but weak on concrete targets for restructuring and delivering.<sup>210</sup> A social welfare action plan was released in April 1998 “to convert” the White Paper for Social Welfare into a reality. This document no longer receives attention within the Department of Welfare. The report of the Taylor Committee will probably guide future social welfare policy.<sup>211</sup> The Welfare White Paper is discussed in chapter 6 in more detail in the context of policy which can determine the future impact of informal social security on social security in the country.

### 3.5.4 *The Taylor Report*

The Taylor Committee was appointed to engage in consultations and to generate proposals with regard to an improved and better-structured social security system.<sup>212</sup> The broad terms of reference of the Committee were to review a broad number of elements relating to social security, *inter alia*:<sup>213</sup>

- options pertaining to ultimate objectives and targets for the social security system;
- options for immediate practical implementation;
- viability and implications of the options considered;
- to cover the following specific areas of social security: national pensions system, social assistance grants, social insurance schemes, unemployment insurance, and health funding and insurance;
- the Committee also had to look at existing processes and core issues in each of these areas;

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<sup>210</sup> Ibid.

<sup>211</sup> Ibid. Also see the discussion of the Taylor Report op cit note 39 at par 4.4, ch 6.

<sup>212</sup> Taylor Report idem at 10.

<sup>213</sup> Ibid.

- the Committee also had to make key recommendations for purposes of future direction;
- the Committee also had to make recommendations regarding the implementation of proposals for improvement of the system.

The Committee made a number of recommendations that have not yet found application in the transformation of the system. The most significant changes since publication of the Report have been the introduction of the Social Security Agency<sup>214</sup> and the Social Assistance Act.<sup>215</sup> The Taylor Committee Report is discussed in detail in chapter 6.<sup>216</sup> It is mentioned here to indicate that government is showing a willingness to transform the present social security system to make it more comprehensive. The shortcomings are therefore recognised and the Taylor Report put rather extensive recommendations for transformation of the system on the table. Government's reaction to the Report will prove its commitment to transformation of the welfare dispensation and its sympathy to the plight of the poor and indigent in the country.

It is thus clear that, since the dawn of democracy, the social security system in South Africa has undergone some changes and, in general, has improved. It however still lacks a comprehensive scope of coverage and still requires further reform.

#### **4 CONCLUSION**

From the above discussion it is clear that South Africa has a three-tier social security system consisting of formal, informal and indirect social security. The focus in this chapter has been mainly on the historical development of the formal social security system. From the discussion of the development of the formal system, the "exclusivity" of the system became manifest. This "exclusivity" has been the main cause for the

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<sup>214</sup> South African Social Security Agency Act, 9 of 2004.

<sup>215</sup> South African Social Assistance Act, 13 of 2004.

<sup>216</sup> See par 3.5.4, ch 2, par 4.4, ch 6 & ch 8 in general.

development and maintenance of the informal social security leg of the present dualistic system. The formal social security system focused on the minority of the population, namely White people. This system was based on the Western European model and, in this regard, was quite successful in providing comprehensive protection of the White population.

Formal social insurance existed in the context of formal employment. Pension schemes and medical aid schemes existed per industry and were privately arranged. Compensation for occupational injuries and unemployment insurance existed on a public basis and were connected to formal employment. White people comprised the majority of the formal workforce and, owing to policies of job reservation for Whites, unemployment was never a long-term threat. For those outside the reach of the protective scope of formal social security measures, a social safety net was created through social assistance. Child, old-age and disability benefits only became available to all as from the middle of the previous century. The level of benefits was however disproportional and benefits were distributed according to race. After removal of racial distinctions, benefits were equally distributed, but the level thereof remained low. The system was therefore only adequate when it came to providing benefits for the minority of the population. It could be argued that a welfare state existed for White South Africans. The system however totally excluded the needs of African people and led to the development of “two safety nets”, namely a formal and informal component. In the process of trying to employ this system for the broader population, it appeared that the system was not suitable and was very much like someone trying to fit into a jersey that is too small.

If the course of the natural development of the system had not forcefully been interrupted in order to impose racial segregation, one cannot help but wonder if a more comprehensive system could not have been created many years ago. There are however certain factors that would have limited the development of a welfare state similar to those of Western Europe, for example the lack of economic growth in the country due to the small scale of the local “industrial revolution”, international sanctions, the high level of poverty, high unemployment, etcetera.

The following can be concluded from the above discussion:

- South Africa to a limited extent adopted the Western European social security model. The system was however changed to provide limited protection along racial lines and lacked true reflection on proper social insurance or social assistance principles. For example, the worker protection measures that were also developed were merely a codification of the common law. This, coupled with certain restrictions on claims against the employer, did not truly reflect social insurance principles, such as the creation of a social fund (based on solidarity) from which claims could be paid. All measures were also made to fit the racial bias in the country at the time. This resulted in the creation of a welfare state, but only for the White population.
- Typical of the development of the social security system was the specific racial flavour that accompanied expansion of the system. Africans were, for almost a decade, excluded from adequate formal social security protection. This laid the foundations for the exclusionary nature of the present system. The focus on racial segregation shifted the focus away from expansion and improvement of the system, setting the country's social security mechanism back at least a century.
- Unlike Bismarck and, later, Beveridge in Britain, there was no leadership as far as development of the social security system was concerned. This can be attributed to the fact that, in order to keep racial separation in place, the focus was always on political rather than social issues. Social upliftment and a system for achieving this were never a priority. Political leaders who would be able to keep the political dispensation intact were chosen and social development issues were subjected to the dictates of this cause. No clear and comprehensive plan was ever created in almost a century of social security development. Solidarity was therefore never able to develop, because so many people were excluded from the social platform. The focus was so much on

who should be kept out that the concept of a “safety net” was distorted and actually did not exist for the majority of the population. The “safety net” that did develop was never able to accommodate the expansion. This proved particularly problematic after the introduction of the new Constitution in 1995, which lays down that benefits be open to everyone regardless of race and gender.

- In Western Europe the suffering of the working population forced on the need for social reform. In South Africa, the working population also suffered, but was at the same time forcefully oppressed. The focus of workers was, for a long time, also on the struggle to achieve basic rights for workers (for example the right to form trade unions and to bargain collectively) and could therefore not extend to lobbying for other related social rights. It seems as if social insurance was implemented very haphazardly. Instead of there being a culture of employer, employee and government contributions (based on solidarity), protection and compensation were curbed and were made the responsibility of the employer. During the early days of development of the system, the state was seldom seen as a partner in providing social security protection. Only as far as social assistance grants were concerned, was the state involved. These, however, were based on a categorical approach benefiting only the aged, the disabled and children. Again, benefits were distributed along racial lines.
- Because of the exclusionary nature of the formal social security system, the informal social security system continued to exist and expand. This eventually culminated in the dual system of social security existing in the country today. Because the welfare of only a part of the population was always the issue, no true tradition of social solidarity could develop.

It is therefore clear that the present system is in dire need of reform. Up until now, reform has assumed the form of piecemeal changes to the system, for example by removing



racial inequalities and by limited reforms, for example amending the Unemployment Insurance Act<sup>217</sup> to include domestic workers.

The present system was never designed to cover the whole population and amendments to the system will not, in the near future, achieve comprehensive coverage, especially with the limited economic resources available. An overall change to the system is therefore necessary, and a new system must be created in order to make it more inclusive of the whole population.

Instead of simply focusing on the present formal system and its shortcomings, the focus must shift to the “system” (informal social security) that existed in the past century amongst those excluded from formal social security protection. It must be established if the positive aspects of the informal social security and formal social security system can be aligned in order to better extend the scope of social security protection. The focus of the thesis will therefore shift to an in-depth discussion of the present formal social security system (chapter 3) and then to consideration of the concept of informal social security (chapter 4).

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<sup>217</sup> Act 63 of 2001.

## CHAPTER 3: THE SOUTH AFRICAN REGULATORY FRAMEWORK FOR SOCIAL SECURITY

South Africa has a fairly developed social security system and a rich institutional framework of welfare services delivered by non-governmental organisations, such as voluntary welfare organisations, religious organisations, community-based organisations and informal family and community networks. These organisations have expertise, infrastructure and other resources, which could play a significant role in reconstruction and development.<sup>218</sup>

### 1 EXECUTIVE SUMMARY

The discussion of the regulatory framework of the present formal social security system is instrumental to the development of this thesis for the following reasons:

- To illustrate what the present, formal regulatory framework of the social security system looks like. The historical development of the social security system has been discussed in chapter 2. The result of these developments is that the system still suffers from many shortcomings and deficiencies. The formal social security system is therefore outlined in broad terms to give the reader an overview of what the system looks like currently. This discussion will not attempt to deal with the shortcomings in the present system in detail, since this would fall outside the scope and focus of this thesis. Only problems of relevance to informal social security will be focused on in the discussion of the formal regulatory framework.
- The outline of the present, formal regulatory framework confirms the exclusionary nature of the present formal social security system. The continuing exclusion of large pockets of people from social security results in increased strain on informal social security. The continued inadequacies and

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<sup>218</sup> Welfare White Paper op cit note 186 at par 20, ch 1.

inefficiencies of the present social security system and its administration also put increased pressure on informal social security schemes.

- The discussion of the present, formal regulatory framework also confirms the lack of legislative recognition of informal social security as a phenomenon. Social security is presently restricted to the narrow concept of formal social security, consisting of social insurance and social assistance. Very few legislative instruments attempt to regulate the field of informal social security. The few which do are discussed in chapter 6 and do not form part of the traditional, “core”, formal social security regulations.<sup>219</sup>
- It should be kept in mind that the difference between formal and informal social security consists of more than regulatory differences.<sup>220</sup> However, it is important to look at the formal regulatory framework, because this is the structure which sets the parameters within which change will have to be made. Policy is implemented by means of legislation. This thesis will focus on policy recommendations, but, ultimately, change will have to be effected through legislation. It is therefore important to examine the legislative landscape within which a broader social security policy will have to apply.
- Social security came to the forefront for the first time in 1995 with the introduction of the new Constitution.<sup>221</sup> It is this constitutional guarantee of access to social security which necessitates a change to the social security system to make it more inclusive. It is also this very constitutional imperative

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<sup>219</sup> From the analysis of the regulatory framework it is apparent that the “first level of welfare”, namely state-provided welfare and formal social security, is well regulated within the present regulatory framework. The “second level” of welfare services, namely Non-governmental Organisations (NGOs), Community-based Organisations (CBOs) and Nonprofit Organisations (NPOs), as well as indirect social security measures, is also regulated, but to a lesser extent. From the “third level” downwards, very little regulation exists and, as far as informal social security is concerned, is completely absent. This does not mean that there is no self-regulation within these areas, but merely that there is a lack of legislative recognition of these systems of self-regulation.

<sup>220</sup> See par 3, ch 4.

<sup>221</sup> Constitution of the Republic of South Africa supra note 2 at s 27(1). Interestingly enough, the right of access to social security was not protected in terms of the interim Constitution, 200 of 1993. The only reference in this regard was contained in s 30(c), which referred to every child’s right to security, basic nutrition, basic health and social services.

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which serves as the impetus for the transformation of the present formal social security system. In the Bill of Rights, the right of access to social security has been entrenched as a human right. Social security is one of a number of socio-economic rights which is protected in terms of the Constitution. The constitutional protection of certain socio-economic rights has given rise to a number of judgments confirming the justiciability of socio-economic rights.<sup>222</sup> This also applies to the right of access to social security, which is a fundamental right.

- As a result of an increased focus on the right of access to social security, the shortcomings in the present system are also coming under increasing scrutiny. The two main shortcomings relate to the system's fragmented and exclusionary nature. It is precisely these shortcomings in the present formal social security system that, firstly, enforce the existence of reliance on informal social security, and, secondly, must be rectified in forthcoming amendments to the social security system. By highlighting these shortcomings, ways can be developed to determine how informal social security can narrow these holes in the social safety net.
- The South African social security system does not have the luxury of evolving over time. There is no room, owing to time constraints, for a gradual development from informal to formal social security. In order to accord everyone a right of access to social security, these two systems must work together. This synergy will have to be developed, planned and implemented. In order to comply with the constitutional obligation regarding social security, the state can view informal social security as a way in which to help alleviate its burden and to extend the scope of protection and reach of the present formal social security system.

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<sup>222</sup> In the first certification judgment, *Ex Parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) (par 78), the general enforceability and justiciability of socio-economic rights were confirmed. This was followed by a number of other judgments which will be discussed below in par 4.2, ch 3.

## 2 INTRODUCTION

The aim of this thesis, as stated earlier, is to determine what the role of informal social security should be within the broader social security framework, and to look at ways in which it can be accommodated alongside the present, formal, regulatory social security framework. The development of social security in South Africa has been discussed above. This chapter will now focus on the present South African regulatory framework for social security. Very little recognition has so far been given to this phenomenon in present policy and in the present legislative framework functioning in the country.

The South African social security system does not comprise a clearly demarcated area. Social security in its broadest sense can include social welfare and broader concepts such as indirect and informal social security. There is presently no legislative umbrella or overall framework for social security, even in its narrowest sense as formal social security. In fact, one of the criticisms of the present system relates to its fragmented nature.<sup>223</sup> If indirect and informal social security are added to the concept of social security, it is clear that the legislative framework is even more diverse and fragmented and will add to a further blurring of the borders of social security. The “infiniteness” of the concept should, however, be seen as a strength rather than a weakness.<sup>224</sup>

This chapter will therefore consider the present, formal regulatory framework in respect of social security in South Africa. This is necessary in order to set the context of the present social security dispensation within which informal social security should function.

The present regulatory framework does not currently lend itself to the accommodation of informal social security. All legislative tools currently still exclude informal social security schemes. Formal social security mechanisms are also extended only to workers

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<sup>223</sup> See par 3.3.5, ch 3.

<sup>224</sup> See par 4.1, ch 4. Also see ch 6 in general.

who fall within the formal definition of “employee”. Workers in the informal sector are mostly not included in this definition and, as a result, they are also excluded from social security protection. Current legislative examples cannot provide a suitable vehicle to guide future protection and accommodation of informal social security.<sup>225</sup>

### **3 OUTLINE OF THE PRESENT FORMAL SOCIAL SECURITY STRUCTURE IN SOUTH AFRICA**

The traditional view of the scope of social security has always been that social security consists only of formal social security, which, in turn, consists of social assistance and social insurance.<sup>226</sup> In recent years, there has been an increasing awareness that social security encompasses more than formal social security and should also include related links to concepts such as informal and indirect social security.<sup>227</sup> For purposes of this thesis, this broader concept is also supported.<sup>228</sup> Social security should therefore be seen to consist of three main strands, namely formal, informal and indirect social security. Since the main focus of the thesis is on the interaction between formal and informal social security, indirect social security will be discussed only briefly. Informal social security is discussed in detail in chapter 4. The focus of this chapter will be on formal social security. The three strands of social security can be illustrated as follows:

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<sup>225</sup> Other legislative examples relating to informal social security are discussed in par 3, ch 6.

<sup>226</sup> Olivier MP, Okpaluba C, Smit N & Thompson M (eds) *Social Security Law – General Principles* (1999) at 9-13. (Hereafter Olivier et al *Social Security Law – General Principles*). Also see Strydom EML (ed) *Essential Social Security Law* (2001) at 6. (Hereafter Strydom et al).

<sup>227</sup> See ch 1 in general. Also see pars 3 & 4, ch 4.

<sup>228</sup> See ch 4 & ch 8 in general.

**Table 2: The Three Strands of Social Security**

Formal		Informal	Indirect
Social insurance	Social assistance		
<ul style="list-style-type: none"> <li>• Unemployment</li> <li>• Employment injuries and disease</li> <li>• Road Accident Fund</li> <li>• Health care</li> <li>• Retirement</li> </ul>	<ul style="list-style-type: none"> <li>• Grants: disability, old age, grant-in-aid, child grants (child support, care dependency, foster child)</li> <li>• Social services</li> <li>• Social relief</li> <li>• Private savings</li> <li>• Charity</li> </ul>	<ul style="list-style-type: none"> <li>• Support by family, friends and community, e.g. stokvel / burial society</li> <li>• No state involvement</li> <li>• Informality as to regulation and procedure</li> <li>• Can be divided into kinship and community support</li> </ul>	<ul style="list-style-type: none"> <li>• Access to transport</li> <li>• Access to food and nutrition</li> <li>• Access to health</li> <li>• Access to communication</li> <li>• Access to a healthy environment</li> <li>• Access to land</li> <li>• Access to housing and shelter</li> <li>• Access to water</li> <li>• Access to education</li> </ul>
<i>Publicly and privately provided</i>		<i>Privately provided</i>	<i>Provided by state &amp; semi-state institutions</i>

Formal social security is characterised by its division into social insurance and social assistance. Both these concepts are discussed in more detail below. In South Africa, social insurance entails the existence of statutory schemes to provide protection against unemployment, occupational injuries and diseases, and injuries occurring in road accidents. Social insurance for health care and retirement is not provided for through statutory schemes, but several private schemes exist to provide protection against these risks. This approach of designing the system to address basic social security risks is called the risk-based approach. This is in keeping with the traditional Western European model, which also advocates a risk-based approach. The risks for which cover is provided in the Western European model might therefore not be the same as the risks and contingencies familiar to people in developing countries. Owing to this risk-based approach, the present system lacks a comprehensive approach to social protection. The Taylor Committee recommended that the system be changed in order to address the underlying structural and material basis of social exclusion, as well as poverty. The concept of comprehensive social protection (a move away from a risk-based approach) could assist in achieving the goal of a comprehensive approach to social protection.<sup>229</sup>

<sup>229</sup> See Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at (par 2.4) 31.

Social insurance is also often available only to people in formal employment who qualify as “employees”. As will be illustrated in the discussion below, this is a very narrow concept with limited application.<sup>230</sup> It is also problematic in South African labour law to determine who qualifies as an employee. The most popular test adopted by South African courts to determine if someone is an employee or independent contractor is the dominant impression test.<sup>231</sup>

Social assistance in South Africa comprises mainly the grant system, which allows the poor and indigent access to certain grants, namely the old-age grant, the disability grant and child grants (child-support grant, care-dependency grant and foster child grant). Social assistance also provides for social services, social relief, private savings and charity.<sup>232</sup> In the case of both social insurance and social assistance, public and private role players are involved.

### 3.1 Social insurance

According to the International Labour Organisation (ILO), the following are the principal elements of social insurance:<sup>233</sup>

- Social insurance is financed by contributions which are normally shared among employers, employees and, sometimes, the state (mostly by means of a supplementary contribution or other subsidy from general revenue). These schemes provide for the automatic payment of benefits and the rendering of services whenever the social risk against which the beneficiaries insure themselves occurs.

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<sup>230</sup> See pars 3.1 & 3.3.3, ch 3.

<sup>231</sup> *McKenzie v SABC* 1999 20 ILJ 585 (LAC). Also see *Niselow v Liberty Life Association of Africa Limited* 1998 19 ILJ 752 (SCA) and *Democratic Nursing Organisation of South Africa and others v Somerset West Society for the Aged* 2001 22 ILJ 919 (LC). See s 200(A) of the Labour Relations Act, 56 of 1995. This section creates a rebuttable presumption as to who are employees. See footnote 317, ch 3.

<sup>232</sup> See par 3.2, ch 3.

<sup>233</sup> International Labour Organisation (ILO) *Introduction to Social Security* (1984) at 4. (Hereafter ILO *Introduction to Social Security*).



- Participation is normally compulsory.
- Contributions are accumulated in special funds from which benefits are paid.
- Surplus funds are invested to earn further income.
- A person's right to a benefit is secured by his/her contribution record, without any needs or means test.
- Contribution and benefit rates are often related to what a person is, or has been, earning.
- Employment injury insurance is usually financed wholly by employers, with the possibility of state help from general revenue.

### ***3.1.1 Unemployment insurance***

Unemployment insurance in South Africa is regulated mainly by the Unemployment Insurance Act (UIA)<sup>234</sup> and the Unemployment Insurance Contributions Act (UICA).<sup>235</sup> The former provides for the payment of unemployment insurance benefits and the latter regulates the collection of contributions and establishes the Unemployment Insurance Fund. All employers are expected to pay two percent of the remuneration of an employee to the South African Revenue Service (SARS) Commissioner or to the Unemployment Commissioner. In terms of the UIA, benefits are paid out in respect of temporary unemployment arising from (a) termination of an employee's services, (b) illness, (c) maternity and (d) adoption. The Act also makes provision for benefits to dependants should the contributor pass away. The UIA and the UICA are applicable to all employers and employees, unless they are specifically excluded.<sup>236</sup> An employee is defined as "any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent

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<sup>234</sup> Act 63 of 2001. (Hereafter UIA).

<sup>235</sup> Act 4 of 2002. (Hereafter UICA).

<sup>236</sup> Section 3.

contractor”.<sup>237</sup> The emphasis on remuneration in the definition of “employee” signifies a more restricted scope of coverage than the approach followed for “employees” in terms of the labour laws. In terms of the latter, persons assisting employees are also included.<sup>238</sup> The exclusion of independent contractors is similar to the approach followed by other labour laws.

The Act was recently amended to include more categories of employees, namely domestic workers and high-income earners. Some groups are however still excluded from the protective scope of the Act. These include (a) persons who do not fall within the definition of “employee” and “contributor”<sup>239</sup> (resulting in the self-employed, the informally employed, and the long-term unemployed being excluded from protection);<sup>240</sup> (b) employees who receive remuneration under a learnership agreement registered in terms of the Skills Development Act;<sup>241</sup> (c) employees in the national and provincial spheres of government;<sup>242</sup> (d) persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership if there is a legal or contractual requirement, or any other agreement or undertaking, that such person must leave the Republic, or that such person be repatriated upon termination of the contract;<sup>243</sup> and (e) employees employed for less than 24 hours per month by a particular employer.<sup>244</sup>

These exclusions are problematic, especially categories (a), (c) and (e). Their exclusion from formal social protection means that, should they become unemployed, they will have no formal social protection. They will either be without any support, or will have to

<sup>237</sup> Section 1 UIA (supra note 234) & s 1 UICA (supra note 235).

<sup>238</sup> Section 213 of the Labour Relations Act (LRA) supra note 231, s 1 of the Basic Conditions of Employment Act (BCEA), 75 of 1997, and s 1 of the Employment Equity Act (EEA), 55 of 1998.

<sup>239</sup> Olivier MP & Van Kerken ET “Unemployment Insurance” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 437. (Hereafter Van Kerken & Olivier).

<sup>240</sup> *Idem* at 436.

<sup>241</sup> Section 3(1)(b) (supra note 234) UIA & s 4(1)(B) UICA (supra note 235).

<sup>242</sup> Section 3(1)(c) UIA (supra note 234) and s 4(1)(c) UICA (supra note 235). Public servants were traditionally excluded from unemployment insurance because they enjoyed stability of employment. This, however, no longer applies. There is an international tendency to include public servants in general unemployment insurance. Inclusion of this group will also be necessary to comply with the constitutional obligation of granting everyone a right of access to social security. Van Kerken & Olivier op cit note 239 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 439.

<sup>243</sup> Section 3(1)(d) of the UIA (supra note 234), s 4(1)(d) UICA (supra note 235).

<sup>244</sup> Section 3(1)(a) of the UIA (supra note 234), s 4(1)(a) UICA (supra note 235).

rely on informal social security. This will increase the pressure on the already weak informal social safety net and will create additional groups of vulnerability.<sup>245</sup>

### 3.1.2 Pensions

South Africa does not have a national retirement scheme. Retirement is provided for by means of private arrangements. Private retirement provisioning is mainly governed by the Pension Funds Act.<sup>246</sup> The social assistance system does provide for an old-age grant for men over 65 years of age and women over 60 years of age. The grant is subject to a means test and fulfils an extremely important role in the present social protection system.<sup>247</sup>

The effect of the present retirement system in the country is that only the very rich (who are able to make private provision) and those in formal employment (with access to employment-based retirement funds) can make provision for old age. The rest, again, must rely on own means or on the social assistance system. This unnecessarily burdens both informal social security and the social assistance system. Although the old-age grant fulfils an indispensable role in poverty alleviation, the cumulative effect is that the old-age grant is not used to address the needs of the aged, but is used as an important household income.<sup>248</sup>

<sup>245</sup> Van Kerken & Olivier op cit note 239 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 415.

<sup>246</sup> Act 24 of 1956.

<sup>247</sup> Several committees have in recent years been appointed to look at the position of old people in the country, namely the Smith Committee (*Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa* (1995)), the Mouton Committee (*Report of the Committee of Investigation into a Retirement Provision System for South Africa* (1992)), the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons (*Mothers and Fathers of the Nation: The Forgotten People?* (February 2001)). See Asher A & Olivier MP “Retirement and Old Age” in Olivier *Social Security: A Legal Analysis* op cit note 6 at 231-242. (Hereafter Asher & Olivier).

<sup>248</sup> Welfare White Paper op cit note 186 at 9-10. Taylor Report op cit note 39 at 30.

### 3.1.3 Health care

The Constitution specifically mentions the right of everyone to have access to health care services, including reproductive health care,<sup>249</sup> and the right not to be refused emergency medical treatment.<sup>250</sup> Health care in South Africa is characterised by a distinction between public and private provisioning. Private medical schemes are often linked to occupation in the formal sector and are governed by the Medical Schemes Act.<sup>251</sup> There is no public health care insurance system, although public health care is available in the form of primary health care and through public hospitals. Free health care is available to old people, pregnant mothers and children under the age of seven years. This can be regarded as a form of social assistance.<sup>252</sup>

Again, the lack of an effective health system results in poor people having to shoulder the high costs of health care themselves, and, normally, from their own pockets. Their only access to affordable health care is through the public health care system, which offers services inferior to those of the private health care system. The result is a lack of access to protection against the high costs of health care. This further exhausts the already limited resources available to those excluded from the formal social security safety net.

### 3.1.4 Occupational injuries and diseases

The Compensation for Occupational Injuries and Diseases Act (COIDA)<sup>253</sup> is the main legislative tool regulating occupational injuries and diseases in the country. The Act is administered by the Department of Labour. COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of, and in the

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<sup>249</sup> Section 27(1)(a).

<sup>250</sup> Section 27(3).

<sup>251</sup> Act 131 of 1998.

<sup>252</sup> See Van den Heever AM “Health Care” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 345-365. (Hereafter Van den Heever). Also see Christianson MA “Health Care” in Strydom et al op cit note 226 at 122-160.

<sup>253</sup> Act 130 of 1993 (COIDA).

course of, their employment, or who contract occupational diseases.<sup>254</sup> COIDA provides benefits for employees in the case of permanent and temporary disablement, as well as for dependants of employees who die as a result of injuries sustained, or diseases contracted, at work.<sup>255</sup>

In terms of the Act, an employee is defined as a person who has entered into, or works under, a contract of service or apprenticeship or learnership with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind.<sup>256</sup> Persons excluded are: (a) a person, including a person in the employ of the state, performing military service or undergoing training and who is not a member of the Permanent Force of the South African Defence Force;<sup>257</sup> (b) a member of the Permanent Force of the South African Defence Force while on service in the defence of the Republic;<sup>258</sup> (c) a member of the South African Police Force while employed<sup>259</sup> on service in defence of the Republic;<sup>260</sup> (d) a person who contracts for the carrying out of work and himself engages other persons to perform such work,<sup>261</sup> and (e) a domestic employee employed as such in a private household.<sup>262</sup>

The effect of these exclusions, in particular (d) & (e), is that people in the informal sector and domestic workers who sustain occupational injuries and/or diseases are without social protection. They will have to rely on other (probably informal social security)

<sup>254</sup> An employee is barred in terms of s 35 of the Act from instituting a civil claim against the employer. Also see *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 BCLR 139 (CC).

<sup>255</sup> Other related legislation providing for safety measures in the workplace includes the Occupational Health and Safety Act (OHSA), 85 of 1993 and the Mine Health and Safety Act, 29 of 1996. The latter is administered by the Department of Minerals and Energy. See Smit N “Employment Injuries and Diseases” in Olivier *Social Security: A Legal Analysis* op cit note 6 at 459-462. (Hereafter Smit).

<sup>256</sup> Section 1(xviii). Smit idem at 470.

<sup>257</sup> Section 1(xviii)(d)(i).

<sup>258</sup> As defined in s 1 of the Defence Act, 44 of 1957. Section 1(xviii)(d)(ii).

<sup>259</sup> In terms of s 7 of the Police Act, 7 of 1958.

<sup>260</sup> As defined in s 1 of the Defence Act, 44 of 1957. Section 1(xviii)(d)(iii).

<sup>261</sup> Section 1(xviii)(d)(iv).

<sup>262</sup> Section 1(xviii)(d)(iv). The Act’s cover has been extended to two categories that were previously excluded, namely outworkers and domestic employees in boarding institutions with less than five such employees. An outworker is an employee to whom an employer gives material to work on premises under the employer’s control. Smit op cit note 255 in Olivier *Social Security: A Legal Analysis* op cit note 6 at 470.

measures or the family for financial help or support. The risk for people in the informal sector of sustaining occupational injuries and diseases is even greater, because they work under less strict supervision and in more dangerous and desperate situations. Ironically, those in need of more protection therefore have less protection in terms of the formal social security system.<sup>263</sup>

### **3.1.5 Summary**

These exclusions from social insurance are untenable for they impact directly on the informal social security system. The only social protection available to people excluded from formal social security is the informal social safety net (including the extended family). This increases the strain on the already weak informal social security system. If the scope of protection of social insurance can be extended, this will automatically have a positive impact on the informal social security system.

## **3.2 Social assistance**

The other leg of the formal social security system is social assistance. In the case of social assistance, a beneficiary receives benefits and/or services that are wholly funded and supported by the state. These benefits and/or services are means-tested and are provided whenever, and for as long as, the beneficiary is in need of assistance. Social assistance benefits are non-contributory and can assist people who must rely on their own social security strategies (e.g. informal social security) for survival.

Social assistance has, according to the ILO, the following principal features:<sup>264</sup>

- The total cost of the social assistance programme is funded by the state.

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<sup>263</sup> Also see par 5.3.2, ch 4.

<sup>264</sup> ILO *Introduction to Social Security* op cit note 233 at 5.

- There is a legal right to the payment of benefits, which are paid in the prescribed categories of need, for example old people and people with disabilities.
- Entitlement to the benefits is subject to a means test.
- Social assistance is designed to bring a person's total income up to a community-determined minimum.

The South African social assistance system comprises the following important components:

### **3.2.1 Social assistance grants**

Social grants are currently still regulated in terms of the Social Assistance Act, 59 of 1992. A new Social Assistance Act<sup>265</sup> was enacted in 2004, but must still come into force on a date determined by the President in the Government Gazette. The new Social Assistance Act makes provision for a child-support grant,<sup>266</sup> a care-dependency grant,<sup>267</sup> a foster child grant,<sup>268</sup> a disability grant,<sup>269</sup> an older-persons grant,<sup>270</sup> a war veteran's grant,<sup>271</sup> a grant-in-aid,<sup>272</sup> and also for financial awards to welfare organisations and persons.<sup>273</sup> These grants are similar to the grants available in terms of the 1992 Social Assistance Act.<sup>274</sup>

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<sup>265</sup> Act 13 of 2004.

<sup>266</sup> Section 6.

<sup>267</sup> Section 7.

<sup>268</sup> Section 8.

<sup>269</sup> Section 9.

<sup>270</sup> Section 10.

<sup>271</sup> Section 11.

<sup>272</sup> Section 12.

<sup>273</sup> Section 13.

<sup>274</sup> In terms of s 2 of the Social Assistance Act, 59 of 1992, social grants are made to aged and disabled persons and to war veterans (s 2(a)). These categories could also qualify for a grant-in-aid (s 2b), while war veterans could also qualify for supplementary grants (s 2(c)).

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The most important part of social assistance is probably the payment of social grants.<sup>275</sup> The payment of social grants is currently still administered by the Department of Social Development. Legislation aimed at establishing a new social security agency<sup>276</sup> has however been adopted and, in the near future, the administration of the South African grant system will be administered by the Social Security Agency.<sup>277</sup> Under the present South African social security system, social grants are available to certain categories, which are discussed below. However, the grant system is not without its problems, as will be seen from the discussion below.

### **3.2.2 Old-age grant**

The older-persons grant in terms of the new Social Assistance Act<sup>278</sup> will be payable to women who have attained the age of 60 years and to men who have attained the age of 65 years. This age disparity is contrary to the equality clause<sup>279</sup> in the Constitution.

### **3.2.3 Disability grant**

The disability grant is payable to people who have attained the prescribed age (18 years and older) and who, owing to a physical or mental disability, are unfit to obtain, by virtue

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<sup>275</sup> In the 1996/1997 financial year, approximately 2,9 million people benefited from social assistance in the form of financial benefits. It is estimated that the Social Security Agency will manage a budget of over R50 billion and will provide services for more than 12 million beneficiaries. The Department of Social Development is busy with a campaign to register all eligible children under 14 years by 2005/6, which will bring the total number of children in the system to over seven million. Accessed at <http://www.socdev.gov.za/Statements/2004/June/vote.htm> on 26 Jul 2004. Also see Van der Merwe op cit note 29 at 9.

<sup>276</sup> Social Security Agency Act supra note 214.

<sup>277</sup> According to the Minister of Social Development, the Social Security Agency “ushers in a qualitatively new era towards a people-centred and quality service delivery of social grants”. It is hoped that the Agency will be operational as from April 2005. This Agency will be an institution of excellence working towards the efficient and effective management and payment of social security grants through the optimal utilisation of partnerships. Accessed at <http://www.socdev.gov.za/Statements/2004/June/vote.htm> on 26 Jul 2004.

<sup>278</sup> Act 13 of 2004 supra note 215.

<sup>279</sup> Section 9.



of any service, employment or profession, the means needed to enable them to provide for their maintenance.<sup>280</sup>

### **3.2.4 Child grants**

Child grants consist of the child-support grant, the foster child grant and the care-dependency grant. The child-support grant is payable to primary care givers of children currently under 14 years of age. The care-dependency grant is payable to the parent, primary care giver or foster parent of a child who requires and receives permanent care or support services on account of his or her physical or mental disability and who is not cared for on a 24-hour basis for a period exceeding six months in an institution that is fully funded by the state. A foster parent is eligible for a foster child grant for a child for as long as that child needs such care, if the foster child is in need of care and if he or she satisfies the requirements of the Child Care Act.<sup>281</sup>

### **3.2.5 Financial awards to individuals for the social relief of distress**

Social relief has a number of meanings. In the Fund-Raising Act,<sup>282</sup> social relief is defined as “the alleviation of (the) need of a person by means of the temporary rendering of material assistance to them”. Social relief entails short-term measures undertaken by the state and other private organisations to assist persons who cannot meet their basic needs during individual or community crises. The Director-General of Social Development has a discretion to make a financial award to a person if he is satisfied that such person is in need of social relief of distress.<sup>283</sup> Social relief can be provided for individuals in the event of individual crises, or for whole communities where such communities face crises.

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<sup>280</sup> Section 9.

<sup>281</sup> Act 74 of 1983.

<sup>282</sup> Act 107 of 1978.

<sup>283</sup> Section 5(2) of the Social Assistance Act supra note 215.

A person will qualify for social relief of distress if he or she satisfies one or more of the following requirements: (a) if the person is awaiting permanent aid; (b) if the person is medically unfit to be employed for less than six months; (c) if no maintenance payments are being received from a person obliged to pay maintenance; (d) if the breadwinner of the family is deceased, or has been admitted to an institution for less than six months, and insufficient means are available; (e) if the person has been affected by a disaster (although the area in which he/she lives has not yet been declared a disaster area) or by any other emergency situation; (f) if the person is not receiving assistance from any other organisation. Social relief for distress is paid monthly for a maximum period of three consecutive months and may not exceed the maximum social grant payable to the person per month.<sup>284</sup>

### ***3.2.6 Special pensions, military pensions, gratuities and financial reparation for individuals who have suffered because of political confrontation***

This particular category of social assistance is more in the nature of social compensation than social security. It is a condition of these pensions and gratuities that the beneficiaries were not able to provide adequately for themselves owing to their involvement in political conflict and that their sacrifices are deemed to be deserving of the gratitude of society. Such assistance can be classified as special categories of social assistance. These categories are: special public interest pensions, demobilisation gratuity, military pensions, and reparation by the Truth and Reconciliation Commission.<sup>285</sup>

### ***3.2.7 Financial awards to welfare organisations***

The Department of Social Development may make financial awards to certain welfare and fundraising organisations if they comply with certain criteria and requirements.<sup>286</sup>

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<sup>284</sup> Van der Merwe op cit note 29 at 20-21. Also see Mpedi LG, Kuppan GY & Olivier MP “Welfare and Legal Aid” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 205.

<sup>285</sup> Van der Merwe op cit note 29 at 21-29.

<sup>286</sup> Idem at 29-30. Section 5(1).

### **3.2.8 State-sponsored provision of social services, facilities and programmes**

Social services (as opposed to financial awards and assistance) are also rendered to indigent members of society through the provision of an administrative infrastructure for social welfare services and welfare programmes, and through the statutory regulation of specific welfare services or programmes, such as care for the aged, probation services, care of children, adoption of children and the prevention and treatment of drug dependency.<sup>287</sup>

## **3.3 Shortcomings in the present formal social security system**

### **3.3.1 General**

A closer analysis of the present formal social security system confirms that the system suffers from many deficiencies. Although the aim of this thesis is not to expose in detail the shortcomings in the present system, the main problems in the system which impact on informal social security are highlighted below. The exclusionary nature of the system, which, in a sense, underlies all the other shortcomings of the system, is especially important, because it leads to the continued exclusion of people from formal social security protection and to an increased reliance on informal social security. Several categories of people are excluded from social security protection, mainly because the system follows a limited risk-based approach and also extends cover only to those who qualify as “employees”, or who qualify according to similar terms that are used.<sup>288</sup> The administration of the system is also fragmented, which leads to increasing inefficiency, confusion and a lack of accountability.

In the recent Constitutional Court judgments of *Khosa and others v The Minister of Social Development and others*; *Mahlaule and others v The Minister of Social*

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<sup>287</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 142-143. Van der Merwe op cit note 29 at 30-48.

<sup>288</sup> See pars 3.3.2 & 3.3.3, ch 3.

*Development and others*<sup>289</sup> (discussed below), the exclusionary nature of the present social assistance system came under the scrutiny of the court. The court ordered that the scope of protection of social assistance be extended to include permanent residents.

### **3.3.1.1 Khosa and others v The Minister of Social Development and others; Mahlaule and others v The Minister of Social Development and others**<sup>290</sup>

Both these cases concern a constitutional challenge to certain provisions of the Social Assistance Act, 59 of 1992. In both matters, the applicants were Mozambican citizens who had acquired permanent residence status in South Africa. All of the applicants would have qualified for social assistance under the Act were it not for the fact that they were not South African citizens.<sup>291</sup>

The applicants concluded that their exclusion from social assistance was inconsistent with the state's obligations under s 27(1)(c) of the Constitution to provide "everyone" with a right of access to social security. They also contended that their exclusion also limited their right to equality and was unfair in terms of s 9 of the Constitution (which guarantees everyone a right to equality) and unjustifiable in terms of s 36 (the general limitation clause) of the Constitution.<sup>292</sup>

The court confirmed the *Grootboom* judgment,<sup>293</sup> where it was stated that the socio-economic rights in the Constitution are closely related to the founding values of human dignity, equality and freedom.<sup>294</sup>

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<sup>289</sup> 2004 (6) BCLR 569 (CC).

<sup>290</sup> Ibid.

<sup>291</sup> Par 1.

<sup>292</sup> Pars 38 & 29.

<sup>293</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2000 11 BCLR 1169 (CC). See discussion in par 4, in particular par 4.2.2, ch 3.

<sup>294</sup> Par 40. "The proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on these values."

The court found that the term “everyone” as used in s 27 also includes non-citizens and, for purposes of the case, permanent residents.<sup>295</sup> For example, as regards the right of access to land, the Constitution specifically restricts access of the right to “citizens”. The Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country”. In the light thereof, and in the absence of any indication that s 27(1) is restricted only to citizens (as is the case in s 25(2) with regard to the right of access to land), the word “everyone” in s 27 (1) cannot be construed to refer only to “citizens”.<sup>296</sup>

The court specifically extended the right of access to social security to permanent residents only. The position of permanent residents is different from that of temporary or illegal residents. It will be reasonable to exclude workers who are citizens of other countries, visitors and illegal residents who have tenuous links with the country. Permanent residents, however, differ from temporary or illegal residents. They reside legally in the country and have made South Africa their home. They are compelled to return to the country at least once every three years in order not to forfeit their citizenship. They are in much the same position as citizens, and they even owe a duty of allegiance to the state. The court therefore found that it is reasonable to exclude temporary residents from a right of access to social security.<sup>297</sup>

In order to ensure that permanent residents do not become a burden on the state, the state must exercise care with regard to the admission procedure. It must therefore act at the time that admission takes place and cannot later try to curb costs by withholding certain benefits from permanent residents. If a mistake is made in this regard and a permanent

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<sup>295</sup> Par 46.

<sup>296</sup> Par 47. Government excluded permanent residents because it contended that they do not have a legitimate claim to the right of access to social security. According to the court, it would have been acceptable if they had been excluded, for example, as a temporary measure or if it had been suggested that they would be included in attempts to progressively realise the right of access to social security (par 50). The state averred that citizenship is a requirement for social benefits in almost all developed countries. The court did not really pay much attention to this argument in the light of the fact that our Constitution specifically grants the right of access to social security to “everyone” in the country (par 54). There must be a rational connection between the differentiating law (differentiating between citizens and non-citizens) and the legitimate government purpose it is designed to achieve. If it does not have this rational connection, it will amount to a violation of s 9(1) and s 27(2) of the Constitution (par 53).

<sup>297</sup> Par 59.

resident becomes a burden, then the cost must be paid for because of the constitutional commitment to develop a caring society and to grant access to socio-economic rights to all who make their homes here.<sup>298</sup>

The exclusion of permanent residents in need of social security forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. These families or dependants, who may be in need of social assistance themselves, are asked to shoulder burdens not asked of other citizens. The denial of the welfare benefits therefore impacts not only on permanent residents without other means of support, but also on the families, friends and communities with whom they have contact. Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.<sup>299</sup>

The court found that the denial of access to social grants for permanent residents who, but for their citizenship, would otherwise have qualified for such assistance, does not constitute a reasonable legislative measure as contemplated by s 27(2) of the Constitution.

This judgment is important for informal social security. If social assistance is extended to permanent residents, it will lessen the burden on the informal social security system. Social assistance can provide additional income for the informal social system, thereby providing it with more support.

### **3.3.2 Risk-based approach**

Social insurance is designed to address the typical ILO risks.<sup>300</sup> It can therefore be said that the system follows a risk-based approach, which is one of the shortcomings of the present social security system. The risk-based approach is too limited to apply in a developing country such as South Africa, where other risks such as significant capital expenditure, crop failures or HIV/AIDS also pose threats to the social security of people

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<sup>298</sup> Par 65.

<sup>299</sup> Par 76.

<sup>300</sup> See par 3.1, ch 3.

and where there is a difference between typical social security risks in rural and urban areas.<sup>301</sup>

The present risks against which protection is provided are regulated by legislation that has been specifically drafted to regulate coverage of such contingencies.<sup>302</sup> This, in turn, has led to an ad hoc system of coverage of the various risks without a clear, overarching policy being in place. There are in excess of 25 special pieces of legislation governing the social security system in South Africa.<sup>303</sup> The Taylor Committee was appointed to look at ways of making the overall system more inclusive. One of its suggestions was that an overall strategy or aim for social security should be developed. It proposed that social security should be aimed at providing comprehensive social protection. This would enable the system to address multifaceted poverty, which it should do by way of a number of measures and a basket of services.<sup>304</sup>

The Taylor Committee recommended a move away from a risk-based approach to an approach entailing comprehensive social protection (CSP) which could provide everyone with an adequate standard of living. It must be reiterated, however, that it will not be possible to move away completely from a risk-based approach. CSP should rather be seen as the overall purpose of the system, whereas, previously, the overall purpose was seen as protection against certain social security risks.<sup>305</sup>

<sup>301</sup> Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 30.

<sup>302</sup> For example, the UIA (supra note 234) was introduced to protect employees against unemployment and a loss of income during pregnancy. COIDA (supra note 253) was introduced to protect employees against a loss of income as a result of injuries or diseases sustained during the course of employment.

<sup>303</sup> For example: Aged Persons Act, 81 of 1967, Basic Conditions of Employment Act, 75 of 1997, Child Care Act, 74 of 1983, Compensation for Occupational Injuries and Diseases Act, 130 of 1993, Constitution of South Africa, 108 of 1996, Friendly Societies Act, 25 of 1956, Fund-Raising Act, 107 of 1978, General Pensions Act, 29 of 1979, Health and Safety in Mines Act, 29 of 1996, Labour Relations Act, 66 of 1995, Machinery and Occupational Safety Act, 6 of 1983, Military Pensions Act, 84 of 1976, Mine Health and Safety Act, 29 of 1996, Nonprofit Organisations Act, 71 of 1997, Occupational Diseases in Mines and Works Act, 78 of 1973, Occupational Health and Safety Act, 85 of 1993, Pensions Fund Act, 24 of 1956, Retirement Funds Act, 38 of 1996, Road Accident Fund Act, 56 of 1996, Unemployment Insurance Act, 30 of 1996, Unemployment Insurance Contributions Act, 4 of 2002, Welfare Laws Amendment Act, 106 of 1997.

<sup>304</sup> Par 4.3, ch 4 & par 4.4, ch 6.

<sup>305</sup> Par 4.4, ch 6, & par 5.1, ch 8.

### 3.3.3 Exclusionary nature of the present formal social security system

Although statutory definitions may differ in their understanding of “employee”, the general principle is that major categories of workers, such as independent contractors (which include the self-employed and people working in the informal sector), are excluded.<sup>306</sup> The effect of this is that a large category of the labour force, namely the unemployed, excluded employees, the self-employed, the informally employed and the atypically employed, is being excluded from the protection and benefits of the social insurance system in South Africa.<sup>307</sup>

In some statutes, the definition of “employee” has been extended to include more persons under the protective scope of social insurance. This was for example done in the Compensation for Occupational Injuries and Diseases Act<sup>308</sup> by broadening the definition of employee to provide for the inclusion of dependants of a deceased employee.<sup>309</sup> The Unemployment Insurance Act<sup>310</sup> also widened its scope of protection to include domestic workers and seasonal workers.<sup>311</sup> The ambit of the Labour Relations Act<sup>312</sup> has also been widened and the exclusions provided for are now much narrower than in its predecessor, the 1956 Labour Relations Act. The Labour Relations Act currently applies to all employees, except members of the National Defence Force, the National Intelligence Agency and the Secret Service.<sup>313</sup> Independent contractors are also specifically excluded.<sup>314</sup> Section 200A of the Labour Relations Act (LRA)<sup>315</sup> (and s 83A of the Basic

<sup>306</sup> See, for example, s 1 of the BCEA (supra note 238), s 1 of the EEA (supra note 238), *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A), *SABC v McKenzie* 1999 20 ILJ 585 (LAC).

<sup>307</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 131.

<sup>308</sup> Section 1 supra note 253.

<sup>309</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 132.

<sup>310</sup> Supra note 234.

<sup>311</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 132.

<sup>312</sup> Supra note 231.

<sup>313</sup> Section 2.

<sup>314</sup> Section 213 in the definition of “employee”.

<sup>315</sup> Section 200A states that, until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present: (a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month



Conditions of Employment Act (BCEA))<sup>316</sup> creates a rebuttable presumption as to who an employee is. In similar vein, both the BCEA and the Employment Equity Act (EEA)<sup>317</sup> also cover almost all employees, with only a few categories of workers excluded.<sup>318</sup> The BCEA makes almost all the provisions of the Act applicable to employees who work more than 24 hours in a month for a particular employer. The effect of this is that almost all casual, part-time, temporary and seasonal employees benefit from the vast range of protective measures included in the BCEA. As far as social security is concerned, the most notable of these protection measures relate to maternity leave, protection before and after the birth of a child, and the fact that an employer must have due regard for the family responsibilities of an employee.<sup>319</sup> The BCEA does to a limited extent deal with workers who do not fit the definition of “employee”. The Act<sup>320</sup> allows for the Minister of Labour<sup>321</sup> to prohibit or regulate, by means of a sectoral determination, task-based work, piecework, home work and contract work in a sector or area. It also allows for the Minister to specify minimum conditions of employment for persons other than employees.<sup>322</sup> The Act further allows the Minister<sup>323</sup> to deem any category of persons specified in a notice published in the Government Gazette to be employees for purposes of the Act, or for purposes of any sectoral determination.<sup>324</sup>

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over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.

<sup>316</sup> The definition contained in s 83A is exactly the same as that in s 200A of the LRA.

<sup>317</sup> Supra note 238.

<sup>318</sup> Section 3 of the BCEA (supra note 238). Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 132.

<sup>319</sup> Ibid.

<sup>320</sup> Section 55(4)(g).

<sup>321</sup> On the recommendation of the Employment Services Commission.

<sup>322</sup> Section 55(4)(k). Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 133.

<sup>323</sup> On the advice of the Employment Services Commission.

<sup>324</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 133. The effect of this power that has been assigned to the Minister of Labour may potentially benefit employees who are currently still excluded from social security measures. Unintentionally, this may lead to a new exclusion and to the unequal treatment of categories of workers whose regulatory employment laws are not assigned to the administration of the Minister of Labour. For example, the Occupational Diseases in Mines and Works Act (ODMWA), 78 of 1973 allows for the payment of benefits to workers who contract certain occupational lung diseases and also regulates the payment of benefits to dependants of workers who die from such diseases. This legislative measure is administered by the Minister of Health. The same problem arises with regard to health and safety standards in mines. The Mine Health and Safety Act (MHSA), 29 of

Although most labour laws have widened their scope, many social security laws still contain a restricted scope of application, for example COIDA and the UIA. In many of these categories, the cumulative effect is that mostly African people, and women, are excluded. Given the absence of a reasonable justification for their exclusion, this might as well be regarded as indirect discrimination based on race and gender.<sup>325</sup> Both the ILO Country Review and the Labour Market Commission Report recommended that coverage should be extended to rectify these shortcomings.<sup>326</sup> The exclusion of certain groups from access to social security is also in conflict with the constitutional requirement to provide everyone with access to social security.

### ***3.3.4 Categorical approach of the social assistance system***

The social assistance system follows a categorical approach, that is, only certain categories of the indigent are targeted for purposes of social assistance protection, namely the elderly, children and the disabled.

The levels of benefit provided by the various grants remain low, and this is a problem. For example, the child-care grant currently provides coverage for children only up until 14 years. The age limit, coupled with the low level of benefits, is insufficient to address the scale of child poverty in the country. In terms of the Constitution, children are defined as everyone under 21 years of age.<sup>327</sup>

Social assistance also suffers from its share of administrative problems. A number of cases, especially in the Eastern Cape, were brought to court in recent years where welfare benefits were unlawfully and unreasonably terminated.<sup>328</sup> In the recent Constitutional

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1996 is enforced by the Department of Minerals and Energy, while the Occupational Health and Safety Act, 85 of 1993 is administered by the Department of Labour.

<sup>325</sup> *Idem* at 134. Also Basson AC “Discrimination in Social Security Legislation” in Strydom et al op cit note 226 at 240-242.

<sup>326</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 134.

<sup>327</sup> Section 28(3).

<sup>328</sup> *Mbanga v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 359 SECLD. In this case, the court awarded an applicant back-pay, together with interest, in respect of an old-age grant which was never processed by the Director-General. The court held that the grant had to be processed within a reasonable

Court judgment of *Mashava v The President of the Republic of South Africa and others*<sup>329</sup> (discussed below), the administrative problems relating to grant payments by provincial authorities were also addressed. This judgment illustrates how inadequacies in the formal social security system's administration increase the pressure on informal social security schemes.

### 3.3.4.1 Mashava v The President of the Republic of South Africa and others<sup>330</sup>

Mr Mashava applied for a disability grant in 2000 and only in 2002 received an arrear payment for four months, with approximately R5 460 still outstanding by then. He alleged that, had it not been for the assignment of the administration of parts of the Social Assistance Act (1992) to the Limpopo Provincial Government, his grant would have been approved and paid within a reasonable period. He would then have been able to rely on a consistent standard definition of disability and his grant would not have been subject to the budgeting administration of the Limpopo Government or to potential demands for the reallocation of social assistance monies for other purposes.<sup>331</sup>

The *Mashava* case dealt with the constitutional validity of a presidential proclamation<sup>332</sup> which, in terms of the Interim Constitution,<sup>333</sup> assigned the administration of the whole of

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time from the date of application. This was also confirmed in *Nomala v Permanent Secretary, Department of Welfare* 2001 8 BCLR 844 (E). There have also been a number of decisions confirming that the unilateral suspension of grants is unlawful and invalid and does not conform to the principles of administrative justice. For example: *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E). The *Ngxuza* judgment was upheld by the Supreme Court of Appeal in *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 4 SA 1184 (SCA). Olivier MP, Khoza JF, Jansen van Rensburg L & Klinck E "Constitutional Issues" in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 70 (footnote 261). (Hereafter Olivier, Khoza, Jansen van Rensburg & Klinck).

<sup>329</sup> CCT 67/2003 decided on 6 September 2004 (unreported).

<sup>330</sup> Ibid.

<sup>331</sup> At the time of the court application, the applicant had received what was due to him and he therefore only sought confirmation of the constitutional invalidity of the proclamation (par 10).

<sup>332</sup> Proclamation R7 of 1996.

<sup>333</sup> According to section 235(8), the President may, by proclamation in the Government Gazette, assign, within the framework of s 126, the administration of a law referred to in s 235(6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to a specified extent.

the Social Assistance Act<sup>334</sup> to provincial government.<sup>335</sup> The proclamation in question was promulgated on 23 February 1996. The Social Security Act was enacted on 6 May 1992, but only came into operation on 1 March 1996.<sup>336</sup>

The attack on the validity of the proclamation was based mainly on the following arguments:<sup>337</sup>

- The Social Assistance Act was not “in force” and “administered” at the time of the assignment of the powers to the provinces, which it was required to be in terms of s 235(8)(a) and s 235(6)(b), read with s 235(1) of the interim Constitution.

The court held that the interim Constitution had to facilitate a process of fundamental transition in the country. During this dramatic process, the authorities responsible for implementation and administration of the various laws had to be identified. In the absence of such provision, all pre-1994 legislation would have lapsed, because it would not have been lawful in terms of the interim Constitution. The interim Constitution should therefore not be interpreted to draw any distinction between laws which were actually being implemented, executed, or administered and laws which had been enacted, but had not yet come into operation.<sup>338</sup> This applied to all laws which were on the statute book immediately before 27 April 1994. The same reasoning applied to the term “administered”. The finding that the powers could not be assigned because they were not “in force” and “administered” was not upheld by the court.<sup>339</sup>

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<sup>334</sup> Act 59 of 1992 (supra note 274). This Act has been replaced by a new Social Assistance Act supra note 215. For the purposes of the discussion of this judgment, references to the Social Assistance Act will mean the old Social Assistance Act, 59 of 1992.

<sup>335</sup> Pars 1 & 4.

<sup>336</sup> Par 6. The Social Assistance Act was once again changed by the Welfare Laws Amendment Act, 106 of 1996 and 106 of 1997, which transferred the powers of provincial functionaries back to national functionaries. The provinces had administered all of the assigned provisions of the Social Assistance Act pursuant to the proclamation, and subject to the subsequent amendments of 1996 and 1997 (par 8).

<sup>337</sup> Par 11.

<sup>338</sup> Par 25.

<sup>339</sup> Par 28.

- The Social Assistance Act is not a Schedule 6 law, which it must be in order for it to be assigned.

In terms of s 235(6)(b) of the interim Constitution, the President may only assign a law to the provinces if it is a law with regard to a matter which falls within the functional areas specified in Schedule 6. Schedule 6 does refer to “welfare services”. It was questioned by the applicant if the Social Assistance Act falls within the functional area of “welfare services”,<sup>340</sup> since the payment of money deals with welfare, but not welfare services.<sup>341</sup> The court determined the meaning of “welfare” within its constitutional context, and within the true purpose and effect of the Social Assistance Act, and found that “welfare services” form part of Schedule 6 and can be assigned.

- The President did not have the power to assign such powers to the provinces (it must be a law in terms of s 126(3) to be assigned).

The judgment in effect revolved round the answering of this question. In order to determine whether the Social Assistance Act is a law which might be assigned by the President in terms of s 126(3), the following questions should be answered: (a) Does it deal with a matter that cannot be regulated effectively by provincial legislation? (b) Does it deal with a matter that, to be performed effectively, requires to be regulated or coordinated by uniform norms and standards that apply generally throughout the Republic? (c) Is it necessary to set minimum standards across the nation for the rendering of public services provided for by the Social Assistance Act?<sup>342</sup>

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<sup>340</sup> Par 30.

<sup>341</sup> Par 33.

<sup>342</sup> Par 39.

The court found that the experience of Mr Mashava and the general “failure and sorry saga”<sup>343</sup> of the administration of the Social Assistance Act by the provinces indeed illustrated that social assistance is a matter that cannot be regulated effectively by provincial legislation. To be rendered effectively, it must be regulated by uniform norms and standards that apply generally throughout the Republic for effective performance. Effective regulation and performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality, for example as far as the distribution and application of resources and assistance are concerned.<sup>344</sup>

The court therefore concluded that the proclamation was not valid insofar as it purported to assign the administration and amend the provisions of the Social Assistance Act.<sup>345</sup>

The court expressed the hope that the solution to these administrative problems would come with the enactment of the new Social Security Agency Act<sup>346</sup> and the new Social Assistance Act.<sup>347</sup> However, it is debatable whether these two Acts really make major strides towards the progressive realisation of the right of access to social security. In terms of the Social Assistance Act, the administration of social assistance is delegated to the Social Security Agency.<sup>348</sup>

In terms of the Social Security Agency Act, the Agency must administer social assistance in terms of the Act and also perform other social security functions. It seems there is a loose use of the term “social security”. The difference between social assistance and social security should be clarified and respected. The present Social Security Agency also fulfils a different role from the one proposed by the Taylor Committee.<sup>349</sup> The Committee proposed that the Agency deal with all social security programmes, as well as with private sector regulation. According to the Committee, the primary functions of the

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<sup>343</sup> Par 46.

<sup>344</sup> Pars 46, 57 & 66.

<sup>345</sup> Par 68.

<sup>346</sup> Act 9 of 2004 (supra note 214).

<sup>347</sup> Act 13 of 2004 (supra note 215).

<sup>348</sup> Section 3.

<sup>349</sup> Taylor Report op cit note 39 at 122-124.

Agency should be research and monitoring, policy coordination, information and IT services. The Agency should act as an interface between the public and all parts of the social security system.<sup>350</sup>

It is also important to realise, for purposes of informal social security, that, as long as the social security system does not function properly, there will be (unnecessary) increased pressure on the informal social security system. This is also, to a limited extent, the conclusion of the *Khosa* judgment.<sup>351</sup> As long as permanent residents are denied access to social assistance, they will increasingly have to burden other family members in times of need. For purposes of the model suggested in chapter 8, it is therefore proposed that the current social assistance system should continue to provide support and actually increase such provision.<sup>352</sup> It could be added that the present system should also continue to improve its service delivery and administrative capacities. This will directly impact on the informal social security system by relieving the unnecessary burden on the system where those eligible for social assistance are denied benefits and must consequently rely on the informal social security system for support.

### 3.3.5 *Fragmented nature of the administration of formal social security*

South Africa has inherited a social security system which is remarkably comprehensive for a middle-income, developing country.<sup>353</sup> This system is, however,

characterised by a patchwork of fragmented institution. There is no coherent social security approach and little synergy is reflected in the construction, establishment, functioning, purpose of, as well as in the cooperation between, these schemes.<sup>354</sup>

The regulatory framework of the present social security system clearly reflects this fragmented state. Certain risks, for example maternity, family, and death and survivor

<sup>350</sup> Olivier MP & Smit N “Summarised Commentary on Two Bills: (a) Social Assistance Bill (B57-2003); (b) South African Social Security Agency Bill (B51-2003)”. (Personal copy received from authors).

<sup>351</sup> Op cit note 289. Also see par 3.3.1.1, ch 3.

<sup>352</sup> See par 5.2, ch 8.

<sup>353</sup> Van den Berg op cit note 6 at 481.

<sup>354</sup> Olivier & Kalula op cit note 6 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 127. Also see par 3.3, ch 3.

benefits, are not regulated by separate laws, but are, to a limited extent, provided for within the framework of other laws. For example, maternity protection is regulated in terms of the LRA,<sup>355</sup> the BCEA<sup>356</sup> and the UIA.<sup>357</sup>

Another shortcoming of the present social security system is the fragmented nature of the administration system. Different government departments are in control of different parts of the social security system. There is no overarching national body dealing with all aspects of social security. The various administrations responsible for the respective risks are indicated below:

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<sup>355</sup> In terms of s 186, the definition of “dismissal” includes the refusal to allow an employee to resume work after she has taken maternity leave. Section 187(1)(e) regards the dismissal of an employee as automatically unfair if the reason for the dismissal is the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy.

<sup>356</sup> Section 25 entitles an employee to at least four consecutive (unpaid) months’ maternity leave.

<sup>357</sup> Section 24 entitles a “contributor” who is pregnant to maternity benefits in terms of the Act for any period of pregnancy or delivery, and the period thereafter. The maximum period of maternity leave in respect of which benefits may be paid is 17,32 weeks.



Table 3:<sup>358</sup> Outline of Present Social Security Administrative Framework

Contingency	Social insurance		Social assistance	
	Public	Private	Public	Private
<b>Unemployment</b>	- UIF	- Private savings - Private insurance - Informal social security		- Private charity - Informal social security
<b>Disability</b>	- COIDA Fund - RAF - Public occupational schemes	- Private occupational schemes - Private insurance - Savings - Informal social security	- Disability grant (Provincial Departments of Social Development)	- Private charity - Informal social security
<b>Old age</b>		- Occupational savings schemes - Private insurance - Savings - Informal social security	- Old-age grant (Provincial Departments of Social Development)	- Private charity - Informal social security
<b>Survivor benefits &amp; funeral schemes</b>	- UIF - COIDA - RAF	- Private individual schemes - Occupational schemes - Private insurance - Savings - Informal social security		- Private charity - Informal social security
<b>Health care</b>	- Dept of Health - RAF - COIDA	- Employer-based medical aid insurance - Private insurance - Savings - Informal social security	- Certain free services (Dept of Health)	- Private charity - Informal social security
<b>Maternity</b>	- UIF - LRA & BCEA (Dept of Labour)	- Private insurance - Occupational health schemes - Savings - Informal social security		- Private charity - Informal social security
<b>Child benefits</b>	- UIF - COIDA - RAF	- Private insurance - Savings - Informal social security	- Child grants (Provincial Departments of Social Development) - Dept of Health - Dept of Education	- Private charity - Informal social security
<b>Employment injuries</b>	- COIDA - RAF	- Private occupational schemes - Private insurance - Savings - Informal social security		- Private charity - Informal social security
<b>Sickness</b>	- UIF - Public sector scheme - COIDA - LRA & BCEA (Dept of Labour)	- Private occupational schemes - Private insurance - Savings - Informal social security		- Private charity - Informal social security
<b>General</b>	- Dept of Public Works - Dept of Housing - Dept of Land Affairs	- Private insurance - Savings - Informal social security		- Private charity - Informal and indirect social security

<sup>358</sup> Adapted from Mpedi LG “Administration and Institutional Framework” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 156-157. Own structure added.

### 3.4 Summary

The present social security system in the country seems, from the perspective of the regulatory framework, to consist of social insurance and social assistance. Both these legs of formal social security have a restricted scope of application and do not provide comprehensive social protection. The result is that informal social security, although not recognised by the formal social security system, must step in to rectify many of the shortcomings of the present system.

## 4 CONSTITUTIONAL IMPERATIVE FOR CHANGE

### 4.1 General

In any discussion of the regulatory framework of social security it is imperative to consider the underlying foundation of the framework, which, in this case, would be the constitutional imperative to guarantee everyone access to social security as a fundamental right. The discussion of the constitutional imperative will focus on the interpretation of the courts of similarly protected socio-economic rights in the light of the internal limitations contained in these rights. This discussion and interpretation of other constitutionally protected socio-economic rights will give important pointers as to the interpretation of the right to social security as a fundamental (socio-economic) right. The view of the Constitutional Court in this regard will also provide important guidelines on the shaping of future policy and the development of a social security policy in the context of the right of access to social security as a fundamental right.

The Constitution refers to social security and social assistance.<sup>359</sup> The interpretation of “social security” in the South African context has yet to be determined by the “fledgling jurisprudence on socio-economic rights”.<sup>360</sup> There are however indicators that a broader

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<sup>359</sup> Section 27. Also see Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 24-25.

<sup>360</sup> Khoza S & Chirwa D “Editorial” *ESR Review (Economic and Social Rights in South Africa)*, Vol 3, No 2 (2002) at 1. There is no indication that the Constitution supports a wider notion of social security or that

interpretation is favoured.<sup>361</sup> The constitutional imperative to realise, progressively, the right of access to social security within available resources dictates a change in the present exclusionary social security system.

This is also necessitated by other constitutional rights, for example the right to equality. The right to equality is guaranteed by section 9 of the Constitution and makes reform of the present system obligatory and not optional. Many social security laws still exclude people from their protective scope, which can amount to discrimination, especially in respect of Black women.<sup>362</sup> This practice runs the risk of being labelled discriminatory. Other forms of discrimination also still remain, for example the difference between the pensionable age for men and women as eligibility criteria in terms of the old-age grant. For women, the retirement age is 60, while for men it is still 65.

#### 4.2 A right of access to social security in terms of section 27

The Constitution is the supreme law of the Republic. Any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.<sup>363</sup> The state must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>364</sup>

One of the aims of the Constitution is to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights.<sup>365</sup> A

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informal social security is included in the concept of social security as contained in s 27. Even internationally there is no uniform definition of social security.

<sup>361</sup> Taylor Report op cit note 39 at 41. Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 24-28. In its recent report, the Taylor Committee suggested that the term “social security” should be replaced with the term “comprehensive social protection”. The Welfare White Paper op cit note 186 at par 1, ch 7, & Glossary also supports this view.

<sup>362</sup> For example, both the UIA supra note 234 and the BCEA supra note 238 still exclude employees who work less than 24 hours a month for a particular employer. Black women make up the majority of domestic servants in the country. It is common practice in South Africa for Black women to work for a different employer every day of the week. Although they therefore work a five-day work week, they are effectively excluded from the protective ambit of the UIA and the BCEA, because they work less than 24 hours a month for one particular employer. Although the UIA has done away with this by now including domestic and seasonal workers in its ambit, the COIDA supra note 253 still excludes these two categories of employees from its protective scope.

<sup>363</sup> Jansen van Rensburg L “Grondwetlike Voorskrifte en die Reg op Toegang tot Sosiale Sekerheid” *De Jure* Vol 32 (1999) at 292. (Hereafter Jansen van Rensburg).

<sup>364</sup> Section 7(2).

further aim is to improve the quality of life of all citizens and to free the potential of each person.<sup>366</sup> Social security (and informal social security) can play an important role in ensuring social justice, in freeing the potential of all citizens and in improving their quality of life.

Section 1 of the Constitution contains the values on which the country is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>367</sup> In the *Government of the Republic of South Africa and others v Grootboom and others*,<sup>368</sup> the court relied heavily on this right to human dignity as a core value underlying all other human rights. This value of human dignity has also been embodied as a fundamental right.<sup>369</sup>

Section 27(1)(c) of the Constitution guarantees everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Section 27(2) compels the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.

The right of access to social security contains certain qualifiers. The internal limitation of the right of access to social security is contained in the wording of s 27(2), namely that the state must take (a) reasonable legislative and other measures, (b) within its available resources, to achieve (c) the progressive realisation of each of these rights.<sup>370</sup>

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<sup>365</sup> Preamble to the Constitution supra note 2.

<sup>366</sup> Jansen van Rensburg op cit note 363 at 290.

<sup>367</sup> Section 1(a).

<sup>368</sup> Supra note 293.

<sup>369</sup> Sections 10 & 39(1)(a). A distinction should be drawn between fundamental rights and constitutional values, although the Constitution states that, when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human equality and freedom.

<sup>370</sup> The right of access to social security has two other internal limitations, namely the fact that s 27(1)(c) states that people who cannot support themselves and relatives should have access to social assistance. Since social assistance is a sub-section of social security, it should apply only to social assistance. The second internal limitation relates to the “right of access” to social security and not merely the “right to”. This means that the state can decide which system to implement. This was however interpreted differently in terms of *Grootboom* (supra note 293). In the latter judgment, the court interpreted the “right of access to”

External limitation of this right is allowed in terms of s 36 of the Constitution, which states that any right in the Bill of Rights may be limited only in terms of a law of general application, and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose, and (e) less restrictive means to achieve the purpose.

A number of socio-economic rights have, since 1995, formed the subject of a number of Constitutional Court judgments. These judgments can be used to illustrate a number of points. Most importantly, they confirm the justiciability of socio-economic rights. For purposes of this thesis, the focus in the following discussion will be on the way in which the court interpreted the constitutional restrictions pertaining to these socio-economic rights. This will also indicate how the internal qualifiers pertaining to the right of access to social security should be interpreted and how the state's role and responsibility in this regard should be defined. The three judgments are first discussed and then the focus shifts to the following five pointers emerging from the constitutional interpretation of these judgments, namely: "progressive realisation", "reasonable legislative and other measures", "within available resources", "the doctrine of separation of powers" and "minimum, core content".

#### ***4.2.1 Soobramoney v Minister of Health, KwaZulu-Natal***<sup>371</sup>

This judgment was the first significant Constitutional Court case looking at the enforceability of a particular socio-economic right, namely the right to emergency medical treatment and the right to life. Mr Soobramoney suffered from chronic renal failure. His life could be prolonged by means of kidney dialysis treatment. The provincial

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so as to place a more onerous duty on the state, in that ancillary services necessary to fulfil the right must also be in place; for example, for a right to housing to be realised, access must also be enabled through access to land and services. Jansen van Rensburg op cit note 363 at 295.

<sup>371</sup> 1997 12 BCLR 1696 (CC). (Hereafter *Soobramoney*).

hospital where he applied for treatment however refused him access to its kidney dialysis treatment facility because of a lack of funds and equipment. The hospital had only a few machines, which worked overtime to accommodate all the patients requiring kidney dialysis. The hospital therefore developed a clear policy for determining who received treatment. The policy of the hospital was clearly formulated and the court found that the reasons for refusing treatment were reasonable. The hospital had only 20 dialysis machines. Treatment of a patient took four hours, and the cleaning of the machine took a further two hours. This resulted in a lack of resources and the hospital was unable to obtain any more money from the provincial health department. The hospital had a clear policy regarding the use of dialysis resources, namely that only patients who suffered from acute renal failure which could be treated, and remedied by the treatment, would be given automatic access to renal dialysis at the hospital. If the chronic renal failure was irreversible (as was the case with the applicant), a person was not automatically admitted. A set of guidelines had been drawn up to determine who would then qualify, and, in terms of the guidelines, only persons eligible for a kidney transplant would qualify and would receive treatment until a donor had been found and a transplant had been completed. The applicant suffered from ischemic heart disease, was not eligible for a kidney transplant and was consequently refused treatment. He applied to the Constitutional Court for an order compelling the provincial hospital to allow him access, in terms of the Constitution, to kidney dialysis treatment. He based his claim on s 27(3) of the Constitution, which provides that no one may be refused emergency medical treatment, and on s 11, which stipulates that everyone has the right to life.

The state, in its defence, relied on the internal limitation clause contained in s 27, namely that the state must comply with its constitutional obligations “within available resources”. The court found that there were indeed limited resources available. By applying the policy determined by the hospital, the state could keep people alive, which was more beneficial, because the policy was aimed at curing patients instead of maintaining chronically ill patients. The court found that the policy guidelines laid down by the hospital were not unreasonable, and that they were not applied unfairly or irrationally when a decision was taken. If everyone in the same condition as the appellant were to be

admitted, the carefully tailored programme would collapse and no one would benefit from that. Access by all people in the same position as the appellant would entail an increase in the health budget to the prejudice of other needs which the state had to meet.

The court also held that Mr Soobramoney's condition was not an emergency requiring immediate treatment. Section 27(3) could not be interpreted to mean that the treatment of chronically ill patients must be accorded priority to the detriment of other forms of medical treatment, for example preventative health care.

The court indicated that it would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it was to deal with such matters. The state had to manage its limited resources in order to address all the claims regarding access to socio-economic rights. There would be times when this required it to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within society.

#### ***4.2.2 Government of the Republic of South Africa and others v Grootboom and others***<sup>372</sup>

Interestingly enough, in this case the court chose to look at "reasonableness" in order to define the state's responsibility as far as the realisation of socio-economic rights is concerned and did not look at a lack of resources as a legitimate excuse for not realising socio-economic rights.

According to the preamble to the Constitution, the founding values of society are "human dignity, the achievement of equality and the advancement of human rights and

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<sup>372</sup> Supra note 293.

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freedoms”.<sup>373</sup> This case applied these values and utilised them as the basis for the decision.<sup>374</sup>

The facts of the case are briefly the following:<sup>375</sup> Mrs Grootboom and the respondents<sup>376</sup> were evicted from private land which they illegally occupied. They previously lived in the Wallacedene squatter camp under lamentable conditions and moved their shacks to privately owned land earmarked for low-cost housing. When evicted from the private land, they went back to Wallacedene only to find that their former sites had been occupied by others. In the process of eviction, the respondents’ homes were bulldozed and burnt, and their possessions destroyed. They subsequently had literally nowhere to go and found shelter on the Wallacedene sports field. The respondents approached the court and demanded that the municipality meet its constitutional obligations to provide them with access to housing and to provide temporary accommodation for the respondents.

The case first came before the Cape High Court<sup>377</sup> by way of an urgent application and an appeal was subsequently lodged with the Constitutional Court by the Municipality. The Constitutional Court paid special attention to s 26(1), stating that everyone has the right to have access to adequate housing. This is, however, subject to the internal limitation contained in s 26(2) compelling the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.<sup>378</sup> The court specifically stated that the rights (housing and shelter) need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution,<sup>379</sup> of which the right of access to social security forms a part.

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<sup>373</sup> Section 1(a), *Grootboom* 1175.

<sup>374</sup> 1175F. At the outset of the judgment, the court indicated what the constitutional values are and continued as follows by way of an introduction: “*This case grapples with the realisation of these aspirations for it concerns the State’s constitutional obligations in relation to housing.*”

<sup>375</sup> 1177D-1178G.

<sup>376</sup> 510 children and 390 adults.

<sup>377</sup> 31 May 1999.

<sup>378</sup> Also of importance is s 28(1)(c), which guarantees every child the right to basic nutrition, shelter, basic health care services and social services.

<sup>379</sup> 1181H.



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The court ordered the Municipality to devise and implement, within its available resources, a comprehensive and coordinated programme for progressively realising the right of access to adequate housing. The programme had to include reasonable measures to provide relief for people who had no access to land, for people who had no roof over their heads and for people who were living in intolerable conditions or in crisis situations.

#### 4.2.3 *Minister of Health v Treatment Action Campaign and others*<sup>380</sup>

The court in the *Treatment Action Campaign (TAC)* case also looked at “reasonableness” to determine the state’s responsibility to fulfil socio-economic rights.

In the *TAC* case, the government’s AIDS programme came under attack. The programme was devised to deal with mother-to-child transmission of HIV/AIDS and it identified the anti-retroviral drug, Nevirapine, as its drug of choice for this purpose. The drug was, however, only made available at 18 state hospitals involved in a pilot project and not to all HIV-infected pregnant mothers. The main reason for the government’s refusal was its concern about the safety and efficacy of Nevirapine. Government wanted to develop and monitor its human and material resources nationwide for the delivery of a comprehensive package of testing, dispensing, counselling and follow-up services. Government did have a national strategic plan and a number of HIV/AIDS-related policy guidelines dealing with various aspects of the strategic plan. Government’s policy was not reasonable in the circumstances, and, according to the applicant, the government did not have a comprehensive policy for the prevention of mother-to-child transmission of HIV.<sup>381</sup> The court found that the cost of the drug was not a factor for confining Nevirapine only to research sites, but rather that the real reason for so doing was the cost of providing the infrastructure for counselling and testing, and of providing and monitoring the use of formula milk, instead of breastfeeding, coupled with vitamins and antibiotics.

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<sup>380</sup> 2002(10) BCLR 1033 (CC). (Hereafter *TAC*).

<sup>381</sup> 1049I, par 47.

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The court weighed up the government's delivery package against the effect thereof on the mothers and children who could not afford access to private health care and who did not have access to research and training sites. The issue was no longer whether socio-economic rights were justiciable, but whether the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fell short of its constitutional obligations.<sup>382</sup>

The plan was found to be unreasonable in that it restricted the availability of Nevirapine to certain test sites, though the drug was offered to government free of charge.<sup>383</sup> The court compelled the government, in terms of the Constitution, to forthwith plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.<sup>384</sup> The court subsequently compelled government to devise and implement a comprehensive and coordinated programme to progressively realise the rights of pregnant women and their newborn children to have access to health services to combat the mother-to-child transmission of HIV.<sup>385</sup>

#### 4.2.4 “*progressively realise*”

It is clear that the s 27(2) right of access to social security will have to be progressively realised. The question, however, is: What time frame can be assumed from “progressively realised”? Some of the European social security systems have been developed over the past century, but, in South Africa, we are faced with a constitutional imperative, as well as with the reality and extent of poverty, both of which will not allow for progressive realisation over a period of 100 years. In the matter of *Grootboom* the court followed the interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) given to “progressive realisation” to the effect that progressive realisation “imposes an obligation to move as expeditiously and effectively as possible

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<sup>382</sup> 1044, par 25.

<sup>383</sup> 1036C, par 4.

<sup>384</sup> 1037, par 5.

<sup>385</sup> 1067A, par 115.

towards the goal".<sup>386</sup> The ultimate objective, however, is obviously to realise the right fully. Progressive realisation recognises that full realisation will not be achieved within a short period of time.<sup>387</sup> Progressive realisation therefore necessitates the development of a realistic and comprehensive plan or programme to indicate how the fundamental rights concerned will be gradually developed.<sup>388</sup> Although the Constitution requires the progressive realisation of the right, it does compel government to take steps to achieve this goal, even though the rights cannot be realised immediately. This means that accessibility should be progressively facilitated and that all hurdles (such as legal, administrative, operational and financial obstacles) should be identified and, where possible, be lowered over a period of time. For example, housing must be made more accessible to a larger number and wider range of people as time progresses.

Social insurance can similarly be extended to include more risks and a larger number of people over a period of time. This is also the recommendation in the model in chapter 8.<sup>389</sup>

Some interpret "progressively realise" to mean that the state may exercise a discretion, but, in doing so, must ensure that it provides a certain core content.<sup>390</sup> In its first annual report, the South African Human Rights Commission remarked that a minimum standard for defining the right of access to social security must be developed. The Taylor Committee also recommended that the obligation to take reasonable steps should be translated into making a minimum level of provisioning available.<sup>391</sup> The Constitutional Court has, in a series of judgments, begun to develop its approach to adjudicating claims based on socio-economic rights, but, in all of the cases, the court chose not to develop a minimum core for each of these rights. Instead, it decided to focus the interpretation on

<sup>386</sup> Olivier, Khoza, Jansen van Rensburg & Klinck op cit note 328 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 74.

<sup>387</sup> Idem at 74-75.

<sup>388</sup> Ibid.

<sup>389</sup> Liebenberg S "The Courts and Socio-Economic Rights: Carving Out a Role" *ESR Review (Economic and Social Rights in South Africa)*, Vol 3, No 1 (2002) at 6. (Hereafter Liebenberg "Carving Out a Role").

<sup>390</sup> See discussion of minimum, core obligation in par 4.2.8, ch 3.

<sup>391</sup> Olivier, Khoza, Jansen van Rensburg & Klinck op cit note 328 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 73. Taylor Report op cit note 39 at 43.

the aspect of “reasonableness” contained in the internal limitation clauses of these rights.<sup>392</sup> The interpretation given to “reasonable legislative and other measures” is discussed below.<sup>393</sup> It seems that, in most of the socio-economic judgments, the court focused on “reasonableness” or terms akin thereto (e.g. in the *Soobramoney* matter, the court referred to “rational decision taken in good faith”) to limit the state’s responsibility, rather than focusing on the other two qualifiers, namely “available resources” or “progressive realisation”.

#### 4.2.5 “reasonable legislative and other measures”

In the *Grootboom* case, the court found that a state programme (e.g. the housing plan in *Grootboom*) must establish a coherent plan directed towards the progressive realisation of the right within available means. The programme must be capable of facilitating the realisation of the right, but the exact packaging and content of the measures to be adopted are a matter for the legislature and the executive. The only requirement is that the measures they adopt should be reasonable. The measures can consist of legislation, or other measures such as policies and programmes. The reasonableness of the programme will be determined by its content, as well as by the way in which it is implemented. The programme will therefore have to be reasonable in terms of its introduction and execution.<sup>394</sup>

The reasonableness of the measures in *Grootboom* was determined by the court in the following manner:<sup>395</sup>

- The court considered the housing problem in the context of the social, economic and historical background.

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<sup>392</sup> Bilchitz D “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” *South African Journal for Human Rights (SAJHR)* Vol 19 (2003) at 1-2. (Hereafter Bilchitz).

<sup>393</sup> Par 4.2.5, ch 3.

<sup>394</sup> 1190H -1191B.

<sup>395</sup> 1191F.

- The court considered the capacity of the institutions responsible for implementing the programme.
- The programme must be balanced and flexible.
- The programme must make appropriate provision for attention to the particular crises (e.g. housing) and for long-, medium- and short-term needs.
- A programme that excludes a significant segment of society cannot be said to be reasonable.
- The programme must be reviewed on an ongoing basis.
- The measures cannot ignore the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent, and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures. Measures will therefore still be unreasonable if, though statistically successful, they fail to address the needs of those most in peril and in desperate need.

The nationwide housing programme in *Grootboom* focused on medium- and long-term objectives, but was not sufficiently flexible to cater for immediate and short-term requirements.<sup>396</sup> The programme had to be implemented with due regard to urgency and the issues to be addressed.<sup>397</sup> There was therefore no provision for immediate needs and financial resources had to be made available to address this and to manage crisis situations. The housing programme fell short in that it did not make provision for relief to the categories of people in desperate need.<sup>398</sup>

In the *TAC* case, the court found that, while government was busy developing the best programme and procuring the necessary funds and infrastructure, Nevirapine could not be

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<sup>396</sup> 1198I &1201F.

<sup>397</sup> 1201I.

<sup>398</sup> 1202B-C.

withheld from mothers who did not have access to test sites. A programme for the realisation of socio-economic rights had to be balanced and flexible and had to make appropriate provision for attention to crises, as well as short-, medium- and long-term needs. A programme that excluded a significant segment of society could not be said to be reasonable,<sup>399</sup> especially while the administering of Nevirapine was within the state's available resources.<sup>400</sup>

#### 4.2.6 “*within available resources*”

At the heart of all three Constitutional Court decisions on socio-economic rights lies proof of a lack of financial resources.<sup>401</sup> The state attempted to prove in all three cases that it could not progressively realise the right in question because of a lack of available resources. In *Soobramoney*, the Constitutional Court held that the allocation of funds was a political issue. The court was reluctant to dictate to the state how health care should be provided.<sup>402</sup> The court in effect agreed that financial constraints and the rights and interests of other users of the state's health care services limited Mr Soobramoney's right of access to health care services.<sup>403</sup>

In the *TAC* case, the state failed to convince the court that its policy was based on a lack of resources, mainly because the cost of the drug was not a factor. It had been offered free of charge to the state by the manufacturer for a period of five years.<sup>404</sup> The court also rejected the state's argument relating to the cost of providing a “comprehensive, ideal programme” for preventing mother-to-child transmission of the disease. The court found

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<sup>399</sup> 1055, par 68.

<sup>400</sup> The state also incurred a responsibility in respect of children whose needs were the most urgent and most in peril, and whose ability to have access to Nevirapine and to enjoy the rights to which they were entitled was profoundly affected by government's inflexible policy. Government's approach to the matter, and its stance during subsequent proceedings before the court, was viewed as being rigid and inflexible.

<sup>401</sup> Van Wyk C “The Enforcement of the Right of Access to Health Care in the Context of HIV/AIDS and its Impact on the Separation of Powers” *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* Vol 66 (2003) at 397. (Hereafter Van Wyk).

<sup>402</sup> Par 4.2.1, ch 4.

<sup>403</sup> Van Wyk op cit note 401 at 398 “*The conflicting interests of the parties concerned were weighed and balanced and precedence given to the overriding interest.*”

<sup>404</sup> *Idem* at 403.

that Nevirapine could not reasonably be withheld until the best programme was devised and funds and infrastructure were in place. These costs were not relevant to the provision of a single dose of Nevirapine for mother and child at the time of birth. The court also relied on reasonableness to justify the order. The policy was not reasonable, since it excluded significant segments of society.<sup>405</sup>

The limited financial resources in the case of *Grootboom* seemed more difficult to address. The court recognised that “available resources” is an internal limitation. There is no unqualified obligation to meet existing needs.<sup>406</sup> Limited resources may therefore justify the giving of priority to the larger needs of society, rather than the specific needs of particular individuals. The availability of resources is an important factor in determining what is reasonable. The availability of resources will govern the realisation of the obligation in terms of (a) the content of the obligation, (b) the rate at which it is achieved, (c) as well as the reasonableness of the measures employed to achieve the result.<sup>407</sup>

As a rule, the courts will not decide on whether resources are available to adopt certain measures or on whether these resources should be employed in order to achieve certain desired goals. However, in obvious cases, where particular action has to be taken and where it is clear that such action indeed could be taken and that it is affordable, the courts may be prepared to grant an order to this effect.<sup>408</sup>

In *Grootboom*, the court found that, although limited financial resources existed, the budget could be rearranged to make it more reasonable and also to provide for the needs of the extremely vulnerable.<sup>409</sup>

It can therefore be said that a shortage of resources cannot be an absolute bar to the enforcement of economic and social rights in all circumstances. In order to give social

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<sup>405</sup> *Idem* at 403-404.

<sup>406</sup> Olivier, Khoza, Jansen van Rensburg & Klinck op cit note 328 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 76.

<sup>407</sup> 1192H.

<sup>408</sup> Olivier, Khoza, Jansen van Rensburg & Klinck op cit note 328 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 76.

<sup>409</sup> *Ibid.*

rights meaning, the courts should be prepared to make decisions with wider budgetary repercussions.<sup>410</sup> There is a need to develop a coherent jurisprudence on the way in which courts should engage with the issue of available resources.<sup>411</sup>

#### 4.2.7 “separation of powers doctrine”

In both the *Grootboom* and *TAC* cases the separation of powers doctrine also constituted an important subject.<sup>412</sup> In terms of the doctrine of separation of powers, the judiciary and executive should perform separate functions. The function of the former is that of resolving disputes and interpreting legislation. The latter should make policy and enforce it. It is within the executive’s domain to decide upon priorities and formulate a budget. If people are unhappy about policy or its implementation, they can show their dissatisfaction at the ballot box.<sup>413</sup> Even during the *Certification Judgment*<sup>414</sup> it was realised that the inclusion of socio-economic rights in the Bill of Rights would create tension between the executive and judicial arms of the state, since it could result in court decisions impacting on budgetary matters.<sup>415</sup> However, the court remarked that its intervention in the area could imply the extension of benefits to categories thus far excluded.<sup>416</sup> It also found that the inclusion of socio-economic rights in the Bill of Rights does not confer a task upon the courts so different from that ordinarily conferred so as to result in a breach of powers.<sup>417</sup>

As far as the separation of powers doctrine is concerned, the court held that it may subject the reasonableness of state measures in addressing socio-economic needs, to

<sup>410</sup> Liebenberg S “The Right to Health Care: Soobramoney Case – An Unpromising Start” *Rights Now* (Apr 1998) at 11. (Hereafter Liebenberg “Soobramoney Case – An Unpromising Start”).

<sup>411</sup> Liebenberg “Carving Out a Role” op cit note 389 at 7.

<sup>412</sup> Van Wyk op cit note 401 at 394.

<sup>413</sup> *Idem* at 395.

<sup>414</sup> *Supra* note 222 at par 78.

<sup>415</sup> Van Wyk op cit note 401 at 395.

<sup>416</sup> Par 800 B-F. Also see Olivier, Khoza, Jansen van Rensburg & Klinck op cit note 328 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 88.

<sup>417</sup> Par 800. Also see Van Wyk op cit note 401 at 395.



evaluation.<sup>418</sup> Such determinations of reasonableness may have budgetary implications, although they are not in themselves directed at rearranging budgets.<sup>419</sup>

Indeed, given the context, it would be a sad day for socio-economic rights if the right to have access to health care services in s 27 could not support the Court's view of a specific government programme which has vast implications for the fulfilment of the right. Not only is the government obliged to have a plan. But the plan must reasonably address the socio-economic problem under consideration.<sup>420</sup>

#### 4.2.8 “*minimum, core obligation*”

The International Covenant on Economic, Social and Cultural Rights (ICESCR) developed a framework for interpreting and understanding socio-economic rights. The monitoring body for the ICESCR, the United Nations Committee on Economic, Social and Cultural Rights (UNESCR), has developed the minimum, core obligations for socio-economic rights. This minimum-core responsibility is placed on all signatory states to the Covenant.<sup>421</sup> A minimum core will ensure the satisfaction of, at least, minimum, essential levels of each of the rights incumbent upon every state party. The state is therefore obliged to provide a minimum-core entitlement, which is the basic minimum realisation of a socio-economic right and embodies the intrinsic value of each right.<sup>422</sup>

In the *Grootboom* and *TAC* judgments, the Constitutional Court found minimum, core obligations to be inapplicable in the South African context. The court in *Soobramoney* did not touch on the subject. In *Grootboom*, the court argued that it was not possible to determine the minimum threshold for South African purposes owing to the fact that the court did not have information comparable with that used by UNCESCR. UNCESCR developed the concept of minimum core over many years of examining reports by reporting states.<sup>423</sup> In *TAC*, the court reiterated that it was not willing to interpret the

<sup>418</sup> Van Wyk idem at 403.

<sup>419</sup> Par 38.

<sup>420</sup> Klug H “Access to Health Care: Judging Implementation in the Context of Aids” *South African Journal for Human Rights (SAJHR)* Vol 18 (2002) at 123-124. (Hereafter Klug).

<sup>421</sup> Section 2(1) ICESCR. Also see Chetty C “The Right to Health Care Services: Interpreting Section 27 of the Constitution” *South African Public Law (SAPL)* Vol 17 (2002) at 454. (Hereafter Chetty).

<sup>422</sup> Ibid.

<sup>423</sup> Par 32.

relevant socio-economic rights so that a “core” service would be available immediately. All that was possible and was expected of the state was that it acted reasonably in providing access, on a progressive basis, to the socio-economic rights identified in s 26 and 27. In the *TAC* case, the Constitutional Court concluded that it was impossible to give everyone access to a minimum, core service immediately.<sup>424</sup> The state could only be expected to “act reasonably to provide access to socio-economic rights in s 27 on a progressive basis”.<sup>425</sup> In effect, s 27(1) and (2) were read together as defining the scope of the state having to respect, protect, promote and fulfil these rights.<sup>426</sup>

Some commentators argue that section 27(2) does not impose an immediate “obligation of result” on the state. It, instead, imposes an “obligation of conduct”, meaning the taking of reasonable legislative and other measures to achieve the progressive realisation of the right. This duty is limited by the availability of resources.<sup>427</sup> The state must show that it has prioritised its resources to meet these core, basic obligations. While the state cannot provide immediate access to these rights, it is not prevented from instructing the legislature and executive to devise programmes that will realise rights to the maximum of its available resources.<sup>428</sup>

In *Grootboom*, the court rejected the argument that s 27(1)(a) creates a self-standing, minimum, core obligation independent of that of the “progressive realisation” obligation imposed on the state by s 27(2). It is impossible to give everyone access to a core service immediately. (This is why the proposed model in chapter 8 is also staggered.) All that is possible is for the state to act reasonably in providing access, on a progressive basis, to the socio-economic rights identified in ss 26 and 27.<sup>429</sup> In *Grootboom*, the court focused its role on whether state duties meet the constitutional imperative of reasonableness.<sup>430</sup> In order to satisfy the test for reasonableness, those whose needs are most urgent and whose

<sup>424</sup> Par 35.

<sup>425</sup> Par 35.

<sup>426</sup> Section 7(2). Chetty op cit note 421 at 458.

<sup>427</sup> Liebenberg “Soobramoney Case – An Unpromising Start” op cit note 410 at 5.

<sup>428</sup> *Idem* at 11.

<sup>429</sup> Khoza S “Reducing Mother-to-Child Transmission of HIV: The Nevirapine Case” *ESR Review (Economic and Social Rights in South Africa)* Vol 3, No 2 (2002) at 4. (Hereafter Khoza).

<sup>430</sup> *Ibid.*

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ability to enjoy all rights is most in peril must not be ignored in the measures aimed at realising a relevant socio-economic right.<sup>431</sup>

#### **4.2.9 Analysis of limitation of socio-economic rights for purposes of informal social security**

For purposes of the interpretation and limitation of the right of access to social security, the following lessons can be learnt from the above Constitutional Court judgments:

- In the *Grootboom* and the *TAC* cases (and, to a lesser extent, in *Soobramoney*), the court held that the main question in terms of the Constitution was whether the measures taken by the state to realise the relevant rights were reasonable.<sup>432</sup> In the *Soobramoney* case, the reasonableness was judged with reference to the rationality and good faith of the decision of the legislature and the executive.<sup>433</sup> In the *TAC* case, the court, in determining reasonableness, took account of the degree and extent of denial of the right that the government sought to realise. The court also held that a programme (such as the one attempting to treat HIV-positive mothers) should be flexible and balanced, had to pay attention to the short-, medium- and long-term needs of the target group and must not exclude a significant sector of society.<sup>434</sup> The extent and degree of denial of the right of access to social security would determine if the prevailing social security measures were reasonable. As stated above, the social security system is characterised by its exclusionary nature, which leaves government at risk when the prevailing formal social security system is challenged.
- The social security programme must establish a coherent plan which is reasonable in terms of its inception and execution. One of the problems with

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<sup>431</sup> *Idem* at 5. The court did not give any guidance as to which people constitute those whose needs are most urgent.

<sup>432</sup> Bilchitz op cit note 392 at 3.

<sup>433</sup> Chetty op cit note 421 at 456.

<sup>434</sup> Bilchitz op cit note 392 at 4.

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the present social security system is its lack of a coherent structure. Measures are often implemented in a piecemeal and haphazard way. The Social Security Agency, proposed to come into force in 2005, is an attempt to rectify this, but its jurisdiction relates only to social assistance matters. If one ministry were tasked with overall administration of social security, it might ensure reasonableness as far as a coherent plan for the introduction and execution of social security is concerned.<sup>435</sup>

- The social security system should be balanced and flexible, should pay attention to short-, medium- and long-term needs of society and should not exclude a significant sector of society. The Taylor Committee's terms of reference included devising options regarding ultimate objectives and targets for the social security system, as well as options for immediate practical implementation that would also reflect on the viability and implications of the options considered.<sup>436</sup> The rate of implementation of these proposals is however cause for concern. Although "progressively realise" does not give a clear timeline, it does imply that there should be movement (and as effectively as possible) towards the goal. In the process, hurdles of a legal, administrative, operational and financial nature should be identified and be lowered over a period of time. The Taylor Committee Report has already gone far in identifying some of the hurdles in the present system, but not much has since been done to remove these hurdles.
- The courts' approach of steering clear of a core content is further cause for concern. The courts clearly did not attempt to give a core content to any of the socio-economic rights before them. In particular, the court's approach in the *TAC* matter can be criticised because it attempts to sidestep the need to give content to the rights in s 27(1). Any analysis of the content, or of what the rights involve, is virtually absent.<sup>437</sup> In the *Grootboom* case, there was some

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<sup>435</sup> See par 5.2, ch 8.

<sup>436</sup> Taylor Report op cit note 39 at 10 (par 1.2).

<sup>437</sup> Bilchitz op cit note 392 at 4.

analysis of what the right of access to housing is designed to achieve,<sup>438</sup> but, in the *TAC* case, there is absolutely no consideration of what the section 27(1) right (the right of access to health care) is trying to achieve.<sup>439</sup> Some argue that the only way in which the core reasonableness of the state's action can be determined is with reference to the content of the right. The court in the *TAC* case should not have attempted to, in one case, give a final and exhaustive definition of what is included therein, but it could have at least attempted some further clarification and specification of the obligations imposed by the right.<sup>440</sup> The first step should have been to attempt to understand the content of the right, and only then should the court have engaged in an enquiry to determine whether the measures adopted by the government were reasonable methods of progressively realising the right. Another reason why this first step in the enquiry is necessary is that reasonableness alone cannot provide the content necessary to adjudicate cases based on socio-economic rights.

- “Reasonableness” is an illusive concept used by the Constitutional Court to attempt to restrict the socio-economic rights. For example, in the *TAC* case the court stated that the following criteria are necessary for reasonableness: (a) it requires a consideration of the urgency of the need; (b) it requires balance and flexibility and must take account of short-, medium- and long-term needs; (c) it must not exclude a significant sector of society; and (d) it must take account of those who cannot pay for the services. In the *Grootboom* case, the reasonableness of the measures was determined with reference to (a) the problem in the context of the social, economic and historical background; (b) the capacity of the institutions responsible for implementing the programme; (c) the balance and flexibility of the programme; (d) appropriate provision for the particular crises as well as long-, medium- and short-term needs; (e) the

<sup>438</sup> See *Soobramoney* (supra note 371) at par 34-8.

<sup>439</sup> Bilchitz op cit note 392 at 7.

<sup>440</sup> Idem at 8. The normative content of the right to health care has been analysed by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) (General Comment 14, available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)) and by a number of writers, for example Bilchitz at 8.

inclusivity of the programme, especially as far as the indigent are concerned; and (f) a review of the programme on an ongoing basis.

Although these are desirable features of any policy, it is questionable if these features can be derived from the concept of reasonableness itself. For example, it seems that the requirement of urgency is more likely to arise from a consideration of the right itself and the obligation it entails rather than from the notion of reasonableness. In *Soobramoney*, reasonableness was interpreted not to entail flexibility, but rather to mean that available resources must be used in the best possible manner.<sup>441</sup>

It seems that reasonableness stands in for whatever the court regards as the desirable features of state policy. This approach lacks a principled basis for taking decisions in socio-economic rights cases.<sup>442</sup>

- Although these judgments can be criticised as far as their approach is concerned, they do have one important feature in common and that is that they confirm the justiciability of all socio-economic rights. They also confirm that a lack of resources will not always serve as an excuse for not extending the protective scope of social security rights to the poor, the vulnerable and the marginalised. It is precisely the poor, the vulnerable and the marginalised who heavily rely on informal social security for their social security support. It is clear from the above that social security as a right will therefore be enforceable.

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<sup>441</sup> *Idem* at 10.

<sup>442</sup> *Ibid.*

## 5 CONCLUSION

This chapter examined the present regulatory framework pertaining to formal social security and the constitutional obligation to accord everyone a right of access to social security. It is in the light of this constitutional obligation that the present formal social security system has been outlined, along with the main shortcomings in the system, as far as such shortcomings are relevant to the existence of informal social security. This discussion is relevant to informal social security for the following reasons:

- The present social security system does not provide comprehensive social security coverage. The shortcomings in the system illustrate that the current system might not pass constitutional scrutiny, since it does not provide everyone in the country with a right of access to social security.
- One of the biggest concerns relates to the system's exclusionary nature, as a result of which a number of people were in the past excluded from accessing sufficient social security protection, and are today still excluded. Although the system has been transformed and amended since Apartheid, the changes have been piecemeal and, to date, have still not been translated into a comprehensive social security system. It is this exclusionary nature of the formal social security system that has given rise to the development and existence of informal social security in order that at least some form of a social safety net may be provided.
- The Constitutional Court has, in a number of judgments, attempted to build a culture of enforceability of socio-economic rights. The courts have, however, not yet given meaning to the core content of most of the rights, but have gradually developed a strong reliance on "reasonableness". The concept of "reasonable" was used to compel the government in many instances to devise more inclusive policies. However, it is debatable whether the present social security system will pass the test of reasonableness.

- Informal social security developed in order to fulfil an extremely important role in the social safety net. If talks about reform of the present social security system are continued, the informal social security system should also be recognised, either to support the system or replace it. Whatever the options, the system cannot be ignored.
- Only some of the shortcomings in the present social security system have been highlighted above. It is clear that the system suffers from many deficiencies. It is indeed one of the aims of this thesis to determine how informal social security can be applied to support the formal system in extending its protective scope of coverage.

In this thesis, the focus will now shift to an examination of the concept of informal social security.

From the judgments discussed above it is clear that the court continues to return to the importance of interlinking all fundamental human rights. Denial of access to a certain human right will also impact on a person's right to human dignity. This is also true as regards the right of access to social security. A person cannot live a dignified life if his/her right of access to social security is denied. Informal social security at least provides some measure of human dignity and should be commended (and supported) for fulfilling this constitutional responsibility. If the formal and informal social safety nets are strengthened together, more people can be provided with social protection and more people can live dignified lives.



## CHAPTER 4: THE CONCEPT OF INFORMAL SOCIAL SECURITY

When survival is at stake, especially for workers who do not have a clear employer-employee relationship, organization needs to be based around other more immediate needs such as access to credit and access to training, notably through the creation of self-help groups or cooperatives.<sup>443</sup>

### 1 EXECUTIVE SUMMARY

This chapter will attempt to clarify the concept of informal social security. In the analysis of informal social security, clarification of the concept is extremely important for the following reasons:

- Informal social security is a specific strand of social security that has only recently been recognised as part of our present social security dispensation. The exact scope and meaning of informal social security should therefore be clarified before the synergy between formal and informal social security can be considered.
- This conceptual analysis will clarify the boundaries of informal social security. By providing a definition and examples, the concept can be better described. Informal social security is described below and should be compared with formal social security, as described in chapter 3 above. In this comparison, it should be remembered that these two systems are not mirror-images. They do share similarities, for example as far as social insurance is concerned. Where formal social security is well regulated, informal social security is not. In this sense they are mirror-images of each other. However, as pointed out below,<sup>444</sup> regulation as such is not the main difference between these two systems. They both form integral parts of social organisation and

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<sup>443</sup> Dasgupta S “Organising for Socio-Economic Security in India” ILO InFocus Programme on Socio-Economic Security (October 2002) accessed at <http://www.ilo.org/ses> on 7 Jan 2004 at 32. (Hereafter Dasgupta).

<sup>444</sup> See par 3.2, ch 4.

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differ and complement each other on various levels. This conceptual analysis is therefore primarily aimed at highlighting the foundations of informal social security (and related issues) against the background of formal social security<sup>445</sup> with which it still co-exists as a separate system.

- Owing to the formal employment bias in the present system, the informal sector is largely excluded from formal social security and must rely on informal social security measures to gain social protection. It is within this sector that the importance of informal social security can be seen. In this arena, kinship-based support has been transformed into community-based support and, in some instances, has even developed into large-scale social protection schemes.<sup>446</sup>
- Informal social security can be divided into two main categories which are “evolutionarily joined together”.<sup>447</sup> These two forms are kinship-based social security and neighbourhood-based social security. The former relates to social protection provided to blood relatives and the latter refers to mutual aid schemes that have developed among people within a specific community. Both forms of informal social security rely on a strong foundation of reciprocity and solidarity.<sup>448</sup>
- From the two types of informal social security referred to, it can be seen that informal social security plays an important role as a social security measure within the extended family and in the informal sector. In both environments, social security has a very specific gender bias. Women are the main role players in the informal social security arena and are also the main beneficiaries. Ironically, it is these women (especially Black women) who make up the majority of those who are excluded from formal social security protection. The fact that the exclusionary nature of the formal social security

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<sup>445</sup> See ch 3 in general.

<sup>446</sup> See par 5, ch 4.

<sup>447</sup> Zwanecki op cit note 132 at 18.

<sup>448</sup> See pars 3 & 5, ch 4.

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system disproportionately affects more women than men, and, in particular, Black women, amounts to indirect discrimination. This is one of the reasons for the need to reform the system.<sup>449</sup>

- Inherent to the concept of informal social security is the debate regarding terminology. There seem to be two issues regarding the use of the term “informal” social security. First, the term is inadequate to encapsulate the multi-layered qualities of the concept.<sup>450</sup> Secondly, the term “informal” has an inherent bias towards informal social security schemes and their users.<sup>451</sup> Despite the term’s inappropriateness, an appropriate, uniform term that can truly reflect the dynamics of the phenomenon is lacking.<sup>452</sup>
- Social security should assume its rightful place within the social security paradigm. An analysis of what informal social security entails can assist in this process, for example from a discussion of the concept it can be determined that the present definition of social security should be extended to make provision for informal social security.<sup>453</sup> It is proposed that the definition of social security be broadened to allow for: (a) the involvement of the state as well as non-state actors; (b) recipients of social security to comprise individuals as well as societies, communities and households; and (c) the risks in respect of which social security protection is described to be defined in a non-restrictive manner instead of being part of a closed list.<sup>454</sup>

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<sup>449</sup> See par 3.3, ch 3.

<sup>450</sup> Von Benda-Beckmann F, Von Benda-Beckmann K, Casino E, Hirtz F, Woodman GR & Zacher HF (eds) *Between Kinship and the State: Social Security and Law in Developing Countries* (1988) at 10. (Hereafter Von Benda-Beckmann *Between Kinship and the State*). Also see the discussion in par 3.2, ch 4.

<sup>451</sup> See par 3, ch 2.

<sup>452</sup> See pars 3.2 & 3.3, ch 4.

<sup>453</sup> See par 4.3, ch 4 & pars 4 & 5.2, ch 8.

<sup>454</sup> See par 3.3.2, ch 3 & par 4.3, ch 4.

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## 2 INTRODUCTION

As is evident from the discussion above, South Africa has, owing to the historical development of the formal social security system, developed a dualistic social security system in which both formal and informal social security provide social protection.<sup>455</sup> The social safety net in South Africa is made up of at least three “strands”, namely formal social security, informal social security and indirect social security.<sup>456</sup> Owing to the historical development of the present social security system, formal and informal social security are seen as two separate and parallel systems.<sup>457</sup> The possibilities for cooperation and synergy between informal and formal (and indirect) social security should be explored further.<sup>458</sup>

This chapter will focus on the conceptual analysis of informal social security. Indirect social security (as the third strand of social security) will be referred to from time to time, but does not form part of the main discussion topic of this thesis, as the focus of this thesis is on ways of coordinating informal and formal social security in order to better provide social security for a larger part of the population.

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<sup>455</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 560. Also see ch 1 in general.

<sup>456</sup> Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 24. Mpedi LG “Indirect Social Security” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 535. The core, indirect social security rights, which are those rights protected in terms of the Constitution, are: the right to a healthy environment (s 24), the right to have access to land (s 25), the right to have access to housing and shelter (s 26), the right to have access to food and nutrition (s 27(1)(b)), the right to have access to water (s 27(1)(b)), and the right to have access to education (s 29). Other “indirect social security rights” that are not entrenched in the Constitution are access to basic energy, to communication and to transport. The Constitution affords everyone the right to inherent dignity and the right to have their dignity respected and protected (ss 7 & 10). Indirect social security aims to realise this basic right to dignity. In order for the social security system to give comprehensive protection, indirect social security should be recognised as an important part of the comprehensive social security network. Informal and indirect social security should, however, be distinguished from each other as separate concepts. Where informal social security lacks formal government involvement, indirect social security in South Africa is mostly provided by government and government agents, for example water is provided by the Department of Water and Forestry, housing is provided by the Department of Housing, etcetera. Indirect social security is a specialised field of study and, although it plays an important role in providing social security protection for the poor, it does not form part, conceptually, of informal social security. It will therefore not be further discussed for purposes of this thesis.

<sup>457</sup> Taylor Report op cit note 39 at 50.

<sup>458</sup> See ch 8 in general.

Informal social security is part and parcel of social security, and plays a very important role as a social protection instrument. The phenomenon of informal social security is not exclusive to developing countries. It is also more frequently found in developed or “first world” countries, although the form it takes may be different from the experience in developing countries.<sup>459</sup>

The importance of informal social security cannot be ignored if estimates are correct that, in Africa, almost 90 percent of the population remains outside the protective scope of the formal social security protection net.<sup>460</sup> Recent studies<sup>461</sup> estimate that nearly half (45 percent) of South Africa’s population is considered to be poor and to be living below the poverty line. Almost half of the poor could be classified as people who live in absolute poverty.<sup>462</sup> It is estimated that the extension and reform of the present formal social insurance system could reach roughly another 5 to 10 percent of the working population.<sup>463</sup>

<sup>459</sup> See par 5.2.2.1, ch 5, where the example of long-term care for the elderly in Germany is discussed. In developed countries, the form it takes embraces mainly social security for informal-sector workers. Informal social security can be re-thought in the European context where systems come under increasing pressure as a result of sustainability and globalisation. Olivier MP, Mpedi LG & Dekker AH “Accommodating Informal Social Security within Social Security Systems: Observations from a Southern African Perspective” Paper presented at the 2002 Conference on Social Values, Social Policies: Normative Foundations of Changing Social Policies in European Countries (Tilburg 29-31 August 2002) at 2. (Hereafter Olivier, Mpedi & Dekker).

<sup>460</sup> Van Ginneken W *Social Security for the Informal Sector: Issues, Options and Tasks Ahead* (Working Paper ILO) at 2. Accessed at <http://www.ilo.org/public/english/protection/sosec/pol/index.htm> on 6 Aug 2001. (Hereafter Van Ginneken *Social Security for the Informal Sector*).

<sup>461</sup> May J, Woolard I & Klasen S “The Nature and Measurement of Poverty and Inequality” in May, J (ed) *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) at 5. Taylor Report op cit note 39 at 16.

<sup>462</sup> Van der Waal & Malan op cit note 26 at 8-9. The majority of the poor, that is, almost 70 percent, live in rural areas and African people constitute the majority of the poor in the country, although poverty is not confined to any particular race group. It is mainly the poor who are largely excluded in terms of classic/government-based/formal social security, since access to these social security mechanisms is often linked to the concept of formal employment and the poor are usually not part of the formal workforce.

<sup>463</sup> Olivier et al *Social Security Law – General Principles* op cit note 226 at 31. Informal social security schemes have been shown to have a great impact on the wealth of communities whose members trust one another and come together to form associations of various kinds. In a study undertaken in Tanzania in 1995 (conducted by the Government of Tanzania, the University of Dar es Salaam and the World Bank in collaboration with the British Overseas Development Administration in more than 87 villages across Tanzania), it was found that social capital (which can include informal social security arrangements) plays a very important role as a determinant of household welfare, alongside factors such as human capital, physical capital, natural capital and access to markets. The study found strong evidence that a better quality of human relationship (which is known as social capital) creates prosperity. The study also found that these benefits of high-quality human relationships occurred because people could rely on one another’s sense of

Informal social security plays an important role in social protection, but, at the same time, cannot indefinitely sustain those excluded from formal social security protection.<sup>464</sup> Views on the traditional, solidarity-based networks range from romantic scenarios to less optimistic views of the state of informal networks.<sup>465</sup> Informal social security should not be over-idealised. Although it provides social security support, it suffers from increasing strain and can provide only low levels of benefit.<sup>466</sup> It does provide a safety net, albeit a very weak one. Nevertheless, it should not be ignored in discussions on reform of the present formal social security system.<sup>467</sup>

### 3 “TO CALL A SPADE A SPADE”

#### 3.1 General

From the development of social security in Western Europe<sup>468</sup> it is clear that in Western Europe social security has developed – at least partly – from informal to formal, that is, from a non-regulated basis to a regulated basis and from a situation where the extended family or community assumed responsibility for protection against social risks to a situation where government and employers also began to share in the responsibility for providing protection against social risks.<sup>469</sup> South African social security followed more or less the same route, except that informal social security remains a strong force in social security due to the exclusionary nature of the present social security system.

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mutual obligation, honesty, reciprocity, mutual respect and helpfulness. People’s norms and expectations feed into, and become part of, the pattern and stability represented by the informal and formal organisations. Dixon-Fyle op cit note 112 at 8.

<sup>464</sup> See par 5.5, ch 4.

<sup>465</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 22.

<sup>466</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 568.

<sup>467</sup> Olivier, Mpedi & Dekker op cit note 459 at 2. The family can play only a limited role in guaranteeing economic security, since it cannot only be inadequate in guaranteeing security but may also be counter-productive, for example where the enhancement of the security of one’s own family may be at the expense of the security of others and there is thus conflict between families; or where the heads of families may believe (correctly or incorrectly) that the security of the family is best ensured by giving priority to a particular member of the family, for example the eldest children or male children.

<sup>468</sup> See ch 5 in general.

<sup>469</sup> See ch 5 in general. Olivier, Mpedi & Dekker op cit note 459 at 2.

State-regulated social security is often labelled as “formal” social security. This is because state regulation has led to statutory “formalisation” of rules and principles. This resulted in the “residual” forms of social security, from which “formal” social security originated, being referred to as “informal” social security.

These “residual” forms of social security have, however, not disappeared all together. In developing countries where economies are not strong enough to provide adequate social security protection, informal social security (in the form of private provisioning and community and family protection against insecurity) is still an important source of social security protection. In fact, in most developing countries, family support continues to be an important source of social security protection. The family is often the last fall-back option open to individuals marginalised from formal social security protection.<sup>470</sup>

### 3.2 Problematic terminology

The use of the term “informal” social security is problematic. Many of the terms used to describe informal social security systems are inadequate, because they fail to describe the various levels of protection against insecurity at which social security can function.<sup>471</sup>

For example, the use of the term “informal” social security as opposed to “formal” social security implies that traditional systems are haphazard and unregulated. This indirectly demeans indigenous social security systems.<sup>472</sup> “Informal” cannot be interpreted as “not legally regulated”. Informal social security is based on a set of quite well-defined legal

<sup>470</sup> Ibid.

<sup>471</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 10. Various terms exist to describe the term “informal social security”, for example “indigenous social security”, “indigenous systems of support”, “informal forms of social security”, “the voluntary sector”, “voluntary organisations”, “the third sector”, “the private sector”, “the independent sector”, “the philanthropic or non-profit sector”, “*economic sociale*” and “traditional forms of solidarity”. Formal social security is also often described by other names, for example: “modern social security”, “statutory social security”, “state-organised social security”, “social insurance” and “social assistance”.

<sup>472</sup> Midgely J “Social Security Policy in Developing Countries: Integrating State and Traditional Systems” in Von Benda-Beckmann F, Von Benda-Beckmann K & Marks H (eds) *Coping with Insecurity* (1994) at 222. (Hereafter Midgely *Coping with Insecurity*).

obligations and rights.<sup>473</sup> Even the support relationship within the family, which is partly governed by love and trust, implies a legal obligation in the context of informal social security.<sup>474</sup> Informal social security systems are governed by clear rules and obligations, although they might not be in writing or might exist only in traditional law or practice.<sup>475</sup> Also, by referring to “formal” social security, as opposed to “informal” social security, the focus remains on the institutions providing social security, for example state-provided as opposed to non-state-provided social security.<sup>476</sup>

Other problematic terms are: (a) The use of the term “unconventional” as opposed to “conventional” social security. “Unconventional” systems are in fact more conventional for indigenous groups, whereas “conventional” systems have been imported from the outside (through colonialism) and are therefore more foreign than “conventional”. It should be kept in mind that the “labelling” of the social security system depends on the perspective from which it is viewed. If it is viewed from the perspective of accommodating it in the formal system, then the existing system is likely to be labelled as “conventional”, with the opposite system being “unconventional”. (b) It is also inappropriate to refer to “modern social security systems” as compared to “traditional social security”, because “traditional” has a negative and demeaning connotation if compared with “modern”. It also suggests that these systems are of an ancient origin and are deeply ingrained in the culture, which is not necessarily always true. It might be more appropriate to talk about “traditional” and “non-traditional” forms of social security, but even this option has an inherent bias in that it assumes that the Western European model of social security was the first (becoming the traditional) model of social protection to exist. Informal (non-traditional) forms of social security existed long before legislation was introduced to recognise these measures. “Traditional” to some extent refers to the tradition of reciprocity between generations, which is necessary to ensure the continued

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<sup>473</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 11.

<sup>474</sup> *Idem* at 12.

<sup>475</sup> Midgely *Coping with Insecurity* op cit note 472 at 222.

<sup>476</sup> Von Benda-Beckmann F & Von Benda-Beckmann K “Coping with Insecurity” in Von Benda-Beckmann F, Von Benda-Beckmann K & Marks H (eds) *Coping with Insecurity* (1994) at 13. (Hereafter Von Benda-Beckmann *Coping with Insecurity*). The discussion of other problematic terms below is also based on arguments gathered from Von Benda-Beckmann *Coping with Insecurity*. *Ibid.*



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existence of the system. “Traditional” as opposed to “modern” means a system established through tradition as opposed to a newly designed system. These comments seem valid. It is suggested that one refrain from stigmatising “informal social security schemes”. The fact that they have for a long time not been recognised as social security systems does not render them inferior.

Although these criticisms of the use of “informal” in the term “informal social security” have a valid point, whether or not “informal” is demeaning will depend on the interpretation of “informal”. “Informality” does not necessarily refer to a lack of proper governance, but rather to the informality of the administration of these systems, which is not necessarily derogatory. For example, administration may be carried out without unnecessary paperwork, constitutions, minutes of meetings, etcetera. In this thesis, for example, informal social security is seen as the opposite of formal social security. “Formal” in this context refers to legislative regulation and recognition of the system, whereas informality refers to the lack of state involvement in the creation and regulation of the governing principles of these organisations.

Even if the difference between formal and informal is not seen as demeaning, it remains problematic owing to the fact that the focus on the regulating institution does, in a sense, detract from the different layers of social organisation of which social security forms a part. The difference between formal and informal social security entails more than merely the difference between the various regulating institutions.<sup>477</sup>

Social security in essence comprises the effort on the part of individuals, kin groups, villages and state institutions to overcome insecurity.<sup>478</sup> By trying to distinguish between formal and informal social security, the focus can fall on a number of aspects, for example the risks covered (e.g. the International Labour Organisation’s (ILO) risk-based approach<sup>479</sup> as opposed to protection against social insecurity, as suggested by the Taylor

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<sup>477</sup> Midgely *Coping with Insecurity* op cit note 472 at 222. Indigenous social support systems are highly regulated with such regulation originating in traditional or folk law.

<sup>478</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 476 at 11.

<sup>479</sup> ILO *Introduction to Social Security* op cit note 233 at 3.

Committee<sup>480</sup>), or it can fall on the services provided, or on delivery agents or on regulating institutions.<sup>481</sup> All these different focus points can make up the various layers or dimensions of social security.

Social security arrangements can have different dimensions which encompass more than the regulatory institution. Formality or informality can therefore exist with regard to a number of aspects, but most notably (and these aspects will form the focus of this thesis) with regard to:

- service delivery,
- regulation of the system, and/or
- collection and redistribution of benefits (this includes the source and payment of benefits).<sup>482</sup>

Attempting to express all these various aspects in a single, “one-dimensional dichotomy” (such as “formal” or “informal” social security) obscures, rather than clarifies, the distinction.<sup>483</sup> In some systems, these three aspects may all be regulated, or may be only partly regulated or may not be regulated at all.<sup>484</sup>

### 3.3 Approach in this thesis

Having examined the deficiencies in the present terminology, the nomenclature debate has still not been decisively won. It is in fact almost impossible to find a term to aptly

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<sup>480</sup> Taylor Report op cit note 39 at 41.

<sup>481</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 11.

<sup>482</sup> Von Benda-Beckmann K during interview on 6 April 2004, Halle (Germany) at the Max Planck Institute for Social Anthropology.

<sup>483</sup> Von Benda-Beckmann *Coping with Insecurity* op cit note 476 at 13.

<sup>484</sup> Regulation and formalisation should also be distinguished from each other. Formalisation in the sense of the writing up of details might be lacking in a number of traditional systems, whereas regulation exists in most informal systems without having to formally write up the rules. Regulation can manifest itself in the form of tradition, customary law or practice. In the classification of the system based on the regulatory framework, the multi-layered characteristics are often ignored.

encompass all the different functions and layers of social security. The current approach should therefore rather be to find a term and to clearly define what is meant by the term.

For want of a better term, “informal social security” is chosen to describe the concept as set out above. It should be noted that, in using this term, its deficiencies are nevertheless acknowledged. For the following reasons, it is however still considered appropriate, despite its shortcomings:

- It is the most well-known term in South Africa used to describe this phenomenon. Informal social security is a relatively new field of study in the country and it is important to build on the little available South African research in this regard. In most previous South African publications on this topic, the term “informal social security” has been used.<sup>485</sup> “Formal” and “informal” social security were also the terms used by the Taylor Committee to describe the two systems of social security under the present dispensation.<sup>486</sup>
- This study focuses on the possible cooperation and linkages between the two systems, namely formal and informal social security. The use of the term “informal” (as opposed to “formal”) better illustrates the distinction between the two systems.
- “Formal social security” will be used to describe the present, formal, state-regulated social security paradigm in the country. What is understood by the

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<sup>485</sup> Informal social security was indirectly acknowledged in the Welfare White Paper op cit note 186. Although the term “informal” was not used, reference was made to the importance of family, kinship and voluntary social security mechanisms. The Taylor Report does contain references to the importance of informal social security. The term was used for the first time in a publication by Olivier MP, Kalula E, Van Steenberge J, Jorens Y & Van Eeckhoutte W *The Extension of Social Security Protection in South Africa – A Legal Inquiry* (2001) in chapter 10 (Dekker AH “Social Security for Those Who Work Informally, and Informal (Community-and Family-Based) Solutions to Social Protection” 247). This was followed by the comprehensive publication by Olivier MP, Smit N & Kalula ER *Social Security: A Legal Analysis* (2003) in chapter 19 (Dekker AH & Olivier MP “Informal Social Security”).

<sup>486</sup> Taylor Report, Executive Summary (iv).

concept of “informal” social security will be discussed in more detail below.<sup>487</sup>

## 4 DEFINING INFORMAL SOCIAL SECURITY

### 4.1 General

Informal social security should not be seen as a concept separate from (formal) social security. It is only theoretically possible to isolate informal social security (which is such an important part of social organisation) from broader concepts such as social security.<sup>488</sup> It is for this reason that it is important to consider a possible extension of the definition of social security to include informal social security, rather than trying to separate these two concepts. Inclusion of informal social security in the definition of social security will also facilitate better recognition of the concept of informal social security. By adopting this approach, one is confronted with the “infiniteness” of the scope of the phenomenon of social security, which should be viewed as a strength rather than a weakness.<sup>489</sup>

Social security does not have a uniform definition nationally or internationally.<sup>490</sup> In one of the broad attempts at a definition, the ILO defined social security as:

the protection which society provides for its members, through a series of public measures, against economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death, the provision of medical care, and the provision of subsidies for families with children.<sup>491</sup>

<sup>487</sup> See par 5, ch 4. The present formal social security system is discussed in detail in ch 3.

<sup>488</sup> Von Benda-Beckmann *Coping with Insecurity* op cit note 476 at 14.

<sup>489</sup> Ibid. “*The concept of Social Security has been further widened, so as to include provisions for housing, safe drinking water, sanitation, health, educational and cultural facilities as also a minimum wage which can guarantee workers a decent life... . It is now believed that social security can act as a catalyst for social transformation and progress.*” Singh P *Social Security Systems in Developing Countries: Asia, Africa and South America* (1997) at 2. (Hereafter Singh).

<sup>490</sup> Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 24. Also see par 4, ch 4.

<sup>491</sup> ILO *Introduction to Social Security* op cit note 233 at 3.

Most definitions of social security maintain the distinct difference between social assistance and social insurance, as well as the “risk-based approach” in terms of which social security is defined with reference to a contingency list.<sup>492</sup> Definitions differ from narrow to more general. It is especially those definitions which seek to describe the general features and principles of social security that are more useful, but also more difficult to formulate.<sup>493</sup>

In seeking a workable definition for South Africa, social security should not be defined too narrowly.<sup>494</sup> In South Africa as a developing country, the definitions should make provision for the possible inclusion of informal social security. The concept of social security is also subject to evolution and improvement.<sup>495</sup>

The present conceptual foundations of social security are inappropriate to South Africa's socio-economic conditions, since these conceptual foundations are defined too narrowly and the social risks insured against are based primarily on the social, economic and ecological conditions of Western Europe.<sup>496</sup>

#### **4.2 Defining informal social security within the context of social security<sup>497</sup>**

In order to grasp comprehensively the concept of informal social security, it is imperative to define informal social security within the broader concept of social security, since it forms part of the social safety net, alongside formal and indirect social security. Rather than defining informal social security as a separate strand of social security, it is

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<sup>492</sup> Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 25. Some definitions focus on the aims of social security in general, for example poverty alleviation (Welfare White Paper op cit note 186 at ch 7, par 1) or creating solidarity for people with a lack of earnings. Pieters D *Introduction into the Basic Principles of Social Security* (1993) at 2. (Hereafter Pieters).

<sup>493</sup> Midgely J *Social Security, Inequality and the Third World* (1984) at 81. (Hereafter Midgely *Social Security, Inequality and the Third World*).

<sup>494</sup> Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 25.

<sup>495</sup> Olivier labels it as evolutionary development. Idem at 47.

<sup>496</sup> The basic matrix was that work provides income and that income meets the needs. ILO *Introduction to Social Security* op cit note 233 at 3-19. Shortcomings in the present formal social security system are discussed in par 3.3, ch 3.

<sup>497</sup> The ideas for this part of the thesis (par 4.2, ch 4) are based on a chapter co-written by Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 559-593.

recommended that the definition of social security be broadened to provide for all three strands, namely formal, informal and indirect social security. Presently, social security is mainly defined with regard to risks covered and within the framework of formal employment.

#### 4.2.1 *Social security defined in terms of risks covered*

It is generally agreed that the traditional ILO definition of social security, referring to nine areas of social insurance,<sup>498</sup> is too restrictive to cover informal social security as well. In ILO Convention 102 of 1952,<sup>499</sup> social security is defined in terms of protection by society, through public measures, against certain risks. Nine risks are identified as typical risks that can cause economic and social distress.<sup>500</sup> On closer examination, the ILO definition, especially the *numerus clausus* of risks listed therein, is not adequate for South Africa as a developing country. For example, communities in developing countries often face risks that are not dealt with in most social security definitions.<sup>501</sup> Or, for example, the idea underlying the classification by the ILO and other international organisations of unemployment as a risk is that the loss of income poses a risk to the wellbeing of people. The majority of the South African unemployed have never been employed; therefore, long-term unemployment is not a risk, but merely a way of life.<sup>502</sup>

This illustrates that, despite certain similarities, there is a clear distinction between the types of social risks that are present in developed and developing countries. A social security paradigm with a concept of social security that does not take cognisance of these

<sup>498</sup> *ILO Social Security (Minimum Standards) Convention* 102 of 1952.

<sup>499</sup> *Ibid.* Also see *ILO Introduction to Social Security* op cit note 233 at 3.

<sup>500</sup> Pieters op cit note 492 at 4. It is interesting to note that the ILO and ISSA definition of social security places more emphasis on social insurance than on social assistance. It is suggested that the role of social assistance as an income-maintenance provision cannot be ignored in a comprehensive definition of social security. See pars 4 & 5.3, ch 8. Midgely *Social Security, Inequality and the Third World* op cit note 493 at 83.

<sup>501</sup> Kasente op cit note 22 at 27. These risks and calamities can be grouped into four categories, namely calamities (flood, fire, civil unrest and famine), loss of earning power (disability, ill health, loss of assets), life-cycle crises (death and marital breakdown), and sudden and large expenditures (hospital, wedding). Van Ginneken W *Promoting Productivity and Social Protection in the Urban Informal Sector* (1996) at 4. (Hereafter Van Ginneken *Promoting Productivity*).

<sup>502</sup> Taylor Report op cit note 39 at 17, 19-21.

needs and risks will not form a solid foundation to build on for the protection of the social security needs of all the people in South Africa.<sup>503</sup>

#### **4.2.2 Social security defined within the formal employment framework**

The particular setting of social security in the formal employment framework of the ILO was based on the assumption that all workers would sooner or later end up in secure, formal-sector employment. The experience in developing countries (and, more recently, in developed countries) has been quite the opposite.<sup>504</sup>

When the informal sector first came under scrutiny, it was considered in developing circles to be a transitory form of employment whose significance would decrease as formal-sector employment grew and absorbed the marginal working population. The formal sector was seen as the solution to low productivity and poor working conditions. It seems that the original premises of the 1950s still remain, namely that there is an unlimited supply of labour in most developing countries and that the large pool of surplus labour will be absorbed by the mainstream economy.<sup>505</sup> However, informal activities have increased since the 1970s and are far from being absorbed into the formal sector.<sup>506</sup>

<sup>503</sup> In addressing certain contingencies and risks as part of the definition of formal social security, the dualistic character of risk should be included. Risk has two sides, namely the “*cost of unexpected losses as well as the cost of uncertainty itself, even if there are no losses*”. There are also various forms of risk, namely low-frequency risks versus high-frequency risks, idiosyncratic risks versus covariate risks, single versus repeated shocks, as well as immediate versus future risks. The type of risk and damage faced by people in developing countries differ however from the traditional risks associated with social insecurity. Poverty in itself is an immediate risk, but also a future risk in that a poor family will not be able to absorb any future shock to the household. “Mutual Insurance Schemes and Social Protection” ILO accessed at <http://www.ilo.org/public/english/protection/sossec/step/download/szjjins.doc> at 3. (Hereafter “Mutual Insurance Schemes”).

<sup>504</sup> Van Ginneken *Social Security for the Excluded Majority* op cit note 28 at 3. Also see par 5.3.2, ch 4.

<sup>505</sup> Lund op cit note 47 at 1.

<sup>506</sup> Beneria L “Changing Employment Patterns and the Informalisation of Jobs: General Trends and Gender Dimensions” (ILO 9 August 2001) at 6. Accessed at <http://www.ilo.org/ses> on 19 Jan 2004. In countries that have experienced little or no economic growth (as in most sub-Saharan African countries), the phenomenon of “jobless-growth” has emerged. This originates where not enough jobs have been created for all those seeking work, resulting in many frustrated job seekers finding employment or creating their own work in the informal sector. It is undeniable that average incomes in the informal economy are lower than in the formal economy and, as a result, a higher percentage of people working in the informal economy are poor. This link between working in the informal economy and poverty is also stronger for women than for men. Worldwide, a higher percentage of women than men work in the informal economy. What is also significant is that, even in the informal economy, there is a wage gap between the two genders.

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In fact, these trends and the increase in the informal sector have led to a growing reliance by poor people on precarious forms of survival.<sup>507</sup>

Research on the informal sector has demonstrated that a broader concept of social security is necessary in order to understand the realities faced by the majority of the workforce falling under the informal sector.<sup>508</sup>

### 4.3 Suggested broadening of definition of social security

The implication of the above analysis is that there is no uniform system that is generally applicable across countries. Rather one can infer that a country's social security system needs to address its own particular set of risks and challenges in a manner that best reflects its societal values and resource base.<sup>509</sup>

The following definition of Kaseke defines social security in broad terms in order to allow for the recognition and inclusion of informal social security in the realm of social security:

Social security can be seen to comprise of a complex and interrelated set of systems (e.g. governmental, non-governmental, semi-formal, traditional etc.) which operate and are mobilised to provide in varying degrees for the social security needs of people in various contingencies.<sup>510</sup>

Van Ginneken defines social security broadly enough to include informal social security:

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This is mainly because women are, worldwide, under-represented in higher-income employment statuses in the informal economy (employer and self-employed) and over-represented in the lower income statuses (casual wage worker and industrial outworker). For example, male traders tend to have large-scale operations dealing in non-perishable items, while female traders tend to have smaller-scale operations and deal in food items. Carr M & Chen MA "Globalisation and the Informal Economy: How Global Trade and Investment Impact on the Working Poor" Working Paper on the Informal Economy (ILO Employment Sector 2002/1) at 2-3. (Hereafter Carr & Chen).

<sup>507</sup> Beneria *ibid.* Available evidence suggests that, during periods of economic adjustment, the informal economy tends to expand. This is mainly due to the fact that retrenched workers move into the informal economy, or because households need to supplement formal-sector incomes. Carr & Chen *idem* at 2.

<sup>508</sup> Van Ginneken *Social Security for the Excluded and Majority* op cit note 28 at 5.

<sup>509</sup> Taylor Report op cit note 39 at 37.

<sup>510</sup> Kaseke E "The Challenges of Extending Social Security to the Poor: An African Perspective" Paper presented at the International Council on Social Welfare Biennial Conference (Cape Town 23-27 October 2000) at 10. (Hereafter Kaseke "The Challenges of Extending Social Security to the Poor").



(a) the provision of benefits to households and individuals, (b) through public or collective arrangements, (c) to protect against low or declining living standards, (d) arising from a number of basic risks and needs.<sup>511</sup>

Another definition of social security that attempts to include informal social security is the one of Getübig, who defines social security (especially in developing countries) as:

any kind of collective measures or activities designed to ensure that members of society meet their basic needs (such as adequate nutrition, shelter, health care and clean water supply), as well as being protected from contingencies (such as illness, disability, death, unemployment and old age) to enable them to maintain a standard of living consistent with social norms.<sup>512</sup>

As stated earlier, social security consists of various layers. A definition can hardly encapsulate this multi-layered concept. The focus should therefore not be on the definition, but on the key components of the definition.<sup>513</sup>

#### 4.3.1 *State involvement and non-state actors*

The source of the benefits should be defined to allow for state as well as non-state role players to act as social security providers.<sup>514</sup> The definition of Getübig lacks a reference to possible state intervention by only mentioning collective measures. Van Ginneken allows for “public measures” of intervention in the sphere of informal social security, which is very important for purposes of sustainability. The concept of “collective measures” as applied in both definitions should be interpreted in line with the definition of Kaseke, which allows for non-governmental, semi-formal and traditional arrangements of informal social security.<sup>515</sup>

<sup>511</sup> Van Ginneken *Social Security for the Excluded Majority* op cit note 28 at 5.

<sup>512</sup> Van Ginneken W *Social Security for the Informal Sector: Investigating the Feasibility of Pilot Projects in Benin, India and El Salvador and Tanzania* ILO Discussion Paper (1997) at 3-5. (Hereafter Van Ginneken *Investigating the Feasibility of Pilot Projects*).

<sup>513</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 572.

<sup>514</sup> *Ibid.* This is in line with the broad approach followed in the matter of *Grootboom* supra note 293.

<sup>515</sup> *Ibid.*

### 4.3.2 Defining risk in a non-restrictive manner

Risks peculiar to rural as well as urban areas are relevant for developed as well as developing countries. It is important to define risks in a non-restrictive manner in order to allow for a number of contingencies that can occur.<sup>516</sup>

All three definitions above include references to needs and risks. This reflects the tension between future and immediate risks. Poverty is a current risk that has materialised, but it also has an element of future risk. It is therefore important that the proposed definition of informal social security should allow for the reference to risks as well as needs.<sup>517</sup>

According to both definitions, the overarching goal of social security should be to maintain a basic standard of living.<sup>518</sup> Getübig goes further and defines it as a standard of living consistent with social norms.<sup>519</sup>

Van Ginneken's definition contains a strong element of prevention. Social protection should prevent risks and needs that might lead to low living levels. This risk management approach should form a part of any definition of informal social security and is also in line with the World Bank's policy on risk management.<sup>520</sup>

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<sup>516</sup> Ibid.

<sup>517</sup> Ibid.

<sup>518</sup> This is also one of the aims which the Taylor Committee proposed government strive towards, namely to ensure that everyone has a minimum, acceptable standard of living. Taylor Report op cit note 39 at 41. Also see Dekker & Olivier *ibid*.

<sup>519</sup> In the light of the *Grootboom* judgment (*supra* note 293), the ideal in the South African context should be to maintain a standard of living with human dignity. See par 4.2.2, ch 3, for a discussion of the *Grootboom* judgment.

<sup>520</sup> See par 4.3, ch 4. This is also in line with international social security trends in terms whereof the focus of social security should be on the causes of social insecurity rather than on dealing with the effects. Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 32. Also see Berghman J "Basic Concepts of Social Security" in Bruylant T *Social Security in Europe* (1991) at 18. (Hereafter Berghman). It is also more generally accepted that any definition of social security should include references to prevention and reintegration. Social security should not merely address consequences, but should also aim to address causes. It is also important to maintain the work ethic. People should primarily be given the opportunity to earn primary income. When social security steps in, in the case of a person who becomes unemployed, it should provide benefits, but should also aim to reintegrate the person into the job market. Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 25, 32 & 40-41. Olivier also suggests the broadening of the conceptual approach through the identification of overall aims. This implies that social security is not just described with reference to its risk-based approach, for

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In fact, it is generally accepted in social security thinking that social security is not only curative but also remedial and preventative in nature.<sup>521</sup> This requires that the focus should also be on causes of social insecurity rather than on remedying of effects. This focus should form an integral part of social policy.<sup>522</sup>

### ***4.3.3 Recipients of social security***

Both the definitions of Getübig and Van Ginneken move away from merely addressing individual needs and also refer to societies, communities and households, which play a very important role in traditional support mechanisms in informal social security networks.<sup>523</sup>

### ***4.3.4 Suggested definition***

It is important for any definition which attempts to encapsulate the totality of social security to include a reference to informal social security. In the context and framework of formal social security, informal social security, as part of a multi-layered concept, is clearly illustrated.<sup>524</sup>

The following is suggested as a definition (building on the above three definitions) of social security:

Social security comprises (a) the provision of benefits (in money / kind / services / support) to members of society, households and individuals (b) through public or collective (including non-governmental, semi-formal, community and traditional) arrangements (c) to maintain a present living standard of human dignity by meeting basic needs (d) and to protect against low or declining living standards (e) arising from a number of basic risks, contingencies and needs.

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example providing comprehensive social security or avoiding social exclusion protection, as was suggested by the Taylor Committee in the Taylor Report op cit note 39 at 17.

<sup>521</sup> Berghman op cit note 520 at 18-20. Pieters op cit note 492 at 2-4. Also see Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 32-35.

<sup>522</sup> Olivier *ibid*.

<sup>523</sup> This was also the view taken in the Welfare White Paper op cit note 186 at 10-12.

<sup>524</sup> Zwanecki op cit note 132 at 17.

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#### 4.3.5 *Social protection*

This term is often used to indicate a broader form of social security. The Taylor Committee chose to move to a concept broader than social security and opted for “comprehensive social protection”, as opposed to “social security”, as the narrower concept.

Comprehensive social protection does not follow a (restricted) risk-based approach, but rather aims to provide everyone in the country with an adequate standard of living.<sup>525</sup>

Comprehensive social protection is defined as follows:

Comprehensive social protection for South Africa 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.<sup>526</sup>

Comprehensive social protection can be achieved by means of a number of measures, such as measures to address

- income poverty (minimum income),
- capability poverty (provision of certain basic services),
- asset poverty (income-generating assets), and
- special needs (e.g. disability or child support).

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<sup>525</sup> Taylor Report op cit note 39 at 17.

<sup>526</sup> Idem at 41.

The first three components are seen as core elements of comprehensive social protection (CSP) and should be available to all South African citizens and to certain categories of non-citizens.<sup>527</sup> These components need to be established as universally as possible, services and access should be provided in a non-work-related manner and the availability thereof should not necessarily be subject to an ability to pay. The final component is added for special needs. Social insurance can also be added as an additional component to the package.<sup>528</sup>

Social protection could create added potential for the linking of private, public and community-sector benefits and other interventions. Comprehensive social protection includes developmental strategies and programmes typical of a developing country and increases the opportunities for people doing “informal” work to gain access to social protection.<sup>529</sup>

Although comprehensive social protection is seen as a broader concept, there is no specific reference to informal social security in its definition, although it is clear from the report as a whole that the term “informal social security” is recognised. The fact that the definition of social protection goes beyond the traditional concept of social security allows room to include informal social security in the realm of social protection.<sup>530</sup>

Two definitions are therefore suggested in the thesis, namely a widened definition of social security<sup>531</sup> or a wider concept such as comprehensive social protection.<sup>532</sup> Both these definitions are wide enough to allow for the recognition of informal social security and incorporation into the overall social security paradigm in the country. The concept of comprehensive social protection is favoured in this thesis because it is the suggested definition currently, and most recently, put on the table by the Taylor Committee. It is developed in the context of South Africa and encompasses a broader view to welfare than

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<sup>527</sup> *Idem* at 42.

<sup>528</sup> *Idem* at 43 & 75.

<sup>529</sup> *Idem* at 40.

<sup>530</sup> *Ibid.*

<sup>531</sup> Pars 4.3.1-4.3.4, ch 4.

<sup>532</sup> Par 4.3.5, ch 4.

mere social security. It puts social security in the larger picture of poverty alleviation, which is important. In the suggested model in chapter 8, the relevance of this will be illustrated and the term “comprehensive social protection” will be preferred to “direct future social security policy”.

## 5 WHAT IS INFORMAL SOCIAL SECURITY?

### 5.1 General

It would appear that there is much to be learnt from other experiences where existing traditional and informal (mostly community-based) forms and mechanisms of social security coverage on the basis of risks and/or need are being investigated. Accommodating these forms and measures in or alongside the formal system, and adapting or extending the formal system in order to cover these excluded categories in an appropriate manner, might go a long way to extending protection to them.<sup>533</sup>

Informal social security has only recently been identified as a new strand of the traditional concept of social security.<sup>534</sup> Previously, social security was seen only as the traditional Western European model of social security that had been transplanted into the country.<sup>535</sup>

For purposes of this thesis, two main categories of informal social security can be distinguished, namely kinship-based support and neighbourhood-based support.<sup>536</sup>

<sup>533</sup> Olivier et al *Social Security Law – General Principles* op cit note 226 at 4.

<sup>534</sup> The other two strands of the South African social security system are formal and informal social security. Olivier, Mpedi & Dekker op cit note 459 at 1-2.

<sup>535</sup> Olivier et al *Social Security Law - General Principles* op cit note 226 at 4.

<sup>536</sup> Others have identified other sub-categories. For example, according to Gsänger, informal social security essentially rests on four security pillars, namely (a) individual provisioning based on individual economic activities, for example the self-employed who work as peasants and subsistence farmers, or as casual wage labourers in agriculture, or in informal off-farm jobs; (b) membership of traditional solidarity networks, for example neighbourhood-based and kinship-based support; (c) membership of cooperative or social welfare associations, for example self-help groups, rotating savings and credit clubs (ROSCAs), cultural associations, etcetera; and (d) access to public benefit systems which make targeted transfers and donations, or even social services provided by voluntary organisations, churches, trade unions, etcetera. Gsänger H “Linking Informal and Formal Social Security Systems” *Deutsche Stiftung für Internationale Entwicklung* – accessed at <http://www.dse.de/ef/social/gsaenger.htm> on 6 Aug 2001. While it should be noted that Gsänger’s observations are based on informal social security systems as found in Kenya, it nonetheless follows that these four pillars are observable in informal social security systems as found in southern Africa. The above four pillars as identified by Gsänger can comfortably fit into either of these two

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Informal social security developed from the principle of kinship-based support. It has, however, transcended kinship and has developed into mutuality.<sup>537</sup> This mutuality can also be referred to as neighbourhood-based or community-based social security.<sup>538</sup> The former normally comprises support or monetary transfers provided by and for family members, whereas the latter refers to support and monetary transfers provided by people in the same circumstances, or by communities, normally along the lines of one or other common denominator, for example traders in the same marketplace.<sup>539</sup>

Informal social security can also be described as networks which can be “strong links” or “weak links”.<sup>540</sup> “Strong links” are formed by reciprocity and solidarity binding people from the same clan or tribe, while “weak links” develop when people from different clans, regions and tribes trust one another, pool resources and work towards the common good.<sup>541</sup> These “weak links” are beneficial, since they reduce the pressure on the “strong links” and enrich social exchange. This can also help individuals from marginalised groups to become integrated in the mainstream economy.<sup>542</sup>

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sub-groups. The last category as identified by Gsänger would typically be classified as charity, but, as stated earlier in chapter 4, the definition of social security is wide enough to accommodate charity and general welfare as well.

<sup>537</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 563.

<sup>538</sup> This takes place where informal support is no longer provided along the lines of kinship or family, but along the lines of community- or work-based relations. Informal social security (especially community-based support) is supported by the principle that the only or best way in which workers can exercise power is by means of organisation. Workers in the formal sector organise themselves into trade unions and exercise these powers through collective bargaining. In South African labour legislation, this right and the right to exercise power have been recognised, as is clearly apparent from the importance attached to collective bargaining under the new labour law dispensation. Informal workers can also organise in order to gain a voice. Since informal sector workers and the unemployed are not part of the formal concept of “work” or “employee”, they will not generally have access to trade unions, but will organise through solidarity movements, women’s organisation, NGOs and CBOs. Gallin D *Organising in the Informal Sector* (ILO Labour Education, Nr. 127, 2002/2)(June 2002) at 3. Accessed at <http://www.wiego.org/main/publi1.shtml> on 17 Mar 2005. (Hereafter Gallin). Also see par 5.3, ch 4. Also see Dekker & Olivier *ibid*.

<sup>539</sup> Dekker & Olivier *ibid*.

<sup>540</sup> Dixon-Fyle op cit note 112 at 9.

<sup>541</sup> *Ibid*.

<sup>542</sup> *Ibid*. For women in particular, these networks play a very important role. With the breakdown of the family and with increasing strain and distance in the relationship between the sexes, many women in Africa are finding themselves on their own, or without adequate support, while doing care work as well as finding income to support themselves and those they care for.

## 5.2 Mutual characteristics

It is problematic and impossible to attempt a clear distinction between the two forms of informal social security, since they often co-exist and overlap, in addition to co-existing and overlapping with other formal forms of social security. The term “informal social security” will therefore be used as the umbrella term, encompassing both forms of informal social security.

Informal social security developed as those marginalised in terms of the formal social security system created other mechanisms to provide protection against certain risks threatening their existence and security.<sup>543</sup> The first line of defence against basic risks and contingencies for these marginalised groups appears to be the extended family. With the dawn of urbanisation and industrialisation, the family structure eroded as more and more members migrated to urban areas.<sup>544</sup> This, in turn, led to the emergence of new forms of informal support, such as urban reciprocal networks and market associations.<sup>545</sup>

One of the important characteristics of informal social security is the fact that it is characterised by a support network based on a strong sense of solidarity and on the premise of reciprocity<sup>546</sup> and *ubuntu*.<sup>547</sup> Informal social protection schemes are based on the existence of an association built on trust, and on an administration that is capable of collecting contributions and paying out benefits.<sup>548</sup>

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<sup>543</sup> Singh op cit note 489 at 3. Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 10.

<sup>544</sup> Kaseke “Informal Social Security in Eastern and Southern Africa” op cit note 11 at 1-5.

<sup>545</sup> Ibid.

<sup>546</sup> Idem at 1.

<sup>547</sup> *Ubuntu* means that people are people through other people. Olivier et al *Social Security - General Principles* op cit note 226 at 14.

<sup>548</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 575. Apart from the fact that existing structures and specific needs are covered in these schemes, they also contain elements of self-reliance, participation and self-management. Overheads are minimal and monitoring is close. Membership of these associations could be determined along gender, occupational, sector, regional or religious lines. One of the biggest advantages of informal social security schemes is that they address both immediate and future needs. Also, they provide timeous payments that make it possible for beneficiaries to, in turn, meet their needs timeously. In this way, an effective contribution to poverty reduction is made.



Informal social security has a very specific gender dimension in that it fulfils an extremely important social protection role for especially women who are excluded in terms of the formal social security system.<sup>549</sup> Experience has shown that women are extremely good at organising themselves in order to gain a “voice”.<sup>550</sup> When women in vulnerable circumstances come together as a group, they can combat the forces leading to their marginalisation as a group.<sup>551</sup>

<sup>549</sup> Dasgupta op cit note 443 at 10. Women form the majority of those who are left out of formal social protection. This is mainly due to the fact that women perform those forms of work that are unregulated and unregistered, forms that are mostly found in the informal sector and in the care economy. Many studies reveal the stories of women’s lives in these circumstances, lives in which crisis after crisis is encountered. The women have undergone some typical cyclical patterns in their lives – crisis, coping with it, managing to break even, till another crisis strikes. Their very existence is threatened by insecurity. Also see Olivier MP “Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed” *Industrial Law Journal (ILJ)* Vol 19, No 4 (1998) at 671-672. (Hereafter Olivier “The Predicament of the Atypically Employed”).

<sup>550</sup> Dasgupta idem at 15-16. Women form the backbone of the family, providing support. Grandmothers often remain the primary caregivers and heads of the households in multi-generational families. Women try to combine income-generating work with care work by working from home while looking after the children. Care work is one of the main reasons why women’s income-earning possibilities are restricted.

<sup>551</sup> Idem at 1, 2 & 33. Organisation can take the form of membership of a union or membership of community-based associations. This form of organisation also has other benefits, for example it gives women a voice, it pools resources (both financially and emotionally) and it can empower workers both politically and economically. Informal workers find it more difficult to organise, mainly due to the fact that the majority of the informal sector is self-employed, and this particular section is often mobile, with irregular working activities and illiteracy, making organisation of this sector a real challenge. It is also due to the fact that the informal sector is synonymous with the unorganised sector. Organisation is necessary for empowerment and it is also necessary to give a voice to the marginalised. It must however be effective organisation that can properly represent members’ needs and bargain over those needs. Owing to the fact that the majority of informal workers are self-employed, traditional trade unions have been less successful in organising the informal sector. Unions functioning mainly in the area of the formal workforce do not place the needs and realities of those in the informal economy on their agendas. Unionisation of informal workers also seems to pose a real problem. This is mainly because of the self-employed status of a large number of the informally employed, resulting in an absence of an employer-employee relationship. This gives rise to questions such as who must be bargained with, and within which framework. The existence of a union with so many different kinds of workers also seems to raise concerns. There is nothing in South African labour legislation prohibiting the registration of a trade union for informal workers. In terms of the Labour Relations Act (supra note 231), any trade union may apply for registration if it has adopted a name, a constitution and an address in the Republic and if it is independent (s 95(1)). A trade union is independent if it is not under the influence and control of an employer or employers’ organisation (s 95(2)). The only prohibition might be s 95(7) of the Labour Relations Act which states that the Registrar must not register a trade union unless he is satisfied that the applicant is a genuine trade union. The Act does not give guidelines on what will be regarded as a “genuine” trade union. As a result thereof, a number of trade unions have been deregistered in the past few years. See *Labournet Holdings (Pty) Ltd v McDermott & Another* (2003) 24 ILJ 185 (LC). Also see Jordaan B “Labour Relations Law” in *Juta’s Annual Labour Law Update* (2003) at 64-65.

Informal and formal social security systems often co-exist. Many families base their means of support and survival strategies on neighbourhood-based, kinship-based and formal social assistance (where a member of the family receives a disability or old-age grant). The impact of social insurance transfers tends to be minimal in view of the unavailability of formal-sector employment.<sup>552</sup> Informal social security schemes in the region function either as independent schemes or as (unofficial) schemes that are subsidiary to the formal ones. In South Africa, for example, the old-age grant (which is the largest social assistance programme) is, in most instances, the only form of income for families, which often comprise three generations.<sup>553</sup> This phenomenon<sup>554</sup> has been highlighted in the Taylor Report in the following terms:

The SOAP [State Old Age Pension] reduces the poverty gap for pensioners by 94 per cent. Poor households that include pensioners are on average significantly less poor than households without pensioners.

“Skip generation” households (comprising child and grandparent), on average, have their poverty gap closed by over 60 per cent. For three-generation households the poverty gap is closed by less than 50 per cent due to the burden of the working age members.

For the average poor household without a pension-eligible member, however, social security’s impact is almost negligible. For households with no pensioners, the reduction is less than 10 per cent.<sup>555</sup>

### 5.2.1 *Introductory example*

The dynamics of informal social security can be illustrated by the story of Manu Wolu, who lived in the village of Sumba in Indonesia.<sup>556</sup>

<sup>552</sup> Olivier, Mpedi & Dekker op cit note 459 at 2.

<sup>553</sup> See Taylor Report op cit note 39 at 59. Samson M et al “Social Security Reform and the Basic Income Grant for South Africa” Economic Policy Research Institute Policy Report 31 (2002) at 7.

<sup>554</sup> Which shows the relationship between, and interdependence of, a formal social security scheme (social assistance scheme) and an informal social security scheme (kinship-based safety net).

<sup>555</sup> Taylor Report op cit note 39 at 59. Income transfers by the old to the rest of the household, irrespective of their poverty-alleviation role, weaken the impact of old-age grants on the intended recipients.

<sup>556</sup> This example is taken from Vel J “Manu Wolu and the Birds’ Nests – The Consequences of a Deviant Way to Cope with Insecurity” in Von Benda-Beckmann *Coping with Insecurity* op cit note 476 at 35-46. (Hereafter Vel).

In poor communities, social security means to be sure of a basic level of subsistence, which includes food, shelter and care in times of illness and old age. In the absence of help from the state, people maintain a large number of social relations in order to create a social safety net in a non-monetary environment.<sup>557</sup> Access to land and human labour in poor communities often depend on relations within the kin group and neighbourhood, and distribution of food and exchange of services and the use of resources and goods are organised along the lines of specific sets of social relations.<sup>558</sup> The Taylor Committee in South Africa found indicators that there are a significant number of people in South Africa who must cope without any form of income.<sup>559</sup> This creates the impression that they should be starving, which is not the case, although they do live below the poverty line. This implies that people have found ways in which to survive in the non-monetary economy.

For poor households, social security is not provided by the state, but by own means and measures.<sup>560</sup> Through a steady network of social relations, a poor family ensures a basic level of subsistence. This involves creating and maintaining as many relations as are required to be sure of support in case one of the many instances of shortage or trouble should occur.<sup>561</sup> Coping with insecurity means, in this respect, dealing with relatives and neighbours, or with anyone who could potentially be an important partner in exchange.<sup>562</sup>

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<sup>557</sup> Vel idem at 35. It was found that, in poor households in Sumba, most of the household's needs and requirements were met without using cash. It is also interesting that the poor people in Sumba make their own distinction between rich and poor. The rich are the buffalo owners, those who sow more than one bag of rice per year and the people with a regular cash income. The poor are those who do not have a horse to ride, or a buffalo to pull, and who depend for their livelihood on dry-land agriculture. This view is also similar to that in South Africa, where the experience and definition of poverty is different from formal definitions based on per capita income. The poor measure poverty in terms of experiences of poverty. See Taylor Report op cit note 39 at 15-16 (par 2.2).

<sup>558</sup> Vel idem at 36.

<sup>559</sup> Taylor Report op cit note 39 at 28 (par 2.7.1) According to Statistics SA, in 1995, 32 percent of African households (a minority of which are pensioner households) were "workerless", meaning they contained no employed people. By 1999, the figure had risen to 38 percent.

<sup>560</sup> Vel op cit note 556 at 35.

<sup>561</sup> Idem at 36. These relations serve the purpose of social security. They do not constitute arrangements to help the needy nor to assure a basic level of subsistence for all members of society. The local community sets the rules for access to social security.

<sup>562</sup> Idem at 35.

The dynamics of this social structure entail that only those with something to offer will be accepted as a partner in exchange. Only those who comply with the rules of proper behaviour and live up to the expectations of what is considered appropriate will be able to maintain these relations and, consequently, be assured of security and assistance in times of crisis.<sup>563</sup>

Manu Wolu made a living by gathering edible birds' nests and sold them to traders in town. This did not comply with the rules of the local community. The gathering of birds' nests was strongly disapproved of in the village where Manu Wolu lived, because it implied contact with evil spirits who resided in the sites where the nests were situated. It was also believed that only people who did not perform their duties within the community gathered these nests and, consequently, they were isolated from the community. Manu Wolu was therefore faced with a dilemma. By selling birds' nests he earned cash, but, as a result, he was excluded by the community and did not have assurances of a basic level of subsistence. Manu Wolu chose a different (controversial) way to cope with insecurity and consequently became excluded from social security arrangements that were common in the village where he stayed.<sup>564</sup> The result was that Manu Wolu did not have relations with complementary partners in a network for the exchange of resources. He did not offer anything that would complement other people's resources.<sup>565</sup>

Although the example of Manu Wolu originates from Indonesia, the same principles regarding informal social security apply to the South African context. Informal social security is therefore a system of providing support in the form of money or services to family and community members to ensure that everyone in the community or family can

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<sup>563</sup> Idem at 36. What the rules are, and their application, is open for negotiation.

<sup>564</sup> Ibid.

<sup>565</sup> Idem at 42-45. Everywhere in the world, cultural constraints limit the range of activities that are considered acceptable as ways of earning money, and the content of these cultural constraints is flexible and is not the same for each group or person. The choice and options for those people on the outer edge of the local economy are often very limited, especially where there is hardly a viable alternative for making a living. Coping with insecurity is the permanent theme of their subsistence and of their way of life. In their view, a controversial way to earn cash can be preferable to access to local social security arrangements.

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maintain an adequate standard of living. The informal social security system is maintained through the reciprocal duty of care and by upholding of social relationships.

### 5.3 Neighbourhood-based social security

Neighbourhood-based social security refers to collective, “informal” social security measures by members of a certain sector.<sup>566</sup> It is also known as informal sector social security or mutual aid schemes,<sup>567</sup> and normally refers to mutual saving schemes or revolving credit associations, for example where street vendors pay a daily fee into a fund, which serves as a form of health insurance when members or their families become ill. These systems originated in urban areas mainly as a result of the proliferation of traditional family structures.<sup>568</sup> One of the advantages of these schemes is that they enable the poor to accumulate assets.<sup>569</sup>

Neighbourhood-based social security has received the most attention in the literature up to now.<sup>570</sup>

#### 5.3.1 Examples of neighbourhood-based social security<sup>571</sup>

The best local example of a neighbourhood-based social security scheme is that of SEWU (Self-Employed Workers Union). This union operates mainly in KwaZulu-Natal, and in the Eastern and Western Cape, and presently has more than 3 000 members. The union facilitates access to training and finances, develops the leadership skills of poor

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<sup>566</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 563.

<sup>567</sup> See discussion in par 5.3.2, ch 4 for a description of the informal sector.

<sup>568</sup> See par 3, ch 2.

<sup>569</sup> Kaseke “Informal Social Security in Eastern and Southern Africa” op cit note 11 at 3.

<sup>570</sup> Neighbourhood-based social security shows signs of social insurance mechanisms, with very little resemblance to social assistance. Kinship-based support mechanisms, on the other hand, show characteristics identical to social assistance, relying more on a reward and support system. Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 563.

<sup>571</sup> These examples are taken from a chapter co-written by the writer hereof and Prof MP Olivier. Idem at 573-577.

women and also enhances the bargaining power of the informal sector by increasing its visibility.<sup>572</sup>

Another common example of neighbourhood-based social security is membership of a burial society. Members of a burial society pay monthly instalments to the society as a form of insurance against funeral expenses in the case of the death of a family member. In the case of the death of a family member, the contributing member will receive an amount of money to cover certain funeral expenses, and/or will receive support in terms of services with regard to arrangements for and during the funeral. Some burial societies even have facilities (e.g. tents, tables and chairs) which the member can use free of charge for the purposes of a funeral or wedding.<sup>573</sup>

Another example of neighbourhood-based social security also frequently found in poorer communities is that of a rotating credit scheme or *stokvel*.<sup>574</sup> A *stokvel* is a revolving credit scheme in terms whereof all members make monthly contributions to a common pool. Every member then gets a chance to receive the monthly pool. This lump sum enables a member to buy capital goods, for example furniture, or to pay school fees.<sup>575</sup>

A regional example of a neighbourhood-based social security scheme is the Mwanayamala Scheme in Tanzania.<sup>576</sup> Almost 1 000 market vendors in Dar es Salaam belong to this cooperative. They pay a daily amount for renting a lot at the market. The contributions are used to fund funeral costs and also to pay out an amount when a member is hospitalised.<sup>577</sup>

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<sup>572</sup> Idem at 574.

<sup>573</sup> Idem at 576.

<sup>574</sup> Sometimes also known as a “oorgooi” or a “gooi-gooi”.

<sup>575</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 576.

<sup>576</sup> Van Ginneken *Social Security for the Informal Sector* op cit note 460 at 6.

<sup>577</sup> Olivier, Mpedi & Dekker op cit note 459 at 1-2. Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 574.

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Another regional example is the UMASIDA health scheme in Tanzania.<sup>578</sup> This scheme covers five informal-sector groups in Dar es Salaam. It provides health care by making available private health care providers who provide health care services for contributors and their families. All members contribute about one US dollar per month, which is put into a bank account managed by the group itself. The system is administered by the members who have, amongst other things, designed a photo identity card, a sick-sheet and a list of the group leaderships to facilitate administration. The doctors have also agreed to prescribe medicines approved by the World Health Organisation. This system is dependent upon the availability of private health care providers as well as an identifiable informal group.<sup>579</sup>

The best success story as far as informal social security is concerned is that of the SEWA (Self Employed Women's Association) Integrated Social Security Scheme in India.<sup>580</sup> SEWA is a registered trade union covering a broad spectrum of workers, such as home-based workers, traders and labourers. The SEWA integrated social security scheme is financed by contributions from members, by a subsidy from the Minister of Labour (through the Life Insurance Corporation of India) and through interest on a grant from the German Technical Development Agency. Administration and management of the scheme are primarily the responsibility of the members. SEWA administers the largest comprehensive contributory social security scheme in India today and presently insures over 32 000 women. Benefits include health insurance, a small maternity benefit, life insurance and asset insurance. Two-thirds of the premium is financed through government and private institutions and a third by members personally. Payment

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<sup>578</sup> Kiwara A & Heijnis F "Health Insurance for Informal Sector Workers - Feasibility Study on Arusha and Mbeya, Tanzania" in Van Ginneken *Investigating the Feasibility of Pilot Projects* op cit note 512 at 71.

<sup>579</sup> This example is taken from Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 574.

<sup>580</sup> Lund op cit note 47 at 17. SEWA functions as a trade union. It follows a holistic approach to improving the conditions of workers, not only through collective bargaining but also by giving them access to a number of amenities they lack. This has a profoundly powerful impact in inducing women to join SEWA. Dasgupta op cit note 443 at 21.

structures exist to accommodate the very poor, for example payment of a once-off life membership fee which accrues interest for the payment of annual premiums.<sup>581</sup>

### 5.3.2 *The informal sector*

The informal sector participates mainly in neighbourhood-based social security schemes. In order to be able to truly understand what is meant by “the informal sector”, it is necessary to take a more in-depth look at this particular part of the economy. Other special categories of the excluded and marginalised also rely on neighbourhood-based social security as an important social protection mechanism, for example the self-employed, the aged, the atypically employed. None of these, however, comprise a specific group like the informal sector. The informal sector also, to a certain extent, can include some of the categories mentioned above. Olivier describes the main categories of atypical workers as: part-time employees working on a permanent basis, hired-out workers (through labour brokers), casual employees, temporary employees, apprentices, fixed-term employees, homeworkers, the self employed, and contract workers.<sup>582</sup> They have in recent years received increasing protection under the Basic Conditions of Employment Act (BCEA)<sup>583</sup> and the Labour Relations Act (LRA).<sup>584</sup> The BCEA is applicable to all employees who work at least 24 hours in a month for an employer. Independent contractors are excluded from the definition of employee.<sup>585</sup> The scope of application of the LRA has also been widened to include most atypical employees. Other social security legislation still excludes atypical employees from its scope of protection, for instance the Compensation for Occupational Injuries and Diseases Act (COIDA) still excludes domestic servants and those involved in atypical employment from its field of application. Despite the fact that the atypical employed are covered by most of the self-

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<sup>581</sup> It appears that the benefits of belonging to an organisation such as SEWA are twofold. First, it renders material benefits in the form of greater access to credit and training information and, in the process, increases basic security and employment security. Secondly, it renders non-material benefits in the form of greater decision-making power over earnings and expenditure, as well as greater self-confidence and greater self-worth. This can, in turn, impact on the income and working conditions of the people involved. Dasgupta *ibid*.

<sup>582</sup> Olivier “The Predicament of the Atypically Employed” *op cit* note 549 at 674-679.

<sup>583</sup> 75 of 1997.

<sup>584</sup> 66 of 1995.

<sup>585</sup> Section 213.



employed, they are still not covered and rarely qualify as “employees” in need of protection. The informal sector largely qualifies as self-employed and as a “special group”. That is why the informal sector as a specific group is discussed in detail below.

### 5.3.2.1 The emergence of the informal sector<sup>586</sup>

The term “informal sector” was first made popular by the ILO mission to Africa in the early 1970s. It is however a term used to cover a wide variety of people<sup>587</sup> and some observers are of the opinion that the sector is simply too heterogeneous to be captured in a meaningful concept. However, because this sector accounts for a significant share of employment, it cannot merely be dismissed or disregarded.<sup>588</sup>

In terms of the official international definition of the informal sector, an informal enterprise is defined as one whose size in terms of employment is below a certain threshold and/or which is not registered in terms of specific forms of national legislation.<sup>589</sup>

In 1993, the ILO recognised the need for a uniform definition of the informal sector in order to aid data collection. In terms of this definition,<sup>590</sup> the informal sector is defined,

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<sup>586</sup> Some commentators (e.g. see Lund op cit note 47) are of the opinion that it is not correct to use the term “informal sector”. Instead, they believe that, given its large size and diversity, as well as its increasing ties and overlaps with the formal sector, the correct term is “informal economy”. Many observers have therefore started to use the term “informal employment” and “informal economy” rather than the term “informal sector”. For purposes of this thesis, the term “informal sector” will be used.

<sup>587</sup> Carr & Chen op cit note 506 at 3. “*The term ‘informal sector’...is invoked to refer to street vendors in Bogota; shoeshine boys and rickshaw pullers in Calcutta; garbage collectors in Cairo; home-based garment workers in Manila, Montreal, Madeira or Mexico-city; and home-based electronic workers in Leeds, Istanbul, and Kuala Lumpur.*”

<sup>588</sup> Ibid.

<sup>589</sup> See Lund op cit note 47 at 9-10 (fn 9). The definition is silent about registration with, or in terms of regulations by, local authorities, for example registration to obtain trading licences or business permits. There is a perception that the informal sector is avoiding regulation and taxation and is therefore operating illegally. This perception is not entirely correct and informal activities and arrangements should rather be seen to occupy the “grey, semi-legal middle ground between legality and illegality”.

<sup>590</sup> Charmes J “Informal Sector, Poverty and Gender – A Review of Empirical Evidence” Background paper for the World Development Report 2001 (October 1998) at 4. (Hereafter Charmes).

irrespective of the kind of workplace, the extent of fixed capital asset, the duration of the activity of the enterprise and its operation as a main or secondary activity, as comprising:

- 1) informal self-owned enterprises which may employ family workers, and employees on an occasional basis: for operational purposes and depending on national circumstances, this segment comprises either all self-owned enterprises, or only those which are not registered under specific forms of national legislation (factories or commercial acts, tax or social security laws, professional groups, regulatory or similar acts, laws or regulations established by national legislative bodies).
- 2) enterprises of informal employers which may employ one or more employees on a continuous basis and which comply with one or both of the following criteria:
  - i. size of the establishment below a specified level of employment (defined on the basis of minimum size requirements embodied in relevant legislation or other empirical or statistical practices: the choice of the upper size limit taking account of the coverage of statistical enquiries in order to avoid an overlap),
  - ii. non-registration of the enterprise or its employees.

Furthermore, and for practical purpose the informal sector may and should be restricted to non agricultural activities. Professional and domestic workers are included in the informal sector as far as they comply with the definitional characteristics or criteria. Home-based workers are included if they are own-account or sub-contracting with other informal sector units. Non-market production is excluded.<sup>591</sup>

### 5.3.2.2 Regulation of the informal sector

People in the informal economy face different risks from those in the formal economy. The risks differ according to the employment status, according to the industry or trade they are engaged in, and according to the broader social, economic and political context in which they live and work. Four broad generalisations can however be made as far as the risks faced are concerned:<sup>592</sup>

- Those working in the formal and informal economies face the same general risks, notably: illness, property loss, disability, old age and death. Informal

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<sup>591</sup> The statistical definition distinguishes two main components or segments of the informal sector, namely the family enterprise and the micro-enterprise with permanent employees. The informal sector exhibits some common features, some of which are: ease of entry, small scale of activity, self-employment with a high percentage of family workers and apprentices, little capital and equipment, labour-intensive technologies, low skills, low level of organisation with little access to organised markets, or formal credit and information, low productivity and low incomes. *Idem* at 5.

<sup>592</sup> *Lund op cit* note 47 at 14.

workers are often subject to greater exposure to these general risks given the nature of their work and living conditions.

- Those working in the informal sector (as employees) also face greater work-related risks than those in the formal sector. They have little assurance of work, and low wages, few worker benefits and often unsafe and unhealthy working conditions are prevalent. Independent informal workers often have insufficient market information and skills and have less access to emerging market opportunities.
- Those working in the informal economy also have fewer mechanisms to deal with risks compared with those in the formal sector, for example access to formal financial instruments.
- Informal wage-workers enjoy fewer career opportunities than formal wage-workers and informal entrepreneurs enjoy fewer market opportunities and are less competitive than formal entrepreneurs or businesses.

It is clear that, even if the present formal social security system could be extended to include certain categories of the informal sector, the formal system would still not be sufficient to serve their needs. Informal social security measures are, to a certain extent, more suitable to serve this purpose. The quest will however be to design a system in which the positive aspects of formal and informal social security can be combined to provide social security protection for the marginalised, for example informal sector workers.

#### **5.4 Kinship-based support**

Kinship-based social security depends on a specific relationship of kinship and relies heavily on the principle of reciprocity. Contributions or social security support can consist of money or services, or both. This occurs, for example, in cases where families look after the elderly and support the elderly as part of the family using their own means.

This particular branch of social security has received very little attention in research up until now. This has resulted in poor documentation of actual examples of these informal forms of social security and of the dynamics within these structures.

#### ***5.4.1 Examples of kinship-based support***

It is very difficult to find well-documented examples of this form of social security support. Schemes which fall under this type of informal social security system may be assistance-based schemes (e.g. where a family provides assistance to those members who are unable to provide for themselves) or insurance-based schemes (e.g. a family burial society). Support provided may be in cash or in kind.<sup>593</sup>

A common example in South Africa is that of children staying with other family members. The family members act as foster parents, although they do not legally apply for appointment as such. This is a unique arrangement where the “foster parents” look after the child during the school term and the child then goes home for holidays, or they look after the child from time to time, or up until a certain age.<sup>594</sup>

Another example is that of grandparents supporting children and their grandchildren and, in return, the children and grandchildren look after the elderly when they can no longer take care of themselves.<sup>595</sup>

The example of the Masai in Tanzania also serves as a good example of this form of social security support. When a Masai man loses his cattle due to disaster, for example drought, the extended family give him some cattle, since cattle are seen as a form of social security.<sup>596</sup>

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<sup>593</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 574.

<sup>594</sup> Idem at 576.

<sup>595</sup> Ibid.

<sup>596</sup> Kaseke op cit note 11 at 5. This example can also be found in Dekker & Olivier idem at 577.

## 5.5 Shortcomings of informal social security

Despite the important role played by informal social security, it must be appreciated that informal social security is subject to limitation.

One of the concerns is that informal social security systems tend to lose their effectiveness because of erosion and disintegration of the traditional family owing to urbanisation and industrialisation. Young people migrate to towns to earn a wage.<sup>597</sup> In consequence, the number of working hands in rural areas (which normally spreads the social security risks) declines.<sup>598</sup> Many of those who have “opted” out of the traditional system by becoming migrant workers or salaried employees are no longer prepared to recognise and meet obligations of mutual help towards an extended circle of relatives.<sup>599</sup> Informal social security can only provide low benefits, mainly because contributions are low.<sup>600</sup> It functions in a poor environment resulting in inadequate benefits which are often uncertain, especially during widespread or prolonged crises.<sup>601</sup> In addition, HIV/AIDS has seriously eroded the support and financial base of many informal schemes.<sup>602</sup> People in the informal economy typically have fewer mechanisms for dealing with risk (for example access to financial instruments) than people in the formal sector do. The costs and risks associated with informal social security are often quite high and a number of these schemes have eroded over time.<sup>603</sup>

Corruption, poor financial management and poor record keeping are also characteristics of some of the schemes.<sup>604</sup>

It is poverty that forces most people to take up unattractive jobs in the informal economy and it creates a vicious poverty cycle.<sup>605</sup>

<sup>597</sup> Dekker & Olivier idem at 568.

<sup>598</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 102.

<sup>599</sup> Ibid.

<sup>600</sup> Olivier & Dekker op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 568.

<sup>601</sup> Chen et al “Supporting Workers in the Informal Economy” op cit note 77 at 40.

<sup>602</sup> Olivier & Dekker op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 568.

<sup>603</sup> Chen et al “Supporting Workers in the Informal Economy” op cit note 77 at 40.

<sup>604</sup> Olivier & Dekker op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 568.

...peasants view their social, economic, and natural universe - their real environment - as one in which all of the desired things in life such as land, wealth, health, friendship and love, manliness and honour, respect and status, power and influence, security and safety exist in finite quantity and are always in short supply. Not only do these and all other 'good things' exist in finite and limited quantities, but in addition there is no way directly within peasant power to increase the available quantities...Consequently there is a primary corollary to the Image of the limited Good: if 'Good' exists in limited amounts which cannot be expanded, and if the system is closed, it follows that an individual or a family can improve a position only at the expense of others. Hence an apparent relative improvement in someone's position with respect to any 'good' is viewed as a threat to the entire community.<sup>606</sup>

Poor people will therefore, in difficult circumstances, first fend for themselves rather than sustain a social network, especially if the benefits gained from the network are uncertain or insufficient owing to economic or social conditions.

## 6 CONCLUSION

From the above discussion it is clear that informal social security has developed to such an extent in South Africa that it forms a separate safety net for people excluded and marginalised in terms of the formal social security paradigm.

Informal social security should not (and cannot) indefinitely remain conceptually separate from formal social security. One way in which this can be addressed is through incorporation of informal social security in the definition of social security. It is suggested that the definition of social security be broadened to allow for elements that are also associated with informal social security, namely the involvement of state as well as non-state actors, by recognising that recipients of social security are not just individuals, but also societies, communities and households, and by defining risk in a non-restrictive manner.

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<sup>605</sup> International Labour Organisation (ILO) *Decent Work and the Informal Economy (Report IV)* (2002) at 31. (Hereafter ILO *Decent Work*).

<sup>606</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 93.

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The Taylor Committee seems to support this broadening of the concept of social security. The concept of comprehensive social protection as defined by the Taylor Committee moves away from a risk-based approach towards a broader concept of providing everyone with a minimum standard of living. It should be noted that the present informal social security system has developed along the lines of a risk-based approach. A definition of social security and of informal social security along the lines of a risk-based approach does have advantages, most notably that it facilitates better comparison of the two systems and also makes future incorporation, or cooperation between these two systems, easier. By considering the risks against which coverage and protection are provided, it will also be easier to establish possible future links.<sup>607</sup> It is, however, proposed that the suggested definition of comprehensive social protection is used to broaden the scope of application of social security by also making provision for the inclusion of informal and indirect social security in the social safety net.

As is apparent from the foregoing, the concept of informal social security is quite easy to recognise, but very difficult to describe. This is mainly because it encapsulates such a heterogeneous group of people and activities. The main purpose of these schemes is to provide protection against risks threatening the existence and income-earning capacity of the people concerned. Risks, both real and particular to these groups, have been identified and very specific schemes for addressing these risks have been devised amongst themselves. These schemes have developed and evolved, and some of them are highly sophisticated.<sup>608</sup>

The social security protection afforded within kinship relations and within community relations is often different from formal social security, because the risks faced by these groups are different. The main features of mutuality and solidarity seem, however, to form the main foundations of these systems, which are also the main features of the formal social security system.

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<sup>607</sup> See discussion in par 3.3.2, ch 3 & 4.3, ch 4.

<sup>608</sup> This is, interestingly enough, also the way in which most European schemes have developed over a few hundred years until they were codified and formalised after the World Wars. This will be discussed in more detail in ch 5.

The gendered dimension of informal social security can also not be ignored. The Constitution guarantees everyone the right to equality. Mostly women, and also mostly Black women, are excluded in terms of the formal system. They make up the majority of the informal social security sector. In order to ensure equity, more protection should be afforded to them in terms of the formal social security framework.

The continuing growth of the informal sector is also an important reason for reform of the present system. This particular sector is expanding and will not disappear or be absorbed by the formal sector. The reality is that people in the informal sector are even more exposed to social security risks than their counterparts in the formal economy.

The thesis has up to now illustrated what informal social security is and what the current status of informal social security within the present social security paradigm is. The traditional Western European model of social security and its development path will now be discussed as a foundation to determine the future of informal social security alongside the present formal social security system in South Africa.



## CHAPTER 5: THE TRANSFORMATION FROM INFORMAL TO FORMAL: THE HISTORICAL DEVELOPMENT OF SOCIAL SECURITY IN WESTERN EUROPE

There is nothing as powerful as an idea whose time has come.<sup>609</sup>

### 1 EXECUTIVE SUMMARY

This chapter will focus on the historical development of social security in the context of Western Europe. The aim of this thesis is to recommend a model which can guide policy recommendations as to the future of informal social security within the South African legislative framework pertaining to social security. This proposed model for South Africa can benefit from the experiences of Western Europe where a transition was also made from (informal) voluntarily to publicly provided (formal) social security. For various reasons indicated below, it is useful to start in this chapter with an overview of social security in its original Western European context.

- The development path of formal social security in Western Europe illustrates that almost all well-developed Western European social security systems also originated from informal social security measures. Informal social security is therefore not a concept unique to the African continent. The investigation in this chapter into the development of social security in the context of Western Europe will therefore reveal that informal social security was once frequently used in Western Europe to provide protection against insecurity.<sup>610</sup> Social solidarity in the African context is often translated with *ubuntu*<sup>611</sup> and is seen as a principle unique to Africa. Social solidarity was a popular concept during the development period of Western European social security, but it is used

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<sup>609</sup> Hugo V as quoted in *Reading Dynamic Manual* (2004) at 4.

<sup>610</sup> See discussion below.

<sup>611</sup> See par 5.2, ch 4. *Ubuntu* means that people are people through other people.

less often nowadays because it has taken on a more sophisticated form and application in the context of the welfare state.<sup>612</sup> However, we can still learn from the development and transition process from informal to formal which took place in Western Europe almost a century ago.<sup>613</sup>

- The impetus for more comprehensive social protection in Western Europe resulted from a number of political, social and economic factors which prevailed in Western Europe at the time. Certain factors, such as greater economic resources, industrialisation and political pressure, all played a pivotal role in the creation of a new system of formal social security in which individual responsibility for protection against insecurity was transferred to the state. Those factors can be identified in order to determine if they correlate with the factors which dictate change in South Africa today.<sup>614</sup>
- The process of evolution and transformation from informal to formal social security took place over a few centuries, gaining particular momentum in the first few decades of the twentieth century. Specifically, social insurance (privately and informally arranged) usually formed the basis of protection against social insecurity. In the light of the “time constraints” we have in South Africa, it must be determined if there is room for gradual fruition of social welfare and how certain “ripening factors” can be forced in order to lead to a better and more comprehensive social security paradigm.<sup>615</sup>
- For a certain period after the creation of formal social security in Western Europe, informal (voluntary) and formal social security mechanisms co-existed. This can provide very valuable insights into the ways in which South Africa can ensure the co-existence of informal and formal social security and as to whether it is feasible to juxtapose these two systems. It was especially as far as the administrative execution of formal social security was concerned

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<sup>612</sup> See par 5.2.5, ch 5.

<sup>613</sup> See ch 5 in general.

<sup>614</sup> See par 4, ch 5.

<sup>615</sup> See par 4.2, ch 3.

that voluntary agencies in Western Europe played an important role. Examples of ways in which this was done can be very useful for purposes of the proposed model for South Africa.<sup>616</sup>

- From the Western European experience it is also clear that certain risks lent themselves more to accommodation by the voluntary (informal social security) sector, for example health care was frequently administered by voluntary agencies even after being introduced in the welfare state. This can help to identify the particular areas of risk in South Africa where informal social security can be utilised to lessen the burden on the state.<sup>617</sup>
- In the development of the formal Western European systems, the basic underlying values or founding principles of the respective nations (e.g. self-administration in Germany and “*laissez-faire*” in Britain)<sup>618</sup> were retained, but were applied in a new, evolved form in order to help citizens to “buy into” the concept.<sup>619</sup> In South Africa, the basic founding values of our nation should be identified and an attempt should also be made to incorporate them in the transformation process to ensure the commitment (and buying in) of everyone to the reformed system.<sup>620</sup>
- In the context of Western Europe, informal social security can be seen as a stage of development or process of evolution which has been left behind as a result of the process of formalisation and creation of the welfare state. However, as seen from the discussion of the concept of informal social security in chapter 4, in the context of South Africa, informal social security is indeed a stage of development, but the concept has (in the light of the limited development of the formal social security system) evolved to play a pivotal role in the provision of social security.<sup>621</sup> Informal social security will not

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<sup>616</sup> See pars 4 & 5, ch 5. See ch 8 in general.

<sup>617</sup> See pars 4.2 & 5.1, ch 5. See par 5, ch 8.

<sup>618</sup> See footnote 718 in the present chapter.

<sup>619</sup> See par 4, ch 5.

<sup>620</sup> See pars 4 & 5, ch 5.

<sup>621</sup> See par 5, ch 4.

merely “blow over” once the South African social security system is improved.<sup>622</sup> In this context, informal social security and the present formal social security systems will have to look at ways of working together in providing social protection.

## 2 INTRODUCTION

Social security<sup>623</sup> in essence means freedom from social and economic want which, throughout the ages, people have found to be something that can be obtained only through some form of mutual aid or insurance.<sup>624</sup> The idea of social security is as old as civilisation itself, although the name only came into popular use after World War I.<sup>625</sup>

Although social security only became regulated in the late nineteenth and early twentieth centuries, many informal social security arrangements have existed since early civilisation.<sup>626</sup> This may be partly because poverty has been with humankind since the beginning of time and because social security has (initially) developed to address poverty. Later on, the individual responsibility to alleviate poverty through own (informal social security) measures was transferred to the state. This resulted in the creation of

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<sup>622</sup> See par 5, ch 4. Also see chs 1 & 8 in general.

<sup>623</sup> The word “social” comes from the Latin word *socius*, meaning a companion or friend. The word “security” derives from two Latin words which mean an absence of care. Parrott AL *The Iron Road to Social Security* (1985) at 1. (Hereafter Parrott).

<sup>624</sup> Ibid.

<sup>625</sup> The first beginnings of social security can be traced to the time of the French Revolution and the Declaration of the Rights of Man (1793), the latter being included in the French Constitution. It states: “*Public assistance is a sacred duty. Society owes subsistence to unfortunate citizens by procuring them work or by ensuring to those who are unable to work, the means of existence.*” Singh op cit note 489 at 1. According to Parrott *ibid*, the world’s first social security legislation had its origins in the USA in 1935. This legislation was however based mainly on contributory social insurance principles which Bismarck first applied in Germany on a national scale in the 1880s. New Zealand passed a social security act in 1938, but this was based on different techniques known as social assistance, which means benefits were non-contributory and means-tested and were generally financed from general taxation. Although the contributory principles applied by Bismarck in the 1880s were actually the first foundations of social security legislation, this was never termed “social security”. The term however became popular prior to World War II when the International Social Security Association was founded in 1927.

<sup>626</sup> These are often also called private / mutual / voluntary social security in the context of Western Europe. Kramer RM *Voluntary Agencies in the Welfare State* (1981) at 4. (Hereafter Kramer). ILO *Decent Work* op cit note 605 at 23.

public (state-involved) and formal (regulated through legislation) social security whereby insecurity and poverty were addressed in more sophisticated and proactive ways.<sup>627</sup> With the inception of the welfare state,<sup>628</sup> universal protection was provided against certain social security risks which could lead to insecurity and resultant poverty.<sup>629</sup> It can therefore be said that, in Western Europe, the pace of welfare reform was first set by the informal (voluntary) social security sector and, later on, by the state.<sup>630</sup> The development of the formal social security system and of the welfare state in Western Europe is the story of the development from informal social insurance to (formal) social security.<sup>631</sup>

The development of social security in the context of Western Europe can be divided into three main phases: (a) that of an ancient society, (b) that of more developed societies and (c) that of protection by the state in modern society.<sup>632</sup> These general stages of social security development in Western Europe can be illustrated as follows:

***Table 4: General Stages of Development of Social Security in Western Europe***

<b>General stages of development of social security in Western Europe</b>	<b>Main examples</b>	<b>Most predominant forms of (informal) social security during particular stage</b>
Ancient societies	<ul style="list-style-type: none"> <li>• Primitive societies</li> <li>• Roman Empire</li> <li>• Medieval times</li> </ul>	Family- and clan-based social security, mutual societies, and guilds.
More developed societies	<ul style="list-style-type: none"> <li>• Napoleonic and early Victorian times</li> <li>• Industrial Revolution</li> </ul>	Family, friendly societies, mutual aid societies and trade unions.
Protection by the state in modern society	<ul style="list-style-type: none"> <li>• After World War I</li> <li>• After World War II</li> <li>• Modern applications of the welfare state</li> </ul>	The development of social insurance and the welfare state.

<sup>627</sup> See discussion in ch 5 in general.

<sup>628</sup> The meaning of “welfare state” is discussed in more detail in par 5.2.5, ch 5.

<sup>629</sup> Parrott op cit note 623 at 5.

<sup>630</sup> Kramer op cit note 626 at 41.

<sup>631</sup> Van Langendonck J “The Legislative Framework: Changes of Laws in a Changing Environment – A Comparative View” Tripartite Symposium on the Future of Social Security in Industrialised Countries (ILO, Geneva, 1991) at 2. (Hereafter Van Langendonck).

<sup>632</sup> Idem at 1.

This chapter can be divided into two main themes. First, it contains an outline and discussion of the general stages of development of social security in Western Europe. In the general outline, no distinction is made between the various Western European countries, since all the countries more or less followed the same basic trends as far as forms of (informal) social security were concerned. In the second part of the chapter, a distinction will be drawn between the differences in the development of the British and German formal social security systems. These two countries were specifically chosen because they represent the two basic forms which social security took in the early years of development.<sup>633</sup>

In Western Europe, the welfare state has developed to provide extensive protection and coverage against insecurity. It is however believed that the 21<sup>st</sup> century will see the end of the era of expansion of the welfare state.<sup>634</sup> In the final part of the discussion, it will also be illustrated how Germany is returning to a new form of “informalisation” of social security. It is interesting to note that informal social security (in a transformed form) still has a place in the modern welfare state.<sup>635</sup>

### **3 SOCIAL SECURITY IN ANCIENT SOCIETIES**

#### **3.1 Primitive societies**

People have realised from the beginning of time that it is easier to survive as one of a group than as an individual. Tribes or small hunting groups were the most primitive forms of organised society.<sup>636</sup> Groups were formed to spread the risk among a number of persons, thereby protecting the individual. These groupings of people had rules and structures which identified specific needs or risks and which applied specific remedies or forms of protection.<sup>637</sup>

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<sup>633</sup> See pars 4.2.2 & 5, ch 5.

<sup>634</sup> Kramer op cit note 626 at 6. Olivier, Mpedi & Dekker op cit note 459 at 2.

<sup>635</sup> See par 5.2.2.1, ch 5.

<sup>636</sup> Parrott op cit note 623 at 10.

<sup>637</sup> Idem at 10-12.

It is clear that, since the beginning of time, the family (and the extended family, which equates to the tribe or clan) provided valuable social security support. In primitive societies, production was often just sufficient to provide for the daily necessities of human life.<sup>638</sup>

It seems that burial societies constitute the oldest example of social security. The earliest traces of this phenomenon were found to have existed in Crete in the Early Minoan Period<sup>639</sup> when immigrants from elsewhere in the Eastern Mediterranean joined inhabitants in order to ensure a proper burial. By the time of Solon,<sup>640</sup> burial societies were so well established that one of Solon's laws dealt with the regulation of these societies.<sup>641</sup> By the third century BC, there had been an extension of the principle of contributory social security from death to more general adversities of life. The philosopher, Theophrastus,<sup>642</sup> mentions associations with a common chest or box in which monthly contributions from each individual were deposited in order to raise funds for the relief of members who had experienced misfortune.<sup>643</sup> Some of the rules of these associations were inscribed on stone and have been preserved.<sup>644</sup>

### 3.2 The Roman Empire

In Roman times, wage deductions for purposes of compulsory savings were quite common, and more organised social security arrangements evolved in the form of mutual clubs.<sup>645</sup> Military societies were quite popular in Roman times. Only soldiers on active duty could become members. These societies provided members with a sum of money upon retirement from active duty, or paid for a proper burial in the case of death. Military societies also provided assistance to cover the travelling expenses of members who had

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<sup>638</sup> Ibid.

<sup>639</sup> Ibid. c. 3000 to c. 2000 BC.

<sup>640</sup> Ibid. Athenian legislator and constitutional reformer c. 638-558 BC.

<sup>641</sup> Idem at 11-12.

<sup>642</sup> 372 - 288BC.

<sup>643</sup> Parrott op cit note 623 at 12.

<sup>644</sup> Idem at 13.

<sup>645</sup> The savings of soldiers were saved in the compulsory savings bank (*librarii depositorum*). Havenga P *The Origins and Nature of the Life Insurance Contract in South African Law with Specific Reference to the Requirement of an Insurable Interest* (1993) at 10. (Hereafter Havenga). Also see Parrott idem at 20.

been transferred. It is uncertain whether these societies required members to make regular contributions or whether the fund was made up from a levy raised on the *donativo*.<sup>646</sup>

Different types of societies developed for religious, military and entertainment purposes.<sup>647</sup> A vital ingredient of these societies was good fellowship. The rules of these societies often provided for regular meetings and, on entrance to the meeting, prospective members were required to bring a sum of money and an amphora of good wine.<sup>648</sup>

One of the main benefits offered by these societies was the offering of proper burial rites to their members.<sup>649</sup> The Roman culture required that Romans of worth had to be given a respectable funeral and mutual insurance was essential as some form of security against the unexpected expense.<sup>650</sup> The society required members to contribute on a monthly basis and the society in turn undertook to accord a proper burial to the member upon his death. Some of the societies even had their own burial grounds or monuments<sup>651</sup> where their members could be buried or cremated. Others merely paid an amount of money to the deceased member's family to enable the family to arrange a proper burial.<sup>652</sup>

Most burial and military societies disappeared after the fall of the Roman Empire and no traces of them can be found in the Middle Ages, primarily because of the disappearance

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<sup>646</sup> Havenga idem at 10-11. A *donativo* was made up of bonuses awarded by the government to soldiers after battle and during prosperous intervals of peace.

<sup>647</sup> One of the earliest recorded Roman societies was a mutual club known as The Hornblowers. The club was founded in AD203 and had as its members the legionary officers of the Roman garrison. They were paid monthly, but had significant deductions for pensions. The rules of their society provided for 500 *denarii* on promotion, 500 *denarii* on transfer plus travelling expenses, 500 *denarii* when a legionary became a veteran, and 500 *denarii* to his family if he died. Contributions from the members were collected and paid into a central fund. Gray P "A Brief History of Friendly Societies" Accessed at <http://www.afs.org.uk/research/researchpgrayhistorypage.htm> on 23 Oct 2003. (Hereafter Gray). Also see Parrott op cit note 623 at 1-20.

<sup>648</sup> Gray idem at 2-3. Parrott ibid.

<sup>649</sup> Havenga op cit note 645 at 10.

<sup>650</sup> Ibid. These societies were known as *collegia tenuiorum* or *collegia funeraticia*.

<sup>651</sup> Ibid. Called *columbarium*.

<sup>652</sup> Ibid.



of the Roman monetary system and the return to a society where barter was the main form of trade after the collapse of the Roman Empire.<sup>653</sup>

### 3.3 The emergence of social security in medieval times

Little of this influence of the Roman Empire remained in the territories Rome once occupied. The contributory principle however reappeared in medieval times through the introduction of guilds in Western Europe by merchants and other travellers.<sup>654</sup> Guilds were imaginary clans or brotherhoods formed when the bonds with original clans or families were loosened by migration or other occupations.<sup>655</sup>

Guilds provided support during illness and other difficult times of need and afforded members the right to a decent burial. Some even provided benefits for disability and old age.<sup>656</sup>

Guilds eventually disappeared owing to increasing pauperisation and increasing legislative regulation.<sup>657</sup> Although the guilds began as independent associations, they

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<sup>653</sup> Idem at 11. The disappearance of burial societies can also be attributed to the rise of Christianity and the role that the Church played in the burial of its members.

<sup>654</sup> As the primitive ideal of the family faded and its economic functions grew weaker, so the guild rose to fill a widely felt need for social security. Parrott op cit note 623 at 20.

<sup>655</sup> Ibid. Guilds were originally instituted by mutual agreement among friends and neighbours and had no further object than the relief of the brethren in times of distress and perhaps the protection of the associated members against the lawless attacks of powerful neighbours. After the Conquest, guilds were established for the express purpose of promoting religion, charity or trade and it is from these fraternities that many companies and city corporations were derived. In Britain these guilds were usually founded under licence of the King and were supported either by specific contributions by members (in money or goods) or through lands assigned to them by the founder. The rules of some of these institutions were preserved. An example is the Ordinances of St Catherine's Guild at Coventry: (1) if a member suffer from fire, water, robbery, or other calamity, the guild is to lend him a sum of money without interest; (2) if sick, or infirm through old age, he is to be supported by his guild according to his condition; (3) no one notorious for felony, homicide, lechery, gaming, sorcery, or heresy, is to be admitted; (4) if a member falls into bad courses, he is first to be admonished, and if found to be incorrigible, he is to be expelled; (5) those who die poor and cannot afford themselves burial are to be buried at the charge of the guild; (6) the chaplain is not to frequent common taverns. After the guilds were abolished in Germany, the journeymen associations were allowed to maintain existing fraternities and funds for mutual assistance. The guilds were characterised by fellowship, enjoyment of life and benevolence, as well as by mutual rights and obligations. It is interesting to note that most ancient associations (or guilds, fraternities, mysteries, companies or brotherhoods) were addicted to conviviality just like the ancient Roman clubs were.

<sup>656</sup> "Guilds" accessed at <http://www.ohiou.edu/~Chastain/dh/guilds.htm> on 5 Jul 2004.

were absorbed into the administrations of towns and their benevolent functions widened into a more general responsibility for the welfare of the poor within the town.<sup>658</sup> Guilds were also weakened by the split between the guilds and journeymen's associations/fraternities. The latter provided the same type of benefits as guilds, but also provided sick leave.<sup>659</sup>

## 4 SOCIAL SECURITY IN MORE DEVELOPED SOCIETIES

### 4.1 The development of social security during Napoleonic and early Victorian times

It can be argued that the first beginnings of publicly provided social security occurred at the time of the French Revolution when the Declaration of the Rights of Man was proclaimed. This served as the preamble to the French Constitution of 1793, which stated inter alia that:

...public assistance is a sacred duty. Society owes subsistence to unfortunate citizens by procuring them work or by ensuring to those who are unable to work, the means of existence.<sup>660</sup>

After the French Revolution and the disappearance of guilds, other societies of various kinds continued to be an important part of the fabric of life throughout Western Europe and met various business, religious or social needs. A few centuries after the guilds disappeared, friendly societies evolved to fill the void in social security provisioning of the time.<sup>661</sup> Some of these societies sometimes granted benefits that were quite advanced

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<sup>657</sup> Guilds were also gradually institutionalised and were increasingly governed by statutes and regulations. The guilds were also later transformed into corporations. Guilds were forbidden in Germany by the Prussian General Factory Act (*Allgemeine Gewerbeordnung*) of 1845. Zöllner D "Germany" in Köhler PA & Zacher HF (ed) *The Evolution of Social Insurance 1881-1981: Studies in Germany, France, Great Britain, Austria and Switzerland* (1982) at 20. (Hereafter Zöllner).

<sup>658</sup> Prior to the French Revolution, there was progressive pauperisation of a great number of artisans and unemployed journeymen, leading to the depletion of support funds and the creation of an increasing amount of non-guild masters. Parrott op cit note 623 at 21.

<sup>659</sup> Zöllner op cit note 657 at 20.

<sup>660</sup> Singh op cit note 489 at 1.

<sup>661</sup> Gray op cit note 647 at 3. Also see Parrott op cit note 623 at 4.

for their time.<sup>662</sup> Friendly societies were mainly found in Britain<sup>663</sup> and never proved very popular in Germany.<sup>664</sup> Apart from being provided by friendly societies, protection against insecurity during this period also came from the family, private savings and charity.<sup>665</sup>

Friendly societies were to some extent the forerunners of modern insurance schemes. They provided insurance against social security risks. A financial benefit was payable in order to assist members upon the happening of specified contingencies or in adversity.<sup>666</sup> In Britain, the government never supported friendly societies, since the government of the day was more concerned about control of the population and with the motives for joining societies than with the financial stability many sought from friendly societies.<sup>667</sup>

In Britain, friendly societies have never really disappeared.<sup>668</sup> Informal social security has, in the course of time and as a result of the development of society, been successfully

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<sup>662</sup> Gray *ibid.* The benefits of the Clerk's Society in 1807 in Newcastle-upon-Tyne serve as an example of these types of benefits: (a) sickness benefit of one guinea per week for the first 52 weeks of incapacity, reducing by a half for the next 26 weeks, and, thereafter, to seven shillings for so long as the incapacity continues; (b) unemployment benefit of ten shillings per week for 26 weeks, extendible for a further 26 weeks at the discretion of the Management Committee; (c) total disablement, blindness, or other providential cause: 30 pounds per annum, payable quarterly; (d) loans of up to 25 pounds upon imprisonment for debt; (e) 100 pounds upon death, payable as directed in the member's will, or, alternatively, a widow's pension of 15 pounds per annum.

<sup>663</sup> Gray *idem* at 3-4. It is believed that friendly societies originated in Britain and that the first Friendly Society Act was introduced in 1793.

<sup>664</sup> This can be attributed to the fact that, during that period, the labour movement in Germany gained momentum and trade union benefit societies fulfilled the same role as friendly societies.

<sup>665</sup> Van Langendonck *op cit* note 631 at 1. The most significant source of, and the one most heavily relied upon for, social security was the family (which was heavily emphasised, and to this can be added the extended family). Charity was mainly relied upon if and when family care and private savings were absent.

<sup>666</sup> Gray *op cit* note 647 at 4.

<sup>667</sup> *Ibid.* Early in the nineteenth century, a number of bills were introduced to encourage friendly societies and to protect their members. The resultant legislation was essentially political in nature and repressive, for example the Societies Act of 1797 in Britain. Despite this, throughout the nineteenth century, tremendous growth in the number of friendly societies took place and, by the end of the nineteenth century, there were almost 30 000 registered friendly societies catering for the needs of some 4,5 million people in Britain. A further million people were catered for by special societies applying only to their own industry, trade or profession. This illustrates the importance of societies when the working population comprised only about 10 million people. This means that about half of them were actually covered by friendly society membership. Friendly societies still exist today and are one of the few forms of informal social security providers governed by legislation, even in South Africa.

<sup>668</sup> *Ibid.* From 1910 to 1947, friendly societies administered the state sickness benefit scheme in Britain and, at their peak in 1945, they also catered for the further needs of 8,75 million private subscribers through over 18 000 branches or societies.

turned into social virtues, moral duties, religious dictums and, finally, into legal rules and institutions.<sup>669</sup> Friendly societies still exist today, although universal social security and private insurance have diminished their importance.<sup>670</sup>

## 4.2 Social security during the Industrial Revolution

### 4.2.1 General

The Industrial Revolution took place from 1740 to 1830 in Britain.<sup>671</sup> It originated in the textile and clothing industry where workers moved to factories instead of weaving at home. Several inventions at this time were also responsible for this move to factories.<sup>672</sup> The key invention, which served as a catalyst for the Industrial Revolution, was however the steam engine,<sup>673</sup> which, in turn, led to the development of the railroad, which revolutionised the world economy.<sup>674</sup>

The Industrial Revolution led to the formation of two new population classes, namely industrial employers and urban proletarian workers at the bottom of the social pyramid. The wage-earning classes were exploited and suffered extreme poverty and insecurity. In Britain, the Poor Laws were used especially during this period to try to combat the resultant poverty. The Poor Laws heavily stigmatised the poor and were in fact not

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<sup>669</sup> Van Langendonck op cit note 631 at 1.

<sup>670</sup> Gray op cit note 647 at 1. The distinguishing features of a friendly society are: (a) a financial benefit is payable in order to assist members upon the happening of specified contingencies or in adversity; (b) the rules engender a spirit of self-help and self-reliance and discourage dependence upon the state or charity; (c) government of a society is by members for members, subject to the rules, which are devised by the members; (d) there exists equality between each member, subject to the rules, irrespective of the size of a member's individual stake in the society; (e) one member one vote; (f) the rules provide for variation by restriction or extension of the rights, privileges or terms of membership; thus the ability to preserve financial solvency exists, provided that there is willingness among members to make additional contributions or to reduce benefits as circumstances may demand; (g) the provisions of benevolence and charitable grants to distressed members beyond that to which they are strictly entitled under the benefit tables provided for in the rules.

<sup>671</sup> Some historians disagree about the exact dates and place of origin of the Industrial Revolution. The above dates and the English midlands as source of origin seem to be the most widely accepted view. "War and Social Upheaval: Industrial Revolution (1740/60-1830)" accessed at <http://histclo.hispeed.com/essay/war/war-ir.html> on 5 Jul 2004. (Hereafter Social Upheaval).

<sup>672</sup> Such as the spinning jenny, the flying shuttle and the water-powered loom. Idem at 2.

<sup>673</sup> Developed by John Newcomen and James Watt.

<sup>674</sup> Social Upheaval op cit note 672 at 2.

welcomed, but dreaded.<sup>675</sup> Private charity was more highly valued than assistance under the Poor Laws.<sup>676</sup>

In order to counter the worst effects of the Industrial Revolution, people developed various mechanisms to provide social security support, for example friendly societies, reliance on the family, mutual aid organisations, trade union benefit schemes, etcetera.<sup>677</sup>

After the Industrial Revolution, in the late 1800s, a serious economic depression also occurred and shattered beliefs in the self-regulating capacity of the individual and of the market and in the ability of the market and of the individual to protect itself/himself by its/his own devices against poverty, economic hardships and exploitation. The depression also gave rise to fears of a threat to public order owing to increasing unemployment and poverty. This set in motion a gradual process of social reform whereby social problems were identified and detailed solutions were provided.<sup>678</sup> Social insurance gradually took over from new and traditional poor relief and defined the discussion of the social question in Europe from the 1880s onward.<sup>679</sup>

#### ***4.2.2 Different reactions in Britain and Germany to the Industrial Revolution***

##### **4.2.2.1 General**

Britain and Germany have been chosen for a more detailed discussion, as these two countries followed two different paths in reaction to the effects of the Industrial

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<sup>675</sup> The poor were classified into two groups, namely: (a) the impotent poor, those who would work but could not (e.g. the sick or elderly); and (b) those able-bodied paupers who could work but would not. This group suffered harsh consequences and were often beaten until they realised the error of their ways, or they were put in workhouses or poorhouses which resembled prisons and which were aimed at discouraging people from claiming poor relief.

Accessed at <http://dspace.dial.pipex.com/town/terrace/adw03/peel/poorlaw/plaa.htm> on 6 Jul 2004.

<sup>676</sup> Kramer op cit note 626 at 39.

<sup>677</sup> Ibid.

<sup>678</sup> Ritter GA *Social Welfare in Germany and Britain: Origins and Development* (1983) at 1 & 2. (Hereafter Ritter).

<sup>679</sup> Idem at 2.

Revolution. These two main streams of social security flowing from Britain and Germany respectively are discussed below and the process of development from informal to formal social security is further illustrated.

The development in Britain is also important for South Africa as a former British colony. The British social security system was to a certain extent transplanted on South African soil through colonisation. Although South Africa never experienced an industrial revolution to the extent found in Britain, industrialisation and urbanisation took place in South Africa as a result of the Gold Rush in the early 1900s and as a result of the developments which took place after the Boer War.<sup>680</sup> The economic, social and political climate, however, never really lent itself to the evolution from informal social security to formal social security on the same scale as was experienced in Western Europe during that same period.<sup>681</sup>

After (and mostly because of) the Industrial Revolution, dramatic changes occurred in the welfare arena in Western Europe which resulted in the development of more sophisticated forms of social security and, particularly, in the state acknowledging that it had a role to play in providing social protection.

The determining factors underlying this social change however differed in Britain and Germany. In Britain, social change was brought about by the dissolution of society based on traditional estates and a system of guilds, by increasing urbanisation, by the disintegration of the traditional family and by the resultant loss of the family's function as a provider of relief in times of distress, by the development of a capitalist labour market, by the emergence of an industrial proletariat, by the increased danger of accidents at work and by industry's lack of interest in older workers.<sup>682</sup>

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<sup>680</sup> 1899-1903. See par 3.3, ch 2.

<sup>681</sup> Pars 3.3-3.4, ch 2.

<sup>682</sup> Ritter op cit note 678 at 2.

The timing of the development of social insurance in Germany was determined by the particular character of the dominant political and social traditions at the time,<sup>683</sup> by the vitality and flexibility of traditional forms of poor relief (administered by the state, churches, guilds and private charities) and by traditional self-help. In addition, it was influenced by the development of social sciences and their identification of areas of social risk, and by the ability to calculate the costs involved in providing relief through social insurance.<sup>684</sup>

#### 4.2.2.2 Germany

By the middle of the nineteenth century, the intensive pace of industrialisation necessitated the first modern laws protecting the worker.<sup>685</sup>

Political forces also played an important role in the development of social insurance in Germany.<sup>686</sup> The labour movement and the socialist movement grew stronger in Germany in the period between 1840 and 1880. It is believed that Bismarck's fear that workers could become a danger to the state constituted his initial motive for concerning himself with social policy.<sup>687</sup> He realised that the labour movement could not be countered with suppression alone and he proposed to tie the worker to the state by

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<sup>683</sup> Ibid. For example, the political constitution, the presence of the state bureaucracy, the timing and extent of the workers' political mobilisation.

<sup>684</sup> Idem at 4, footnote 4. Insurance made considerable headway at this time and became widely prevalent in the course of the eighteenth and nineteenth century, initially in marine insurance and later in the areas of fire, livestock and damage insurance. One leading German economist saw the "*triumph of insurance in every conceivable area as one of the age's great advances in social progress*".

<sup>685</sup> Zöllner op cit note 657 at 17. German social insurance, as it developed in the late nineteenth century, contained four elements, namely savings, welfare (by the community or the state), employers' liability and insurance, each of differing importance, which, together, represent the beginnings of social security.

<sup>686</sup> Idem at 28. "*The giant strength which pushed legislation through against the trends and currents of the day was purely political and was not based on a particular understanding of the matter at issue.*" Some are also of the opinion that it would have been highly unlikely that workers' insurance would have been carried through without the titanic powers of Bismarck.

<sup>687</sup> Idem at 13. As early as 1849 he stated that the factories "*reared a mass of proletarians, of poorly fed workers who were a danger to the state because of the insecurity of their very existence*".

providing welfare benefits.<sup>688</sup> By the late 1860s, there was a discernable strain on relations between the state and organised labour. Bismarck tried to pull the carpet from under the feet of the liberal opposition by attempting to win over the workers' loyalty to the concept of a "social monarchy".<sup>689</sup>

Very little protection for workers existed at that stage in Germany and the starting point for governmental work on social insurance legislation was accident insurance. In 1881, a bill on accident insurance was drafted to redress social problems, thereby suppressing the Social Democrats and also to positively promote workers' welfare.<sup>690</sup> There existed a Liability Act of 1871,<sup>691</sup> which was based on civil liability for accidents. Bismarck, for the first time, proposed that this Act should be replaced by compulsory, general accident insurance. Bismarck initially proposed that a government insurance institution should oversee the administration of this system. This was however opposed and he took an

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<sup>688</sup> Ibid. Some believe that he acquired this idea in France during his visits to the country between 1855 and 1857 and as ambassador in Paris in 1861. "I have lived in France long enough to know that the faithfulness of most of the French to their government ... is largely connected with the fact that most of the French receive a state pension." Also see "The Constitutional and Institutional Foundations of the German Social State" accessed at [http://tiss.zdv.uni-tuebingen.de/webroot/sp/spsba01\\_W98\\_1/germany1@.htm](http://tiss.zdv.uni-tuebingen.de/webroot/sp/spsba01_W98_1/germany1@.htm) on 21 Feb 2005. (Hereafter "Constitutional and Institutional Foundations of Germany").

<sup>689</sup> There was no political labour movement in Germany until 1848. Workers' education associations had been formed in the 1830s and 1840s. The revolution in France in 1848 influenced political events in Germany and resulted in the establishment of the General German Workers' Fraternity (*Allgemeine deutsche Arbeiter-Verbrung*) from local workers' associations in Berlin. This was the first political German workers' association. This Fraternity was banned in 1854 and the General German Workers' Association (*Allgemeiner deutscher Arbeiterverein*) was founded in 1863 under the leadership of Ferdinand Lassalle, and regarded itself as a political party. Zöllner *idem* at 10-11. Bismarck entered into an exchange of ideas with Ferdinand Lassalle, which influenced his thoughts and ideas concerning workers' social insurance. Ritter *op cit* note 678 at 23.

<sup>690</sup> Ritter *idem* at 34. The 1871 accident insurance legislation (*Reichshaftpflichtgesetz*) proved extremely unsatisfactory. Only the railways accepted full liability for industrial injury, even when factors beyond their control were to blame, while mine-workers, factory workers, quarrymen and navvies (journeymen, agricultural workers and other groups) could claim compensation only if they could prove culpability on the part of the employer. Existing old-age and disablement provisions were also quite unsatisfactory. The burden of providing for elderly workers and their dependants (forced out of work through accidents, sickness, disablement, old age or unemployment) fell mainly on the existing system of poor relief. Poor relief was the responsibility of local authorities (parishes) and municipal councils increasingly requested the reduction of local rates for poor relief. Bismarck was concerned that poor relief was not everywhere fairly distributed. In the first draft of the accident insurance law (1881) it was proposed that regional poor relief associations or their equivalents (*Landesarmenverbände*) should, for a worker earning less than 750 marks per annum, pay a third of the insurance premium and the remainder should be paid by the employer. For a worker earning over 750 marks, the cost of the contributions was to be equally shared between the employer and employee.

<sup>691</sup> *Reichshaftpflichtgesetz*.



amended stance by organising the administrative structure in the form of cooperative associations under state protection and with state assistance. Social insurance in Germany borrowed from the experiences of mutual benefit societies such as guilds, corporations and journeymen associations<sup>692</sup> and carried on earlier traditions.<sup>693</sup> The application of the concept of collecting contributions from various role players resulted in a broader incorporation into the insurance scheme of the employer, the insured and the state compared with earlier social security systems such as guilds, where insurance, and the obligations and rights relating thereto, was restricted to members of a particular group.<sup>694</sup>

At the same time as the Accident Insurance Bill,<sup>695</sup> a Sickness Insurance Bill was tabled. The Sickness Insurance Act came into force on 31 May 1883 and the Accident Insurance Act came into force on 1 October 1885.<sup>696</sup> In order to address the issue of high administrative costs associated with the paying of temporary illness benefits under the Accident Insurance Bill,<sup>697</sup> Bismarck decided to transfer this duty to existing (informal) sick relief funds.

The administrative framework established by these Acts laid the foundation for the principle of self-administration, which built on the structure of the guilds and mutual aid organisations. Self-administration was seen as one of the key characteristics of the

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<sup>692</sup> The provision of social benefits by the employer for his employee goes back to the old patriarchal traditions of landlordism, of guilds and of seafaring. This patriarchal tradition continued into the era of early industrialisation and led to the establishment of a large number of works' welfare institutions. According to a survey by the Prussian Ministry of Trade, Industry and Public Works, there were welfare institutions in 4 850 firms in Prussia in 1876. The largest number of these institutions was concerned with accident insurance (2 828 firms), followed by sickness and relief funds. In 1860 there were 779 relief funds for factory workers in Prussia, with 171 000 members, to which employers also paid contributions. Zöllner op cit note 657 at 18-19. Some also believe that the Prussian General Law Code of 1794 (*Allgemeines Landrecht*) played a role in the development of social insurance in Germany. This Act provided that an employer was obliged to provide his servants and clerical workers with protection. Ritter op cit note 678 at 4.

<sup>693</sup> For example, the Prussian Servants' Ordinance of 1810 (*Gesindeordnung*) placed a duty on masters to ensure that care and medical attention were given to their servants in case of illness. The General German Code of Commerce of 1861 obliged ship owners to assume the costs of care and treatment of a sick sailor for up to three months in his home port and up to six months in a foreign port. Zöllner *ibid*.

<sup>694</sup> Ritter op cit note 678 at 4.

<sup>695</sup> Zöllner op cit note 657 at 25.

<sup>696</sup> This was followed in 1891 by the Disability Insurance Act.

<sup>697</sup> Enacted 1 Oct 1885.

German social insurance system, and still is today.<sup>698</sup> Self-administration means that insured persons and their employers (or the representatives of the insured) are actively involved in shaping policy. The various funds functioned as corporations under public law, which could carry out their legally mandated tasks under government supervision while remaining organisationally and financially independent.<sup>699</sup>

It is clear from the historical development discussed above that the first social security legislation of Germany was founded on the principle of social insurance and was based on an employment bias that aimed to protect workers. This “bias” was not negative, since the majority of Germans were in formal employment. As the economy grew and expanded, so did the protective scope of the German social security legislation. The basic social security principles however remained the same. Legislation was created to cover more risks and more categories of workers. More sophistication and refinement of the various schemes took place.<sup>700</sup>

Social insurance in Germany after the Industrial Revolution acquired a highly specific identity which owed much to earlier, informal social security schemes, but which was quite distinct from all of them.<sup>701</sup> The outstanding feature of this identity was that every social insurance institution had its own particular function, technique or organisation. The function of social insurance was determined by the belief that protection should be concerned with major contingencies of life experienced by workers, such as sickness, employment injury, invalidity and old age.<sup>702</sup> Protection was therefore extended to clearly identified categories of wage earners who were seen as particularly vulnerable to the kind of risks threatening them, specifically their capacity to work, which was often

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<sup>698</sup> Zöllner op cit note 657 at 26.

<sup>699</sup> “Deutsche Sozialversicherung Organisation”

accessed at [http://www.deutsche-sozialversicherung.de/en/health/organisation\\_print.html](http://www.deutsche-sozialversicherung.de/en/health/organisation_print.html) on 13 Jul 2004.

<sup>700</sup> The introduction of social insurance also established the principle that general factors can produce crises in the life of the individual for which he could not be held responsible and social insurance therefore provided protection against “social” factors. Perrin G “Hundred Years of Social Insurance Part II” *Labour and Society (Quarterly Journal of the International Institute for Labour Studies)* Vol. 9, No. 2 (April-June 1984) at 183. (Hereafter Perrin).

<sup>701</sup> Ibid.

<sup>702</sup> Idem at 184.

their only available resource.<sup>703</sup> Insurance included the mass of unskilled workers.<sup>704</sup> The social insurance scheme was only partly dependent for its financing on members' contributions (which contributions varied according to the risks covered). For protection against certain risks, employers were also required by law to pay part of the contributions, while the state undertook to pay a fixed amount on behalf of the insured. Management of social insurance was no longer under public administration (as was the case with social assistance), but was handed over to autonomous institutions administered by the representatives of the workers or employees.<sup>705</sup>

From the late 1800s there was increasing regulation and institutionalisation of informal social security mechanisms (local relief funds). The Industrial Relief Fund Act of 1854 serves as an example. In terms of this Act, local relief funds could be made compulsory and regional governments were also authorised to pronounce membership of sickness schemes compulsory.<sup>706</sup> In 1876, a law on registered relief funds was enacted which set certain standards with which local relief funds had to comply. On compliance with these conditions, certain free funds were allocated to these organisations. They qualified as registered relief funds functioning as corporations under civil law. Statutory standards were also set which had to be complied with.<sup>707</sup>

It should be noted that self-administration is not informal social security per se, but is a form of evolution of the principle of mutualism found in informal social security. In the development of social security administration, Bismarck drew on the experiences of informal social security agencies and included them in the initial administrative framework of the social security structure. This can be seen very clearly in the German health care system. Traditional relief funds were used to provide relief. After social

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<sup>703</sup> *Idem* at 183-184.

<sup>704</sup> *Ibid.* Also called the proletariat.

<sup>705</sup> *Ibid.* From the development of the German social insurance model it is clear that the roots of informal social security (or mutuality) continued to play a role, especially as far as the administration of social security systems was concerned. Up until today, the modern German social security system is characterised by self-administration.

<sup>706</sup> Zöllner *op cit* note 657 at 21.

<sup>707</sup> *Ibid.* On the eve of social insurance legislation, there were about 10 000 relief funds of all kinds in Germany in 1874, with about 2 million members.

insurance came into force, these funds were compelled to include employers in their administration. The organisational structure was based on the already existing relief funds.<sup>708</sup> The sickness insurance law existing in Germany at the time also provided for different types of funds. These funds were retained under formalisation.<sup>709</sup>

Sickness funds were gradually consolidated.<sup>710</sup> Only in the early parts of the twentieth century were insurance institutions joined together to form federations to safeguard their common interests.<sup>711</sup> Some “free” relief funds continued to function, but had to obtain an official certificate as a sickness insurance institution. This ensured that their benefits corresponded to those of the local community sickness insurance schemes. Membership of a relief fund freed persons from membership of the statutory insurance funds.<sup>712</sup> This culture has been retained and, currently, eight types of statutory health insurance funds and their central association exist in Germany.<sup>713</sup>

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<sup>708</sup> *Idem* at 27.

<sup>709</sup> *Idem* at 30. The following types of funds were provided for: (a) local sickness insurance funds (*Ortskrankenkassen*) by resolution of the community for insured persons in a branch or type of trade or industry; (b) works sickness insurance funds (*Betriebskrankenkassen*) by resolution of the works; (c) guild sickness insurance funds (*Innungskrankenkassen*) by resolution of the guilds; (d) builders’ sickness insurance (*Baukrankenkassen*) established by the employers under certain conditions; (e) community sickness insurance schemes (*Gemeinde-Krankenversicherung*), a community institution (not a sickness insurance fund) established by all the communities (or together with other communities), with people not covered by one of the other funds having to belong to this scheme. Later on (by the Imperial Insurance Decree (*Reichsversicherungsordnung*) of 1911), community sickness insurance was discontinued and people insured thereunder became members of local sickness insurance institutions. At this point, a new form of insurance scheme was created, namely the *Landkrankenkasse* for agricultural workers. The aim of the Imperial Insurance Decree was to simplify and concentrate the various social insurance schemes. Registered relief funds were thus organised as mutual insurance associations under the law on private insurance companies.

<sup>710</sup> *Idem* at 47.

<sup>711</sup> *Idem* at 36. For example the Central Federation of Local Sickness Insurance Schemes (*Centralverband der Ortskrankenkassen*) was founded in 1894, the Central Federation of German Guilds’ Sickness Insurance Schemes (*Hauptverband Deutscher Innungskrankenkassen*) in 1910 and the Federation of Commercial, Registered Relief Funds, which were *Ersatzkassen* (*Verband kaufmännischer eingeschriebener Hilfskassen*), in 1912. These federations were initiatives by self-administering insurance bodies.

<sup>712</sup> *Idem* at 30. These were known as *Ersatzkassen*, which literally means substitute insurance funds.

<sup>713</sup> (a) General local health insurance funds, which are organised into the Federal Association of Local Health Insurance Funds, (b) health insurance funds for salaried employees, which are organised into the Federation of Salaried Employees’ Health Insurance Funds, (c) workers’ alternative health insurance funds, which are organised into the Federation of Workers’ Alternative Health Insurance Funds, (d) company health insurance funds, which are organised into the Federal Association of Company Health Insurance Funds, (e) guild health insurance funds, which are organised into the Federal Association of Guild Health Insurance Funds, (f) agricultural health insurance funds, which are organised into the Federal Association

This example of the co-existence of formal and informal social security can also be found in other Western European systems, for example in the Dutch health care system.<sup>714</sup>

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of Agricultural Health Insurance Funds, (g) the Federal Insurance Fund for Miners, and (h) the Maritime Health Insurance Fund.

<sup>714</sup> It is especially with regard to the development of the Dutch health care system that the evolutionary role of (private) informal social security mechanisms can be seen. The Dutch social security system also developed from informal into formal social security and more or less followed the same development path and trends as in Britain and Germany. The Netherlands, however, has allowed, to a far greater extent than Britain or Germany, for the co-existence of informal and formal social security. The Dutch system still provides for a predominantly private supply of health care services. This can be attributed to its long tradition of health care by private voluntary organisations at local and regional level. Until today, the majority of hospitals and other care institutions in the Netherlands are owned and run by not-for-profit organisations. The tradition of private ownership has not been overturned, as has happened in the United Kingdom with the nationalisation of health care. This can be attributed to the principle of “pillarisation”, which is part of the Dutch tradition. The Dutch state was heavily divided along political and denominational lines. Three main subcultures existed. The first subculture comprised the reformed Calvinistic movement representing farmers, the petty bourgeoisie, civil servants and schooled labourers. The second subculture was made up of Roman Catholics and represented Catholics from all social strata. The third subculture comprised the socialist movement, which organised labourers of all kinds. This resulted in the division of Dutch society into pillars (*zuilen*). These pillars organised their members in a common culture and focused on segregation. This process of “pillarisation” strengthened the special relationship between the state and civil society. The role of the state was limited and civil society preferred to take care of its members from midwife to undertaker (birth to death). Some even speak of a historically grown characteristic of the Dutch society, namely the pursuit of autonomy and an aversion to central government. The system of “pillarisation” declined during the 1960s. In 1906, the first medical expense insurance was established to provide medical insurance for poor people. Those who earned too much to qualify for benefits, but too little to afford private insurance, were excluded and private insurance continued to cover this part of the population. This marked the beginning of the culture of co-existence between public and private insurance in the Netherlands. Private funds formed the basis on which the government later (in the 1940s) established rules and regulations, for example permission had to be obtained from the government to provide the obligatory insurance as mutual benefit societies, and these funds were not allowed to be involved in any activity other than health insurance. This dual system was for the first time comprehensively regulated by the Health Insurance Act of 1966. The public health insurance system has thus maintained its private elements and has its roots in voluntary mutual health insurance. As the risks of increased health costs grew, more people (not falling under obligatory insurance) decided to buy private insurance offered by companies, and these companies either assumed the legal form of a mutual benefit society or of a limited company. Despite transformation, the dualistic character has been retained. Legislation has increased in intensity over the years, but the private basis of (what later became health insurance funds) has always been maintained. In the last ten years, many firms from the two pillars of insurance entered into cooperative ventures to present themselves as single-head insurance. Van Oorschot W “The Reconstruction of the Dutch Social Security System 1980-2000: Retrenchment and Modernisation” accessed at

<http://www.socsci.auc.dk/ccws/Workingpapers/1998-3-ThereconstructionoftheDutchsocialsecuritysystem1980-2000.pdf> on 10 Jul 2004. Bontje M “Health Insurance in the Netherlands: mutuality between public and private funds” accessed at [http://www.aim-mutual.org/docs/martin\\_bontje.pdf](http://www.aim-mutual.org/docs/martin_bontje.pdf) on 10 Jul 2004; Zorgverzekeraars Nederland “Dutch Health Care System: Background” accessed at <http://www.zn.nl/international/english/about-zn/dutchhealthcare/background.asp> on 9 Jul 2004.

Germany's social insurance legislation was of worldwide significance and influenced other European countries.<sup>715</sup> Some saw the spread of social insurance as a civilising mission designed to bring about greater unity among the world's nations.<sup>716</sup>

#### 4.2.2.3 Britain

Social insurance was introduced in Britain only 30 years after Bismarck introduced it in Germany. Britain's social reforms were not spurred on by political pressure, but were aimed primarily at solving the problem of mass poverty.<sup>717</sup> Britain was much slower to see state intervention in welfare, because there was no powerful political movement to represent the English worker at the end of the nineteenth century. The country also had a strong tradition of self-help, sometimes referred to as *laissez-faire*.<sup>718</sup> This tradition was strengthened by friendly societies and trade union benefit funds. The strong influence of the English Poor Laws abated only in the early twentieth century when a greater awareness arose that poverty was a condition for which individuals could not be blamed. It was realised that, by alleviating social distress, the nation's human resources could be protected.<sup>719</sup>

Some are of the opinion that the traditional, strong Anglo-Saxon customary law also contributed to the delay in the introduction of social insurance in Britain. The Anglo-Saxon common law had a strong focus on private property. This meant that the contractual basis of social insurance was strongly emphasised, and that social assistance

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<sup>715</sup> Ritter op cit note 678 at 5.

<sup>716</sup> Idem at 8.

<sup>717</sup> Idem at 131-132. The Labour Party was formed at the turn of the century as a federation of various socialist organisations and trade unions and was, before 1918, never regarded as a revolutionary threat.

<sup>718</sup> *Laissez-faire* is a philosophy advocating self-help and condemning state intervention made popular by Bentham and JS Mill in the late 1800s. "Letting alone should be the general practice, every departure from it, unless required by some great good, is a certain evil" Ogus AI "Great Britain" in Köhler PA & Zacher HF (eds) *The Evolution of Social Insurance 1881-1981: Studies of Germany, France, Great Britain, Austria and Switzerland* (1982) at 159. (Hereafter Ogus).

<sup>719</sup> Ritter op cit note 678 at 133. Increasing criticism of the system of welfare, major changes in the sphere of social ideas and the belief in the individual's ability to improve his situation through his own efforts increasingly gave way to socialist and collectivist attitudes that government should assume a role in this process.

was seen as inadequate because it did not give rise to rights for the individual beneficiary. Social insurance was also not conceived as being part of the ordinary law of the land.<sup>720</sup>

Although it is often believed that the British social security system was only truly reformed during and after World War II with the publication of the Beveridge Report, the social security system underwent significant developments at the beginning of the twentieth century. These developments were more of an ad hoc nature and were less comprehensive than those that characterised the German model during the same period. In Britain, the Industrial Revolution and resultant mass poverty, as well as the influence of the earlier German model, coupled with the rise of Liberalism in the early twentieth century, led to increasing pressure for welfare reform in order to create a better society in which poverty and distress would be eliminated.

Protection for workers existed under British common law, but was insufficient. In terms of the common law, the doctrine of “common employment” was applied.<sup>721</sup> According to this doctrine, a worker was deemed to “accept the risk” of injuries caused by the fault of a fellow worker.<sup>722</sup> The doctrine also laid down that a worker had to prove personal fault on the part of his employer.<sup>723</sup> The position was partly rectified by the Employers Liability Act of 1880 which extended the circumstances in which a worker (injured in the course of his employment) could sue his employer. It also provided that, where an accident resulted from the negligence of another employee entrusted with the supervision of work, the employer could no longer rely on the defence of “common employment”.<sup>724</sup> During this period, since the protection afforded in terms of the prevailing legislative framework was insufficient, protection against workplace injuries was still mostly provided by voluntary schemes, which mostly existed among more affluent workers.<sup>725</sup>

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<sup>720</sup> Ogus op cit note 718 at 236.

<sup>721</sup> Idem at 174. It was originally laid down in 1826.

<sup>722</sup> Idem at 159.

<sup>723</sup> Idem at 174.

<sup>724</sup> Idem at 151.

<sup>725</sup> Ritter op cit note 678 at 147-150. Britain had a Workmen’s Compensation Act of 1897 which, in 1906, was further extended to cover more occupational groups and even took account of occupational diseases, which went beyond the current German practice at the time. Ogus idem at 174.

The first Workmen's Compensation Act was introduced in 1897 and provided that a workman suffering injury from specified employment was entitled to recover compensation from his employer without proof of negligence. This was by no means an insurance scheme, but it nevertheless established the principle of compensation being shared between the employee and the employer.<sup>726</sup> In 1906, the 1897 scheme was extended to cover industrial diseases and most of the occupations which were previously excluded.<sup>727</sup>

Another form of social security protection which developed in the early twentieth century was protection against old age. There was an increasing awareness that poverty was widespread among the aged.<sup>728</sup> In the light of the Bismarck legislation, it was urged that a similar system be introduced in Britain. This was however strongly opposed on the grounds that it would involve the "compulsory adherence of the population", which would necessarily extend the power of the state over the individual. Such extension of power was seen as being harmful to the habit of self-help which prevailed among the working classes to a considerable extent.<sup>729</sup> Timing also played a role in deciding the course of action, because social insurance would not solve the problem of those who were already too old to work. The only existing option was therefore a form of non-contributory pensions. Plans for this were delayed by the Boer War,<sup>730</sup> but, in 1908, an Old Age Pensions Act was enacted which granted pensions, financed from general taxation, to persons aged 70 and above whose means did not exceed a certain amount.<sup>731</sup>

During this same period, measures were also sought to deal with the rising problem of unemployment. The Poor Laws had, up until then, dealt with the problem of unemployment, but were seen to be insufficient. Two forces opposed each other in the process of considering reform. The one group believed that voluntary action (informal

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<sup>726</sup> Ogus *idem* at 175-176.

<sup>727</sup> *Idem* at 151.

<sup>728</sup> *Idem* at 177.

<sup>729</sup> *Ibid.* The friendly societies saw these proposals as a threat to their own privileged position in providing old-age relief, and the trade unions were ambivalent.

<sup>730</sup> 1899-1903.

<sup>731</sup> Ogus *op cit* note 718 at 153.



social security) was the primary source of welfare and should be encouraged so as to make public assistance less attractive. The other promoted the idea that only through a rational and coherent structure of state intervention could the proper degree of welfare be achieved.<sup>732</sup> Only in 1914, with the enactment of the National Insurance Act, was unemployment insurance for the first time comprehensively provided for.

It is clear from the discussion above that Britain also had major legislative, social security reforms in order to combat the effects of the Industrial Revolution and mass poverty. Britain (to a greater extent than Germany) tried to retain the principles of self-help and voluntarism (common to informal social security). This resulted in a less comprehensive overhaul of the system in the early 1900s. With every reform effort there seem to have been opposing factions, one for state involvement and one against, which would rather see the maintenance of the principle of self-help.

#### 4.2.2.4 Conclusion

The social security systems as they developed in Britain and Germany are often compared as two opposing systems, namely the Bismarck and Beveridge systems. Bismarck created the German system based on social insurance in the 1880s, while Beveridge featured in the reform of the British social security system in the 1940s. These

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<sup>732</sup> *Idem* at 152, 181-182. Unemployment insurance was first effected by the Labour Bureaux (London) Act of 1902 in terms whereof the metropolitan local authority was permitted to establish labour bureaus with which unemployed workers could register. This was followed by the Unemployed Workmen Act of 1905 which enabled funds to be used by local authorities to assist unemployed persons to emigrate or move to another area to obtain temporary work, or to find more permanent employment. During the period between 1906 and 1914, a major series of welfare reforms were effected. The National Insurance Act of 1911 introduced the most significant reforms. In 1911, Part I of the National Insurance Act came into force, establishing a health scheme that provided compulsory insurance for all employed manual workers between 16 and 70 earning less than a prescribed amount. It provided for medical treatment and appliances and for a flat-rate financial benefit for sickness, disablement and maternity. The scheme was mainly administered by independent approved societies which were allowed to pay benefits above the national minimum. In 1909, the Labour Exchanges Act came into effect and provided for a national system of labour exchanges administered by the Board of Trade. In 1916, the National Insurance (Part II) Act came into effect. Part II established the unemployment schemes under which flat-rate benefits were payable for a maximum period of 15 weeks of unemployment in one year. These schemes only covered workers in seven industries and were administered by the Board of Trade.

two systems can be seen as the two main foundations for social security in the modern welfare state.<sup>733</sup>

The Beveridge model was based (as will be seen in par 5.2.3) on the solidarity of the total population and not just workers.<sup>734</sup>

The Constitution of the United Kingdom is not codified. This means that it is not contained in a single document but is made up of several sources, such as Acts of Parliament, Conventions, Common Law, Royal Prerogative, European Union (EU) Law, Treaties and Works of Authority. There is therefore no Bill of Rights to protect the right to social security directly. Through EU Policy and Acts of Parliament these are however protected.<sup>735</sup>

The Constitution of the Federal Republic of Germany<sup>736</sup> does not contain any reference to social security. It is however protected through s 20(1) which states that Germany is a “democratic and social federal state”.

The Social State is a state which guarantees and, if required, corrects the economically influenced proportions in a society, with the aim to offer each and everybody a life with dignity of man by giving the members of this society a minimum amount of social welfare.<sup>737</sup>

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<sup>733</sup> The Beveridge system will be discussed in par 5.2.3, ch 5.

<sup>734</sup> Ogus op cit note 718 at 235. Beveridge was initially not commissioned to draw up this report. Arthur Greenwood was a minister without portfolio in the wartime cabinet from 1940 to 1942 and was given a vague commission by Churchill to inquire into the practical development of social policies. He was to consider the adequacy of social insurance and to set up an inter-departmental committee of civil servants to survey existing schemes and make recommendations. Beveridge was appointed as chairman of this committee, but saw possibilities of a wider scope and persuaded Greenwood to allow him to produce the report himself and to use the civil servants only as advisers. The result of this was a major restatement of social policy to cope more adequately with the problems revealed in the 1920s and 1930s by Lord George and Churchill. The underlying value of the social security system is that of solidarity. Solidarity exists in that all the employed are obliged to pay the same income-based social security contributions, and everybody is obliged to pay contributions for all sectors, and all trade unions, health insurance funds, or mutual insurance funds and employers' organisation co-decide about the various aspects of the system.

<sup>735</sup> “Constitution of the United Kingdom” accessed at <http://www.answers.com/topic/constitution-of-the-United-Kingdom> on 28 Feb 2005.

<sup>736</sup> Also known as the Basic Law or Grundgesetz.

<sup>737</sup> Zacher H “Sozialstaatsprinzip” *Handwoertenbuch der Wirtschaftswissenschaften* (1977) at 154.

Certain factors should be emphasised to illustrate why social insurance made such an exceptionally early appearance in Germany as compared with Britain. Germany had a long tradition of believing that the state was responsible for the wellbeing of its citizens. It was believed that the state had a special role and function in promoting social welfare. This belief derived from the earlier feudal system where the subject could expect adequate provision for material needs as long as he fulfilled his obligation to the appropriate authority.<sup>738</sup>

Industrialisation also occurred relatively late in Germany. As a result of the experience gained from other countries, the German industrial bourgeoisie feared the uncontrollable growth of the urban (potentially revolutionary) proletariat.<sup>739</sup> Consequently, the idea developed that the middle class should educate the lower classes in the community, thereby encouraging them to move towards savings associations<sup>740</sup> and benefit societies.<sup>741</sup>

It can therefore be concluded that the growth of social insurance as an institution concerned with the protection of workers in Western Europe took place in two phases. The first phase extended from the time Germany's 1883 Sickness Insurance Act first came into effect up to 1919, although it spread slowly from and around Germany (where it originated) towards the central and northern parts of Europe, and then to Britain.<sup>742</sup> The second phase in the evolution of social insurance originated in about 1919, when it spread more swiftly throughout Europe, and beyond Europe, to most of the industrialising countries during the immediate post-war period. This movement also gained momentum under the influence of the International Labour Organisation (ILO), which applied its international information and standard-setting capability in the service of the development of national schemes.<sup>743</sup>

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<sup>738</sup> Ritter op cit note 678 at 17-18.

<sup>739</sup> Ibid.

<sup>740</sup> *Sparvereine*.

<sup>741</sup> *Unterstützungsvereine*. Ritter op cit note 678 at 18.

<sup>742</sup> Perrin op cit note 700 at 297.

<sup>743</sup> The ILO prepared a series of documents and instruments relating to unemployment, maternity, workmen's compensation for accidents and occupational diseases, sickness insurance, invalidity insurance,

## 5 THE PROTECTION AFFORDED BY THE STATE IN MODERN SOCIETY

### 5.1 The era after World War I

#### 5.1.1 Germany

In the last two decades prior to World War I, Germany completed its transition from an agricultural to an industrial society.<sup>744</sup> After the turn of the century, Germany's social insurance system entered a period of expansion. This can be attributed to the fact that the deficiencies and imperfections of the system as it developed demanded rectification.<sup>745</sup> Benefits were increased and coverage was extended to new social groups.<sup>746</sup>

After World War I, the Weimar Republic was established. This coincided with the world economic crisis and eligibility for benefits became more stringent and monetary benefits were reduced, yet the fundamental structure remained intact.<sup>747</sup>

After the birth of social insurance in Germany in 1880, the state emerged as a major role player in the social security arena, and informal social security in its original form disappeared. The German social insurance system deliberately created new state-controlled social institutions, leaving little or no room for private or informal social security schemes, although these were incorporated in the system's administrative infrastructure.<sup>748</sup> Britain, however, managed to preserve the continuity of existing social

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old-age insurance and survivor's insurance. With the adoption of these instruments, the ILO provided its member states with an international model. Perrin 299-300. Also see par 5.2.4, ch 5.

<sup>744</sup> Zöllner op cit note 657 at 34.

<sup>745</sup> Idem at 32.

<sup>746</sup> Ritter op cit note 678 at 85 & 103-104. Before 1914, there was already an improvement in the general situation of working-class families as a result of social insurance protection. By 1908, it was estimated that the German working class spent an average of three percent of its expenditure on insurance contributions.

<sup>747</sup> Zöllner op cit note 657 at 43.

<sup>748</sup> The role of community organisations also became prominent in the German history of unemployment insurance. After World War I, the number of unemployed people soared. In November 1918, a decree was issued providing relief for the unemployed. In terms of this decree, the communities were responsible for

institutions by allowing “Approved Societies” to provide informal (private) protection in respect of risks such as sickness, disablement and unemployment insurance. However, this did not prove practical and was discontinued after World War II in favour of a unified state administration.<sup>749</sup> This was also the case in other European countries where certain informal social security institutions co-existed within the formal social protection environment.<sup>750</sup>

### 5.1.2 Britain

After World War I, the Labour Movement arose as an undeniable force that could not be ignored. The very high levels of unemployment dominated social welfare policy during this period and the national insurance structure as a whole was affected by the difficulties caused by unemployment. Consequently, unemployment insurance legislation was amended to provide protection.<sup>751</sup> Other forms of social protection, for example National Health Insurance, underwent very little change during the interwar years.<sup>752</sup> The only great change to the social security system during this period was the inclusion of old-age pensions under the national insurance scheme.<sup>753</sup>

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unemployment relief. The state would contribute 50 percent and the various German states 33 percent of the outlay. From 1923 onwards, employers and employees had to pay contributions in respect of unemployment relief. Only in 1927 did a law on labour offices and unemployment insurance come into force and a National Institution for Labour Office and Unemployment Insurance was established in the form of a corporation under public law. (*Reichsanstalt für Arbeitsvermittlung und Arbeitslosenversicherung*). Idem at 50.

<sup>749</sup> Ritter op cit note 678 at 185.

<sup>750</sup> Ibid. See the discussion of the example of the Netherlands in footnote 714 of the present chapter.

<sup>751</sup> Ogus op cit note 718 at 188-189. During this period, unemployment legislation was greatly expanded to provide protection, for example in 1921 “an uncovenanted benefit” was introduced in terms of which a benefit was paid in advance of a contribution on the assumption that, in the long run, such contributions would in fact be made.

<sup>752</sup> Ibid.

<sup>753</sup> Idem at 154. In 1925.

### 5.1.3 *International organisations*

The International Labour Organisation (ILO) was established after World War I by way of the Treaty of Versailles.<sup>754</sup> The preamble to its constitution referred to the need for the protection of workers against sickness, disease and injury arising out of their employment. Thus the right to social security was, for the first time, recognised at international level.<sup>755</sup>

The ILO was initially created for humanitarian reasons. The intolerable conditions under which workers were functioning became less acceptable. This is apparent from the Preamble to the Constitution of the ILO where it is stated, “conditions of labour exist involving injustice, hardship and privation to large numbers of people”. The creation of the ILO also had a political motivation. It was feared that workers would revolt if there was no improvement in their condition. The Preamble notes that injustice produces “unrest so great that the peace and harmony of the world are imperilled”. The third reason for the creation of the ILO was economic. Because of its inevitable effect on the cost of production, any industry or country adopting social reform would find itself at a disadvantage compared to its competitors.<sup>756</sup> Another reason for the creation of the ILO was that, at the end of World War 1, workers had contributed significantly both on the battlefield and in industry. This idea appears at the very beginning of the Constitution: “Universal and lasting peace can be established only if it is based upon social justice.”<sup>757</sup>

The ILO Constitution was drafted between January and April of 1919 by the Labour Commission set up by the Peace Conference.<sup>758</sup> It resulted in a tripartite organisation, the

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<sup>754</sup> Versailles 1919, Preamble Part XIII of the Treaty of Peace.

<sup>755</sup> Singh op cit note 489 at 1.

<sup>756</sup> The Preamble states that “*the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries*”.

<sup>757</sup> ILO “ILO History” accessed at <http://www.ilo.org/public/english/about/history.htm> on 1 Nov 2004. (Hereafter “ILO History”).

<sup>758</sup> The Commission was composed of representatives from nine countries, namely: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.

only one of its kind bringing together representatives of governments, employers and workers in its executive bodies.<sup>759</sup>

The first annual International Labour Conference<sup>760</sup> met in Washington as from 29 October 1919. It adopted the first six International Labour Conventions, which dealt with hours of work in industry, unemployment, maternity protection, night work for women, minimum age and night work for young persons in industry. The ILO would be run by an Executive Council. The ILO Executive Council would be elected by the Conference, and half of the members would be government representatives, one-fourth workers' representatives and one-fourth employers' representatives.<sup>761</sup>

The International Social Security Association (ISSA)<sup>762</sup> was also founded in the years between the two great wars under the auspices of the ILO. Its aims were the protection, promotion and development of social security throughout the world. While the ILO comprises of member states, ISSA is an association of government departments and central institutions, or national federations of institutions, which administer social security, or one of its branches of social security, or mutual benefit schemes. It has consultative status with the United Nations Economic and Social Council and its structures include a General Assembly, a Council, a Bureau and a General Secretariat.<sup>763</sup>

## 5.2 The era after World War II

### 5.2.1 General

After the experiences of the Depression and World War II, the number of persons covered by social security grew rapidly in all industrialised countries.<sup>764</sup> This state of

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<sup>759</sup> "ILO History" op cit note 757.

<sup>760</sup> Composed of two representatives from each government, and one each from employers' and workers' organisations from each member state.

<sup>761</sup> "ILO History" op cit note 757.

<sup>762</sup> Founded in Brussels in 1927 (4 October).

<sup>763</sup> Singh op cit note 489 at 388.

<sup>764</sup> Van Langendonck op cit note 631 at 2.

social security as found in the present Western European welfare state could be attained only where the means became available for the state to provide its citizens with a certain degree of economic security and when the population became persuaded that, for economic security, they must place their ultimate confidence in the state.<sup>765</sup> World War II was, for western industrialised nations, the turning point when this level of consciousness was reached.<sup>766</sup> From then on, social security was to be considered a basic human right and therefore a primary obligation of the state.<sup>767</sup> This was reflected in all national constitutions drafted after World War II, which consistently recognised the right to social security as one of the basic human rights. This had the effect that social protection became the direct responsibility of the state.<sup>768</sup>

### 5.2.2 *Germany*

The National Socialist Party<sup>769</sup> had no particular social policy, mainly because the leadership had neither a tradition rooted in, nor experience of, the labour world.<sup>770</sup> The political leadership of the National Socialist Movement opposed self-administration and, in May 1933, a law was passed which allowed for the creation of honorary posts in social insurance.<sup>771</sup> In 1934, self-administration was formally abolished by the Reconstruction Act.<sup>772</sup> Apart from this, social policy was based largely on the usual lines and, in some

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<sup>765</sup> Ibid.

<sup>766</sup> Ibid.

<sup>767</sup> Idem at 3. This was made clear by a number of international legal documents and declarations: the “Atlantic Charter” of 14 August 1941, the Declaration of the Aims and Objectives of the International Labour Organisation (Philadelphia Declaration) of 10 May 1944, the Universal Declaration of Human Rights on 10 December 1948, the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, the European Social Charter of 18 October 1961.

<sup>768</sup> Ibid.

<sup>769</sup> 1933-1945.

<sup>770</sup> Zöllner op cit note 657 at 52.

<sup>771</sup> Idem at 53. This especially affected local sickness insurance funds. This resulted in the dismissal of at least 10 percent of all sickness insurance employees. Grounds for dismissal included Marxist activities, non-Aryan decent and no guarantee of wholehearted backing for the national state because of previous political activity. In a publication on the local sickness insurance schemes (*Die Ortskrankenkasse*), a Nazi official justified these measures by stating that the changes to local sickness insurance were important to re-establish the real purpose of such insurance, namely the insurance of the working population of Germany. At the time, these insurance schemes were largely in the hands of Marxists and Jews.

<sup>772</sup> *Aufbaugesetz* (July 1934).



ways, further development was even brought about, for example additional groups of self-employed were included in sickness insurance.<sup>773</sup>

Western Europe was divided after World War II. In Germany, the Federal Republic of Germany was created and it had to re-create its social welfare dispensation. The example of the Weimar Republic, which was established after World War I, was greatly reapplied and extended. During this period, legislation was mostly restorative in nature and little innovation took place. This also applied to social welfare law. Germany was cut off from international discussion for almost a decade and the term “social security” entered the German language only at the beginning of the 1950s. The initial social institutions (re-established after the war) were streamlined and expanded from the 1950s onwards.

After World War II, there was a strong trend against centralisation, there was a return to the original system of self-administration and the old traditions were followed. After the founding of the Federal Republic of Germany, self-administration was reinstated in 1952.<sup>774</sup>

The era between 1970 and 1997 is known as the era of reform, and several changes were effected to the social security system in general. Today, the German system of social security rests on five pillars of social insurance, namely statutory unemployment insurance, statutory pension insurance, statutory health insurance, statutory accident insurance and statutory long-term care insurance.<sup>775</sup> A discussion of the legislative process of refinement and improvement of the formal social security system in Germany since World War II will however have very little relevance for the development of a

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<sup>773</sup> For example artists, midwives and people in home industries were included. Zöllner op cit note 657 at 54.

<sup>774</sup> Idem at 58 & 60.

<sup>775</sup> Deutsche Sozialversicherung “The Pillars of Social Insurance” accessed at [http://www.deutsche-sozialversicherung.de/en/guide/pillars\\_print.html](http://www.deutsche-sozialversicherung.de/en/guide/pillars_print.html). Statutory health insurance is one of the five pillars of the German social insurance scheme. The system commenced with the Health Insurance Act of 1883, which introduced compulsory insurance for industrial workers. The Reich Insurance Code of 1911 systematised health, pension and accident insurance, integrating them in one set of laws. The Reich Insurance Code (RVO) extended compulsory insurance to messengers, migrant workers and those working in farming and forestry. Up until the enactment of the Health Care Reform Act, 1 of 1989, the RVO was the decisive legal basis for health insurance law.

model of informal social security for South Africa. This is because the welfare state (as it functioned in Germany after World War II) has become so sophisticated that very little evidence of the “informal” roots of the system still exists today. It is however interesting to note that, as far as statutory, long-term care for the elderly in Germany is concerned, traces of informal social security can be seen in the modern setting. This particular form of social security was introduced in Germany in 1995 and justifies a discussion to illustrate the evolutionary application of the concept of informal social security within the modern welfare state.<sup>776</sup>

More and more developed social security systems are building more flexibility into their systems in order to relieve the pressure on the state and taxpayers as sponsors of the system. In the process, they embrace two of the most significant features of informal social security, namely power to the people and flexibility. In Germany, long-term care insurance is an example of this.<sup>777</sup>

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<sup>776</sup> See par 5.2.2.1, ch 5.

<sup>777</sup> Another excellent example of this is that of the Dutch PGB (*Persoonsgebondenbudget Financiering*, also known as the PGB). The PGB can be defined as the giving of a guaranteed amount of money to an insured which is indicated for a specific type of aid in kind. So, instead of aid in kind, the sum of money is advanced so that the individual can use that amount for his/her own care. This amount can be paid to private or public institutions for purposes of care, but also to family members. In the Netherlands, the amount of the PGB is worked out on a sliding scale and has a certain maximum threshold. The aim of the PGB is to provide an alternative for chronic care for certain categories of the elderly, the chronically ill and the disabled. The PGB gives greater independence to those depending on care. The most important characteristic of the PGB is that it gives the user of care provisioning a say in the use of care. All people have an intrinsic right to a say over the direction of their own existence. One must be able to have a say about the way in which care is organised, administered and executed. Only then can it be certain that the service delivery and care are in accordance with own needs and preferences. One of the main benefits of this is the fact that especially older people can stay longer in their homes without having to be moved to public institutions. The same applies to the disabled. It seems that this concept does not only hold benefits for the state, but also for the individual who perceives it as very positive. The PGB is also (less commonly) known as the client-gebonden budgetten. Tweede Kamer deer Staten-Generaal 2 (23 904)(Nr. 13) Financieel Overzicht Zorg 1995 *Brief van de Minister en de Staatssecretaris van Volksgezondheid, Welzijn en Sport* accessed at <http://www.overheid.nl/> on 1 Apr 2004. The PGB is also an example where service delivery is informalised, while regulation, administration and financing are retained by the state.

### 5.2.2.1 Modern applications of the welfare state and the crisis of the welfare state

One of the most interesting features of the modern German social security system is long-term care insurance for the elderly. This can be seen as the “outsourcing” of the service delivery leg of social security. It therefore constitutes informal service delivery. The financing and administration legs of the function are still retained within the formal social security system. This is an evolution of informal social security, because it illustrates that informal social security can be “informal” as regards (a) regulation, (b) administration, (c) financing and (d) execution (service delivery). In the example of long-term care for the elderly in Germany, state involvement exists with regard to (a) to (c), but (d) is left to “informality”.

Germany has been faced with tremendous growth in its elderly population. In 1995, about 21 percent of the population consisted of Germans 60 years and older.<sup>778</sup> It is expected that this will increase to 36 percent in 2030.<sup>779</sup> In order to address this, Germany introduced a mandatory, long-term care (LTC) insurance system in 1995. The system became fully operational in July 1996.<sup>780</sup>

This programme shifts the financial burden in respect of long-term care from the Länder (states) and municipalities.<sup>781</sup> For 20 years prior to 1994, acute conditions were covered by universal health insurance, while long-term care was covered only in the case of the most needy through a land-based, means-tested programme.<sup>782</sup>

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<sup>778</sup> Geraedts Max, Heller GV, Harrington CA “Germany’s Long-Term-Care Insurance: Putting a Social Insurance Model into Practice” *Milbank Quarterly (A Journal of Public Health and Health Care Policy)* Vol. 78, No. 3 (2000) at 375. (Hereafter Geraedts et al).

<sup>779</sup> Ibid.

<sup>780</sup> Ibid.

<sup>781</sup> It expanded home and community-based services, increased the supply of long-term care services, lessened the dependence on means-tested welfare, and increased support for informal caregivers. Cuellar Allison E & Wiener JM “Can Social Insurance for Long-term Care Work? The Experience of Germany in Health Affairs” *The Policy Journal of the Health Sphere* (Vol. 19, Number 3, May/June 2000) at 9. (Hereafter Cuellar & Wiener).

<sup>782</sup> Ibid.

In terms of this law, every German inhabitant has to be insured against the risks of long-term care by the same institution which provides health insurance.<sup>783</sup> This insurance is part of health insurance, based on the principle that “care follows illness”, meaning that long-term care insurance should be provided by the same institution providing health insurance.<sup>784</sup>

Care insurance in Germany is financed by care funds that operate within the system of health insurance. These payments can be made directly to the person in need of care, or to the carer (in which case the amount is lower).<sup>785</sup> This provides a link between the family’s responsibility to care and the welfare state. Care insurance ensures comprehensive cover for those in need of care, and provides an income and pension entitlement for many carers within the family. It encourages care in the home and gives rise to the development of mobile care services. This also means that the elderly could remain in their own homes for longer, whilst tens of thousands of jobs have been created in the care services.<sup>786</sup>

### 5.2.3 *Britain*

In Britain after the war years, there was widespread poverty, but also an increased feeling of solidarity and nationality. It is believed that this set the stage for the development of the welfare state.

As can be seen above, Beveridge was not the originator of social security in Britain, but he reformed the systems dramatically and, for the first time, rationalised social insurance methods. Some argue that what was even more important than his reforms was the fact

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<sup>783</sup> This meant that all those who were not members of the statutory health insurance system, but who had private health insurance, had to be insured under private, compulsory long-term care insurance. Those insured under statutory health insurance funds automatically receive compulsory, long-term care insurance and health insurance from the same insurance company. Geraedts et al op cit note 778 at 27.

<sup>784</sup> Riedel H “Private Compulsory Long-Term Care Insurance in Germany” *The Geneva Papers on Risk and Insurance* Vol. 28 No. 2 (April 2003) at 275-293. (Hereafter Riedel).

<sup>785</sup> Dienel C “The Individual at the Cross Roads of Various Solidarity Systems” Paper presented at European Regional Meeting (Luxembourg, 19-21 May 1999) at 17.

<sup>786</sup> Ibid.

that he established three commitments on which he based his reforms, namely full employment,<sup>787</sup> family endowment<sup>788</sup> and the National Health Service.<sup>789</sup>

The Beveridge Report was published in 1942 and ushered in reform of the English welfare system. The Beveridge model was based on solidarity among the entire population, and not just workers.<sup>790</sup> Not just workers were entitled to subsistence security, but the whole population. Regardless of the type of employment, the system provided, by means of taxes, the same lump sum benefit for every citizen in the case of certain risks such as unemployment, sickness, pension, etcetera.<sup>791</sup> Beveridge's submission comprised two forms, namely minimum coverage by the social insurance scheme and coverage of any surplus by way of private transaction.<sup>792</sup> Social assistance was therefore intended to provide a safety net for those in respect of whom the insurance approach was unavailable or insufficient.<sup>793</sup>

This resulted in the juxtaposing of "Approved Societies" and formal social security institutions as far as the administration of social security was concerned. The establishment of different insurance schemes at different times and for different purposes

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<sup>787</sup> Government should commit itself to the maintenance of a high and stable level of employment and the means for securing this should, in the short term, be through a substantial degree of control of production to speed up reconstruction after the war and, in the long term, through control of capital expenditure and the creation of incentives for the proper distribution of industry and the mobility of labour, public spending to stimulate demand where depression threatens, and training facilities to redeploy the workforce. Oguş op cit note 718 at 191.

<sup>788</sup> Family endowment was paid as a non-means-tested universal benefit.

<sup>789</sup> For most people, the National Health Service represented the welfare state. This system of health care, in which the focus shifted from social insurance to a system of universal provision financed by general taxation, formed the foundations of the welfare state and recognised the limitations of social insurance. Oguş op cit note 718 at 192.

<sup>790</sup> Ibid. The underlying value of the social security system is that of solidarity. The solidarity operates among: (a) the employed and the jobless; (b) the young and the old; (c) the healthy and the ill; (d) families without children and those with children. Solidarity exists, in that all the employed are obliged to pay the same income-based social security contributions, and everybody is obliged to pay contributions for all sectors, and all trade unions, health insurance funds, mutual insurance funds and employers' organisation co-decide on the various aspects of the system.

<sup>791</sup> <http://socialsecurity.fgov.be>.

<sup>792</sup> "Social security must be achieved by cooperation between the State and the individual... The State in organising security should not stifle incentive, opportunity, responsibility, in establishing a national minimum, it should leave room and encouragement for voluntary action by each individual to provide more than the minimum for himself and his family." Oguş op cit note 718 at 194.

<sup>793</sup> Idem at 235.

naturally led to a lack of coordination, for example in the field of health care. The National Health Insurance Scheme, in particular, allowed for minimum, state-provided benefits and the supplementation of these benefits through private provisioning. The health scheme, which attempted to combine the virtues of a state system (providing minimum benefits) with a private scheme (allowing for additional benefits), resulted in a considerable degree of decentralisation.<sup>794</sup> Administration was in the hands of the “Approved Societies” (friendly societies, trade unions, insurance and collection societies), provided that they satisfied two conditions: first, they could not be operated for profit, and, secondly, they had to be subject to the control of their members. These “Approved Societies” could formulate their own rules and regulations governing the payment of benefits, though they were subject to some overriding statutory principles.<sup>795</sup> Unemployment insurance was more centralised.<sup>796</sup> One of Beveridge’s fundamental principles related to the unification of administrative responsibility and unemployment, and health and pensions were amalgamated into a single national insurance system.<sup>797</sup>

The Beveridge model differed from the Bismarck model in that it was not based purely on social insurance. Social insurance was treated as only one part of a comprehensive policy of social progress.<sup>798</sup> The basic principle of the system however relied on the contributory principle.<sup>799</sup> A national insurance fund was established to which everyone (not just employees) had to contribute on a flat-rate basis. Flat-rate benefits were payable and all citizens were covered. Citizens were divided into categories which dictated their

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<sup>794</sup> *Idem* at 229.

<sup>795</sup> *Ibid.*

<sup>796</sup> *Ibid.*

<sup>797</sup> *Ibid.*

<sup>798</sup> “Social insurance fully developed may provide income security; it is an attack upon Want. But Want is one only of five giants on the road of reconstruction and in some ways the easiest to attack. The others are Disease, Ignorance, Squalor and Idleness.” Beveridge Report par 8. Modern History Sourcebook: Sir William Beveridge: Social and Allied Services (The Beveridge Report), November 1942 accessed at <http://www.fordham.edu/halsall/mod/1942beveridge.html> on 4 Nov 2004. (Hereafter Beveridge Report).

<sup>799</sup> “The first view is that benefit in return for contributions, rather than free allowances from the State, is what the people of Britain desire. This desire is shown both by the established popularity of compulsory insurance, and by the phenomenal growth of voluntary insurance against sickness, against death and for endowment, and most recently for hospital treatment. It is shown in another way by the strength of popular objection to any kind of means test.” (Beveridge Report *idem* at par 21). “The scheme is described as a scheme of insurance, because it preserves the contributory principle.” (Beveridge Report *idem* at par 24).

entitlement in respect of certain risks.<sup>800</sup> Room was left for voluntary provisioning as a top-up of minimum state benefits.<sup>801</sup> A national health service existed and means-tested social assistance was available to those excluded from social insurance.

The Beveridge model of social insurance proved to be a failure in combating poverty and changes to the system were introduced, for example earnings-related contributions.<sup>802</sup> The Beveridge system did not ultimately provide a permanent solution and many deficiencies in the system were revealed after implementation. The main shortcomings related to the fact that a number of families remained below the poverty line. It took no account of such factors as disability, divorce and long-term unemployment, that is, of situations where people were unable to contribute. Benefits were inadequate and were held at an unreasonably low level. They provided for the subsistence levels only - enough to cover the costs of physical existence, but not enough for a basic standard of living, let alone replacing income lost owing to redundancy or sickness. This resulted in some major changes to the original Beveridge model, for example the system of flat-rated payments and contributions was abolished.<sup>803</sup>

As with Germany, a discussion of the refinement and improvement of the social security system in Britain since the World War II will have very little relevance for the development of a model for informal social security in South Africa. The primary lessons to be extracted from the development path of social security in Britain, relate to the co-

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<sup>800</sup> *“The plan covers all citizens without upper income limit, but has regard to their different ways of life; it is a plan all-embracing in scope of persons and of needs, but is classified in application. In relation to social security the population falls into four main classes of working age and two others below and above working age respectively, as follows: (1) Employees, that is, persons whose normal occupation is employment under contract of service, (2) Others gainfully occupied, including employers, traders and independent workers of all kinds, (3) Housewives, that is married women of working age, (4) Others of working age not gainfully occupied, (5) Below working age, (6) Retired above working age.”* (Beveridge Report idem at par.19).

<sup>801</sup> *“The third principle is that social security must be achieved by co-operation between the State and the individual. The State should offer security for service and contribution. The State in organising security should not stifle incentive, opportunity, responsibility; in establishing a national minimum, it should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself and his family.”* (Beveridge Report idem at par.9).

<sup>802</sup> Ogun op cit note 718 at 201.

<sup>803</sup> Grunsell J “60 Years After Beveridge: Welfare Reform - Back to the Future?” accessed at <http://www.socialistparty.org.uk/2002/281/index.html?id=pp6.htm> on 15 Jul 2004. (Hereafter Grunsell).

existence of formal and informal social security in the evolution from informality to a welfare state. These are discussed in paragraph 6 of the present chapter.

#### 5.2.4 *International organisations*

After World War II, the United Nations General Assembly adopted the Universal Declaration of Human Rights, in which the right to social security for every member in society is protected.<sup>804</sup> This right to social security also became part of most constitutions around the world during this period.<sup>805</sup>

After World War II, the International Labour Office adopted the Philadelphia Declaration, which recognised the solemn obligation of the ILO to further, among the nations of the world, such programmes as would achieve the extension of social security measures. In 1950, the ILO also noted that a new conception was transforming the pre-war systems of social insurance in many countries. According to the ILO, there was a movement everywhere towards including additional classes of the population, to cover a wider range of contingencies and to provide benefits more adequately suited to needs and which loosened the ties between benefit right and contribution payment. It was thus a “quest for universality”, which transformed the pre-war social service state into some kind of welfare state.<sup>806</sup>

Another important instrument during this period was the ILO Minimum Standards Convention<sup>807</sup> which made provision for medical care, sickness benefits, unemployment benefits, old-age benefits, invalidity benefits, employment injury benefits, family benefits, maternity benefits and survivor’s benefits. This was followed by a number of

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<sup>804</sup> Article 22, Universal Declaration of Human Rights, Adopted by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948.

<sup>805</sup> Singh op cit note 489 at 2.

<sup>806</sup> Briggs A “The Welfare State in Historical Perspective” in Goodin Robert E & Mitchell D (eds) *The Foundations of the Welfare State Volume 3(III)* (2000) at 224-225. (Hereafter Briggs). This international view or movement will be discussed at length in the British context.

<sup>807</sup> 102 of 1952.



conventions and resolutions amplifying and extending the scope of the various social security measures.<sup>808</sup>

With the improvement of production conditions and with the increased sophistication of the organisation of human society, the problem of insecurity was tackled in ways that were more efficient. New ways were developed to create a stronger sense of security among the population.<sup>809</sup> At the same time, and during the same period, private charity transformed itself into public assistance.<sup>810</sup> The “mutualist” or informal social security movement exerted quite a strong influence on the development of social security in Western Europe.<sup>811</sup>

### ***5.2.5 The meaning of “welfare state”***

The state as a structure was created to provide its citizens with social protection, which they could not be expected to provide for themselves. This role of the state as protector developed over time. Initially, the state was only expected to provide military protection, directed at protection against aggression by other people. Police and judiciary powers against criminal attacks by fellow citizens were also based on this principle. The state then also became invested with protective duties in respect of other risks against which people were unable to protect themselves, for example social security risks.<sup>812</sup> The welfare state was therefore not a new institution, but a gradual evolution of the role of the state in the social security arena, made possible by more economic and political resources.

The advent of the welfare state was marked by state intervention in the protection against social security risks. These first interventions were of a mixed nature. They were provided along private legal lines and were made compulsory by public legal authorities.

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<sup>808</sup> Singh op cit note 489 at 2.

<sup>809</sup> Social insurance measures which have developed can serve as an example in this regard.

<sup>810</sup> Van Langendonck op cit note 631 at 2.

<sup>811</sup> Ibid.

<sup>812</sup> Ibid.

Certain minimum employment requirements were set whereby employers had to provide employees with certain guarantees. After a while, this was made compulsory by legislation within the same framework as the contract of employment, and it became obligatory to insure the worker with a mutual insurance fund, which provided further protection when the contract of employment ended.<sup>813</sup> It was only much later that the duty to provide protection against risks inherent in human existence was considered a direct and primary duty of the state. This evolution can be described as the transition from state interventionism to state protection, or from social insurance to social security.<sup>814</sup>

The phrase “welfare state” is of recent origin.<sup>815</sup> It was first used to describe Labour Britain after 1945. From Britain, the phrase made its way around the world.<sup>816</sup>

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<sup>813</sup> Ibid.

<sup>814</sup> Ibid. In Britain, the year 1948 is known as the year of the arrival of the welfare state. It began in 1946 with the passage of the National Health Service and the National Insurance Act and in 1948 with the National Assistance Act (establishing the National Assistance Board) and Children’s Acts. This ended the supremacy of the voluntary organisation. In 1948 it was passed to the nation as a whole with the abolition of the Poor Laws and the establishment of the National Assistance Board. With the introduction of the National Assistance Act in 1948, the Elizabethan Poor Laws finally disappeared from the statute book and the machinery of the welfare state was largely complete. This meant a change from Public Assistance to National Assistance and the Assistance Board encouraged people to come forward to use the system, especially those who still feared the stigmatisation of the previous Poor Laws. Another important piece of legislation in this process of creating the British welfare state was the National Insurance Act of 1946. This Act established an extended system of national insurance, providing pecuniary payments by way of unemployment benefits, sickness benefits, maternity benefits, pensions, a widow’s benefit, a guardian’s allowance and death grants, unemployment insurance, national health insurance, widows’, orphans’ and old-age contributory pensions and non-contributory old-age pensions. In 1966, the Labour Government brought pensions, insurance and assistance together in a new Ministry of Social Security, to which the NHS was later added. National Assistance was also renamed “Supplementary Benefits” in order to overcome the reluctance of many to apply for it.

<sup>815</sup> It should be noted that the term “welfare state” is somewhat ambivalent, especially in the German context. It can refer to the modern democratic *Sozzialstaat*, but it also carries echoes from the period of absolutism when it signified state “welfare” for citizens subject to a strict form of social control exercised by the paternalistic government. See Ritter op cit note 678 at 117-120.

<sup>816</sup> Briggs op cit note 806 at 221. The term “welfare state” was often very loosely used and referred to both social and economic changes. Welfare state models require one or two generations to come to fruition. The 1970s represented a watershed for both these systems (as well as for other welfare states). In the British case, Margaret Thatcher initiated, in the early 1980s, a series of reforms which would (in the course of time) pull the rug from under the Beveridgean postwar welfare state model. In Germany, the catalyst for significant welfare state change would be the fall of the Berlin Wall in 1989 and the reunification of Germany. Daly M *The Gender Division in Welfare: The Impact of the British and German Welfare States* (2000) at 2. (Hereafter Daly).

The concept of a welfare state can mean different things in different countries. Basically, three models exist, namely: an ideal model in terms of which the state accepts responsibility for the provision of comprehensive and universal welfare for its citizens; a state welfare model in terms of which welfare is provided by the state; and a social protection model in terms of which social protection is not delivered by the state at all, but through a combination of independent, voluntary and government services.<sup>817</sup>

For example, the British welfare state is based on three principal elements, namely the guarantee of minimum standards, including a minimum income, social protection in the event of insecurity, and the provision of services at the best possible level.<sup>818</sup> The German welfare state adheres to the principle that social welfare is most effectively furthered through economic development. The German economy and welfare system developed through a corporatist structure based on the existence of mutual aid associations that remained the basis for subsequent social protection. Social insurance, which covers the cost of health, some social care and much of income maintenance, is managed by a system of independent funds. There is, thirdly, a strong emphasis on the principle of subsidiariness. This entails that services should be independently managed and that state intervention should be residual and limited only to circumstances where coverage is otherwise not sufficient.<sup>819</sup>

Many believe that the welfare state makes people less inclined to work, or that it will lead to high taxes. It is also believed that welfare services provided by the state are more expensive and less efficient than the same services provided by private business.<sup>820</sup> These assumptions are not necessarily true.<sup>821</sup>

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<sup>817</sup> Robert Gordon University Aberdeen “An Introduction to Social Policy: The Welfare State” accessed at <http://www2.rgu.ac.uk/publicpolicy/introduction/wstate.htm> on 1 Nov 2004. (Hereafter “An Introduction to Social Policy: The Welfare State”).

<sup>818</sup> Ibid.

<sup>819</sup> Ibid.

<sup>820</sup> Wikipedia “The Welfare State” accessed at [http://en.wikipedia.org/wiki/Welfare\\_state](http://en.wikipedia.org/wiki/Welfare_state) on 1 Nov 2004.

<sup>821</sup> Atkinson AB *Incomes and the Welfare State: Essays on Britain and Europe* (1996) at 12.

Much of the criticism of the welfare state is believed to stem from misconceptions about the welfare state.

The welfare state was never designed for the poor. It was designed to stop people becoming poor, which is very different.<sup>822</sup>

Once the concept of state social security (the welfare state) was adopted, the changes to be made with regard to the previous situation (where private or informal social security provisioning existed) were quite radical.<sup>823</sup> For example, under traditional (informal) social insurance schemes, only those united in an association to defend their interests could be protected by that particular fund, and membership was voluntary. The first state interventions, for example under Bismarck, made such funds compulsory for certain groups of low-paid workers in dangerous occupations. Mandatory insurance was later gradually extended, but remained restricted to low-wage earners and was sometimes even limited by a wage ceiling.<sup>824</sup> Under the Bismarck system of compulsory social insurance, the contribution was divided between the employer and employee. This was done to gain sympathy for social security reform from trade unions and to obtain the right for employers to sit on the administrations of these funds.<sup>825</sup>

According to the traditional view, social protection was based mainly on the insurance concept. This means that premiums had to be paid by the insured and that the premiums were calculated according to the size of the risk to be covered.<sup>826</sup> In social insurance, the premiums to be paid were termed “contributions” because of the mutual fund or friendly society tradition. These contributions were however not calculated according to the individual risk of each member, but according to the aggregate risk of the whole group of members.<sup>827</sup>

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<sup>822</sup> Spicker P “Poverty and the Welfare State” A Catalyst Working Paper accessed at <http://www.catalystforum.org.uk/pubs/paper9.html> on 1 Nov 2004.

<sup>823</sup> Van Langendonck op cit note 631 at 4.

<sup>824</sup> Ibid.

<sup>825</sup> Idem at 5. This is one of the main stumbling blocks for self-employed people.

<sup>826</sup> Ibid.

<sup>827</sup> Ibid.

Under private social insurance arrangements, relations between funds and members were deemed to be of a contractual nature. The claimant had to introduce and prove his claim. These elements are still found in contemporary social security regulations. However, there is an added duty on a public service to provide legally guaranteed protection to all who need it, offering adequate information and assistance to those who are unable to file their claims in due time and in the correct manner.<sup>828</sup>

Social insurance was later on supported by social assistance<sup>829</sup> as a safety net, and social insurance was even extended to non-contributory beneficiaries. This resulted in further expansion and protection of the social security system in the welfare state.<sup>830</sup>

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<sup>828</sup> Ibid. The South African Road Accident Fund (Road Accident Fund Act, 56 of 1996) is an example of this type of risk calculation.

<sup>829</sup> Social assistance tends to rely on unattractive procedures of inquiry to frighten off possible “undeserving poor”. It also imposes conditions on claimants to conform to accepted social standards and morality in order to separate the “deserving” from the “undeserving” poor. Some of this is still found in present-day social security principles. The right of access should however remain a basic right for everyone and the right to benefits should not be restricted or be made unattractive through excessive control measures. The right of access to benefits can also not be made dependent on any conditions limiting the citizen’s personal freedom and self-determination. Van Langendonck op cit note 631 at 6.

<sup>830</sup> Perrin op cit note 700 at 406-408. In developed economies, the concept of social insurance has achieved the objective of affording protection to non-active persons and ensuring minimum income security for all members of society, irrespective of their ability to make contributions or of whether they are covered by the system, but taking into account their genuine protection requirements. This is achieved through a combination of financing based on contributions determined in accordance with income ceilings and of guaranteed uniform benefits, with no period of contributions prescribed for widows’ and orphans’ insurance and with a requirement regarding the period of residence in the case of old-age insurance that is equivalent to a career-long period of insurance contributions. This is also called the principle of social integration whereby benefits are extended to the non-active person. The extension of social security to include coverage of non-active persons (in conjunction with present-day policies for reducing inequalities and combating poverty) proceeded hand in hand with the development of non-contributory benefits for a wide variety of purposes and categories of beneficiaries. This simultaneous development of social assistance and social insurance explains the difficulty experienced by social insurance in providing effective protection for persons who are unemployed, have no regular income and are unable to satisfy requirements regarding periods of contribution. Social insurance nevertheless continues to play an important and decisive role in both developed as well as developing systems. In developed systems it is characterised by its remarkable ability to adjust to new problems as solidarity among the different social categories broadens and deepens. In developing countries, it plays an even greater role, where particular emphasis has deliberately been placed on social insurance through international technical cooperation. Also see Corden A “Self-Employed People in the United Kingdom: Included or Excluded?” *International Social Security Review (ISSR)* Vol 52, No. 1 (1999) at 31-47. (Hereafter Corden).

## 6 CONCLUSION

The welfare state in Western Europe is a very powerful tool which provides comprehensive social protection against social risks. From the discussion above it is clear that this phenomenon has developed from “informal” roots into the strong mechanism it is today.

The “proper” process of development from “informal” to “formal” has now been described. In South Africa (a former British colony), the concept of social security took a slower but similar development path to that of the Western European systems. Kinship- and family-based support constituted (and remains) a strong source of social security protection against insecurity in South Africa.

It should at this stage be noted that colonisation and the Gold and Diamond Rush led to the birth of a working class in South Africa. The colonialists exploited the workers to the maximum and did not introduce any worthwhile social security schemes, apart from the occasional schemes for compensation in the case of employment injury and maternity benefits. Only after World War II were some steps taken in the field of social security, but, even so, the development of social security in most developing countries is much less than that achieved in developed countries.<sup>831</sup>

If the development of Western European and South African social security is compared, it is clear that they have, in common, roots in “informality”. In both forms of social security, state involvement was initially limited. Only when the state was financially capable of assuming responsibility for social security protection did it take on this responsibility.

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<sup>831</sup> Singh op cit note 489 at 2-4. Some maintain that the development and extension of social security are vital for the economic progress of these countries and that it is the responsibility of developed countries to come forward in a significant way to provide financial support and expert support in establishing an infrastructure in these countries. This is due to the fact that these colonialist countries exploited the resources in developing countries which were their colonies for hundreds of years.

Social solidarity in the African context is often translated with *ubuntu* and is seen as a principle unique to Africa. *Ubuntu* can be compared with the Western European concept of social solidarity, although the latter is taking on a more sophisticated form and application in the context of the welfare state. However, we can still learn from the process of development and transition from informal to formal which took place in Western Europe almost a century ago. This development path and these informal social security roots can provide the following useful insights for South Africa:

- First, it is encouraging to note that informal social security systems have the potential to be transformed into more comprehensive systems when given the correct circumstances and environment. It also illustrates that successful transformation from informal to formal social security has in the past been achieved.
- It can be ascertained from this development process that change, or transformation, can be achieved only when the state recognises the important role played by these schemes, and when it extends a hand to these schemes as social security instruments. This will not happen by itself. Active planning for purposes of incorporation of these systems for particular risks will be imperative. For example, the state can step in as financier or regulator and incorporate informal social security as service delivery partner.
- The social security model applied in the welfare state is worker-based and, in terms thereof, social security benefits are linked to employment status, with social assistance providing a safety net for those outside the formal social security system. In developing countries, however, owing to the poor economy, low levels of employment and the nature of the social security risks present, employment-based schemes cannot sufficiently provide cover against contingencies.<sup>832</sup> The expansion of the formal social security safety net will therefore not be sufficient in the context of South Africa. Innovative ways will

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<sup>832</sup> See ch 4 in general.

have to be found to extend the protective scope of the social security safety net to those outside formal employment, for example to those in the informal sector.<sup>833</sup>

- Although social security in South Africa is quite developed, it remains an “imperfect” transplant of a Western European system in an African context.<sup>834</sup> The development paths may show similarities, but developing countries will never have the economic capacity to fully develop into a Western European welfare state. The development path can therefore be used only to a limited extent to predict what the future of informal systems in South Africa might hold. In particular, it can provide useful insights into the various phases, or stages, and ways of transforming “informal schemes” into formal ones. It must however still be decided if transformation from informal to formal is the proper way to deal with informal social security in future. In the context of South Africa, the result and final aim of social security development will never be the welfare state, because of economic circumstances, a different political and cultural situation, and high poverty and unemployment. South Africa is however in dire need of social security transformation as a result of the constitutional imperative and pressing socio-economic needs. In the Preamble to the Constitution it is stated that, amongst other things, the Constitution is adopted to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. Social justice embodies one of the aims of the welfare state.<sup>835</sup>
- In South Africa, there is another dimension to social security transformation as a result of the history of discrimination leading to an imbalance in social security and wealth distribution. Apartheid changed the course of the present social security system.<sup>836</sup> In South Africa, therefore, various factors necessitate a change to the social security system. The impetus for more

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<sup>833</sup> See chs 1 & 8 in general.

<sup>834</sup> See ch 2 in general.

<sup>835</sup> See ch 3 in general.

<sup>836</sup> See par 3.4, ch 2.



comprehensive social protection in Western Europe was provided by a number of political, social and economic factors which prevailed in Western Europe at the time. Certain factors such as greater economic resources, industrialisation and political pressure all played a pivotal role in the creation of a new system of formal social security in terms of which individual responsibility for protection against insecurity was transferred to the state. Those factors can be identified and used to determine if they correlate with the present-day factors dictating change in South Africa. In the light of the “time constraints” we have in South Africa, it must be determined whether there is room for gradual fruition of social welfare and how certain “ripening factors” can be forced in order to arrive at a better and more comprehensive social security paradigm. Intervention in the course of development of social security is therefore necessary. This intervention process should also take account of informal social security and should take stock of the present social security dispensation.

- Informal social security and formal social security are functioning as two parallel systems in South Africa and it is not certain if their paths should be merged, or cross, or be linked in some way or another. In order to get people to “buy into” a new system of social security, it will help if systems (such as informal social security), with which the majority of the people are familiar, are included in the transformed system for a transition period, as was the case in Western Europe. In the development of the formal Western European social security systems, the basic philosophies of the nation, for example self-administration in Germany and self-provision in Britain, were retained, but were applied in a new, evolved form in order to help citizens buy into the concept. In South Africa, the basic, main truths should be identified and an attempt should also be made to incorporate them in the transformation process in order to ensure the commitment (and buying in) of everyone to the reformed system.

- It should also be explored if the co-existence of formal and informal social security is possible in the present South African system. In Western Europe, for a certain period after the creation of formal social security, there was co-existence of informal (voluntary) and formal social security mechanisms. It was especially as far as the administrative execution of formal social security was concerned that voluntary agencies played an important role. The example of how this was done can be very useful for purposes of the model for South Africa.
- In the search for common ground between formal and informal social security, the areas of social risks in which informal social security can play an important role should be identified. In Western Europe, certain risks lent themselves more than others to incorporation of the voluntary sector, for example health care was frequently administered by voluntary agencies even after the advent of the welfare state.
- Informality can exist with regard to regulation, administration, financing and execution (service delivery). In the context of the welfare state, regulation, administration, financing and execution were all responsibilities of the state, but, for certain risks, certain aspects (e.g. service delivery) were “outsourced” to the informal sector. It should be determined to what legs of “outsourcing” informal social security lends itself and for what particular risks. This might also lessen the burden on the state.

In South Africa, informal social security has evolved to play a pivotal role in providing social security. Although reform of the present social security system is needed, formal and informal social security will have to consider ways of working together in providing social protection.

## **CHAPTER 6: THE POSSIBLE ACCOMMODATION OF INFORMAL SOCIAL SECURITY WITHIN THE FORMAL SOUTH AFRICAN SOCIAL SECURITY REGULATORY FRAMEWORK**

### **1 EXECUTIVE SUMMARY**

The discussion in the thesis has so far focused on the origins of informal social security as part of the bigger social security paradigm and has also analysed the concept of informal social security. The discussion has also outlined the formal regulatory framework and has indicated the lack of legislative provision for informal social security therein. The focus of the thesis will now turn to the possible accommodation of informal social security within the broader South African social security framework.

Informal social security is presently not recognised within the formal regulatory system, but ideas akin thereto (e.g. non-profit organisations, friendly societies, and social investment) are to a certain extent accommodated within legislation.<sup>837</sup> An investigation into these legislative tools ancillary to social security is important for the following reasons:

- An analysis of the accommodation of these similar systems can provide valuable guidelines on how informal social security can be accommodated in future in the regulatory system.
- Regulation is a fluid concept. An analysis of how similar fields of law have been regulated (e.g. non-profit organisations) can provide examples of how the legislature can treat the regulation of informal social security in future. The various examples of legislation dealing with the regulation of formerly unregulated areas of law (e.g. Black Economic Empowerment, non-profit

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<sup>837</sup> See pars 3.1 & 3.2, ch 6.

organisations, the lottery) are important indications of the type of legislation that may be enacted with regard to the regulation of informal social security. For example, if such regulation entails close government involvement in the affairs of informal schemes and stringent and cumbersome compliance measures, it will scare many informal social security schemes away from compliance. If, on the other hand, regulation is translated into an inviting and supporting role by government, it might contribute to more people buying into the concept of regulation through legislation. The examples of the various ways in which regulation can occur can serve to illustrate how informal social security can be structured, or how it should be transplanted, or what the underlying tone or intention should be when formulating the legislation applicable to informal social security.

- It is important to explore the readiness of the present regulatory system to accommodate the regulation of informal social security. An exploration of the ancillary legislative tools discussed below is a way in which to test the “ripeness” of the legislative system to accommodate a new concept such as informal social security. Furthermore, an exploration of the environment within which informal social security must function will guide proposals for the future accommodation of informal social security.
- An analysis of present policy will also indicate if the time is ripe to seek greater recognition for, and the incorporation of, informal social security within the wider social security dispensation. Policy refers to an overall plan or course of action by local or national government. Overall policy will dictate specific legislation, regulations or sectoral policies, and these should be enforceable in a manner that conforms with the original intent of the policy. A policy analysis is therefore necessary and entails that overall policy regarding informal social security be considered before recommendations can be made

on specific laws, regulations or programmes for this specific branch of the law.<sup>838</sup>

## 2 INTRODUCTION

A number of legislative tools (not normally viewed as part of social security legislation) exist which influence informal social security to a certain extent. These “ancillary” legislative tools are discussed below.<sup>839</sup> These statutes include, for example, the National Welfare Act,<sup>840</sup> the Friendly Societies Act,<sup>841</sup> the Nonprofit Organisations Act,<sup>842</sup> the Lotteries Act,<sup>843</sup> the National Small Business Act,<sup>844</sup> and the Broad-Based Black Economic Empowerment Act.<sup>845</sup> They do not normally form part of discussions on social security and informal social security, but it is interesting (as can be seen from the analysis below) that they can indeed play a role in social security and can have an impact on the future of informal social security within the broader regulatory framework.

Many informal social security schemes fear statutory regulation,<sup>846</sup> and, if some of the examples of regulation in the laws discussed below are taken into account, it is understandable why.<sup>847</sup>

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<sup>838</sup> Lund op cit note 47 at 17.

<sup>839</sup> For example, the National Welfare Act. See discussion below in pars 3.1 & 3.2, ch 6.

<sup>840</sup> 100 of 1978. See par 3.1.1, ch 6.

<sup>841</sup> 25 of 1956. See par 3.1.2, ch 6.

<sup>842</sup> 71 of 1997. See par 3.1.3, ch 6.

<sup>843</sup> 57 of 1997. See par 3.2.1, ch 6.

<sup>844</sup> 102 of 1996. See par. 3.2.3, ch 6.

<sup>845</sup> 53 of 2003. See par 3.2.2, ch 6.

<sup>846</sup> Van Ginneken W “Extending Social Security: Policies for Developing Countries” *International Labour Review* Vol. 142 No. 3 (2003) at 278. (Hereafter Van Ginneken “Extending Social Security: Policies for Developing Countries”).

<sup>847</sup> There are various stakeholders and interest groups involved in the informal economy. The most important question is: To what extent should government, as a stakeholder, be involved in the informal economy? Three major viewpoints exist with regard to government involvement in the informal sector, viewpoints that are also applicable to government involvement in the broader informal social security sector. First, it is feared that, because markets operate efficiently, government intervention will lead to inefficiencies and distortions and that the informal sector and informal economy will decline with economic growth. A second viewpoint is that the informal economy is beyond the reach of government, because those operating in it want to avoid regulation and taxation. Another school argues that the informal economy is here to stay and requires appropriate regulations, laws and policies to reduce the biases in existing regulations and policies that favour the formal economy and disadvantage informal workers. Those

Present regulation in the social security and ancillary legislative sphere is extensive and cumbersome.<sup>848</sup> Informal social security functions well because of its informality and agility. The system is based on trust, mutuality and solidarity and is in touch with, and designed around, the needs of its members.<sup>849</sup> Many of these systems do not have the ability, and their members do not have the knowledge and skills, to comply with complex administrative and financial requirements.<sup>850</sup> Protection and incorporation of informal social security should therefore not always be translated into stricter regulation.<sup>851</sup> The legislative examples of regulation therefore influence informal social security, but cannot be used in an unchanged form as a model or vehicle to accommodate informal social security in the future social security dispensation.

The purpose of the analysis is not to suggest that formal regulation or incorporation of informal social security is the only option available for informal social security in the future. Instead, it is merely to test the readiness and ripeness of the present legislative environment should regulation of informal social security become an option. This testing can be done through an examination of the present regulation of other areas of the law ancillary to informal social security.

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who subscribe to government involvement in the informal economy base their arguments on a mix of equity, efficiency and political and economic principles. Those basing their argument on equity argue that women (who form the majority of those in the informal economy) have unequal market power, experience discrimination, have insufficient skills and information, and have inadequate insurance against risks. The increased number of people in the informal economy “threatens to do away with decades of social progress”. This school of thought recommends a new social contract between government, business, organised labour and other social actors. Those arguing that efficiency necessitates government involvement maintain that the informal economy contributes to GDP and represents a potential source of capital goods as well as a possible training ground for entrepreneurs. Government involvement can promote productivity. The school basing its plea for state intervention on political and economical principles argues that governments do intervene in markets, and in ways that are often biased towards large industries, for example through trade and industry policies. Most economic policies, whether targeted or not, impact on the informal economy and such impact differs from that on the formal sector. Lund op cit note 47 at 17.

<sup>848</sup> See par 3, ch 6. Also see par 3, ch 3.

<sup>849</sup> Von Benda-Beckmann F, Kirsch R & Freiburg-Strauß J *The Capacity of Social Security Systems in Southern Africa: Conditions, Constellations and Socio-Political Relevance (Volume 1)* (1993) at 19. (Hereafter Von Benda-Beckmann, Kirsch & Freiburg-Strauß).

<sup>850</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 2.

<sup>851</sup> The Nonprofit Organisations Act serves as an example of protective legislation that is also accommodating at the same time.

### 3 PRESENT LEGISLATIVE TOOLS RELEVANT TO INFORMAL SOCIAL SECURITY

#### 3.1 Legislation regulating fields of law similar to informal social security

If the entire body of legislation in the country is examined, it becomes apparent that there are a number of “non-traditional” social security laws which impact on the possible future accommodation of informal social security in South Africa. These Acts are discussed below.

##### 3.1.1 *The National Welfare Act*<sup>852</sup>

###### 3.1.1.1 Discussion of the Act

This Act governs social welfare services, which encompass a wide and divergent number of welfare activities.<sup>853</sup> Of particular importance to informal social security is s 3 of the Act. This section sets out the functions of the South African Welfare Council established in terms of the Act. Section 3(1)(f) states that the functions of the Council are to advise government in relation to a number of aspects and to provide welfare organisations with information and guidance in connection with social welfare services.<sup>854</sup> Some of the aspects on which the Council can advise government are the following:

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<sup>852</sup> 100 of 1978.

<sup>853</sup> The term “social welfare services” means organised activities, measures or programmes in connection with (a) social work as defined in s 1 of the Social Work Act, 110 of 1978, and the prevention and treatment of social and pathological conditions within the community, or within groups of persons, or within families, or among individuals; (b) the promotion, protection or stability of family or marital life; (c) the welfare of the aged or of physically or mentally handicapped persons; (d) the welfare of children; (e) the prevention of alcoholism or dependence upon dependence-producing substances, or the treatment of persons who are dependent upon alcohol or any other dependence-producing substance; (f) the provision of housing for indigent persons or persons in need; (g) any corrective service; and (h) social relief. Although the definition of social welfare services is quite broad, the Act is not really relevant for purposes of informal social security.

<sup>854</sup> It should be noted that “welfare organisation” specifically refers to an organisation registered in terms of s 13(4) of this Act.

- (d) the measures which should be taken in order to improve social welfare services in the Republic;
- (e) the rendering of social welfare services by welfare and other organisations and matters connected therewith;
- (f) any research which should be undertaken in connection with any social problem;
- (g) any social welfare matter referred to the council by the Minister or about which the council deems it necessary or desirable to advise the Government.

In 2000, the Developmental Welfare Governance Bill<sup>855</sup> was introduced to repeal the National Welfare Act of 1978. The Bill has so far not come into effect.

The Bill aims to provide a national governance structure in the welfare sector and to build and consolidate the partnership between government and civil society.<sup>856</sup> For this purpose, the South African Developmental Welfare Council will be established.<sup>857</sup> The objectives of the Council<sup>858</sup> are twofold, namely to advise the Minister of (then) Welfare (currently Social Development) on a number of issues<sup>859</sup> and to act as a consultative forum for the Minister to discuss certain matters of welfare governance.<sup>860</sup>

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<sup>855</sup> B43-2000. Explanatory summary of Bill published in Government Gazette No. 21369 of 21 Jul 2000.

<sup>856</sup> Preamble of the Bill. "Civil society" (s 1(i)) is defined as: "*institutions, organisations and individuals outside of government and includes trade unions, consumer organisations, the formal and informal welfare sectors, non-governmental organisations, community-based organisations, religious organisations and other organisations delivering social welfare services*". "Developmental social welfare" (s 1(iv)) means "*planned social change designed to promote social and economic development of people by utilising social welfare services, programmes, methods and approaches which are (a) responsive to social, cultural, economic and political conditions; (b) accessible to the needs and problems of the people; and (c) directed at the prevention, alleviation and elimination of the social problems of individuals and communities*".

<sup>857</sup> The South African Developmental Welfare Council will replace the present South African Welfare Council. Section 2.

<sup>858</sup> Section 3.

<sup>859</sup> These include (a) measures to promote the transformation and continuous improvement of welfare services; (b) measures to promote social development initiatives; (c) measures to promote poverty relief, poverty reduction and poverty elimination; (d) measures to include local government in the provision of welfare services; (e) proposals for new legislative frameworks for the welfare sector and amendments to existing legislation; and (f) the introduction of local and international best practices in welfare services.

<sup>860</sup> These include (a) improving the quality of provincial and national welfare governance; (b) the introduction of new policy and successful policy implementation in the government and non-government environment; (c) facilitating consultation between stakeholders and government regarding the implementation of developmental social welfare; (d) ensuring the effective review of the formulation, implementation and evaluation of welfare policies, programmes and legislation, as informed by the needs and priorities of society; (e) assisting provincial and local governments in the formation and development of consultative, developmental social welfare governance structures at all levels of government; (f) inputs from the welfare sector to international forums and protocols.



The Council has important duties which are relevant for informal social security measures. These include the following:

- to respond to, and advise, the Minister on developmental social welfare issues identified by, or referred to, the Council;<sup>861</sup>
- to identify, promote, monitor and evaluate policy, legislation and programmes with regard to developmental social welfare and its impact on the quality of life of the people;<sup>862</sup>
- to consider all proposed developmental social welfare legislation before it is introduced in Parliament;<sup>863</sup>
- to facilitate dialogue between government and civil society on developmental social welfare issues;<sup>864</sup>
- to promote stakeholder participation in developmental social welfare, particularly consumer and grassroots-sector participation;<sup>865</sup>
- to facilitate consultation between stakeholders, various spheres of government and the Minister in order to identify developmental social welfare matters requiring attention;<sup>866</sup>
- to develop an information and communication strategy between government and civil society;<sup>867</sup>
- to establish clear lines of communication (including formal meetings) with structures that it interacts with, including the Portfolio Committee on Welfare;<sup>868</sup>

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<sup>861</sup> Section 5(1)(a).

<sup>862</sup> Section 5(1)(b).

<sup>863</sup> Section 5(1)(c).

<sup>864</sup> Section 5(1)(d).

<sup>865</sup> Section 5(1)(e).

<sup>866</sup> Section 5(1)(f).

<sup>867</sup> Section 5(1)(g).

- to include the minority views of one or more members of the Council when providing the Minister with advice or recommendations.<sup>869</sup>

### **3.1.1.2 Lessons to be learnt for informal social security**

It seems that the South African Welfare Council can advise government on a wide range of aspects relating to social welfare. If “social welfare” is interpreted in its broadest sense, it definitely includes social security and informal social security. One of the ways in which social welfare can be improved is by recognising the role played by informal social security in the social safety net.

For purposes of informal social security, it is therefore relevant to recognise the possible role that the South African Welfare Council can play in promoting the interests of informal social security and in assisting in the recognition of informal social security as part of the welfare dispensation. The South African Welfare Council should therefore be recognised as a possible stakeholder and partner in the reform process relating to the present social security dispensation. It is, however, uncertain from the proposed amendments what influence the South African Welfare Council will have on the government regarding reform of the social welfare system.

The proposals in the Developmental Governance Welfare Bill are important indicators that government proposes, as part of its overall transformation of the welfare system, a structure that will influence political decision-making and facilitate maximum dialogue between the Ministry of Social Development and the developmental welfare sector at grassroots level.<sup>870</sup> This awareness of non-formal welfare systems will definitely add to better recognition and acknowledgement of informal social security.

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<sup>868</sup> Section 5(2).

<sup>869</sup> Section 5(3).

<sup>870</sup> Memorandum on the Objects of the Developmental Welfare Governance Bill, 2000 at 8. Accessed at <http://www.welfare.gov.za/Legislation/2001/welgov.pdf> on 2 Nov 2004.

Where the South African Welfare Council is currently a stakeholder in the welfare arena, the South African Developmental Welfare Council could definitely perform an active role in bringing welfare dependants and informal social security users in contact with policy makers. Greater awareness of the struggles and needs of informal social security users will benefit informal social security.

### 3.1.2 *The Friendly Societies Act*<sup>871</sup>

#### 3.1.2.1 **Discussion of the Act**

As can be seen from the discussion in chapter 5 of this thesis, friendly societies were one of the earliest forms of informal social security schemes and they continue to exist in the law today. Although the Friendly Societies Act is still in force, very few friendly societies still function in South Africa today. They have mostly been absorbed into formal insurance schemes.<sup>872</sup> This Act provides for the registration, incorporation, regulation and dissolution of friendly societies.

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<sup>871</sup> 25 of 1956. The Ministry assigned to this Act is the Ministry of Finance.

<sup>872</sup> Informal social security schemes do not form part of the insurance industry and will not qualify as short-term insurance schemes. In terms of s 7 of the Short-Term Insurance Act, 53 of 1998, no person may carry on any kind of short-term insurance business unless that person is regulated as a short-term insurer, or is authorised to do so in terms of s 56 of the Act. Short-term insurance business is defined in s 1 as the business of providing, or undertaking to provide, policy benefits under a short-term policy. Among other things, a short-term policy (the terms of which are similar to the typical protection measures provided by informal social security schemes) means an accident and health policy which is a contract in terms of which a person, in return for a premium, undertakes to provide policy benefits if a (a) disability event, (b) health event or (c) death event contemplated in the contract as a risk occurs, but excluding any contract (d) of which the contemplated policy benefits (i) are something other than a stated sum of money; (ii) are to be provided upon a person having incurred, and to defray, expenditure in respect of any health service obtained as a result of the health event concerned; (iii) are to be provided to any provider of a health service in return for the provision of such services; or (e)(i) of which the policyholder is a medical scheme registered under the Medical Schemes Act, 1967; (ii) which relates to a particular member of the scheme or to the beneficiaries of such member; and (iii) which is entered into by the scheme to fund, in whole or in part, its liability to such member or beneficiaries in terms of its rules; and includes a reinsurance policy in respect of such a policy. This will therefore exclude typical benefits provided by informal social security schemes.

The definition of a friendly society in terms of the present regulatory framework is wide enough to include certain informal social insurance arrangements such as burial societies, stokvels, etcetera. In terms of s 1 of the Act, a friendly society is defined as

- (a) any association of persons established for any of the objects specified in section 2 or
- (b) any business carried on under a scheme or arrangements instituted for any of those objects, and includes any central society referred to in section 39 whether or not it is liable to provide any benefits mentioned in section 2, and any central society, association or business as aforesaid which is or may become liable for any such benefits, whether or not it continues to admit or to collect contributions from members.

A member is defined as any person who contributes to the society in order to obtain any benefit referred to in the Act, either for himself/herself or for any other person.<sup>873</sup>

Section 2 lists the objects for which friendly societies may be established, which coincide with many of the objectives of informal social security schemes, namely:

- (a) The relief or maintenance during minority, old age, widowhood, sickness or other infirmity, whether bodily or mental, of members or their husbands, wives, widows, widowers, children or other relatives or dependants.
- (b) The granting of annuities, whether immediate or deferred, to members or to nominees of members, or the endowment of members or nominees of members.
- (c) The insurance of a sum of money to be paid or other benefit to be provided -
  - i. On birth of a member's child; or
  - ii. On the death of a member or any other person mentioned in paragraph (a) or in the form of an endowment insurance on the life of a member or such a person;
  - iii. Towards the expenses in connection with the death or funeral of any member or any such person; or
  - iv. During a period of confined mourning by a member or such a person;
- (d) The insurance against fire or other contingencies of the implements of the trade or calling of any member.
- (e) The provision of a sum of money on a member's leaving the service of his employer owing to dismissal, resignation or otherwise, unless in the opinion of the registrar the principal object is the provision of a sum of money on a member's leaving such service because of marriage or intended marriage.
- (f) The relief or maintenance of members, or any group of members, when unemployed or in distressed circumstances, otherwise than in consequence of the existence of a strike or lockout as defined in section 213 of the Labour Relations Act, 1995.
- (g) The provision of sums of money for the advancement of the education or training of members or of the children of members.

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<sup>873</sup> Section 1.

The scope of application of the Act is restricted to friendly societies whose aggregate value of income does not exceed R100 000 per annum.<sup>874</sup> It would seem that this provision precludes many informal social security schemes from registering. A misconception often exists about the monetary strength of social insurance schemes.<sup>875</sup>

By ensuring that members of friendly societies conduct their business in a proper manner and maintain financial credibility, the Act protects members of friendly societies. In order to ensure that they operate according to sound business and financial principles, state involvement is indirectly introduced.<sup>876</sup> Ironically, many informal schemes fear state involvement. Solidarity and reciprocity are seen as being sufficient to ensure credibility and trust.<sup>877</sup>

The Act has not been drafted in a very user-friendly style and the requirements set out therein to ensure the protection of members are very extensive, detailed and difficult to comply with. For example, in terms of s 5, all friendly societies must be registered, but the application for registration is very extensive.<sup>878</sup>

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<sup>874</sup> Section 3(1)(b).

<sup>875</sup> For example, it is estimated that there are approximately 2 000 stokvels in the country. The majority of their members (65%) are mostly women. Men only account for 38 percent of the membership. According to the National Stokvel Association of South Africa (NASASA) it is estimated that stokvels collect about R1 billion a month of which R350 to R400 million is spent on savings. NASASA is believed to have almost 8 million members. NASASA is however not listed in the telephone directory and does not have a listed web address. The last reported contact person according to the Sunday Times (October 2000) was Stephen Japp. Barloworld-Logistics *Maize Research Report* (2 April 2003) prepared for Ramsay Brierley CC 1-3.

<sup>876</sup> Section 4. The Registrar and Deputy Registrar of Friendly Societies are the executive officer and deputy executive officer of the Financial Services Board. The Executive of the Financial Services Board reports directly to the Minister of Finance. Financial Services Board Act, 97 of 1990, s 1. <http://www.finforum.co.za/regulate/regstruc.htm> accessed on 5 Nov 2004.

<sup>877</sup> Olivier MP & Mpedi LG “Extending Social Security Protection to Families in the African Context: The Complementary Role of Formal and Informal Social Security” Paper presented at the 4<sup>th</sup> International Research Conference of the International Social Security Association *Social Security in a Long-Life Society* (Antwerp, Belgium 5-7 May 2003) at 18. (Hereafter Olivier & Mpedi “Extending Social Security Protection to Families in the African Context”).

<sup>878</sup> The application for registration must be accompanied by the particulars of the name and address of the person charged with the management of the affairs of the society to which the application relates, and a copy of the rules of such society, together with a certificate by a valuator as to the soundness of such rules from a financial point of view or, if no valuator has been employed, such information regarding their financial soundness as the applicant may possess, and the registration fee prescribed by regulation, and, in the case of a society in existence at the commencement of this Act (a) a statement in detail of the revenue and expenditure of the society in question for the last financial year for which accounts have been prepared,

The Act does not appear to provide any real benefits for registered friendly societies. The effect of registration is that the friendly society will become a body corporate capable of suing and being sued in its corporate name,<sup>879</sup> and all the assets, rights, liabilities and obligations pertaining to the business of the society are deemed to be assets, rights, liabilities and obligations of the society to the exclusion of any other person.<sup>880</sup> The registration process is cumbersome and the rules very extensive,<sup>881</sup> with the result that it

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and a copy of its balance sheet as at the end of that year; and (b) a statement showing in detail the latest valuation of assets and liabilities made by a valuator, including particulars as to the principles applied in making such valuation, or, if no such valuation has been made, such particulars regarding the financial condition of the society as the applicant may possess. Upon receipt of the necessary documentation the registrar will, if the society has complied with such requirements as the registrar may have prescribed and he is satisfied that the registration of the society is desirable in the public interest, register the society provisionally and forward to the applicant a certificate of provisional registration. If after considering any such application in respect of a society which has been provisionally registered, the registrar is satisfied (a) that the rules of the society are not inconsistent with this Act and are based on sound financial principles; (b) that the methods according to which business is or is proposed to be transacted by the society are not undesirable; (c) that the society is in a financially sound condition; and (d) that, having regard to all the circumstances, the rules of the society are not unduly inequitable as between different members or groups of members, he shall register the society as a friendly society and transmit to the applicant a certificate of registration as well as a copy of the rules of the society bearing an endorsement of the date of registration, and thereupon the society shall cease to be provisionally registered. The provisional registration of a society shall be valid for a period of five years, but may, where the registrar is satisfied that the society has made all reasonable efforts to meet his requirements, be renewed from time to time for periods not exceeding twelve months at a time. Whenever a society which is provisionally registered under this section has complied with all the requirements, the registrar shall register the society and transmit to it a certificate of registration as well as a copy of its rules with the date of registration duly endorsed thereon, and thereupon the society shall cease to be provisionally registered. If after considering any such application, the registrar is not satisfied as regards all the matters in respect of which he is required to be satisfied he shall in writing indicate to the applicant the requirements to be complied with in order that he may be so satisfied. Section 5.

<sup>879</sup> Section 7(1)(a).

<sup>880</sup> Section 7(1)(b) & (c).

<sup>881</sup> The rules of a friendly society shall be in one of the official languages of the Republic and shall contain provisions in regard to the following matters: (a) the name of the society and the situation of its registered office; (b) the objects of the society; (c) the manner in which funds are to be raised and collected and the purposes for which they are to be applied; (d) the various classes (if any) of members and the requirements for admission to membership and the circumstances under which membership is to cease; (e) the conditions under which any member or other person may become entitled to any benefit and the nature and extent of any such benefit; (f) the fines and forfeitures (if any) to be imposed on any member and the consequences of non-payment of any contribution or fine; (g) the appointment, removal from office, powers and remuneration (if any) of officers of the society; (h) the powers of investment of funds; (i) whether or not any part of the business of the society is subject to actuarial scrutiny, and, if so, which kinds of business are so subject; (j) the maintenance of accounts relating to such kinds of business as are subject to actuarial scrutiny separately from accounts relating to any other business; (k) whether or not a separate account is to be kept in respect of any particular kind of business other than as required in terms of the preceding paragraph, and, if so, in respect of which kinds; (l) if the society is entitled to receive contributions from its members towards the expenses of management, and if such contributions are payable under a separate table, the maintenance of a separate account of such expenses and contributions; (m) if separate accounts are kept in respect of any particular kind of business, or in respect of expenses of management and

would be very difficult for an ordinary individual to draft the necessary rules. As a result of the minimum requirements, namely audited financial statements<sup>882</sup> and the involvement of actuaries,<sup>883</sup> friendly societies are not a viable vehicle for the regulation of informal social security schemes.

### **3.1.2.2 Lessons to be learnt for informal social security**

Although this Act would appear to be able to accommodate informal social security schemes, it is not possible to do so for a number of reasons. First, the Act excludes organisations with an annual turnover of less than R100 000. Many informal arrangements operate on a small scale (with a turnover of less than R100 000) and to attempt to apply this Act to these structures would be like attempting “to shoot a fly with a shotgun”.

The Act contains very strict guidelines in order to protect the public. Financially sound principles are very important; hence strict rules are laid down in this regard, for example actuarial scrutiny and audited financial statements. These strict guidelines would prove

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contributions towards such expenses, the circumstances in which and conditions upon which amounts may be transferred from one such account to another; (n) the manner of determining profits and losses and of disposing of such profits or providing for such losses; (o) the manner in which contracts and other documents binding the society shall be executed; (p) the custody of the securities, books, papers and other effects of the society; (q) the manner of altering and rescinding any rules, and of making any additional rule; (r) the manner of deciding disputes between a member or former member or any person whose claim is derived from a member or former member and the society or any officer of the society; (s) in the case of a society with share capital, the amount of such share capital and the division thereof into shares of a fixed amount, whether the liability of a shareholder for the debts of the society is limited or unlimited, and the conditions relating to participation in the profits of the society by the shareholders (subject to the condition that such participation shall not in any one year exceed an amount equal to five per cent of the paid-up share capital), the conditions of redemption or repayment of shares, the conditions relating to calls on shares, the manner of transfer and transmission of shares, the manner of forfeiture of shares, and the manner of alteration of share capital; (t) the appointment of the auditor of the society and the duration of such appointment; (u) subject to the provisions of this Act, the manner in which and the circumstances under which a society shall be terminated or dissolved; (v) the appointment of a liquidator in the case of a voluntary dissolution; (w) the manner of calling the annual general meeting and special general meetings of members, the quorum necessary for the transaction of business at such meetings and the manner of voting thereat; (x) such other matters as the registrar may approve. Section 13.

<sup>882</sup> Sections 7(2), 11 & 13(1)(t).

<sup>883</sup> Section 13(1)(i) & (j).

too costly, and the required level of book-keeping too difficult, for those currently involved in informal social security schemes. The wording and underlying tone of the Act are also not very user-friendly.

The registration requirements set out in the Act are very extensive, while the benefits of registration appear to be very few.

In mutual support schemes, the strong concepts of mutuality and solidarity are seen as adequate protection against corruption. Third-party involvement is therefore frowned upon and not welcomed as a safeguard against financial corruption.<sup>884</sup>

The Friendly Societies Act is not likely to assist with the future incorporation of informal social security. In fact, the provisions as contained in the Friendly Societies Act may scare many informal social security schemes away from compliance.

### **3.1.3 *Nonprofit Organisations Act*<sup>885</sup>**

#### **3.1.3.1 Discussion of the Act**

If the structure, wording and functioning of the Friendly Societies Act are compared with those of the Nonprofit Organisations Act, the latter is a much more user-friendly and suitable vehicle for the accommodation of informal social security schemes.<sup>886</sup>

The definition of a non-profit organisation (NPO) covers all organisations that do not exist to make a profit for their owners or members. It does not cover private companies, cooperatives or income-generating products that exist solely to produce benefits for

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<sup>884</sup> Von Benda-Beckmann *Between Kinship and the State* op cit note 450 at 33.

<sup>885</sup> 71 of 1997.

<sup>886</sup> “Constitutions for Non-Profit Organisations”

accessed at <http://www.etu.org/toolbox/docs/building/const.html> on 16 Mar 2004.



members.<sup>887</sup> All of these are regarded as for-profit organisations. Cooperatives are not NPOs and do not fall under the NPO Act.<sup>888</sup> Cooperatives are usually formed so that profits for the members can be generated and therefore cannot fall under the scope of application of the NPO Act.<sup>889</sup> This therefore excludes informal social security schemes. It is however nevertheless still interesting to consider this Act, since the underlying tone thereof is not merely to regulate NPOs, but also to accommodate them. This Act may also serve as an example of appropriately worded legislation which can assist in the drafting of similar legislation pertaining to the governing of informal social security schemes.

A non-profit organisation (NPO) does not exist to make a profit, for the owners or members of the organisation, from the work of the organisation, but to serve some public purpose other than merely serving the personal interests of the owners or members of the organisation.<sup>890</sup> If members receive payments or benefits, these are only in the form of reasonable salaries and benefits in return for the work performed by them as employees of the organisation.<sup>891</sup> Any profit is used by the organisation to make a greater impact in terms of its purpose.<sup>892</sup>

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<sup>887</sup> Section 1.

<sup>888</sup> Definition by the Legal Resource Centre. Accessed at “Constitutions for Non-Profit Organisations” op cit note 886. A cooperative is defined as a group of people, who are the members, who together own and control an enterprise for the profit and benefit of themselves. A cooperative has the potential to operate democratically in that the members may work for themselves and decide together how to run the cooperative and how to share the profits fairly.

<sup>889</sup> Cooperatives register with the Registrar of Cooperatives at the Department of Agriculture by lodging a number of founding documents.

<sup>890</sup> Section 1.

<sup>891</sup> “Constitutions for Non-Profit Organisations” op cit note 886.

<sup>892</sup> Ibid. NPOs usually target groups on the basis of who needs the service most and not on the basis of who can pay for the service. There is often confusion regarding the various terms used in this sector. A non-governmental organisation is an organisation which is not part of government. This includes a large group of organisations, from large charitable organisations to small community organisations. NGOs are normally non-profit as well and are included in the concept of a NPO for purposes of this discussion. The broader term is “civil society”, which refers to NGOs (Non-governmental Organisations), NPOs (Non-profit Organisations) and CBOs (Community-based Organisations). In terms of s 1 of the Nonprofit Organisations Act, 71 of 1997, a non-profit organisation is defined as “a trust, company or other association of persons (a) established for a public purpose and (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered”. It is clear from the definition that informal (kinship-based/community-based support groups) are excluded from the scope of application of the Act.

<sup>892</sup> Ibid.

Prior to 1994, the South African government's policy and legal environment was largely hostile to non-profit organisations. This was due to the approach of the previous regime, which viewed non-profit organisations only as welfare-type organisations operating as a smoke screen for anti-Apartheid activities.<sup>893</sup>

Estimates produced in 1997 indicated that there were probably up to 80 000 NPO groups offering a wide range of vital services to people and communities in need. Funds circulating within the NPO community were also estimated to represent up to 4,7 percent of the South African gross domestic product as of 1993. Ironically, the challenges faced by the NPOs nowadays include the fact that much of the funding which used to be channelled to organisations fulfilling an essential role during the Apartheid years has dried up because resources are needed by the government itself in order to push forward major new developments.<sup>894</sup>

Some of the accommodating features of the Nonprofit Organisations Act are for example the following:

- The Act provides for an environment in which non-profit organisations can flourish and establishes an administrative and regulatory framework within which non-profit organisations can conduct their affairs.<sup>895</sup>

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<sup>893</sup> "Government-NGO Partnership" op cit note 187.

<sup>894</sup> "Country Profile 2: The International Tax and Legal Framework for Charities and NGOs (South Africa Charities Aid Foundation)" accessed at [www.cafonline.org/downloads/word7/policyprofilesa.doc](http://www.cafonline.org/downloads/word7/policyprofilesa.doc) on 17 Mar 2004.

<sup>895</sup> In terms of s 2, the objects of the Act are to encourage and support non-profit organisations in their contribution to meeting the diverse needs of the population of the Republic by (a) creating an environment in which non-profit organisations can flourish; (b) establishing an administrative and regulatory framework within which non-profit organisations can conduct their affairs; (c) encouraging non-profit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards; (d) creating an environment within which the public may have access to information concerning registered non-profit organisations; and (e) promoting a spirit of cooperation and shared responsibility within government and among donors and other interested persons in their dealings with non-profit organisations. The approach in this section is therefore supportive as opposed to regulatory. It is much more user-friendly and inviting, which will encourage more groups to register. The Act states in s 2 that any person interpreting and applying the Act must (a) give a liberal construction to its provisions, in a manner that (i) is consistent with the objects of the Act set out in s 2; (ii) accounts for the particular purpose, role and circumstances of a particular non-profit organisation.

- The wording of the Act is less formal than that of the Friendly Societies Act. For example, the definition of “accounting officer” in chapter 1 is significant.<sup>896</sup> Another example is the definition of the “constitution” of an NPO,<sup>897</sup> which includes a trust deed and memorandum and articles of association. It therefore seems to have provisions that are more similar to those of a close corporation.<sup>898</sup> In addition, the document to be drafted requires much less detail.
- Government’s role is also set out and is one of support and encouragement as far as NPOs are concerned. Every organ of state must determine and coordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of non-profit organisations to perform their functions.<sup>899</sup> The Minister must establish, within the national department, a Directorate for Nonprofit Organisations.<sup>900</sup> The function of the Directorate will be to assume responsibility for facilitating the process of developing and implementing policy; determining and implementing programmes, including programmes to support non-profit organisations in their endeavour to register; ensuring that the standard of governance within non-profit organisations is maintained and improved; liaising with other organs of state and interested parties; and facilitating the development and implementation of multi-sectoral and multidisciplinary programmes.<sup>901</sup>
- The Directorate must prepare and issue model documents, including model constitutions for non-profit organisations, and a model of the narrative report to be submitted by registered non-profit organisations to the Directorate. The

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<sup>896</sup> It is less onerous than in the case of the Friendly Societies Act and means, in relation to a non-profit organisation, a person contemplated in s 60 of the Close Corporations Act, 69 of 1984, which need not be an auditor or actuary.

<sup>897</sup> Section 1.

<sup>898</sup> Close Corporations Act, 69 of 1984.

<sup>899</sup> Section 3.

<sup>900</sup> Section 4.

<sup>901</sup> Section 5.

Directorate must also prepare and issue codes of good practice for (i) non-profit organisations, and (ii) those persons, bodies and organisations making donations or grants to non-profit organisations. This is to enable NPOs to register and comply with legislation.<sup>902</sup>

- The application for registration as an NPO is also fairly simple.<sup>903</sup> A non-profit organisation may apply for registration by submitting to the Director (a) the prescribed form, properly completed;<sup>904</sup> (b) two copies of its constitution;<sup>905</sup> and (c) such other information as may be required by the Director so as to assist the Director to determine whether or not the non-profit organisation meets the requirements for registration.<sup>906</sup>

### **3.1.3.2 Lessons to be learnt for informal social security**

It is clear that the NPO Act was written in order to extend a helping hand to this sector to help it comply with the provisions of the Act. If regulation of informal social security is the way to go, the approach in the NPO Act is a commendable one and one that could be

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<sup>902</sup> Section 6.

<sup>903</sup> Sections 12 & 13.

<sup>904</sup> Section 13(1)(a).

<sup>905</sup> Section 13(1)(b).

<sup>906</sup> Section 13(1)(c). A time limit is also set. Within two months of receiving an application which complies fully with the Act, the Director must consider the application and any further information provided by the applicant; and, if satisfied that the applicant complies with the requirements for registration, must register the applicant by entering the applicant's name in the register. If, after considering an application, the Director is not satisfied that the application complies with the requirements for registration, the Director must send the applicant a written notice, giving reasons for the decision and informing the applicant that it has one month from the date of the notice to comply with those requirements. Upon registering any applicant, the Director must issue a certificate of registration in the applicant's name on the prescribed form, which must include a registration number; must send the certificate and a certified copy of the registered constitution to the applicant; and must advise the applicant of the date on which its name was entered in the register. A non-profit organisation that has been registered remains registered until its registration is cancelled in terms of this Act; or the organisation is voluntarily deregistered; or the organisation is wound up or dissolved. The certificate of registration of a non-profit organisation, or a duly certified copy of the certificate, is sufficient proof that the organisation has been registered in terms of this Act; and is a body corporate. A registered non-profit organisation must reflect its registered status and registration number on all of its documents.

followed. The preamble of the Act states that the Act seeks to provide an environment in which non-profit organisations can flourish and to establish an administrative and regulatory framework within which non-profit organisations can conduct their affairs.

The Act contains simplified procedures as far as registration, book-keeping and general administration are concerned – procedures that are much the same as those of the Close Corporations Act<sup>907</sup> – in order to make compliance much simpler.

It also assists people in the non-profit sector to comply with the Act by making model forms and procedures available. It is clear that the focus is not merely on regulation, but also on support and encouragement.

From the Act it is clear that the first step in the process of regulation seems to be registration. This is also probably the first step that will be necessary if informal social security is to be regulated as well. The Act is written to encourage and assist in this process of registration, and registration procedures are simplified.

Interestingly, the Act resorts under the Minister of Social Development. The Ministry is not merely there to control compliance, but to fulfil its responsibility towards NPOs by promoting, supporting and enhancing the capacity of NPOs to perform their functions.

The approach followed by the Act is commendable. In the proposed model contained in chapter 8, this example reappears again to illustrate how government can act to support informal social security schemes.

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<sup>907</sup> 69 of 1984.

## 3.2 Other legislation impacting on informal social security

### 3.2.1 *The Lotteries Act*<sup>908</sup>

#### 3.2.1.1 Discussion of the Act

The Lotteries Act is relevant to social security, and to informal social security in particular, since it is an important instrument by means of which money is channelled for purposes of social investment and socio-economic upliftment. In terms of the Lotteries Act, a National Lotteries Board is established to run the National Lottery. In terms of s 26, the Board must appropriate money for expenditure for specific purposes. These purposes include:

- expenditure connected with reconstruction and development projects and other programmes referred to in the RDP Fund Act, 7 of 1994;<sup>909</sup>
- charitable expenditure, which is defined in terms of s 1 as expenditure by any organisation or institution established for charitable, benevolent or philanthropic purposes, including friendly societies, welfare organisations and conduit organisations or trusts established in respect of any such organisation or institution;<sup>910</sup>
- expenditure in connection with the development of sport and recreation;<sup>911</sup>

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<sup>908</sup> 57 of 1997.

<sup>909</sup> In terms of s 2 of the RDP Fund Act, the RDP Fund may be credited with (a) money appropriated by Parliament for the Fund, (b) domestic and foreign credit to the Fund, (c) interest derived from the investment of money standing to the credit of the Fund, (d) the proceeds derived from the sale of state assets for the reconstruction and development projects and programmes, (e) money accruing to the Fund from any other source. In terms of s 3(a), the money of the Fund should be utilised to finance reconstruction and development projects and programmes authorised by Cabinet. Section 26(3)(a).

<sup>910</sup> Section 26(3)(b).

<sup>911</sup> Section 26(3)(c).

- expenditure on, or connected with, the arts, culture and national historical, natural, cultural and architectural heritage.<sup>912</sup>

The Lotteries Act allows for the allocation of monies to inter alia “charitable expenditure”. Such expenditure is defined very broadly, but, in particular, refers to “friendly and conduit” societies. By implication, informal social security should be able to benefit from monies flowing from the Lotteries Act. However, it is not certain how the allocation to the various beneficiary groups works. According to the Act, the Board is responsible for the allocation. According to s 28(1), the Minister to whom the administration of the Act has been assigned (currently the Minister of Trade and Industry), in consultation with the Minister of Social Development, will appoint a distributing agency which possesses the required skills and expertise to distribute the allocated sum fairly and equitably among all persons who meet the prescribed requirements. Uthingo Management (Pty) Ltd is the distributing agency of the National Lottery.<sup>913</sup> The distributing agency must consider applications for grants and make payments,<sup>914</sup> which are subject to scrutiny by the Auditor-General. The process for applying for a grant and the criteria for taking decisions are not evident from the Act.

In February 2001, a separate distribution agency for charities was set up with the task of providing guidance with regard to allocations to the charity and welfare sector. The initial focus of the agency was directed at organisations serving the needs of children, the youth, socially vulnerable groups (e.g. the elderly, women and the disabled) and people living with HIV/AIDS. This was made subject to the clause that organisations had to show that they faced the risk of scaling down, or of closure, if not assisted. Effectively, this excluded organisations with reserve funds and own investments, for example stokvels,

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<sup>912</sup> Section 26(3)(d).

<sup>913</sup> Uthingo is a consortium formed in 1996 comprising a variety of South African Black economic empowerment partners, industry shareholders and state shareholders.  
[http://www.sarpn.org.za/documents/d0000032/page1\\_1.php#b](http://www.sarpn.org.za/documents/d0000032/page1_1.php#b) accessed on 5 Nov 2004.

<sup>914</sup> Section 28(2).

burial societies, etcetera. This provision also contradicted government's general insistence that non-profit organisations must secure their own sustainability.<sup>915</sup>

As a result of pressure, this criterion was changed for the 2002/2003 cycle and the focus was placed on:

- capacity building for organisations and communities, which will involve training, skills development and lobbying;
- poverty alleviation;
- community and residential care for the vulnerable.

More recently, new criteria have been laid down and one of the funding criteria requires non-profit organisations to enter into a formal working relationship with unregistered, community-based organisations to assist these organisations to apply for money and, if successful, help them to administer the funds distributed to them.

In 2000/2001, a total of R44,2 million was distributed by the Charities Distributing Agency. In 2001/2002, R103,28 million was distributed out of an available R154,7 million.

Criticism of the Act still prevails, with one such criticism being that funding is largely short-term, which makes non-profit organisations vulnerable when it comes to medium-term planning. Furthermore, monies allocated for reconstruction and development projects and other programmes referred to in the RDP Fund Act<sup>916</sup> have not been spent since the abandonment of the Reconstruction and Development Programme. In 2003, R153 million was set aside for RDP projects, which was not spent.<sup>917</sup>

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<sup>915</sup> [http://www.sarpn.org.za/documents/d0000032/page1\\_1.php#b](http://www.sarpn.org.za/documents/d0000032/page1_1.php#b) accessed on 5 Nov 2004.

<sup>916</sup> Act 7 of 1994.

<sup>917</sup> See <http://www.iol.co.za> accessed on 5 Nov 2004.



### 3.2.1.2 Lessons to be learnt for informal social security

The Lotteries Act is relevant for social security because it is a source through which money can be channelled to the social security sector, specifically non-profit organisations.<sup>918</sup> It seems that informal social security agencies will be able to access this form of funding, although the criteria for allocation and distribution of funds do not always appear to be very clear and transparent. The linking of non-profit organisations with non-registered, community-based organisations is a very good way of extending the effect of the lottery to the broader community. Informal social security schemes should become more aware of the ways in which to access lottery money so that such money can be used for the purposes of their activities.

## 3.2.2 *Black Economic Empowerment*<sup>919</sup>

### 3.2.2.1 Discussion of the Act

Another important legislative instrument through which money can be channelled to social security is Black Economic Empowerment (BEE). In terms of the Broad-Based Black Economic Empowerment Act,<sup>920</sup> BEE entails the economic empowerment of all Black people<sup>921</sup> through diverse, but integrated, socio-economic strategies.<sup>922</sup> The

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<sup>918</sup> Section 28(3).

<sup>919</sup> Act 53 of 2003. (Hereafter the BEE Act).

<sup>920</sup> Ibid.

<sup>921</sup> Including women, workers, the youth, people with disabilities and people living in rural areas. BEE Act s 1.

<sup>922</sup> These strategies do not form a *numerus clausus* and can include, in terms of s 1, (a) increasing the number of Black people that manage, own and control enterprises and productive assets, (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises, (c) human resources and skills development, (d) achieving equitable representation in all occupational categories and levels in the workforce, (e) preferential procurement, and (f) investment in enterprises that are owned or managed by Black people. BEE Act, s 1.

objectives of the Act seem to have a broader focus than merely addressing racial inequalities in the workplace and contain references to social investment.<sup>923</sup>

One of the objectives of the Act seems to be to extend the effect of BEE to broader society, and not just to workers in formal employment. Especially phrases like “investment programmes for infrastructure”, “sustainable development”, “land ownership” and “general prosperity” imply similar objectives to those of the social security system in general.<sup>924</sup>

This socio-economic objective can also be ascertained from the Code of Good Practice issued in terms of the Act.<sup>925</sup> In terms of the Code of Good Practice, room is left for a residual 10 percent on the BEE scorecard, which sectors and enterprises can determine. A scorecard was proposed as part of BEE to serve as an incentive for White capital investment in the schemes. According to the scorecard, certain weights are assigned to certain aspects of BEE, for example ownership, management/control of a company, and skills development. Suggestions are given in the Code for this determination, for example: (a) the provision of infrastructural support to suppliers; (b) investment in, and support for, enterprises operating in rural communities and areas where urban renewal programmes are operating; (c) investment in the development needs of employees, including, but not limited to, investment in housing, transport and health care for employees.<sup>926</sup>

The Financial Sector Charter, for example, makes provision for a targeted investment. “Targeted investment” relates to the financing of, and investment in, transformational infrastructure projects that support economic development in underdeveloped areas and contribute to equitable access to economic resources.<sup>927</sup> The Charter also makes

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<sup>923</sup> Section 2.

<sup>924</sup> Section 2.

<sup>925</sup> Code of Good Practice issued in terms of s 9 of the BEE Act. Accessed at <http://www.workinfo.co.za> on 19 Jul 2004.

<sup>926</sup> Ibid. Item 5 of the Code of Good Practice issued in terms of s 9 of the BEE Act.

<sup>927</sup> Such infrastructure projects could be in the following sectors: transport, telecommunications, water, waste water, solid waste, energy, social infrastructure (such as health, education and correctional service

provision for Corporate Social Investment (CSI), in terms of which each financial institution must set a target of directing 0,5 percent per annum of post-tax operating profits to CSI until 2014. CSI encompasses investment in projects aimed primarily at Black groups, communities and individuals that have a strong developmental approach and contribute to transformation. CSI projects may include, but will not be limited to, education, training, development programmes, the environment, job creation, the arts and culture, health and sport.<sup>928</sup>

Another example of how CSI is applied in practice can be found in the Charter for the Mining Industry. The South African Mining Industry Broad-Based Socio-Economic Empowerment Charter refers inter alia to the mobilisation of all stakeholder resources for the purpose of integrated socio-economic development for host communities, major labour-sending areas and areas which, owing to the unintended consequences of mining, are becoming ghost towns.<sup>929</sup> The Charter also provides for measures to improve the standard of housing of employees, to promote home ownership options for mine employees and to improve the nutrition of mine employees.

As a result of BEE, a considerable amount of corporate money will be spent on the improvement of socio-economic conditions in South Africa. This leg of corporate spending can therefore complement social security.

### **3.2.2.2 Lessons to be learnt for informal social security**

The South African formal social security system in its present form has more or less reached its capacity.<sup>930</sup> This creates quite a dilemma for the state, because the state is constitutionally obliged to provide access to social security.<sup>931</sup>

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facilities), municipal infrastructure and services, low-income housing and small and medium Black enterprises. Financial Sector Charter 2.34.1. Ibid.

<sup>928</sup> Par 13.

<sup>929</sup> Section 2.

<sup>930</sup> Taylor Report op cit note 39 at 15-33.

If the state can tap into additional financial resources, for example the money spent by corporate South Africa on social investment in terms of BEE, the state will be able to fulfil its social responsibilities and money can be channelled into the socio-economic development of the country. This by no means indemnifies the state from reforming the social security system, but it is one way of addressing a lack of financial resources so as to provide better social security protection. The challenge is therefore to attempt to align BEE and social security. If they work together within a coherent and comprehensive structure, scarce resources can be deployed more effectively to address the issue of poverty and social inequality. There seems to be a lack of coordination between the various legislative tools created to address social inequalities. If money coming from BEE can be used to assist in various areas of social and informal security, the state can use its resources for other social security risks not receiving any benefits under, for example, BEE.

In order to achieve this, a comprehensive and holistic approach is necessary to address poverty alleviation. There is currently no government department sufficiently equipped to oversee such a comprehensive strategy. One of the problems with the current social security system is its fragmented nature, for example the Department of Social Development is tasked with administering the bulk of social security legislation; the Department of Labour deals with unemployment insurance and employment injuries; and mining injuries fall under the auspices of the Department of Mineral and Energy Affairs. A new Social Security Agency was recently created,<sup>932</sup> but it has been tasked primarily with social assistance and the administration of social grants, so it seems impossible that this agency will be able to assume responsibility for this task.

If all stakeholders and tools in the fight against poverty can be coordinated, then the holes in the social safety net can be more effectively mended and the net can be strengthened, and even extended to provide a sustainable social and economic future for all South Africans. This will directly impact on informal social security.

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<sup>931</sup> Section 27 of the Constitution *supra* note 2. See par 4, ch 3.

<sup>932</sup> Social Security Agency Act *supra* note 214.

### 3.2.3 *National Small Business Act*<sup>933</sup>

#### 3.2.3.1 Discussion of the Act

The National Small Business Act is aimed at providing guidelines for organs of state to promote small business in South Africa. This Act for the first time creates an institutional framework for the promotion of Small, Medium and Micro Enterprises (SMMEs). A large number of businesses in the informal sector are SMMEs. According to the Act, firms with less than 200 employees are viewed as SMMEs.<sup>934</sup> The Act also puts state assistance schemes in place to enable small business to play a bigger role in the economy. Initially, a National Small Business Council and the Ntsika Enterprise Promotion Agency<sup>935</sup> were established. The Act was however amended in 2003<sup>936</sup> to repeal all provisions pertaining to the National Small Business Council and to empower the Minister to establish an Advisory Body to represent the interests of small business. The Advisory Body must advise the Minister on a number of matters, including:<sup>937</sup> (i) strategies to address identified market failures affecting the sector; (ii) the impact of current and new legislation on small business; (iii) national standards pertaining to small business development and regulation; (iv) measures to ensure the creation of physical

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<sup>933</sup> 102 of 1996.

<sup>934</sup> Dekker JM *The Stimulation of Small Business in South Africa* (1999) at 7. (Hereafter Dekker JM). A micro-enterprise employs less than five workers, a small business between five and 50, and a medium business between 50 and 200.

<sup>935</sup> Idem at 75. Ntsika (which means “pillar of support”) was set up by the National Small Business Act (s 10) to facilitate and promote small business in South Africa. Its aim is to provide non-financial services to the small business sector, for example through the provision of simplified registration of new businesses, through the expansion, coordination and monitoring of training, through advice and counselling to small businesses, through facilitating business advice and counselling, through access to raw materials, national and international markets, and research relating to the support of these businesses, through the general strengthening of the capacity of service providers and small businesses to compete successfully in the economy, and through the coordination of the implementation of national small business support strategies. Ntsika does not seem to be very successful and suffers from many problems, such as a shortage of funds, delays with statutory support, and limited ability to implement and coordinate. In 1997, some financial irregularities were also discovered in Ntsika. It is debatable if the Agency currently serves its purpose in terms of the Act.

<sup>936</sup> By the National Small Business Amendment Act, 26 of 2003.

<sup>937</sup> Section 3(2)(b).

business infrastructure through viable business sites; (v) the development of skills in all aspects of small business, but not value chains; (vi) constraints affecting the viability of the small business community; (vii) methods for liaising with the small business community in order to identify their needs; (viii) methods for monitoring and influencing the provision of support services to the small business sector; (ix) any other matter that the Minister may deem appropriate.<sup>938</sup>

The Act also endeavours to create a regulatory framework that will ensure that organs of the state assess the effect of laws on small business and give reasonable consideration to providing alternative relief to SMMEs, or to adopting measures to minimise compliance costs.<sup>939</sup> This Act falls under the auspices of the Ministry of Trade and Industry.

The state has also in recent years increasingly recognised the important role played by small business in the country. In the 2005 budget, government pledged to make life easier for small companies. The Minister of Finance announced a number of reforms, including removing red tape and adding R1,8 billion in tax relief for SMMEs.<sup>940</sup> Some of the most notable reforms included in the 2005/2006 budget are: (a) small businesses with an annual payroll of less than R500 000 will also no longer pay Skills Development Levies as from August 2005; (b) the South African Revenue Service (SARS) will send staff to visit small businesses in order to help them with tax issues like registration, tax returns and other tax obligations; (c) a single, national call centre number will be created for all tax and customs enquiries; (d) dedicated facilities will be made available for small businesses at the call centre and at the SARS offices, with extended hours; (e) a specific campaign relating to VAT education will be undertaken; (f) SARS will make accounting and payroll packages available to small businesses (small businesses can obtain software for their own computers or use SARS kiosks that will be set up); (g) only one tax form

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<sup>938</sup> In terms of the National Small Business Act (s 2), the National Small Business Council was also set up to promote the interests of small business at national, provincial and local level. This Council has also suffered as a result of financial corruption. Other institutions created in recent years to assist SMMEs are the Department of Trade and Industry, the Development Bank of South Africa, Regional Development Corporations and the Small Business Development Agency. Dekker JM op cit note 934 at 70-74.

<sup>939</sup> *Idem* at 75.

<sup>940</sup> *Business Day (Budget 2005)* (Thurs Feb 24, 2005) at 1.

will be needed to register for all taxes, including income tax and VAT; (h) a VAT package for small retailers (with a turnover of less than R1 million per year) will be ready from April 2005 in order to help people who do not use a modern cash register to account for VAT.<sup>941</sup>

### **3.2.3.2 Lessons to be learnt for informal social security**

The Act recognises the important role played by the informal sector in the larger economy and also attempts to set up structures and guidelines to promote small businesses. This Act therefore indirectly benefits informal social security, because the stimulation of small business will also increase the income and opportunities of people involved in the informal sector, thereby strengthening the informal social security safety net.

The informal sector makes up a large percentage of the workforce.<sup>942</sup> It also comprises the majority of those excluded and marginalised in terms of the formal social security system.<sup>943</sup> Better access by this part of the workforce to financial resources will strengthen informal social security resources. In addition, better communication and increased recognition of this sector will also lead to the recognition of informal social security and to a greater awareness of this sector's welfare needs and requirements.

The National Small Business Act indirectly strengthens informal social security, because it leads to recognition of the important role played by the informal sector in the economy. The Act attempts to support informal social security, but not by attempting to incorporate it into the present legislative structure. Instead, it supports informal social security by providing bodies and mechanism to improve skills, facilitate access to resources and training, and build the capacity of those involved in the informal sector.

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<sup>941</sup> *Business Day* (Thurs, Feb 24, 2005) at 7.

<sup>942</sup> ILO *Decent Work* op cit note 605 at 20.

<sup>943</sup> Taylor Report op cit note 39 at 19-21.

One of the options available in respect of informal social security may be better recognition and support without forcing regulation onto these systems. If this route is followed, the National Small Business Act may serve as a useful example of how to accomplish this.

The increased recognition of the importance of SMMEs in the economy is also encouraging. The tax relief measures proposed in the 2005/2006 budget are an affirmation thereof. Moreover, the measures implemented by SARS to empower small businesses are also proof that recognition need not always assume the form of strict regulatory measures, but can be achieved through supportive measures designed to ensure better compliance. This change of attitude by government as regards small business can be construed as implying that there is a slow, but sure, change in attitude to areas of the economy which were previously unregulated, such as informal social security schemes. Instead of alienating them through legislative measures, government is increasingly trying to encourage them to comply voluntarily with regulatory measures, thereby bringing them within the protective scope of legislation.

### **3.2.4 *Skills Development Act***<sup>944</sup>

#### **3.2.4.1 Discussion of the Act**

The Act applies to both “employees” and “workers”. The definition of “employee” is similar to the definition of employee contained in the Labour Relations Act. “Worker” is defined so as to include employees, unemployed persons and work-seekers. This will therefore also cover the unemployed and informally employed.<sup>945</sup>

In terms of the Act, employers contribute to the National Skills Development Fund by means of payments to SARS. This fund then funds Sector Education and Training

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<sup>944</sup> 97 of 1998.

<sup>945</sup> Section 1.



Authorities (SETAs) established in terms of s 9(1) of the Act and reimburses employers who conduct learnership<sup>946</sup> and development programmes from which employees and workers can benefit.

The purposes of the Act are set out in section 2. One of the purposes is to develop the skills of the South African workforce and thereby improve the quality of life of workers, improve their prospects of work and labour mobility, improve productivity in the workplace, increase the competitiveness of employers, promote self-employment, and improve the delivery of social services (s 2(1)(a)). Secondly, the Act aims to increase the levels of investment in education and training in the labour market, and to improve the return on that investment (s 2(1)(b)). Thirdly, it aims to encourage employers to use the workplace as an active learning environment, to provide employees with the opportunities to acquire new skills, to provide opportunities for new entrants to the labour market to gain work experience, and to employ persons who find it difficult to be employed (s 2(1)(c)). Fourthly, it aims to encourage workers to participate in learnership and other training programmes (s 2(1)(d)). Fifthly, the Act sets out to ensure the quality of education and training in, and for, the workplace (s 2(1)(f)). Sixthly, the Act also seeks to assist work seekers to find work, to assist retrenched workers to re-enter the labour market, and to assist employers to find qualified employees (s 2(1)(g)).

#### **3.2.4.2 Lessons to be learnt for informal social security**

The Skills Development Act makes opportunities available for people in the informal sector and for the unemployed to acquire skills which will increase their potential to improve their employment status. Social insecurity can and should be addressed on different levels,<sup>947</sup> and the combating of unemployment is one of the important strategies

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<sup>946</sup> The Act distinguishes between three types of programmes, namely learnership agreements, a contract of employment and a skills programme. Learnership agreements are regulated in terms of ss 16 & 17 of the Act. A contract of employment with a learner is regulated by means of s 18 of the Act. Skills programmes are described in s 20 of the Act.

<sup>947</sup> See Taylor Report op cit note 39 at 17-34. Also see ch 8 in general.

which can be used. Skills development is an important tool in this struggle to combat unemployment. This will also directly impact on informal social security in that the pressure on the system will be relieved and more resources will be available to improve the strength of the system. More employment means more protection in terms of the formal social security system and less dependence on the informal social security system.

## **4 POLICY RELATING TO INFORMAL SOCIAL SECURITY**

### **4.1 Introduction**

No political democracy can survive and flourish if the mass of our people remains in poverty without land, without tangible prospects for a better life. Attacking poverty and deprivation must therefore be the first priority of our democratic Government.<sup>948</sup>

Informal social protection measures are not regulated by legislation and it is uncertain whether present policy considers them to be part of social security, since they fall outside the formal social security framework. An analysis of the policy on informal social security is important, since policy will eventually be translated into legislation and regulation, and because such policy will serve as an indication of what government plans to do in future about the matter.<sup>949</sup> Government does not have a clear policy on the development or restructuring of informal social security. There are, however, several documents pertaining to social security policy. It is important to consider the general policy on social security in order to attempt a prediction of the weight which might in future be given to informal social security.

Various documents regarding reform of the present social security framework have seen the light since 1995, the two most important ones being the Social Welfare White Paper<sup>950</sup> and the Taylor Committee Report.<sup>951</sup> Both these documents can give limited

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<sup>948</sup> Taylor Report *idem* at 35.

<sup>949</sup> Lund *op cit* note 47 at 17.

<sup>950</sup> Welfare White Paper *op cit* note 186.

<sup>951</sup> The RDP and Gear are also policy documents, but do not deal with informal social security, but rather with formal social security in the broader context. Consequently, they are not discussed in this section, but in par 3.5.1 & 3.5.2, ch 2.

guidance on possible future policy directions with regard to informal social security and are therefore analysed below.

## **4.2 General policy**

Besides policy documents such as the Welfare White Paper and the Taylor Committee Report, which are discussed below, the general policy on welfare can be ascertained from the general values supported by the Department of Social Development, which is primarily responsible for broader social development in the country. These values are reflected in the Department's vision, mission and goals.

The Department of Social Development is committed to a caring and integrated system of social development services that facilitates human development and improves the quality of life.<sup>952</sup> In order to realise this vision, the Department has developed a strategic plan, based on a ten-point plan, which reflects the priorities to be addressed by the social development sector during the period 2000 to 2005.<sup>953</sup> The ten-point plan refers to:

- the rebuilding of the family, the community and social relations;
- integrated poverty eradication strategies;
- a comprehensive social security system;
- a response to violence against women, children, older persons and vulnerable groups;
- programmes and services to assist people and communities living with HIV/AIDS;
- youth development;

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<sup>952</sup> Vision of the Department of Social Development.

Accessed at <http://www.socdev.gov.za/About%20us/vision.htm> on 3 Nov 2004.

<sup>953</sup> Ibid.

- accessibility of social welfare services;
- services to people with disabilities;
- commitment to cooperative governance;
- the training, education, redeployment and employment of a new category of workers in social development.

The ten-point plan contains very broad guidelines. Some of these may, however, be relevant for informal social security in particular, as is apparent from the following for example:

- The rebuilding of the family, the community and social relations can indirectly support the strengthening of kinship-based support by strengthening the family and community at large. Recognition that the rebuilding of these relationships is a welfare priority is also significant, since it acknowledges that informal social security support is a form of welfare support that should be encouraged.
- Integrated poverty eradication strategies will have to have due regard for people who are currently excluded from formal social security protection and who must rely on informal social security measures for support. One of the main concerns expressed in the discussion above is that money flowing in from non-government sources, for example from the Lottery and BEE, is not applied within the context of a comprehensive poverty alleviation strategy designed to strengthen the broader social security system. If more money can be applied in a comprehensive manner for social security, this will indirectly benefit informal social security.
- A comprehensive social security system is crucial in order to bring more people, who are currently excluded from social security protection, into the

protective ambit of social security. The recommendations of the Taylor Committee largely determine how the system should be changed to ensure comprehensiveness. The impact of the findings of the Taylor Committee is discussed below. Accessibility of social welfare services will also improve the present formal social security system and add to its comprehensiveness, which, in turn, will indirectly lessen the burden on informal social security.

- The commitment to cooperative governance can help informal social security. Through such governance, other social welfare role players at grassroots level, such as non-profit organisations, civil society in general and other informal social security schemes, will be recognised. The recognition of these role players and an acknowledgement as far as governance is concerned will ensure that the needs of these groups are better addressed in future policy.

### **4.3 The White Paper on Social Welfare**

#### ***4.3.1 Discussion of the White Paper***

The first move towards reform of the previous welfare dispensation came with the publication of the White Paper for Social Welfare in 1997. The most notable contribution of the White Paper lies in its indication of the proposed way forward as far as reform of the post-Apartheid social security system is concerned. It sets out broad goals, aims and guidelines as regards reform of the welfare dispensation. What is of more importance for purposes of this study is the fact that the White Paper already recognises the role of informal welfare measures and lays the foundation for the strengthening of these systems.

The goals set out in the White Paper have largely been replaced by the Taylor Committee Report. It is however still necessary to examine the proposed reforms set out in the White Paper as far as informal social security is concerned and to consider some of the goals of the (then) Department of Social Welfare (now the Department of Social Development) to

determine if informal social security was recognised even during these earlier stages of reform.

According to the White Paper, social security encompasses a wide variety of public and private measures that can provide cash or in-kind benefits, or both. The domains of social security are poverty prevention, poverty alleviation, social compensation and income distribution.<sup>954</sup> Although the White Paper fails to pertinently recognise informal social security as one of the domains of social security, it does contain references to elements of informal social security. In this regard, the following elements can be identified:

- The preamble of the White Paper indicates that social security is not only seen as a publicly provided system. It states that welfare needs can be adequately addressed only through an inter-sectoral approach within government, and between government and civil society.<sup>955</sup> The Ministry will strive to achieve the social goals in a collaborative partnership with individuals, organisations in civil society and the private sector.<sup>956</sup> One of the goals set out in the White Paper is the development and strengthening of a partnership between government, the community and organisations in civil society and the private sector.<sup>957</sup> Community development is identified as an integral part of developmental social welfare. The focus of community development programmes in the welfare field will include (a) the development of family-centred and community-based programmes, (b) the encouragement and facilitation of voluntary participation in social and community programmes, (c) the facilitation of self-help groups and mutual aid support programmes, (d) the facilitation of institutional development, with the emphasis on creating and/or strengthening existing government institutions and organisations of

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<sup>954</sup> Ch 7(1).

<sup>955</sup> Par 2 at 20-21. This increased focus on the family should go hand in hand with community development, which should include the development of family-centred and community-based programmes and the encouragement and facilitation of voluntary participation in social and community programmes, as well as the facilitation of self-help groups and mutual aid support programmes.

<sup>956</sup> Par 5.

<sup>957</sup> Par 7.

civil society, and (e) the promotion of community dispute-resolution and mediation programmes and training programmes.<sup>958</sup>

- The White Paper highlights the important role of the family in social protection. Part of its proposed reform strategy revolves around the preservation of the family as a unit in which children are raised to healthy adulthood, since this is the environment best suited to meeting the primary needs of children.<sup>959</sup> The family is the first circle of care for children. In order to ensure its sustainability, the family should be strengthened and supported. Special support is needed for those destitute and vulnerable people who have special needs and who are not part of families or households. Government is committed to giving the highest priority to the promotion of family life, and to the survival, protection and development of all South African children.<sup>960</sup> The promotion of family life can indirectly strengthen kinship support and therefore informal social security.
- The White Paper acknowledges the important role played by civil society<sup>961</sup> in the welfare sector. It is estimated that there are up to 10 000 organisations in civil society with a welfare and developmental focus. The White Paper

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<sup>958</sup> Par 7.

<sup>959</sup> Pars 46-48, ch 7. This view was also reflected in the judgment in *Grootboom* (supra note 293) where s 28(1)(b) of the Constitution was interpreted. The section states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. In *Grootboom* it was found that children firstly have the right to family care, and, secondly, the right to appropriate alternative care only when family care is absent. Malherbe K “Family” in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 380. (Hereafter Malherbe).

<sup>960</sup> Section 1(41). In the Welfare White Paper op cit note 186 at 10-12, government refers in particular to the role of social and family networks in addressing poverty. Welfare support can assist in preventing the weakening of social and family networks providing social support and security. The White Paper sets, as one of the restructuring priorities, the building of partnerships between government, organisations in civil society, religious organisations and the private sector. Promotion of the principle of *ubuntu* is also specifically mentioned. The principle of caring for each other’s wellbeing will be promoted, and a spirit of mutual support will be fostered.

<sup>961</sup> The description of the informal welfare sector contained in the White Paper is very restricted. It states that the informal welfare system has developed with its roots in the anti-Apartheid movement. It further states that these NGOs are funded almost exclusively by foreign donors. The informal welfare sector, however, encompasses more than NGOs and also includes family and community support networks not linked to NGOs. It recognises that NGOs are well placed to assist government. They can identify local needs, respond speedily and appropriately to these needs, promote grassroots participation in decision-making and direct service delivery in order to mobilise communities to take action to meet their needs and coordinate action at local level. Pars 4 & 23, ch 3.

distinguishes between the formal welfare sector (government-subsidised organisations delivering welfare services) and the informal welfare sector (non-governmental subsidised institutions).<sup>962</sup> Informal social networks exist which provide tangible and intangible resources and social support. These consist of networks such as family, friends, neighbours and indigenous helping systems, such as self-help groups, and spiritual and customary networks.

#### ***4.3.2 Comments on the White Paper***

It is clear that the White Paper acknowledges that informal welfare arrangements are part of the current welfare dispensation. The White Paper recognises the important role played by players other than the state, for example, families and communities. This lays the foundation for the recognition of informal social security.

The Welfare White Paper advocates a comprehensive welfare policy with legislation as the end result of, and not the initial impetus for, policy formulation.<sup>963</sup> It is still however not clear from the White Paper exactly how these two welfare components, formal and informal social security, will be accorded equal status and how the system will function after recognition of both these systems. Probably the most significant shortcoming as far as current social security legislation is concerned is the fact that existing legislation is not based on the planned implementation and continuous evaluation of a comprehensive welfare policy. It reflects ad hoc and partial reactions to different needs at different times, as well as a lack of consultation with stakeholders.<sup>964</sup> This movement towards a more comprehensive approach, as reflected by the White Paper, is commendable. Such movement is further necessitated by the South African Constitution, which provides a new legislative imperative for the restructuring of welfare legislation at national and provincial levels.

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<sup>962</sup> Par 2, ch 3.

<sup>963</sup> Par 10, ch 5.

<sup>964</sup> Par 5, ch 5.



The White Paper set the ball rolling for further welfare reforms. This has culminated in a number of changes to the welfare dispensation since 1995.<sup>965</sup> The White Paper was followed (and was largely replaced in terms of importance) by the Taylor Committee Report.

#### **4.4 The Taylor Committee Report**

##### ***4.4.1 Discussion of the Taylor Committee Report***

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa, under the chairpersonship of Prof Vivienne Taylor,<sup>966</sup> was appointed in 2002 to investigate ways in which the present formal social security system's protective scope could be extended.<sup>967</sup> This discussion will focus on the weight attached by the Taylor Committee to informal social security and not on the findings of the Committee in general.

The Taylor Committee acknowledged (more indirectly than directly) the concept of informal social security. Informal social security is twice mentioned by name in the Report<sup>968</sup> and once in the executive summary of the Committee.<sup>969</sup> Indirectly, informal social security is implied in references to aspects such as the informal sector and groups marginalised from formal social security, in references to the role of civil society in

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<sup>965</sup> For example, a White Paper on Population Policy followed in April 1998; transformation of the child and youth system commenced and resulted in a policy framework as well as in the implementation of successful pilot projects; and the social security system was restructured in 1995 by the amalgamation into one computer database of the 14 different systems that existed prior to 1994. Accessed at <http://www.socdev.gov.za/About%20us/chron.htm> on 3 Nov 2004.

<sup>966</sup> Taylor Committee op cit note 39.

<sup>967</sup> The Committee, in its executive summary in paragraph (iv), recognises the important role played by informal social security.

<sup>968</sup> Taylor Report op cit note 39 at par 6.2.5 at 74 and par 15 at 153.

<sup>969</sup> Paragraph iv.

social security, and by mentioning the widening of the scope of protection of the current safety net.<sup>970</sup>

The terms of reference of the Committee were fairly broad and required it to review a broad number of elements relating to social security. These included the consideration of (a) options regarding ultimate objectives and targets for the social security system, including alternative options for an envisaged final structure, (b) options for immediate practical implementation, which should be practical and focus on immediate needs, the current level of South Africa's development and affordability, and (c) all information regarding the viability and significant negative or positive implications linked to the various options.<sup>971</sup> The Committee also had to examine specific, existing social security areas, namely social assistance grants, social insurance schemes and unemployment insurance, as well as health funding and insurance. In each of these areas, the analysis had to include existing processes, core issues and key recommendations regarding the future direction and implementation processes.<sup>972</sup>

In order to draw up its report, the Committee was also expected to enter into a fairly broad consultation process with all relevant stakeholders linked to the core issues under examination and to receive inputs from all relevant South African experts in the various policy areas under examination and from all government departments affected by the policy. In addition, the Committee had to review all relevant material on international practice in both industrial and developing settings.<sup>973</sup>

The Committee found that the key, underlying principle of the present formal social security system remains the assumption that those in the labour force can support themselves through work, and that unemployment is a temporary condition. The effect of this assumption, it found, is that the unemployed, informally employed and many

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<sup>970</sup> Taylor Report op cit note 39 at par 2.2.4 at 17, par 2.4.1.2 at 21, par 2.8.2 at 31, par 2.8.2 at 31, par 3.1 at 35, par 3.4 at 40, par 3.5.3 at 46, par 4.5 at 50.

<sup>971</sup> *Idem* at 10-11.

<sup>972</sup> *Ibid.*

<sup>973</sup> *Idem* at 10-11.

temporary workers fall through the holes in the social safety net.<sup>974</sup> People should be able to earn a living through employment rather than through relying on welfare transfers.<sup>975</sup> Government's macro-economic policy aims to push the economy onto a stable and sustainable growth path that will generate jobs.<sup>976</sup> Given the size of unemployment in the country and slow economic growth, full employment is not a feasible scenario in the short to medium term. In fact, the high level of unemployment, extreme poverty and inequality pose a barrier to the attainment of sustainable growth.<sup>977</sup>

The Committee therefore found that, owing to the large number of unemployed persons and the large number of persons who are forced into the informal sector, the South African economy gives rise to two different sets of needs as far as social security is concerned: first, there are the needs of the poor who are largely excluded from the productive capacity and rewards of the formal economy, and, secondly, there are the security needs of the informally employed.<sup>978</sup>

The Committee envisaged the development of a comprehensive social security system to cater for these two different sets of needs. In order to extend social security protection so as to fundamentally improve the standard of living of all people in the country, the Taylor Committee opted for a broader conceptualisation of social protection (instead of social security as the narrower concept).<sup>979</sup> Despite the fact that the definition of social protection does not contain a specific reference to informal social security, according to the Committee comprehensive social protection will sufficiently benefit other forms of social security, and this will have important benefits for South Africa. These benefits are also indirectly important for the possible future incorporation of informal social security into the broader social security paradigm. These benefits can be summarised as follows:

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<sup>974</sup> *Idem* at 15.

<sup>975</sup> *Ibid.*

<sup>976</sup> *Ibid.*

<sup>977</sup> *Ibid.*

<sup>978</sup> *Idem* at 35.

<sup>979</sup> *Idem* at 40-43.

- Comprehensive social protection includes developmental strategies and programmes typical of a developing country and increases the opportunities of people doing “informal” work to gain access to social protection.<sup>980</sup>
- Comprehensive social protection will provide a coherent framework for integrating existing and proposed social and economic policy and will address new risks and increased vulnerability.
- Social protection could create added potential for the linking of private, public and community sector benefits and other interventions.

The only specific reference to informal social security in the Report is to be found in the chapter regarding employment and unemployment. It states that people marginalised in terms of the formal system must rely on informal social security mechanisms and it distinguishes between family-based/kinship-based and community-based forms of informal social security. The reasons for marginalisation, according to the Committee, relate to: (a) the formal-employment bias and the categorical approach of the present social security system, (b) the urban bias of the present system, (c) the restricted family concept underlying much of the formal system, (d) the low levels of benefit of the grant system and (e) the limited concept of work, which leads to a marginalisation of women in poor and traditional communities.<sup>981</sup>

The Committee also acknowledged that it is important not to impose a social security system that will be detrimental to traditional support mechanisms, such as informal social security support. Transformation of the present social security system should therefore rather support and strengthen existing informal social security to further enhance solidarity.<sup>982</sup> The Committee proposed that this could be achieved by considering ways to integrate groups currently excluded from formal schemes, into such schemes. Other proposals include pilot schemes aimed at supporting informal social security, the removal

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<sup>980</sup> *Idem* at 40.

<sup>981</sup> *Idem* at 74.

<sup>982</sup> *Ibid.*

of unnecessary legal restrictions restricting access to informal social security schemes, the division of tailor-made schemes to cater for the excluded and marginalised, and campaigns to promote private insurance and savings.<sup>983</sup> There was also a need, in the view of the Committee, for broader programmes to boost the overall capacity of communities and informal systems to cope with, and manage, increased levels of risk and hardship.<sup>984</sup> More research and policy analysis are required to understand the role and function of informal social security mechanisms and how they are linked to formal systems locally and in the region as a whole.<sup>985</sup>

#### ***4.4.2 Comments on the Taylor Committee Report***

It is clear from the Report as a whole that the term “informal social security” is recognised. The term is also indirectly implied in the definition of comprehensive social protection by reference to the fact that the definition of social protection encompasses more than the traditional concept of social security. This will allow room for the inclusion of informal social security in the realm of social protection.<sup>986</sup> Through this approach of adopting a broad conceptualisation of social protection, the Committee laid the foundation for the recognition of other non-formal forms of social security.

Social, fiscal and occupational welfare measures, collectively and individually, whether public or private or of mixed public and private origin, must be taken into account when developing coherent social security policies. In a country such as South Africa such an approach may not only be advisable, but also necessary, in order to fully utilise limited resources.<sup>987</sup>

The Committee did acknowledge informal social security, but did very little more than that. It did not venture to suggest how informal social security should function within the broader conceptualisation of comprehensive social protection, or how informal and formal social security should co-exist. Probably the most valuable comment regarding informal social security in the Report is the statement that more research and policy

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<sup>983</sup> Ibid.

<sup>984</sup> Idem at 75.

<sup>985</sup> Idem at 153.

<sup>986</sup> Idem at 40.

<sup>987</sup> Idem at 50.

analysis are required to understand the role and function of informal social security and how they link with formal social security systems. In the proposed model for incorporation set out in chapter 8, the recognition by the Taylor Committee of informal social security is taken as the starting point for future recommendations.

## 5 CONCLUSION

This chapter has considered the “ripeness” of the broader, welfare-related regulatory system in the country, as well as future policy to accommodate informal social security. The discussion of other welfare-related legislation illustrates that, although some legislative tools contain strict and unaccommodating features, others are formulated in a more relaxed and accommodating way. Only legislative examples of the latter kind can be used as a model for the future recognition of informal social security. In fact, policy reflects a recognition of informal social security that is far greater than that reflected in the present legislative landscape.

If present legislation and policy are examined, it becomes clear that informal social security can expect to enjoy better recognition in future. The Taylor Committee Report mentioned informal social security, although to a limited extent, but, more importantly, it indicated that changes to the present social security system are imminent. The system must be extended to improve its protective scope, and, in the process, forms of social security other than formal protection must be recognised.

Although informal social security is not recognised in present legislation, there is an indication (as can be seen in, for example, the Nonprofit Organisations Act<sup>988</sup>) that legislation can be formulated in a more supportive and user-friendly manner.<sup>989</sup>

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<sup>988</sup> Par 3.1.3.

<sup>989</sup> “Legal texts may have a life of their own, but they do not have it in a vacuum. They are constantly confronted with changes in the social realities of the countries where they have to be applied. They are used as tools by the public authorities to achieve certain objectives, and they reflect the reactions of governments to problems.” Van Langendonck op cit note 631 at 9.

The time has come for legislation to accommodate a broadening of the concept of social protection, and there is an indication that the present regulatory framework is ready to accommodate a new concept such as informal social security. There is also, as indicated earlier in this chapter, a need to align legislative tools and policies, for example social investment and money for socio-economic purposes must be comprehensively channelled to the right causes so that formal and informal social security can be strengthened.

All stakeholders and role players should be consulted in this process, for example the South African Welfare Council and the South African Developmental Welfare Council (once it comes into effect), civil society, non-governmental organisations, etcetera, in order to put more pressure on government to recognise informal social security as being part of the broader welfare dispensation, and to integrate it into such dispensation.

Policy analysis should cover issues such as: What stance should government take regarding informal social security? What segments or categories of the informal economy and informal social security should be targeted? Which specific areas of policy should be reformed to conform to the overall policy? How should the policy analysis be carried out?<sup>990</sup>

In this context, basically four stances regarding informal social security can be identified, and governments can adopt one, or a combination, of these stances:<sup>991</sup>

- a dismissive stance, that is, a stance which ignores the issue of the dependant in the realm of informal social security in the hope that the problem will go away;

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<sup>990</sup> Lund op cit note 47 at 17. These questions have been posed by Lund in the context of the informal sector, but the same principles can be applied to the broader informal social security sector and have accordingly been adapted as such.

<sup>991</sup> Idem at 18. Various groups depending on informal social security can also be targeted. For example, in the informal sector, the following groups can be identified as forming the subject of policy reforms: (a) the self-employed and their enterprises/economic activities; (b) informal wage-workers and their employers; (c) informal workers as a whole; (d) organisations or associations of informal workers.

- a punitive stance, that is, a stance that aims to eliminate informal social security (e.g. by evicting street vendors and prohibiting private informal insurance schemes);
- a restrictive stance, that is, a stance that aims to contain informal social security (e.g. by issuing only a limited number of permits for street vendors);
- a promotive stance (e.g. by providing street vendors with storage facilities and credit).<sup>992</sup>

The challenge of changing social protection policies for the betterment of the poorest of the poor is immense. Accordingly, the last-mentioned stance is recommended.<sup>993</sup>

Government has engaged in some efforts to address the issues regarding the exclusionary nature of the system. Several committees and commissions of enquiry have been appointed since the early 90s, the most recent one being the Taylor Committee.<sup>994</sup> However, social policy still covers only a very small fraction of employees. A comprehensive overall plan and policy are necessary in order to establish clear guidelines for the future of informal social security in the present social security paradigm. This is also reiterated in the proposed model in chapter 8. However, before the model is discussed, the thesis will examine mutual health insurance schemes in the next chapter as an innovative way in which formal and informal social security are used in combination to provide better social protection.

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<sup>992</sup> *Idem* at 17 & 22. Lund provides examples of policies which have assisted the informal sector. The following are some examples: In India, there is large-scale employment in the area of handicrafts and products produced by artisans. In order to promote this sector, a ministry for handicrafts was established. Certain raw materials and markets have been reserved for certain products, such as handlooms. Research into designs and technologies has been promoted, and special budgets and subsidies have been allocated to this sector. In India, as well, small-scale industries were deliberately promoted in the 1970s. The policies concerned allowed for different excise rates for large-, medium- and small-scale industries, were translated into stricter labour laws for large-scale industry, and provided for certain market items to be reserved for small-scale industry.

<sup>993</sup> *Idem* at 41.

<sup>994</sup> See par 4.4 above.



## CHAPTER 7: MUTUAL HEALTH INSURANCE AS A MODEL FOR BRIDGING THE DIVIDE BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY

It is unfortunate that discussions of the role of non-formal social welfare systems in the industrial countries have ignored the growing literature on the subject emanating from the Third World, where indigenous systems of support are well developed and extensively used.<sup>995</sup>

### 1 EXECUTIVE SUMMARY

Mutual health insurance is a very particular form of informal social security which reflects to some extent the possibility of linkages between informal and formal social security. Mutual health insurance is the form of informal social security mostly proposed by international organisations to extend the social security safety net to those without any protection against the high costs of health care.<sup>996</sup> Health care in particular underlies all other forms of social protection. A healthy person can better cope with adversity, provide for his or her own livelihood and better contribute to society.<sup>997</sup>

Since state-subsidised health care protection in developing countries is very limited and is mostly connected to formal-sector employment, few people have access to proper health care.<sup>998</sup> This increases the demand for community arrangements to finance and organise social protection. One way in which to address this issue is to be part of a mutual health insurance scheme. The protective scope of the social safety net can be increased if formal social security systems complement, rather than act as a substitute for, indigenous systems. This implies that the state as resource provider will remain an important role player, with informal social security playing a complementary role.

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<sup>995</sup> Midgley J & Sherraden M (eds) *Alternatives to Social Security: An International Inquiry* (1997) at 118. (Hereafter Midgley & Sherraden).

<sup>996</sup> See par 2, ch 7.

<sup>997</sup> Ibid.

<sup>998</sup> Von Benda-Beckmann, Kirsch & Freiburg-Strauß op cit note 849 at 14-15.

In this chapter, mutual health insurance is discussed as an example of an innovative strategy to achieve this objective of co-existence and greater cooperation between formal and informal social security. Since the focus of the discussion in this chapter will be on the construction of mutual health insurance as a model, and not on health care as a social security risk, the discussion assumes that the high cost of health care is a social security risk. The formal social security measures and the related problems pertaining to this particular risk are therefore not discussed in detail. The innovative models designed by the informal social security system to address this risk will however be discussed in detail.

Mutual insurance schemes have certain benefits, but they also have some shortcomings. These shortcomings are discussed in this chapter on the basis of the examples provided.<sup>999</sup> However, it is from the example of mutual health insurance schemes in other developing countries that very valuable lessons can be learnt which can be fruitfully applied in the South African context. Moreover, from the examples discussed below, more general recommendations are extracted regarding ways in which the compartmentalisation between formal and informal social security can be removed.<sup>1000</sup>

## 2 INTRODUCTION

Both developed and developing countries face the challenge of rising costs of social security. Increasingly, it is becoming too expensive for traditional welfare states to maintain the elaborate contemporary schemes they operate.<sup>1001</sup> Ironically, while many developing countries are trying to extend their social security coverage, many developed countries are contemplating how to cut down on some of the benefits their citizens

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<sup>999</sup> See pars 5.1 and 5.2, ch 7.

<sup>1000</sup> See pars 6 and 7, ch 7.

<sup>1001</sup> Midgley J *Social Welfare in Global Context* (1997) at 50. (Hereafter *Midgley Social Welfare in Global Context*).

enjoy.<sup>1002</sup> In developed countries, the state was for a long time the sole provider of social security protection. Few private role players were present in the welfare arena. In recent years, even in developed countries, more public-private partnerships<sup>1003</sup> have developed to lessen the burden on the welfare state.<sup>1004</sup> This has led to an increase in the privatisation of services, to deregulation, to a cutback in public sector expenditure and to the promotion of voluntary work.<sup>1005</sup>

Nowhere in the Third World are state systems of social security so developed that they provide adequate protection for the majority of the population.<sup>1006</sup> This usually results in a combination of support mechanisms from formal and informal sources being made available to those facing social security risks.<sup>1007</sup> Owing to factors such as recession, international indebtedness, inflation and low investment in developing countries, economic conditions have deteriorated. This has given rise to a situation where there is little optimism that such countries will draw more people into waged employment and within the scope of the resultant social security protection.<sup>1008</sup> This consequently increases the demand for community arrangements to finance and organise social services. People in developing countries have found that it is more beneficial to be part of a community-based insurance or financing scheme than to face social security risks individually.<sup>1009</sup> As shown in chapter 4 above,<sup>1010</sup> informal social security remains the primary vehicle through which people in need and distress receive some form of social

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<sup>1002</sup> Kolawole RT *Problems of Social Security and Development in a Developing Country: A Study of the Indigenous Systems and the Colonial Influence on the Conventional Schemes in Nigeria* (1993) at 31.

<sup>1003</sup> Jütting J “Public-Private Partnerships in the Health Sector: Experiences from Developing Countries” International Labour Organisation: *Extension of Social Security* (2002) at 2-3. (Hereafter Jütting “Public-Private Partnerships”). A public-private partnership (PPP) can be defined as “*institutional relationships between the State and the private for-profit and/or the private not-for-profit sector, where the different public and private actors jointly participate in defining the objectives, the methods and the implementation of an agreement of cooperation*”. Jütting is of the opinion that it is important to understand that a PPP is not a development strategy or a loose interaction between various agents. Because it is a partnership, there must be an ongoing set of interactions, an agreement on objectives and methods, as well as a division of labour to achieve these goals.

<sup>1004</sup> Ibid. This concept was developed in the early 1980s by Prime Minister Thatcher and President Reagan.

<sup>1005</sup> Idem at 2. Also see par 5.2.2.1, ch 5.

<sup>1006</sup> Midgley *Social Welfare in Global Context* op cit note 1001 at 53-55.

<sup>1007</sup> Pre-Conference Reader *Social (in)Security & Poverty as Global Issues* Conference in preparation for the UN World Summit on Social Development, Copenhagen, Maastricht 4 & 5 March 1994 at 10.

<sup>1008</sup> Midgley *Coping with Insecurity* op cit note 472 at 219.

<sup>1009</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 278.

<sup>1010</sup> See par 5, ch 4.

security.<sup>1011</sup> Kinship solidarity should however not be over-idealised.<sup>1012</sup> Mutual help has sometimes collapsed under extreme conditions of pressure, such as drought and famine.<sup>1013</sup> Formal social security systems should attempt to complement, rather than be a substitute for, indigenous systems.<sup>1014</sup> There is an increasing awareness of a “third sector” in the welfare provisioning sector.<sup>1015</sup>

The state bears the ultimate responsibility for ensuring the realisation of social security rights<sup>1016</sup> because of its authority and its resources for promoting social protection for all, and, in South Africa, because of its constitutional obligation.<sup>1017</sup> The role of the state as a resource provider is important, but the role that it plays as a providing agent is increasingly being criticised. The state is regarded as being incapable of reaching the poor and of reacting adequately to the difficulties involved in dealing with the poor.<sup>1018</sup> In this regard, informal social security can constitute the urgently required link for

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<sup>1011</sup> Midgley & Sherraden op cit note 995 at 108. Par 5.4, ch 4.

<sup>1012</sup> Idem at 109-110. Informal social security consists of a variety of social relationships. These can be based on kinship, friendship, village membership, neighbourhood, community involvement, etcetera. These relationships are not necessarily differentiated from “ordinary” social and economic relationships. These same relationships serve as normal relationships and also serve as a safety net in periods of distress and need. The effect is that these relationships are multifunctional and the social security dimension of these relationships is only one of many different aspects interwoven into the relationship. They can therefore serve a social security function as well as other functions. These relationships therefore also do not entail a specific body of social security rules which can be set apart from general legal and social rules and practices. People are also often both providers and recipients of social security. Indigenous social security is characterised by dynamic processes. Relationships are maintained or rearranged in order to establish better security and wellbeing for family members. The extent to which people are able to create and mobilise various options depends on many factors, for example gender, age and status. Also, people rarely possess a right without a concomitant reciprocal obligation (which could have been fulfilled in the past or must be fulfilled in future). Indigenous social security systems are also based on social relationships which are clustered in a relatively small social and geographical space. The result is that they have limited potential to provide a basis for pooling and redistributing resources. This also makes them particularly vulnerable to some specific forms of risk. Many people rely on both statutory and indigenous social security support. The effect is that different social security mechanisms operating at different levels of social organisation actually merge in such social relationships or networks.

<sup>1013</sup> Idem at 108.

<sup>1014</sup> Ibid.

<sup>1015</sup> This is especially the case as regards the health and pension system in South Africa. The main reason for this probably lies, on the one hand, in the economic pressures on government to address the issue of poverty within the reasonable resources available, and, on the other, in the already prominent role played by non-state actors in providing social security protection.

<sup>1016</sup> Olivier & Mpedi “Extending Social Security Protection to Families in the African Context” op cit note 877 at 33.

<sup>1017</sup> Von Benda-Beckmann, Kirsch & Freiburg-Strauß op cit note 849 at 55-56 & 59.

<sup>1018</sup> Idem at 7-8.

providing social protection at the micro-level.<sup>1019</sup> Informal social security can complement the state in one of its four roles, namely provisioning, financing, regulation and monitoring.<sup>1020</sup> It is necessary to attempt to interlink or integrate statutory and indigenous social security systems in order to expand the scope of protection to the population as a whole.<sup>1021</sup>

There is a need for policy makers to identify innovative ways in which social security protection can be extended to those marginalised in terms of the formal social security system.<sup>1022</sup> It should be kept in mind that there are “formidable problems in formulating strategies for integrating statutory and traditional approaches”.<sup>1023</sup> The literature on the subject is limited, and detailed accounts of innovative programmes are difficult to obtain. In most developing countries today, the dual systems of statutory and indigenous social security continue to operate in parallel.<sup>1024</sup> Despite these problems, there are many authors advocating an end to the compartmentalisation of the two systems of formal and informal social security.<sup>1025</sup> They maintain that the time has come to strengthen the indigenous system and to integrate it with the statutory sector.

It would be naïve to claim that formal and informal social security are completely separated and unrelated systems. For example, self-help cooperatives and NGOs obtain government funds to support their operations. People also use the formal social assistance grant to supplement their contributions to, or benefits from, informal social security mechanisms.<sup>1026</sup> However, there are only a few examples indicating innovative approaches that have been formulated with the objective of linking these two systems.

Attempts to link formal and informal social security generally result in two main approaches. First, there is the approach of extending or modifying the current formal

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<sup>1019</sup> *Idem* at 56.

<sup>1020</sup> Jütting “Public-Private Partnerships” op cit note 1003 at 5.

<sup>1021</sup> Von Benda-Beckmann, Kirsch & Freiburg-Strauß op cit note 849 at 58.

<sup>1022</sup> Midgely *Coping with Insecurity* op cit note 472 at 219.

<sup>1023</sup> *Idem* at 222.

<sup>1024</sup> *Idem* at 224.

<sup>1025</sup> *Ibid.*

<sup>1026</sup> Von Benda-Beckmann, Kirsch & Freiburg-Strauß op cit note 849 at 58.

system to cover those who are excluded from protection. This process does not normally take account of existing indigenous social security systems and does not use these systems as a major resource for the expansion of the state-regulated social security system. It is aimed at the extension of the state system, but not at integration of the two systems.<sup>1027</sup> The second approach is that where the state recognises the indigenous system by providing financial support to individuals and organisations operating within the indigenous system, or by trying to incorporate indigenous practices into statutory systems.<sup>1028</sup> Examples of the state using its resources to strengthen traditional social security arrangements are rare. A good example is however to be found in Saudi Arabia in the form of the zakat.<sup>1029</sup> The zakat payment is mandated in terms of prevailing religious beliefs and provides aid for the needy. The system has been integrated with the country's social assistance system. Fifty percent of the zakat payment is required for the state programme, while the remaining amount can be spent according to individual preference and as prescribed by Islamic law. Statutory social assistance and the zakat therefore complement each other.<sup>1030</sup>

There is increasing interest in developing countries in the possibility of extending social security coverage by means of cooperation between formal and informal social security. In particular, in South Africa the environment is ripe for better partnerships and for cooperation. Emphasis is increasingly being put on the socio-economic responsibilities of Corporate South Africa.<sup>1031</sup> The hard face of capitalism has been softened and the emphasis has shifted from a strictly profit-driven approach to one where time and money are spent on social issues.<sup>1032</sup> More non-state role players are contracting into social

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<sup>1027</sup> Ibid.

<sup>1028</sup> Ibid.

<sup>1029</sup> In the Islam religion, the zakat is an amount of money that all financially able adult Muslims must pay to support specific categories of needy people in their community. Each Muslim calculates his or her own zakat individually, but it normally involves the payment each year of 2,5 percent of one's capital. Accessed at <http://www.islamicity.com/mosque/Zakat/> on 4 Feb 2005.

<sup>1030</sup> Von Benda-Beckmann, Kirsch & Freiburg-Strauß op cit note 849 at 58.

<sup>1031</sup> For example, the BEE Act compels employers to make social investments in society as part of Black Economic Empowerment (BEE). The objectives of the Act (s 2) contain references to social investment and also indicate a broader focus than merely addressing racial inequalities in the workplace. The main underlying objective of the Act seems to be one of a socio-economic nature, namely to extend the effect of BEE into the broader society and not just to workers in formal employment. See par 3.2.2, ch 6.

<sup>1032</sup> Brynard K "‘n Hart vir Besigheid" *Insig* (Mei 2004) at 31. (Hereafter Brynard).

responsibility, which makes the environment very suitable for including these (and other) role players in the process of designing and providing a larger, stronger and more comprehensive social safety net.

A good example of the involvement of non-state role players in the welfare field is that of the Phelophepa Train.<sup>1033</sup> The main sponsor of the train is Transnet (South Africa's national rail carrier),<sup>1034</sup> although the train receives support from academic institutions, professional bodies, government agencies, community organisations and businesses.<sup>1035</sup> The train houses about 57 full-time staff and travels from January to September to four of the nine provinces in the country. It is not a hospital on tracks. Its core functions are basic: health examinations and education, pharmaceutical dispensing, an eye clinic (which does screening and dispenses glasses), a six-chair dental clinic (equipped for cleanings, fillings, extractions and restorations) and psychological counselling. The train visits each station on average only once every two years. The train also provides training at every stop for 25 people selected from and by the community. The training involves basic training in public health fundamentals, such as nutrition, environmental and personal cleanliness, and the prevention of sexually transmitted diseases (STD's) and HIV/AIDS. The trainees then become a core of public health care knowledge in communities.<sup>1036</sup>

In the light of the state's lack of adequate provision for social security, informal social security systems will, despite their weaknesses, still be indispensable carriers of social security for most people in the future.<sup>1037</sup> The strengthening of these systems should be

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<sup>1033</sup> Phelophepa means "good clean health" in Sotho.

<sup>1034</sup> Transnet pays 70 percent of the operating costs of the train, which amount to approximately R875 000 per month. Transnet has also made a R15 million capital investment in the train. Florkow D "The Phelophepa Train" accessed at <http://www.medhunters.com/articles.thePhelophepaTrain.html> on 3 Feb 2005.

<sup>1035</sup> Ibid. No examination fees are charged, but patients pay a modest R5 per prescription and R30 for glasses.

<sup>1036</sup> Ibid. According to the Director of the Train, the goal of the Phelophepa train is "*health for all, physically and emotionally, hand-in-hand with reconciliation and nation building*".

<sup>1037</sup> Von Benda-Beckmann, Kirsch & Freiburg-Strauß op cit note 849 at 18-22.

an important objective of social security policies and of attempts to improve the social security conditions of the poor.<sup>1038</sup>

In this chapter, examples of innovative strategies to achieve this objective of bridging the divide between formal and informal social security will be explored. Attempts to this effect can be found mainly in developing countries, where informal social security is crucial in extending the social security safety net. The discussion in this chapter will focus on the example of mutual health organisations, as this is the example that is encountered most often in developing countries and illustrates how formal and informal social security can be linked. It is also the model most frequently promoted by the International Labour Organisation (ILO) and the World Health Organisation (WHO) for bringing statutory and traditional approaches closer to each other.<sup>1039</sup> Programmes to promote better health care protection are also extremely important, because the improvement of the health status of people in developing countries is a prerequisite for sustainable economic development and poverty reduction.<sup>1040</sup> A person's health status directly affects the accumulation of human capital. For poor people, sickness is a huge problem, as they cannot afford expensive treatment and, at the same time, are unable to use their labour to earn an income.<sup>1041</sup> The improvement of the health status of the population in developing countries is directly dependent on a functioning health care system. An efficient health care system can therefore help to break the vicious cycle of poverty and bad health care.<sup>1042</sup>

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<sup>1038</sup> *Idem* at 55-56. Also see Taylor Report *op cit* note 39 at 74.

<sup>1039</sup> The ILO's Strategies and Tools against Social Exclusion and Poverty Programme (STEP) promotes the setting up of micro-health insurance organisations. These provide conceptual work and also fulfil networking functions. They also facilitate and provide training and further education in various parts of the world to assist people in developing countries in setting up local health insurance organisations. More research by international organisations in this regard is necessary to further raise awareness of the issue of mutual health insurance. Novartis Foundation for Sustainable Development "Social Exclusion and Access to Health Care in Developing Countries". Accessed at <http://www.novartisfoundation.com> on 18 May 2004 at 1. (Hereafter Novartis Foundation).

<sup>1040</sup> Asfaw A & Jütting J "Mutual Health Insurance: A Viable Solution to Increase Access to Health Care? An Ethiopian Case Study" accessed at <http://www.zef.de> on 18 May 2004 at 2. (Hereafter Asfaw & Jütting).

<sup>1041</sup> *Ibid.* Recent studies have shown that there is a direct link between the health status of the breadwinner in the family and the nutritional status of children in the house.

<sup>1042</sup> *Ibid.*



According to the findings of the World Bank, the level of health spending in low-income countries is insufficient to address the health challenges these countries face.<sup>1043</sup> In low-income countries, domestic health expenditure is mostly out-of-pocket expenditure, which results in very little insurance being built into private savings.<sup>1044</sup> In order to overcome this, the World Health Organisation recommends that out-of-pocket expenditure in poor communities should increasingly be channelled into “community financing” schemes to help cover the costs of community-based health delivery.<sup>1045</sup>

From the discussion below of the examples, certain lessons and general principles emerge with a view to making policy recommendations for the accommodation of formal and informal social security.

### **3 MUTUAL HEALTH INSURANCE**

#### **3.1 General characteristics**

Mutual health insurance has emerged as a form of social protection that reduces the gap between formal and informal social security. Mutual health insurance has developed mainly because of the inaccessibility of health care services in developing countries. It is believed that community financing improves access by rural and informal-sector workers to the necessary health care and provides them with some protection against the cost of illness.<sup>1046</sup>

Different terms are often used to describe mutual health organisations, such as “community health financing”, “mutual health insurance”, “community finance”, “micro-insurance”, and “community-based health insurance”.<sup>1047</sup> For purposes of this thesis, the

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<sup>1043</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 19.

<sup>1044</sup> Ibid.

<sup>1045</sup> Idem at 20.

<sup>1046</sup> Idem at 22.

<sup>1047</sup> Jakab M et al “Community Involvement in Health Care Financing: Impact, Strengths and Weaknesses: A Synthesis of the Literature” accessed at <http://www.janani.org/pdf/LiteratureSurvey.pdf> on 19 Jan 2004. (Hereafter Jakab et al).

term “mutual health insurance” will be used. Mutual health insurance should be distinguished from other resource-mobilisation instruments such as out-of-pocket payments, voluntary private insurance, social insurance and general taxation.<sup>1048</sup>

In order to understand exactly what mutual health insurance entails, it is important to look at the three main features of such insurance.<sup>1049</sup>

- First, an important common feature of all mutual health insurance schemes is the predominant role played by the community in the system.<sup>1050</sup> The community is actively involved in mobilising, pooling, allocating, managing and supervising health care resources.<sup>1051</sup> “Community” should be understood as the broader term and refers to more than the geographic entity. It also refers to (according to the *Oxford Dictionary*) “people organised into common political, municipal and social unity”.<sup>1052</sup> People covered by mutual health insurance are often bound together not only by geographic proximity, but also by shared professional and cultural identity.<sup>1053</sup> It should however be noted that, despite the predominance of community action, these schemes rely on government, donor and external support. In fact, such support is a key determinant of their sustainability. The community however maintains its predominant role in designing the rules and in managing and supervising the scheme as far as resources, and their pooling and allocation, are concerned.<sup>1054</sup>
- The second common feature of mutual health insurance is the beneficiaries.<sup>1055</sup> Mutual health insurance typically attracts those individuals with no access to health-care financing arrangements. This mostly includes

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<sup>1048</sup> Idem at 11.

<sup>1049</sup> Idem at 11-13.

<sup>1050</sup> Idem at 11.

<sup>1051</sup> Ibid.

<sup>1052</sup> Ibid.

<sup>1053</sup> Idem at 13.

<sup>1054</sup> Idem at 11. Midgely & Sherraden op cit note 995 at 109.

<sup>1055</sup> Idem at 112. Jakab et al idem at 12.

those not employed in the formal sector and those who do not have the ability to pay for market-based private care.<sup>1056</sup>

- The third important feature of the definition refers to the social principles underlying the design of the scheme.<sup>1057</sup> Mutual health insurance relies on voluntary participation, built-in solidarity mechanisms and reciprocity. In many instances, these principles originate from traditional, informal social security schemes. Members usually have to meet certain obligations, for example the payment of premiums, and they are bound together by a common objective and a strong local affiliation.<sup>1058</sup>

The underlying motivation for joining a mutual health insurance scheme is the desire “to seek reciprocity in sustaining risk sharing arrangements among essentially self-interested individuals”.<sup>1059</sup> This will be manifested at the local level, where a manageable group of people (most of whom will probably know one another) makes a contribution (in cash or in kind) to the local insurance scheme. From this fund, specific treatment costs and/or drug costs can be fully or partially borne by the insurance association if one of the members falls ill.<sup>1060</sup> This can substantially improve the health situation of poor households and avoid the shock of very high treatment costs that would otherwise reduce them to poverty, or even deepen it.<sup>1061</sup> The setting up of micro-health insurance organisations can therefore help with poverty alleviation at the local level.<sup>1062</sup>

### 3.2 Examples of models of mutual health insurance

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<sup>1056</sup> Jakab et al *ibid.*

<sup>1057</sup> Jakab et al *ibid.*

<sup>1058</sup> “Mutual Insurance Schemes” *op cit* note 503 at 3.

<sup>1059</sup> Asfaw & Jütting *op cit* note 1040 at 2.

<sup>1060</sup> *Ibid.*

<sup>1061</sup> Dror DM & Jacquier C “Micro Insurance: Extending Health Insurance to the Excluded” *International Social Security Review (ISSR)* Vol 52, No. 1 (1999) at 92. (Hereafter Dror & Jacquier).

<sup>1062</sup> Novartis Foundation *op cit* note 1039 at 1.

Four main models of mutual health insurance can be distinguished and are discussed below.<sup>1063</sup>

### **3.2.1 Community cost-sharing**

Through this type of scheme, medical expenses are paid by means of out-of-pocket payments, but the community is actively involved in fee design, collection and allocation, as well as in the management of resources. However, there is no risk-sharing and pre-payment. An example of this type of scheme is the health care provided by SEWA in India.<sup>1064</sup>

#### **3.2.1.1 The example of the Women's Public Health Service Cooperative Ltd SEWA (India)**<sup>1065</sup>

SEWA has a unique health delivery system. Health care is provided for members of SEWA by a cooperative of health workers called the Women's Public Health Service Cooperative Ltd (*Shri Swashrayi Mahila Lok Swasthya SEWA Cooperative Ltd*).<sup>1066</sup> Lok Swasthya is a cooperative of 105 midwives, community health workers, pharmacists and doctors committed to providing health care for members of SEWA and their families. Lok Swasthya was started by a group of SEWA members and has been serving 10 000 members of SEWA in rural and urban areas. Lok Swasthya provides primary health care services (preventative and curative) and health education through training, and sells standard-quality drugs.<sup>1067</sup>

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<sup>1063</sup> Jakab et al op cit note 1047 at 14-15.

<sup>1064</sup> Goudge J, Khumalo N & Gilson L "Policy Options to Improve the Economic Access of Low-Income Households to State-Provided Health Care" Centre for Health Policy, University of the Witwatersrand (April 2004) accessed at <http://www.wits.ac.za/chp/b49.pdf> on 2 Feb 2005 at 14. (Hereafter Goudge).

<sup>1065</sup> Gupta RC *NGO Experiences in Social Security* (1994) at 22-23. (Hereafter Gupta).

<sup>1066</sup> Hereafter Lok Swasthya.

<sup>1067</sup> During 1992/1993, the outreach of the organisation was as follows: Occupational health - 250 women helped; maternal health - 1 290 women helped; general health, including reproductive health - 9 180 women helped; children's health - 7 378 children helped.

The health workers and midwives are self-employed women and have been providing health education for members of SEWA for several years. In the event of the self-employed women or their families falling sick, they not only lose their daily income, but also spend a large amount of money on life-saving drugs and treatment.

In order to curb the high costs of drugs, Lok Swasthya started to sell generic drugs of standard quality to its members over two counters. At these counters, drugs bought in bulk are made available at rates well below those in the open market. In addition, members obtain information on how and when to use drugs, and on possible side effects. One of Lok Swasthya's goals is self-reliance – both financially and in terms of decision-making. From the sales generated by the two drug counters, and through training fees collected from members of SEWA, Lok Swasthya has begun working towards its goal of providing health services for poor, self-employed women, and, at the same time, is becoming a viable organisation. In addition, since its establishment, Lok Swasthya has had a democratically elected executive committee for the management of its services which comprises community health workers who themselves are self-employed workers.<sup>1068</sup>

### ***3.2.2 Community-based pre-payment schemes/mutual health organisations***

These schemes entail voluntary membership, pre-payment of a prescribed fee (normally annual) and risk-sharing. The community is closely involved in the design and management of the scheme.<sup>1069</sup> Examples of such schemes are the Msimbazi Private Health Insurance Model and the Ghana Social Trust.

#### **3.2.2.1 The Msimbazi Private Health Insurance Model (Tanzania)**<sup>1070</sup>

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<sup>1068</sup> Gupta op cit note 1065 at 22-24.

<sup>1069</sup> Jakab et al op cit note 1047 at 15.

<sup>1070</sup> Zwanecki op cit note 132 at 111-113.

Very little public health insurance exists in Tanzania.<sup>1071</sup> The government spends less than 2 percent of the GNP on health care. Before independence, churches traditionally established hospitals, with the result that, even after independence, half of the existing medical facilities remained charity property.<sup>1072</sup>

In order to seek an alternative approach to health-care provisioning, the Congregation of Msimbazi developed a private health insurance model in 1995. This model was partly financially supported by the Christian Professionals of Tanzania and the Tanzanian Episcopal Conference.<sup>1073</sup> The scheme was designed around basic units, or “small Christian communities”, with groups of ten families congregating weekly in order to pray and exchange religious thoughts. These religious units were also used to form the basis of the health insurance scheme. Units were urged to join and to make contributory payments in order to establish a private health insurance scheme. These communities then grew and households outside the religious borders joined and became members of the mutual health insurance scheme. The heads of the households were responsible for their own and their family’s contributions.<sup>1074</sup>

Membership entitles members to free medical treatment in a communal dispensary, which has a doctor, a nurse and medicine.<sup>1075</sup> The health insurance scheme (with contributions from donors) must carry the costs involved in running the dispensary. Specific conditions are excluded from coverage, since they require stationary treatment, especially maternity care, HIV/AIDS, cancer and tuberculosis.<sup>1076</sup>

This scheme is not very successful. The number of members increased up until the time when contributions had to be raised as a result of increasing expenses. Participants did not realise the long-term advantages of being insured and therefore the price members

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<sup>1071</sup> Lambo E *Social Security Medical Care: Overview of Current Status of Implementation and Options for Extending Coverage* (2000) at 283. (Hereafter Lambo).

<sup>1072</sup> Zwanecki op cit note 132 at 111.

<sup>1073</sup> Idem at 112.

<sup>1074</sup> Ibid.

<sup>1075</sup> Ibid.

<sup>1076</sup> Idem at 113.

were willing to pay remained low.<sup>1077</sup> The scheme also lacks a proper monitoring mechanism. This results in many people delaying their contributions on purpose, or never paying, despite having used the services offered in terms of the insurance.<sup>1078</sup> The operation of a private health insurance scheme requires expert knowledge and planning, which is not necessarily present in this case if compared with the example of the Bwamanda Health Insurance Scheme discussed below.<sup>1079</sup> From the example of the Msimbazi model it is also evident that, if a health insurance scheme is funded by contributions alone, the overall sum of the contributions has to meet running expenses, otherwise the institution will produce a financial deficit.

### **3.2.2.2 The Ghana Social Trust**<sup>1080</sup>

The Ghana Social Trust is an initiative of the ILO.<sup>1081</sup> The ILO has recently<sup>1082</sup> re-committed itself to the extension of social security coverage and to the improvement of the governance, financing and administration of social security.<sup>1083</sup> One of the chief priorities of the ILO is the extension of social security coverage to excluded populations.<sup>1084</sup> Although this aim is clearly stated and has been reaffirmed,<sup>1085</sup> progress has been slow. This could be because the ILO's activities have for a long time been based on the idea that the gradual extension of coverage would be based on institutional (worker-based) social security as the modern, formal economy gained ground on the

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<sup>1077</sup> Cichon M, Tumwesigye D, Pal K, Leger F & Vergnaud D "Linking Community Initiatives to National Institutions: Ghana" *International Social Security Review* Vol 56, No 3-4 (2003) at 50. (Hereafter Cichon et al).

<sup>1078</sup> Zwanecki op cit note 132 at 112-113.

<sup>1079</sup> ILO "Third Discussion Paper of the Global Trust Fund" (27 Sep 2001). (Hereafter ILO "Third Discussion Paper").

<sup>1080</sup> Cichon et al op cit note 1077 at 50.

<sup>1081</sup> ILO "Third Discussion Paper" op cit note 1079.

<sup>1082</sup> These principles were also confirmed at the 89<sup>th</sup> Labour Conference held at Geneva on 19 Jun 2001.

<sup>1083</sup> Cichon et al op cit note 1077 at 50.

<sup>1084</sup> Reynaud E "The Extension of Social Security Coverage: The Approach of the ILO" *Extension of Social Security*, Paper No. 3 Social Security Policy and Development Branch, ILO (2002) at 1. (Hereafter Reynaud).

<sup>1085</sup> At the 89<sup>th</sup> session in June 2001 (Geneva).

traditional economy.<sup>1086</sup> However, the former is in some cases shrinking while the informal economy is expanding.<sup>1087</sup>

At the 89<sup>th</sup> Labour Conference (ILC) in June 2001,<sup>1088</sup> the discussion on social security was concluded with the renewed commitment by the ILO to extend social security coverage and to improve governance, financing and administration of social security.<sup>1089</sup> The conclusions also called for innovative approaches in the area of social security to help people moving from the formal to the informal economy.<sup>1090</sup>

In order to work towards this aim, the ILO has developed various programmes, for example Health for All in the Health Care Sector.<sup>1091</sup> The ILO's International Financial and Actuarial Service (ILO-FACTS) has also developed an innovative concept, namely a Global Social Trust Network,<sup>1092</sup> which aims to interconnect the global, national and community levels of financing for social security.<sup>1093</sup> The latter wants to create a link between informal social security schemes and formal social security schemes. A feasibility study to this effect was conducted in Ghana and is known as the Ghana Social Trust Project (GhST).<sup>1094</sup> The Global Social Trust Team designed a feasibility project aimed at putting the idea to the test in a country with an established national social insurance scheme and informal social security provisions.<sup>1095</sup> The government of the Netherlands provided funding for the project.<sup>1096</sup> Ghana was chosen, because 43 mutual health organisations have been created with the help of the government and international,

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<sup>1086</sup> Reynaud op cit note 1084 at 1.

<sup>1087</sup> Ibid.

<sup>1088</sup> Ibid.

<sup>1089</sup> Cichon et al op cit note 1077 at 60.

<sup>1090</sup> Ibid.

<sup>1091</sup> Ibid.

<sup>1092</sup> Also called the Global Social Trust Network or TRUST for short.

<sup>1093</sup> ILO *A Global Social Trust Network: Investing in the World's Social Future - Report and Documentation of a Feasibility Study*, Geneva (2002). (Hereafter *ILO A Global Social Trust Network*).

<sup>1094</sup> In Ghana, in recent years, 43 mutual health organisations (MHO) have been created with the help of the government and international NGOs. The country also has a social insurance scheme that has been operating since 1965.

<sup>1095</sup> Cichon et al op cit note 1077 at 60. ILO "Third Discussion Paper" op cit note 1079.

<sup>1096</sup> Ibid.



non-governmental organisations, and because a social insurance scheme for the formal sector has been operating there since 1965.<sup>1097</sup>

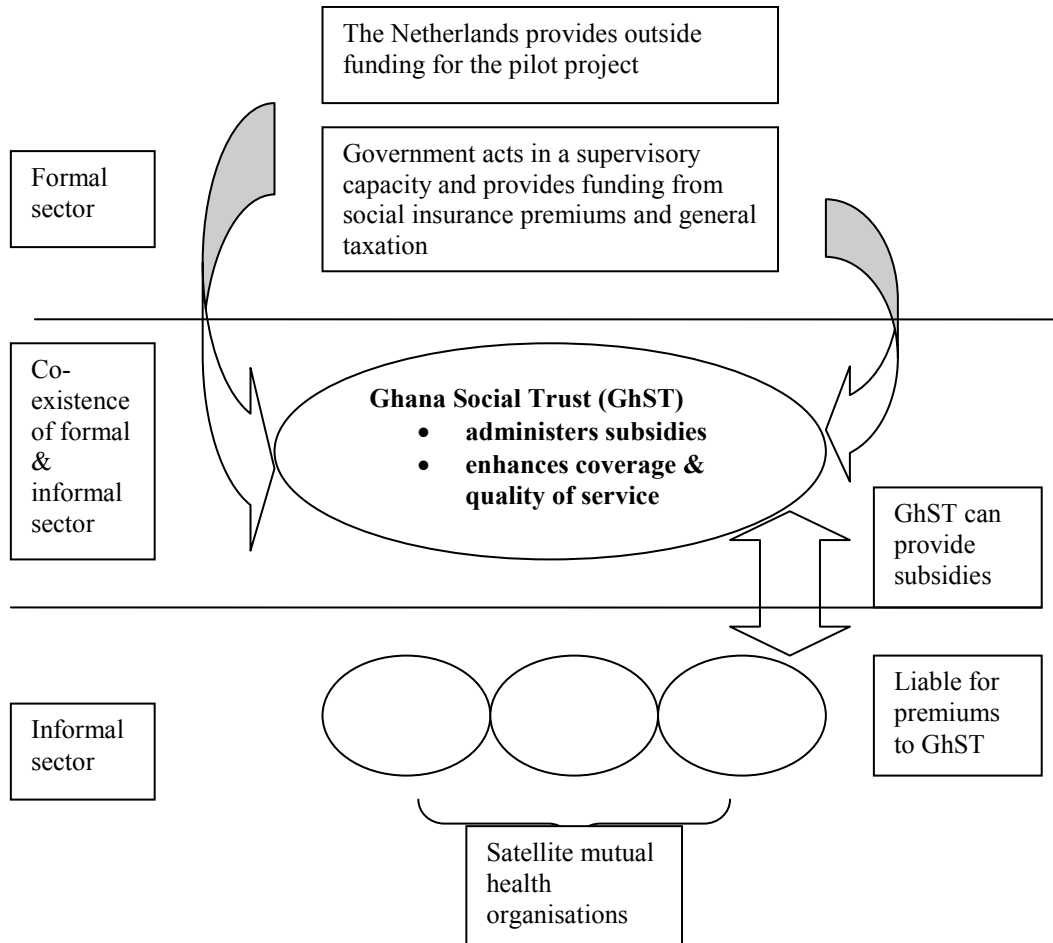
The project seeks to support the establishment of a pluralistic, national social protection scheme in Ghana. This will be established by linking the formal and informal sector schemes in a “hub-satellite” relationship.<sup>1098</sup> This can be illustrated as follows:

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<sup>1097</sup> Cichon *ibid.* The feasibility project was formally launched during a two-day workshop in Accra in February 2003. It has been designed for a duration of about four years.

<sup>1098</sup> *Idem* at 62-65.

*Figure 1: Illustration of Ghana Social Trust*



A national organisation will act as a hub and partner for satellite mutual health organisations that are at present being set up in the informal sector under the aegis of the national government. The Ghana Social Trust will provide a cash benefit (i.e. a straightforward subsidy) to pay the insurance premium of the mutual health organisation. Those who will qualify for a subsidy are those too poor to afford the whole premium and those who would otherwise be excluded from health coverage owing to pre-existing

health conditions. This will reduce the effective cost of insurance coverage, resulting in better population coverage by mutual health organisations in rural areas.<sup>1099</sup>

The main objective of the project is to support the government in developing models for the rapid extension of health insurance coverage and in developing effective tools for good governance within the health insurance sector. The project will further attempt to enhance the coverage and quality of service provided for the informal sector population.<sup>1100</sup>

Health insurance coverage in the informal sector will probably always be voluntary. This is due to the fact that mandatory enrolment in informal sector environments is hard to police and because the majority of the informal sector will have insufficient regular income to afford membership. The Ghana Social Trust has set out to explore ways to overcome this poverty obstacle of not being able to pay regular contributions, and, at the same time, aims to ensure good quality in the community-based local health insurance scheme and to achieve a stable balance between government and community policy responsibilities.<sup>1101</sup>

The resources for funding the satellite health insurance system will have to be provided by the country through social insurance contributions or general tax revenue.<sup>1102</sup>

### ***3.2.3 Provider-based health insurance***

This type of scheme is often centred on single-provider units such as a regional hospital. These units also entail voluntary membership, pre-payment and risk-sharing and are often started up by the providers or through donor support. The involvement of the community

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<sup>1099</sup> Idem at 66.

<sup>1100</sup> Idem at 65.

<sup>1101</sup> Ibid.

<sup>1102</sup> Idem at 66.

is often more supervisory than strategic.<sup>1103</sup> A good example of this type of scheme is the Bwamanda Hospital Scheme in the Democratic Republic of the Congo.

### **3.2.3.1 The Bwamanda Hospital Scheme (Democratic Republic of the Congo)**<sup>1104</sup>

The Bwamanda Hospital is an existing hospital in the area of Bwamanda in the Democratic Republic of the Congo. The hospital faced severe financial difficulties because of a lack of government funding and external subsidies. In order to guarantee financial viability, the hospital, in cooperation with a local NGO, set out to raise local revenue and devised the Bwamanda Hospital Scheme. The scheme was launched in 1986.<sup>1105</sup>

Since the population in Bwamanda is dependent on agricultural output with its fluctuating seasonal crops, the objective of the insurance scheme is to make health services affordable for all groups, including poor rural households. By paying premiums, members become entitled to avail themselves of medical services provided free of charge by the hospital. When a patient is admitted to hospital, a 20 percent co-payment is required.<sup>1106</sup>

The CDI (Centre de Developpement Integral) Bwamanda, a Zairian non-profit organisation, helped with the economic and social development of the scheme. The CDI Bwamanda has had a long-standing relationship of trust and social cohesion owing to the length of time that it has been in the area and owing to the success of previous CDI projects in the area.

The scheme reflects the great demand of the community for this type of voluntary insurance scheme. Within four weeks of its establishment, 32 600 people (28% of the

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<sup>1103</sup> Jakab et al op cit note 1047 at 15.

<sup>1104</sup> “Mutual Insurance Schemes” op cit note 503 at 7.

<sup>1105</sup> Ibid.

<sup>1106</sup> Ibid.

district's population) had joined the scheme. The number kept on rising and eventually stabilised at a membership rate of between 60 and 65 percent.<sup>1107</sup>

A mandatory referral system ensures that admission to the hospital is only possible when a patient has been referred to the hospital by a health centre.<sup>1108</sup>

Premiums are collected annually during the months of March and April and are set at 20 Zaire (0,3 US\$). The revenue generated by the Bwamanda Hospital increased even more after the introduction of the scheme. The revenue is made up of direct payments by non-insured patients, pre-payments by employer-organised health care schemes, reimbursements to the hospital by the insurance fund, and co-payments by insured patients.<sup>1109</sup>

The CDI helped in providing the technical expertise and acted as financial guarantor of the scheme. The Bwamanda scheme is managed by the district health team. It is a direct insurance scheme, as the insurance institution is also a care provider. The scheme is characterised by relatively high administrative efficiency when compared with other schemes, as is reflected by its low administrative costs. Administrative costs in the years from 1990 to 1995 ranged between 5 to 10 percent of total expenses, whereas the costs in similar schemes in other African countries were much higher.<sup>1110</sup>

If the equity of the scheme is investigated, it seems that the aim of the scheme to make access to hospital affordable to all groups has not been realised. In the non-member population, very low- and very high-income groups were more represented than in the member population. The rich probably did not see the need to join the scheme, while the poorer part of the population probably could not afford to pay the premiums. In addition,

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<sup>1107</sup> Ibid.

<sup>1108</sup> Idem at 8.

<sup>1109</sup> Idem at 9.

<sup>1110</sup> Ibid.

households living close to the health care facility had a higher utilisation rate and were more likely to join the insurance scheme.<sup>1111</sup>

The success of the scheme can be attributed to the significant influence of the CDI. The Bwamanda scheme has found effective ways of dealing with adverse selection and moral hazard. The former is controlled by the high membership rate and by allowing the whole household to be a subscription unit. The latter (moral hazard) is combated by the mandatory referral system and the co-payments of patients. It is, however, questionable whether the risk pool is diversified enough, since the insurance scheme is available only to inhabitants of the Bwamanda district.<sup>1112</sup>

### ***3.2.4 Government- or social insurance-supported community-driven scheme***

This type of scheme is linked to formal social insurance arrangements or government-run programmes. The community participates in running the scheme, but the government or social insurance system contributes a significant amount to the financing. These schemes are not always voluntary.<sup>1113</sup> A good example of such a scheme can be found in South Africa where it is referred to as a “network scheme”, and forms part of social insurance.

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<sup>1111</sup> Ibid.

<sup>1112</sup> Idem at 10. Another example of this type of scheme is the Nkoranza community-financing health insurance scheme. This scheme was launched in 1992 in the Democratic Republic of the Congo and is hospital-based. The scheme was designed in association with Memisa, a Dutch Christian NGO. The scheme is affiliated to a private district hospital, St. Theresa’s Hospital, and pays the hospital bills on a fee-for-service basis. The scheme has voluntary membership based on a community-rated premium. The founding NGO offered to meet any deficits in the first three years of operation of the scheme. The scheme has a low coverage rate of 30 percent of the area’s population. The attractiveness of the scheme and its enrolment have been affected by poor management of the scheme. This has been attributed to a lack of general management skills, risk management techniques, negotiation skills, accounting and book-keeping skills, computer skills, and monitoring and evaluation of the scheme, as well as to a negative attitude on the part of hospital staff towards patients. The scheme is basically run as a hospital-based scheme and is therefore viewed as just another department of the hospital. Jakab et al op cit note 1047 at 39.

<sup>1113</sup> Jakab et al idem at 15.

### 3.2.4.1 CareCross (South Africa)<sup>1114</sup>

In South Africa, very little information is available on existing mutual health insurance schemes. So-called network options as part of existing medical aid schemes do however exist, and one such option is CareCross. CareCross has collaborated with a number of reputable medical schemes to provide health insurance at a lower cost than regular medical aid schemes would. The administration of CareCross is handled by the medical aid administration and the CareCross option is offered as a so-called network scheme. The CareCross option has been developed to curb escalating medical costs and to provide core health cover.<sup>1115</sup> For example, a network scheme provides for unlimited visits to a chosen doctor for day-to-day services. The doctor will provide consultation services and will dispense acute medicine according to the list of specified generic medication on the CareCross health formulary. After-hours or emergency visits are for a user's own account. The scheme also provides for limited pathology, radiology, dental and optometry benefits.<sup>1116</sup>

The network option mainly restricts the user to using certain medicines and visiting certain doctors and hospitals. Currently, there are three well-known network schemes, PrimeCure,<sup>1117</sup> CareCross<sup>1118</sup> and OneCare.<sup>1119</sup> These networks negotiate with practitioners for a better rate, resulting in lower costs for the user. The networks negotiate with practitioners for a better rate by guaranteeing that certain practitioners will serve all the scheme's members.<sup>1120</sup>

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<sup>1114</sup> Du Preez L "Understand All Your Medical Scheme Options" accessed at <http://www.persfin.co.za> on 9 Nov 2004. (Hereafter Du Preez).

<sup>1115</sup> *Idem* at 2.

<sup>1116</sup> *Ibid.*

<sup>1117</sup> PrimeCure has medical centres in certain areas and contracted practitioners in other areas.

<sup>1118</sup> CareCross Health has a network of private practitioners. Du Preez op cit note 1114 at 2.

<sup>1119</sup> OneCare is a private-practitioner network aimed at the middle-income market. Members have to choose one doctor and must always consult him/her, unless they have a good reason not to do so.

<sup>1120</sup> Du Preez op cit note 1114 at 1-2.

## 4 IMPORTANT FEATURES OF MUTUAL HEALTH INSURANCE

### 4.1 Common characteristics

The term “mutual health insurance” has evolved into an umbrella term that covers a wide spectrum of health-financing instruments, such as community-based health financing, micro-insurance, community health funds, mutual health organisations, rural health insurance, revolving drug funds, and community involvement in user-fee management.<sup>1121</sup> Mutual health insurance mostly attracts those who are not employed in the formal sector (and are therefore not eligible to be part of social insurance schemes) and who do not have the ability to pay for market-based private health care.<sup>1122</sup>

As can be gathered from the examples above, mutual health insurance schemes have certain common characteristics. The community (geographic, religious, professional and ethnic) is actively engaged in mobilising, pooling and allocating resources for health care.<sup>1123</sup> The beneficiaries of the scheme have predominantly low income, earning subsistence from the informal sector (rural and urban), or are the socially excluded.<sup>1124</sup> The underlying principles upon which the schemes are based rely on voluntary engagement of the community (although not necessarily of individual community members), and the mobilisation of resources and benefits reflects principles of solidarity. The primary purpose of the schemes is not commercial (i.e. not-for-profit), but to prevent people being faced with the high costs of health care.<sup>1125</sup>

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<sup>1121</sup> Jakab et al op cit note 1047 at 13.

<sup>1122</sup> Ibid.

<sup>1123</sup> Ibid.

<sup>1124</sup> Ibid.

<sup>1125</sup> Ibid.



## 4.2 Risk pool

An important design feature of a mutual health insurance scheme is the fact that the scheme should aim for the widest possible pool of risks.<sup>1126</sup> Schemes with purely voluntary, individual membership tend to attract people with pre-existing health problems and are unattractive to the healthier and better-off members of the community. A broad risk pool with both healthy and unhealthy members is better off.<sup>1127</sup> This can be achieved by, for example, making household membership compulsory or by imposing a fee structure instead of individual membership.<sup>1128</sup>

A successful insurance scheme requires a broad risk pool comprising both healthy and unhealthy members, as well as those who are better off and those who are poorer. To avoid adverse selection, the unit of membership must be defined as a village, or a group of villages, or, at the very least, a whole household.<sup>1129</sup>

## 4.3 Referral service

Another key design feature is the issue of a referral service. This is a “gate-keeping” mechanism whereby the scheme provides an incentive to use the most cost-effective treatment,<sup>1130</sup> for example primary care or hospital care. The first point of contact between the beneficiary and the health system should be at the primary level.<sup>1131</sup> Some insurance schemes provide coverage for hospital care, but others focus primarily on primary care. The latter is usually more affordable.

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<sup>1126</sup> Creese A & Bennett S “Rural Risk-Sharing Strategies in Health” Paper presented at The World Bank *International Conference on Innovations in Health Care Financing* (Washington, March 10-11, 1997) at 4. (Hereafter Creese & Bennett).

<sup>1127</sup> World Health Organisation *Health Insurance Schemes for People Outside Formal Sector Employment* (1997) at 8. (Hereafter WHO *Health Insurance Schemes for People Outside Formal Sector Employment*).

<sup>1128</sup> Idem at 4. Creese & Bennett op cit note 1126 at 4-5, 10-11.

<sup>1129</sup> Ibid.

<sup>1130</sup> Jakab et al op cit note 1047 at 39-40. Gilbert N “Alternative Forms of Social Protection for Developing Countries” *Social Security Review (SSR)*, Sept (1976) at 370-373. (Hereafter Gilbert).

<sup>1131</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 9.

#### 4.4 Investment strategy

The sustainability of the scheme can also be improved by including preventative and promotive services. It is also important that scheme managers have an investment strategy for funds under their control.<sup>1132</sup>

#### 4.5 Enrolment period

Another important design feature is the need for an enrolment or qualifying period. This refers to the time which has to lapse between joining the scheme and qualifying for benefits under it. This prevents people from joining only when they are sick.<sup>1133</sup> Some schemes have limited enrolment periods, such as harvest time (when rural people are most likely to have cash), and a waiting period of at least one month is implemented.<sup>1134</sup>

#### 4.6 Preventative strategy

Another key design issue is the need to ensure that preventative and promotive services are included in the activities of all service providers. This helps improve the sustainability of schemes and contains overall costs.<sup>1135</sup>

#### 4.7 Community involvement

Communities (in the broader sense of the word) can be involved in this process of primary health care. Community participation can take the form of individuals and families assuming responsibility for their own health and welfare and of those in the community.<sup>1136</sup> Such participation plays an important role in health care, especially in scattered, isolated rural areas, because it focuses on communities in their own setting,

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<sup>1132</sup> *Idem* at 7-9.

<sup>1133</sup> Creese & Bennett op cit note 1126 at 21.

<sup>1134</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 7-9.

<sup>1135</sup> Creese & Bennett op cit note 1126 at 10-11. Jakab et al op cit note 1047 at 11.

<sup>1136</sup> Jakab et al *idem* at 11 & 20.

namely in the home or village, rather than at hospitals where the focus is away from the community and on the individual. Often, community involvement advocates primary prevention rather than the treatment of illnesses.<sup>1137</sup>

Care delivery should be dealt with at the lowest level (which is the community level) in order to bring the service closer to the people. This also guarantees a better link with the culture, routines and power structures of communities and implies that traditional health care workers, community health care workers and community leadership should be involved.<sup>1138</sup>

#### **4.8 Traditional leadership**

Traditional leadership should be involved in community health care efforts and mutual health insurance. This is important, because traditional leaders are responsible for dealing with community affairs and are ideally situated to mobilise and build community support. They are also regularly in contact with the community and deliberate about community issues, thus facilitating communication and decision-making regarding health affairs.<sup>1139</sup>

In rural areas, the best community health workers are the traditional health practitioners who are already offering health care at this level. They should receive basic training in order to become more productive and to be able to deliver a better quality of care.<sup>1140</sup> They are also better suited to serve the community, because they are recognised and accepted by the community and because there is less chance of them abandoning the service, since they do not fully depend on the service for a living.<sup>1141</sup>

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<sup>1137</sup> “Pastoralist Health Care in Kenya” *International Journal of Integrated Care* (1 Mar 2001) accessed at [http://www.ijic.org/publish/articles/000019/article\\_print.html](http://www.ijic.org/publish/articles/000019/article_print.html) on 18 May 2004 at 14. (Hereafter “Pastoralist Health Care in Kenya”).

<sup>1138</sup> Ibid.

<sup>1139</sup> Ibid.

<sup>1140</sup> Idem at 15.

<sup>1141</sup> Ibid.

#### **4.9 Establishing links**

In order to improve health care provision (especially in rural areas), there should be better integration of, and cooperation between, the health care system and other systems such as the veterinary sector and the agricultural sector. Moreover, there should be better cooperation between policy makers on national and local level, and cognisance should be taken of local health care, local culture and power relations. There should also be better cooperation between traditional and western-oriented health care and health care services.<sup>1142</sup>

### **5 POSITIVE AND NEGATIVE ASPECTS OF MUTUAL HEALTH INSURANCE**

#### **5.1 Positive aspects**

From the discussion of the various mutual health insurance examples above, some positive and negative conclusions can be drawn. It is important to highlight these, since they will influence the lessons to be learnt for bridging the divide between formal and informal social security.

- Community financing arrangements contribute significantly to the resources available for local health care systems. They lead to increased tapping into more household resources than would otherwise be available for health care. Mutual health insurance schemes are reported to reduce the out-of-pocket spending of their members, while at the same time increasing the utilisation of health care services.<sup>1143</sup>
- Community-based health financing is effective in reaching a large number of low-income populations that would otherwise have no financial protection

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<sup>1142</sup> *Idem* at 19.

<sup>1143</sup> See par 4.7, ch 7. Goudge et al op cit note 1064 at 10 & 12-14.

against the cost of illness. However, the poorest of the poor and socially excluded groups are not automatically included in community-based health financing initiatives. In addition, high-income groups are frequently under-represented relative to the population as a whole, thereby undermining the redistribution from rich to poor.<sup>1144</sup>

- Mutual health insurance also has good access to information owing to the close proximity of members. Where there is close cooperation between the scheme operators and the community, the scheme will also more readily enjoy the trust of the community. Whereas governments tend to be bureaucratic and centralised, community-based institutions are more flexible and non-hierarchical in nature. They operate on grassroots level, have a good information base, and can react more quickly to complaints or changing demands.<sup>1145</sup>
- Health insurance schemes for people outside formal employment are not just a financing mechanism. They can have a very positive impact on the organisation and delivery of health care. However, they should be utilised to supplement government resources and not as a substitute for them.<sup>1146</sup> It should, however, be noted that there will always be a need for government subsidies to ensure access to health services. Health care cannot just be provided by means of “self-financing”. Government can provide financial assistance by granting subsidies via insurance funds, or by providing them directly to health care providers.<sup>1147</sup>

## 5.2 Negative aspects

Weaknesses as regards mutual health insurance relate to the following:

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<sup>1144</sup> Creese & Bennett op cit note 1126 at 17-19.

<sup>1145</sup> Idem at 19 & 21-22. Gilbert op cit note 1130 at 370-371.

<sup>1146</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 3.

<sup>1147</sup> Idem at 4.

- Efficiency of risk coverage.<sup>1148</sup> Informal social security arrangements can only deal with certain types of risks and are helpless against other types. For example, low-frequency, covariate and repeated shocks have a great financial impact on insurance and are associated with the largest and most costly damage. Mutual insurance schemes are usually not effective in addressing such large-scale risks, mainly owing to the lack of heterogeneity and the small size of the risk pool. This means that, in the case of drought or HIV/AIDS, no household will be able to pay into the insurance budget anymore because of the breakdown of the scheme. The fact that informal social security can deal with some risks should not lead to the conclusion that the informal sector is taken care of and that state and market-based institutions need no longer be concerned with the provision of insurance to this sector.<sup>1149</sup> Mutual insurance schemes also have to make risk-pooling more effective. An increase in the risk pool will improve the scheme's ability to deal with covariate risks. In addition, compulsory membership could be a solution. Imposing compulsory membership is however not easy. The state can step in and provide organisational and regulatory assistance. In addition, some kind of subsidy should be available for poor households that cannot pay the premiums.<sup>1150</sup>
- Sustainability.<sup>1151</sup> Informal social security schemes are often praised for their flexibility. However, the structure of mutual insurance arrangements is not always compatible with economic development. Factors relating to modernisation, such as migration and urbanisation, can also have a destabilising effect on local insurance arrangements. Financial viability is also threatened because of the structure of informal schemes. Small risk pools, problems with adverse selection and administrative inefficiencies can lead to financial difficulties in the long term.<sup>1152</sup>

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<sup>1148</sup> "Mutual Insurance Schemes" op cit note 503 at 12.

<sup>1149</sup> Ibid.

<sup>1150</sup> Idem at 18.

<sup>1151</sup> Idem at 12.

<sup>1152</sup> Idem at 13.

- Organisational inefficiency.<sup>1153</sup> Mutual insurance schemes often lack management, financial and technical expertise, resulting in organisational inefficiencies. For example, informal insurance schemes are not necessarily cost-effective and administrative costs are often high, ranging between 5 and 17 percent of income.<sup>1154</sup> Mutual insurance arrangements often lack the technical and organisational expertise for running the schemes. Consequently, the provision of assistance by experienced persons can be of great help.<sup>1155</sup>
- Involvement of external actors.<sup>1156</sup> Cooperation with external actors can ensure the viability of the scheme. Reinsurance and the support of private businesses, as well as public-private partnerships, can help to make mutual insurance schemes more suitable.<sup>1157</sup>

## 6 LESSONS LEARNT FROM MUTUAL HEALTH INSURANCE FOR INFORMAL SOCIAL SECURITY

The cost of health care services is often assigned (as is the case with any other goods purchased) to the individual using these services.<sup>1158</sup> These costs may however be reassigned, or shared, through a variety of risk-sharing institutions or mechanisms. Risk-sharing, such as in the case of mutual health insurance, can work by combining a larger number of similarly exposed individuals or households in a common fund that makes good the loss caused to any one member.<sup>1159</sup>

Effective mutual health insurance requires more than a mere community initiative. Planning and implementation of such a scheme take time.<sup>1160</sup> For effective mutual health

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<sup>1153</sup> *Idem* at 12.

<sup>1154</sup> *Idem* at 13.

<sup>1155</sup> *Idem* at 18.

<sup>1156</sup> *Idem* at 19.

<sup>1157</sup> *Ibid.*

<sup>1158</sup> Creese & Bennett *op cit* note 1126 at 3.

<sup>1159</sup> *Ibid.*

<sup>1160</sup> In the Republic of Korea, it took only 12 years from the inception of social health financing schemes to universal coverage because of the favourable economic conditions. Lambo *op cit* note 1071 at 273.

insurance, relevant national infrastructure must exist; for example, social health financing requires an efficient national banking system and a high level of administrative capacity.<sup>1161</sup> A degree of integrity in public and corporate affairs is also required, since the generation of new funds creates opportunities for misappropriation and misuse.<sup>1162</sup>

The state should demonstrate greater commitment to social health financing (and informal social security in general) by providing an appropriate regulatory framework and supervision, thereby endowing the scheme with the power to collect contributions, to enforce the necessary compliance and to develop the necessary administrative and managerial skills.<sup>1163</sup> Community-based pre-payment schemes should be supported technically and financially, and such schemes should be incorporated into the national health system.<sup>1164</sup> Governments also need to embark on effective marketing to raise awareness on all levels of the importance of putting in place effective social health financing schemes.<sup>1165</sup> The implementation of the various strategies for extending coverage will require funding. Although there will be funding from employers and other sources, government will need to commit more resources in the form of subsidies to fill the financial gap.<sup>1166</sup> In addition, economic development and growth should be vigorously pursued in order to alleviate poverty, since a buoyant economy can facilitate the successful implementation of any plan aimed at extending coverage by means of social health financing schemes.<sup>1167</sup>

Non-formal employment poses substantial problems for the development of health insurance, because it is difficult to identify beneficiaries, to assess their incomes, and to collect contributions.<sup>1168</sup> Mandatory membership, which has substantial advantages in

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<sup>1161</sup> Gilbert op cit note 1130 at 311-315.

<sup>1162</sup> Lambo op cit note 1071 at 267.

<sup>1163</sup> Idem at 273.

<sup>1164</sup> Idem at 274-276.

<sup>1165</sup> Ibid.

<sup>1166</sup> Ibid.

<sup>1167</sup> Ibid.

<sup>1168</sup> “Mutual Insurance Schemes” op cit note 503 at 18-20.



terms of the size of the risk pool and the control of adverse selection, is also much harder to implement for the non-formal than the formal sector.<sup>1169</sup>

Membership and coverage can also be problematic.<sup>1170</sup> Most mutual health insurance schemes take the household as the unit of membership. Those allowing individual enrolment rapidly face economic problems of adverse selection.<sup>1171</sup> Prevention measures against adverse selection would entail that a minimum number of households in a village or administrative area join a scheme. It is also important that there should be a waiting period, otherwise people will only enrol when they need care. Therefore, in designing such schemes, efforts must be made to guard against adverse selection; and if enrolment throughout the year is allowed, then a waiting period prior to accessing services should be required.<sup>1172</sup>

Premiums are generally flat-rated, but some schemes do allow for premiums on a sliding scale.<sup>1173</sup> Monthly payments nevertheless create difficulties for workers with seasonal income. Some schemes allow for a lump sum fee payable annually. Most schemes do rely on funds other than those received from premiums, for example moneys from drugs subsidised by donors, etcetera. Fund management is important. Where premiums are collected at a particular time and must be used to meet financial commitments over the whole year, it is essential that the funds are invested.<sup>1174</sup>

## 7 CONCLUSION

In recent years, mutual health insurance schemes have gained increasing importance as independent components of a national health system. This can partly be explained by the generally accepted fact that the approach of enlarging state-based social security systems

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<sup>1169</sup> Creese & Bennett op cit note 1126 at 3.

<sup>1170</sup> See par 4.2, ch 7.

<sup>1171</sup> Creese & Bennett op cit note 1126 at 10-11. WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 4.

<sup>1172</sup> Ibid.

<sup>1173</sup> See par 4.5, ch 7.

<sup>1174</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 4.

in developing countries has failed.<sup>1175</sup> These schemes are also becoming more popular, because neither market-based systems nor private household-based systems can fill the gap of universal coverage owing to high transaction costs.<sup>1176</sup>

Although it is still too early to determine the success of these schemes, existing studies have so far shown that these schemes have the potential to help those who would otherwise be excluded to gain access to health care.<sup>1177</sup> However, these schemes are not perfect. One of their biggest advantages is that they help people to gain access to health care.<sup>1178</sup> Their biggest shortcoming is that they tend to attract people with pre-existing health problems as a result of adverse selection and a small risk pool. This may quickly lead to financial collapse.<sup>1179</sup> If the extent of the HIV/AIDS problem in Africa is taken into account, then the situation becomes particularly problematic.<sup>1180</sup>

These threats are interrelated, so it is important to establish under what conditions community health insurance schemes can be sustainable and/or can be replicated or expanded. One option is that such schemes form organisations among themselves to enable them to achieve various objectives, such as increased negotiation power when negotiating with government as well as health providers, the sharing of knowledge and greater financial stability.<sup>1181</sup>

Owing to financial constraints, it is unlikely that the majority of mutual health insurance schemes will ever be able to operate as stand-alone schemes that are independent from other financing systems. If they cannot operate in the long run on a stand-alone basis, then such schemes should be embedded in national social security networks.<sup>1182</sup>

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<sup>1175</sup> Asfaw & Jütting op cit note 1040 at 2.

<sup>1176</sup> Ibid.

<sup>1177</sup> Jakab et al op cit note 1047 at 43. Lambo op cit note 1071 at 249-250.

<sup>1178</sup> Lambo idem at 250.

<sup>1179</sup> Asfaw & Jütting op cit note 1040 at 3.

<sup>1180</sup> Dror & Jacquier op cit note 1061 at 94-95. Jakab et al op cit note 1047 at 43-44. Dekker AH "Where Have All the Young Men Gone? The Impact of HIV/AIDS on Informal Social Security Systems and Care for the Elderly" *South African Public Law* Vol 19 (2004) at 152-160.

<sup>1181</sup> Van Ginneken "Extending Social Security: Policies for Developing Countries" op cit note 846 at 25.

<sup>1182</sup> Cichon et al op cit note 1077 at 61.

Mutual health insurance schemes can be successful for people outside the formal sector if contributions are spread over time and between sick and healthy people. This can mobilise extra resources for health care, which can be used to improve the quality of care. The accountability generated through community participation can also enhance and improve the quality of care.<sup>1183</sup>

There are several reasons why participants in community schemes would prefer community schemes to individual spending and financing. By making regular contributions, the problem of indebtedness brought about by high medical bills can be alleviated. People will join because of economic and social need. These two needs can be combined through joining a mutual health insurance scheme. Economically, it also makes more sense to join a mutual health insurance scheme than to save money as individuals or as a family.<sup>1184</sup>

Mutual health insurance can also help groups to gain financial power. This may enable administrators to negotiate services of better quality, or better value for money, when dealing with health care providers, and the group may be willing to spend money on preventative and health promotion activities to keep down the cost of medical services.<sup>1185</sup>

A mutual health insurance scheme would also make social sense in that people voluntarily seek contact with other people. By joining a mutual health insurance group, they can satisfy this need, and, at the same time, improve their health status, thereby

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<sup>1183</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 3-4.

<sup>1184</sup> If one assumes that an African adult between 15 and 60 years has a 1 in 10 000 chance of suffering a serious illness or injury, and that the treatment needed would require an average annual hospital bill of US\$3 000, then 10 000 people would have to pay US\$0,30 per year in order to pay the bill. This would convert the low probability of a loss of US\$3 000 for the individual into a small annual loss of US\$0,30 per year. If an individual wanted to save for this type of low-probability risk (e.g. by way of a medical savings account), he or she would have to save US\$60 for 50 years in order to achieve protection. As members of an insurance organisation with an annual contribution of only US\$0,60 (instead of US\$0,30 in order to make the insurance probable), the protection could be purchased annually, whereas with individual savings the protection would be achieved only after 50 years. The economic benefit of joining the organisation is therefore obvious. Novartis Foundation op cit note 1039 at 3.

<sup>1185</sup> Van Ginneken *“Extending Social Security: Policies for Developing Countries”* op cit note 846 at 22.

allowing them to have control over their living conditions. They can, for example, specify health risks according to their needs and resources. These people will thus be empowered as a group to make demands and they will be able to ensure that the quality of health service is improved through negotiations with various providers and by creating competition between health care providers.<sup>1186</sup>

Mutual health organisation is one way of “informally” extending social protection, thereby moving closer to recognition for informal social security.

...community based health care financing is growing exponentially. This reflects enthusiasm among policy makers and researchers alike about the potential of these schemes to mobilize resources for the health care of the poor.<sup>1187</sup>

The same problems experienced by, and lessons learnt from, mutual health insurance schemes are relevant to informal social security schemes in general. The lessons learnt will find application in the solution proposed by the model in chapter 8. Informal social security schemes, like mutual health insurance schemes, need support to extend their protective scope and ability. They can rarely function indefinitely as stand-alone schemes for providing social security support. They can, however, be used as a basic scheme to extend, with help from the state, social security protection to the present excluded majority.

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<sup>1186</sup> Novartis Foundation op cit note 1039 at 2.

<sup>1187</sup> Jakab et al op cit note 1047 at 43.

## CHAPTER 8: A MODEL FOR POLICY RECOMMENDATIONS

Currently, the position as regards formal and informal social security in South Africa can be described as one where each is travelling along a road parallel to the other. Formal social security is on a single, tarred carriage-way. This road is in the process of being improved and is being transformed into a dual carriage-way. Informal social security is travelling on a road parallel to this road, and to the same destination, but its road is only a small dirt road with potholes. Since both roads lead to the same destination, and run along more or less the same course, it is time to consider whether they should not both form part of the greater road-planning project for the area.<sup>1188</sup>

### 1 THE ROAD AHEAD

The aim of this thesis has been to consider the future of informal social security in South Africa. Currently, informal and formal social security exist as two separate social security networks.<sup>1189</sup> Informal social security, despite the important role it is fulfilling, is only starting to be recognised in South Africa as a separate strand to social security.<sup>1190</sup> International organisations and writers have for a long time stressed and realised the importance of informal social security as a way in which to extend social security to people currently excluded from such protection.<sup>1191</sup>

The thesis has up until now paved the way for the discussion of an appropriate solution to the dualism of formal and informal social security. This dualism developed as a result of the development of social security in South Africa.<sup>1192</sup> Unlike Western Europe where the present formal social security system also originated from informality,<sup>1193</sup> in South Africa informal social security was never absorbed into formal social security.<sup>1194</sup> Owing to a number of factors highlighted earlier in the thesis, the present formal social security system remains exclusionary in nature.<sup>1195</sup> This has resulted in a dualistic system where

<sup>1188</sup> Own analogy. Repetition from par 4, ch 1.

<sup>1189</sup> See chs 1 & 3 in general. Also see par 3, ch 2.

<sup>1190</sup> Par 2, ch 4.

<sup>1191</sup> Par 4, ch 4 & par 2, ch 6.

<sup>1192</sup> See ch 2 in general.

<sup>1193</sup> See ch 5 in general.

<sup>1194</sup> Par 3, ch 3.

<sup>1195</sup> See ch 2 in general & par 3.3, ch 3.

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informal and formal social security co-exist as two separate social protection systems, and where the former is hardly recognised as such. The future of these two systems has, however, now come under the spotlight as a result of the regulatory landscape being influenced by the constitutional guarantee of access by everyone to social security.<sup>1196</sup> An analysis of the present South African regulatory framework also indicates that, in the present legislative framework, there are legislative tools which suggest that the time is ripe for greater cooperation between formal and informal social security.<sup>1197</sup> The specific example of mutual health insurance has also been discussed as a model used by international organisations and developing countries as a way in which greater cooperation between formal and informal social security can be achieved.<sup>1198</sup>

With the current position regarding formal and informal social security having been clearly stated, the focus must turn to the ultimate goal to which the social security system should aspire. As highlighted throughout the earlier discussions, the ultimate goal to which the system must aspire is comprehensive social protection.<sup>1199</sup> What remains to be discussed in this chapter is the way in which to get from where the social security system currently is to where it should ultimately be. The following discussion will, therefore, first reaffirm what the future position or ultimate goal of formal and informal social security should be,<sup>1200</sup> and, secondly, recommend how to achieve this goal.<sup>1201</sup>

Although it was stressed at the beginning of the thesis that the focus would not be on the shortcomings in the present formal social security system but rather on possible common ground between formal and informal social security, it is to a certain extent necessary to examine some of the changes proposed to the formal system in order to achieve comprehensive social protection. Since the ultimate goal of the following recommendations will be to achieve greater cooperation between formal and informal social security, it will be necessary to consider changes to both systems in order to come

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<sup>1196</sup> Par 4.2, ch 3.

<sup>1197</sup> See ch 6 in general.

<sup>1198</sup> See ch 7 in general.

<sup>1199</sup> Par 2, ch 3 & par 4.3, ch 4.

<sup>1200</sup> Par 1 & 2, ch 8.

<sup>1201</sup> Par 3 - 5, ch 8.

closer to this goal. The proposals for reform of the present formal social security system will increase its capacity to provide social protection and will lessen the burden on the informal social security system. The proposals for reform of the formal social security system are also largely based on proposals by the Taylor Committee.

Most writers agree that there should be greater recognition of informal social security, and greater cooperation between formal and informal social security, as is evident from the following extracts:

There is an urgent need for policy makers to identify innovative ways of extending protection to those who are currently excluded from statutory social security programmes.<sup>1202</sup>

The current dualistic approach which separates the statutory system from the indigenous system should be ended.<sup>1203</sup>

Of highest priority are policies and initiatives which can bring social security to those who are not covered by existing systems... The potential for micro-insurance should also be rigorously explored: even if it cannot be the basis of a comprehensive social security system, it could be a useful first step...<sup>1204</sup>

...(T)raditional social security systems, however weak they might have become, still will be indispensable carriers of social security for most people in the future. In view of the present inability of the state to provide sufficient means to take care of the social security problems of the poor and needy, the strengthening of these systems should be an important objective of social security policies, especially in attempts to improve the social security conditions of the poor.<sup>1205</sup>

These informal social security systems do, however, play an important role in the present social security system. It would be extremely unwise to implement a social security system without having proper regard to existing informal social security mechanisms present in traditional communities and in informal employment contexts. In the process of transforming the South African social security system the challenge would be how to develop, transform and strengthen existing informal social security, and how to incorporate this phenomenon conceptually and structurally in the formal social security system. If this were to be achieved, it would also relieve the burden on the state and on public resources.<sup>1206</sup>

Greater cooperation between formal and informal social security should therefore form the cornerstone of the social security system if better social protection is to be achieved.

<sup>1202</sup> Midgley *Coping with Insecurity* op cit note 472 at 219.

<sup>1203</sup> *Idem* at 227.

<sup>1204</sup> ILO *Decent Work* op cit note 605 at 58-59.

<sup>1205</sup> Freiburg-Strauß J & Meyer K *The Real World of Social Policy* op cit note 78 at 33-34.

<sup>1206</sup> Dekker & Olivier op cit note 41 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 562.

In order to achieve this, a holistic view of social security is necessary, without the compartmentalisation of the indigenous and statutory systems. The dualism will end only when formal and informal social security provisions are interlinked within the framework of a policy for providing comprehensive social protection.<sup>1207</sup>

The present South African formal social security system is however also in the process of being reformed in order to provide better social protection. According to the Constitution, everyone should be granted a right of access to social security. In order to achieve this, government appointed the Taylor Committee to propose reforms to the present formal system so as to extend its present scope of protection. According to the Taylor Committee, the ultimate goal of social security should be to provide “comprehensive social protection”. Although the Taylor Committee recognised the role of informal social security, it did not indicate how informal and formal social security should work together to achieve greater, comprehensive social protection.<sup>1208</sup>

According to the Taylor Committee, comprehensive social protection should consist of a basket of goods. The figure below illustrates, according to the Committee, what the ideal scenario is in respect of a comprehensive social protection package and its components:

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<sup>1207</sup> Midgley & Sherraden op cit note 995 at 114.

<sup>1208</sup> See par 3.5.4, ch 2 & par 4.4, ch 6.



**Table 5: Suggested Components of a Comprehensive Social Protection Package**

<b>Comprehensive social protection measures</b>	<b>Application</b>	<b>Key components</b>
(a) Income poverty *	Universal application	<ul style="list-style-type: none"> <li>• Basic income grant</li> <li>• Child-support grant</li> <li>• Old-age grant</li> </ul>
(b) Capability poverty *	Universal application/subject to an eligibility criterion	<ul style="list-style-type: none"> <li>• Free and adequate publicly provided health care</li> <li>• Free primary and secondary education</li> <li>• Free electricity</li> <li>• Free water and sanitation</li> <li>• Accessible and affordable public transport</li> <li>• Access to jobs and skills training</li> </ul>
(c) Asset poverty *	Universal application/subject to an eligibility criterion	<ul style="list-style-type: none"> <li>• Access to productive and income-generating assets such as land and credit</li> <li>• Access to social assets such as community infrastructure</li> </ul>
(d) Special needs **	Subject to an eligibility criterion	<ul style="list-style-type: none"> <li>• Reformed disability grant, foster care grant, child-dependence grant</li> </ul>
(e) Social insurance ***	Subject to an eligibility criterion	<ul style="list-style-type: none"> <li>• Cover for old age and survivors', disability, unemployment and health needs</li> </ul>

\* (a), (b) & (c) are core elements of the comprehensive social protection package and should be available to all South Africans as a universal-as-possible package of income transfers, services and access to provide for non-work related needs and whose availability is not primarily dependent on the ability to pay.

\*\* (d) addresses special needs that will be added to the package.

\*\*\* (e) is a social insurance component that will be reformed so as to be more inclusive, equitable and efficient and to provide consumer protection. This component completes the package.<sup>1209</sup>

The ideal scenario set out above will definitely extend the protective scope of the current social security system to categories of people who were previously excluded. However, the achievement of this ideal scenario will not be as easy as it looks. Also, as indicated earlier, despite its recognition of the concept of informal social security,<sup>1210</sup> the Taylor

<sup>1209</sup> Taylor Report op cit note 39 at 42-43.

<sup>1210</sup> As far as informal social security is concerned, the Taylor Committee reiterated the importance of not imposing a social security system that will be detrimental to traditional support mechanisms, such as informal social security support. Transformation of the present social security system should rather support and strengthen existing informal social security to further enhance solidarity. The proposals in this regard are, however, very broad and are not very concrete. Such proposals include the establishment of pilot schemes aimed at supporting informal social security, removing unnecessary legal restrictions regarding

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Committee did not really take cognisance of the role which informal social security can play in this process of achieving the ideal scenario.<sup>1211</sup>

This goal of comprehensive social protection should be pursued as part of an overall policy on social security and poverty. However, it is in this respect that the controversies and difficulties arise in the discussion. How this process of transformation should take place, and how informal social security should be strengthened or linked to formal social security systems, is rarely elaborated upon in detail. The focus is mainly on problems in attempting to reconcile the two systems. The result is that there are no real and feasible proposals on the table as to how to tackle the issue of coordination between formal and informal social security. It seems that highlighting the problems is much easier than trying to provide solutions. Many authors also fall into a discussion of very broad guidelines which do not really take the process any further. It is the aim of this thesis to attempt to give guidelines on how to tackle this road-planning process (to borrow from the analogy at the beginning of the chapter). In this process, some uncharted territory will have to be ventured upon so as to come up with some concrete guidelines and proposals.

Klinck points out that the following six phases are necessary for bringing about a process of transformation:<sup>1212</sup>

- Description and analysis of the point of departure, with a formulation of the specific need for reform, including immediate crisis.

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access to informal social security schemes, the devising of tailor-made schemes to cater for the excluded and marginalised, and campaigns to promote private insurance and savings. The Committee also realised the need for broader programmes to boost the overall ability of communities and informal systems to cope with and manage increased levels of risk and hardship. It concluded that more research and policy analysis are required to understand the role and function of informal social security mechanisms and how they link to formal systems locally and in the region as a whole. *Idem* at 74-75 & 153. Also see par 4.4, ch 6.

<sup>1211</sup> *Idem* at 74. Also see par 4.4, ch 6.

<sup>1212</sup> Klinck E “Transformation in – and as a Prerequisite for – Social Security” Paper prepared for Frederich Ebert Stiftung (2001) at 4. (Hereafter Klinck). Empowerment means that a process is embarked upon in which the conditions that foster powerlessness are identified and removed.

- Basic decision in relation to the transformation which considers the change in the system or the further development of the system (i.e. decision in principle).
- Construction of the model in terms of which the transformation is to take place and concretisation of the basic decisions made (i.e. decisions in respect of measures).
- Law-making process.
- Implementation of the reform/transformation, bearing in mind prerequisites for success and other disciplines involved in such programme.
- Evaluation of the reform.

In terms of the above analysis, it seems that transformation of social security in the country is currently in the second phase, namely at the point where basic decisions in relation to the transformation must be made. This stage of the transformation process kicked off with the report of the Taylor Committee. Such stage also entails the creation of an overall social security policy. It is therefore crucial that informal social security is recognised in this stage as an important contender in the social security arena. The thesis therefore aims to exert an impact on policy that will accord informal social security its rightful place in social security. The correct overall policy should be adopted to drive this process forward. The thesis further attempts to prepare the groundwork for the third stage of transformation by suggesting a model in terms of which the transformation should take place. This should be supported by the legislative process, and only then can implementation and, later on, evaluation take place.

Ultimately, the task of providing social protection to the whole population in developing countries will require a complex mix of innovations, existing programmes, and modifications to existing programmes... . In the current global economic and political

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climate, the idea that the state can formulate and implement innovative programmes will be contentious.<sup>1213</sup>

## **2 WHY IS COOPERATION BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY NECESSARY?**

The legacy of Apartheid has led to the present “exclusivity” of the South African social security system. The present formal social security system was grounded on the Western European social security model and provided comprehensive social protection for the majority of people in formal employment. These happened to be mostly the White population owing to the existence of political policies which ensured job reservation for Whites. The system was developed to exclude the needs of African people, and this led to the development of “two safety nets”, namely a formal and informal social security system. The focus on racial segregation took the focus away from expansion and improvement of the system and rather reinforced its exclusionary nature.<sup>1214</sup>

In Western Europe, the hardship suffered by the working population was one of the main forces giving rise to the need for social reform.<sup>1215</sup> In South Africa, however, the needs of the White working population were addressed, while the needs of the Black (including Indian and Coloured) working population were forcefully oppressed, with the result that the influence of the latter on transformation was limited. The focus of workers was also, for a long time, on the struggle to achieve basic rights, and, therefore, could not extend to lobbying for other related social rights.<sup>1216</sup>

Because of the exclusionary nature of the South African formal social security system, the informal social security system continued to exist and expand, and, eventually, such a situation culminated in the dual system of social security existing in the country today. Because the welfare of only a part of the population was always the issue, no true

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<sup>1213</sup> Midgely *Coping with Insecurity* op cit note 472 at 227.

<sup>1214</sup> Par 3.4, ch 2 & par 3.3, ch 3.

<sup>1215</sup> Par 4.2, ch 5.

<sup>1216</sup> Par 3.3, ch 2.

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tradition of social solidarity could develop.<sup>1217</sup> The present system was never designed to cover the whole population, and amendments to the system will not in the near future achieve comprehensive coverage, especially with the limited economic resources available. Overall change to the system is therefore necessary and a new system must be created in order to make it more inclusive of the whole population. Up until now, reforms have been haphazard and have focused on the removal of racial barriers. There is therefore a need for the reforms to now focus on greater inclusivity and on the extension of social security protection.<sup>1218</sup>

This shift in focus is becoming increasingly imminent in the light of the constitutional obligation guaranteeing everyone a right of access to social security. The present exclusionary nature of, and other shortcomings in, the system might lead to the system not passing constitutional scrutiny. The system does not currently provide everyone in the country with a right of access to social security.<sup>1219</sup> The Constitutional Court has reaffirmed the enforceability of socio-economic rights and has relied on “reasonableness” as a yardstick for tracking progress in this regard. The concept of “reasonable” was used to compel government in many institutions to devise its policies so as to make them more inclusive. It is debatable whether the present social security system will pass the test of reasonableness.<sup>1220</sup>

Informal social security should not (and cannot) indefinitely remain conceptually separate from formal social security. Informal social security should be recognised as an important strand in the social security system and should therefore be incorporated into the definition of social security.<sup>1221</sup> The continuing growth of the informal sector is also an important reason for reform of the present system. The informal sector is expanding and will not disappear or be absorbed by the formal sector. The informal sector is in great need of social security protection, especially because people in the informal sector are

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<sup>1217</sup> See par 3.4, ch 2 & pars 3.1 & 3.2, ch 3.

<sup>1218</sup> Par 3, ch 3 & par 4, ch 4.

<sup>1219</sup> Par 3.3, ch 3.

<sup>1220</sup> Par 4.2.5, ch 3.

<sup>1221</sup> Par 4.3, ch 4.

even more exposed to social security risks than their counterparts in the formal economy.<sup>1222</sup> Informal social security schemes cannot, on their own, provide adequate social protection.<sup>1223</sup>

....a belief that existing informal institutions are equipped to meet the challenges facing the most vulnerable sections of our society is a dangerous delusion.<sup>1224</sup>

The potential of informal social security schemes should not be overestimated. Throughout this thesis it has been stressed that informal social security, while it fulfils an important social protection function, should not be over-idealised.<sup>1225</sup> In the context of linking formal and informal social security, there are also many shortcomings as far as informal social security is concerned. Social security, especially informal social security schemes, is very difficult to sustain, especially in the face of large-scale disasters and epidemics such as HIV/AIDS.<sup>1226</sup> Participation in informal social security schemes also carries its own burden. Time spent organising and in meetings means less time spent on income-earning activities and on domestic responsibilities.<sup>1227</sup> Coordination of the various schemes is also difficult, as each has its own agenda. In addition, such schemes are not always altruistic organisations, but endeavour to satisfy the interests of donors, their own members and clients. The decision-making structure of informal social security schemes is often in the hands of a small group of active members.<sup>1228</sup> Some critics doubt that the linking of two weak and insufficient systems (such as the present formal social security system with its shortcomings and the informal social security system) could overcome the obstacles.<sup>1229</sup> On the other hand, informal social security cannot be left to fend for itself indefinitely.<sup>1230</sup> The most needy and vulnerable persons normally become the first victims of any change, and care must be taken to prevent this. Government

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<sup>1222</sup> Par 5.3.2, ch 4.

<sup>1223</sup> Par 5.4, ch 4.

<sup>1224</sup> Meth C *Informal (Forms of) Social Security: Social Security for Those who Work Informally, and Informal (Family- and Community-based) Solutions to the Need for Social Security: An Economist's View* Background paper prepared for the Taylor Committee (6 Aug 2001) at 18.

<sup>1225</sup> See par 5.4, ch 4.

<sup>1226</sup> Chen et al "Supporting Workers in the Informal Economy" op cit note 77 at 41.

<sup>1227</sup> Ibid.

<sup>1228</sup> Ibid.

<sup>1229</sup> Von Benda-Beckmann & Kirsch "Informal Security Systems in Southern Africa" op cit note 78 at 34.

<sup>1230</sup> Olivier, Mpedi & Dekker op cit note 459 at 11.

intervention must therefore be extremely mindful of disturbing functional social security relationships.<sup>1231</sup>

Another concern is the fact that social security cannot be regarded as the primary means of raising the living standards of people. Social security should contribute to the realisation of this objective, and, at the same time, should be compatible with broader developmental goals.<sup>1232</sup> Social security coverage in the Third World will not expand with an increase in waged employment, since such increase is very slow and, in many cases, does not keep pace with population growth.<sup>1233</sup> Alleviation of the poverty problem in the Third World lies in sustained economic and social development which generates income, creates employment and raises levels of living. Attempts to solve the problem of mass poverty and underdevelopment through social security transfer payments alone are bound to be a failure.<sup>1234</sup> Despite social security's limitations in eradicating poverty, it must be acknowledged that social security has, traditionally, been concerned with poverty and this should not be overlooked in the context of developing countries.<sup>1235</sup> Social security affects different areas of life and should form part of a comprehensive poverty alleviation strategy. The activities and strategies which increase investments, capabilities and the productivity of the poor should figure strongly, but without neglecting the basic needs of those who are unable to do anything for themselves.<sup>1236</sup>

Ethical issues also arise, for example does the extension of social protection through informal mechanisms not constitute an abdication of the responsibility of the state, and specifically its constitutional obligations?<sup>1237</sup> Would this not unnecessarily and

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<sup>1231</sup> Von Benda-Beckmann & Kirsch "Informal Security Systems in Southern Africa" op cit note 78 at 35.

<sup>1232</sup> Midgley *Social Security, Inequality and the Third World* op cit note 493 at 189. "There is an urgent need to examine social security's proper role in preventing and alleviating poverty in the Third World and to find appropriate forms of social security which will promote this role."

<sup>1233</sup> Ibid.

<sup>1234</sup> Ibid.

<sup>1235</sup> Ibid.

<sup>1236</sup> Van der Waal & Malan op cit note 26 at 14. It should be remembered that prevention and reintegration are also important components of social security and cannot be separated from its role as a poverty alleviation measure. The former two make up medium- and long-term goals in the present South African economic landscape. The focus in this model is however on the role of social security as a poverty alleviation measure.

<sup>1237</sup> Ibid.

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additionally burden communities? If we task communities with the welfare of those who are presently excluded from the welfare system, is this not a strategy to allow governments to get their hands on new resources or to make the poor pay for their own security?<sup>1238</sup>

Although informal social security schemes should not be romanticised, they could provide the urgently required link with people at grassroots level. They do have the ability to provide social protection at a micro-level. Policy should therefore encourage and support the role of these organisations.<sup>1239</sup>

If present legislation and policy are examined, it becomes clear that informal social security can expect to enjoy increased recognition in future.<sup>1240</sup> The Taylor Committee Report mentioned informal social security, although to a limited extent, but, more importantly, it indicated that the present social security system must be extended to extend its protective scope.<sup>1241</sup> The challenge of changing social protection policies for the better of everyone in the country is immense. New policies should be based on a careful analysis of different options and should be determined by the different categories of people in the informal economy and by those depending on informal social security. Political involvement and pressure are necessary to identify mechanisms to reinforce, or strengthen, existing informal social security schemes; to extend existing statutory provisions; to extend private insurance schemes; and to develop alternative mechanisms.<sup>1242</sup>

In the literature, there are many examples of successes in the sphere of informal social security. It is, however, disconcerting to realise that so few of these success stories are more widely known. Also, none of these success stories has really been used to extend

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<sup>1238</sup> Ibid.

<sup>1239</sup> Von Benda-Beckmann & Kirsch "Informal Security Systems in Southern Africa" op cit note 78 at 36. Pars 4.4.4 & 6, ch 4.

<sup>1240</sup> See ch 6 in general.

<sup>1241</sup> Par 4.4, ch 6.

<sup>1242</sup> Von Benda-Beckmann & Kirsch "Informal Security Systems in Southern Africa" op cit note 78 at 36.



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social protection on a wider scale or has been used as a basis to link informal and formal social protection.

### **3 THE MAIN PROPOSALS TO BRIDGE THE DIVIDE BETWEEN FORMAL AND INFORMAL SOCIAL SECURITY**

From an examination of the views of many writers and international organisations on the topic of integration of, or cooperation between, formal and informal social security, it is clear that the same themes reoccur time and time again. These themes are discussed below. The themes set very broad parameters within which greater accommodation of informal and formal social security should be achieved. These parameters provide some guidance on the way forward, but remain very broad. The various approaches dealt with below can be adopted simultaneously.<sup>1243</sup> The main, recurring theme in all these proposals is, however, that the formalisation of traditional support systems is most strongly disapproved of as an option.<sup>1244</sup>

#### **3.1 The role of government**

When discussing bridging of the divide between formal and informal social security, the first challenge relates to the responsibility for this process of integration. It would be very difficult for any agency other than the state to assume responsibility for this task.<sup>1245</sup> In Western Europe, change was brought about by a number of factors, but the state took ultimate responsibility. Especially in Germany, the impact of Bismarck's leadership in this regard was exemplary. In South Africa up until now there has unfortunately been a lack of proper leadership as far as social welfare is concerned.

The strongest weapon in the hand of government for driving this process is that of policy. Policy will be discussed in more detail below, but, at this stage, it will suffice to state that

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<sup>1243</sup> Midgely *Social Security, Inequality and the Third World* op cit note 489 at 208.

<sup>1244</sup> Von Benda-Beckmann & Kirsch "Informal Security Systems in Southern Africa" op cit note 78 at 36.

<sup>1245</sup> Midgely *Coping with Insecurity* op cit note 472 at 226.

governments can create policies which will strengthen informal obligations to provide support.<sup>1246</sup> Given the fact that the field of social security is affected by a number of different state policies, only the state itself can possibly change and integrate cross-sectoral policies in a structured and coherent manner.<sup>1247</sup> Only states have the nationwide organisation which makes it possible to generate resources and to redistribute them inter-regionally and inter-locally.<sup>1248</sup>

The role of government is critical in order for informal social security schemes to be improved. Government can undertake this process in partnership with other groups. In particular, local government can play an important role in the establishment of area-based social security schemes in partnership with local civil society groups.<sup>1249</sup>

The starting point in efforts to strengthen informal social security systems and schemes is recognition by government of the fact that non-formal systems are providing social security protection for a large number of people.<sup>1250</sup> Steps in the development of an initial framework would include a review and evaluation of the scale, scope and nature of existing formal and informal social security schemes in the social security arena. This should be followed by the identification of those groups currently not protected by insurance and who face financial risks when seeking better social protection. Finally, an assessment of whether and how existing and proposed schemes should link with and support existing social security objectives is necessary.<sup>1251</sup>

In the final analysis, it is the ability of governments to use their authority and resources to formulate and implement innovative programmes that offers the best prospect for promoting social protection for all.<sup>1252</sup>

In this regard, there are four possible forms of support by government:

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<sup>1246</sup> Ibid.

<sup>1247</sup> Von Benda-Beckmann & Kirsch “Informal Security Systems in Southern Africa” op cit note 78 at 35.

<sup>1248</sup> Ibid.

<sup>1249</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 284.

<sup>1250</sup> Kaseke “Informal Social Security in Eastern and Southern Africa” op cit note 11 at 8.

<sup>1251</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 284.

<sup>1252</sup> Midgely in *Coping with Insecurity* op cit note 472 at 226.

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- The role of facilitator and promoter. The state can promote informal social security schemes through recommendations concerning design and good practice (e.g. in relation to the benefit package, affiliation and administration), through the introduction of management information systems and programmes to improve managerial procedures, through providing assistance as regards more secure investments, and through assistance in recruiting more members. It can also ensure that existing schemes have the opportunity to share experiences and discuss strategies.<sup>1253</sup> Committees should be set up for the exchange of experiences between informal social security organisations and the state administration in the area of poverty alleviation and social policy. Government can also ensure that technical support, advice and training are available to groups switching to the establishment of informal social security schemes and to groups already operating informal social security schemes.<sup>1254</sup>
  - Government can also encourage the broadening of the scope of informal social security systems and introduce linkages with formal social security.<sup>1255</sup> Scope should be created for strategy development so that schemes can evolve over time.
  - The state can also fulfil a monitoring function. Informal social security schemes must be adequately monitored and evaluated. For example, the state can monitor the performance of informal social security schemes within the context of legislation providing for the efficient and transparent administration of schemes.<sup>1256</sup> Government can also ensure that schemes have the necessary legal status to function as official entities. Current legislation should be reviewed to ensure that approved schemes have the protection, security and accountability conferred by legal existence.<sup>1257</sup>

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<sup>1253</sup> Kaseke “Informal Social Security in Eastern and Southern Africa” op cit note 11 at 8.

<sup>1254</sup> Ibid. Also see par 5.4, ch 4.

<sup>1255</sup> Ibid.

<sup>1256</sup> Ibid.

<sup>1257</sup> See par 5.4, ch 3.

- In discussing reform, it is important to realise that there will continue to be a need for government subsidies.<sup>1258</sup> The state can act as co-financier to ensure access to informal social security by low-income groups, possibly through subsidies or by matching contributions.<sup>1259</sup> The state's role as a provider of resources is recognised, but its role as providing agent has received very little critical attention. It is often believed that the state's perspective is limited to that of macro-level intervention and that it is therefore incapable of reaching the poor and reacting adequately to problems that arise.<sup>1260</sup>

The state must recognise that it has a role to play as a partner in policy-making at national and local levels. The state should also promote avenues and mechanisms for regular dialogue involving organisations of informal workers, established trade unions and employers' organisations.<sup>1261</sup> An umbrella body consisting of government and representatives of schemes could prove to be a useful forum in contexts where there are already several schemes functioning in the country.<sup>1262</sup>

Governments should not attempt to control or over-regulate self-help groups and informal social security schemes. The participation of these groups in social security will be enhanced by avoiding over-bureaucratisation and by fostering participation and democratic decision-making. Group cohesion should be fostered and the composition of these groups should be balanced.<sup>1263</sup>

In addition to the linking of statutory and indigenous social security, government also needs to adopt policies and programmes that address the basic social and economic needs

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<sup>1258</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 4.

<sup>1259</sup> Van Ginneken "Extending Social Security: Policies for Developing Countries" op cit note 846 at 225.

<sup>1260</sup> Von Benda-Beckmann & Kirsch "Informal Security Systems in Southern Africa" op cit note 78 at 35. The *Persoonsgebondenbudget* in the Netherlands (fn 777, ch 5) and Long-Term Care for the Elderly in Germany (par 5.2.2.1, ch 5) are examples of service delivery being outsourced by the state to be dealt with by the informal social security system.

<sup>1261</sup> ILO *Decent Work* op cit note 605 at 202.

<sup>1262</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 5. See par 4, ch 5.

<sup>1263</sup> Midgley & Sherraden op cit note 995 at 114.

of citizens. There is little point in attempting to enhance the effectiveness of the social security system if broader social and economic policies exacerbate the conditions of poverty and deprivation that exist in the country.<sup>1264</sup>

### 3.2 Policy

A policy framework entails a public statement of the roles and responsibilities of major actors in the field of informal social security, such as communities, insurance organisations, civil society and government.<sup>1265</sup> A policy should be flexible and allow scope for innovation.<sup>1266</sup> Ideas that inform and guide policy should not be one-way, top-down ideas. A participatory and bottom-up approach to social security is an extremely important precondition for better social security protection.<sup>1267</sup> State policies should endeavour as far as possible to maintain or improve the capacity of informal social security mechanisms.<sup>1268</sup> This means that government must consider the probable influence of new policies on informal social security systems.<sup>1269</sup> Support for informal social security schemes should be followed by consistent policies and effective implementation at the local level.<sup>1270</sup>

According to the ILO, there are three basic policy approaches to extending social security. The first step is to extend and adapt statutory social insurance schemes. This involves political commitment, public resources and a mobilised labour force. The

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<sup>1264</sup> The above proposals link up with the new strategy recommended by the ILO for improving and extending social security coverage. The ILO strategy consists of taking three complementary forms of action, namely: (a) Extension based on “classical” social security mechanisms such as social insurance, universal benefits and social assistance. When considering the extension of social security protection to uncovered populations, a fundamental question is whether one should try to extend the existing coverage to the entire population or create specific mechanisms that provide a lower level of protection for the uncovered population. The risk associated with the latter option is that it can create a dualistic social protection system with solidarity among the privileged on the one hand and among the poor on the other. (b) The promotion of, and support for, the development of decentralised systems deriving from local initiatives (in particular micro-insurance). (c) The design of linkages and bridges between decentralised systems and other forms of social protection and public initiatives. Reynaud op cit note 1084 at 2.

<sup>1265</sup> WHO *Health Insurance Schemes for People Outside Formal Sector Employment* op cit note 1127 at 6.

<sup>1266</sup> Ibid.

<sup>1267</sup> Von Benda-Beckmann & Kirsch “Informal Security Systems in Southern Africa” op cit note 78 at 36.

<sup>1268</sup> Ibid.

<sup>1269</sup> Ibid.

<sup>1270</sup> ILO *Decent work* op cit note 605 at 75.

second approach is to foster contributory (often informal) schemes for workers in the informal economy, particularly in low-income countries. The coverage of these schemes remains low, but, with proper technical and institutional support, they could significantly improve coverage and reduce social exclusion. The third step is to promote tax-financed social benefits (social assistance) for vulnerable groups which may not be able to benefit from contributory schemes. It is also important to ensure that there are linkages between these three approaches in order to develop and test new ways of reaching out to workers in the informal economy. This can ultimately culminate in the formulation of national strategies to achieve, at least, basic social security for all.<sup>1271</sup> This approach is used as the basis for the model proposed in paragraph 5 below.

The following South African example serves as a positive way in which policy can be designed in order to accommodate informal social security, in this case the informal sector.<sup>1272</sup>

After the introduction of the new Constitution, the Durban City Council faced a tremendous challenge in addressing the issue of informal traders. Under the previous Apartheid regime, informal activities (mostly performed by Black people) were suppressed, but, after 1990, these policies were relaxed and trading in public places exploded. The new Constitution mandated local governments to:

- promote local economic development and to engage in pro-poor policies that opened up work opportunities;
- to engage in a process of re-regulating the informal economy; and
- to emphasise participation and consultation regarding new policy directions at local government level.

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<sup>1271</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 290.

<sup>1272</sup> Example taken from Chen et al op cit note 77 at 44.

In order to achieve these goals, the Durban local government embarked on a one-year process of policy development to guide the city in its support for, and control of, the informal sector. An inter-departmental team was established and external advisers were appointed.<sup>1273</sup>

Agreement was reached about the important role of the informal economy. First of all, it was recognised as being an important job creator and contributor to the city's economy. It was also recognised that, especially to poor South Africans, it is important that the formal and informal parts of the economy are closely linked and that the health of the one sector depends upon the health of the other. These sectors are in fact not separate sectors, but are in a constant state of flux, with parts of the formal becoming informalised, and vice versa.<sup>1274</sup> The important role players also had to realise that street traders and most visible informal workers should, in the first place, be seen as workers and not as survivalists in need of welfare. They should also not be seen as city invaders, but as workers, albeit with precarious and sometimes unsustainable enterprises. It was also important that it be accepted that informal work and workers are a permanent part of the city's life and economy. Part of the vision was formed by determining the image of Durban as a city in the new South Africa. It was accordingly viewed as not being a European city, but rather an African one – vibrant and bustling with trade, texture and noise.

The task team followed this up by conducting extensive research and by engaging in extensive consultation.<sup>1275</sup> The policy devised was “friendly” and supportive of street traders. It understood the potential of pavement space as a development tool to be valued by both traders and the city. Registration was simplified and incentives were attached to

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<sup>1273</sup> *Idem* at 45. On this team, various departments were represented, such as Development and Planning, Health, Police, Precinct Management and Small Business Support. The team worked under the overall aegis of the local government's Department of Economic Policy and Development Planning.

<sup>1274</sup> *Ibid.*

<sup>1275</sup> *Idem* at 45-46. The task team drew on the work that had already been done in the city, for example as regards urban renewal (where a unit for development was set up and endeavoured to support small traders by, for example, providing buildings for training, etc.) and hygiene (where the City Health Department negotiated with street traders about conditions of cleanliness and provided certified courses for improving the standard of stalls).

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registration. An information system, which could link management, registration and support functions, was developed. The policy also provided for informal trader organisations to be represented on planning and policy committees in the same way that formal business associations were represented. It offered concrete support to trader organisations, such as legal advice, secretarial help, low-cost meeting places and the use of existing resources. Furthermore, it linked newly built markets in outlying areas to local economic needs.<sup>1276</sup>

In the process of changing policy, it is very important to realise that, firstly, an overall vision is needed (as was the case regarding the role of the informal economy in the example of the Durban City Council discussed above). In the case of the Durban City Council, the development of this vision took time and complemented the long-term economic plans of the city. This vision was then supported by institutional structures to carry forward the policy intent. The team then developed an implementation strategy for developing the new system. This was complemented by inter-departmental cooperation. Also important were budget allocations, or reprioritisation, in order to make resources available to assist with the new policy direction.<sup>1277</sup>

These lessons in the changing of policy are important. In the model below it will be illustrated how an overall policy is imperative for driving the reform process forward.

### 3.3 Legislative changes

Although it is believed that regulation weakens rather than strengthens the informal sector, a certain degree of order in general is needed.<sup>1278</sup> An appropriate legal framework is a prerequisite for an integration policy.<sup>1279</sup>

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<sup>1276</sup> *Idem* at 46.

<sup>1277</sup> *Ibid.*

<sup>1278</sup> Maes A “Informal Economic and Social Security in Sub-Saharan Africa” *International Social Security Review (ISSR)* Vol 56 No 3-4 (Jul-Dec 2003) at 53. (Hereafter Maes).

<sup>1279</sup> Midgley & Sherraden *op cit* note 995 at 115.



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Legislation which is developed for informal social security schemes needs to be sensitive to the following three points:

- Formalities need to be simple, for many of the excluded are also illiterate. Even for those who can read and write, it is often difficult to complete a form, since particulars such as fixed address and date of birth are unknown and vary.<sup>1280</sup>
- Social security systems have to be affordable. There should also be confidence that one will receive a return on the premiums paid. Costs that are justified are often seen as affordable. Also important are the time and method of payment, for a certain degree of flexibility is needed, although everyone must comply with the same rules. One option would be to provide for payment in kind or to allow some form of labour as payment, for example where people from the local community work in an administrative capacity for an informal social security scheme.<sup>1281</sup>
- The close proximity of service centres to residences of potential members is important, since access to transport is often not readily available and, if available, is expensive.<sup>1282</sup>

Legislation can be used to lay down procedures for registration and coordination.<sup>1283</sup> The approach followed in the Nonprofit Organisations Act is commendable. The Act is written in plain English and also exhibits an underlying note of support rather than regulation.<sup>1284</sup> This is in contrast to the Friendly Societies Act which exhibits a strong regulatory approach.<sup>1285</sup>

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<sup>1280</sup> Maes op cit note 1278 at 53-54.

<sup>1281</sup> Ibid. Also see ch 7 where payment to mutual health insurance was seasonal.

<sup>1282</sup> Ibid.

<sup>1283</sup> Midgley *Social Security, Equality and the Third World* op cit note 493 at 204.

<sup>1284</sup> Par 3.1.3, ch 6.

<sup>1285</sup> Par 3.1.2, ch 6.

### 3.4 When intervention should take place

Various risks can be covered by informal social security schemes. These risks can include: low-frequency risks (e.g. old age, death in the family, chronic poverty and chronic disability) versus high-frequency risks (e.g. illness, crop loss, temporary unemployment, macroeconomic and political shocks), idiosyncratic risks (which only affect certain households) versus covariate shocks (which affect the whole community at once, e.g. drought), and single versus repeated shocks.<sup>1286</sup>

Certain risks can only be addressed through formal social security measures, whereas others can also be addressed by informal social security measures. The nature of the risk will determine the appropriateness of the measure to be applied. For example, formal social security measures can operate where the nature of the risk is such that informal arrangements can rarely provide a sustainable or long-term solution, for example in the case of covariate risks such as HIV/AIDS and retirement benefits.<sup>1287</sup>

Social security involves a number of social actors, for example families, kin, self-help groups, NGOs, churches and state institutions. All these groups have an important role to play in policy-making as well as implementation.<sup>1288</sup>

Another important role player in this field is the formal trade union. The role and potential of such trade unions in the field of social welfare has not yet been recognised in South Africa. Formal trade unions operate in the arena of formal employment and have traditionally organised around the conflict of interest between formal wage-workers and employers. They find it very difficult to deal with informal workers whose employment

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<sup>1286</sup> “Mutual Insurance Schemes” op cit note 503 at 3-4

<sup>1287</sup> Olivier, Mpedi & Dekker op cit note 459 at 11. Government involvement will also be necessary in order to adopt specific measures for supporting informal arrangements, for example to protect poor people’s right of access to property, building financial literacy, etcetera. Decisive government policy may also be required to determine certain long-term goals regarding, for example, the eradication of child labour.

<sup>1288</sup> Von Benda-Beckmann & Kirsch “Informal Security Systems in Southern Africa” op cit note 78 at 35.

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status is uncertain. For example, some of the most pressing questions regarding trade union involvement in the informal sector are the following.<sup>1289</sup>

- Should informal workers be organised in separate unions or organisations?
- Should the various types of informal workers be organised into different trade unions?
- Should trade unions become involved with the self-employed?
- What services can trade unions offer self-employed producers and traders?
- Should the rights established through collective bargaining for formal workers be extended to the informal sector?
- Many trade unions have limited funds and administrative personnel. Should these resources be stretched to cover a new group of members if such unions can hardly serve their own members?
- Should the informal sector, which is already poor, be burdened with further expenses such as trade union membership fees?

Trade unions are not established primarily to provide help with welfare issues. Some trade unions have however started to break new ground in this area. A South African example is that of the Helping Hand Trust of the Solidarity Trade Union. The Helping Hand Trust examines the needs of a number of communities and, with the help of specialists, determines what projects must be implemented to address the needs in these various communities. For example, the Trust looks at feeding schemes for primary schools and at study help for children of members, helps to look for employment for members who have lost their jobs, and assists needy pensioners and supports orphanages,

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<sup>1289</sup> Chen et al op cit note 77 at 16.

retirement homes and homes for the retarded.<sup>1290</sup> Although trade unions do not have the necessary funds, they do possess negotiating powers which they can use to mobilise Big Business to make donations to funds such as the Helping Hand Trust.<sup>1291</sup> They can therefore become important role players in the welfare arena. With existing structures in place, they can organise so as to add the provision of limited social security benefits to their delivery packages, thereby extending the informal social security safety net.

### 3.5 Financial access

Proper access by informal social security schemes to financial instruments and institutions is needed to improve their viability.<sup>1292</sup> Also, financial assistance by government and non-governmental organisations can help to improve their financial base.<sup>1293</sup>

### 3.6 Training

There is a need to ensure the stability and effectiveness of informal social security schemes. Mismanagement is a serious problem and corruption is not uncommon.<sup>1294</sup> The schemes therefore require support in the form of training.

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<sup>1290</sup> Buys F “Vakbonde gee Helpende Hand in Nood” *Geld Rapport* (Oct, 10, 2004) at 36-37.

<sup>1291</sup> Ibid. Informal operators and workers are seldom organised. In order to secure and exercise an independent voice at work, employers and employees alike need representational security. This is based on the freedom of workers and employees to join organisations of their own choosing without fear of intimidation. Informal operators seldom have their own membership-based organisations to represent their interests. Where they have mobilised themselves, it is at community level in self-help groups or trade-based associations. These organisations are rarely officially registered and have limited access to the formal economy and public authorities. According to the ILO World Labour Report 1997-1998, “*the existing informal sector associations tend, in fact, to have a limited geographical coverage, and their effectiveness and sustainability are undermined by the irregularity and instability of their members’ employment and incomes. Their daily struggle for survival, their lack of managerial and technical skills and their limited ability to mobilise assets from external sources limit the coverage of the organisations and their range of services and activities.*” ILO *Decent Work* op cit note 605 at 71-72.

<sup>1292</sup> Olivier, Mpedi & Dekker op cit note 459 at 11.

<sup>1293</sup> Kaseke “Informal Social Security Schemes in Eastern and Southern Africa” op cit note 11 at 8.

<sup>1294</sup> Midgley *Social Security, Equality and the Third World* op cit note 489 at 204.

Governments and private role players should become involved in informal social security arrangements by means of training and skills development.<sup>1295</sup> Training can also help to strengthen the administrative capacity of informal social security schemes, especially as far as compliance, record-keeping and financial management are concerned.<sup>1296</sup> This can go hand in hand with education and public awareness programmes to improve the image of the social security system.<sup>1297</sup>

### 3.7 Research

Before policies can be formulated, more research is needed into the activities of informal social security schemes so as to identify the constraints and problems they encounter and the way in which they currently operate.<sup>1298</sup> Research should be accompanied by feasibility studies which specifically focus on the potential for integrating traditional and statutory systems of social security.<sup>1299</sup>

National governments can be assisted by international agencies such as the International Social Security Association (ISSA) and the International Labour Organisation (ILO). These agencies can encourage research into the field of informal social security and can make money available to foster the development of appropriate social security programmes.<sup>1300</sup>

<sup>1295</sup> Olivier, Mpedi & Dekker op cit note 459 at 11.

<sup>1296</sup> ILO *Decent Work* op cit note 605 at 61.

<sup>1297</sup> Ibid.

<sup>1298</sup> Midgely *Social Security, Equality and the Third World* op cit note 489 at 197. Olivier, Mpedi & Dekker op cit note 459 at 11.

<sup>1299</sup> Midgely *Coping with Insecurity* op cit note 472 at 226. In order to understand the scope for the social protection of informal workers, the reality should be taken into account. This can be done through sub-sector analysis – looking at the various sub-sections in the informal sector, for example wage-employees – and through a gendered and life-cycle analysis of risks and contingencies faced by workers in different employment statuses and locations of work in specific commodity chains. This will, for example, make it clear that the prospects for organising around contributory schemes for maternity benefits are very different for more isolated, home-based workers at the lower end of the commodity chain in the highly competitive garment industry as opposed to groups of workers working seasonally in commercial agriculture. Chen et al op cit note 77 at 41. Also see Taylor Report op cit note 39 at 74-75.

<sup>1300</sup> Midgely *Coping with Insecurity* op cit note 472 at 226.

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New approaches to social security require much more detailed insight into the complex interrelations between the different elements of the totality of social security regulations, institutions and practices.<sup>1301</sup>

### 3.8 Awareness

A greater awareness of all aspects pertaining to informal social security should be encouraged.<sup>1302</sup>

### 3.9 Linkages

Existing informal social security schemes are potentially valuable social security resources. Those which have well-defined social security functions and which are already properly constituted can be encouraged to expand their activities to cover many more people who do not belong to modern social insurance schemes.<sup>1303</sup> Trade unions can, for example, form part of this category.<sup>1304</sup> Informal and loosely organised societies can be helped to consolidate their activities and to provide a more effective service.<sup>1305</sup> Those cooperative societies which do not have any social security responsibilities can be encouraged to extend their activities into this field and be given the necessary assistance to develop the appropriate skills and services.<sup>1306</sup>

The coverage of informal social security schemes can also be improved through partnerships such as organisations formed by these schemes among themselves. This will enable these schemes to, for example, acquire stronger negotiation power, to increase the

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<sup>1301</sup> Von Benda-Beckmann & Kirsch “Informal Security Systems in Southern Africa” op cit note 78 at 37. “*This needs much more systematic empirical research as well as further theoretical and methodological refinement.*”

<sup>1302</sup> Olivier, Mpedi & Dekker op cit note at 459 at 11.

<sup>1303</sup> Midgley *Social Security, Inequality and the Third World* op cit note 493 at 203.

<sup>1304</sup> Par 3.4, ch 8.

<sup>1305</sup> Midgley *Social Security, Inequality and the Third World* op cit note 493 at 203.

<sup>1306</sup> Idem at 204-205. This can be achieved by encouraging existing agricultural, marketing and consumer societies to establish social security schemes for their members. Where these societies exist and already have management experience, this should not be a daunting task. These societies should then create communal funds to provide credit in times of hardship.

sharing of knowledge and to achieve greater financial stability.<sup>1307</sup> Such an association of groups can grow into a professional organisation with a beehive structure.<sup>1308</sup>

Linkages between the three strands of social security, namely formal, informal and indirect social security,<sup>1309</sup> must also be introduced to strengthen and extend the social security safety net.<sup>1310</sup>

### 3.10 The role of social insurance

Experience in a number of countries has shown that the extension of formal social security is feasible.<sup>1311</sup> A major reason why social protection is especially critical for informal workers is that they are much more likely to be exposed to poor working environments, low safety and health standards and environmental hazards than formal workers are. This impairs the health, productivity, general wellbeing and quality of life of informal workers and their families. Often, workers in the informal sector are not even aware of the risks they face and how to avoid them.<sup>1312</sup> However, it is acknowledged by the ILO that the extension of social insurance to the informal sector remains problematic. This is mainly because of the serious problems encountered in identifying, registering, educating, persuading and monitoring persons and businesses in the informal economy to ensure that they comply with all the rules of the scheme.<sup>1313</sup> Even where compulsory social insurance schemes are extended to informal workers, these schemes may not be

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<sup>1307</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 283.

<sup>1308</sup> Ibid.

<sup>1309</sup> Ancillary, indirect social security issues which can play a role in informal social security are land reform and housing, water and electricity, public works programmes for the extension of national infrastructure and labour-intensive production technologies, social services, improved health services, access by the poor to credit, skills training and the development of sector-specific standards and institutions, and improvement of the support of institutional structures for the poor and informally employed. Van der Waal & Malan op cit note 26 at 14-17.

<sup>1310</sup> Kaseke “Informal Social Security in Eastern and Southern Africa” op cit note 11 at 244. By including social security in the broader poverty alleviation strategy, this can be achieved. See par 5, ch 8.

<sup>1311</sup> ILO *Decent Work* op cit note 605 at 59.

<sup>1312</sup> Idem at 65. Par 5.3.2, ch 4.

<sup>1313</sup> Idem at 59.

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successful if the benefit and contribution structures of the schemes are not appropriate for the various categories of informal workers.<sup>1314</sup>

Workers are often excluded from formal social security schemes not only because of the formal-employment bias of the system, but also because of the fact that workers in the formal economy are often unwilling, or unable, to contribute a relatively high percentage of their income in order to finance social security benefits that do not meet their priority needs. They give greater priority to their immediate needs, such as health and education.<sup>1315</sup>

If incorporation of the informal sector within the formal social security framework is considered, it is definitely more problematic to include certain groups of employees, such as domestic workers or migrant workers, within the formal system. The best time to include these groups is when large interest groups and groups of informal workers are willing to negotiate and carry the costs of the scheme.<sup>1316</sup>

### **3.11 Gradual implementation**

Some countries have found ways to extend selected components of formal social insurance to designated categories of the informal workforce. This has, for example, been done in South Africa by including domestic workers in the protective scope of the Unemployment Insurance Act.<sup>1317</sup>

Another example of formal social security being successfully extended to the informal sector is that of the Republic of Korea's health insurance scheme. Universal health insurance coverage was achieved in 1989, within 12 years of the introduction of compulsory medical insurance in 1977. Employees of large corporations were covered first, followed by government employees. Then the employees of small enterprises were

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<sup>1314</sup> Ibid.

<sup>1315</sup> Van Ginneken "Extending Social Security: Policies for Developing Countries" op cit note 846 at 278.

<sup>1316</sup> Chen et al op cit note 77 at 41.

<sup>1317</sup> Par 3.1.1, ch 3.



covered. The last group to be covered was the self-employed. Government implemented a health insurance pilot programme in three rural areas in 1981, and in one urban area and two additional rural areas in 1982. In January 1988, the self-employed in rural areas joined the health insurance programme. In 1989, the self-employed in urban areas were covered. Both political and economic factors contributed to the rapid extension of health insurance to the self-employed. The booming economy in the late 1980s substantially improved people's ability to pay for social insurance. Government also had the fiscal capacity to subsidise health insurance for the self-employed. The presidential election in 1987 also motivated the ruling party to expand social welfare programmes as part of the campaign agenda. The government also responded to a campaign by farmers' organisations and other civic groups for health insurance reforms and increased its subsidy to health insurance for the self-employed from 33 percent to 50 percent of the financing.<sup>1318</sup>

Health care protection in South Africa can be used as an example to illustrate this. Compulsory affiliation of workers under national health insurance is something that will arise in South Africa in the near future if the findings of the Taylor Committee are taken into account.<sup>1319</sup> The Committee indicated that the question of compulsory affiliation could be addressed in a number of ways, for example people can choose to affiliate to either a state-initiated scheme, to a national health insurance system (both must still be created) or to a certified health insurance scheme.<sup>1320</sup> The time line indicated by the

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<sup>1318</sup> ILO *Decent Work* op cit note 605 at 60.

<sup>1319</sup> In low-income countries, it is estimated that no more than 5 percent of the labour force is covered by statutory social health insurance. The lack, or limited availability, of free or subsidised access to basic health care has resulted in greater reliance on mutual health insurance schemes. The success of these schemes depends on the characteristics of the organisational bodies (the association should be based on trust among members, which is enhanced by factors such as strong leadership, the association's economic base, the existence of participative structures, and reliable financial and administrative structures), on scheme design (good design features include measures to control fraud and abuse, to promote some form of mandatory participation to contain costs, and to foster preventative and promotive health services), and on the context within which they operate (important context variables are the availability of quality and affordable health care services and a favourable climate for the development of community-based schemes). Van Ginneken "Extending Social Security: Policies for Developing Countries" op cit note 846 at 283. Taylor Report op cit note 39 at 85-92.

<sup>1320</sup> *Ibid.* See discussion in par 5.5, ch 8.

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Taylor Committee seems to be six years, which is too short to ensure gradual implementation.<sup>1321</sup>

As can be seen from the Korean example above, compulsory coverage should be extended in stages by bringing successively smaller enterprises into the scheme. With each extension, the number of insured workers is expanded.<sup>1322</sup> When the extension of social protection is therefore discussed as an alternative, it is imperative that the extension of coverage on the basis of a prescribed timetable be considered.<sup>1323</sup>

### 3.12 Restructuring of benefits according to the needs of the poor

Social security systems should be amended to open new windows and offer benefits that suit the needs and contributory capacity of groups currently excluded from formal social security protection.<sup>1324</sup> It is not always necessary, or even feasible, to have the same range of social security provisions for all categories of people. Social security schemes can, as national circumstances permit, become more comprehensive with regard to the categories of people covered and the range of provisions.<sup>1325</sup> Where there is limited capacity to finance social security, priority should in the first instance be given to needs which are the most pressing in the view of the groups concerned.<sup>1326</sup>

### 3.13 Marketing

More effort must be devoted to the marketing of informal social security, as a large percentage of the target population may still not be well informed of the benefits of being insured.<sup>1327</sup>

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<sup>1321</sup> Taylor Report *idem* at 85-92. See par 5.5, ch 8.

<sup>1322</sup> ILO *Decent Work* op cit note 605 at 59.

<sup>1323</sup> *Idem* at 61.

<sup>1324</sup> *Ibid.*

<sup>1325</sup> *Ibid.*

<sup>1326</sup> *Ibid.*

<sup>1327</sup> *Idem* at 64.

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#### 4 PROPOSALS AND RECOMMENDATIONS EXTRACTED FROM THESIS

The following conclusions were extracted from the individual chapters in the thesis. These form general recommendations (along with the proposals in paragraph 3) regarding the interlinking of formal and informal social security. These recommendations are dealt with before the actual model is discussed. The recommendations will be addressed through the model contained in paragraph 5 below.

- The ultimate goal of the thesis is to make recommendations in order to achieve greater cooperation between formal and informal social security. Better social protection will only be possible if greater cooperation between formal and informal social security forms the cornerstone of the social security system. This will require a holistic view of social security, without the compartmentalisation of the indigenous and statutory systems. In order to accommodate informal social security within the South African social security system, innovative thinking will be necessary. The importance of informal social security will have to be recognised.
- The potential of informal social security schemes should not be overestimated. At the same time, they could provide a link with people at grassroots level, since they do have the ability to provide social protection at the micro-level. Policy should therefore encourage and support the role of informal social security organisations.
- In South Africa, the development of the social security system took on a specific racial flavour, which laid the foundations for the exclusionary nature of the present system. Because of the exclusionary nature of the formal social security system, the informal social security system continued to exist and expand. This eventually culminated in the dual system of social security existing in the country today. Solidarity was never able to develop and, coupled with the lack of a comprehensive plan for development of the system,

the “safety net” that did develop was never able to accommodate the expansion. This proved particularly problematic after the introduction of the new Constitution in 1995, which lays down that benefits be open to everyone regardless of race and gender.

- The current system might not pass constitutional scrutiny, since it does not provide everyone in the country with a right of access to social security. In previous judgments related to socio-economic rights, the concept of “reasonable” was used to compel government in many instances to devise more inclusive policies. Current measures to reform the system might not amount to “reasonable” measures. The possible element of discrimination can also not be ignored. Mostly women, and mostly Black women, are excluded in terms of the formal system. This could amount to indirect discrimination.
- The expansion of the formal social security safety net will not be sufficient to provide comprehensive social protection. Innovative ways will have to be developed to extend the protective scope of the social security safety net to those outside formal employment. Transformation of the social security system to make it more comprehensive can only take place when the state recognises the important role played by informal social security schemes, and when it extends a hand to these schemes. In order to achieve this, active planning for purposes of incorporation of these systems for particular risks will be imperative.
- Comprehensive social protection in Western Europe was driven by a number of political, social and economic factors. In South Africa, there are definitely political, social and economic factors which compel change. There is, however, no room for the gradual fruition of social welfare. Intervention in the course of development of social security is therefore necessary. This intervention process should also take account of informal social security.
- In the development of the formal Western European social security systems, the basic philosophies of the nation were retained, but were applied in a new,

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evolved form in order to help citizens to buy into the concept. In South Africa, the basic, main truths should be identified and should be incorporated in the transformation process to ensure the commitment (and buying in) of everyone to the reformed system. The basic main truths can be found in the Constitution. In terms of s 1 of the Constitution, the country is founded on the following values, which are relevant for social security: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms; (b) non-racialism and non-sexism; and (c) supremacy of the Constitution and the rule of law.

- In Western Europe for a certain period after the creation of formal social security there was co-existence of informal (voluntary) and formal social security mechanisms. And it was especially as far as the administrative execution of formal social security was concerned that voluntary agencies played an important role. The way in which this was done can be very useful for purposes of the model proposed for South Africa. Informality can exist with regard to regulation, administration, financing and execution (service delivery). In the context of Western Europe, regulation, administration, financing and execution were all responsibilities of the state, but health care service delivery was, for example, for a long period outsourced to the informal social security system. It should be determined to what legs of “outsourcing” informal social security lends itself, and for what particular risks. This might also lessen the burden on the state.
- Informal social security is presently not recognised within the formal regulatory system, but ideas akin thereto (e.g. non-profit organisations, friendly societies, and social investment) are to a certain extent accommodated within legislation. An analysis of how similar fields of law have been regulated can provide examples of how the legislature can treat the regulation of informal social security in future. For example, the Friendly Societies Act contains very strict guidelines in order to protect the public. These strict guidelines would prove too costly and the required level of book-

keeping too difficult for the people currently involved in informal social security schemes. The wording and underlying tone of the Act are also not very user-friendly. Furthermore, the registration requirements set out in the Act are very extensive, while the benefits of registration seem to be very few. The Friendly Societies Act is not likely to assist with future incorporation of informal social security. In fact, provisions as contained in the Friendly Societies Act may scare many informal social security schemes away from compliance. On the other hand, the Nonprofit Organisations Act was written to extend a helping hand to the non-profit sector to assist it to comply with the provisions of the Act. The Act provides for simplified procedures as far as registration, book-keeping and general administration are concerned. It can therefore serve as a good example of legislation that could encourage compliance by informal social security schemes.

- Other legislative tools exist which can indirectly benefit informal social security schemes, since they constitute a source by means of which money can be channelled to the social security sector, for example the Lotteries Act, the National Small Business Act and the Black Economic Empowerment Act. If the state can tap into additional financial resources, this could assist it to comply with its social responsibilities and money could be pumped into the socio-economic development of the country.
- An example of an innovative scheme to extend social security protection through informal social security measures is that of the mutual health insurance scheme. Mutual health insurance is a very particular form of informal social security which to some extent reflects the possibility of linkages between informal and formal social security. Health care underlies all other forms of social protection. Although it is still too early to determine the success of these schemes, existing studies have so far shown that these schemes have the potential to help otherwise excluded people in gaining access to health care. However, these schemes are not perfect. One of their biggest advantages is the fact that they help people to gain access to health

care. Their biggest shortcoming is the fact that they tend to attract people with pre-existing health problems owing to adverse selection and a small risk pool. It is important to establish under what conditions community health insurance schemes can be sustainable and/or replicated or expanded. Mutual health organisations are one way of “informally” extending social protection, thereby moving closer to the recognition of informal social security.

In the following discussion of the model, these proposals, coupled with the main suggestions in paragraph 3, are used as the basis to structure the model for policy recommendations.

In all five stages of the model, regulation will be required to achieve the goals that are set. In Step 1, regulation to guide policy will have to be wide and overarching. In Step 2, the social assistance system will have to be actively regulated. In Step 3, regulation will be required to expand the scope of existing social insurance schemes. In Step 4, regulation can be supportive and encouraging. It should also be focused to ensure compliance, for example registration, compliance with minimum requirements, etcetera. In Step 5, regulation will be necessary to devise, implement and regulate the proposed new schemes. Only after finalisation of the appropriate policy can proper regulation be devised to drive the process forward. Since the focus of this thesis is on policy recommendations, it will suffice at this stage to acknowledge that regulation will form an important part of the process. The exact structure and content of such regulation must still be devised and be in line with the policy adopted by government.

## **5 RECOMMENDED MODEL FOR FUTURE DIRECTION OF FORMAL AND INFORMAL SOCIAL SECURITY**

The discussion above highlighted some of the general issues which arise in attempting to bring formal and informal social security together. Although these broad parameters are useful, they do not really answer the question as to how formal and informal social security systems should be linked.

The model contains references to reform of the formal social security system, but differs from other recommendations for reform, for example those of the Taylor Committee, because it attempts to include informal social security.

The literature contains examples of recommendations for extending the formal system, as well as innovative systems and general ways in which to strengthen informal social security. These recommendations have, however, never been combined in one model which could help to improve informal social security within the parameters of the overall social security paradigm. This is what makes the proposed model unique. This model combines recommendations, and formal and informal social security, in order to create comprehensive social protection. In the process, the scope of protection provided by both the formal and informal social security networks is strengthened and increased. New ways of increasing the overall strength of the comprehensive social safety net are also suggested.

It must be reiterated that these proposals should form part of an overall policy. It is suggested that they form part of an overall poverty alleviation policy, which is broader than an overall social protection policy.<sup>1328</sup> The policy, and commitments by government and all role players, will determine the success of the recommendations. It is admitted that these proposals are not without problems and controversy. In fact, an analysis and comments on the proposed model could easily form part of a separate doctoral thesis. It should, however, be kept in mind that South Africa is a unique country. Whereas very few people believed that a peaceful transition from Apartheid to democracy would be possible, it was in fact successfully achieved. In the same vein, reform of social security and the alleviation of poverty may seem a daunting task in South Africa and might entail hard work, but the realisation of these goals is not impossible.

South Africa has, in the recent past, been an example for the rest of the world in the peaceful and efficient transformation of its political dispensation into a new, true democracy. It would be quite an achievement if we can, again, set an example for transformation of a social security system in order to, not only try to fulfil existing needs,

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<sup>1328</sup> See discussion of Step 1 below, par 5.1, ch 8.



but also to empower people and to improve living conditions across the board for all South Africans.<sup>1329</sup>

The negative aspects of the model are therefore not discussed below. In general, the problems relating to informal social security, to the informal sector and to attempts to provide better social security to excluded groups also apply to this model. It should be reiterated that South Africa is a developing country with limited economic resources. In defence of the model, the proposals concerned aim to overcome these hurdles by building on the strengths of the present formal social security system and by introducing informal social security into the “official” safety net. The model attempts to secure a diverse resource base for social protection and to involve more role players than merely the state.

The model, despite its shortcomings, should therefore be seen as a first attempt to put something on the table as to how informal social security can be incorporated into the official safety net in South Africa.

The following model therefore contains the recommendations regarding the suggested way forward for formal and informal social security. The underlying assumption of this model is that informal social security is recognised as an important component of social protection.<sup>1330</sup>

The model contains five steps which should be followed. These steps can be seen as five stages in the road-planning process (to again borrow from the analogy at the beginning of the chapter) towards social protection.

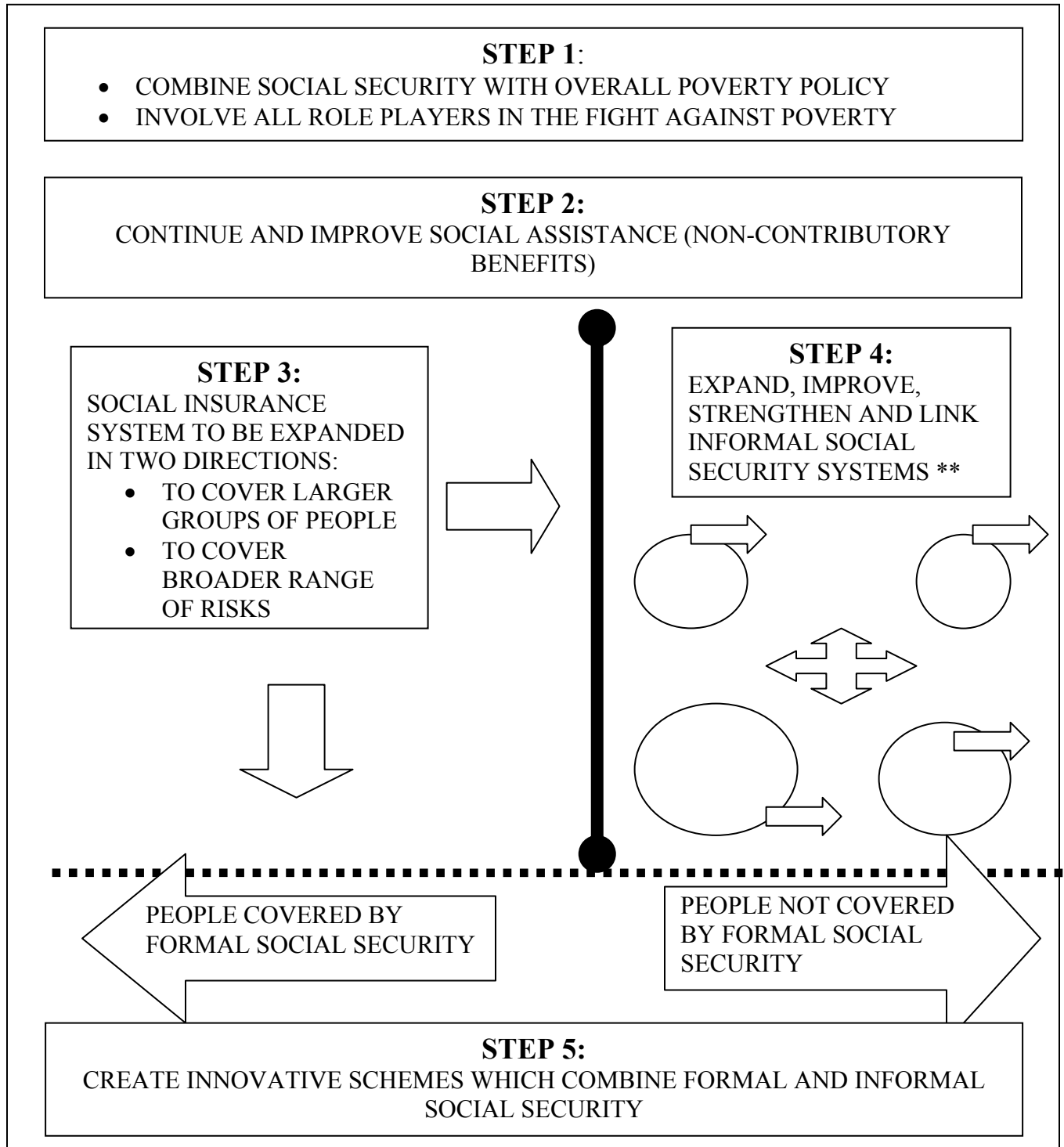
The model is contained in Figure 2 below and a detailed discussion of the model then follows.

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<sup>1329</sup> From the keynote address of the Minister of Social Development, Mr Zola Skweyiya, at a seminar on Transformation of the Social Security System in South Africa (Jhb 2001).

<sup>1330</sup> See ch 2 in general.

**Figure 2: Model for Cooperation between Formal and Informal Social Security**



*\*\*The strengthening of indirect social security can also be added here as an additional step. This model however focuses on the interaction of formal and informal social security and will therefore not elaborate on this aspect.*

## 5.1 STEP 1: Combine social security with overall poverty policy and involve all role players in the fight against poverty

As a first step, a holistic approach to social security is necessary.<sup>1331</sup> This has been advocated by many writers on this topic.<sup>1332</sup> This is also one of the recommendations of the thesis.<sup>1333</sup> It is therefore recommended that social security be combined within an overall poverty alleviation policy. Even though social security and poverty remain two separate issues, it is submitted that they cannot be completely separated.<sup>1334</sup> Since social security is but one tool in the fight against poverty, the holistic approach should not simply relate to social security, but should also relate to poverty alleviation in general.<sup>1335</sup> One of the biggest challenges for the present government is poverty alleviation, and social security is one of the most important tools for addressing this issue.

The demographic trends and impacts of poverty, HIV/AIDS and other chronic illnesses as well as unemployment in the formal sector reinforce the need for a comprehensive approach to social security. Furthermore, existing levels of poverty have reached unsustainable levels, and left unattended have the potential to reverse democratic gains achieved since 1994. The urgent need to address deepening social exclusion and alienation of those households living in destitution cannot be ignored. A redesigned social security system has to respond to the constitutional, democratic and human development imperatives that provide the framework for transformation.<sup>1336</sup>

Poverty should be addressed through a combination of measures, of which social security should form an important component.<sup>1337</sup> If this holistic approach is followed, the

<sup>1331</sup> Par 1, ch 8.

<sup>1332</sup> Par 3.2, ch 8.

<sup>1333</sup> Par 4, ch 8.

<sup>1334</sup> Par 2, ch 8. *“Social security affects different areas of life and should form part of a comprehensive poverty adoption strategy.”* Van der Waal & Malan op cit note 26 at 14.

<sup>1335</sup> This is also in line with the approach adopted by the Taylor Committee. See Taylor Report op cit note 39 at 71. *“The Committee therefore agrees with Government that policies to address poverty and social exclusion should not be limited to the creation of a conventional social safety net. For, even after a net to stop people from falling into destitution has been constructed, the negative effects of unemployment on social cohesion will continue to be felt. Instead, the notion of social protection has to be more comprehensive and must provide an effective framework to design a system appropriate to South African needs.”*

<sup>1336</sup> *Idem* at 32-33.

<sup>1337</sup> Part of poverty alleviation is prevention and reintegration. See fn 1236, ch 8.

dualism between formal and informal social security should disappear.<sup>1338</sup> It would also to a certain extent address the problems relating to the fragmented administrative structure of the present formal social security system.<sup>1339</sup>

It is recommended that, instead of maintaining a narrow focus on reform of the present social security dispensation, the focus should be broader and should fall on ways in which to better address poverty in the country. A national poverty alleviation strategy should be developed. The RDP to a certain extent aimed to do this, but was not very successful.<sup>1340</sup>

If social security is treated as part of a holistic poverty alleviation policy approach, this will also have the advantage that more resources will become available in the fight against poverty, which, in turn, will relieve the burden on the existing social security system. As illustrated earlier, money made available through Black Economic Empowerment can have a significant impact on indirect social security, thereby also increasing the standard of living of the indigent. In addition, by means of the National Lottery money is channelled to welfare organisations and NGOs, and this will also assist the poor in achieving an increased standard of living.<sup>1341</sup>

It is therefore recommended that social security should also form part of the agenda for a national poverty alleviation strategy. At present in South Africa, there is no specific government department or body tasked with addressing poverty.<sup>1342</sup> In the case of poverty alleviation, a two-track approach is often found, that is, economic growth and human development are on two divergent tracks which rarely interact. These two policies

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<sup>1338</sup> Par 4, ch 4 & par 4, ch 8.

<sup>1339</sup> The RDP plan stated: *"No political democracy can survive and flourish if the mass of our people remains in poverty, without land, without tangible prospects for a better life. Attacking poverty and deprivation must therefore be the first priority of our democratic Government."* Taylor Report op cit note 39 at 35.

<sup>1340</sup> Par 3.5.1, ch 2.

<sup>1341</sup> Pars 3.2.1 & 3.2.2, ch 6.

<sup>1342</sup> It forms part of the activities of the Departments of Finance, Water Affairs and Forestry, Education, Social Development, Housing, Minerals and Energy, Transport, Labour, Health, Land Affairs and Agriculture. Mpedi op cit note 456 in Olivier et al *Introduction to Social Security* op cit note 130 at 111-114.

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often contradict each other, since economic growth is not designed for the poor, while social services are designed to address the needs of the poor.<sup>1343</sup>

One alternative could be to create a Ministry for Poverty. This is however only recommended as a second option. It is recommended that an overarching body for poverty alleviation should rather be created. This body should be tasked with monitoring, investigating and addressing poverty in all its dimensions in the country. All role players in the poverty arena should be represented on the body, for example government,<sup>1344</sup> labour, the Social Security Agency, the informal sector, NGOs and economists. This body should furthermore not take a narrow view of poverty by merely focusing on present formal social security measures to deal with poverty alleviation, but should also consider ancillary matters such as informal social security, indirect social security, economic policy and the impact of business<sup>1345</sup> and other private role players<sup>1346</sup> in the field of poverty alleviation.

This body will, owing to the holistic approach to poverty and poverty alleviation, be better able to recommend prioritisation of human and financial resources for the fight against poverty.

Initially, the body can convene twice a year and act as a committee issuing a report on poverty. The committee should be developed into a full-time, independent monitoring body with powers to make and enforce policy recommendations. The state will have to be the driving force behind reforms and policy coordination. In order, therefore, to ensure the success of this body, it should enjoy the full support of the state.<sup>1347</sup>

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<sup>1343</sup> Dekker op cit note 130 in Olivier et al *Introduction to Social Security* op cit note 130 at 217.

<sup>1344</sup> Representatives from different departments should be represented, for example the Ministries of Labour (UIF & COIDA), Social Development (social security in general, social grants), Minerals and Energy (mine health and safety), Trade and Industry (lottery), Finance (general economic policy), Education (free education and school nutrition programmes) and Water and Health.

<sup>1345</sup> For example through Black Economic Empowerment.

<sup>1346</sup> For example loans and donations by international organisations, or money channelled for poverty alleviation through the National Lottery.

<sup>1347</sup> Par 3.2, ch 8.

## 5.2 STEP 2: Continue and improve social assistance (non-contributory benefits)

The present importance of the social assistance system is widely recognised.<sup>1348</sup> It is recommended that the benefits currently available in terms of social assistance should not be reduced, but should be increased where possible. In the past few years, increases in grants have been above the inflation rate, and this precedent should be continued.<sup>1349</sup>

The present scope of the social assistance system should however be increased as proposed by the Taylor Committee. Since the aim of this thesis is not to discuss the shortcomings and possible reforms of the present formal social security system in detail, it will suffice to state that the Taylor Committee recommended that a more comprehensive social assistance system, which can play an important role in achieving medium- to long-term economic transformation in the country, must be developed. The Committee also found that a Basic Income Grant (BIG) will be able to eliminate destitution and will have a developmental impact on the poorest, although its implementation will be constrained in the short term owing to fiscal and administrative obstacles. In addition to the present grants available, and as a long-term intervention, the Committee recommended the creation of a new grant to adults living in destitution and poverty.<sup>1350</sup>

It is also important to realise that, as long as the social assistance system does not function properly, it will (unnecessarily) increase the pressure on the informal social

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<sup>1348</sup> Taylor Report op cit note 39 at 58. “*The important redistributive impact of this (social assistance) programme has been recognised by Government, labour and academia.*” Midgely *Social Security, Inequality and the Third World* op cit note 493 at 132.

<sup>1349</sup> In the 2005 budget speech, an additional R22 billion was allocated for spending on social grants over the next three years as part of a continuing trend of increased state spending on social services. The additional allocation will see child-support benefits extended to 11 million people. In April 2005, the child-support grant will be increased to R180 and will cover children up to the age of 14 years. Pension grants and disability grants will each increase by R40, taking them to R780 a month each. The Minister of Finance indicated that the increased social spending stemmed from government’s commitment to increase spending on the poorest 40 percent of the population. According to the Minister, social security programmes accounted for 14 percent of consolidated, non-interest expenditure, compared with 9,5 percent five years ago. Dlamini J “Extra R22bn for Social Grants as Manuel Casts Net Wider” *Business Day* (Feb 24, 2005).

<sup>1350</sup> Taylor Report op cit note 39 at 65-66.

security system. This was illustrated by the *Mashava* judgment<sup>1351</sup> and also by the *Khosa* judgment.<sup>1352</sup> For purpose of the model, it is therefore proposed that the current social assistance system should also continue to improve its service delivery and administrative capacities. This will directly impact on the informal social security system by relieving the unnecessary burden on the system as a result of those eligible for social assistance being denied benefits and consequently having to rely on the informal social security system for support.

### **5.3 STEP 3: Social insurance system to be expanded in two directions, namely to cover larger groups of people and to cover a broader range of risks**

#### ***5.3.1 To cover larger groups of people***

According to the traditional Western European model of social security, the number of people relying on informal social security will decrease as more people are absorbed into formal employment.<sup>1353</sup> As illustrated earlier, the present social security system, which is based on the Western European model, is not always appropriate for a developing country such as South Africa.<sup>1354</sup>

The present system can, however, to a limited extent expand its current protective scope to include more people in the definition of “employee” in terms of the formal system. This was recently successfully done by also including domestic workers and high-income earners as “contributors” (“employees”) for purposes of the Unemployment Insurance Act.<sup>1355</sup>

This is also in line with the recommendations of the Taylor Committee.

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<sup>1351</sup> See par 3.3.4.1, ch 3.

<sup>1352</sup> See par 3.3.1.1, ch 3.

<sup>1353</sup> Par 5.3.2, ch 4 & par 4, ch 5.

<sup>1354</sup> Par 3.2, ch 3 & par 5, ch 4.

<sup>1355</sup> Par 3.1.1, ch 3.

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Further the Committee proposes that the principle of social insurance, based on entitlements through contributory schemes, should where feasible, be extended to include as many of the employed as possible. There are likely to be certain groups of workers who will remain excluded from social insurance schemes such as the UIF, because of their location in the workforce. For these workers other arrangements for providing social security are proposed.<sup>1356</sup>

Other possible extensions which can still be effected to the present social insurance system to make it more representative are the following:

### 5.3.1.1 Unemployment insurance

- For purposes of the Unemployment Insurance Act, the Taylor Committee recommended that access to maternity-type benefits for those in casual, seasonal or insecure employment should be investigated.<sup>1357</sup>
- Government employees should be allowed to become contributors to the UIF.<sup>1358</sup>

### 5.3.1.2 Retirement provisioning

- All people in the formal sector (including all casual and part-time employees) must be required to contribute a minimum percentage of their income for retirement savings according to the Taylor Committee.<sup>1359</sup>

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<sup>1356</sup> Taylor Report op cit note 39 at 71.

<sup>1357</sup> Idem at 72.

<sup>1358</sup> Ibid. Olivier & Van Kerken op cit note 239 in Olivier et al *Social Security: A Legal Analysis* op cit note 6 at 439-442 argue that the continued exclusion of public servants from the UIF creates a specific category of vulnerability. From an international perspective, the various ILO Conventions and Recommendations are clearly aimed at inclusion of public servants in unemployment insurance schemes. For example Convention 168 of 1998 concerning Employment Promotion and Protection against Unemployment provides that such a scheme should cover not less than 85 percent of all employees, including public servants.

<sup>1359</sup> Taylor Report op cit note 39 at 94.



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- The Committee further recommended that survivor's and disability cover be mandated as one of the benefits provided by retirement funds.<sup>1360</sup>

### 5.3.1.3 Occupational injuries and diseases

The Taylor Committee recommended that domestic workers, the self-employed and independent contractors should be included under the protective scope of the Act, as their exclusion presently violates the right to equal protection and benefit of the law guaranteed in terms of s 9 of the Constitution.<sup>1361</sup> The preference accorded to civil law wives at the expense of indigenous law wives, wives according to custom and a cohabitant should end, as this is also subject to challenge in terms of the Constitution.<sup>1362</sup> The possibility of voluntary registration in terms of COIDA should also be considered if compulsory coverage is not feasible.<sup>1363</sup>

It should be noted that the formal social security system will never be able to absorb all informal sector workers into its protective scope, as in the case of the Western European model. This is illustrated by the thick, black vertical line in figure 2 above. The line can only be moved to the right to include a few more groups of "employees". The rest will remain excluded from formal social security protection and will have to rely on informal social security support, unless specific schemes are devised to provide social security coverage for them.<sup>1364</sup>

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<sup>1360</sup> *Idem* at 95.

<sup>1361</sup> *Idem* at 114.

<sup>1362</sup> *Ibid.*

<sup>1363</sup> *Ibid.*

<sup>1364</sup> Par 5.3.2, ch 4 & par 3.10, ch 8.

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### 5.3.2 *To cover a broader range of risks*

The present risk-based approach of the formal social security system has been copied from the traditional Western European model of social security. This traditional approach is however not entirely appropriate for a developing country such as South Africa.<sup>1365</sup>

Some of the recommendations of the Taylor Committee mentioned in paragraph 5.3.1 above already address the expansion of the risks presently covered by the formal social security system. The main overhaul in this regard will however not necessarily relate to the extension of risks, but to a move away from a risk-based approach towards a model of comprehensive social protection as suggested by the Taylor Committee. Instead of adding new risks, which would be more appropriate to the needs of those currently excluded from formal social protection, it is recommended that the route already indicated by the Taylor Committee should be followed. The focus of social security should move away from a risk-based approach towards a model of comprehensive social protection which aims to provide everyone with an adequate standard of living.<sup>1366</sup> Formal adoption and recognition of the definition of comprehensive social protection suggested by the Taylor Committee will already go a long way towards achieving this. An adequate standard of living envisaged by comprehensive social protection will ensure compliance with the main constitutional values of human dignity and the achievement of equality.<sup>1367</sup> It will also ensure that reasonable measures are taken by the state to comply with its constitutional obligations.<sup>1368</sup>

This is also in line with the view of international authors on the subject that a broad conceptualisation of social security is necessary in developing countries in order to increase the protective scope of the formal social security system.<sup>1369</sup>

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<sup>1365</sup> Par 3.3.2, ch 3.

<sup>1366</sup> Par 4.3, ch 4 & par 4.4, ch 6.

<sup>1367</sup> Par 4.3.5, ch 4 & par 4, ch 8.

<sup>1368</sup> Par 4.2.5, ch 3 & par 4, ch 8.

<sup>1369</sup> Par 4, ch 4.

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Adoption of a broader concept of social security will not necessarily provide immediate and greater protection to people in need, but it will lay the foundation for the extension of policy and for a more holistic approach to address social exclusion. The broader conceptualisation of social security should also be accompanied by active steps to support this approach.<sup>1370</sup>

#### **5.4 STEP 4: Expand, improve, strengthen and link informal social security systems**

The main underlying suggestion which all writers on the subject of informal social security agree on is that greater recognition of informal social security should go hand in hand with support for these schemes in order to improve their functioning and ensure their continued existence.<sup>1371</sup> Suggestions in this regard encompass a wide number of interventions, some of which have already been referred to in paragraph 3 above.

The first and less intrusive form of support is that of public awareness programmes to raise awareness of the role played by informal social security measures. This could help to get more people to voluntarily join informal social security schemes, thereby increasing their risk pool and ensuring their continued existence.<sup>1372</sup>

Another less intrusive measure to support informal social security schemes is that of training and skills development.<sup>1373</sup> Government should become involved in this process to facilitate and finance workshops in various areas around the country by providing training for people involved in informal social security schemes. Training could focus on basic book-keeping, financial accountability, management skills, just administrative practices, etcetera.<sup>1374</sup> Basic, model documents which could help informal social security schemes to strengthen their administrative capacity could be made accessible on the

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<sup>1370</sup> See par 3.1 & 3.2 ch 8.

<sup>1371</sup> Pars 3.1, 3.8, 3.13, & 4, ch 8.

<sup>1372</sup> Pars 3.6 & 3.8, ch 8.

<sup>1373</sup> Par 3.6, ch 8.

<sup>1374</sup> Par 3.6, ch 8.

Internet or the website of, for example, the Department of Trade and Industry.<sup>1375</sup> Another option would be to offer a free helpline for dealing with enquiries in this regard. The example of the Nonprofit Organisations Act could be helpful in this regard.<sup>1376</sup> In the Nonprofit Organisations Act, the government's role is set out as one of support and encouragement as far as NPOs are concerned. The preamble of the Act states that the Act seeks to provide for an environment in which non-profit organisations can flourish and to establish an administrative and regulatory framework within which non-profit organisations can conduct their affairs. The Act provides for simplified procedures as far as registration, book-keeping and general administration are concerned in order to make compliance much simpler.<sup>1377</sup>

Another less intrusive step is that where informal and loosely organised societies are assisted to consolidate their activities in order to provide a more effective service.<sup>1378</sup> Through partnerships, informal social security schemes can acquire greater negotiation power, can share knowledge and can ensure greater financial stability.<sup>1379</sup> This process could be initiated by providing a forum in which schemes are able to discuss relevant matters and establish possible common ground and areas for linking up. The example of SEWA in India is proof that this can be done.<sup>1380</sup>

Ancillary measures to support informal social security schemes could be to provide better access to financial institutions and support.<sup>1381</sup> In this regard, non-governmental role players (such as the banking sector) can play an important supportive role. Better access to financial institutions can go hand in hand with training regarding better financial practices, investment strategies and basic book-keeping.<sup>1382</sup>

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<sup>1375</sup> Par 3.1.3, ch 6.

<sup>1376</sup> Par 3.1.3, ch 6. Also see par 4, ch 8.

<sup>1377</sup> Par 3.1.3, ch 6 & par 4, ch 8. Also see the way in which the Skills Development Act, 97 of 1998 is accommodating this; par 3.2.4, ch 6.

<sup>1378</sup> Par 3.9, ch 8.

<sup>1379</sup> Par 3.9, ch 8.

<sup>1380</sup> Par 5.3, ch 4.

<sup>1381</sup> Par 3.9, ch 8.

<sup>1382</sup> Par 3.6, ch 8.

A more compelling step could be to promote registration of informal social security schemes.<sup>1383</sup> As with the Nonprofit Organisations Act, registration procedures should be simplified. Registration will enable the government to better monitor the extent and activities of informal social security schemes. Registered schemes could gradually be encouraged to improve their accountability and administrative and financial practices. This basic network could also gradually be encouraged to expand the present risks which it covers, or to expand its membership base to cover more people who do not belong to modern social insurance schemes.<sup>1384</sup> For example, if a registered, informal social security scheme complies with certain minimum requirements, it could qualify for a government subsidy, provided that it covers a compulsory risk such as health care. This is similar to the way in which some informal social security schemes in Western Europe evolved into formal systems.<sup>1385</sup>

Finally, research into this important area of social security should be encouraged. This will stimulate the debate (and give rise to more suggestions) as to how to bridge the divide between informal and formal social security and present more innovative ideas on how to extend the social security safety net.<sup>1386</sup>

## **5.5 STEP 5: Create innovative schemes which combine formal and informal social security**

It is recommended that steps 1 to 4 be embarked upon immediately. The true challenge and innovative thinking will come when plans are devised to provide social protection for those who will, despite these efforts, still be excluded from social protection.

It is recommended that, in the development of new schemes, the focus should be on small-scale feasibility studies and gradual implementation.<sup>1387</sup> The work of the ILO in

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<sup>1383</sup> Pars 3.2 & 3.3, ch 8.

<sup>1384</sup> Par 3.9, ch 8.

<sup>1385</sup> Par 4, ch 5. Also see par 4, ch 8.

<sup>1386</sup> Par 3.7, ch 8.

<sup>1387</sup> Par 3.11, ch 8.

other developing countries could provide useful guidelines in this regard.<sup>1388</sup> Government could initiate pilot projects to ascertain the possibility of creating special social security schemes for people currently excluded from social security.<sup>1389</sup>

In the design of new schemes, two principles should however be kept in mind, namely:

- The type of risk to be addressed. Only certain risks are appropriate for protection by small-scale schemes. For example, protection against old age is a covariate risk and a small-scale scheme will be able to provide long-term protection.<sup>1390</sup> In Western Europe during the transformation from informal to formal, health care schemes were very popular in voluntary circles. This also seems to be the approach of international organisations such as the World Bank, the ILO and the World Health Organisation.<sup>1391</sup>
- The level of intervention by the government and the informal social security system respectively. The state can be involved in its capacity as financier, administrator or delivery agent.<sup>1392</sup>

If the strategy of the ILO is examined, it seems that the first risk which is normally addressed through small-scale informal social security schemes relates to protection against the high costs of health care.<sup>1393</sup> Mutual health insurance schemes are seen as a way in which to use informal social security schemes to address this risk.

Pilot projects that vary widely have been launched throughout Africa and in other developing countries. The focus in this model will however remain on mutual health insurance schemes. Health as a social security risk is not discussed in detail but is merely

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<sup>1388</sup> See ch 7 in general.

<sup>1389</sup> Par 3.2, ch 7.

<sup>1390</sup> Par 3.4, ch 8.

<sup>1391</sup> Par 4, ch 8.

<sup>1392</sup> Van Ginneken “Extending Social Security: Policies for Developing Countries” op cit note 846 at 281. Also see pars 3.2, 3.4 & 4, ch 8.

<sup>1393</sup> Par 2, ch 7.

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used as an example where an innovative construction can be applied. Mutual health insurance schemes seem to be a very innovative construction to strengthen informal social security and, at the same time, link it with the formal social security system. While mutual health insurance schemes seem to be the most suitable example of an innovative idea to link formal and informal social security, it is admitted that other suitable examples for other risks should also be explored. The success of mutual health insurance schemes in South Africa can be explored on a small scale. Four possible models have been discussed in chapter 7.<sup>1394</sup> All four models will be feasible in the context of South Africa. The aim of mutual health insurance schemes is not to provide comprehensive protection against the costs of health care, but to provide at least some basic level of protection in this regard.

New groups need not be established. Existing, informal social security schemes can be grouped into mutual health insurance schemes or be given incentives to extend protection to the area of health care as well. Trade unions could also be involved in this process.<sup>1395</sup> At a later stage of development, local mutual health insurance schemes could be grouped into a larger organisation.<sup>1396</sup> As a next step, these schemes could be allowed to evolve into network schemes.<sup>1397</sup>

Whereas the Taylor Committee relied solely on the extension of social protection via the formal social security system, the present recommendations provide a solution to improve protection against the high costs of health care in the interim by also relying on informal social security. Extension of formal social security to cover everyone in the country will take some time. In Korea, it took 12 years in very favourable economic conditions.<sup>1398</sup> Informal social security can provide people without protection with an important interim lifeline as regards the high costs of health care. Mutual health insurance is a form of

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<sup>1394</sup> Par 3.2, ch 8.

<sup>1395</sup> Par 3.4, ch 8.

<sup>1396</sup> Par 3.9, ch 8.

<sup>1397</sup> Par 3.2.4.1, ch 7, & par 3.9, ch 8.

<sup>1398</sup> Par 3.11, ch 8.

informal social security which can provide a loosely woven social safety net. As the success of these schemes increases, the net can be tightened and be cast wider.

## **6 CONCLUSION**

South Africa embarked on a very challenging and exciting road in 1993. One of the areas affected by the new road taken since then is social security. With the dawn of democracy, the social security system was (and still is) in dire need of change. The past history of the country led to a system of co-existence between formal and informal social security. The latter was however largely ignored by policy and regulation. With the introduction of the new Constitution in 1995, the right of access to social security was entrenched as a fundamental right. Many changes have been affected to the present social security system, but were mostly ad hoc and lacked a comprehensive approach. The first comprehensive approach designed to change the formal social security system was outlined by the Taylor Committee in 2002. Although informal social security has, since then, increasingly been recognised as part of the social security landscape in all the proposals for reform, the role and importance of informal social security have largely been ignored.

This thesis has therefore attempted to change this. First, it attempted to indicate that informal social security is part and parcel of social security and developed as a result of the historical development of the formal social security system. In Western Europe, formal social security also originated from informal social security, which became increasingly formalised. The main underlying assumption of Western European schemes is that protection should be provided for workers in formal employment. As more workers were absorbed into formal employment, the more social security increased. South Africa adopted this model through the influence of colonialism. In South Africa, however, the formal sector only accommodated a portion of the workforce and the model became inappropriate for application in the country.



This thesis also attempted to illustrate that informal social security exhibits the core characteristics of formal social security schemes, in line with the Western European model of social security. However, informal social security has been denied a rightful place in the South African social security landscape. It also illustrated that determining what precisely “a rightful place” entails is problematic. The Constitution and Constitutional Court judgments have indicated that government will not be able to avoid its socio-economic responsibilities. Government will have to take reasonable legislative and other measures within available resources to progressively realise the right of access to social security for everyone.

In order to accommodate informal social security within the South African social security system, innovative thinking will be necessary. The importance of informal social security will have to be recognised. Informal social security should not be absorbed into formal social security, but should remain a separate safety net, but one that enjoys support from the formal social security system. The thesis also recommended a model as to how the divide between formal and informal social security can be bridged. This model will, it is hoped, serve as a baseline for stimulating debate and generating new innovative ideas as to how to improve the present social security system in South Africa.

The main idea is therefore not to formalise informal social security schemes, but to innovatively use them to extend social protection to those currently outside the protective net of the formal system.

The world does not lack the resources to eradicate poverty; it lacks the right priorities.<sup>1399</sup>

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<sup>1399</sup> Juan Somavia, Director-General ILO as quoted in Cichon et al op cit note 1077 at 59.



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**TABLE OF STATUTES**
STATUTES

Aged Persons Act, 81 of 1967 .....	71
Bantu Authorities Act, 68 of 1951.....	35
Bantu Building Works Act, 27 of 1951 .....	35
Bantu Education Act, 47 of 1953 .....	35
Bantu Homelands Citizens Act, 26 of 1970 .....	36
Bantu Labour (Settlement of Disputes) Act, 48 of 1953 .....	35
Basic Conditions of Employment Act (BCEA), 75 of 1997.....	73, 136
Black Labour Regulations Act, 15 of 1911 .....	23
Blind Persons Act, 48 of 1944.....	34
Broad-Based Black Economic Empowerment Act, 53 of 2003.....	197, 217, 218
Child Care Act, 74 of 1983.....	65, 71
Children’s Protection Act, 25 of 1913.....	31, 32, 34
Close Corporations Act, 69 of 1984.....	211
Coloured Persons Communal Reserves Act, 3 of 1961 .....	35
Compensation for Occupational Injuries and Diseases Act, 130 of 1993.....	60, 71, 74, 81, 136, 316, 320
Defence Act, 44 of 1957.....	61
Disability Grants Act, 36 of 1946.....	34
Diseases in Mines and Works Act (ODMWA), 78 of 1973 .....	73
Employment Equity Act, 55 of 1998.....	73
Extension of University Education Act, 45 of 1959.....	35
Factories Act, 28 of 1918 .....	31
Fund-Raising Act, 107 of 1978 .....	65, 71
General Pensions Act, 29 of 1979 .....	71
Group Areas Act, 41 of 1950.....	35
Group Areas Development Act, 69 of 1956 .....	35
Health and Safety in Mines Act, 29 of 1996 .....	71
Labour Relations Act, 66 of 1995 .....	72, 129, 136, 204, 224
Machinery and Occupational Safety Act, 6 of 1983.....	71
Medical Schemes Act, 131 of 1998.....	60, 203
Military Pensions Act, 84 of 1976.....	71
Mine Health and Safety Act, 29 of 1996 .....	61, 71, 73

Miners' Phthisis Act, 19 of 1912.....	33
Miners' Phthisis Allowances Act, 34 of 1911 .....	32
Mines and Works Act, 12 of 1911.....	31, 32
National Small Business Amendment Act, 26 of 2003 .....	221
Natives (Prohibition of Interdicts) Act, 64 of 1956.....	35
Natives Law Amendment Act, 54 of 1952 .....	35
Natives Resettlement Act, 19 of 1954 .....	35
Nonprofit Organisations Act, 71 of 1997 .....	71
Occupational Health and Safety Act (OHSA), 85 of 1993 .....	61
Pensions Fund Act, 24 of 1956.....	71
Police Act, 7 of 1958 .....	61
Preservation of Coloured Areas Act, 31 of 1961 .....	35
Prevention of Illegal Squatting Act, 52 of 1951 .....	35
Promotion of Bantu Self-Government Act, 46 of 1959.....	35, 36
Reservation of Separate Amenities Act, 49 of 1953.....	35
Retirement Funds Act, 38 of 1996.....	71
Road Accident Fund Act, 56 of 1996 .....	71
Services Board Act, 97 of 1990.....	205
Short-Term Insurance Act, 53 of 1998.....	203
Social Assistance Act, 59 of 1992 and 13 of 2004 .....	45, 63, 64, 65, 68, 75, 76, 77, 78
South Africa Social Security Agency Act, 9 of 2004 .....	39, 64, 78, 220
South African Social Assistance Act, 13 of 2004.....	5, 45
South African Social Security Agency Act, 9 of 2004 .....	5, 45
Unemployment Benefit Act, 25 of 1937.....	34
Unemployment Insurance Act, 53 of 1946 and 63 of 2001 .....	34, 49, 57, 71, 72, 83, 303, 318, 319
Unemployment Insurance Contributions Act, 4 of 2002.....	57, 58
Urban Bantu Councils Act, 79 of 1961 .....	36
War Special Pensions Act, 29 of 1916 .....	34
Welfare Laws Amendment Act, 106 of 1997.....	71, 76
Workmen's Compensation Act, 25 of 1914; 13 of 1917 and 59 of 1934 .....	168
Workmen's Compensation Act, 30 of 1941 .....	168

---

**TABLE OF CASES**
CASES

<i>Democratic Nursing Organisation of South Africa and others v Somerset West Society for the Aged</i> 2001 22 ILJ 919 (LC) .....	56
<i>Ex Parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa</i> 1996 1996 4 SA 744 (CC) .....	52, 96
<i>Jooste v Score Supermarket Trading (Pty) Ltd</i> 1999 2 BCLR 139 (CC) .....	61
<i>Labournet Holdings (Pty) Ltd v McDermott &amp; Another</i> (2003) 24 ILJ 185 (LC) .....	129
<i>Mbanga v MEC for Welfare, Eastern Cape and another</i> 2002 (1) SA 359 SECLD .....	74
<i>McKenzie v SABC</i> 1999 20 ILJ 585 (LAC) .....	56
<i>Minister of Health and others v Treatment Action Campaign and others</i> 2002 10 BCLR 1033 (CC) ...	89, 93, 94, 96, 97, 99, 100, 101
<i>Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape</i> 2001 2 SA 609 (E) .....	75
<i>Niselow v Liberty Life Association of Africa Limited</i> 1998 19 ILJ 752 (SCA) .....	56
<i>Nomala v Permanent Secretary, Department of Welfare</i> 2001 8 BCLR 844 (E) .....	75
<i>Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza</i> 2001 4 SA 1184 (SCA) .....	75
<i>Smit v Workmen's Compensation Commissioner</i> 1979 1 SA 51 (A) .....	72

---

**INDEX**
**A**

Apartheid. 1, 20, 22, 24, 25, 28, 31, 35, 36, 37, 38, 40, 41, 103, 192, 210, 229, 231, 283, 293, 311, 333, 334, 336

**B**

Beveridge ..... 47, 167, 169, 170, 180, 181, 182, 183, 333, 337  
 Bismarck..... 28, 47, 148, 159, 160, 161, 163, 166, 168, 169, 182, 188, 288  
 Britain..3, 22, 47, 147, 153, 154, 155, 156, 157, 158, 165, 166, 167, 168, 169, 171, 172, 173, 180, 182, 183, 186, 187, 193, 329, 330, 331

**C**

Categorical approach.....5, 21, 34, 48, 74, 236  
 Colonialism .....2, 22, 25, 27, 28, 29  
 Comprehensive social protection (CSP). 8, 9, 16, 19, 55, 71, 82, 83, 124, 125, 143, 146, 190, 193, 235, 237, 277, 279, 280, 281, 283, 307, 311, 321  
 Concept of informal social security..... 11, 13, 49, 104, 105, 107, 116, 117, 143, 147, 178, 195, 233, 280  
 Constitution1, 12, 21, 42, 43, 48, 51, 52, 60, 64, 68, 69, 70, 71, 74, 75, 76, 77, 82, 83, 84, 85, 86, 87, 88, 90, 91, 97, 99, 108, 144, 148, 154, 170, 174, 192, 220, 231, 232, 279, 293, 307, 308, 320, 327, 328, 331, 336

**D**

Defining informal social security ..... 117  
 Development of social security in South Africa..... 10, 11, 12, 20, 53, 276

**E**

Exclusionary nature ..... 2, 20, 21, 47, 48, 50, 52, 67, 68, 99, 103, 106, 110, 240, 283, 284, 306

**F**

Formal social security..2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16, 18, 19, 20, 21, 22, 23, 24, 37, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 60, 62, 67, 72, 75, 79, 82, 99, 103, 105, 106, 108, 109, 110, 111, 113, 116, 117, 119, 123, 128, 129, 130, 139, 142, 143, 144, 145, 146, 147, 149, 150, 158, 165, 177, 179, 181, 191, 193, 194, 219, 223, 226, 228, 229, 233, 234, 237, 241, 242, 245, 256, 276, 277, 278, 279, 281, 283, 284, 285, 288, 290, 297, 302, 303, 305, 306, 307, 308, 309, 311, 312, 315, 316, 317, 320, 321, 324, 326, 327, 328  
 Fragmented nature.....53, 80, 220



**G**

- GEAR.....39, 42  
 Germany 23, 109, 114, 147, 148, 150, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 169,  
 170, 171, 172, 176, 177, 178, 179, 180, 183, 186, 193, 288, 291, 330, 331, 332, 333  
 Gold and Diamond Rush .....2, 22, 29, 30, 190

**H**

- Health care.....16, 23, 33, 55, 60, 87, 88, 90, 94, 97, 101, 121, 135, 147, 163, 165, 181, 182, 194, 218, 241,  
 242, 247, 248, 249, 250, 252, 253, 260, 261, 263, 265, 266, 267, 268, 270, 273, 274, 275, 280, 304, 308,  
 309, 324, 325, 326  
 Historical development of social security in Western Europe.....11, 14, 15

**I**

- Industrial Revolution ..... 14, 149, 156, 157, 158, 162, 167, 169, 338  
 Informal sector 3, 9, 19, 40, 41, 54, 61, 72, 106, 119, 120, 127, 129, 133, 134, 136, 137, 138, 139, 144, 192,  
 194, 197, 221, 223, 225, 233, 235, 239, 240, 249, 256, 257, 258, 263, 269, 284, 293, 294, 295, 298, 299,  
 300, 302, 303, 312, 316, 320

**K**

- Kinship-based social security ..... 13, 106, 126, 127, 130, 140, 209, 228, 236

**M**

- Model for policy recommendations.....11, 16, 310  
 Mutual health insurance schemes ..... 16, 240, 242, 250, 262, 263, 272, 273, 275, 304, 325, 326

**N**

- Neighbourhood-based social security..... 13, 106, 126, 127, 130, 133, 134, 136

**O**

- Occupational injuries and diseases .....55, 60, 62

**P**

- Pensions..... 33, 34, 36, 38, 40, 130, 155, 160, 177, 180, 181, 244

**R**

- Reasonable legislative and other measures..... 1, 13, 84, 85, 88, 92, 98, 328  
 Reasonable measure .....89, 321  
 Reconstruction and Development Programme (RDP)..... 39, 40, 41, 42, 214, 216, 226, 315, 337, 338

---

Regulatory framework..	11, 12, 13, 50, 51, 53, 79, 82, 103, 114, 195, 197, 204, 210, 213, 222, 239, 271, 277, 323
Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa ..	5, 6, 38, 39, 44, 45, 55, 59, 71, 78, 83, 91, 100, 108, 109, 114, 115, 118, 120, 122, 123, 124, 125, 130, 131, 143, 219, 223, 225, 226, 227, 229, 233, 234, 235, 237, 238, 240, 247, 278, 279, 280, 281, 282, 285, 287, 300, 304, 305, 311, 314, 315, 317, 318, 319, 320, 321, 326, 327, 335
Right of access to social security..	1, 13, 51, 52, 58, 68, 69, 78, 82, 83, 84, 85, 88, 90, 91, 99, 103, 104, 279, 284, 307, 327, 328
Risk-based approach.....	3, 55, 67, 70, 71, 113, 117, 122, 124, 143, 321
<b>S</b>	
Separation of powers doctrine .....	96
Social assistance ..	1, 4, 6, 13, 14, 17, 21, 32, 34, 35, 37, 38, 39, 44, 46, 47, 48, 51, 54, 55, 56, 59, 60, 62, 63, 64, 66, 68, 70, 74, 75, 78, 79, 82, 84, 100, 111, 117, 118, 124, 130, 133, 148, 163, 166, 183, 189, 191, 220, 234, 245, 246, 292, 293, 310, 317
Social grants .....	5, 24, 36, 38, 55, 56, 59, 63, 64, 65, 66, 70, 74, 75, 81, 83, 95, 130, 135, 215, 236, 245, 280, 317
Social insurance..	3, 4, 6, 13, 14, 15, 17, 23, 32, 33, 35, 37, 39, 44, 46, 47, 48, 51, 54, 55, 56, 62, 72, 82, 105, 109, 111, 117, 118, 124, 130, 133, 146, 148, 149, 159, 160, 161, 162, 163, 164, 166, 168, 169, 170, 171, 172, 176, 177, 180, 181, 182, 183, 184, 186, 188, 189, 204, 205, 234, 249, 256, 258, 261, 263, 280, 292, 301, 302, 303, 304, 310, 319, 324
<b>T</b>	
Terminology .....	107, 111, 114
Trade unions ..	30, 31, 35, 41, 48, 126, 127, 129, 135, 149, 155, 157, 166, 168, 170, 181, 182, 188, 200, 291, 297, 298
Traditional Western European social security model .....	2, 3, 4, 14, 20
<b>U</b>	
Unemployment insurance .....	32, 33, 34, 36, 37, 44, 46, 57, 58, 169, 172, 173, 177, 186, 220, 234, 319
<b>W</b>	
White Paper for Social Welfare.....	40, 43, 44, 50, 59, 83, 115, 117, 123, 226, 227, 229, 231, 232
Within available resources .....	83, 85, 86, 94, 328