

PROPOSED LEGAL REFORMS TO PROTECT SOUTH AFRICA'S INFORMAL SOCIAL SECURITY

by

ROBIN ERIN ZEELIE

Student number: 19000104

Prepared under supervision of Dr Kamalesh Newaj

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Declaration

I declare that the dissertation, which I hereby submit for the degree Master of Laws (Mercantile Law) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.



Robin E Zeelie

[signed electronically]

2 November 2024

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Abstract

Informal social security is a non-governmental form of social security between kin and/or community members and is a prevalent practice in South Africa. The question this dissertation analyses is whether the South African government fails in its constitutional duty to protect and advance informal social security. The dissertation limits itself to analysing cash transfers through social grants, and social insurance in the Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act. This dissertation delineates its definition of informal social security, historically contextualises its practice, and explains the contemporary formal social security framework. This dissertation finds five prominent shortcomings in the formal framework, and that these shortcomings have a profoundly negative, weakening effect on informal social security, as the more people who rely on informal mechanisms, the less it can respond to needs arising from life contingencies, shocks, and risks. The dissertation concludes by analysing three legal reform proposals the state can implement: extending existing social insurance frameworks to those in the informal sector, promoting cooperatives as a formal platform for the informal, and the basic income grant.

Keywords

Informal social security, history, social security, social assistance, social insurance, Constitution of the Republic of South Africa, duty, cooperatives, basic income grant.

Table of contents

Declaration	ii
Acknowledgements	iii
Dedication	iv
Abstract	v
Keywords.....	v
Table of contents.....	vi
List of tables.....	viii
Abbreviations and acronyms	ix
Chapter 1 Introduction.....	1
1.1 Research problem, objectives, and thesis statement	4
1.1.1 Research problem.....	4
1.1.2 Research objectives.....	4
1.1.3 Thesis statement.....	4
1.2 Landscape of existing literature.....	5
1.3 Significance and contribution of the research.....	8
1.4 Methodology and methods.....	8
1.5 Delineations and limitations	10
1.6 Key definitions	10
1.6.1 Social protection and social security	10
1.6.2 Social assistance	12
1.6.3 Social insurance	12
1.6.4 Informal social security.....	12
1.6.5 Unemployment.....	12
1.6.6 Neoliberalism and austerity.....	13
1.7 Outline of chapters.....	13
Chapter 2 Defining informal social security.....	15
2.1 Informality	16
2.1.1 Informality in general.....	16
2.1.2 Informality in the context of informal social security.....	17
2.2 Kin and community social security	19
2.2.1 Kinship-based social security.....	20
2.2.2 Community-based social security.....	21
2.3 Monetary or in-kind support	23
2.3.1 Monetary support.....	24
2.3.2 In-kind support	24
2.4 Mitigation, insurance, and maintenance	26
2.5 Conclusion.....	27

Chapter 3 Historical reliance on informal social security	28
3.1 Kin and community in South Africa before colonisation	28
3.2 Impact of colonisation between 1652 and 1910	30
3.2.1 The Dutch's upheaval of traditional support structures	31
3.2.2 The British, poor relief, and informal social security	33
3.2.3 Labour, migration and family during the mineral revolution.....	34
3.3 The Union between 1910 and 1948	36
3.4 The apartheid state and the National Party's welfare	41
3.4.1 The apartheid state's ideology	41
3.4.2 Apartheid legislation and social security.....	42
3.5 Post-1994 developments in the economic and social sphere	44
3.6 Conclusion	47
Chapter 4 South African legislative framework	49
4.1 Constitution of the Republic of South Africa	50
4.1.1 Introduction to the Constitution and its socio-economic rights	50
4.1.2 Interpretation of socio-economic rights.....	51
4.2 Social assistance	60
4.3 Social insurance	63
4.4 Conclusion	65
Chapter 5 International and regional framework	66
5.1 The role of non-domestic law in South Africa's framework	66
5.2 International framework.....	67
5.2.1 United Nations	68
5.2.2 International Labour Organisation	72
5.3 Regional framework.....	75
5.3.1 African Union	76
5.3.2 Southern African Development Community.....	78
5.4 Conclusion.....	80
Chapter 6 The South African state's duty to protect informal social security	82
6.1 The shortcomings of South Africa's social security	83
6.1.1 The employment bias in social insurance.....	84
6.1.2 Poverty traps through means-testing.....	86
6.1.3 Categorical approach to social assistance: The missing middle	87
6.1.4 Low benefits within social assistance	89
6.1.5 Overall fragmentation of the social security framework	92
6.2 The South African state's duty to protect and advance informal social security	94
6.2.1 Informal social security as a constitutional right	95
6.2.2 Reasonability assessment: General considerations	95
6.2.3 Reasonability assessment: Progressive realisation.....	98
6.2.4 Reasonability assessment: Within available resources	102
6.2.5 Concluding remarks	105
6.3 Conclusion.....	107
Chapter 7 Legal reform proposals to protect and advance informal social security .	109
7.1 Extending formal frameworks.....	111
7.1.1 International and regional perspectives.....	111
7.1.2 Case study: India and its protection of informal workers.....	113
7.1.3 Application of the proposal to South Africa.....	117
7.2 Cooperatives.....	121
7.2.1 Defining Cooperatives via the International Cooperative Alliance.....	121

7.2.2	International and regional perspectives	125
7.2.3	Case study: India and the Self-Employed Women's Association	126
7.1.4	Application of the proposal to South Africa	128
7.3	Basic income grant	131
7.3.1	Defining and delineating the (universal) basic income grant.....	132
7.3.2	International and regional perspectives	134
7.3.3	Case study: India and its pilot programmes.....	136
7.3.4	Application of the proposal to South Africa	138
7.4	Conclusion	141
Chapter 8 Conclusion		142
8.1	Conclusions regarding research objectives	142
8.1.1	Research objective 1	142
8.1.2	Research objective 2	143
8.1.3	Research objective 3	144
8.1.4	Research objective 4	145
8.2	Overall conclusions.....	146
8.3	Summary of contributions	146
8.4	Recommendations for further research	147
Bibliography		148
9.1	Constitution.....	148
9.2	Case law	148
9.3	Instruments, International.....	149
9.4	Instruments, Regional	150
9.5	Foreign legislation.....	151
9.6	Legislation.....	151
9.7	White papers and draft policies	153
9.8	Books.....	153
9.9	Book and report chapters	155
9.10	Journal articles	160
9.11	Reports and working papers.....	167
9.12	Theses and dissertations.....	171
9.13	Internet sources and websites	173

List of tables

Table 1: Summary of kinship and community social security's defining characteristics	19
Table 2: Summary of proposed legal reforms.....	110

Abbreviations and acronyms

1992 SAA	Social Assistance Act of 1992
ACHPR	African Charter on Human and Peoples' Rights
ACHPR on Social Protection	African Charter on Human and Peoples' Rights Protocol on Social Protection and Social Security
ANC	African National Congress
APY	Atal Pension Yojana
AU	African Union
BIG	Basic income grant
BIS Report	2021 Expert Panel on Basic Income Support
CESCR	Committee on Economic, Social and Cultural Rights
COIDA	Compensation for Occupational Injuries and Diseases Act
COVID-19 SRD	COVID-19 Social Relief of Distress
DSBD	Department of Small Business Development
GDP	Gross domestic product
GEAR	Growth, Employment and Redistribution
ICA	International Cooperative Alliance
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IMF	International Monetary Fund
ISS	Informal social security
IYC25	International Year on Co-operatives
MTCT	Mother-to-child transmission
NASVI	National Alliance of Street Vendors of India
NLA	Natives Land Act
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
PMJJBY	Pradhan Mantri Jeevan Jyoti Bima Yojana
PMSBY	Pradhan Mantri Suraksha Bima Yojana
RDP	Reconstruction and Development Plan
SAA	Social Assistance Act 13 of 2004

SADC	Southern African Development Community
SADC CFSR	Charter on Fundamental Social Rights in the Southern African Development Community
SAR	Social Assistance Regulations
SASSA	South African Social Security Agency
SASSA Act	South African Social Security Agency Act 9 of 2004
SDG	Sustainable Development Goals
SEWA	Self-employed Women's Association
SRD	Social Relief of Distress
SVA	Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014
UDHR	Universal Declaration on Human Rights
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UN	United Nations
VOC	Dutch East India Company / <i>Vereenigde Oost-indische Compagnie</i>

Chapter 1

Introduction

My government's commitment to create a people-centred society of liberty binds us to the pursuit of the goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear.¹

– NR Mandela, State of the Nation address, 1994.

Just as we cannot deny the progress South Africans have made over the last 30 years, nor should we diminish the severe challenges that we continue to face. We have endured times of great difficulty, when the strength of our constitutional democracy has been severely tested.²

– MC Ramaphosa, State of the Nation address, 2024.

In 1994, former President Nelson Mandela committed the state to combat the “social pathology” of poverty and the “scourge” of unemployment.³ Thirty years later, South Africa’s official rate of unemployment is 33,5% and is the second highest in the world.⁴ South Africa’s most recent data on poverty derives from the 2014/2015 Living Conditions Survey, which calculated that 35,1 million adults in South Africa were living on R441.00 per month.⁵ South Africa’s inequality remains structurally embedded and persistent, with one of the highest Gini coefficients of wealth.⁶

Historically, socio-economic challenges and rising threats to livelihoods necessitated kin and community members to consolidate and redistribute resources to those in

¹ RN Mandela ‘State of the Nation address’ (1994) (available at: sahistory.org.za/archive/1994-president-mandela-state-nation-address-24-may-1994-after-national-elections) (last accessed 26 October 2024).

² MC Ramaphosa ‘State of the Nation address’ (2024) (available at: <https://www.gov.za/news/speeches/president-cyril-ramaphosa-2024-state-nation-address-08-feb-2024>) (last accessed 26 October 2024).

³ Mandela (n 1).

⁴ The official definition of employment refers to people who were available for work, were actively looking for work, or who were unemployed at the time of the study. Statistical Release P0211 ‘Quarterly Labour Force Survey – Quarter 2: 2024’ *Statistics South Africa* (13 August 2024) at 1, 18; International Labour Organisation ‘Statistics on unemployment and labour underutilization’ (2024) (available at: ilostat.ilo.org/topics/unemployment-and-labour-underutilization/) (last accessed 26 October 2024). The only country with a higher unemployment rate is Eswatini with 37% as of 2021.

⁵ R Maluleke ‘Men, women and children: Findings of the Living Conditions Survey, 2014/15’ *Statistics South Africa* (Pretoria 2018) at 13. After thorough research into more recent data than 2014/2015, most statistics refer to the Living Conditions Survey. The World Bank projects that, according to the Living Conditions Survey, approximately 62,6% of people in South Africa live on \$6,85.00 / R127.17 in 2024. See World Bank Group ‘Sub-Saharan Africa macro poverty outlook: Country-by-country analysis and projections for the developing world’ *World Bank Group* (Washington 2024) at 82-83.

⁶ South Africa’s Gini coefficient of wealth is 76. See World Bank Group ‘The state of social security safety nets: 2018’ *World Bank Group* (Washington 2018) at 9; World Bank Group ‘Inequality in southern Africa: An assessment of the Southern African Customs Union’ *World Bank Group* (Washington 2022) at 43.

need thereof.⁷ These behaviours gradually morphed into coordinated efforts where policies and statutes formalised previously informal organisational characteristics. The formalised forms of redistribution became known as formal social protection and social security.⁸

However, South Africa's racially discriminatory and labour-oriented past warped the application and development of its social security.⁹ In particular, apartheid's separate development policy decentralised and racialised social security, resulting in fragmentation and social exclusion.¹⁰ Principally excluded from formal structures, kin and community social security – or informal social security ('ISS') – served and still serves as an important safety net for persons who fall through gaps in social security.¹¹

In 1994, the constitutional dispensation faced an onslaught of change and inherited apartheid's fragmented and inefficient social security systems.¹² In the face of brutal socio-economic disparities, the Constitution of the Republic of South Africa promoted a deracialised, accessible social security framework.¹³

The Constitution guarantees the progressive realisation of socio-economic rights, including everyone's right to access social security, but limits these rights according to the state's available resources.¹⁴ The state has a central role in giving effect to section

⁷ S Jehoma & A Ornellas 'Social security in South Africa: A historical overview' in S Motala, S Ngandu & T Hart (eds) *Social Security Review 2021 – Evolution of Social Security in South Africa: An Agenda for Action* (Department of Social Development: Pretoria 2021) 9-18 at 10.

⁸ K Tang & J Midgley 'The origins and features of social security' in J Midgley & K Tang (eds) *Social Security, the Economy and Development* (Palgrave Macmillan: Hampshire 2008) 17-50 at 18-19; MP Olivier 'The concept of social security' in MP Olivier; N Smit & ER Kalula (eds) *Social Security: A Legal Analysis* (LexisNexis Butterworths: Durban 2003) 23-47 at 29.

⁹ Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 11; Olivier in Olivier, Smit & Kalula (n 8) 29.

¹⁰ F Lund 'State social benefits in South Africa' (1993) 46(1) *International Social Security Review* 5-25 at 5-6; M Brown & RJ Neku 'A historical review of the South African social welfare system and social work practitioners' views on its current status' (2005) 48(3) *International Social Work* 301–312 at 303.

¹¹ Brown & Neku (n 10) 303; B Seepamore 'Indigenous social security systems: A South African perspective' in N Noyoo & E Boon (eds) *Indigenous social security systems in Southern and West Africa* (African Sun Media: Stellenbosch 2018) at 69-86; MT Mushunje & E Kaseke 'Indigenous social security systems in Zimbabwe: Strengths, challenges and prospects' in Noyoo & Boon (eds) 105-122 at 112, 113 & 119.

¹² AH Dekker *Informal Social Security: A legal analysis* (Doctor of Laws: University of South Africa 2005) at 52-53.

¹³ Constitution of the Republic of South Africa ('Constitution') sec 27.

¹⁴ Constitution (n 13) secs 27(1)(c) & 27(2); A Müller 'Economic, Social and Cultural Rights and the Notion of Progressive Realisation' in M O'Flaherty & D Harris *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts* (Leiden 2013) 67-109 at 69.

27 and positively developing socio-economic conditions yet trust in the South African state dwindles as circumstances in the country continue to worsen.¹⁵

Despite improvements in South Africa's social security, its shortcomings result in substantial parts of the population remaining unassisted and vulnerable.¹⁶ Social insurance legislation prioritises formal employment, meaning informally employed and unemployed people remain unprotected against life contingencies.¹⁷ Social grants remain categorical and means-tested, which leaves most of the population unassisted by the state.¹⁸

The historically significant role of ISS remains integral to alleviating contemporary South Africa's worsening socio-economic conditions. The country's crises of unemployment, poverty, social exclusion, and gaps in social security call upon ISS to take up the torch of protecting the vulnerable in their communities and families. ISS mechanisms promote the attainment of basic needs like food or clothing,¹⁹ as well as medium- and long-term investments such as improving shelters and homes.²⁰ However, South Africa's state has a responsibility to alleviate the worsening socio-economic circumstances, as when combined with its problematic economic policies and neglect to repair shortcomings in the social security system, the state increasingly weakens ISS.²¹

¹⁵ H Dayal & C Van Zyl 'Policy brief: Trust in government' *Department of Planning, Monitoring & Evaluation* (Pretoria 2021) at 2.

¹⁶ See heading 6.1 below for an elaboration on these shortcomings.

¹⁷ N Smit & LG Mpedi 'Social Protection for Developing Countries: Can Social Insurance Be More Relevant for Those Working in the Informal Economy' (2010) 14 *Law, Democracy and Development* 159–187 at 160.

¹⁸ Dekker (n 12) 74; Taylor Committee 'Transforming the Present – Protecting the Future' *Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (Pretoria 2002) at 119.

¹⁹ S Matuku & E Kaseke 'The role of stokvels in improving people's lives: The case in Orange Farm, Johannesburg, South Africa' (2014) 50(3) *Social Work/Maatskaplike Werk* 504-515 at 509; T Matthews 'Traversing the cracks: social protection toward the achievement of social justice, equality and dignity in South Africa' *The Southern Centre for Inequality Studies* (Witwatersrand 2020) at 8. In instances where grant money was insufficient, recipients of grants invested in methods to "multiply or grow grant monies." See L Patel, V Dikoko & D Archer 'Research brief: Social grants, livelihoods and poverty responses of social grant beneficiaries in South Africa' *Centre for Social Development in Africa* (Johannesburg 2023) at 5.

²⁰ Matuku & Kaseke (n 19) 509; Patel, Dikoko & Archer (n 19) 2, 6-7.

²¹ Taylor Committee (n 18) 74; AH Dekker & MP Olivier 'Informal social security' in MP Olivier, N Smit & ER Kalula (eds) *Social security: A legal analysis* (LexisNexis Butterworths: Durban 2003) 559-593 at 568. See chapter 6 below for a discussion on the shortcomings of the formal social security system and its impact upon ISS.

The state's constitutional mandate does not merely apply to *formal* social security but extends to *informal* social security.²² Its policy-making and legal reforms do not currently incorporate ISS, despite ISS mitigating many of the state's shortcomings. There are legal reforms which the state can implement to protect and advance ISS, which will give effect to its constitutional duty in terms of section 27.²³

1.1 Research problem, objectives, and thesis statement

1.1.1 Research problem

The state struggles from centuries of fragmentation and discrimination against non-White persons in the formal social security system. The shortcomings within the formal framework place too much pressure on ISS, leaving people in inescapable states of deprivation. While the state has attempted to repair these shortcomings, unemployment and poverty levels remain stubbornly high.

1.1.2 Research objectives

To understand where the state has fallen short of its constitutional mandate to fulfil the right to access (informal) social security, this research aims to:

1. Investigate the positive impacts of ISS on vulnerable members of society;
2. Investigate the historical impact of ruling powers on ISS;
3. Evaluate the extent to which the state protects and advances ISS; and
4. Analyse proposed legal reforms to protect and advance ISS.

1.1.3 Thesis statement

ISS is an integral social safety net. Formal social security suffers from shortcomings, resulting in *more* people relying on ISS. As unemployment and poverty remain perpetual, fewer people can contribute to ISS. The pool of resources begin to diminish, and the entire support system of ISS begins to break down. Considering that formal social security's shortcomings weaken the important safety net of ISS, and in light of

²² AH Dekker 'Mind the gap: suggestions for bridging the divide between formal and informal social security' (2008) 12(1) *Law, Democracy and Development* 117-131 at 119.

²³ See chapter 7 below for a discussion on the legal reform proposals of: extending formal frameworks, supporting co-operatives as they provide a formal platform for ISS, and the implementation of a proposed BIG.

the research objectives stated above, this research argues that the South African state does not fulfil its constitutional duty to protect and advance *informal* social security.

1.2 Landscape of existing literature

Social security aims to alleviate the impact of socio-economic challenges and livelihood shocks, particularly the loss of income.²⁴ The general agreement is that social security reduces poverty. However, the theories and attitudes behind how social security alleviates poverty differ.

If a legislative framework assumes that the populace has high rates of permanent employment, it can assume that social security is a temporary measure to assist people until they can generate income again.²⁵ However, if full employment is the exception and unemployment becomes long-term or structural, then social security can no longer serve as a temporary measure and becomes an integral survival mechanism for those unable to generate income.²⁶

Social security forms part of a cluster of socio-economic rights in the Constitution. Although the Constitution entrenches all persons' rights to access socio-economic rights, it limits the realisation thereof through qualifying phrases. Scholars²⁷ have analysed the exact meaning of "available resources," "progressive realisation," and

²⁴ W Van Ginneken 'Extending social security: Policies for developing countries' *International Labour Organisation* (Geneva 2009) at 4-5; S Devereaux & R Sabates-Wheeler 'Transformative social protection' *Institute of Development Studies* (Sussex 2004) at 9; K Philip 'Public employment programmes and their interface with social protection' in L Patel, S Plagerson & I Chinyoka *Handbook on Social Protection and Social Development in the Global South* (Edward Elgar Publishing: Cheltenham 2023) 362-380 at 362.

²⁵ K Makino 'Social security policy reform in post-apartheid South Africa: A focus on the basic income grant' *Centre for Civil Society* (Durban 2004) at 4.

²⁶ Makino (n 25) 4.

²⁷ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (Juta: Claremont 2010); JFD Brand *Courts, socio-economic rights and transformative politics* (Doctor of Laws: Stellenbosch University, 2009); CI Tshoose 'The Role and Impact of Constitutional Values of Ubuntu, Equality, and Human Dignity in the Interpretation and Protection of the Right to have Access to Social Security in South Africa' (2023) 48(2) *Journal for Juridical Science* at 163–194; E Klinck 'It Takes Three to Tango: The Right to Equality, Social Security and Constitutional Law in South Africa Shorter Articles and Commentaries' (2001) 3(2) *European Journal of Law Reform* at 163–188; M Heywood 'Economic Policy and the Socio-Economic Rights in the South African Constitution, 1996–2021: Why Don't They Talk to Each Other?' (2021) 11(1) *Constitutional Court Review* at 1–37; M Sagan 'Monitoring the right of access to social security and appropriate social assistance in South Africa: An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to social security' *Studies in poverty and inequality institute* (Johannesburg 2017); A Govindjee & O Dupper 'Constitutional perspectives on unemployment security and a right to work in South Africa' (2011) 22(3) *Stellenbosch Law Review* at 775–803.

“reasonable,” especially considering major Constitutional Court cases in the early 2000s.²⁸

It is a difficult road to navigate, but authors such as Sandra Liebenberg and Daniel Brand have shed some light on interpretations of these phrases. Liebenberg, in her book on transformative adjudication of socio-economic rights, distilled the Court’s reasonability assessment into a concise and clear list of factors to consider.²⁹ Brand’s doctoral dissertation centred on the transformative politics of socio-economic rights within the Courts and provided more insight into the Court’s rulings.³⁰

Social security law is not a decidedly well-explored or well-established field when compared to the broader labour, corporate or commercial law.³¹ It was not always an independent field and instead fell under the banner of labour law. The Constitution’s entrenchment of the right to access social security was a catalyst for South African social security law as a specialised subject. Most of the broad literature – that is, textbooks and analyses of the state of South Africa’s social security – originated around this period.³² Since then, most writings surrounding social security have come forth in a semi-piecemeal fashion, primarily in journal articles.

Furthermore, and as would be expected following the introduction of a new constitutional dispensation, most of the substantial legislative reforms occurred in the early 2000s. Following a series of investigations commissioned by the state,³³ the Taylor Committee report stands as a beacon advocating for South Africa to formulate

²⁸ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC) (‘Soobramoney’); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (‘Grootboom’); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (10) BCLR 1033 (CC) (‘Treatment Action Campaign’).

²⁹ Liebenberg (n 27).

³⁰ Brand (n 27).

³¹ As at 27 October 2024, through utilising Google Scholar, the term “social security law” in sources mentioning South Africa and published since 2020 returned about 535 results. Compared to “commercial law,” with the same parameters, there were about 4,720 results and “labour law” returned 5,970 results. See Google Scholar (2024) (available at: scholar.google.com/) (last accessed 27 October 2024)

³² See, for example, the following textbooks: MP Olivier; N Smit; ER Kalula *Social security: A legal analysis* (LexisNexis Butterworths: Durban 2003); EML Strydom (ed) *Essential social security law* (Juta: Cape Town 2006).

³³ Some examples of these investigations include the Mouton Committee ‘Report of the Committee of investigation into a retirement provision system for South Africa’ (1992); the Smith Committee ‘Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa’ (1995); Lund Committee ‘Report of the Lund Committee on child and family support’ (1996). These Committees investigated the child and family support grant and the retirement scheme. See also Dekker (n 12) 5; MP Olivier & ER Kalula ‘Scope of coverage’ in MP Olivier, N Smit & ER Kalula (eds) *Social security: A legal analysis* (LexisNexis Butterworths: Durban 2003) 123-147 at 146.

a comprehensive social security system.³⁴ This report prompted the state to overhaul the social assistance system, establishing the 2004 Social Assistance Act ('SAA') and the South African Social Security Agency ('SASSA').³⁵

Formal social security is not the only form of social security, particularly in South Africa. ISS, as provided by kin and community members, is an understudied area of South Africa's broader social protection system, and features in only a handful of authors' works.³⁶ ISS is often a subject of individualised, narrowed studies where scholars sample or survey specific communities or areas. Subsequent authors studying ISS must then generalise these specific studies to all forms of ISS, which is an unfortunate consequence for an otherwise widely variable and ever-changing practice.

Some authors focus on the role that ISS – in its variable and ever-changing forms – can play in alleviating socio-economic challenges. A fundamental work in this regard was Andriette Hendrina Dekker's 2005 doctoral thesis, wherein she advocated for "policy that will accord informal social security its rightful place in social security."³⁷ She developed a model for integrating formal and informal social security into a singular, comprehensive system. Primarily, she recommended the state must close the divide between the dual systems of social security through policy and legislation changes.

³⁴ Taylor Committee (n 18).

³⁵ Social Assistance Act 13 of 2004 ('SAA'); South African Social Security Agency Act 9 of 2004 ('SASSA Act').

³⁶ See, for example, Jeremy Seekings, Elena Moore, Donald Cox, Marcel Fafchamps, Andriette Dekker, Marius Olivier, and Leila Patel. Their works include: J Seekings 'Beyond "fluidity": Kinship and households as social projects' *Centre for Social Science Research* (Cape Town 2008); J Seekings & E Moore 'Kin, market and state in the provision of care in South Africa' *Centre for Social Science Research* (Cape Town 2013); E Moore & J Seekings 'Social Protection, Intergenerational Relationships and Conflict in South Africa' *Centre for Social Science Research* (Cape Town 2018); E Moore 'Who has a duty to support? Care practices and legal responsibilities in South Africa' (2019) 39(4) *Critical Social Policy* at 582-598; D Cox, E Galasso & E Jimenez 'Private Transfers in a Cross Section of Developing Countries' *Center for Retirement Research* (Boston 2006); D Cox & E Jimenez 'Achieving social objectives through private transfers: A review' (1990) 5(2) *The World Bank Observer* at 205-218; D Cox & M Fafchamps 'Chapter 58 Extended Family and Kinship Networks: Economic Insights and Evolutionary Directions' (2008) 4 *Handbook of Development Economics* at 3711-3784; Dekker (n 12); M Olivier 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20(10) *Industrial Law Journal* at 2199-2212; L Patel *Social Welfare and Social Development* (Oxford University Press: Cape Town 2015).

³⁷ Dekker (n 12) 283.

1.3 Significance and contribution of the research

In South Africa, ISS is a common practice and serves a significant supporting role in people's everyday lives.³⁸ The shortcomings in the formal social security framework might drive people *into* or *out of* such informal support. Should people fall through the gaps in social assistance or social insurance, they may rely on ISS. However, too many people falling through the gaps defeats the protective function of ISS, as there will not be enough capital to distribute.³⁹

This research highlights the gap in South African literature regarding a comprehensive and current insight into the state's constitutional duty towards *participants in ISS*, in particular. It discusses what ISS entails, its history, and the ways in which the shortcomings within the formal system inhibit the positive, protective functions of ISS, and instead weaken ISS.

This research contributes to the understudied and limited field of ISS and proposes legal reform proposals to protect and advance the practice. The novelty of this research is its unique perspective. While it discusses the state's duties regarding ISS, it does so by focusing on legal reforms which *support* participants of ISS without losing the fundamental principles of the practice. These proposed legal reforms afford participants the ability to participate in ISS not only to survive, but to grow.

1.4 Methodology and methods

The dissertation collates primary resources with secondary sources from multiple disciplines to construct a cohesive narrative fit for a topic as complex as ISS.⁴⁰ It involves secondary, desktop-based, doctrinal, and socio-legal research. The research is necessarily qualitative, as it formulates a hypothesis and researches phenomena relating to "real-world problems."⁴¹

³⁸ Patel, Dikoko & Archer (n 19) 2.

³⁹ The protective function is discussed in heading 2.4 under the functions "mitigation, insurance and maintenance." Regarding the "gaps" in the framework, see chapter 6 below.

⁴⁰ Primary sources include international and foreign law and South African legislation, case law, customary and common law. Secondary resources include peer-reviewed articles, policy and working papers, and interviews and survey data.

⁴¹ S Tenny, JM Brannan & GD Brannan 'Qualitative study' (2022) (available at: ncbi.nlm.nih.gov/books/NBK470395/) (last accessed 29 October 2024).

In law, the doctrinal method has traditionally been appropriate, as it establishes “legal rules and principles that inform legal reasoning.”⁴² Socio-legal methodology looks at the law in its broader context and establishes it as another social system that interacts with other disciplines.⁴³

This research utilises Indian case studies to develop legal reform proposals aimed at protecting and advancing South Africa’s ISS. South-South comparisons and guidance (that is, comparing countries located in the global South) diffuse ideas at a horizontal level and do not solely rely on international ideas.⁴⁴ India is an optimal candidate for case studies, as it is like South Africa in its social, economic, and historical constructions.⁴⁵

India’s Constitution does not guarantee social security but instead utilises welfare as a directive principle.⁴⁶ Despite both state and regional state involvement in social security programmes, spending on social security in India remains low.⁴⁷ Like South Africa, India’s culture and sense of responsibility towards the vulnerable culminate in ISS structures.⁴⁸ India’s extension of social insurance to informal sector workers, along with its cooperatives, will serve as useful case studies for ISS protection mechanisms. The pilot programmes in Indian villages also serve as a basis for the proposal of a universal basic income grant (‘BIG’) to protect South African ISS.

This research utilises anthropological, sociological, and economic studies in ISS. It engages with the history and development of both formal and informal social security as a method of analysing the current legislative and socio-economic landscape. Furthermore, it utilises comparisons with and investigations into India’s legal system

⁴² M Nyathi ‘Re-Asserting the Doctrinal Legal Research Methodology in the South African Academy: Navigating the Maze’ (2023) 140(2) *South African Law Journal* 365-386 at 367.

⁴³ R Banakar & M Travers ‘Introduction’ in R Banakar & M Travers (eds) *Theory and method in socio-legal research* (Bloomsbury Publishing: London 2005) ix-xvi at xii.

⁴⁴ S Brooks ‘The politics of social protection in the global South’ in L Patel, S Plagerson & I Chinyoka *Handbook on Social Protection and Social Development in the Global South* (Edward Elgar Publishing: Cheltenham 2023) 44-62 at 50.

⁴⁵ L Leisering ‘Social protection in the global South: An ideational and historical approach’ in L Leisering (ed) *One hundred years of social protection: The changing social question in Brazil, India, China, and South Africa* (Springer Nature Switzerland AG: Cham 2021) 3-52 at 28-29.

⁴⁶ A Sivaramakrishnan & S Pellissery ‘The digital delivery of welfare services in India: Achievements, anomalies and lessons learnt’ in L Patel, S Plagerson & I Chinyoka *Handbook on Social Protection and Social Development in the Global South* (Edward Elgar Publishing: Cheltenham 2023) 471-485 at 471.

⁴⁷ Sivaramakrishnan & Pellissery (n 46) 471.

⁴⁸ S Jajodia ‘Social (in) security in India: Some reflections’ (2014) 4 *Research Horizons* 195-198 at 196.

to establish a baseline from which this research develops suggested protection mechanisms for ISS.

The author approaches the problem statement from an analytical and critical perspective of existing solutions to protect ISS. The author takes the position that the law cannot expect to thoroughly regulate ISS to protect it, thus any suggestions of protection must aim to *support* factors beyond its direct control.

1.5 Delineations and limitations

The research limits its scope by analysing three proposed methods of protecting ISS, as derived from the literature: extending formal frameworks, cooperatives, and the proposed basic income grant ('BIG').

The methodology of the dissertation necessarily limits it, as it cannot go further than what the existing literature discusses. The existing data within the literature has its own sampling biases and limitations, which this research works with and around. The research conducted herein assuages the existing limitations through thorough cross-referencing, and recent data and statistics.

Lastly, this research's utilisation of Indian case studies has limitations, as some literature may be in a language the author does not speak. While this research uses cross-referencing as much as possible, primary sources remain limited to a certain extent, due to language barriers.

1.6 Key definitions

Before proceeding, it is prudent to define some key terms the research utilises.⁴⁹ These definitions serve as overviews of commonly utilised terms, or terms prone to misunderstanding or ambiguity.

1.6.1 Social protection and social security

This research utilises the term social protection to refer to those public, private, and semi-public measures which aim to ameliorate worsening socio-economic conditions through redistributing wealth to the poor, creating jobs, and promoting access to healthcare.

⁴⁹ E Hofstee *Constructing a good dissertation* (EPE: Sandton 2006) at 88.

Social security falls under the umbrella of social protection and establishes a minimum floor (or standard) for the lives of all persons through publicly regulated mechanisms, and functions interrelatedly to other related rights falling under social protection such as healthcare, basic education, and housing. Social security consists of two branches: social assistance and social insurance.⁵⁰

The United Nations ('UN') and the International Labour Organisation ('ILO') both use the terms interchangeably but have preferred the term "social protection" since about the 1990s. The UN's Universal Declaration on Human Rights ('UDHR'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the ILO's Declaration of Philadelphia, and the ILO's Minimum Standards (Social Security) Convention 102 of 1952 are all the first defining instruments which refer to *social security* and not social protection.⁵¹ However, more recent instruments and research conducted by both organisations, such as the ILO's Social Protection Floors Recommendation 202, utilise the term *social protection* (or, at times, "basic social security guarantees").⁵²

However, the African Union ('AU') does not view social protection as interchangeable with social security and instead defines social protection as those public and/or private mechanisms protecting persons from life contingencies and includes the concept of social security.⁵³ Social protection, under the AU definition, encompasses all attempts – inclusive of strategies and programmes – aimed at supporting people and the assurance of a minimum standard of living.⁵⁴ The AU's definition of social security includes social protection, social insurance, and social grants in a public-private hybrid

⁵⁰ MP Olivier 'Social security: Core elements' in LTC Harms et al (eds) *The Law of South Africa* (LexisNexis: Pretoria 2013) Volume 13(3).

⁵¹ United Nations *Universal Declaration of Human Rights* (1948) ('UDHR'); United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) ('ICESCR'); International Labour Organisation *Declaration concerning the aims and purposes of the International Labour Organisation* (1944) ('Declaration of Philadelphia'); International Labour Organisation *Social Security (Minimum Standards) Convention 102* (1952) ('Convention 102'). The ILO, as a specialised agency of the UN, mirrors the UN's practise of interchanging frequently utilises the terms interchangeably. Convention 102 does not define social security, but the ILO's usage of Convention 102 in its research and recommendations since 1952 on social protection clearly indicates this interchangeable understanding.

⁵² International Labour Organisation *Social Protection Floors Recommendation 202* (2012) ('Recommendation 202') art 2.

⁵³ African Union *Protocol to African Commission on Human and Peoples' Rights on the Rights of Citizens' to Social Protection and Social Security* (2022) ('ACHPR on Social Protection') art 1(r).

⁵⁴ ACHPR on Social Protection (n 53) art 1(r).

with the goal of income security in the face of life contingencies.⁵⁵ Thus, this research's differentiation between social protection and social security aligns with that of the AU.

1.6.2 Social assistance

Social assistance entails non-contributory, oftentimes means-tested, cash transfers or in-kind benefits funded by taxes collected by the state and provided to persons in need.⁵⁶

1.6.3 Social insurance

This research focuses on the state's duties regarding ISS participants, and thus primarily discusses public (and state-managed) funds. Whilst reference may occasionally be made to private funds, the focus remains on the state's definitions within statutory instruments. Therefore, social insurance entails mandatory contributions to public insurance funds aimed at income replacement. Social insurance also refers to those benefits distributed to contributors in instances of risk or income losses, such as unemployment or occupational injuries and diseases.⁵⁷

1.6.4 Informal social security

While this research dedicates chapter 2 to defining and explaining ISS, the definition is reproduced here for convenience. ISS refers to those forms of social security that distribute support, in cash or in-kind, between kin and/or community members and are not formalised in legislative or policy instruments. ISS aims to, for example, mitigate life contingencies, insure against risks and shocks, and maintain decent living conditions.⁵⁸

1.6.5 Unemployment

There are two definitions for unemployment. The "official definition" refers to workless people actively looking and available for employment or those who had only recently stopped looking for work due to a future job placement. The "expanded definition"

⁵⁵ ACHPR on Social Protection (n 53) art 1(s).

⁵⁶ Taylor Committee (n 18) 36; Olivier in Harms et al (n 50) para 29.

⁵⁷ S Motala, S Ngandu, S & T Hart (eds) *Social Security Review 2021 – Evolution of Social Security in South Africa: An Agenda for Action* (Department of Social Development: Pretoria 2021) at 2; I Woolard, K Harttgen & S Klasen 'The history and impact of social security in South Africa: experiences and lessons' (2011) 32(4) *Canadian Journal of Development Studies* 357-380 at 359.

⁵⁸ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 573.

refers to those unemployed persons who can work but who had, due to discouragement or other reasons, stopped searching for work.⁵⁹

1.6.6 Neoliberalism and austerity

This research defines neoliberalism as those policies reflecting the political belief and ideology that the state should not venture beyond its role of overseer and protector of the market. In short, it aims to privatise and deregulate the market, theoretically allowing it the freedom to expand and alleviate social issues within a region.⁶⁰ Harvey explains that neoliberalism equates economic well-being with human well-being.⁶¹

Austerity, whilst ambiguous at times, broadly refers to policies reducing state deficits. Depending on the perspective, austerity measures may cause economic growth or may slow economic growth.⁶² This research approaches austerity as policies that are detrimental to human well-being in the pursuit of improving the economy, regardless of whether the economy grows or not.

1.7 Outline of chapters

The chapter following hereon, chapter 2, defines the term ISS with reference to four definitional elements. It furthermore explains the positive effects that ISS has on its participants.

Chapter 3 establishes a reoccurring trend of negative influences on ISS from those in power of executive or legislative powers, the recuperation of ISS mechanisms, and subsequent upheavals. The chapter furthermore explains the racially discriminatory patterns and legal cultures of the Union state and apartheid state, including the fragmentation of social security. It serves as a linkage chapter between defining ISS and South Africa's formal social security framework in the following chapter.

⁵⁹ See the definitions as provided in Statistical Release P0211 (n 4) at 18.

⁶⁰ See J Mathekganye, L Van Heerden & D Ukwandu 'The nexus between water, neoliberalism and sustainable development in post-apartheid South Africa' (2019) 11(3) *African Journal of Public Affairs* 41–58 at 44; B Jones & M O'Donnell 'Introduction: The open-market society and its opponents: An overview' in B Jones & M O'Donnell (eds) *Alternatives to neoliberalism: Towards equality and democracy* (Policy Press: Bristol 2017) 1-24 at 2.

⁶¹ See D Harvey *A brief history of neoliberalism* (Oxford University Press: New York 2005) at 2; Mathekganye et al (n 60) 44-45.

⁶² See B Anderson & E Minneman 'The abuse and misuse of the term "Austerity" Implications for OECD countries' (2014) 14(1) *OECD Journal on Budgeting* 109–122 at 114-115.

Chapter 4 explains the formal domestic legislative framework for social security in South Africa, with particular emphasis upon the Constitutional Court's interpretation of socio-economic rights in the Constitution.

Chapter 5 provides the regional and international framework within which South Africa's formal social security functions. It includes the UN, the ILO, the AU, and the Southern African Development Community ('SADC').

Chapter 6 discusses the shortcomings in the current legal framework with reference to its impact on ISS. It argues that the South African state does not fulfil its constitutional mandate to protect and advance ISS.

Chapter 7 answers the previous chapter's question on what potential legal reforms the state can implement to begin fulfilling its constitutional duty regarding ISS. The chapter refers to international and regional perspectives, as well as Indian case studies, and discusses the feasibility of extending formal social insurance frameworks to include informal workers, the utilisation and promotion of cooperatives as a formal platform for ISS mechanisms such as stokvels, and models of the proposed basic income grant ('BIG').

Chapter 8 summarises the arguments put forth throughout the research and applies its findings to the research objectives stated above.⁶³ It concludes by suggesting avenues for further research.

⁶³ See heading 1.1. above.

Chapter 2

Defining informal social security

The previous chapter provides the necessary background information to contextualise the problem and thesis at hand, namely the South African state's failure in its duty to protect and advance informal social security ('ISS'). This chapter clarifies ISS in more detail.

Defining ISS, albeit difficult, is possible. The challenge arises in determining the scope of ISS.⁶⁴ Given that it serves as the central axis to this research, this chapter clarifies the nebulous nature of ISS through four definitional elements.

ISS refers to those forms of social security⁶⁵ that –

1. are not formalised in legislative and policy instruments;
2. occur between kin and/or community members;
3. manifest through monetary or in-kind support; and
4. aim to, for example, mitigate life contingencies, insure against risks and shocks, and maintain decent living conditions.⁶⁶

This definition provides a clear starting point for explaining the elements of ISS. Whilst the terminology may vary slightly (for example, the usage of the phrase “indigenous social security systems” by Seepamore),⁶⁷ ISS provides a suitable umbrella term to encapsulate the above definitional elements. This chapter begins by discussing the informal nature of ISS,⁶⁸ and proceeds onto the commonly identified categories thereof.⁶⁹ It leads into an analysis of the forms of exchange that occur,⁷⁰ and finally discusses the positive effects of ISS.⁷¹

⁶⁴ A Ledeneva 'Introduction: The informal view of the world – key challenges and main findings of the Global Informality Project' in A Ledeneva et al (eds) *The global encyclopaedia of informality: Volume 1* (University College London Press: London 2018) at 1-27; Dekker & Olivier in Olivier, Smit & Kalula (n 21) 573.

⁶⁵ ISS is a form of social security due to its parallels with formal social assistance and social insurance. See Dekker (n 22) 119.

⁶⁶ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 573. See heading 2.4 below. The definition this research provides draws from the definition proposed by Dekker & Olivier in Olivier, Smit & Kalula (n 21) 573.

⁶⁷ Seepamore (n 11) 69-86.

⁶⁸ See heading 2.1 below.

⁶⁹ See heading 2.2 below.

⁷⁰ See heading 2.3 below.

⁷¹ See heading 2.4 below.

2.1 Informality

The first definitional element of ISS is its informality or, in other words, its lack of formality or formalisation in legislative or policy instruments.⁷² This section explains the phrase “informality,” with specific reference to ISS’s opposition to formal social security (formality).

2.1.1 Informality in general

“Informality” is an interchangeable term with other words bearing their own connotations and usages.⁷³ Increasingly, many different disciplines utilise the term “informality” to describe anything beyond the conventional, dominant, or formal.⁷⁴ This results in confusing terminology. Primarily, the term “informality” is in negation of the formal, at least from a philosophical and linguistic perspective.⁷⁵

Boanada-Fuchs and Boanada Fuchs explained that the specific context within which a writer uses the term “informality” determines its more precise, narrowed meaning.⁷⁶ In the context of the legal sphere, the informal lies *outside* the formal boundaries of the law, beyond the officially sanctioned norm’s scope.⁷⁷ Legal informality, as one of the several types of informality and which is the case of ISS, may imply the implementation of one’s “own laws,”⁷⁸ and sometimes occurs in tandem with disobeying stipulations in statutes or policies.⁷⁹

⁷² See the first definitional element in the introduction to this chapter.

⁷³ Phrases often used interchangeably with ISS include “traditional support”, “the voluntary sector,” and “the third sector.” See Dekker (n 12) 111 fn 471; F Von Benda-Beckmann et al ‘Introduction: Between kinship and the state’ in F Von Benda-Beckmann et al (eds) *Between kinship and the state: Social security and law in developing countries* (Foris: Dordrecht 1988) 7-20 at 10 for different terminology referring to ISS.

⁷⁴ See A Polese ‘What is informality? (Mapping) “the art of bypassing the state” in Eurasian spaces - and beyond’ (2023) 64(3) *Eurasian Geography and Economics* 322-364 at 323, where they report that online searches reveal several distinct fields engaging with informality, such as political science, international relations, informal employment, politics, and governance. In their 2018 study, Boanada-Fuchs & Boanada Fuchs identified nine informality categories with 112 characteristics. See A Boanada-Fuchs & V Boanada Fuchs ‘Towards a taxonomic understanding of informality’ (2018) 40(4) *International Development Planning Review* 398-421 at 415-416.

⁷⁵ V Boanada Fuchs & A Boanada-Fuchs ‘Understanding informality: Towards a multi-dimensional analysis of the concept’ *Cities Alliance* (Brussels 2021) at 11.

⁷⁶ Boanada Fuchs & Boanada-Fuchs (n 75) 11-13.

⁷⁷ Boanada Fuchs & Boanada-Fuchs (n 75) 14.

⁷⁸ Boanada Fuchs & Boanada-Fuchs (n 75) 15. They explain that the organisational dimension of informality constructs its own systems and rules due to non-conformity with formal structures. See Boanada Fuchs & Boanada-Fuchs (n 75) 16.

⁷⁹ Boanada Fuchs & Boanada-Fuchs (n 75) 14.

2.1.2 Informality in the context of informal social security

The social security provided by the state is *formal* social security, since it has codified rules and principles in legislation and policies.⁸⁰ Over time, the state has exercised its powers to create a structured and codified legislative framework for social security. This has resulted in some norms and behaviours, such as those of ISS, falling beyond this formal framework's scope. Due to this exclusion, some forms of support remain outside codification, in what has become known as *ISS*.⁸¹ Dekker explained her use of the term "informal social security" as follows:

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.⁸²

Dekker's careful analysis of the potentially problematic connotations arising from the term "informal" led her to explain that the term "ISS" may imply chaos and disorder in contrast to the legally sanctioned, orderly, formal social security.⁸³

However, as Von Benda-Beckmann stated: "It does not help us to redefine... 'informal' as 'not legally recognised.'"⁸⁴ ISS regulates itself through entitlements and obligations, even though it does not fall within the formalised and codified systems of social security. Regulation, in the context of ISS, primarily occurs without codification and manifests through "[forms] of tradition, customary law or practice."⁸⁵

Some of ISS's practices and behaviours obscure their legal nature through feelings, such as love or trust. However, once one displaces the assumption that ISS is chaotic, one can find the implication of legal obligations throughout kin and community assistance.⁸⁶

⁸⁰ Dekker (n 12) 111. These include social assistance legislation such as the SAA (n 35), and social insurance such as the Unemployment Insurance Act 63 of 2001 ('UIA'), Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA'), and Occupational Diseases in Mines and Works Act 78 of 1973 ('ODMWA'). See chapter 4 below for more information on South Africa's formal social security framework.

⁸¹ Dekker (n 12) 111.

⁸² Dekker (n 12) 113.

⁸³ Dekker (n 12) 111.

⁸⁴ Von Benda-Beckmann et al in Von Benda-Beckmann et al (n 73) 11.

⁸⁵ Dekker (n 12) 114 fn 484.

⁸⁶ Von Benda-Beckmann et al in Von Benda-Beckmann et al (n 73) 12.

Take, for example, the existence of stokvels – or rotating credit and savings associations.⁸⁷ Within the community, a group of people come together and agree upon the amount which they will deposit into a communal fund and the frequency with which they will do so. While South African law partially recognises stokvels,⁸⁸ the success thereof depends primarily on the agreed co-operation, solidarity, and accountability of their members.⁸⁹ A stokvel –

[comprises] of agreements (contracts) between the individual members of the stokvel. The nature of and the rules governing the stokvel usually resemble legal constructions from indigenous and/or common law.⁹⁰

In another example of ISS's creation of entitlements and obligations, university students receiving financial assistance from their extended family in turn “expect to support several of their younger siblings, nephews and nieces in the future.”⁹¹ In what Schott refers to as a “contract between generations,”⁹² reciprocal relationships manifest as long-term investments, with a child receiving education and, once they reach adulthood, assuming the obligation of assisting their ageing parents.⁹³

Thus, informality in the context of ISS does not refer to ungoverned, unregulated systems. It is simply the lack of formal administration and official state involvement that leads to its informality. The broadly defined categories of ISS, namely kin and community social security, have their own methods of constructing entitlements and obligations. The following section clarifies these two categories of ISS, including tangible organising characteristics such as reciprocity, solidarity, and co-operation.

⁸⁷ D James ‘Women Use their Strength in the House’: Savings Clubs in an Mpumalanga Village (2015) 41(5) *Journal of Southern African Studies* 1035-1052 at 1036. See heading 2.2.2 below on the explanation of stokvels.

⁸⁸ Stokvels must comply with the Financial Intelligence Centre Act 38 of 2001 and, should the stokvel charge interest or fees, it must comply with the National Credit Act 34 of 2005. They do not fall within the scope of the Banks Act 94 of 1990. However, the Registrar of Banks recognises some stokvels subject to requirements, including: That the members must know each other, and that they must have a constitution for the stokvel. See NASASA ‘Our regulatory framework’ (2024) (available at: nasasa.co.za/about-us/our-regulatory-framework/) (last accessed 16 October 2024).

⁸⁹ Matuku & Kaseke (n 19).

⁹⁰ ZF Mbhekeni *Legal Perspectives on the Potential Regulation of Stokvels in South Africa* (Master of Laws: University of Johannesburg 2021) at 9.

⁹¹ J Baland et al ‘The economic consequences of mutual help in extended families’ (2016) 123 *Journal of Development Economics* 38–56 at 39, citing JC Caldwell ‘Extended family obligations and education: A study of an aspect of demographic transition amongst Ghanaian University students’ (1965) 19(2) *Population Studies* at 183-199.

⁹² R Schott in F Von Benda-Beckmann et al (eds) *Between kinship and the state: Social security and law in developing countries* (Foris: Dordrecht 1988) 89-107 at 98.

⁹³ Baland et al (n 91) 39.

2.2 Kin and community social security

The previous section delineated the concept of informality in negation of formality, as part of its discussion of ISS's first definitional element.⁹⁴ This section explains the second definitional element, namely where and between whom ISS transfers occur.⁹⁵ This second definitional element divides ISS into two categories: kinship social security and community social security.⁹⁶

These two categories involve similar characteristics and behaviours, albeit at times under different terminology. For example, Dekker referred to kinship-based and neighbourhood-based social security,⁹⁷ whereas the Organisation for Economic Co-operation and Development ('OECD') referred to "[firstly] traditional support systems of family members, relatives and immediate neighbours; and [secondly] self-organised mutual aid arrangements."⁹⁸ Another term for ISS is "indigenous social security systems," which Seepamore utilises as an umbrella term for African practices such as *letsema* or *umjikelezo*.⁹⁹ The table below provides a summary of the two categories of ISS and their characteristics, which the following subsections will discuss in more detail.

Table 1: Summary of kinship and community social security's defining characteristics

	Kinship social security¹⁰⁰	Community social security¹⁰¹
Refers to	Family & extended family.	Neighbours & mutual aid societies such as stokvels, burial societies, or faith-based groups.
Receiving support	Vulnerable people such as the young, older persons, persons with disabilities or sick.	Neighbours in need of support and members who contribute to mutual aid societies.

⁹⁴ See the first definitional element in the introduction to this chapter.

⁹⁵ See the second definitional element in the introduction to this chapter.

⁹⁶ Dekker (n 22) 119. This research may at times refer to one of the categories. However, as these two categories often overlap, the term ISS refers to both these categories until stated otherwise.

⁹⁷ Dekker (n 22) 119.

⁹⁸ Development Centre Studies 'Tackling vulnerability in the informal economy' *Organisation for Economic Co-operation and Development* (Paris 2019) ('OECD') at 96.

⁹⁹ Seepamore (n 11) 69-86. *Letsema* refers to people voluntarily working together, whereas *umjikelezo* is another name for communal rotating savings clubs, also known as stokvels. See Seepamore (n 11) 76-77.

¹⁰⁰ See heading 2.2.1 below.

¹⁰¹ See heading 2.2.2 below.

Providing support	Kin receiving higher incomes or who are more financially stable.	Neighbours receiving higher incomes or who are more financially stable. Mutual aid societies themselves (for example through loans or regularly rotating lump-sum payouts).
Organising principles	Reciprocity, solidarity, love.	Reciprocity, solidarity, co-operation, trust.

2.2.1 Kinship-based social security

Kinship-based social security can refer to blood relatives' provision of support.¹⁰² Whilst the term "blood relatives" refers to the inner nucleus of the family, it is more likely that in South Africa the concept of kin extends beyond "a nucleus concept of the family, namely a family headed by a male breadwinner, with one wife and children."¹⁰³ Instead, a single family unit may include multiple generations or span across physical households.¹⁰⁴ Therefore, this research refers to kin as close and extended family, including blood relatives but not necessarily limited thereto.¹⁰⁵

Support-providing members within a kinship structure are those who earn a higher income or who are more financially stable.¹⁰⁶ Depending on the level of need, even those who are beneficiaries of a state-provided social grant may become responsible for providing support, such as older persons distributing their older person's grants.¹⁰⁷ Kinship support disseminates to the vulnerable, including the young, sick, older persons, or persons with disabilities.¹⁰⁸ The increased unemployment in South Africa results in more working-age, yet unemployed, adults requiring assistance, particularly from their ageing parents.¹⁰⁹ For example, the far-reaching impact of the HIV/AIDS

¹⁰² Dekker (n 22) 119.

¹⁰³ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 565.

¹⁰⁴ Seekings & Moore (n 36) 5-6; Cox & Fafchamps (n 36) 3712-3775; RA Ssebagala 'Plugging the welfare gap: The role of kinship transfers in South Africa' (2021) 57(7) *The Journal of Development Studies* at 1154-1171.

¹⁰⁵ For example, in situations where a household takes in orphans or provides childcare on behalf of those parents needing to migrate to labour centres for employment and income.

¹⁰⁶ Cox, Galasso & Jimenez (n 36) 3.

¹⁰⁷ E Ardington & F Lund 'Pensions and development: Social security as complementary to programmes of reconstruction and development' (1995) 12(4) *Development South Africa* 557-577 at 570; A Sagner & RZ Mtati 'Politics of pension sharing in urban South Africa' (1999) 19(4) *Ageing & society* 393-416 at 406.

¹⁰⁸ OECD (n 98) 96.

¹⁰⁹ Seekings & Moore (n 36) 17. See heading 6.1.3 below for the shortcoming identified within South Africa's formal social security system, namely the "missing middle" or categorical approach to social assistance.

epidemic caused a sharp incline in illnesses and parental deaths, which resulted in kinship members providing support for orphaned children or sick kin who are unable to earn an income.¹¹⁰

Cox and Jiminez, in their study on adult children supporting their ageing parents, identify two main reasons therefore.¹¹¹ Firstly, love and care motivate altruistic provision of support.¹¹² Secondly, reciprocity or “self-interested exchange” may motivate kinship members to assist, so they may rely on their kin at another stage.¹¹³

Kinship social security functions reciprocally, with support exchanged based on relationships, trust, and altruism.¹¹⁴ The closer the relationships between kin members, “the higher the draw is to support one another.”¹¹⁵ Kin may at times offer support in return for some level of repayment, which re-emphasises its reciprocal characteristic.¹¹⁶ Solidarity is another organising characteristic of kinship social security, through its mutual assistance.¹¹⁷ Reciprocity and solidarity not only reinforce interdependence between kin, but serve to strengthen connections to one another.¹¹⁸

Whilst the above discussion centres its attention on kinship social security, many qualities thereof overlap with that of community social security, which the following subsection discusses.

2.2.2 Community-based social security

Community-based social security refers to assistance distributed within the broader community, and may be organised around needs requiring fulfilment,¹¹⁹ or

¹¹⁰ AH Dekker ‘Where have all the young men gone? The impact of HIV/Aids on informal social security systems and care for the elderly’ (2004) 19(1) *Southern African Public Law* 152-160 at 152.

¹¹¹ Cox & Jiminez (n 36) 209.

¹¹² Cox & Jiminez (n 36) 209.

¹¹³ Cox & Jiminez (n 36) 209. See, for example, older persons distributing their older person’s grants to younger kin in return for the older person receiving care from them.

¹¹⁴ Cox & Jiminez (n 36) 209.

¹¹⁵ Ssebagala (n 104) 1162; Sagner & Mtati (n 107) 400-401.

¹¹⁶ Seekings & Moore (n 36) 17.

¹¹⁷ E Kaseke ‘Social Security in Eastern and Southern Africa: Organisation, Issues and Concepts in Modern and Traditional Arrangements’ (1997) 12(2) *Journal of Social Development in Africa* 39-47 at 42; Dekker & Olivier in Olivier, Smit & Kalula (n 21) 560. Cambridge Dictionary defines solidarity as “agreement between and support for the members of a group.” See Cambridge Dictionary ‘solidarity’ (2024) (available at: dictionary.cambridge.org/dictionary/english/solidarity) (last accessed 16 October 2024).

¹¹⁸ Kaseke (n 117) 42. See, for example, kin members who must migrate for work, who then send financial assistance to their kin to maintain a connection with them.

¹¹⁹ Such as purchasing food and groceries. See D Neves et al ‘The use and effectiveness of social grants in South Africa’ *Institute for Poverty, Land & Agrarian Studies, Economic Policy Research Institute* (Cape Town 2009) at 3, 68.

commonalities such as geographical location or characteristics.¹²⁰ Community-based social security includes stokvels, burial societies, or faith-based events or services.¹²¹ Unlike kinship-based social security, members voluntarily contribute set amounts at scheduled times.¹²²

Stokvels are one of the best examples of community social security in South Africa.¹²³ People come together, agreeing upon the contribution amounts and frequency of contributions, and then disseminate lump-sum amounts to members on a rotating basis.¹²⁴

Some authors classify burial societies as a type of stokvel,¹²⁵ whilst others classify them as their own form of community social security.¹²⁶ Regardless of their typology, burial societies consist of “[...] friends, relatives, workmates and community residents who come together to insure themselves and their extended families against death-related expenses.”¹²⁷

Literature discussing the role of informal support often limits its scope to the support created and maintained in the informal economy.¹²⁸ This particularly occurs in developed countries where kinship social security is rarer.¹²⁹ Such perceptions and

¹²⁰ Such as solidarity between former activists in Madagascar, or neighbours in the same community. See M Gardini ‘Networks of solidarity among former Marxist activists in the *bas quartiers* of Antananarivo’ (2022) 48(4) *Journal of Southern African Studies* 653-665 at 653; M Makiwane et al ‘Family in a changing South Africa: Structures, functions and the welfare of members’ (2017) 48(2) *South African Review of Sociology* 49-69 at 61.

¹²¹ Matuku & Kaseke (n 19) 506; G Dafuleya ‘(Non)state and (in)formal social protection in Africa: Focusing on burial societies’ (2018) 61(1) *International Social Work* 156-168 at 156; LG Mpedi ‘The role of religious values in extending social protection: a South African perspective’ (2008) 28(1) *Acta Theologica* 105-125 at 1.

¹²² OECD (n 98) 96.

¹²³ James (n 87) 1035.

¹²⁴ James (n 87) 1039; WG Schulze ‘The origin and legal nature of the stokvel (part 1)’ (1997) 9 *South African Mercantile Law Journal* 19-29 at 21.

¹²⁵ James (n 87) 1040.

¹²⁶ Dafuleya (n 121) 156.

¹²⁷ As above. Due to the overlap between kinship social security and community social security, it is not uncommon for relatives to be involved in communitarian organisational structures.

¹²⁸ See, for example: Smit & Mpedi (n 17); OECD (n 98); MA Chen ‘Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment’ *United Nations Department of Economic and Social Affairs* (New York 2007); K Meagher ‘Unlocking the informal economy: A literature review on linkages between formal and informal economies in developing countries’ *Women in Informal Employment Globalizing and Organizing* (Manchester 2013); E Fourie *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* (Doctor of Laws: North-West University 2018); M Nkepe *The informal social security sector: A case for statutory regulation in South Africa* (Master of Laws: North-West University 2008); MSN Nguluwe *Extending access to social security to the informal sector in South Africa: Challenges and prospects* (Masters of Laws: North-West University 2016).

¹²⁹ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 560.

limitations may result in confusion between support in the informal economy and the broader concept of ISS itself.¹³⁰

Community social security may occur between workers in the informal economy, as they frequently do not have access to formal social security, particularly social insurance.¹³¹ The commonality around which they may organise is their work, such as informal farm workers who form stokvels.¹³²

However, as this section discusses, community social security is only one type of support within the broader concept of ISS. ISS in developing countries does not merely refer to social security in the informal economy but also refers to kinship social security.¹³³ Conflating ISS with support offered in the informal economy excludes kinship social security. This research reiterates that its definition of ISS, while including community social security such as that maintained by informal workers, also includes kinship social security, as it is a fundamental aspect of non-state support.

The following section discusses the type of support which ISS participants provide and receive, as such support is broadly similar across kinship and community social security.

2.3 Monetary or in-kind support

The previous section discusses the two commonly delineated categories of ISS. Central to its discussion are the providers and receivers of support, their rationales and motivations, and their organising principles. This section addresses the third definitional element provided in the introduction, which states that ISS involves the provision of monetary or in-kind support.¹³⁴

This section organises its discussion in relation to the four types of support which Wellman and Wortley identify: financial transfers; services; emotional support; and companionship.¹³⁵ Although their analysis centres on kin networks in Toronto, this

¹³⁰ A Tesome in S Devereaux & M Getu (eds) *Informal and formal social protection mechanisms in sub-Saharan Africa* (Fountain Publishers: Kampala 2013) 95-120 at 99.

¹³¹ See heading 6.1.1 below for a more thorough discussion on the formal employment bias in social insurance.

¹³² W Charles *The extension of social protection to informal farm workers in South Africa* (Master of Laws: University of Western Cape 2023).

¹³³ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 560.

¹³⁴ See the third definitional element in the introduction to this chapter.

¹³⁵ B Wellman & S Wortley 'Brothers' Keepers: Situating Kinship Relations in Broader Networks of Social Support' (1989) 32(3) *Sociological Perspectives* 273-306 at 1.

research extends their four categories to apply to both kin and community social security.

2.3.1 Monetary support

Vulnerability frequently arises in cases of financial strain, which kinship networks or community mutual aid societies subsequently attempt to alleviate through financial transfers.

Financial transfers in this research refer to both private transfers and informal loans. Private transfers are, for example, the support which kin offer through donations to vulnerable members.¹³⁶ The term “private transfers” can refer to either kin or community social security, but usually appears in relation to kinship social security. The term only refers to transfers that are considered informal.¹³⁷

In contrast to private transfers, informal loans occur where money lenders, friends, relatives, neighbours or the general informal network provide money to a recipient in expectation of repayment.¹³⁸ Whilst people may loan money to others in their kinship networks, Alvi and Dendir find that informal loans primarily occur in community networks.¹³⁹ Examples thereof are some stokvels which allow for the loaning of money at a pre-determined interest rate.

Monetary support thus aligns with Wellman and Wortley’s first form of support. The following subsection discusses the three other forms of support falling within the meaning of “in-kind”: services, emotional support, and companionship.

2.3.2 In-kind support

In contrast to monetary support, the meaning of “in-kind” requires more detail. The broad understanding of in-kind is its reference to the transfer or provision of items other than money.¹⁴⁰ While transferring items other than money does occur in ISS, other forms of *support* also manifest within ISS.

¹³⁶ Cox & Fafchamps (n 36) 3716; E Alvi & S Dendir ‘Private Transfers, Informal Loans and Risk Sharing Among Poor Urban Households in Ethiopia’ (2009) 45(8) *The Journal of Development Studies* 1325-1343 at 1331.

¹³⁷ Alvi & Dendir (n 136) 1329. See Cox, Galasso & Jimenez (n 36) and Cox & Jimenez (n 36) for the use of private transfers to refer to informal assistance mechanisms.

¹³⁸ Alvi & Dendir (n 136) 1329.

¹³⁹ Alvi & Dendir (n 136) 1329.

¹⁴⁰ Cambridge Dictionary ‘in kind’ (2024) (available at: dictionary.cambridge.org/dictionary/english/in-kind (last accessed 16 October 2024)).

ISS networks may provide *services* to the vulnerable. Within the context of burial societies, some services may include participants transporting the deceased to the funeral or cooking food for mourning families.¹⁴¹ Labour pooling, such as in rotating associations or “labour gangs,” ensure that a sick worker may reach out to another community member to replace them at work.¹⁴² Furthermore, Krishnan and Sciubba explain that, in Ethiopia, kinship networks assist in forming and shaping such labour-pooling groups.¹⁴³ Kinship networks may assist through gifts or favours.¹⁴⁴

Another form of service is kinship members’ housing and care for children. As mentioned above,¹⁴⁵ the HIV/AIDS epidemic had a major impact on South Africa’s labour force and resulted in many children moving to live with kin members.¹⁴⁶ Livelihood shocks such as the passing of a parent are not the only instances of child fostering, as they may also occur in instances where children are attending a school too far from their parental home.¹⁴⁷

A second element of in-kind support is *emotional support and companionship*. Beyond monetary gains, ISS enhances social capital amongst members and offers moral and mutual aid in challenging times.¹⁴⁸ Matuku and Kaseke’s study illustrates the emotional support participants within burial societies experienced, wherein they found comfort from members in their ISS network when a family member had passed on.¹⁴⁹

Albeit a brief interlude in the broader definition of ISS, understanding the extent of monetary and in-kind assistance remains integral to understanding ISS. The following section links the idea of monetary and in-kind support to the positive effects it has on ISS participants, namely its maintenance, mitigation, and insurance functions.

¹⁴¹ L Ngcobo & J Chisasa ‘The nature and benefits of participating in burial society stokvels in South Africa’ (2019) 15 *Acta Universitatis Danubius: Oeconomica* 204-216 at 211 & 213.

¹⁴² Cox & Fafchamps (n 36) 3716.

¹⁴³ Cox & Fafchamps (n 36) 3716, citing P Krishnan & E Sciubba ‘Links and Architecture in Village Networks (previously: Endogenous Network Formation and Informal Institutions in Village Economies)’ *University of Cambridge* (Cambridge 2004).

¹⁴⁴ Cox & Fafchamps (n 36) 3716.

¹⁴⁵ See heading 2.2.1 wherein the loss of young people due to the HIV/AIDS epidemic resulted in more older persons assuming responsibility for children and the sick. See also Dekker (n 110) 152.

¹⁴⁶ Cox & Fafchamps (n 36) 3716. See also heading 2.2 above.

¹⁴⁷ Cox & Fafchamps (n 36) 3716.

¹⁴⁸ Matuku & Kaseke (n 19) 511; Sagner & Mtati (n 107) 403.

¹⁴⁹ Matuku & Kaseke (n 19) 511.

2.4 Mitigation, insurance, and maintenance

The fourth definitional element relates to the purpose of ISS.¹⁵⁰ Whilst it specifically names three examples, it is not a closed list and does not presume to fully understand the reasoning behind any person's participation in ISS.

The shortcomings within the formal social security system¹⁵¹ are one of the primary reasons for relying on ISS. However, this section temporarily removes the formal from its discussion and focuses on the general positive effects that ISS has on its participants.

ISS mitigates and insures people against life contingencies and maintains decent standards of living. For purposes of this research, it first explains the terminology of mitigation, insurance, and maintenance, and will subsequently bring these terms into the context of ISS.

Firstly, mitigation refers to those plans or systems in place with the purpose of reducing the impact of harm.¹⁵² As the best form of harm reduction is preventing harm in the first place, mitigation assumes a proactive function in the long term.¹⁵³ Secondly, insurance forms part of mitigation strategies and aims to distribute risk across a community or class of risk-sharing persons, lessening each individual's total risk.¹⁵⁴ Insurance is thus reactive to risk and harm and reduces the impact thereof in the short term. Finally, maintenance refers to the continuation of current standards and serves a more long-term and passive function than either insurance or mitigation.¹⁵⁵

In the context of ISS, kinship and community social security networks may serve all three functions, or only a few. For example, burial societies may serve to insure their members from the heavy costs of burials but do not prevent deaths from arising. On the other hand, a stokvel aimed at funding groceries may mitigate the harms of hunger and maintain a decent standard of living through funding food purchases.¹⁵⁶ Furthermore, stokvels may be able to fund longer-term projects, such as additions to

¹⁵⁰ See the fourth definitional element in the introduction to this chapter.

¹⁵¹ See chapter 5 below.

¹⁵² Cambridge Dictionary 'mitigation' (2024) (available at: dictionary.cambridge.org/dictionary/english/mitigation) (last accessed 16 October 2024).

¹⁵³ Cambridge Dictionary 'mitigation' (2024) (available at: dictionary.cambridge.org/dictionary/english/mitigation) (last accessed 16 October 2024).

¹⁵⁴ Schulze (n 124) 18.

¹⁵⁵ Cambridge Dictionary 'maintenance' (2024) (available at: dictionary.cambridge.org/dictionary/english/maintenance) (last accessed 16 October 2024).

¹⁵⁶ Dafuleya (n 121) 156; Matuku & Kaseke (n 19).

houses or reinforcing existing building structures, which serve as a mitigation strategy against potential harm should the structure collapse.¹⁵⁷

The risks and shocks which people in developing countries, such as South Africa, face are grouped into four contingencies: the occurrence of calamities,¹⁵⁸ earning power changes,¹⁵⁹ crises in lifestyle,¹⁶⁰ and unexpectedly large expenditures.¹⁶¹ Whilst the gaps in the formal social security system result in people resorting to ISS, the systems and networks in place allow ISS to react much faster to the impact of particularly unexpected life contingencies, and are more likely to cater to the specific needs of the individual concerned.¹⁶² This is because ISS systems are usually set up in local communities, and oftentimes involve neighbours or local family. Thus, the supporting members within the ISS networks can cater the assistance provided more specifically to those in need.

2.5 Conclusion

Despite ISS being infamously difficult and nebulous in its definition, this chapter defines the term with reference to four definitional elements. By clarifying that “informality” does not mean chaos or lack of organisation, this chapter delineates the two categories of ISS, namely kinship and community social security. From this discussion, both categories present similar organising principles, namely reciprocity, solidarity, and co-operation. The chapter further explains both the monetary and non-monetary forms of assistance which ISS offers its participants, as well as its general positive effects through mitigation, maintenance, and insurance functions.

This chapter thus contextualises ISS as part of its research into the South African state’s failure to protect and advance ISS. The following chapter provides further context by explicating the state’s historical reputation for displacing and permanently altering the functioning of ISS.

¹⁵⁷ Matuku & Kaseke (n 19).

¹⁵⁸ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 570. These include “flood, fire, civil unrest, famine.”

¹⁵⁹ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 570. These include “disability, ill health, loss of assets.”

¹⁶⁰ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 570. These include “death and marital breakdown.”

¹⁶¹ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 570. These include “hospital expenses, wedding.”

¹⁶² Boanada-Fuchs & Boanada Fuchs (n 74) 416.

Chapter 3

Historical reliance on informal social security

The previous chapter defines informal social security ('ISS') as it exists in contemporary South Africa. However, people's reliance on ISS is not new, nor is the state's influence on kinship and community networks. This chapter discusses the historical development of social security in South Africa, contextualising the compounding problems and challenges in which contemporary ISS functions.¹⁶³ It illustrates two paths of development. Firstly, it traces the disruption of traditional methods of support ('ISS') by the relevant authorities of the time. Secondly, it illustrates kin and community support despite difficult circumstances.

This chapter begins by discussing the forms of support that existed before European colonisation,¹⁶⁴ and subsequently delves into the centuries of colonial rule by the Dutch and the British.¹⁶⁵ Thereafter, the chapter discusses the Union of South Africa¹⁶⁶ and apartheid's impacts on ISS mechanisms.¹⁶⁷ Finally, the chapter discusses the developments since 1994, especially the economic models which influenced the state's social security expenditure.¹⁶⁸

3.1 Kin and community in South Africa before colonisation

The principles organising precolonial support structures mirrored those of contemporary ISS.¹⁶⁹ This section clarifies some characteristics commonly associated with precolonial societal organisation and support structures to emphasise the long-standing existence of ISS before the Europeans' arrival.¹⁷⁰ Precolonial societies were not a single, homogenous entity and instead organised themselves through various customs and norms.¹⁷¹ However, some characteristics illustrate a society's ability to

¹⁶³ Dekker (n 12) 20-21. See chapter 4 below regarding South Africa's contemporary formal social security framework and heading 6.1 below regarding its shortcomings.

¹⁶⁴ See heading 3.1 below.

¹⁶⁵ See heading 3.2 below.

¹⁶⁶ See heading 3.3 below.

¹⁶⁷ See heading 3.4 below.

¹⁶⁸ See heading 3.5 below.

¹⁶⁹ See heading 2.2 above for the primary organising principles of contemporary ISS.

¹⁷⁰ See here Seepamore's reference to "indigenous social security systems" by referring to traditional practices. Seepamore (n 11) 69-86.

¹⁷¹ The time before Europeans was rich with culture, conflict, and communities. See C Hamilton, BK Mbenga & R Ross 'The production of preindustrial South African history' in C Hamilton, BK Mbenga & R Ross (eds) *The Cambridge History of South Africa: Volume 1* (Cambridge University Press: New York 2010) 1-62 at 27. For more on the incorrect homogenisation of precolonial society, see the "myth of

organise itself on a flexible and adaptable case-by-case basis, like contemporary ISS.¹⁷²

Kin and community mitigated deprivation and social stagnation, serving as economic security to southern African people.¹⁷³ Kinship networks supported vulnerable members of society, a multi-generational safety net spanning from early childcare to the care of older persons.¹⁷⁴ Community networks established social solidarity to distribute resources, which is the central principle of *ubuntu*..¹⁷⁵

Before colonisation, kinship networks were “the centre of production, distribution and consumption” where members continuously strengthened and maintained their relationships by, for example, property transfers or labour.¹⁷⁶ While individual families did pursue power or wealth, they did so to benefit the rest of the community.¹⁷⁷

When communities first began to settle in permanent areas and cultivate crops, they had few cattle and still depended on hunter-gatherers to fulfil nutritional needs.¹⁷⁸ In the process, their culture changed to provide risk and shock mitigation between those unaffected and affected tribes. Once agriculturalists were able to expand their cattle herds, the largest spokes of precolonial economic power began to take shape.¹⁷⁹

merrie Africa,” as coined by AG Hopkins *An economic history of West Africa* (Longman: New York 1973) at 10 and cited in J Iliffe *The African poor: A history* (Cambridge University Press: New York 1987) at 3.

¹⁷² See heading 2.2 above for the characteristics of ISS.

¹⁷³ Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 10.

¹⁷⁴ Dekker (n 12) 26. Every person had a role to play, and inclusivity organised precolonial societies, both internally and externally. Internally, older persons organised society and cared for children. Children, in turn, grew into their seniority and cared for older persons, including their appropriate burial. Externally, hospitality and the belief of each person’s sacredness allowed for a more inclusive approach to outsiders. See K Dixon-Fyle ‘Social policy with respect to care: A perspective for sub-Saharan Africa’ *International Labour Organisation* (Geneva 2002) at 5.

¹⁷⁵ Ministry for Welfare and Population Development ‘White paper for social welfare: Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa’ Government Notice R1108 as published in Government Gazette 18166 (8 August 1997) para 24. See also AS Arah *The constitutional implications of the right to social security for Non-South African Nationals* (Master of Laws: North West University, 2017) at 108; Dekker (n 12) 191. As explained in *S v Makwanyane* (1995) 6 BCLR 665 (CC) (*‘Makwanyane’*) para 224, the principle of *ubuntu* or *batho* is a concept of social solidarity, constructing a community-based culture where members rely on each other. Batswana people, for example, practice *letsema*, where people voluntarily work together for the development of others. See LDM Lebeloane & KP Quan-Baffour “‘Letsema’: A way of inculcating and preserving African indigenous knowledge in the youth through formal education in the 21st century’ (2008) 7(2) *Journal of Educational Studies* 43-49 at 43-46. See also Tshoose (n 27) 179-183.

¹⁷⁶ Dekker (n 12) 25-26.

¹⁷⁷ Lebeloane & Quan-Baffour (n 175) 46-47.

¹⁷⁸ J Parkington & S Hall ‘The appearance of food production in southern Africa 1,000 to 2,000 years ago’ in C Hamilton, BK Mbenga & R Ross (eds) *The Cambridge History of South Africa: Volume 1* (Cambridge University Press: New York 2010) 63-111 at 69, 91.

¹⁷⁹ Parkington & Hall in Hamilton, Mbenga & Ross (n 178) 107-108. For example, the Zulu patronage system *ukisisa* saw wealthier society members loaning cattle to poorer members, demonstrating the

Despite the communality, mutual support and aid, and the promotion of one another, Iliffe argued this reciprocity could hide poverty and inequality.¹⁸⁰ This research acknowledges that poverty doubtlessly existed in precolonial societies. However, such poverty oftentimes occurred due to people's lack of kin or community networks, resulting in less resource distribution and mitigation of shocks or risks.¹⁸¹ Thus, this research maintains that contemporary ISS, which derives from precolonial principles of support, is an effective poverty-reduction mechanism. As Iliffe states:

It is nevertheless true that families were and are the main sources of support for the African poor, as much for the young unemployed of modern cities as for the orphans of the past.¹⁸²

Colonialism brought a level of conflict and domination previously unseen in precolonial southern Africa. The centuries following the permanent Dutch settlement in Table Bay wrung local people of their resources, societal structures, and agency.¹⁸³ Expansion-hungry European rulers uprooted and fundamentally changed the support structures which researchers would later identify as the roots of ISS.

3.2 Impact of colonisation between 1652 and 1910

The previous section explained some traditional mechanisms of support before colonisers arrived. This section discusses the impact that European colonialism had on those methods of support.

Colonialism entails physical and legal pressure by an external force of people onto the local population, with the purpose of controlling resources and authority.¹⁸⁴ Colonisers prioritise their cultural and moral perceptions, disregarding local mechanisms, including traditional leaders and institutions.¹⁸⁵ This eventually culminated in racially biased social security mechanisms in the later Union and apartheid periods.¹⁸⁶

importance of livestock. See STM Makore & N Lubisi 'Dewesternising the South African social security law: a leap towards an Afrocentric legal curricular' (2021) 54(1) *De Jure Law Journal* 232–248 at 243–244; Seepamore in Noyoo & Boon (n 11) 77.

¹⁸⁰ Iliffe (n 171) 71.

¹⁸¹ When the Dutch arrived, they encountered groups of such people wandering the Cape beaches, calling them *strandlopers*. See Iliffe (n 171) 70.

¹⁸² Iliffe (n 171) 7.

¹⁸³ L Smith 'Historiography of South African social work: Challenging dominant discourses' (2014) 50(2) *Social Work/Maatskaplike Werk* 305–331 at 308.

¹⁸⁴ C Himonga & T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (Oxford University Press: Cape Town 2014) at 6.

¹⁸⁵ Himonga & Nhlapo (n 184) 6.

¹⁸⁶ See headings 3.3 and 3.4 below.

3.2.1 The Dutch's upheaval of traditional support structures

The Dutch and their European ideologies landed in Table Bay in 1652, under the authority and support of the Dutch East India Company ('VOC').¹⁸⁷ Dutch military units physically pressured Khoikhoi people to conclude trade agreements with Dutch settlers, which eventually deprived the Khoikhoi of thousands of cattle and sheep by the 1670s.¹⁸⁸

The settlers' increasing pressure upon the Khoikhoi, both in terms of insatiable trade demands and physical violence, led to the local population's eventual collapse. Local leaders maintained their authority through their ability to distribute land and goods (such as cattle and sheep).¹⁸⁹ When settlers deprived them of their resources, they "lost the ability to maintain social cohesion and, eventually, to resist further impositions on the part of the colonists."¹⁹⁰

The Dutch rendered the Khoikhoi powerless, forcing them into the working class of the Cape Colony.¹⁹¹ The eventual absorption of the local tribes into the Colony signalled an end to traditional methods of support, and incorporation of Western social hierarchies.¹⁹² The settlers imported their European perceptions of support and care, transforming previously well-meaning and well-functioning support structures into another method of securing capital.¹⁹³ Where support was once provided based on kin and community networks, now support was linked to labour and the advancement of profits.¹⁹⁴ The broader multi-generational support of kin and community became oriented toward individuals, prioritising men as sole breadwinners.¹⁹⁵

¹⁸⁷ R Ross 'Khoesan and immigrants: The emergence of colonial society in the Cape, 1500-1800' in C Hamilton, BK Mbenga & R Ross (eds) *The Cambridge History of South Africa: Volume 1* (Cambridge University Press: New York 2010) 168-210 at 173; J Selby *A short history of South Africa* (Allen Unwin: London 1973) at 23. The abbreviation 'VOC' derives from its Dutch name, *Vereenigde Oost-indische Compagnie*. See Ross in Hamilton, Mbenga & Ross (n 187) 168.

¹⁸⁸ W Du Plessis 'The historical functions of law' Developments after 1500' in T Humby, L Kotze & A Du Plessis (eds) *Introduction to law and legal skills* (Oxford University Press: Cape Town 2017) 83-148 at 101-102; Ross in Hamilton, Mbenga & Ross (n 187) 174. The Khoikhoi people were herding people around the Cape, whom the Europeans named "Khoikhoi." See Parkington & Hall in Hamilton, Mbenga & Ross (n 178) 108.

¹⁸⁹ Ross in Hamilton, Mbenga & Ross (n 187) 179.

¹⁹⁰ Ross in Hamilton, Mbenga & Ross (n 187) 179.

¹⁹¹ Ross in Hamilton, Mbenga & Ross (n 187) 179.

¹⁹² Dekker (n 12) 28.

¹⁹³ Dekker (n 12) 28.

¹⁹⁴ Dekker (n 12) 29. See also Dixon-Fyle (n 174) 6; Patel (n 36) 32.

¹⁹⁵ Dekker (n 12) 28.

Upon their arrival in 1652, the Europeans relied upon the VOC for economic fluidity, governing, and organisation.¹⁹⁶ The settling Europeans were also vulnerable. The VOC understood its employees' vulnerability and made a series of decisions that began the shift from "being a simple fort to being a colony."¹⁹⁷

The most notable decision, for the purposes of this research, is the VOC's encouragement of a poor relief fund. The layman deacon would collect contributions after church services and religious observations.¹⁹⁸ About 10 years after Van Riebeeck's landing in the Cape, the fund provided relief for settler necessities.¹⁹⁹ Thus, the church was primarily responsible for the first form of colonial poor relief in southern Africa, based on the teachings of John Calvin.²⁰⁰

Freed slaves also received poor relief from the church, originally at the same rate as other recipients.²⁰¹ However, the early 18th century saw the beginning of distinct racial discrimination in social protection mechanisms, with non-White persons receiving less than half the benefits their White counterparts did.²⁰² The overlap between the provision of social support and the Calvinist religion, which appointed White people as superior to all other peoples, "gave religious sanction to [the Calvinists'] racial attitudes."²⁰³

The VOC's rule lasted unheeded until 1795 when the British took power over the Cape Colony to establish a naval base during the Napoleonic wars.²⁰⁴ Control temporarily vested in the Dutch once more under the Batavian Republic (which was the name of

¹⁹⁶ S Schirmer 'The nature and origins of capitalism in South Africa' *Institute for advanced social research* (Johannesburg 1997) at 31.

¹⁹⁷ Schirmer (n 196) 31; Ross in Hamilton, Mbenga & Ross (n 187) 176.

¹⁹⁸ JJ Kruger *State provision of social security: some theoretical, comparative and historical perspectives with reference to South Africa* (Master of Commerce in Economics: Stellenbosch University 1992) at 110; T van der Merwe 'Events, views and ideologies which shaped social security in South Africa' (1997) 12(1/2) *South African Journal of Economic History* 77–102 at 78.

¹⁹⁹ Kruger (n 198) 110. The relief included clothing, temporary monetary assistance, housing, and care homes for orphans and older persons.

²⁰⁰ Kruger (n 198) 110. However, Kruger notes that a mix of state, employer, community, and church all played important roles in the funding of poor relief schemes. See also Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 11; Illiffe (n 171) 97; Van der Merwe (n 198) 79.

²⁰¹ Kruger (n 198) 111 & 113.

²⁰² Kruger (n 198) 111 & 113; Van der Merwe (n 198) 79. Dutch free *burghers* set old or ill slaves free to avoid responsibility for their care. Eventually, the deacons required money from the free *burghers* for the care of newly "free" sick and older slaves. Van der Merwe (n 198) 78.

²⁰³ Patel (n 36) 32; Brown & Neku (n 10) 301-302.

²⁰⁴ J Wright 'Turbulent times: Political transformations in the North and East, 1760s-1830s' in C Hamilton, BK Mbenga & R Ross (eds) *The Cambridge History of South Africa: Volume 1* (Cambridge University Press: New York 2010) 211-252 at 211, 252-253; Schirmer (n 196) 31. See also South African History Online 'Batavian Republic 1803-1806' (2025) (available at: sahistory.org.za/article/batavian-republic-1803-1806) (last accessed 28 January 2025).

the French-controlled Netherlands) for two years, but eventually the Dutch officially ceded power to the British in 1814.²⁰⁵

3.2.2 The British, poor relief, and informal social security

In the early 1800s, the British had a very distinct individualist ideology.²⁰⁶ The importation of British values signalled a shift in southern Africa's treatment of resourceless and poor persons. It also reinforced the White bias in the Cape's social security structure.²⁰⁷ To be poor was to be morally degenerate, and entirely the fault of oneself.²⁰⁸ The continued withdrawal of state involvement arose from the ideology that the public need not bear the weight of those who did not help themselves.²⁰⁹ Due to an emphasis on kin and community as the bearers of responsibility should an individual fail, the British advocated state involvement as a last resort for the vulnerable in society.²¹⁰

The racialised systems of "last resort" poor relief resulted in the materialisation of informal support systems in a recognisable manner during the early nineteenth century.²¹¹ African workers for English stock farmers began to organise meetings with one another on stock fair days, where members would bring food and other resources together and share with one another. These became known as "stokvels."²¹²

Stokvels as a method of alleviating poverty and resource scarcity began to spread throughout the country as African people utilising stokvels migrated with their White

²⁰⁵ Kruger (n 198) 114.

²⁰⁶ Schirmer (n 196) 2.

²⁰⁷ Patel (n 36) 32-33; Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 11; TE Manamela *South Africa's occupational retirement system: a comparative social security perspective* (Doctor of Laws: University of South Africa 2015) at 129. For more information about the British poor relief system, see Van der Merwe (n 198) 81; Smith (n 183) 309; Kruger (n 198) 115; T Besley, S Coate & TW Guinnane 'Incentives, information, and welfare: England's new poor law and the workhouse test' in WA Sundstrom, TW Guinnane & WC Whatley (eds) *History matters: Essays on economic growth, technology, and demographic change* (Stanford University Press: Redwood City 2003) 245-270 at 245-246.

²⁰⁸ Van der Merwe (n 198) 81-82.

²⁰⁹ Van der Merwe (n 198) 81-82; Besley, Coate & Guinnane in Sundstrom, Guinnane & Whatley (n 207) 246.

²¹⁰ Kruger (n 198) 115; Van der Merwe (n 198) 82.

²¹¹ Mbhekeni (n 90) 7; LE Kibuuka *Informal finance for the middle and high income individuals in South Africa: A case study of high budget "stokvels" in Pretoria* (Masters in Agricultural Economics: University of Pretoria 2007) at 20-21; Schulze (n 124) 20-21.

²¹² Mbhekeni (n 90) 7; Kibuuka (n 211) 20-21; Schulze (n 124) 20-21. The word 'stokvel' derives from the change in pronunciation of "stock fair," and is also known as rotating credit and savings clubs.

owners and employers inland, toward modern-day Gauteng.²¹³ The stokvels continued growing in popularity as a method of support *beyond* kinship, and would instead be based on commonalities, such as workplaces or living environments. One such commonality that many African people faced in the late 1800s was the necessities that arose from the deprivations and dangers of the mines.

3.2.3 Labour, migration and family during the mineral revolution

Up until the 1860s, the economy of southern Africa centred on farming and livestock trading.²¹⁴ However, the discovery of diamonds and copious gold sources caused a shift from an agrarian economy to an industrial one, whilst preserving its dependence on cheap and abundant African labour.²¹⁵

The industrialists, to whom the small-scale fortune-seekers had sold their mines, placed White workers into supervisory positions over African workers.²¹⁶ Mine owners also lobbied for legislation allowing them more control over their workers, as African communities and the working class²¹⁷ were growing in power. Their lobbying culminated in the state increasing taxes and requiring people to pay their taxes with money, which forced African people, who could not pay their taxes, into wage labour instead of farming.²¹⁸ They could not pay with grain, and their grain did not sell enough to pay their taxes.

An extreme example of attempts to control the labour force manifested in enclosed mining compounds.²¹⁹ The first mining compound in 1885 enclosed the living areas of African men, which isolated and monitored their movements, and prevented them from regularly returning home.²²⁰

The substantial increase in miners, mining compounds, and dangerous conditions led to three main consequences for (informal) social security. Firstly, as the mine owners

²¹³ Schulze (n 124) 21; Mbhekeni (n 90) 7; N Dube & E Kaseke 'Strengthening informal social security to provide meaningful social protection: The case of stokvels in Soweto' (2018) 33(1) *Journal of Social Development in Africa* 157-181 at 169.

²¹⁴ Schirmer (n 124) 26 & 40; Patel (n 36) 33.

²¹⁵ Patel (n 36) 33; Dekker (n 12) 30.

²¹⁶ N Etherington, P Harries & BK Mbenga 'From colonial hegemonies to imperial conquest, 1840-1880' in C Hamilton, BK Mbenga & R Ross (eds) *The Cambridge History of South Africa: Volume 1* (Cambridge University Press: New York 2010) 319-391 at 370, 374.

²¹⁷ The working class here refers to the miners who increasingly engaged in industrial action, such as trade unions and occupation for occupational injuries and diseases. See Dekker (n 12) 30.

²¹⁸ Dekker (n 12) 30.

²¹⁹ Etherington, Harries & Mbenga in Hamilton, Mbenga & Ross (n 216) 376.

²²⁰ Etherington, Harries & Mbenga in Hamilton, Mbenga & Ross (n 216) 374.

sought more profit, they began abandoning safety precautions to save money, and thus the mines became more dangerous for miners.²²¹ Religious groups and mine owners' "private health arrangements"²²² laid the foundation for the mining sector's racialised social security, due to the increased visibility of and concern for poor White people.²²³ For example, only skilled workers had access to the Present Help League, which excluded most African miners social insurance.²²⁴

Secondly, due to the lack of assistance provided by the mines, African miners began to establish their own informal protection strategies.²²⁵ The lack of connection with their communities in rural areas resulted in people seeking new, "semi-formal arrangements."²²⁶ For example, miners established burial societies to fund the burials of their co-workers.²²⁷ They would find ways to send what money they could spare back home, which continued a commitment to fund distribution reflected in contemporary ISS.²²⁸

And finally, the role of women in the rural areas changed substantially. Coping mechanisms such as stokvels had to continue growing as more men flooding to the mines meant their consistent absence from their communities.²²⁹ The women took advantage of the changing market by selling maize and cattle to the growing towns.²³⁰ However, from the mid-1600s up to this point, "slavery, colonialism, industrialisation, urbanisation and poverty have made inroads into traditional family support networks."²³¹ The number of men who lived in dangerous and deplorable mining compounds, earning negligible wages without access to their families led to severe

²²¹ Etherington, Harries & Mbenga in Hamilton, Mbenga & Ross (n 216) 370.

²²² The first of these deriving from the eventually monopolising De Beers Consolidated Mines. See Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 11.

²²³ Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 11. Whilst poverty for the White population did exist before industrialisation, it was less visible due to them living on farms and working for wealthier individuals. See Iliffe (n 171) 114.

²²⁴ Jehoma & Ornellas in Motala, Ngandu & Hart (n 7) 11.

²²⁵ Dekker (n 12) 30.

²²⁶ Dekker (n 12) 30.

²²⁷ N Dube *Informal social security and its contributions towards meeting the needs of the poor. The case of stokvels in Soweto, Johannesburg* (Doctor of Philosophy: University of Witwatersrand 2018) at 58; Dekker (n 12) 30.

²²⁸ James (n 87) 1038

²²⁹ Etherington, Harries & Mbenga in Hamilton, Mbenga & Ross (n 216) 374; Patel (n 36) 33; LG Mpedi 'Law and Social Policy in South Africa: From Untold Suffering and Injustice to a Future Based on Human Rights' in D Davy & AHY Chen (eds) *Law and Social Policy in the Global South: Brazil, China, India, South Africa* (Routledge: New York 2023) 128-186 at 129.

²³⁰ Etherington, Harries & Mbenga in Hamilton, Mbenga & Ross (n 216) 374; Patel (n 36) 33; Mpedi in Davy & Chen (n 229) 129.

²³¹ Dekker (n 12) 29.

disconnections from their kin and communities. In the face of a changing political and economic landscape, ISS mechanisms began to falter.²³²

3.3 The Union between 1910 and 1948

The gold and diamond economy based its profits off the abundance of Africans, who worked in deplorable conditions for negligible wages. However, Africans' interests in the Treaty of Vereeniging remained disregarded and would continue to be disregarded.²³³ In 1910, the Union of South Africa consolidated the interests and territories of the two conflicting, minority White populations – the English and the Boers – in the South Africa Act.²³⁴

Both the English and the Boers had a vested interest in the increasing problem of poverty in the White population.²³⁵ Poverty, particularly within the Afrikaans-speaking Boer community did exist before the second South African war, but the visibility thereof became apparent following it due to the British concentration camps and British scorched earth policy.²³⁶ Just before the election of the National Party and the Labour Party (referred to as the Pact government) in 1924, the National Party instituted the “second language movement,” in an attempt to maintain the nation’s identity under the Afrikaans language.²³⁷ Thus, Afrikaans-speaking people became known as “Afrikaners.” The increasing Afrikaner nationalist movement’s racist anxieties

²³² Dekker (n 12) 30.

²³³ Treaty of Vereeniging (available at: omalley.nelsonmandela.org) art 8; R Cavendish ‘The peace of Vereeniging’ (2002) (available at: historytoday.com/archive/peace-vereeniging) (last accessed 30 October 2024). See headings 2.2.3 above and 2.3.1 below, respectively.

²³⁴ South Africa Act of 1909; GR Searle *A new England?: Peace and war, 1886-1918* (Clarendon Press: Oxford 2005) at 476. The South Africa Act of 1909 sec 4 united the four colonies – the Cape, Natal, Transvaal, and the Orange River Colony (Orange Free State) – under the government known as the Union of South Africa. Following this unification, other governments – under different names – came into power following elections. For example, during the 1910s, two movements began: The Labour and the National Party. With unification, these two parties came into power as the Pact government in 1924. See B Freund ‘South Africa: The Union years, 1910-1948 – Political and economic foundations’ in R Ross, AK Mager & B Nasson (eds) *The Cambridge History of South Africa: Volume 2* (Cambridge University Press: New York 2011) 211-253 at 215. However, all these different governments came into being following the first establishment of the Union in 1910. Thus, for ease of reference to the period between 1910 and 1948, this research will refer to the state as the Union state.

²³⁵ DA Becker *Neoliberalism and the State of Belonging in South Africa* (Springer Nature Switzerland AG: Cham 2021) at 125.

²³⁶ Becker (n 235) 125; Iliffe (n 171); Searle (n 234) 281, 282. A scorched earth policy refers to a leader’s official order to destroy land, including houses and farms.

²³⁷ See P Bonner “South African society and culture, 1910-1948” in R Ross, AK Mager & B Nasson (eds) *The Cambridge History of South Africa: Volume 2* (Cambridge University Press: New York 2011) 254-318 at 271.

prompted policy changes to focus on White people, leaving African people to mostly rely on themselves and develop their own, informal protection.²³⁸

The Union state in the early 1900s viewed poor White people as morally degenerate, and poor African people as infectious and disease-ridden.²³⁹ The question of reducing White poverty revolved around what a White person *ought* to be, compared to those people who were not White.²⁴⁰ The policies' focus on poor Whites led to a formalised, racially biased, and organisationally fragmented social security framework.²⁴¹

The Afrikaner anxiety over poor Whites led to the enactment of piecemeal legislation to ensure White persons' means of self-reliance, such as labour and wages.²⁴² The concern for the poor White population merged with racist ideologies and individualist, self-reliant narratives into social protection which increasingly pressured ISS systems for the neglected African population.

The ideology of self-reliance and "last resort" state-provided assistance remained entrenched in laws and policies throughout the Union and apartheid periods. In instances where the Union did provide support and initiatives to assist struggling White people, such support placed them in significantly more advantageous positions than African persons.²⁴³

Contrary to the trends in Western Europe, the first social security legislation focused on social assistance, rather than the typical fast-tracking of workers' compensation in social insurance.²⁴⁴ The state implemented the Mines and Works Act,²⁴⁵ Miners' Phthisis Allowances Act,²⁴⁶ and Miners Phthisis Act²⁴⁷ within the first three years of the Union. Notably, while these Acts focused on miners, the emphasis was on granting them or their dependants temporary compensation for work-related injuries or

²³⁸ A Gouws 'A gender perspective on social welfare in post-apartheid South Africa' in Swart et al (eds) *Welfare, religion and gender in post-apartheid South Africa: Constructing a South-North dialogue* (African Sun Media: Stellenbosch 2012) 95-164 at 107.

²³⁹ Smith (n 183) 312.

²⁴⁰ H Giliomee *The Afrikaners: Biography of the people* (NB Publishers: Cape Town 2011) 202; Becker (n 235) 93.

²⁴¹ Becker (n 235) 125; Dekker (n 12) 32.

²⁴² Dekker (n 12) 31.

²⁴³ S Schirmer 'The economic history of South Africa before 1948' in A Oqubay, F Tregenna & I Valodia (eds) *The Oxford handbook of the South African economy* (Oxford University Press: Oxford 2021) 26-46 at 41.

²⁴⁴ Dekker (n 12) 31.

²⁴⁵ Mines and Works Act 12 of 1911.

²⁴⁶ Miners' Phthisis Allowances Act 34 of 1911.

²⁴⁷ Miners Phthisis Act 19 of 1912.

illnesses, entrenching some health and safety regulations, and solely excluded African people.²⁴⁸ For example, the Miners' Phthisis Act deemed an African person's work injury as personal and thus reverted the claim to the Native Labour Regulation Act.²⁴⁹

The exclusion of African people from the scope and/or level of benefits remained a trend throughout the Union period and into apartheid. The state emphasised the upliftment and support for White people through pensions for war veterans following the first World War,²⁵⁰ grants for older persons and children,²⁵¹ and grants for people with disabilities.²⁵²

While legislation did award some benefits to Indian or Coloured people, there was clear disagreement within Parliament as to the continuance of such support. See, for example, the indecisive trend within the Old Age Pension Act,²⁵³ where it originally included, later excluded, and then once again included Coloured people with lower benefits than those White people received.²⁵⁴

The Old Age Pension Act is further notable for the purposes of this research, as it displays a trend of separate development and segregation that would become the official policy of the later apartheid state. According to Dekker, African people did not receive benefits in terms of the Old Age Pension Act, since "kinship support for the elderly was common amongst Africans."²⁵⁵ Only in 1944 did the Old Age Pension Act extend its benefits to Africans, but the benefits remained lower, thus further perpetuating the ideology that Africans support themselves and do not need the same level of support as White people.²⁵⁶ The worsening socio-economic conditions for African people placed them in a position where support to, for example, older persons, could not continue easily. While kinship support was one of the defining features of

²⁴⁸ The Mines and Works Act (n 245) reserved certain job positions for White people only, and the Miners' Phthisis Allowances Act (n 246) and Miners Phthisis Act (n 247) both defined a "labourer" as European descendants, and distinguished African people as "native labourers" who received assistance via the Native Labour Regulation Act 15 of 1911. See Dekker (n 12) 33.

²⁴⁹ Native Labour Regulation Act (n 248); Miners Phthisis Act (n 247) sec 30.

²⁵⁰ War Special Pensions Act 29 of 1916.

²⁵¹ Old Age Pension Act 22 of 1928; Children's Protection Act 31 of 1937.

²⁵² Disability Grants Act 36 of 1946.

²⁵³ Old Age Pension Act (n 251).

²⁵⁴ See Dekker (n 12) 34 fn 162.

²⁵⁵ Dekker (n 12) 34 fn 162.

²⁵⁶ H Bhorat 'The South African social safety net: Past, present and future' (1995) 12(4) *Development Southern Africa* 595-604 at 598; C Haarmann *Social assistance in South Africa: Its potential impact on poverty* (Doctor of Philosophy: University of Western Cape 2000) at 12; Dekker (n 12) 34 fn 162. As Bhorat (n 256) 597 states: "In 1947 the maximum pension for whites was five times that for Africans."

ISS, the state misplaced its belief in complete withdrawal from support due to ISS systems.

Some legislation did allow compensation or benefits to African people, particularly those in the urban areas, such as the Children's Protection Act.²⁵⁷ However, = if Africans did receive the benefits provided for, these benefits were significantly lower than those paid to White people.²⁵⁸

Instead, Africans had to rely more heavily on ISS, as the "idea took root that Africans should 'develop with their own societies.'"²⁵⁹ These ISS systems depended heavily on African peoples' ownership and occupation of land, so as to participate in the market via farming.²⁶⁰ Regardless of their dependence on land ownership, the state dealt a devastating blow to both rural and urban Africans with the Natives Land Act ('NLA').²⁶¹

The NLA designated a small percentage of land as African areas, leaving the rest for White people.²⁶² Whilst this was not the first move of ruling powers to deprive African people of land,²⁶³ the NLA deprived African people from purchasing property or participating in sharecropping.²⁶⁴

The provisions of the NLA encouraged White land ownership whilst depriving the African population of their capacity to profitably farm, and thus compromised their economic well-being, causing a domino effect on their social and cultural organisation.²⁶⁵ Instead, Africans had to resort to more informal economic survival strategies, including defensive farming, migration to urban areas, or finding jobs for

²⁵⁷ Children's Protection Act (n 251);

²⁵⁸ Haarmann (n256) 12.

²⁵⁹ Schirmer in Oqubay, Tregenna & Valodia (n 243) 39.

²⁶⁰ L Modise & N Mtshiselwa 'The Natives Land Act of 1913 engineered the poverty of Black South Africans: a historico-ecclesiastical perspective' (2013) 39(2) *Studia Historiae Ecclesiasticae* 359-378 at 4.

²⁶¹ Natives' Land Act 27 of 1913 ('NLA').

²⁶² Schirmer in Oqubay, Tregenna & Valodia (n 243) 40.

²⁶³ See the Glen Grey Act 24 of 1894, which led to severe land dispossession and labour taxation for African people. For more information, see Schirmer in Oqubay, Tregenna & Valodia (n 243) 39; B Visser *Enfranchised Africans and disfranchising legislations: An analysis of the educated landowners of Queenstown as an African middle class, c.1872-1909* (Master of Arts: Stellenbosch University 2021) at 126-157.

²⁶⁴ Freund in Ross, Mager & Nasson (n 234) 236. Sharecropping referred to African farmers working on White-owned farms.

²⁶⁵ Schirmer in Oqubay, Tregenna & Valodia (n 243) 40; Modise & Mtshiselwa (n 260) 4.

“educated Africans as teachers, nurses, or administrators in the growing bureaucracies of the African ‘reserves’.”²⁶⁶

Agriculture had once again soared in value for the South African economy, and in the 1920s the White population took advantage thereof, with White land ownership increasing by 23% in 10 years. However, drought and the Great Depression caused a jaw-dropping soar of 150% in White poverty – about a sixth of all White people.²⁶⁷

The substantial increase in White poverty promoted the state to form the Department of Social Welfare in 1937, which “signalled a conscious state decision to become more involved in welfare programmes.”²⁶⁸ The Department’s services were geared toward White interests and the state refused to provide for a more consolidated and comprehensive social security system – mainly due to affordability concerns.²⁶⁹ Through its refusal to expand expenditure and elaborate its social security provision, the state reaffirmed its ideology toward self-reliance in respect of both African and White people, with a “last-resort” mentality for any state-provided assistance.²⁷⁰

Due to the restricted social security efforts of the Union state, an unsettled White population lent its ears to growing nationalist Afrikaner politics. The National Party, an Afrikaner political party, leveraged the populace’s dissatisfaction with the Union state and eventually won out in the 1948 election.²⁷¹ Whilst still under the British Crown, the National Party would soon begin implementing harsher boundaries between the races of South Africa, in what became known as the apartheid (separateness) period. The ideologies of those involved, when combined with the power to execute them, remain a stain on South Africa’s contemporary social security legislation.

²⁶⁶ Schirmer in Oqubay, Tregenna & Valodia (n 243) 40. The term “defensive farming” refers to a type of farming indicating a claim on a piece of land, and not for food. See United Nations *Convention to Combat Desertification: Conference of the parties ICCD/COP(14)/20* (2019) para 15.

²⁶⁷ Schirmer in Oqubay, Tregenna & Valodia (n 243) 40.

²⁶⁸ WP Visser ‘Shifting RDP into GEAR: The ANC Government’s Dilemma in Providing an Equitable System for Social Security for the “New” South Africa’ *ITH Linzer Konferenz: Stellenbosch University* (Stellenbosch 2004) at 3.

²⁶⁹ Visser (n 268) 3.

²⁷⁰ Visser (n 268) 3.

²⁷¹ Haarmann (n 256) 13; Dekker (n 12) 35.

3.4 The apartheid state and the National Party's welfare

[The apartheid government] sought to create a state whose purpose was white political and economic empowerment. The apartheid state was a massive white welfare state combined with protectionist economic policies to placate industrial interests.²⁷²

The previous section elaborated upon the social security mechanisms implemented by the Union state, which attempted to broaden the scope of social security beyond racial lines.²⁷³ However, the Union state could not and would not equalise the levels of benefits.²⁷⁴ The change in the political and legislative spheres caused a rippling effect across the socio-economic conditions of South Africa: positive for the White population, and immensely negative for the African, Indian, and Coloured population.

3.4.1 The apartheid state's ideology

The apartheid state's segregationist legislation relating to pass laws, land occupation, language, profession, identity, and even personal relationships had as much an effect on ISS as social security legislation, if not more so.²⁷⁵

Between 1951 and 1980, the National Party constructed the policy of separate development. Hendrik Verwoerd, the "architect of apartheid," proclaimed that South Africa's development relied on separate development, as it could not completely leave Africans to fend for themselves, nor could it integrate them.²⁷⁶ The policy of separate development was nothing more than a method of "domination and inequality,"²⁷⁷ albeit petitioned as a way of assisting African people and their communities.

The National Party fragmented social protection mechanisms along racial lines.²⁷⁸ Such fragmentation entrenched and reaffirmed racial discrimination in the provision of services and the quality thereof.²⁷⁹ White people received a greater range of benefits at higher rates, and the needs of African communities remained neglected and underfunded.²⁸⁰

²⁷² Becker (n 235).

²⁷³ Haarmann (n 256) 13.

²⁷⁴ Haarman (n 256) 12; Bhorat (n 256) 597.

²⁷⁵ Dekker (n 12) 34-35.

²⁷⁶ TD Moodie 'Separate Development as a Failed Project of Social Engineering: The Flawed Logic of Hendrik Verwoerd' (2017) 69(2) *South African Historical Journal* 153-161 at 156.

²⁷⁷ M Legassick 'Legislation, ideology and economy in post-1948 South Africa' (1974) 1(1) *Journal of Southern African Studies* 5-35 at 6-7, as quoted in Becker (n 235) 144.

²⁷⁸ Visser (n 268) 4.

²⁷⁹ Visser (n 268) 4.

²⁸⁰ Visser (n 268) 4.

The apartheid state kept any benefits it afforded to non-White groups low.²⁸¹ The belief was that the White population's taxes paid for Africans, and thus the benefits remained low to account for the smaller group of taxable African people.²⁸²

When referring to the ideology of a group, there is an element of abstraction or imagination involved. Legassick, however, emphasises that any discussion on the apartheid state's ideology must anchor itself within the policies and legislation enacted during apartheid's domination.²⁸³ Thus, this section turns to the discussion of apartheid legislation and the impact that it had on ISS mechanisms.

3.4.2 Apartheid legislation and social security

The apartheid state changed the Union state's attempt to broaden the scope of unemployment benefits. Under the Union, the Unemployment Benefit Act²⁸⁴ removed the qualification that a beneficiary must earn above a minimum income threshold, thus enabling more African people to contribute.²⁸⁵ However, the apartheid state reimplemented this minimum income threshold, and reversed the Union's attempt at social insurance inclusivity.²⁸⁶ While African people could contribute under the apartheid state's social insurance, an income threshold widened the gap between White and African social insurance, since African people earned lower incomes than White people and thus could not qualify to contribute.²⁸⁷ Due to the threshold amount for contributions, fewer Africans received social insurance and thus social security.²⁸⁸

As with the Union's initial exclusion of African people from social security, the apartheid state continued to argue that its social assistance exclusion and income-dependant qualification for African social insurance were part of "a system more in keeping with their indigenous practices and customs."²⁸⁹

The plight within African communities was not isolated. Indian and Coloured persons could only receive unemployment benefits for a period of thirteen weeks, whereafter they could only continue receiving benefits if they undertook employment the state

²⁸¹ See heading 3.2.1 above.

²⁸² Borat (n 256) 598; Haarmann (n 256) 13.

²⁸³ Legassick (n 277) 6-7; Becker (n 235) 144.

²⁸⁴ Unemployment Benefit Act 35 of 1937.

²⁸⁵ Unemployment Insurance Act 53 of 1946.

²⁸⁶ Unemployment Insurance Amendment Act 41 of 1949; Haarmann (n 256) 13; Borat (n 256) 598.

²⁸⁷ Dekker (n 12) 35; Haarmann (n 256) 13.

²⁸⁸ Haarmann (n 256) 13; Borat (n 256) 598.

²⁸⁹ Borat (n 256) 598.

offered.²⁹⁰ This thirteen-week period changed to only six when the Unemployment Insurance Fund could not meet the demand for benefits.²⁹¹

To receive their pensions, Indian and Coloured people had to appear as a “superior class”,²⁹² which was subject to the District Pensions Officer’s opinion.²⁹³ The benefits the Indian and Coloured populations received differed in the 1940s and 1950s, with Coloured people receiving between R14,00-R20,00 more than Indian people. Much later, in 1968, the disparate payments for the Indian and Coloured communities finally equalised – to about half of what White people received.²⁹⁴

The quality of services varied greatly between White and non-White population groups, increasing poverty as the state directed less and lower quality resources and services to non-White groups.²⁹⁵ African people were either explicitly or implicitly excluded from adequate social security and thus had to continue relying on ISS structures for protection. As Dekker stated: “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.”²⁹⁶ The increase in poverty resulted in less people being able to contribute to their ISS networks, whilst simultaneously relying more on said networks. The resources within the ISS networks began to deplete, and as more people relied on ISS, the less it could respond to participants’ needs. ISS could eventually not effectively respond to shocks, risks, and general maintenance of a decent standard of living.

The state did not intend the formal social security system to support non-White persons.²⁹⁷ Social insurance geared itself toward formal employment, as most employees were White.²⁹⁸ Social assistance responded effectively to White poverty, as they were a smaller group.²⁹⁹ The White population thus received the benefit of a

²⁹⁰ Borat (n 256) 598.

²⁹¹ Borat (n 256) 598.

²⁹² Borat (n 256) 598.

²⁹³ Borat (n 256) 598.

²⁹⁴ Borat (n 256) 598-599.

²⁹⁵ Dekker (n 12) 36.

²⁹⁶ Dekker (n 12) 36. Legislation such as the Promotion of Bantu Self-Government Act 46 of 1959 lent legislative support in favour of Africans relying upon one another, and not on the state.

²⁹⁷ Dekker (n 12) 37.

²⁹⁸ Dekker (n 12) 37.

²⁹⁹ Dekker (n 12) 37.

formal social security system, whereas non-White persons relied on informal support through ISS.³⁰⁰

Botha's administration, coined the "late apartheid period" of the 1980s, attempted to restructure social security to eliminate racial boundaries.³⁰¹ Social security favouring White people reflected declining growth, and, as Visser argues, the state underwent neoliberal restructuring to get people of all races to support apartheid.³⁰² Despite the state's attempts to equalise the payment of benefits, it remained markedly resistant to any increase in the national social security budget, and the state's design of formal social security was not intended for the entire population.³⁰³ Non-White persons' social security thus could not increase to match the benefits White people received.³⁰⁴

In summary, the policies favouring White people above all others had not been sustainable for the country, but Becker argues that apartheid never intended these policies to be sustainable.³⁰⁵ Apartheid aimed to uplift White people, and thus, as Becker describes:

With the end of the Cold War apartheid was done but it had achieved what it set out to do and its legacy would continue well into the democratic era.³⁰⁶

3.5 Post-1994 developments in the economic and social sphere

The new dispensation faced many changes, including the fragmented, inefficient, discriminatory apartheid-era social security. The last stretch of apartheid had the National Party repaying foreign debt and borrowing money from the International Monetary Fund ('IMF'),³⁰⁷ attempting to bolster an economy racked with international sanctions.³⁰⁸ In the first years of democracy, the governing party – the African National Congress ('ANC') – fought to bring both social and economic stability.

In response to socio-economic vulnerabilities within the country, the ANC and its partners instituted the Reconstruction and Development Plan ('RDP'). The RDP approached the question of growth by advocating for job creation and social

³⁰⁰ Dekker (n 12) 37.

³⁰¹ Visser (n 268) 5.

³⁰² Visser (n 268) 5.

³⁰³ Visser (n 268) 5; Dekker (n 12) 38.

³⁰⁴ Visser (n 268) 5.

³⁰⁵ Becker (n 235) 128.

³⁰⁶ Becker (n 235) 128.

³⁰⁷ P Bond 'South African social policy "tokenism" as austerity grips' (2016) 46(1) *Africanus* 1–20 at 34.

³⁰⁸ Becker (n 235) 149.

security.³⁰⁹ The RDP had a positive effect on social security, as combined with the Constitution's³¹⁰ entrenchment of the right to access social security, the state began to make inroads on reforming the system and expanding benefit provision across racial boundaries.³¹¹

However, Unfortunately, the RDP was not formulated or implemented in such a way as to be sustainable. Some of the reasons for its inefficiency were: its focus on indirect social security such as access to water and electricity; the insistence that people must reduce their dependency on the state for social grants; the new post-1994 state's inability to implement the RDP's goals due to maladministration and insufficient budget; and the use of vague and abstract language instead of set cemented social security targets.³¹²

A prevailing factor influencing the inefficiency of the RDP was an increasing neoliberal market influence.³¹³ The currency crisis of 1996 and the economy's slow growth, when paired with the RDP's inefficiency, resulted in the state adopting the neoliberal Growth, Employment and Redistribution ('GEAR') macroeconomic policy.³¹⁴

GEAR advocated for foreign investment strategies, which included reducing state spending through austerity measures³¹⁵ and introducing more regulation with fewer constraints in the labour sector (through "regulated flexibility").³¹⁶ GEAR's adoption influenced the state's understanding of "available resources" under section 27 of the Constitution.³¹⁷ Thus, it indirectly influenced social security policies through its fiscal conservatism.³¹⁸

³⁰⁹ WP Visser 'From RDP to GEAR to post-Polokwane. The ANC and the provision of social security for post-apartheid South Africa' (2009) 45(3) *Social Work/Maatskaplike Werk* 225-240 at 229-230; Visser (n 268) 6; V Padayachee & R Van Niekerk *Shadow of liberation: Contestation and compromise in the economic and social policy of the African National Congress, 1943-1996* (Wits University Press: Johannesburg 2019) at 104-108; Heywood (n 27) 26.

³¹⁰ Constitution (n 13).

³¹¹ Visser (n 268) 7.

³¹² Visser (n 309) 230.

³¹³ Visser (n 309) 230

³¹⁴ Visser (n 309) 231; Dekker (n 12) 42.

³¹⁵ S Narsiah 'Neoliberalism and privatisation in South Africa' (2002) 57(1) *GeoJournal* 3-13 at 3.

³¹⁶ Makino (n 25) 12.

³¹⁷ Makino (n 25) 12; Dekker (n 12) 42; Constitution (n 13) sec 27(2).

³¹⁸ Dekker (n 12) 42. For example, Makino (n 25) 13 refers to the Lund Committee (n 33), which acknowledged that GEAR's fiscal restraints would not be able to support an equal, deracialised grant as it stood then. The Committee thus simulated the state's costs according to GEAR's fiscal conservatism, concluding that eliminating the grant in its current state and reintroducing it with lower benefits would be the only way of achieving racial equality.

GEAR recognised the importance of social grants, but prioritised fiscal conservatism through reducing expenses.³¹⁹ Despite the adoption by Cabinet of the White Paper for Social Welfare promoting a people-centred approach, it advocated for the country's development not through social security, but through job creation and foreign investment.³²⁰ The White Paper remained vague in concrete targets and prioritised other socio-economic rights above social security.³²¹ The state maintained that social security serves as temporary assistance, otherwise people would become dependent on the state.³²²

Ultimately, the neoliberal reforms of the late apartheid period bled over into the new dispensation, including the IMF and World Bank's promises to help the South Africa grow fiscally subject to South Africa implementing neoliberal reforms.³²³ The new state's lack of experience with the economics of running a country left it open to such influence.³²⁴ The internal pressures to adopt austerity measures, when combined with the state's refusal to take the IMF's loans, resulted in "arguably the worst possible outcome – IMF policies without IMF support."³²⁵

The South African state has since adopted a range of economic policies, from the RDP to GEAR and, more recently, the 2012 National Development Plan 2030 and the Economic Recovery and Reconstruction Plan in 2020.³²⁶ Despite a seemingly stable economy, in the face of the 2008/2009 economic recession, the state restructured the economy by incorporating constraints, with the intention to help the economy. However, these constraints caused poor persons to suffer the most.³²⁷

Throughout South Africa's history, the state has repeatedly uprooted and destabilised ISS mechanisms. The apartheid state caused disruption and pain so tangible that the international community criticised and sanctioned it. And the new state promised change and upliftment, equality of opportunity and quality of life. However, people

³¹⁹ Makino (n 25) 13.

³²⁰ Minister for Welfare and Population Development (n 175) Preamble; Visser (n 309) 230; Dekker (n 12) 43.

³²¹ Dekker (n 12) 44.

³²² Visser (n 309) 230.

³²³ Padayachee & Van Niekerk (n 309) 170-176; H Marais 'Book reviews: Shadow of Liberation: Contestation and Compromise in the Economic and Social Policy of the African National Congress, 1943–1996' (2021) 73(4) *South African Historical Journal* at 962–964 at 962-963.

³²⁴ Visser (n 268) 10; Padayachee & Van Niekerk (n 309) 229.

³²⁵ Padayachee & Van Niekerk (n 309) 164.

³²⁶ Heywood (n 27) 26-27.

³²⁷ D Fourie 'The neoliberal influence on South Africa's early democracy and its shortfalls in addressing economic inequality' (2024) 50 *Philosophy and Social Criticism* 823–843 at 831.

could not and cannot access jobs, which neoliberal policy depends upon, driving up unemployment and poverty rates.³²⁸ It is true that some African persons are not poor, but, even today, most African persons in South Africa are poor.³²⁹ How, then, can people support themselves through ISS? Where is the capital to invest into stokvels, or to redistribute amongst kin? What happens when an informally employed worker gets injured, sick, or passes away? What happened to the state's commitment to its people?

3.6 Conclusion

The governing authorities after 1652 disrupted, uprooted, and displaced traditional support structures. With increasing levels of intrusion, including violence and forced trade, the Dutch overtook the Cape region and spread inland. While displacing traditional support mechanisms, the development of poor relief mechanisms served to aid vulnerable members of society, often coinciding with religious humanitarian aid.

As time went on, African communities developed their existing or, at times, new coping mechanisms due to their displacement and forced adaptation. Stokvels and burial societies began to fill in the gaps. But ever-increasingly complex changes brought with it destitution, isolation, and alienation in the name of capital and profit. When the mineral revolution began in the 1860s, South Africa's history was rewritten in the sound of clanging hammers.

The dangers of the mines and increasing visibility of Poor White people prompted the state to introduce social security measures. But the African population, one that had been wrung dry of its adaptability and flexibility, its resources and its traditions, was left to fester in its wounds.

Gradually, anti-apartheid movements, church alliances, and economic strife of the African population received more attention from the state. Gradually, that is, with what money the state could afford with its neoliberal approach to spending. Matching the benefits which White people had received was nigh impossible in the face of neoliberalism, and one thought reigned supreme: work is better than "handouts."

³²⁸ A Cloete 'Youth unemployment in South Africa - a theological reflection through the lens of human dignity' (2015) 43(3) *Missionalia: Southern African Journal of Mission Studies* 513–525 at 515. Despite the economy growing, the neoliberal influence did not, as expected, generate the necessary employment.

³²⁹ Fourie (n 327) 832.

Today the issues of fragmentation and inequality remain.³³⁰ The lack of a comprehensive approach to social security leads to gaps, through which the destitute and vulnerable fall, with only ISS to catch them. Before discussing the shortcomings in the formal social security framework, the following chapter explains the framework itself.

³³⁰ See heading 6.1.5 below.

Chapter 4

South African legislative framework

The previous chapters discussed the practices, behaviours, and history of informal social security ('ISS').³³¹ Having explained ISS as this research's central axis, this chapter serves as its backbone by explaining South Africa's contemporary formal social security structure.

South Africa spent an estimated 2% more of its gross domestic product ('GDP') on social security than other developing countries in 2023,³³² investing into its most effective poverty reduction strategy.³³³ However, South Africa's formal social security framework suffers from shortcomings that increase the vulnerability of ISS.³³⁴ These shortcomings cause people to solely rely on ISS, eventually decreasing its ability to respond to shocks and risks.³³⁵

Before discussing the shortcomings of the formal system, and the state's duty to protect and advance ISS, this research must first explain the formal system and its functioning. This chapter begins by discussing the constitutional right to access social security,³³⁶ including the judicial interpretations of socio-economic rights within the Constitution, in particular section 27.³³⁷ Thereafter, it discusses the social assistance and social insurance framework, as they give effect to the section 27 right to access social security.³³⁸

³³¹ See chapters 2 & 3 above, respectively.

³³² C Allison & N Pillay 'Cash transfers and prices: What is the impact of social welfare on prices?' *South African Reserve Bank* (Pretoria 2024) at 2. For the financial year of 2022/2023, the Department of Social Development was allocated about 14% of the National Treasury's expenditures, with the largest payouts constituting the older person's grant and the child support grant. See Department of National Treasury 'Consolidated financial statements for the year ended 31 March 2023' *National Treasury* (31 March 2023) ('National Treasury CFS') at 22.

³³³ L Patel & J Triegaardt 'South Africa: Social security, poverty alleviation and development' in J Midgley & K Tang (eds) *Social Security, the Economy and Development* (Palgrave Macmillan: Hampshire 2008) 85-109 at 85; National Treasury CFS (n 332) 22.

³³⁴ See heading 6.1 below.

³³⁵ See heading 6.1 below.

³³⁶ See heading 4.1 below.

³³⁷ Constitution (n 13) secs 26-29. See headings 4.1.2 and 4.1.3 below.

³³⁸ Constitution (n 13) sec 27. See headings 4.2 and 4.3 below.

4.1 Constitution of the Republic of South Africa

4.1.1 Introduction to the Constitution and its socio-economic rights

The Constitution's drafters entrenched fundamental values into the new democratic dispensation, which underpin the interpretation of all other rights: "Human dignity, the achievement of equality and the advancement of human rights and freedoms."³³⁹

These fundamental values, and all provisions within the Constitution, serve as the country's supreme law, replacing the previous dispensation's parliamentary sovereignty with constitutional supremacy.³⁴⁰ All conduct and laws must abide by the Constitution's provisions, including any positive obligations it places upon the state or persons.³⁴¹ Should any law or conduct not abide by the provisions of the Constitution, it is unconstitutional and thus unlawful and invalid.³⁴²

As part of its commitment to "heal the divisions of the past," the Constitution's Bill of Rights obliges the state to respect, protect, promote and fulfil the rights contained therein.³⁴³ Some of the rights that the Constitution advocates for are the right to equality and freedom from discrimination, which includes the equal enjoyment of all other rights.³⁴⁴ It further promotes the right of dignity afforded by the mere fact of being

³³⁹ Constitution (n 13) sec 1(a).

³⁴⁰ Constitution (n 13) sec 1(c) & 2; MP Olivier et al in MP Olivier, N Smit & ER Kalula (eds) *Social security: A legal analysis* (LexisNexis Butterworths: Durban 2003) 51-122 at 53.

³⁴¹ In other words, any actors receiving obligations from the Constitution must fulfil them. See Constitution (n 13) sec 2.

³⁴² I Currie & J De Waal 'Structure of Bill of Rights litigation' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (Juta: Cape Town 2013) 23-28 at 23. This includes abiding by the requirements of "justifiable limitation," as the below sections discuss.

³⁴³ Constitution (n 13) Preamble & secs 7(2), 8(1); Olivier et al in Olivier, Smit & Kalula (n 340) 51. Section 8(2) also binds all other persons, including judicial and natural persons, depending upon the nature of the right and any duty imposed thereby.

³⁴⁴ Constitution (n 13) sec 9, in particular sec 9(2).

human.³⁴⁵ And importantly, for the purposes of this research, the Constitution entrenches the right of everyone to access social security.³⁴⁶

Section 27(1)(c) provides that: “Everyone has the right to have access to... social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”³⁴⁷ This right is part of a host of other socio-economic rights within the Constitution. A child’s best interests must always be the highest priority in matters involving children, and thus the Constitution specifically provides for their rights to “basic nutrition, shelter, basic health care services and social services.”³⁴⁸ Other rights linked to social security are everyone’s rights to access adequate housing, education, health care services, and sufficient food and water.³⁴⁹

However, all these rights, excluding the right to education and children’s rights, have internal limitations. Sections 26(2) and 27(2) qualify the rights to housing, social security, health care, and sufficient food and water by stating the state need only enact *reasonable* legislative and other measures to *progressively* realise these rights *within its available resources*.³⁵⁰

These internal limitations afford the state some flexibility in its conduct. However, from these limitations, questions of interpretation arise, which impact this research’s reliance on the right to access (informal) social security and the state’s unconstitutional non-fulfilment thereof. The following subsection clarifies the courts’ interpretation of the Constitution’s socio-economic rights.

4.1.2 Interpretation of socio-economic rights

³⁴⁵ Constitution (n 13) sec 10. The wording within this section is the “inherent” dignity, which means that one is afforded this right by mere virtue of being human. See *Qwelane v South African Human Rights Commission and Another* 2022 (2) BCLR 129 (CC) para 132 where the Court explains that: “There is often a complex relationship between [inherent humanity and dignity]. In some cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.” See also *Harksen v Lane N.O and Others* 1997 (11) BCLR 1489 para 47; *S v Lawrence, S v Negal, S v Solberg* 1997 (10) BCLR 1348 para 168; Cambridge Dictionary ‘inherent’ (2024) (available at: dictionary.cambridge.org/dictionary/english/inherent) (last accessed 16 October 2024).

³⁴⁶ Constitution (n 13) secs 26 & 27.

³⁴⁷ Constitution (n 13) sec 27(1)(c).

³⁴⁸ Constitution (n 13) secs 28(2) & 28(1)(c).

³⁴⁹ Constitution (n 13) secs 26, 29, 27(1)(a) & (b).

³⁵⁰ Constitution (n 13) secs 26(2) & 27(2); *Soobramoney* (n 28) para 11.

This subsection interprets the right to access social security, with reference to the courts' interpretation of socio-economic rights. As the right to access social security, which this research centres on, falls within the Bill of Rights, this subsection begins by briefly explaining the litigation and analysis process of constitutional rights. Following thereon, it discusses the primary Constitutional Court cases that inform any analysis of socio-economic rights, particularly their interpretations of key phrases within sections 26 and 27 of the Constitution.

There are two stages concerning the litigation and analysis of a right in the Bill of Rights. The first stage relates to procedural matters and is not relevant for the purposes of this research. The second stage concerns substantive matters and follows a two-part process. Firstly, the court turns to the Bill of Rights to interpret the right concerned and whether the responding litigant has infringed upon it.³⁵¹ Secondly, should the court's findings be in the affirmative, the responding litigant must prove that such infringement is justifiable – in other words, that they justifiably limited the right by virtue of the internal or general limitation clauses in the Constitution.³⁵²

The general limitation clause in section 36 stipulates that any right in the Bill of Rights may be limited if the limitation is “reasonable and justifiable in an open and democratic society based on equality, human dignity and freedom,” and includes factors informing such determination.³⁵³ Section 36 furthermore allows any other right to provide for limitations.³⁵⁴ This is where two other types of limitations may become relevant to analysing the infringement of a right: demarcation and special limitations clauses.³⁵⁵

Demarcated rights have certain conditions attached to their availability, whereas special limitation clauses create their own criteria in determining the specific right's infringement.³⁵⁶ Section 27(2) is a special limitation clause, as it attaches the criteria

³⁵¹ I Currie & J de Waal 'Limitation of rights' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (Juta: Cape Town 2013) 150-175 at 153.

³⁵² Currie & De Waal in Currie & De Waal (n 351) 174.

³⁵³ Constitution (n 13) secs 36(1)(a)-(e).

³⁵⁴ Constitution (n 13) sec 36(2).

³⁵⁵ Currie & De Waal in Currie & De Waal (n 351) 174.

³⁵⁶ Currie & De Waal in Currie & De Waal (n 351) 174. An example of demarcated rights is the freedom of expression, where every person has the right to express themselves and their opinions, subject to the conditions that such expression does not advocate for war, incite imminent violence, or advocate for hatred. See Constitution (n 13) secs 16(1)-(2). Demarcated rights often fall into the first part of the substantive inquiry, namely whether the right has been infringed, whereas special limitation clauses usually fall into the second part of the substantive stage.

of “reasonability,” “progressive realisation,” and “within available resources” to the right to access social security.³⁵⁷

The Constitutional Court in *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (*‘Khosa and Mahlaule’*) stated in its consolidated judgment for both applicants that a section 36 limitation analysis only becomes relevant if its requirement for reasonableness is different than the reasonableness in sections 26 and 27.³⁵⁸ This research focuses on the special limitation clause of section 27(2), and not on the general limitation clause in section 36, as the primary socio-economic Constitutional Court cases focused upon the special limitation clauses’ reasonableness criteria.³⁵⁹ While these cases have not expressly considered ISS, their analyses of other sections with similar wording and limitations extend to the right to access (informal) social security in section 27(1)(c) read with 27(2).

In 1996, the *Certification of the Constitution of the Republic of South Africa, 1996* judgment (*‘First Certification’* judgment) determined that socio-economic rights are justiciable – in other words, a court can order other branches of state to rectify their infringement of, for example, a litigant’s right to access social security.³⁶⁰ The *First Certification* judgment did not find the distinction between first- and second-generation rights³⁶¹ appropriate, as both had the potential of judicial overreach into the democratically elected legislature and executive branches. It stated that: “At the very minimum, socio-economic rights can be negatively protected from improper invasion.”³⁶²

Before the decade was over, the primary grouping of Constitutional Court matters affirmed the *First Certification* judgment. These cases are *Soobramoney v Minister of*

³⁵⁷ *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) (*‘Khosa & Mahlaule’*) paras 83-84.

³⁵⁸ *Khosa & Mahlaule* (n 357) para 84; Tshoose (n 27) 167.

³⁵⁹ See *Grootboom* (n 28) and *Treatment Action Campaign* (n 28). As Currie & De Waal in Currie & De Waal (n 351) 174 appropriately summarised, the cases concerned have “... effectively collapsed the usual two-stage procedure for the assessment of justifiability when assessing the justification of alleged breaches of the positive obligations arising from these sections.”

³⁶⁰ *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) (*‘First Certification’* judgment).

³⁶¹ First generation rights are civil and political in nature and are traditionally negative rights such as the right to vote or equality. Second generation rights are social and economic in nature and are traditionally positive rights such as the right to social security or housing. See I Currie, J de Waal, J Brickhill & N Ferreria ‘Socio-economic rights’ in I Currie & J de Waal (eds) *The Bill of Rights handbook* (Juta: Cape Town 2013) 563-597 at 565.

³⁶² *First Certification* judgment (n 360) paras 77-78.

*Health (Kwazulu-Natal) ('Soobramoney'), Government of the Republic of South Africa v Grootboom ('Grootboom'), Minister of Health v Treatment Action Campaign ('Treatment Action Campaign'), and Khosa and Mahlaule.*³⁶³

Soobramoney was the first case scrutinising the constitutionality of a socio-economic right. The question was whether a chronically ill man – Mr Soobramoney – was entitled to dialysis treatment in the face of the hospital's budgetary and resource constraints.³⁶⁴ Mr Soobramoney did not qualify for such treatment as per the hospital's criteria, and he brought the matter to the courts alleging the infringement of his section 27 right to access health care, as well as his right to life.³⁶⁵

The Court analysed whether the hospital's restriction was a justifiable limitation of his constitutional rights in terms of both sections 27(2) and 36.³⁶⁶ However, it focused much of its attention on the availability of resources, thus emphasising the special limitation in section 27(2).³⁶⁷ It held that the hospital's limited resources, when combined with its criteria aimed at curing patients instead of maintaining chronically ill ones, was a justifiable limitation to the rights to access health care of Mr Soobramoney and others with conditions like his.³⁶⁸ In explaining the limitation of the state's resources, the Court held that –

The state has to manage its limited resources in order to address all these claims [on socio-economic rights]. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.³⁶⁹

Soobramoney emphasised that the hospital's treatment facilities would collapse if all people with Mr Soobramoney's condition received treatment, resulting in complete deprivation for everyone.³⁷⁰ While the Constitution entitles every person to their socio-economic rights, the state can simply not provide everyone with the necessary services and resources. In the context of social security, despite its constitutional guarantee, the state's resources limit its ability to fulfil said guarantee.

³⁶³ *Soobramoney* (n 28); *Grootboom* (n 28); *Treatment Action Campaign* (n 28); *Khosa & Mahlaule* (n 357).

³⁶⁴ *Soobramoney* (n 28) paras 12-13.

³⁶⁵ *Soobramoney* (n 28) para 31.

³⁶⁶ *Soobramoney* (n 28) paras 31, 54.

³⁶⁷ See, for example, *Soobramoney* (n 28) paras 1, 11, 30, 31, 34, 40, and notably para 43.

³⁶⁸ *Soobramoney* (n 28) para 31.

³⁶⁹ *Soobramoney* (n 28) para 31.

³⁷⁰ *Soobramoney* (n 28) para 26; *Dekker* (n 12) 86-87.

Soobramoney evaluated the state's conduct on a *bona fide* basis.³⁷¹ While courts can enforce socio-economic rights, *Soobramoney* set the tone for the following two Constitutional Court matters when it expressed reluctance 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."³⁷²

The next primary socio-economic case which followed *Soobramoney* was *Grootboom*. The municipality had evicted Mrs Grootboom and 900 other people, including children, from private property reserved for the state's low-cost housing programmes.³⁷³

Grootboom agreed with *Soobramoney* when it reiterated judicial restraint in socio-economic matters. Building upon *Soobramoney's* emphasis on the hospital's reasonable conduct,³⁷⁴ *Grootboom* clarified that courts would intervene in other state branches in the instance of unreasonable conduct.³⁷⁵ Thus, *Grootboom* implemented a reasonableness test to determine whether the state had infringed upon the respondents' section 26 rights.³⁷⁶

In short, the Court's reasonableness test comprises several factors.³⁷⁷ The state's conduct is reasonable if its programmes receive the necessary resources (both financial and human) and such programmes can fulfil the right concerned through a comprehensive, coherent, coordinated, balanced, flexible, and transparent plan.³⁷⁸ These programmes should not only fulfil needs in the medium- or long-term but also in the short-term.³⁷⁹

The Court found it prudent to emphasise that the phrasing of the section 26 right to access housing is not a narrowing phrase, and instead expands the scope of the right's application. Section 26 does not merely advocate for programmes of shelter but for the creation and implementation of appropriate services, land, and dwelling.³⁸⁰

³⁷¹ *Soobramoney* (n 28) para 29, 45; Olivier et al in Olivier, Smit & Kalula (n 340) 71.

³⁷² Dekker (n 12) 87.

³⁷³ *Grootboom* (n 28) para 4.

³⁷⁴ *Soobramoney* (n 28) paras 24-25

³⁷⁵ *Grootboom* (n 28) para 41.

³⁷⁶ *Grootboom* (n 28) para 44.

³⁷⁷ Summarised by Liebenberg (n 27) 152-153, as cited in Currie et al in Currie & De Waal (n 361) 578.

³⁷⁸ *Grootboom* (n 28) paras 39-40, 68, 78, 95; *Treatment Action Campaign* (n 28) para 123; Liebenberg (n 27) 152-153; Currie et al in Currie & De Waal (n 361) 578.

³⁷⁹ *Grootboom* (n 28) paras 43-44, 64, 68, 99; *Treatment Action Campaign* (n 28) para 78; Liebenberg (n 27) 152-153; Currie et al in Currie & De Waal (n 361) 578.

³⁸⁰ *Grootboom* (n 28) para 35.

The Court's reasonability assessment reformulated the determination of constitutionality in sections 26 and 27. It is not the complete fulfilment of the right that determines constitutionality, but the reasonable and progressive realisation thereof.³⁸¹

The Court called upon the *First Certification* judgment when it analysed the negative duty in section 26.³⁸² However, it also emphasised that the right to housing is positive in nature.³⁸³ Due to the similar wording of sections 26 and 27, *Grootboom's* pronouncement applies to social security.³⁸⁴ As stated, the state must respect, protect, promote, and fulfil the right to access social security.³⁸⁵ The obligation to *respect* encompasses a negative right which would, for example, entail the state allowing individuals to insure themselves against life contingencies.³⁸⁶ The other three obligations are positive in nature.

In a social security context, the state must *protect* the right by establishing a regulatory framework but does not necessarily entail the direct distribution of resources. Its duties to *promote* and *fulfil*, however, require the state to distribute "positive assistance, or a benefit or service from the state."³⁸⁷ The promotion element entails establishing and effectively implementing frameworks, whereas the fulfilment element requires the state to directly provide for the required need through, for example, distributing resources.³⁸⁸

The Court held that the state's expeditious and effective realisation of the right informed its analysis, but that other influences such as the availability of resources may limit the state's ability to do so.³⁸⁹ The Court echoed *Soobramoney* when it called for a "balance between goal and means."³⁹⁰

Grootboom held that the state's conduct had not been reasonable and ordered it to implement a programme aimed at the relief of those who were most vulnerable and in need of state assistance.³⁹¹ This programme had to provide for the most vulnerable

³⁸¹ Currie et al in Currie & De Waal (n 361) 580.

³⁸² *Grootboom* (n 28) paras 20, 34. A negative duty refers to the non-interference in someone else's fulfilment of their rights. See Currie et al in Currie & De Waal (n 361) 568.

³⁸³ *Grootboom* (n 28) para 24. A positive duty requires some action from the state itself to fulfil a particular right. See Olivier et al in Olivier, Smit & Kalula (n 340) 78.

³⁸⁴ Constitution (n 13) secs 26 & 27.

³⁸⁵ Constitution (n 13) sec 7(2). See also *Grootboom* (n 28) para 21.

³⁸⁶ Olivier et al in Olivier, Smit & Kalula (n 340) 57, 78-79; *Grootboom* (n 28) para 35.

³⁸⁷ Olivier et al in Olivier, Smit & Kalula (n 340) 79.

³⁸⁸ Olivier et al in Olivier, Smit & Kalula (n 340) 80.

³⁸⁹ *Grootboom* (n 28) para 46.

³⁹⁰ *Grootboom* (n 28) para 46.

³⁹¹ *Grootboom* (n 28) paras 93-99.

people, who were living in deplorable or desperate situations, and who did not have access to land, housing, or shelter.³⁹² This included Mrs Grootboom and the people she represented.

The *Treatment Action Campaign* case served as a consolidation of both *Soobramoney* and *Grootboom*, as it concerned the right to access health care, like in *Soobramoney*, but found that the state's conduct was unreasonable, such as in *Grootboom*.³⁹³

The HIV/AIDS pandemic had swept across South Africa, including pregnant mothers who could infect their unborn children through mother-to-child transmission ('MTCT').³⁹⁴ The state established small pilot clinics³⁹⁵ for the testing of a MTCT anti-retroviral medication called Nevirapine.³⁹⁶ Most people across the country could not access these pilot sites, and the state restricted the distribution of Nevirapine, alleging constrained resources.³⁹⁷ The applicants brought the matter to court for the infringement of their rights to access health care.³⁹⁸

The question before the court was whether the state's adopted measures to provide access to healthcare services for HIV-positive mothers and their children fell short of its constitutional obligations.³⁹⁹ The Court echoed the reasonableness test as in *Grootboom*,⁴⁰⁰ and determined the state's conduct to be unreasonable.

The Court held that the state's carefulness regarding the safety and efficacy of Nevirapine did not justify its limitations on all HIV-infected mothers' rights to health care.⁴⁰¹ The lack of resources was furthermore not persuasive, as the cost of Nevirapine did not justify the state's lack of provision.

Akin to *Grootboom*, the Court compelled the state to devise and implement a comprehensive programme to distribute MTCT anti-retroviral medication. Doing so would align the state with its constitutional duty to provide access to health care for pregnant mothers and their children.⁴⁰²

³⁹² *Grootboom* (n 28) para 52; Dekker (n 12) 89.

³⁹³ *Soobramoney* (n 28); *Treatment Action Campaign* (n 28) paras 10-17.

³⁹⁴ *Treatment Action Campaign* (n 28) para 4.

³⁹⁵ Two per province. See *Treatment Action Campaign* (n 28) para 10.

³⁹⁶ *Treatment Action Campaign* (n 28) para 4.

³⁹⁷ *Treatment Action Campaign* (n 28) para 4.

³⁹⁸ *Treatment Action Campaign* (n 28) para 4.

³⁹⁹ Dekker (n 12) 90; *Treatment Action Campaign* (n 28) para 25.

⁴⁰⁰ *Treatment Action Campaign* (n 28) paras 78, 123; Liebenberg (n 27) 152-153; Currie et al in Currie & De Waal (n 361) 578.

⁴⁰¹ *Treatment Action Campaign* (n 28) para 59.

⁴⁰² *Treatment Action Campaign* (n 28) para 124-133.

Shortly after the *Treatment Action Campaign* case, the first Constitutional Court matter directly concerning social security was *Khosa and Mahlaule*. Therein, the applicants challenged the 1992 Social Assistance Act's ('1992 SAA')⁴⁰³ exclusion of permanent residents from receiving social grants.⁴⁰⁴

The Constitutional Court, reading section 27(1)(c) with section 7(1),⁴⁰⁵ held that the Constitution does not limit social security to South African citizens only. The applicants would have qualified for social assistance but for their permanent resident status.⁴⁰⁶

The Court found that the deprivation of permanent residents' right to access social security gravely impacted their access to dignity, as they could only rely on "others to enable them to meet the necessities of life and are thus cast in the role of supplicants."⁴⁰⁷ In the Court's view, the state's financial and immigration considerations do not justify denying social assistance to those in need.⁴⁰⁸ The Court held that, while the availability of resources does limit the extent to which the state can fulfil the right to access social security, such limitation "must be consistent with the Bill of Rights as a whole."⁴⁰⁹ This extension of social security was, however, premised upon the legality of permanent residents and their commitment to the country. Thus, the Court excluded temporary and unauthorised residents from receiving social grants.⁴¹⁰

⁴⁰³ SAA (n 35).

⁴⁰⁴ *Khosa & Mahlaule* (n 357) para 1. Some rights within the Bill of Rights specifically apply to South African citizens, such as Constitution (n 13) sec 19(3): the right to vote. However, many provisions within the Bill of Rights advocate for universal application, regardless of citizenship, as is the case for the right to access social security in Constitution (n 13) sec 27(1)(c).

⁴⁰⁵ Constitution (n 13) sec 7(2) provides that the rights conferred in the Bill of Rights are afforded to "all people in our country."

⁴⁰⁶ *Khosa & Mahlaule* (n 357) paras 2, 37, 41. The Constitutional Court stated that South Africa has social security because South Africa's society wants people to be able to fulfil their basic needs and that: "A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational." See *Khosa & Mahlaule* (n 355) para 52. The Court also stated that: "In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies." See *Khosa & Mahlaule* (n 355) para 82.

⁴⁰⁷ *Khosa & Mahlaule* (n 357) para 80.

⁴⁰⁸ *Khosa & Mahlaule* (n 357) para 82.

⁴⁰⁹ *Khosa & Mahlaule* (n 357) para 45.

⁴¹⁰ *Khosa & Mahlaule* (n 357) para 59.

While many cases concerning socio-economic rights have appeared in courts since the *Khosa and Mahlaule* case in 2003,⁴¹¹ another case relevant for the purposes of this research is *Mahlangu v Minister of Labour* ('*Mahlangu*').⁴¹²

In the beginning of the constitutional dispensation, both the Unemployment Insurance Act ('UIA')⁴¹³ and the Compensation for Occupational Injuries and Diseases Act ('COIDA')⁴¹⁴ expressly excluded domestic workers, who are a notoriously vulnerable group of workers.⁴¹⁵ Parliament removed their exclusion from the UIA in 2003,⁴¹⁶ but until recently COIDA maintained this exclusion.⁴¹⁷

Ms Mahlangu passed away by drowning in her employer's pool while performing her duties as a domestic worker. Upon her mother's passing, the applicant realised she could not claim compensation under COIDA, due to its exclusion of domestic workers. She turned to the courts, alleging that the exclusion infringed on the right to equality, human dignity, and access to social security.⁴¹⁸ The Court held in her favour, agreeing that the exclusion infringed upon various constitutional rights and that extending social insurance to domestic workers "will contribute significantly towards repairing [their] pain and indignity."⁴¹⁹

The approach which the Constitutional Court has taken in its adjudication of socio-economic rights influences the way this research investigates the state's duty to protect and advance ISS, which chapter 6 below discusses. The following section explains the functioning of South Africa's formal social assistance system, as it gives effect to the right to access social security and serves as a precursor to this research's identification of shortcomings therein which negatively impact ISS.

⁴¹¹ See, for example: *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), wherein the Constitutional Court emphasised that the state must strike a balance between socio-economic and other rights within the Constitution (para 36), and must fulfil its constitutional duties with respect (para 56); and *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC), wherein the Court evaluated the interaction between socio-economic rights and the environment.

⁴¹² *Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC) ('*Mahlangu*').

⁴¹³ Unemployment Insurance Act 30 of 1966; UIA (n 80).

⁴¹⁴ COIDA (n 80).

⁴¹⁵ *Mahlangu* (n 412) para 100.

⁴¹⁶ Unemployment Insurance Amendment Act 32 of 2003 secs 4 & 6.

⁴¹⁷ COIDA amends the definition of "employee" by removing the express exclusion of domestic workers, but as at 30 October 2024 has not yet commenced. See COIDA (n 80) sec 1.

⁴¹⁸ *Mahlangu* (n 412) para 28.

⁴¹⁹ *Mahlangu* (n 412) paras 115, 120.

4.2 Social assistance

While most of this research focuses on the payment of social grants within social assistance, there are two “branches” within South Africa’s social assistance: the provision of social services (such as state-provided health care) and the payment of social grants.⁴²⁰ While state-provided healthcare and its public works programmes conceptually form part of social assistance, this section analyses the framework of social grants.⁴²¹

As explained in chapter 3, the development of South Africa’s social security began with social assistance, in contrast to other countries which first developed social insurance mechanisms such as workers’ compensation funds.⁴²² In the transition period after South Africa’s first democratic election, the state put into motion numerous reforms within the social security system.

The state’s release of the White Paper for Social Welfare, and the 2002 Taylor Commission report brought to the fore many issues with the apartheid-legacy social assistance.⁴²³ Amongst these were the fragmented and ineffectively administered grant systems across the country, in particular the older persons’ grant and child-care grants.⁴²⁴ The Taylor Commission called for comprehensive social protection, starting with the consolidation of the various grants and their administration under a singular entity and statute.⁴²⁵ Consequently, Parliament promulgated the South African Social Security Agency Act (‘SASSA Act’) and Social Assistance Act (‘SAA’) in 2004.⁴²⁶

The SAA gives effect to section 27 of the Constitution, aiming to establish a uniform, standardised, efficient, and economical set of standards and norms in the payment of social grants.⁴²⁷ In its Preamble, the SAA declares its promulgation “to assist in securing the well-being of the people of the Republic,” cementing its role as a

⁴²⁰ Olivier & Kalula in Olivier, Smit & Kalula (n 33) 143.

⁴²¹ Olivier & Kalula in Olivier, Smit & Kalula (n 33) 143.

⁴²² See Chapter 3 above.

⁴²³ Minister for Welfare and Population Development (n 175); Taylor Committee (n 18).

⁴²⁴ The White Paper for Social Welfare explained that apartheid administered social security across 14 departments due to the separate development policy, which “resulted in fragmentation, duplication, inefficiency and ineffectiveness in meeting needs.” See Minister for Welfare and Population Development (n 175) 6. The Taylor Committee’s investigations into the old-age, health, disability, poverty, and unemployment policy formulations met with the issue of fragmentation. See Taylor Committee (n 18) 87 & Chapter 3.

⁴²⁵ Taylor Committee (n 18) 122-123.

⁴²⁶ SASSA Act (n 35); SAA (n 35).

⁴²⁷ SAA (n 35) Preamble.

legislative measure in line with the Constitution's preamble, and as mandated by section 27(2).⁴²⁸

Associated with the administration of the SAA and its grants, the Social Assistance Regulations⁴²⁹ ('SAR') outline the administrative and managerial laws surrounding grants, including means-testing requirements.⁴³⁰ This means that the South African Social Security Agency ('SASSA') only approves grants if the potential recipient's income and assets fall under a predetermined threshold. The SAA furthermore empowers the SASSA to distribute social grants, and an inspectorate to investigate the actions of SASSA.⁴³¹

The SAA provides for, and the SAR regulates, eight separate social grants.⁴³² The Minister of Social Development may further increase the value of benefits based on determinations of need.⁴³³ In 2024, the state instituted a raise in most social grants through the SAR.⁴³⁴

The child support grant provides a grant to the primary caregiver of a child.⁴³⁵ Foster parents caring for a child receive the foster child grant.⁴³⁶ The older persons' grant goes to persons 60 years or older, which recipients often redistribute to the rest of the household.⁴³⁷ Only a medically diagnosed person with a disability older than eighteen can receive the disability grant.⁴³⁸ Should parents care for child with a severe disability, they may apply for the care dependency grant.⁴³⁹ The grant-in-aid assists those not in

⁴²⁸ SAA (n 35) Preamble.

⁴²⁹ See, for example, the most recent Social Assistance Regulations: Department of Social Development 'Increase in respect of social grants' Government Notice R2388 of 2024 as published in Government Gazette 50381 (28 March 2024) ('GNR 2388').

⁴³⁰ SAA (n 35) secs 5(2) & 32.

⁴³¹ SAA (n 35) sec 2(2)-(3), Chapter 4; Olivier in Harms et al (n 50) para 28.

⁴³² These include: the older person's grant, disability grant, war veteran's grant, the grant in aid, the child support grant, the foster child grant, the care dependency grant, and the social relief of distress grant. See SAA (n 35) Chapter 4.

⁴³³ SAA (n 35) section 12A, which empowers the Minister of Social Development, in consultation with the Minister of Finance, to "prescribe an additional payment linked to a social grant" and may "differentiate on the basis of need between beneficiaries of social grants."

⁴³⁴ GNR 2388 (n 429).

⁴³⁵ SAA (n 35) sec 6; Department of Social Development 'Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance' Government Notice R2119 of 2022 as published in Government Gazette 46459 (31 May 2022) ('GNR 2119') reg 7.

⁴³⁶ SAA (n 35) sec 8; GNR 2119 (n 435) reg 9.

⁴³⁷ SAA (n 35) sec 10; GNR 2119 (n 435) reg 2; Olivier in Harms et al (n 50) para 29.

⁴³⁸ SAA (n 35) sec 9; GNR 2119 (n 435) reg 4.

⁴³⁹ SAA (n 35) sec 7; GNR 2119 (n 435) reg 10.

a physical or mental condition to support themselves and who must subsequently rely on other persons for assistance.⁴⁴⁰

The Social Relief of Distress ('SRD') grant supports those affected by a disaster as defined in the Disaster Management Act.⁴⁴¹ In the history of post-1994 South Africa, the SRD has served those in "dire material need" who are "unable to meet their families' most basic needs."⁴⁴² However, the pandemic of COVID-19 vastly changed the meaning of the SRD, as the state implemented the COVID-19 Social Relief of Distress grant ('COVID-19 SRD'). An applicant qualifies for a COVID-19 SRD grant if they do not currently receive another social grant, or if their breadwinner is not able to provide an income.⁴⁴³

SASSA determines the eligibility of an applicant through testing their "means," or their income and/or assets, which occurs with most of the above-mentioned grants.⁴⁴⁴ Only the foster child grant does not require such evaluation of means.⁴⁴⁵

Social assistance is non-contributory, in that there is no requirement that the beneficiaries must have contributed to the grants in some way. But from the above grants, there is no specific category for maternity, unemployment, or workmen's compensation. These categories do not fall within the typical boundary of social assistance and instead constitute social insurance.

⁴⁴⁰ SAA (n 35) secs 11; GNR 2119 (n 435) regs 5.

⁴⁴¹ SAA (n 35) sec 13; GNR 2119 (n 435) reg 11. The Disaster Management Act 57 of 2002 defines a disaster as a progressive or sudden occurrence, regardless of origin, which has or could cause death, injury, damage to property, infrastructure, or the environment, or a "significant disruption of the life of a community." An occurrence can only be a disaster if it exceeds the ability of those affected to cope therewith. See Disaster Management Act sec 1 "disaster" (a) & (b). The April 2024 value of the Social Relief of Distress Grant for COVID-19 is R370.00 per month. See Department of Social Development 'Social Assistance Act (13/2004) as amended: Amendment Regulations relating to Covid-19 Social Relief of Distress' Government Notice R4466 of 2024 as published in Government Gazette 50369 (25 March 2024) ('GNR 4466') reg 2.

⁴⁴² South African Government 'Social relief of distress' (available at: gov.za/services/services-residents/social-benefits/social-relief-distress) (last accessed 30 October 2024).

⁴⁴³ GNR 2119 (n 435) reg 11.

⁴⁴⁴ GNR 2119 (n 435) regs 20 & 21.

⁴⁴⁵ GNR 2119 (n 435) reg 10. While the grant-in-aid does not directly require an evaluation of means, SASSA only distributes said grant to those people already receiving the older person's grant, disability grant, or war veteran's grant – all of which require an evaluation of income or means. See GNR 2119 (n 435) regs 2(b), 4(b)-(c), 5, & 6; SAA (n 35) sec 11.

4.3 Social insurance

Persons who contribute to pre-determined funds may withdraw their benefits therefrom in the face of pre-determined hardship which negatively impacts their income generation. In the context of this research, which focuses on the state's duty, the state manages some of these pre-determined funds under, for example, COIDA or the UIA. There are currently five statutes governing the social insurance structure in South Africa relating to employment-related income replacement, specifically: injuries and diseases, pension funds, medical schemes, and unemployment.⁴⁴⁶ South Africa's social insurance broadly comprises of mandatory or voluntary contribution-based funds.⁴⁴⁷ Mandatory funds arise from the UIA, the COIDA, and the Road Accident Fund Act.⁴⁴⁸ Due to the Road Accident Fund serving as the only non-employment-related social insurance, this research limits its discussion of mandatory funds to the UIA and COIDA.

The UIA establishes the Unemployment Insurance Fund ('UIF') wherein both employers and employees must contribute equally. The UIF provides a payout to those rendered unemployed due to terminations of contract or insolvency,⁴⁴⁹ illness, maternity, parental responsibilities, or adoption responsibilities.⁴⁵⁰ The Minister of the Department of Employment and Labour oversees the UIF.⁴⁵¹ While it is true that the Minister delegates his or her powers, it is also true that the Unemployment Insurance

⁴⁴⁶ COIDA (n 80); ODMWA (n 80); Pension Funds Act 24 of 1956; Medical Schemes Act 131 of 1998; UIA (n 80). Other statutes to mention are those related to road accidents, and occupational health and safety. The fifth social insurance statute is the Road Accident Fund Act 56 of 1996, which is the only social insurance legislation not related to employment. The Road Accident Fund Act compensates persons for the wrongful loss or damage caused by the driving of a motor vehicle. While not social insurance, the Occupational Health and Safety Act 85 of 1993 and ODMWA (n 80) both serve to formulate policy related to preventing the need to rely on social insurance in the first place.

⁴⁴⁷ An example of a voluntary contribution-based fund is De Beers Pension Fund, where members who participate in the Defined Benefits section contribute 7,5% of their pensionable salary to the Fund in exchange for the coverage of retirement, death, ill-health, or withdrawal from employment. See De Beers Pension Fund 'Defined benefits section: Working member's guide' (February 2024) (available at: debeerspensionfund.co.za/working-members-2/db-section/) (last accessed 28 January 2025) at 1, 3.

⁴⁴⁸ The Minister of the Department of Employment and Labour is responsible for establishing the Unemployment Insurance Board, as well as the Compensation Board, which manage the Unemployment Insurance Fund and the Compensation Fund. See UIA (n 80) sec 4; COIDA (n 80) sec 4. The Department of Transport administers the Road Accident Fund. See Road Accident Fund Act 56 of 1996.

⁴⁴⁹ UIA (n 80) sec 16(a)(i)-(iv) list the reasons for unemployment as terminating the worker's contract, the worker's dismissal, insolvency, or the death of the worker's employer (if they are a domestic worker).

⁴⁵⁰ UIA (n 80) secs 15-29.

⁴⁵¹ UIA (n 80) sec 58.

Commissioner must report to the Minister, and that the Unemployment Insurance Board must follow the Minister's direction.⁴⁵²

The UIA defines both who a contributor is and who an employee is. An employee is a natural person receiving or accruing remuneration due to services "rendered or to be rendered by that person."⁴⁵³ An employee is furthermore a person who is not an independent contractor, or who has worked more than 24 hours within a month.⁴⁵⁴ A contributor is a natural person who is / was employed, a person who is an employee within the meaning of the UIA, and a person who has contributed to the UIF.⁴⁵⁵ Thus, the beneficiary of the funds from the UIF must have been previously employed in some formal capacity.

The COIDA, like the UIA, establishes a Fund, but only employers contribute.⁴⁵⁶ COIDA compensates employees who get injured or ill in the course of their employment, and functions on a no-fault basis.⁴⁵⁷ The definition of employee in COIDA is denser than the UIA, and refers to:

a person who has entered into or works under a contract of service or of 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.⁴⁵⁸

The entirety of the definition of an employee in COIDA results in a much denser definition than the UIA, and to recreate the entire definition herein is unnecessary. The definition refers to casual employees, a director / member of a body corporate, a labour broker, and a deceased employees or employee with a disability's dependents.⁴⁵⁹ Despite the pending amendment to COIDA to remove the exclusion of domestic workers, the definition above specifically includes casual workers but does not include a self-employed person.⁴⁶⁰

⁴⁵² UIA (n 80) secs 44 & 48.

⁴⁵³ UIA (n 80) sec 1 'employee'.

⁴⁵⁴ UIA (n 80) secs 1 'employee' & 3(1).

⁴⁵⁵ UIA (n 80) sec 1 'contributor' read with sec 3.

⁴⁵⁶ COIDA (n 80) sec 15.

⁴⁵⁷ COIDA (n 80) secs 22 & 35. However, the employee is entitled to additional compensation if they can prove that their injury or disease was caused due to the employer's negligence. See COIDA (n 80) sec 56.

⁴⁵⁸ COIDA (n 80) sec 1 'employee'.

⁴⁵⁹ COIDA (n 80) sec 1 'employee' (a)-(d).

⁴⁶⁰ COIDA (n 80) sec 1 'employee'.

4.4 Conclusion

This chapter explains South Africa's contemporary formal social security structure, as the backbone and precursor to its argument in chapter 6 regarding the state's failure to protect and advance ISS.

The chapter discusses the Constitution by providing a general introduction before diving into an in-depth interpretation of section 27 and its right to access social security. This analysis discusses the Constitutional Court's interpretation of socio-economic rights and applies such interpretation to sections 27(1)(c) and (2). The section concludes that the state's positive obligation is an expansive one that encompasses services and resources, applying to "everyone" who is legally resident in the country. However, such obligation is qualified by the state's available resources and only requires the state to fulfil the right progressively and reasonably.

The subsequent sections discuss the statutory manifestation of the state's duty to fulfil social security in the form of social assistance and social insurance. Social grants arising from the SAA cover a large basis of persons, ranging from children to older persons, persons with disabilities and those with particularly acute needs. However, social insurance has been subject to some constitutional challenges over the decades for its exclusion of domestic workers. It similarly covers a broad range of life contingencies that may impact people's ability to earn an income. However, chapter 6 below identifies and discusses the shortcomings in both the social assistance and social insurance frameworks, as these have a domino effect on ISS.

Before proceeding to discuss the shortcomings in the social security system, the following chapter discusses South Africa's international and regional social security framework, as it is a member of international and regional bodies and has ratified some of international and regional instruments.

Chapter 5

International and regional framework

The previous chapter lays the foundation for South Africa's contemporary formal social security framework. This chapter serves to contextualise South Africa's domestic framework within its broader international and regional obligations, as well as frameworks and standards that South Africa does not (yet) align with.

The instruments herein engage with informality and informal social security ('ISS') to some extent. This chapter includes them due to their persuasive function in chapter 6, wherein this research argues that the state fails in its constitutional duty to protect and advance ISS.

The chapter starts by briefly discussing the role of international and regional law in South Africa's domestic framework.⁴⁶¹ Thereafter, it outlines relevant international instruments that South Africa has and has not ratified, focusing on the United Nations ('UN') and the International Labour Organisation ('ILO').⁴⁶² In the following section, the chapter discusses two relevant regional treaties South Africa is a member of – namely, the African Union ('AU') and the Southern African Development Community ('SADC').⁴⁶³

5.1 The role of non-domestic law in South Africa's framework

The Constitution intends to: "Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."⁴⁶⁴ While international law is not automatically binding at a domestic level,⁴⁶⁵ the Constitution and judicial jurisprudence have migrated international law to a persuasive position within the country's legislative framework.

This research argues that the state fails in its constitutional duty to protect and advance ISS, which requires an interpretation of the Bill of Rights. The Constitution demands that such interpretation align with international law.⁴⁶⁶ These Constitutional provisions

⁴⁶¹ See heading 5.1 below.

⁴⁶² See heading 5.2 below.

⁴⁶³ See heading 5.4 below.

⁴⁶⁴ Constitution (n 13) Preamble.

⁴⁶⁵ Cf Tshoose 'Appraisal of selected themes on the impact of international standards on labour and social security law in South Africa' (2022) 25(1) *Potchefstroom Electronic Law Journal* 1-43 at 5.

⁴⁶⁶ Constitution (n 13) secs 39(1)(b) & 233.

apply even if South Africa is not bound under a treaty.⁴⁶⁷ The Constitution thus intends that South Africa's laws coincide with international law.⁴⁶⁸

South African case law frequently turns its attention to public international law when interpreting domestic socio-economic matters. In *Grootboom*, *Treatment Action Campaign* and *Mahlangu*, the parties referred to international law.⁴⁶⁹ The *amici curiae* referred to the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the General Comments of the UN Committee on Economic, Social and Cultural Rights ('CESCR') when delivering their argument on their relevant socio-economic rights.⁴⁷⁰ The Constitutional Court, in acknowledging international standards, stated that:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary... However, where the relevant principle of international law binds South Africa, it may be directly applicable.⁴⁷¹

The following sections analyse the relevant international and regional instruments concerning social security, as the Constitution intends that South Africa's laws align therewith, to the extent that they align with the Constitution's values.⁴⁷²

5.2 International framework

The entrenchment of social security as a human right within the Constitution originates from international and regional agreements, which many African states are part of.⁴⁷³ Having determined that the Constitution demands that South African law align with international law, the following section discusses the UN and ILO instruments relating to social security. This section references South African case law when relevant, as it

⁴⁶⁷ *S v Makwanyane* (n 175) para 35; MP Olivier 'Social security: Framework' in LTC Harms et al (eds) *The Law of South Africa* (LexisNexis: Pretoria 2012) Volume 13(2) para 48.

⁴⁶⁸ J Dugard & A Coutsooudis 'The place of international law in South African municipal law' in J Dugard et al (eds) *Dugard's international law: A South African perspective* (Juta: Claremont 2018) 57-125 at 89.

⁴⁶⁹ *Grootboom* (n 28) paras 26-28; *Treatment Action Campaign* (n 28) paras 28, 35; *Mahlangu* (n 412) paras 36-46.

⁴⁷⁰ *Grootboom* (n 28) paras 27-29; *Treatment Action Campaign* (n 28) para 28; ICESCR (n 51) arts 2(1) & 11(1); United Nations Committee on Economic, Social and Cultural Rights *General Comment 3: The nature of States Parties' obligations* E/1991/23 (1990) ('CESCR General Comment 3') paras 1, 42.

⁴⁷¹ *Grootboom* (n 28) para 26 & fn 28. The Constitutional Court refers here to Constitution (n 13) secs 231-235.

⁴⁷² Dugard & Coutsooudis in Dugard et al (n 468) 89.

⁴⁷³ C Fombad 'An Overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa' (2013) 21(1) *African Journal of International and Comparative Law* 1-31 at 7.

contextualises not only the role of international law in the judicial interpretation of socio-economic rights but also the judiciary's departure therefrom.

5.2.1 United Nations

The UN is an international organisation formed in the aftermath of the second World War.⁴⁷⁴ Among its declared purposes, the UN fosters international co-operation on economic, social, cultural, and humanitarian problems.⁴⁷⁵ The UN takes a human rights-based approach in solving these problems, emphasising equal rights and fundamental freedoms.⁴⁷⁶ In 1994, South Africa rejoined the UN.⁴⁷⁷

The Universal Declaration on Human Rights ('UDHR') states that national effort and international co-operation must realise economic, social, and cultural rights, which include the right of all members of society to social security.⁴⁷⁸ Although not explicitly binding on member States, the UDHR guided the development of the International Covenant on Civil and Political Rights and the ICESCR, with all three documents comprising the International Bill of Human Rights.⁴⁷⁹

The ICESCR provides for economic and social rights, such as the right to strike, just and favourable conditions at work, and the right to social security, which includes social *insurance*.⁴⁸⁰ The ICESCR's Preamble explains that the international community can only eliminate fear and want by creating conditions which fulfil economic, social, and cultural rights.⁴⁸¹

Despite South Africa signing the ICESCR in 1994, the country only ratified it in 2015. Upon ratification, South Africa became obliged to report upon its fulfilment of the ICESCR's rights, including the right to social security. South Africa admitted in its 2017 concluding remarks to the CESCR that –

⁴⁷⁴ United Nations Department of Public Information *United Nations at a glance* (United Nations Publications: New York 2013) at 5.

⁴⁷⁵ United Nations *Charter of the United Nations* (1945) ('UN Charter') art 1(3).

⁴⁷⁶ UN Charter (n 475) arts 1(2) & (3); Tshoose (n 465) 7.

⁴⁷⁷ For an explanation of the history of South Africa's membership of the UN, see J Dugard & Dugard 'Human rights' in J Dugard et al (eds) *Dugard's international law: A South African perspective* (Juta: Claremont 2018) 454-501 at 457-460.

⁴⁷⁸ UDHR (n 51) art 22.

⁴⁷⁹ ICESCR (n 51); Dugard & Dugard in Dugard et al (n 477) 460; Office of the High Commissioner of Human Rights 'International Bill of Human Rights' (2024) (available at: ohchr.org/en/what-are-human-rights/international-bill-human-rights) (last accessed 30 October 2024).

⁴⁸⁰ ICESCR (n 51) arts 8(1)(d), 7 & 9-10.

⁴⁸¹ ICESCR (n 51) Preamble.

[The commitments in the Constitution] impose obligations on government – obligations that we are committed to meet. And whilst we acknowledge that we have not yet met all our obligations yet (sic), our progress in this regard has been significant.⁴⁸²

Due to the long procedures involved in reporting to the UN, South Africa has not engaged in its reporting duties regarding social security since 2021.⁴⁸³

The rights in the ICESCR which pertain to social security are contained in articles 9-11, and rights indirectly related thereto in articles 12-13.⁴⁸⁴ The ICESCR confirms member States' responsibilities to recognise everyone's right to social security,⁴⁸⁵ emphasising the protection of families and mothers.⁴⁸⁶ It further recognises the right to an adequate standard of living for all persons, including "the continuous improvement of living conditions."⁴⁸⁷

One of the first articles within the ICESCR mirrors that of the South African Constitution's internal limitation of social security but notably includes the word "maximum" when referring to the number of resources to allocate.⁴⁸⁸ Art 2(1) of the ICESCR provides that member States have the responsibility to –

... take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁸⁹

Tshoose and Heywood argue that international law's emphasis on *maximum* resources mandates the South African state to "budget sufficient resources to fulfil [socio-economic] rights, unless it can show that it is impossible to do so."⁴⁹⁰ As South

⁴⁸² United Nations Committee on Economic, Social and Cultural Rights 'Initial reports of States parties due in 2017: South Africa' *United Nations Economic and Social Council E/C.12/ZAF/1* (7 June 2017) paras 168-169.

⁴⁸³ See United Nations Committee on Economic, Social and Cultural Rights 'Information received from South Africa on follow-up to the concluding observations on its initial report' *United Nations Economic and Social Council E/C.12/ZAF/FCO/1* (21 May 2021).

⁴⁸⁴ ICESCR (n 51) arts 9-13. Art 9 establishes the right to social security; art 10 emphasises the protection of families, mothers, and children; art 11 recognises the right to an adequate standard of living, including freedom from hunger, clothing and housing, and improvement of living conditions. The rights indirectly related to social security include the right to the highest attainable standard of physical and mental health (art 12) and the right to education (art 13), which recognises the role of education in promoting the effective participation in a free society (art 13(1)).

⁴⁸⁵ ICESCR (n 51) art 9. As a side note, while Constitution (n 13) sec 27(1)(c) states that the right to social security ICESCR (n 51) includes the right to social assistance, ICESCR (n 51) art 9 places particular emphasis on social insurance. South Africa's commitment to social assistance in its own Constitution reaffirms its position as a country that supports its people through direct cash transfers.

⁴⁸⁶ ICESCR (n 51) arts 10(1)-(2).

⁴⁸⁷ ICESCR (n 51) art 11(1).

⁴⁸⁸ Constitution (n 13) sec 27(2).

⁴⁸⁹ ICESCR (n 51) art 2(1).

⁴⁹⁰ Heywood (n 27) 19; Tshoose (n 27) 172.

Africa has ratified the ICESCR, international standards demand that the state satisfy the court of its utilisation of the maximum of resources allocated to fulfil the relevant socio-economic right. Tshoose, however, questions how the state can prove that it has done what it could according to its resources.⁴⁹¹

The CESCR monitors the extent to which member States have implemented the provisions of the ICESCR.⁴⁹² The General Comments issued by the CESCR serve as interpretative devices for the ICESCR.⁴⁹³ General Comment 1 provides that member States must regularly monitor the extent to which vulnerable groups in their society are receiving benefits of the right to social security.⁴⁹⁴ Furthermore, General Comment 19 provides specific guidelines to member States regarding article 9 of the ICESCR, elaborating upon the normative content of the right, as well as other interconnected rights such as equality and non-discrimination.⁴⁹⁵ Importantly, General Comment 19 emphasises the rights of informal workers to social security.⁴⁹⁶

The ICESCR affords a member State the flexibility to determine for itself how to realise socio-economic rights through the phrase “progressive.”⁴⁹⁷ However, this does not mean that a member State can simply “tick off” its responsibilities by enacting minimum social security legislation and no longer progressing in its full realisation of that right.⁴⁹⁸

General Comment 3 emphasises that a member State’s duties are not merely negative but implores their positive action under art 2(1) to “take steps” in progressively realising the ICESCR’s rights.⁴⁹⁹ It furthermore emphasises that the adoption of legislation, while highly desirable, is not the only measure a state must adopt.⁵⁰⁰ And while progressive realisation does allow some flexibility for a state, it “should not be misinterpreted as depriving the obligation of all meaningful content.”⁵⁰¹

⁴⁹¹ Tshoose (n 27) 170-171.

⁴⁹² United Nations Committee on Economic, Social and Cultural Rights ‘Fact sheet No. 16 (Rev. 1)’ *United Nations Office of the High Commissioner for Human Rights* (1 July 1991).

⁴⁹³ Olivier in Harms et al (n 467) para 117.

⁴⁹⁴ United Nations Committee on Economic, Social and Cultural Rights *General Comment 1: Reporting by States Parties* E/1989/22 (1981) (‘CESCR General Comment 1’) para 3; Olivier in Harms et al (n 467) para 118.

⁴⁹⁵ United Nations Committee on Economic, Social and Cultural Rights *General Comment 19: The right to social security* E/C.12/GC/19 (2008) (‘CESCR General Comment 19’) paras 9-32.

⁴⁹⁶ CESCR General Comment 19 (n 495) para 34.

⁴⁹⁷ Currie et al in Currie & De Waal (n 361) 573.

⁴⁹⁸ Currie et al in Currie & De Waal (n 361) 573.

⁴⁹⁹ CESCR General Comment 3 (n 470) para 2.

⁵⁰⁰ CESCR General Comment 3 (n 470) paras 3-4.

⁵⁰¹ CESCR General Comment 3 (n 470) para 9.

Grootboom cited, with approval, the CESCR's commentary on progressive realisation, confirming that it means a continual, yet gradual, improvement in the fulfilment of socio-economic rights:

... the fact that realization over time, or in other words progressively, is foreseen under the [ICESCR] should not be misinterpreted as depriving the obligation of all meaningful content... It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.⁵⁰²

General Comment 3 further emphasised that the ICESCR articles considering resource scarcity as a justifiable limitation do not give member States the freedom to neglect their duties to establish core minimum obligations.⁵⁰³

In *Grootboom* and *Treatment Action Campaign*, the Court declined to determine a minimum core obligation as prompted by the ICESCR.⁵⁰⁴ In *Grootboom*, the Court did not find the ICESCR's prompts appropriate for South Africa and instead emphasised that a reasonability assessment served to fulfil the constitutional demands of the judiciary, executive, and legislature to respect, protect, promote, and fulfil the rights within the Bill of Rights.⁵⁰⁵

While the CESCR is a Committee of the UN responsible for the monitoring of member States' compliance with the ICESCR, the UN's structure also provides for the establishment of specialised agencies designed and designated for promoting the fulfilment of the rights within the International Bill of Rights. The UN's first specialised agency was the ILO, which the following subsection discusses.⁵⁰⁶

⁵⁰² CESCR General Comment 3 (n 470) para 9, as cited in *Grootboom* (n 28) para 45.

⁵⁰³ ICESCR (n 51) art 2(1); CESCR General Comment 3 (n 470) para 10.

⁵⁰⁴ *Grootboom* (n 28) paras 31-33; *Treatment Action Campaign* (n 28) paras 26-39. The ICESCR states that a member State must fulfil the rights within the ICESCR to the maximum of its available resources. The CESCR's General Comment 3 (n 470) stated that, should the member State be a developing country or one which is facing economic constraints, it must at the least establish a minimum core obligation. See ICESCR (n 51) art 2(1); CESCR General Comment 3 (n 470) para 10.

⁵⁰⁵ *Grootboom* (n 28) para 31-33.

⁵⁰⁶ J Dugard 'The nature and history of international law' in J Dugard et al (eds) *Dugard's international law: A South African perspective* (Juta: Claremont 2018) 1-17 at 8; United Nations Department of Public Information (n 474) 14.

5.2.2 International Labour Organisation

The ILO is older than the UN. The League of Nations – the UN’s predecessor – established it in 1919. The ILO serves to protect and develop employee’s working conditions, with part of its focus being on social security.⁵⁰⁷

The ILO’S Constitution of 1919 and Declaration of Philadelphia of 1944 establish its principles and purposes.⁵⁰⁸ Both in 1919 and 1944, the ILO advocated for decent wages, equal work for equal value, freedom of association, and compensation for occupational injuries and diseases.⁵⁰⁹ The ILO also specifically recognised social security in 1944, stating that one of its primary objectives was to extend “social security measures to provide a basic income to all in need of such protection.”⁵¹⁰

The ILO originally focused on social insurance, and only thereafter began focusing on comprehensive social security systems, including social assistance. Following the second World War, the ILO focused on advocating for higher protections and establishing standards for, *inter alia*, equality of treatment and maintaining social security rights.⁵¹¹

The ILO’s labour and social security standards manifest in three tiers: Conventions and Protocols; Recommendations; and Declarations. The ILO adopts Conventions through its tripartite voting structures at its annual International Labour Conferences. These Conventions only become binding upon a member State once it has ratified the Convention, whereafter it submits to the ILO’s supervisory bodies and complaints procedures.⁵¹² Despite a State being a member of the ILO, there is no obligation upon it to ratify the ILO’s standards, due to respect for a State’s sovereignty and resistance against an “international labour parliament.”⁵¹³

However, the ILO has eleven Fundamental Instruments which have a different binding power than all other Conventions. Of particular note in the Convention on

⁵⁰⁷ Dugard & Dugard in Dugard et al (n 477) 455; Olivier in Harms et al (n 467) para 124.

⁵⁰⁸ Declaration of Philadelphia (n 51) Preamble.

⁵⁰⁹ Declaration of Philadelphia (n 51) art 3(a)-(j); International Labour Organisation *Constitution of the International Labour Organisation* (1919) (‘ILO Constitution’) Preamble.

⁵¹⁰ Declaration of Philadelphia (n 51) art 3(f).

⁵¹¹ International Labour Organisation *Equality of Treatment (Social Security) Convention 118* (1962); International Labour Organisation *Maintenance of Social Security Rights Convention 157* (1982); Olivier in Harms et al (n 467) para 125.

⁵¹² A van Niekerk & N Smit (eds) *Law@work* (LexisNexis: Durban 2023) 6th edition at 27. Should a member State ratify a Convention, it has the same binding effect as a treaty. See Dugard & Dugard in Dugard et al (n 477) 489.

⁵¹³ Van Niekerk & Smit (n 512) 25.

Discrimination (Employment and Occupation) Convention 111 of 1958.⁵¹⁴ These Fundamental Instruments have automatic binding power, and do not require ratification by a member state in order for them to be binding on member states.

Member states cannot ratify the ILO's Recommendations and Declarations. Recommendations usually serve as interpretative guidelines to their corresponding Conventions,⁵¹⁵ whereas Declarations – such as the Declaration of Philadelphia and which the ILO rarely adopts – serve as “[enunciation of] universal and significant principles.”⁵¹⁶

The ILO calls for social security coverage on two levels or “prongs” to establish comprehensive social security systems.⁵¹⁷ The first prong, on the “horizontal dimension,” aims for universal adoption of national strategies establishing a minimum floor of protection.⁵¹⁸ The second prong, on the “vertical dimension,” aims for the progressive realisation of increasing protection levels beyond the minimum floors of protection.⁵¹⁹

Recommendation 202 fulfils the horizontal dimension, providing guidelines for member States to build and establish minimum floors of social protection.⁵²⁰ The vertical dimension, on the other hand, aligns with the Social Security (Minimum Standards) Convention 102, which requires that member States ratify at least three of the nine social security branches listed below.

The ILO has eight social security Conventions, deriving from Convention 102. Convention 102 lists nine traditional branches of social security, each with their own corresponding Conventions, which provide more protection and elaborate upon any exceptions for increased flexibility.⁵²¹

⁵¹⁴ International Labour Organisation *Discrimination (Employment and Occupation) Convention 111 (1958)* ('Convention 111').

⁵¹⁵ Recommendations can also stand without a corresponding Convention. See International Labour Organisation 'Conventions, protocols and recommendations' (2024) (available at: ilo.org/international-labour-standards/conventions-protocols-and-recommendations) (last accessed 30 October 2024).

⁵¹⁶ Declaration of Philadelphia (n 51); Van Niekerk & Smit (n 512) 26.

⁵¹⁷ International Labour Office 'Social security for all: Building social protection floors and comprehensive social security systems' *International Labour Organisation* (Geneva 2012) at 3.

⁵¹⁸ International Labour Office (n 517) 1.

⁵¹⁹ International Labour Office (n 517) 1.

⁵²⁰ Recommendation 202 (n 52) Preamble.

⁵²¹ Convention 102 (n 51) Parts II-X.

The protections listed in Convention 102 include: medical care, and sickness benefits;⁵²² unemployment benefits;⁵²³ employment injury benefits;⁵²⁴ family benefits;⁵²⁵ maternity benefits;⁵²⁶ invalidity, old-age, and survivors' benefits.⁵²⁷ For each of these nine branches, Convention 102 determines standards and sets obligations regarding the scope of coverage, types of benefits, and qualifying conditions.⁵²⁸ A ratifying member State is bound by all obligations arising from the Convention, although they need only implement three of the nine branches and gradually implement the remainder. This allows for progressive coverage of social security and leaves more flexibility for member States to determine for themselves how to reach the obligations and standards of their chosen branches.⁵²⁹

The Social Protection Floors Recommendation 202 of 2012 advocates for two main goals, namely the establishment and maintenance of social protection floors, and to ensure these social protection floors are implemented in such a way as to continuously (progressively) increase the levels of benefits.⁵³⁰ It reminds member States that social security, as a human right, serves as “an important tool to prevent and reduce poverty, inequality, social exclusion and social insecurity” and supports the transition from the informal to formal economy.⁵³¹ Furthermore, Recommendation 202 promotes social security as a support mechanism for a more sustainable economy.⁵³²

Recommendation 202 is a guideline promoting the ILO's two-pronged approach to establish and progressively improve upon the minimum standards or floors of social protection.⁵³³ It does not advance a mere “tick-box” exercise and instead promotes the implementation of benefits adequate to a dignified and decent life.⁵³⁴

⁵²² International Labour Organisation *Medical Care and Sickness Benefits Convention 130* (1969).

⁵²³ International Labour Organisation *Employment Promotion and Protection Against Unemployment Convention 168* (1988).

⁵²⁴ International Labour Organisation *Employment Injury Benefits Convention 121* (1964). See Nguluwe (n 128) 10.

⁵²⁵ Family benefits have not manifested in a separate and dedicated Convention, and instead only receive attention in Convention 102 itself. See Convention 102 (n 51) arts 41 & 42; LG Mpedi & MAT Nyenti *Key international, regional and national instruments regulating social security in the SADC* (African Sun Media: Stellenbosch 2015) at 30-31.

⁵²⁶ International Labour Organisation *Maternity Protection Convention 183* (2000).

⁵²⁷ International Labour Organisation *Invalidity, Old-Age and Survivors' Benefits Convention 128* (1967).

⁵²⁸ Mpedi & Nyenti (n 525) 20.

⁵²⁹ Nguluwe (n 128) 18.

⁵³⁰ Recommendation 202 (n 52) arts 1(a)-(b).

⁵³¹ Recommendation 202 (n 52) Preamble.

⁵³² Recommendation 202 (n 52) Preamble.

⁵³³ Mpedi & Nyenti (n 525) 41

⁵³⁴ Mpedi & Nyenti (n 525) 43.

While a member State's economic and fiscal capacities determine the realisation of the ILO's vertical dimension of social protection, the ILO recommends that a member State seek to improve its range, scope, and levels of benefits as soon as possible.⁵³⁵

From the Conventions, and complemented by Recommendation 202, the ILO promotes a notion of universal social protection under the principle of social solidarity.⁵³⁶ Over their life cycles, people face life contingencies that inhibit their capacity to live a dignified life. A member State should seek to ensure them with basic income security.⁵³⁷ While the Recommendation does advocate for the protection of children, the sick and persons with disabilities, mothers, and older persons⁵³⁸ – which South Africa similarly does – the Recommendation specifically promotes basic income security for working-age, able-bodied yet unemployed persons.⁵³⁹

While ratification of Conventions is preferable, due to the reporting and complaints procedures involved, it is cause for optimism that many countries have considered Convention 102 despite not ratifying it.⁵⁴⁰ Countries within the AU and the SADC have considered Convention 102 in drafting their social security legislation.⁵⁴¹ The following section discusses the AU and SADC's instruments promoting social security.

5.3 Regional framework

While the Constitution specifically mentions international law, it is silent on its responsibility regarding regional law. However, due to the international aspect thereof, the same provisions of the Constitution which oblige the consideration of international law apply with respect to regional law. South Africa is a member of the AU and of the sub-regional SADC. The following sections discuss the instruments relating to social security deriving from the AU and SADC.

⁵³⁵ Mpedi & Nyenti (n 525) 43.

⁵³⁶ Mpedi & Nyenti (n 525) 42.

⁵³⁷ Mpedi & Nyenti (n 525) 43.

⁵³⁸ Recommendation 202 (n 52) arts 5(a)-(d).

⁵³⁹ Recommendation 202 (n 52) art 5(b); Mpedi & Nyenti (n 525) 43.

⁵⁴⁰ Nguluwe (n 128) 19.

⁵⁴¹ Nguluwe (n 128) 19 lists the Democratic Republic of Congo, Namibia, Pakistan, and Mauritius as some of these countries.

5.3.1 African Union

Inheriting and reconfiguring the goals and principles of the Organisation of African Unity ('OAU'), fifty-five⁵⁴² member States established the AU to adapt to a changing world.⁵⁴³ In 2000, the 36th Ordinary Session of the OAU adopted the Constitutive Act of the AU. It emphasises the building of partnerships between states and women, the youth and the private sector.⁵⁴⁴ The AU advocates for the acceleration of Africa's socio-economic integration and promotes co-operation "to raise the living standards of African peoples."⁵⁴⁵

The OAU adopted the African Charter on Human and Peoples' Rights ('ACHPR') in 1981,⁵⁴⁶ which aims to protect human rights and basic freedoms. Although the UN and ILO's standards heavily inspired its wording, the ACHPR does not distinguish between civil/political rights on the one hand, and social/economic rights on the other.⁵⁴⁷ Instead, it emphasises the interconnectedness and mutually supporting roles of the traditional "generations" of rights and enshrines them collectively in the ACHPR. Notably, the ACHPR also includes typical "third generation" rights and obliges individuals, families, and communities to fulfil their obligations to one another.⁵⁴⁸

The ACHPR obliges individuals to promote the development, cohesion, and respect for their families, as well as preserving and strengthening

positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.⁵⁴⁹

Consequently, the AU burdens individuals with socio-economic development more than other instruments. This burden reflects the obligations placed upon individuals

⁵⁴² African Union 'Member States' (2024) (available at: au.int/en/member_states/countryprofiles2) (last accessed 30 October 2024); Council of Ministers 'Resolutions of the twenty-sixth ordinary session of the Council of Ministers' *Organisation of African Unity* CM/Res. 464 (XXVI) (1976) declared the five geographic locations of its member States as Central Africa, Eastern Africa, Southern Africa, Northern Africa, and Western Africa.

⁵⁴³ African Union *Constitutive Act of the African Union* (2000) ('AU Constitutive Act') Preamble; Mpedi & Nyenti (n 525) 49.

⁵⁴⁴ AU Constitutive Act (n 543) Preamble.

⁵⁴⁵ AU Constitutive Act (n 543) art 3(k).

⁵⁴⁶ African Union *African Charter on Human and Peoples' Rights* (1986) ('ACHPR'). South Africa ratified the ACHPR in 1994. See African Union 'African Charter on Human and Peoples' Rights' (2024) (available at: achpr.au.int/en/charter/african-charter-human-and-peoples-rights) (last accessed 30 October 2024).

⁵⁴⁷ ACHPR (n 546) Preamble.

⁵⁴⁸ ACHPR (n 546) art 27.

⁵⁴⁹ ACHPR (n 546) arts 29(7) & (8).

within ISS. As chapter 2 above explained, the notion of informality within ISS does not necessarily entail chaos and instead formulates legal obligations in kin and community social security. Thus, there is a direct link between the AU's imposition of obligations upon the individual and ISS.

Several of the AU's instruments refer to the informal economy and recommend approaches to its member States on how best to protect the persons participating therein. The AU is explicitly aware of the amount of people in Africa currently excluded from formal social security, as is evident from its concerns in the Constitutive Act, the Ouagadougou 2004 Plan of Action on Employment Promotion and Poverty Alleviation, and the Social Policy Framework.⁵⁵⁰ These AU instruments advocate that social security policies must consider and promote the needs of the working poor, workers in the informal economy, and rural sector workers.⁵⁵¹

In 2023, the AU's development of social security, in particular social security within the informal sector, manifested in the ACHPR Protocol on Social Protection and Social Security ('ACHPR on Social Protection'). The ACHPR on Social Protection, as with the ILO's standards, obliges its member States to protect its populace throughout its life cycle, from minority to majority, including persons with disabilities, non-citizens, survivors and dependents, and parental support.⁵⁵² However, the ACHPR on Social Protection has a further link to ISS. The AU obliges its member States to ensure the participation of informal economy workers in developing and implementing social security and promotes that regulatory frameworks incorporate appropriate social security for informal and rural workers. One method the ACHPR on Social Protection suggests is that states adapt their national social security schemes to include informal economy workers, including "the provision or recognition of appropriate formal and *informal social insurance* and micro-insurance mechanisms, *social assistance measures*, and dedicated savings instruments."⁵⁵³

Furthermore, the ACHPR on Social Protection obliges its member States to legally, economically, and socially protect and advance family and extended family life, by

⁵⁵⁰ AU Constitutive Act (n 543); African Union *Ouagadougou Plan of Action on Employment Promotion and Poverty Alleviation* (2004) ('Ouagadougou Plan of Action'); African Union *Social Policy Framework for Africa* (2008).

⁵⁵¹ African Union *Social Protection Plan for the Informal Economy and Rural Workers* (2011) ('SPIREWORK') at 3.

⁵⁵² ACHPR on Social Protection (n 53) arts 10-16.

⁵⁵³ ACHPR on Social Protection (n 53) art 5(1)-(2). Author's own emphasis added.

ensuring the development and implementation of effective strategies to provide for their needs in times of vulnerability and crisis. The ACHPR on Social Protection encourages member States to “promote and support community associations or networks which support families in times of need.”⁵⁵⁴

South Africa has not ratified the ACHPR on Social Protection.⁵⁵⁵ However, the principles enshrined therein serve as persuasive material, as South Africa is a member of the AU. Signing and ratifying the ACHPR on Social Protection would assist the state in organising its response to the informal economy and ISS.

5.3.2 Southern African Development Community

SADC is integral to understanding South Africa’s social security framework, as its Treaty is legally binding on its member States.⁵⁵⁶ Although it is true that the SADC is not often enforceable, it is nevertheless binding. In 1992, the previous Southern African Development Coordination Conference transformed into the SADC upon the signing of the SADC Treaty.⁵⁵⁷ SADC is a multi-state entity and currently consists of sixteen member States, with South Africa joining in 1994 as the eleventh member State and Comoros as the latest member in 2018.⁵⁵⁸

SADC aims to provide a legal framework for enhanced organisation, co-operation between member States, sustainable economic growth, and socio-economic development.⁵⁵⁹ While SADC serves as a mechanism for the harmonisation of

⁵⁵⁴ ACHPR on Social Protection (n 53) arts 9(1)-(7).

⁵⁵⁵ As at April 2024, according to the African Union ‘Status List: List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security’ (28 April 2023) (available at: au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-citizens-social-protection-and) (last accessed: 30 October 2024). So far, only Niger and Sao Tome & Principe have signed the ACHPR on Social Protection.

⁵⁵⁶ Mpedi & Nyenti (n 525) 89.

⁵⁵⁷ The Treaty of the Southern African Development Community (1992) has since been amended five times in 2001, 2007, 2008, and twice in 2009. These amendments are consolidated into one document. See Southern African Development Community *Treaty of the Southern African Development Community* (1992) (‘SADC Treaty’); Southern African Development Community ‘Consolidated text of the Treaty of the Southern African Development Community’ (21 October 2015) (available at: sadc.int/document/consolidated-text-treaty-southern-african-development-community) (last accessed 30 October 2024).

⁵⁵⁸ Southern African Development Community ‘Member States’ (2024) (available at: sadc.int/member-states) (last accessed 30 October 2024); Southern African Development Community ‘History and treaty’ (2024) (available at: sadc.int/pages/history-and-treaty) (last accessed 30 October 2024).

⁵⁵⁹ SADC Treaty (n 557) Preamble; Olivier in Harms et al (n 467) para 145.

economic policy and trade, it also serves to set norms on social standards, as social issues influence economic issues, and vice versa.⁵⁶⁰

The Charter on Fundamental Social Rights in the SADC ('SADC CFSR') recognises the universality and indivisibility of basic human rights and cites with approval the UDHR, the ACHPR, and the ILO's Constitution and Declaration of Philadelphia.⁵⁶¹ The SADC CFSR promotes, *inter alia*, the establishment and harmonisation of social security schemes.⁵⁶² To achieve this objective, article 10 of the SADC CFSR dedicates itself to entrenching social protection as a basic human right which SADC member States must observe. It specifically uses the phrase "every worker" and does not distinguish "status and type of employment" when imposing the obligation on creating an enabling environment for adequate social protection.⁵⁶³ Should a member State's populace be unable to access the labour market, for whatever reason, they are entitled to social assistance.⁵⁶⁴

The Code on Social Security prescribes that member States must maintain standards aligned with the ILO's Convention 102. Thus, despite South Africa's non-ratification thereof, its membership in the SADC means it must align its social security with Convention 102.⁵⁶⁵ Due to the ILO's focus on risks and income replacement from formal mechanisms, the SADC implemented provisions related to ISS in its Code on Social Security.⁵⁶⁶

While the Code on Social Security is non-binding, it is pertinent for the following reasons. Firstly, the Code of Social Security calls for member States to "strengthen and rationalise [informal modes of social security] ... and to integrate them with formal modes of social security."⁵⁶⁷ And secondly, the Code on Social Security not only recognises the vulnerabilities of families but obliges member States to ensure the

⁵⁶⁰ Mpedi & Nyenti (n 525) 88-89; GCZ Mhone 'The socio-economic context and social policy needs in South Africa' in MP Olivier, N Smit & ER Kalula (eds) *Social security: A legal analysis* (LexisNexis Butterworths: Durban 2003) 1-21 at 2; Olivier et al in Olivier, Smit & Kalula (n 340) 54.

⁵⁶¹ UDHR (n 51); ACHPR (n 546); ILO Constitution (n 509); Declaration of Philadelphia (n 51); Southern African Development Community *Charter on Fundamental Social Rights in the SADC* (2003) ('SADC CFSR') art 2(3)(1).

⁵⁶² SADC CFSR (n 561) art 2(1)(e).

⁵⁶³ SADC CFSR (n 561) art 10(1).

⁵⁶⁴ SADC CFSR (n 561) art 10(2).

⁵⁶⁵ Southern African Development Community *Code on Social Security in the SADC* (2003) ('SADC Code on Social Security') art 4.3.

⁵⁶⁶ Olivier in Harms et al (n 467) paras 128 & 149.

⁵⁶⁷ SADC Code on Social Security (n 565) art 20.3; Olivier in Harms et al (n 467) para 149.

family unit *as a whole* is protected.⁵⁶⁸ This second point is relevant due to the prevailing stereotype of a Eurocentric and nuclear family and instead offers a uniquely African perspective.⁵⁶⁹

5.4 Conclusion

This chapter contextualises South Africa's domestic framework within its broader international and regional obligations, as well as frameworks and standards that South Africa does not (yet) align with. The chapter first explains its inclusion of international and regional standards within this research. Thereafter, it explains the UN's framework, which clarifies some aspects on which the South African courts have voiced their rulings. Following thereon, the chapter discusses the ILO's framework with reference to its two-pronged approach to social security and protection. While South Africa has not ratified Convention 102, nor have the courts evaluated Recommendation 202, these instruments are nevertheless persuasive in South Africa's development of a social security system that not only establishes a minimum floor of protection but progressively improves access to benefits.

South Africa is a member of the AU and SADC, and thus this chapter includes these regional organisations' instruments. The AU promotes a social security framework wherein both individuals and the state must take responsibility for the development of families and communities. The AU and SADC are the only non-domestic bodies in this chapter which express recognise ISS and the necessity to not only protect those who rely thereon but also to integrate them with formal systems of protection.

With these instruments in mind, the following chapter discusses the shortcomings within South Africa's formal social security system. These shortcomings result in more people relying on ISS, which can result in a reduced capacity for ISS to respond to shocks and risks, or even building up to promote longer-term insurance mechanisms.⁵⁷⁰ As discussed in chapter 2, and further explained in chapter 6, ISS plays a positive role when there is not a bottleneck of need or want. However, as a bottleneck develops, its capacity to respond lessens.

⁵⁶⁸ SADC Code on Social Security (n 565) art 8.

⁵⁶⁹ Mpedi & Nyenti (n 525) 96-97.

⁵⁷⁰ See heading 2.4 above regarding the functions of ISS.

The following chapter presents this research's argument that the state not only has a duty to protect and promote ISS, but that it is actively failing in its duty. The state cannot effectively monitor the redistribution or reinvestment of grants by kin or community members who are responding to vulnerabilities such as unemployment. Nor can it prevent persons from working in the informal sector. But what the state can do is protect and advance ISS in a manner informed by knowledge of its practices and patterns and adapting thereto.

Chapter 6

The South African state's duty to protect informal social security

The previous two chapters outlined the legislative framework for South Africa's social security system. They elaborated not only on its domestic law,⁵⁷¹ but also on relevant international and regional instruments.⁵⁷² These non-domestic instruments have influenced and still have the potential to influence South Africa's social security, as they incorporate the informal economy and recognise the importance of involving individuals, kin, and communities in a social security framework.⁵⁷³ International and regional law, at the very least, recognise informal forms of support in a broader social security framework. South African instruments do not.⁵⁷⁴

Despite the optimistic advances in poverty alleviation through South Africa's social security, this chapter discusses the manifest shortcomings within it. International calls for the incorporation of family and community support into social security do not resound in South Africa's social security system, which remains steadfast in its primarily means-tested, categorical social assistance and labour-biased social insurance.⁵⁷⁵ Unemployment and poverty statistics soar in tandem with South Africa's economic and fiscal constraints, and gradually more people are falling through the formal system, having nowhere to turn but to informal social security ('ISS').⁵⁷⁶

ISS is – by its very nature – not formalised in any legislative or policy instruments.⁵⁷⁷ How, then, can this research argue that the state fails in its constitutional duty to respect, protect, promote, and fulfil⁵⁷⁸ the right to access (informal) social security? That is the purpose of this chapter: to argue that the state's duties regarding formal social security extend into the realm of ISS.

⁵⁷¹ See chapter 4 above.

⁵⁷² See chapter 5 above.

⁵⁷³ See, for example, the ICESCR's (n 51) emphasis on protecting families and mothers in arts 10(1)-(2); Convention 102 (n 51); the ACHPR (n 546) arts 29(7)-(8); the Ouagadougou Plan of Action (n 550); the African Union *Social Policy Framework for Africa* (n 550); SPIREWORK (n 551); and the SADC Code on Social Security (n 565).

⁵⁷⁴ The explanation of South Africa's domestic social security framework in Chapter 4 above hardly recognises the informal economy, let alone promotes any informal forms of support through ISS mechanisms.

⁵⁷⁵ Chapter 4 above.

⁵⁷⁶ Chapters 2 & 4 above.

⁵⁷⁷ Chapter 2 above.

⁵⁷⁸ Constitution (n 13) sec 7(1).

This chapter begins by elaborating upon shortcomings within formal social security,⁵⁷⁹ which do not constitute a closed list but exemplify where the state fails in its constitutional duty. Thereafter, the chapter formulates and finalises its argument that the state fails in its constitutional duty to protect and advance ISS.⁵⁸⁰

6.1 The shortcomings of South Africa's social security

While formal social security serves as South Africa's most effective poverty alleviation mechanism,⁵⁸¹ it is not without its shortcomings. The shortcomings in the present system are primarily based on who it *excludes* or how it *impedes* the realisation of the constitutional right to access (informal) social security.⁵⁸² The more people the formal system excludes or impedes, the more people rely on ISS.⁵⁸³

These shortcomings, albeit discussed under separate headings, are mutually reinforcing in their contributions to ISS's weakening. Within the context of unemployment, Fourie explained the interconnected nature of different socio-economic issues:

One cannot understand South African unemployment without talking about segmentation *and* about the informal sector *and* about entry and mobility barriers *and* about the impact of poverty conditions *and* about marginalisation.⁵⁸⁴

The following subsections discuss the shortcomings within the formal social security system in more detail, namely: the formal employment biases within the social insurance system,⁵⁸⁵ poverty traps brought about by means-testing,⁵⁸⁶ the lack of protection of persons aged 18-59 who do not fall into existing social assistance categories,⁵⁸⁷ the low levels of non-contributory social assistance benefits,⁵⁸⁸ and the overall fragmented nature of the social security system.⁵⁸⁹

⁵⁷⁹ See heading 6.1 below.

⁵⁸⁰ See heading 6.2 below.

⁵⁸¹ Patel & Triegaardt in Tang & Midgley (n 333) 85.

⁵⁸² For example, the exclusion of informal sector workers from social insurance, or the impeding mean-testing requirements which can lead to poverty traps. See the discussions hereon below.

⁵⁸³ Dekker (n 12) 51.

⁵⁸⁴ F Fourie 'The South African unemployment debate: Three worlds, three discourses?' *Research Project on Employment, Income Distribution and Inclusive Growth: REDI3x3 Project* (Cape Town 2012) 2.

⁵⁸⁵ See heading 6.1 below.

⁵⁸⁶ See heading 6.2 below.

⁵⁸⁷ See heading 6.1.3 below.

⁵⁸⁸ See heading 6.1.4 below.

⁵⁸⁹ See heading 6.1.5 below. The CESCR identified these as primary shortcomings within South Africa's formal social security system. See United Nations Committee on Economic, Social and Cultural Rights

6.1.1 The employment bias in social insurance

The definition of an employee in social insurance statutes excludes certain groups of people from being able to contribute, and thus the definitions determine who can receive benefits in the case of income loss.⁵⁹⁰ Due to the traditional notion of an employee referring to those within formal employment, social insurance benefits are unavailable to a sizeable portion of the populace who are not or have never been (formally) employed, or who have been irregularly employed.⁵⁹¹

Many people still fall outside the scope of the Unemployment Insurance Act's ('UIA') application.⁵⁹² Persons who cannot receive social insurance benefits include structurally unemployed people,⁵⁹³ independent contractors or those who do not work within formal employment relationships, those who are unable to contribute regularly despite being employed (in the case of COIDA),⁵⁹⁴ and those who can contribute regularly but only work for short periods with a particular employer.⁵⁹⁵

Similar to the UIA, the Compensation for Occupational Injuries and Diseases Act ('COIDA') does not protect informal, atypical, and self-employed workers.⁵⁹⁶ The Taylor Committee appropriately predicted that excluding these workers may violate the equality provision in the Constitution. Twenty years later, the *Mahlangu* case was based on the right to equality, along with the right to access social security.⁵⁹⁷

The *Mahlangu* case extended the formal social insurance framework to domestic workers. Despite this extension, 82% of domestic workers remain informal in southern Africa.⁵⁹⁸ Nevertheless, there remain countless numbers of people unable to receive protection in their workplace in the form of social insurance. As a result of their exclusion from social insurance rights protection, people turn to work that is not decent, per

'Concluding observations on the initial report of South Africa' *United Nations Economic and Social Council E/C.12/ZAF/CO/1* (29 November 2018) paras 47(b)-(d).

⁵⁹⁰ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 559; Smit & Mpedi (n 17) 160.

⁵⁹¹ Smit & Mpedi (n 17) 160.

⁵⁹² UIA (n 80).

⁵⁹³ Y Basson 'The compliance of the South African social security system with the international covenant on economic, social and cultural rights' (2020) 41(4) *Obiter* 850–870 at 862.

⁵⁹⁴ UIA (n 80) sec 3(1)(c); ET Van Kerken & MP Olivier 'Unemployment insurance' in MP Olivier, N Smit & ER Kalula (eds) *Social security: A legal analysis* (LexisNexis Butterworths: Durban 2003) 415-458 at 437; Dekker (n 12) 58.

⁵⁹⁵ UIA (n 80) sec 3(1); Van Kerken & Olivier in Olivier, Smit & Kalula (n 594) 443; Dekker (n 12) 58.

⁵⁹⁶ COIDA (n 80) sec 1 'employee'; Taylor Committee (n 18) 113. See heading 4.3 above for more information on COIDA.

⁵⁹⁷ Taylor Committee (n 18) 114-115; *Mahlangu* (n 412) para 115.

⁵⁹⁸ F Bonnet, F Carré & J Vanek 'Domestic workers in the world: A statistical profile' *Women in Informal Employment Globalizing and Organizing* (Manchester 2022) at 5.

the International Labour Organisation's ('ILO') standards, to survive.⁵⁹⁹ These forms of work are characterised by low incomes and potentially dangerous conditions, which further expose them to vulnerability in the case of injury or disease.⁶⁰⁰

The state's failure arises from its refusal to consider, formulate, and implement alternative contributory social insurance models that extend some level of coverage to those persons currently excluded.⁶⁰¹ The state itself realised this when it amended the UIA (and now COIDA) to include and allow contributions by and for domestic workers. However, these amendments are piecemeal, further fragmenting the social security system.⁶⁰² In a developing country such as South Africa, the state cannot exclude alternative forms of work from a social insurance structure intended to protect them if they lose that work. In other words, the informal and atypical must be a consideration within policy formulation.⁶⁰³

As of June 2024, 67.3% of the population aged 15-64 years are unemployed or work in the informal sector and thus do not enjoy any of their own social insurance benefits.⁶⁰⁴ It is true that ISS exists precisely due to the UIA and COIDA's limited scope of application. However, and in tandem with other shortcomings discussed below,⁶⁰⁵ there is an increased reliance on ISS due to the lack of state-provided support. Rising unemployment and poverty lead to less people being able to contribute

⁵⁹⁹ International Labour Organisation *Declaration on Social Justice for a Fair Globalization* (2008) art 1(a); Van Niekerk & Smit (n 512) 540-541.

⁶⁰⁰ FG Benavides, M Silva-Peñaherrera & A Vives 'Informal employment, precariousness, and decent work: from research to preventive action' (2022) 48(3) *Scandinavian Journal of Work, Environment & Health* 169-172 at 169; Taylor Committee (n 18) 69.

⁶⁰¹ MP Olivier & AI Tewolde 'Social protection for refugees and asylum seekers: A South African case study' in L Patel, S Plagerson & I Chinyoka *Handbook on Social Protection and Social Development in the Global South* (Edward Elgar Publishing: Cheltenham 2023) 438-455 at 443.

⁶⁰² See heading 6.1.5 below.

⁶⁰³ Smit & Mpedi (n 17) 161.

⁶⁰⁴ Author's own calculations based on Statistical Release P0211 (n 4) 1. The statistics available to the author in this regard are limited, and the author could thus not calculate whether there were people included in the statistics that are receiving dependent's benefits.

Statistics South Africa defines informal employment as any precarious employment situations – regardless of whether their employer is in the formal/informal sector. This precarious employment specifically refers to “all persons... who are not entitled to or receive basic benefits such as pension or medical aid contributions from their employer, and who do not have a written contract.” See Statistical Release P0211 (n 4) 18. The informal sector currently consists of 3.1 million people. Furthermore, the expanded definition of unemployment includes all discouraged work-seekers and other persons not economically active. Thus, the 16,2 million people who are not economically active plus the total unemployed people (8,3 million) combine into 24,6 million people. These 24,6 million people, when added to the amount of people in informal employment (3,1 million) results in 27,7 million people, about 67.3% of the population aged 15-64 years (41,3 million). Author's own calculations. See Statistical Release P0211 (n 4) 1, 18.

⁶⁰⁵ See headings 6.1.2-6.1.5 below for more shortcomings.

to ISS – the very system that they place reliance on. Thus, the employment bias in social insurance render ISS vulnerable to increased pressure. The state, through its employment bias in social insurance, does not allow those in non-formal employment to insure themselves in public schemes.

People who generate income outside the formal sector, or who are unemployed, are just as susceptible to life contingencies as those in the formal sector. Social insurance excludes a significant portion of society, which deprives them of obtaining adequate living conditions.⁶⁰⁶ Without access to social insurance benefits, they must rely on social assistance or solely upon ISS, which “will increase the pressure on the already weak informal social safety net and will create additional groups of vulnerability.”⁶⁰⁷

6.1.2 Poverty traps through means-testing

Broadly, poverty traps refer to those multi-dimensional conditions within society that, for one reason or another, perpetuate conditions of individual and community poverty. Within the context of social security, poverty traps refer to two main elements. Firstly, poverty traps refer to the inability of social grant beneficiaries to generate and accumulate assets, thus perpetuating their poverty.⁶⁰⁸ Secondly, and for the purposes of this subsection, means-tested social assistance targets people beneath a certain threshold of income, thus creating an intrinsic link between state-provided assistance and income. Grant beneficiaries may adapt their behaviour to remain eligible for a reliable, set income via the grant, such as not finding employment or undertaking activities that do not push their income above the means-tested threshold, thus perpetuating conditions of poverty or “poverty traps.”⁶⁰⁹

Means-testing within social grants thus contributes to poverty traps. Means-testing, as explained in chapter 4,⁶¹⁰ refers to the state's determination of who requires social assistance, and who does not. The Taylor Committee explained that means-testing, although intended to prioritise the poorest of the poor, misunderstands the lived

⁶⁰⁶ Basson (n 593) 868.

⁶⁰⁷ Dekker (n 12) 58-59; Van Kerken & Olivier in Olivier, Smit & Kalula (n 594) 415.

⁶⁰⁸ EK Hassen 'Economic Restructuring and Poverty Traps in South Africa' (2009) 52(3) *Development* 387–393 at 392.

⁶⁰⁹ M Samson 'Universalisation vs targeting: Policy considerations' in S Motala, S Ngandu & T Hart (eds) *Social Security Review 2021 – Evolution of Social Security in South Africa: An Agenda for Action* (Department of Social Development: Pretoria 2021) 42-50 at 43.

⁶¹⁰ See heading 4.2 above.

realities of poor persons.⁶¹¹ Donovan concurs, stating that the “binary means test... ignores the fluid, fluctuating incomes of the poor” which is not necessarily consistent in either frequency or amount.⁶¹²

The state's fundamental misunderstanding of poor persons' means thus perpetuates poverty traps.⁶¹³ Van den Heever explains that removing means-tests from select social grants (such as those for children and persons with disabilities) will eliminate poverty traps wherein recipients adjust their behaviour to qualify for the grant.⁶¹⁴ The state should not rely on direct cash transfers as a one-size-fits-all solution to poverty, as when combined with its means-testing requirements, it contributes to poverty traps. As chapter 2 explains, ISS participants rely on social grants as a reliable and consistent form of capital which they can invest into ISS mechanisms. Take, for example, the distribution of an older persons grant to younger members of the family, or the investment of the child support grant into stokvels. Should grant recipients earn an income higher than the means-tested threshold, they lose the grants and thus lose their access to ISS. This is disrupting and may place people in precarious positions where they earn too much to qualify for a social grant, but too little to distribute to others in need.

6.1.3 Categorical approach to social assistance: The missing middle

The seven social grants this research explains cover a broad range of categories, and span across the life cycle of persons, from children to older persons.⁶¹⁵ While there are a number of these grants, there is a categorical approach to their distribution.⁶¹⁶ One must be either a person with a disability, a parent of a child, or an older person. There is no grant, other than the COVID-19 Social Relief of Distress grant (‘COVID-

⁶¹¹ Taylor Committee (n 18) 119. The targeted nature (categorical) of social grants means that persons falling outside the covered categories “remain part of the socially excluded population.” See Olivier in Harms et al (n 50) para 29.

⁶¹² KP Donovan ‘The Biometric Imaginary: Bureaucratic Technopolitics in Post-Apartheid Welfare’ (2015) 41(4) *Journal of Southern African Studies* 815-833 at 830.

⁶¹³ Olivier in Harms et al (n 50) para 29 states that the means-tested grants “have tended to promote a poverty trap syndrome.”

⁶¹⁴ A van den Heever ‘Social security/protection in South Africa’ Wits School of Governance: SA Future Economy (University of the Witwatersrand 2021) at 14; M Samson ‘An options assessment with respect to making the State Old Age Pension universal’ in *Reform of Retirement Provisions: Feasibility Studies* (Department of Social Development: Pretoria 2007) 1-17 at 5.

⁶¹⁵ Heading 4.2 above.

⁶¹⁶ Dekker (n 12) 74.

19 SRD'), which caters for able-bodied, working-age persons between the ages of 18 to 59. This research refers to this group as the *missing middle*.

The state instituted the COVID-19 SRD grant to help people left vulnerable by the conditions surrounding the pandemic. It provides for people between the ages of 18-59 who do not receive another social grant, and who are unemployed without unemployment benefits.⁶¹⁷ This was the first time that the state openly acknowledged the missing middle and those in the informal economy as excluded groups in social assistance.⁶¹⁸

While the past value of the grant (R300.00-R350.00) was low, it made a substantial difference, particularly considering that the state did not budget for the distribution thereof in 2020. Both the child support grant and the COVID-19 SRD grant helped people who could not otherwise afford food and prevented people from falling further into poverty and destitution.⁶¹⁹ However, despite the state extending the duration of the COVID-19 SRD grant, the current value thereof (R370.00) has not kept pace with inflation, particularly that of food.⁶²⁰

The COVID-19 SRD grant provides for the missing middle, but its temporary nature remains a concerning reality for recipients thereof, as removing the COVID-19 SRD grant entails removing a stable flow of capital.⁶²¹ As of October 2024, the COVID-19 SRD grant will continue until March 2025, whereafter the state will either extend it again, convert it into a different type of grant, or discontinue it in its entirety.⁶²² At its current value, the extension thereof will not appropriately provide for the missing middle.⁶²³ Converting the COVID-19 SRD grant into a different grant comes with its problems, as the models that the National Treasury has proposed seem to prioritise

⁶¹⁷ Department of Social Development 'Regulations relating to COVID-19 social relief of distress' Government Notice R2042 of 2022 as published in Government Gazette 46271 (22 April 2022) ('GNR 2042') reg 2(2); South African Government 'Social grants – Coronavirus COVID-19' (2024) (available at: gov.za/covid-19/individuals-and-households/social-grants-coronavirus-covid-19) (last accessed 30 October 2024); JD Triegaardt 'Social protection responses to COVID-19 in South Africa' in L Patel, S Plagerson & I Chinyoka *Handbook on Social Protection and Social Development in the Global South* (Edward Elgar Publishing: Cheltenham 2023) 513-525 at 517.

⁶¹⁸ Triegaardt in Patel, Plagerson & Chinyoka (n 617) 517.

⁶¹⁹ Triegaardt in Patel, Plagerson & Chinyoka (n 617) 517.

⁶²⁰ Triegaardt in Patel, Plagerson & Chinyoka (n 617) 520. See also heading 6.1.4 below for the low benefits of social assistance.

⁶²¹ Department of Social Development 'The rapid assessment of the implementation and utilisation of the special COVID-19 SRD grant' *Department of Social Development* (Pretoria 2021) at 32.

⁶²² See Institute for Economic Justice 'Memo on treasury and presidency proposals to replace the SRD grant' *Institute for Economic Justice* (Johannesburg 2022) ('IEJ (2022)') at 2.

⁶²³ See heading 6.1.4 below for the negative impacts of low social assistance benefits.

reducing the number of beneficiaries (and thus expenditure),⁶²⁴ which will result in more people having to rely on ISS.

The Department of Social Development, in its Rapid Assessment of the COVID-19 SRD grant, found that just over 60% of applicants for the grant were between the ages of 18 to 34 years.⁶²⁵ This corresponds to the number of people aged 15-34 years who are not in employment, education, or training, which totals 44.2% (about 4.5 million young people) as of August 2024.⁶²⁶ There is a clear link between the missing middle and their reliance on the COVID-19 SRD grant – namely, that a large portion of them, due to unemployment, must rely on an incredibly low level of grant. The state thus fails to provide appropriate support through social assistance to those who reach majority but are unemployed, and subsequently increases the pressure placed on ISS structures.

Since unemployment is what creates the missing middle, another of the state's failures arises from its misplaced reliance on the private sector to generate the necessary (stable) employment opportunities for South Africa's population.⁶²⁷ Whilst the state's implementation and continuation of neoliberal policies did help the economy grow in the first years of the new dispensation, the private sector failed to produce enough jobs, thus contributing to the unemployment crisis.⁶²⁸

Due to the above intersecting factors of vulnerability, unemployment remains high, particularly amongst young people, resulting in their increased reliance upon ISS. As more people are placed in a position where they cannot contribute to ISS whilst simultaneously relying thereon, more pressure is exerted upon ISS to respond with its dwindling resources, thus weakening it.

6.1.4 Low benefits within social assistance

Statistics South Africa specifically states that the national poverty lines are not to be used in the determination of a social grant's value.⁶²⁹ Nevertheless, it concedes that “[the national poverty lines] can help inform and serve as a data input into some of

⁶²⁴ See IEJ (n 622) 2.

⁶²⁵ Department of Social Development (n 621) 9.

⁶²⁶ Statistical Release P0211 (n 4) 9.

⁶²⁷ Cloete (n 328) 515.

⁶²⁸ Cloete (n 328) 515.

⁶²⁹ Statistical Release P0310.1 'National Poverty Lines – 2024' *Statistics South Africa* (29 August 2024) ('Statistical Release P0310.1 (29 August 2024)') 7.

these processes in ways that could create pro-poor dimensions.”⁶³⁰ As of May 2024, the food poverty line stands at R796.00 per person per month, with the lower- and upper-bound poverty lines at R1,109.00–R1,634.00.⁶³¹

As an example of the inadequacy of benefit levels, Fall and Steenkamp argue that the child support grant in South Africa does not serve its purpose of providing for children's basic needs.⁶³² The Pietermaritzburg Economic Justice and Dignity group calculated that, as at September 2024, the average cost of a child's basic nutritional needs per month is R941.51,⁶³³ which is 15% higher than the national food poverty line mentioned above, and about 43% higher than the Child Support Grant as at October 2024.⁶³⁴

As of September 2024, out of the 19 million social grants distributed (excluding the COVID-19 SRD grant), over 13 million of those are the Child Support Grant.⁶³⁵ This indicates the immense need of children's caregivers and the state's attempts, while not inconsequential, nevertheless fall short of basic needs.

The statistics above reflect the dangerous reality for the populace of South Africa. While approximately 40% of the population relies on social grants (including those receiving the COVID-19 SRD grant)⁶³⁶ to sustain them and their dependents, social grants are too low to support a dignified standard of living.⁶³⁷

⁶³⁰ Statistical Release P0310.1 (29 August 2024) (n 629) 7. National poverty lines are tools that inform the planning, implementation and monitoring of policy-making poverty alleviation. Statistics South Africa determines the food poverty line Statistics South Africa with reference to a food basket containing the minimum nutritional standard of about 2,100 daily calories. The lower- and upper-bound poverty lines take the food poverty line and add non-food necessities such as clothing, transport, and education.

⁶³¹ In the past five years, since 2019, the food poverty lines have increased from R561.00, R810.00, and R1227.00, respectively. See Statistical Release P0310.1 (29 August 2024) (n 629) 4.

⁶³² F Fall & A Steenkamp 'Building an inclusive social protection system in South Africa' *Organisation for Economic Co-operation and Development* (France 2020) at 15.

⁶³³ Pietermaritzburg Economic Justice and Dignity Group 'Household affordability index: September 2024' (30 September 2024) ('PEJDG') at 6.

⁶³⁴ The October 2024 value of the Child Support Grant (without the "top-ups" in terms of SAA (n 35) sec 12A) is R530.00. The "top-ups" to the Child Support Grant are R270.00 and are only afforded to the caregivers of orphaned children (See GNR 2119 (n 435) reg 8), bringing the total value of the October 2024 Child Support Grant to R800 – which is still about 15% less than the basic nutritional needs of a child per the calculations of the PEJDG (n 633) 6.

⁶³⁵ South African Social Security Agency 'Fact sheet: Issue No. 9 of 2024: A statistical summary of social grants in South Africa' (30 September 2024) 1.

⁶³⁶ Statistical Release P0318 'General Household Survey – 2023' *Statistics South Africa* (23 May 2024) at 23-25. This percentage reflects the number of *people* who receive some form of social grant. 50% of households receive social grants.

⁶³⁷ Taylor Committee (n 18) 152.

The state fails to provide adequate levels of social grant benefits. While the benefits are higher than those of the COVID-19 SRD grant, the above example of the child support grant illustrates the difference between statistical survival and a dignified standard of living. The state attempts to raise the levels of benefits, but at its current pace, it does not keep pace with inflation, contrary to the state's assertions.⁶³⁸

Of course, the state can only distribute social grants if it has the money to do so, and thus another failure of the state arises from its approach to economic policy. The state has a welfare mindset, but its neoliberal, austerity-based economy traps it into fiscal conservatism and laissez-faire market regulation.⁶³⁹ As with the missing middle, the state's misplaced reliance on the private sector to create the necessary jobs contributes to more unemployment, more poverty, and more people relying on social grants, which negatively influences the levels of benefits.

As discussed in chapter 2 of this research, social grants are fuel for ISS systems. They serve as predictable, dependable sums of money which, while useful for their intended purposes,⁶⁴⁰ can be invested into savings clubs or used to support a different kin or community member. With the rising costs of living and low levels of social grant benefits, when combined with structural and increasing unemployment, ISS participants can barely afford to support themselves, let alone their vulnerable kin or community members.

⁶³⁸ GNR 2388 (n 429) reflects the increase in social grants. Department of National Treasury '2024 Budget Review' *National Treasury* (21 February 2024) at 52 states that the COVID-19 SRD grant was increased from R350.00 to R370.00 to "keep pace with inflation and increase access for the eligible population." However, the South African Reserve Bank reflected an inflation rate of 5,2% in July 2024. See South African Reserve Bank 'Statement of the monetary policy committee July 2024' (18 July 2024) (available at: resbank.co.za/en/home/publications/publication-detail-pages/statements/monetary-policy-statements/2024/Statement-of-the-Monetary-Policy-Committee-July-2024) (last accessed 30 October 2024). The food inflation rate is particularly concerning, as the Bureau for Food and Agricultural Policy reported a year-on-year change of 8.5%. See Bureau for Food and Agricultural Policy 'Food inflation brief' (31 January 2024) at 2. Thus, for example, the COVID-19 SRD increase of R20 represents 5.4%, barely keeping up with the July inflation rates, and falling short of the food inflation rate. There is a misalignment between state's policy on targeted inflation (3-6%) and the day-to-day realities of increasing prices of goods and services. For more on this, see South African Reserve Bank 'Monetary policy' (2024) (available at: resbank.co.za/en/home/what-we-do/monetary-policy) (last accessed 30 October 2024); R Rena & K Kotsokoane 'Inflation Targeting and Economic Growth in South Africa – An Econometric Analysis' (2021) 17(3) *Acta Universitatis Danubius* at 161-180; E Ndou & N Gumata 'Should the South African Reserve Bank lower the inflation target band? Insights from the GDP-inflation nexus' (2024) 46(3) *Journal of Policy Modeling* at 638–654.

⁶³⁹ See, for example, National Treasury's planned budgetary reduction from spending on social grants – from 3.6% of GDP in 2023/2024 to 3.1% in 2025/2026. National Treasury Budget (n 638) 53.

⁶⁴⁰ For example, the older persons grant being used to support an older person, or the disability grant being used to support the person with a disability in question.

6.1.5 Overall fragmentation of the social security framework

The Union state's piecemeal approach to White people's social security resulted in a fragmented system, which the apartheid state worsened through its separate development policy.⁶⁴¹ In 2002, almost a decade after the new dispensation's inception, the Taylor Committee called for the consolidation of systems, departments, and institutions involved in social security.⁶⁴² However, the contemporary social security system still suffers a similar fate, as policymaking fragmentation across five separate departments⁶⁴³ and various statutory agencies contribute to the lack of real reform and requires a "comprehensive system of social security if [the government] wishes to reverse inequality and achieve good economic growth."⁶⁴⁴

Olivier and Van den Heever warn that the fragmentation of the system may contribute to worsening socio-economic circumstances in South Africa.⁶⁴⁵ One such element is that of corruption, the likelihood of which increases the more fragmented a system is due to money having to pass through too many hands before arriving with the beneficiary.⁶⁴⁶

Fragmentation within state bodies extends to outsourcing their duties to the private sector, in what Taylor refers to as the "marketisation of governance."⁶⁴⁷ An example of corruption and fraud arising from public-private outsourcing was the South African Social Security Agency's ('SASSA') contract with Cash Paymaster Services, a subsidiary of Net1, for a new social grant payment system via smart cards and fingerprints.⁶⁴⁸ Black Sash, a civil society organisation, found that other subsidiaries

⁶⁴¹ See headings 3.3 & 3.4.1 above.

⁶⁴² Taylor Committee (n 18) 87.

⁶⁴³ Departments of Social Development; Transport; National Treasury; Health; and Labour. See A van den Heever 'Economic growth and social security: Competing or mutually supportive' in S Motala, S Ngandu & T Hart (eds) *Social Security Review 2021 – Evolution of Social Security in South Africa: An Agenda for Action* (Department of Social Development: Pretoria 2021) 72-80 at 76.

⁶⁴⁴ Van den Heever in Motala, Ngandu & Hart (n 643) 78.

⁶⁴⁵ MP Olivier 'Selected constitutional and legal perspectives on social security in South Africa' in S Motala, S Ngandu & T Hart (eds) *Social Security Review 2021 – Evolution of Social Security in South Africa: An Agenda for Action* (Department of Social Development: Pretoria 2021) 20-32 at 20; Van den Heever in Motala, Ngandu & Hart (n 643) 76.

⁶⁴⁶ See, for example, the security risks SASSA faced when it was created, which the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) BCLR 1 (CC) ('*Allpay Consolidated*') para 8 summarised: "Deficiencies in the system caused duplication of payments. Fraudulent conduct was widespread, including claims being submitted by persons who were not entitled to grants or on behalf of beneficiaries who were deceased."

⁶⁴⁷ V Taylor *Marketisation of governance: Critical feminist perspectives from the South* (SADEP: Cape Town 2000).

⁶⁴⁸ *Allpay Consolidated* (n 646) para 76.

of Net1 had access to the same financial records as Cash Paymaster Services, which the subsidiaries then exploited to deduct unauthorised and unlawful payments from social grant recipients.⁶⁴⁹

Two Constitutional Court cases followed.⁶⁵⁰ The history of these cases is long, but an appropriate comment from the Constitutional Court summarises these cases for the purposes of this research:

The executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures to get it out of this predicament.⁶⁵¹

The fragmentation from the above case illustrates a central problem with fragmentation: increased fraud and corruption,⁶⁵² committed by state actors and non-state actors alike. arising from fragmentation is only one example of committed by state actors and non-state actors alike.⁶⁵³ Fourie explains the linkage between economic policy, fragmentation, and corruption and fraud: "The post-Apartheid state embraced neoliberal morality that seeks self-advancement which encourages fragmentation and, more recently, justifies acts of corruption and state capture."⁶⁵⁴

Directly, fragmentation results in monetary loss through the duplication of costs, corruption, and fraud. This monetary loss thus results in less money in people's pockets; money to which they are entitled. Indirectly, policymaking fragmentation

⁶⁴⁹ Blask Sash 'Hands off our grants' (31 May 2022) (available at: <https://www.blacksash.org.za/hands-off-our-grants-black-sashes-long-battle-for-justice-against-sassa-and-cash-paymaster-services/>) (last accessed 30 October 2024).

⁶⁵⁰ *Allpay Consolidated* (n 646); *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2018 (12) BCLR 1472 (CC) ('*Black Sash Trust*').

⁶⁵¹ *Black Sash Trust* (n 650) para 8.

⁶⁵² See, for example, a recent article by GroundUP, wherein the authors detailed their suspicion of fraud in the SASSA COVID-19 SRD system. J Cedras & V Gosai 'We discovered massive fraud in SASSA's grant system' (14 October 2024) (available at: groundup.org.za/article/we-discovered-flaws-massive-fraud-in-sassas-srd-system/) (last accessed 30 October 2024). SASSA's representative admitted such fraud is indeed widespread, but the impact of such fraud remains uncertain. See R Cloete 'SASSA defends SRD grant payment system after breach claims' (18 October 2024) (available at: skillsportal.co.za/news/sassa-defends-srd-grant-payment-system-after-breach-claims) (last accessed 30 October 2024).

⁶⁵³ This research notes that SASSA has the Fraud Management and Compliance Department, which aims to prevent corruption within SASSA. An example of this Department's work includes the arrest of five SASSA officials in early 2020, who were arrested for fraud totalling R2 million. See N Mashaba & MD Saurombe 'Evaluating the effectiveness of a social grant regulating framework in South Africa' (2023) 23(1) *Acta Commercii* 1-10 at 1-2 for more information on the Fraud Management and Compliance Department.

⁶⁵⁴ Fourie (n 327) 841.

causes disparities to arise between the policies of social assistance and social insurance, resulting in people falling through gaps in the social security framework.

Post-1994 social security, albeit fragmented, aimed to ameliorate and remedy the past injustices of colonialism and apartheid.⁶⁵⁵ Through the distribution of social grants, ISS systems could continue reacting to shocks and risks as required, and serve positive functions within kin and community networks.⁶⁵⁶ However, the direct and indirect costs of fragmentation as explained in the previous paragraph potentially infringe not only upon their right to access social security but also upon their rights to equality and human dignity, as corruption within state bodies “exacerbates inequalities between the rich and the poor, impedes progress on economic and political growth and results in the general degradation of living standards.”⁶⁵⁷

6.2 The South African state's duty to protect and advance informal social security

The previous section elaborated upon the shortcomings within South Africa's social security system, and the role which the state plays in perpetuating – not remedying – these shortcomings. This section is the crux of this research's argument. It argues that the state's failure to repair the existing formal social security shortcomings infringes upon the right to access ISS, a branch of support the state barely recognises, let alone considers in legislation or policy.⁶⁵⁸

It is prudent at this point to reiterate that, despite discussing the shortcomings in the formal social security system, this research seeks to show that the state is infringing the right to access *informal* social security.

This section broadly structures itself according to the phrasing within section 27(1)(c) of the Constitution, read with section 27(2), and incorporates the judicial interpretations thereof.⁶⁵⁹ Since interpretations and analyses must read these provisions together,⁶⁶⁰ they will mutually reinforce one another within a single discussion.

⁶⁵⁵ Mashaba & Saurombe (n 653) 2.

⁶⁵⁶ See Chapter 2 above.

⁶⁵⁷ Mashaba & Saurombe (n 653) 2.

⁶⁵⁸ Makore & Lubisi (n 179) 247-248. See heading 4.1.2 above.

⁶⁵⁹ Thus, the subsection engages with the phrases “everyone,” “access to,” “reasonable,” “progressive,” and “available resources.” See Constitution (n 13) secs 27(1)(c) & (2).

⁶⁶⁰ *Grootboom* (n 28) para 34.

6.2.1 Informal social security as a constitutional right

As a point of departure, this research reaffirms that the protection which the state must provide to the right to access social security similarly applies to ISS (and its participants). The reason therefor is the Court in *Grootboom*'s confirmation that a right to access is more expansive than the mere *right to*.⁶⁶¹ From the Court's expansive interpretation, ISS constitutes a broader avenue of support which functions alongside formal social security, thus rendering it a form of social security within the meaning of section 27.

Furthermore, the right of *everyone*⁶⁶² to access social security not only affords South Africa's populace the right to formal social security but also the right to engage in ISS. This requires the state to pay particular attention to those groups of people excluded from and not appropriately protected within the current formal social security system. Their exclusion or inadequate protection renders them – and their ISS systems – vulnerable and risks the loss of ISS as a constitutionally protected form of support.

6.2.2 Reasonability assessment: General considerations

As chapter 4 above explained, the Constitutional Court has primarily utilised a threshold of reasonability to determine whether the state has infringed upon people's socio-economic rights.⁶⁶³ The reasonability criteria apply to two phases of the framework which are, generally, the conception and implementation phases. The state's conduct must be reasonable in *both* these phases.⁶⁶⁴ This research first discusses the general factors of reasonability that the Constitutional Court established and then proceeds into the two other factors⁶⁶⁵ influencing reasonability: the availability of resources, and the progressive realisation of the right to access (informal) social security.

⁶⁶¹ *Grootboom* (n 28) para 35. See heading 4.1.2 above for its discussion on *Grootboom*'s ruling that the right to access social security is an expansive, and not restrictive, phrasing.

⁶⁶² *Khosa & Mahlaule* (n 357) para 80. See heading 4.1.2 above for its discussion on the meaning of "everyone" in *Khosa & Mahlaule*.

⁶⁶³ See heading 4.1.2 above for a thorough discussion on the Constitutional Court's reasonability assessment.

⁶⁶⁴ *Grootboom* (n 28) paras 40-43; Liebenberg (n 27) 152; Brand (n 27) 130-131.

⁶⁶⁵ Constitution (n 13) sec 27(2).

A reasonably *conceived* framework must be “comprehensive, coherent, and co-ordinated.”⁶⁶⁶ Regarding comprehensiveness, a reasonable framework necessarily entails complete coverage and consideration at all crucial points.⁶⁶⁷ In *Grootboom*'s case, the state's low-cost housing programme did not plan for a crucial point: the people who did not even have shelter to begin with.⁶⁶⁸ The Court stated that: “A programme that excludes a significant segment of society cannot be said to be reasonable.”⁶⁶⁹

As it stands, participants who rely on ISS are already vulnerable groups, such as structurally unemployed persons. The South African state does not develop social security systems and policies that incorporate ISS participants. This includes the state not incorporating and providing for the unemployed and informally employed in social insurance,⁶⁷⁰ or the missing middle in social assistance.⁶⁷¹ These exclusions lead to more people relying on ISS, ultimately reducing its effectiveness. On the face of it, the state's social security framework is not reasonably comprehensive because it does not conceive a legislative framework including ISS.

A reasonable comprehensive framework further requires co-ordination between different spheres of state.⁶⁷² While *Grootboom* was referring to the *spheres* of state (national, provincial, and local), the separation between the *branches* of state (executive, legislature, and judiciary) can similarly not be a brick wall.⁶⁷³ *Grootboom* was encouraging the state to not develop its frameworks in isolation, in line with the *First Certification* judgment's ruling that “there is no separation that is absolute.”⁶⁷⁴

The social security framework currently suffers from policymaking fragmentation,⁶⁷⁵ a form of fragmentation arising when the distinct parts of the state – be it the spheres or branches – are severely disjointed. The state cannot remedy the gaps in the legislative

⁶⁶⁶ *Grootboom* (n 28) paras 39-40, 68, 78, 95; *Treatment Action Campaign* (n 28) para 123; Liebenberg (n 27) 152-153; Currie et al in Currie & De Waal (n 361) 578.

⁶⁶⁷ United Nations Committee on Economic, Social and Cultural Rights *General Comment 12: The right to adequate food* E/C.12/1999/5 (1999) para 25, as cited in Brand (n 27) 124-125.

⁶⁶⁸ Brand (n 27) 125.

⁶⁶⁹ *Grootboom* (n 28) para 43.

⁶⁷⁰ See heading 6.1.1 above.

⁶⁷¹ See heading 6.1.3 above.

⁶⁷² *Grootboom* (n 28) para 40.

⁶⁷³ *First Certification* judgment (n 360) para 109; B Bekink *Principles of South African Constitutional Law* (LexisNexis: Durban 2016) 2nd edition at 199.

⁶⁷⁴ *First Certification* judgment (n 360) para 107.

⁶⁷⁵ See heading 6.1.5 above.

framework without appropriate collaboration throughout its departments, as each brings its own knowledge, experiences, and challenges to the fore.

The state cannot proceed to remedy its formal social security shortcomings on a piecemeal, individual basis as it has done with domestic workers in the UIA and COIDA. Fragmented amendments risk the lack of real reform.⁶⁷⁶ The shortcomings are mutually reinforcing, and the state must treat them as such by conceiving a reasonably co-ordinated and coherent social security framework. Due to the state's fragmented and piecemeal approach to social security, ISS must inevitably bear the state's burdens, which may eventually prove to weigh too heavily upon ISS's limited capacities. Thus, the state does not currently fulfil the requirement that it reasonably conceives its framework in a "comprehensive, coherent, and co-ordinated"⁶⁷⁷ manner. Not only does the unreasonable fragmentation of social security result in legislative gaps at the *conception* phase, but it also has the negative consequences of leaving the framework open to duplication of costs, corruption, and fraud at the *implementation* phase.⁶⁷⁸

Merely adopting legislative or policy measures without appropriate implementation thereof will not constitute reasonable conduct.⁶⁷⁹ In the context of this research, the state technically complies with the legislative measures on paper. However, its substantive implementation – that is, money in people's pockets – is lacking, due to the state's fragmented structures losing money through the duplication of costs, rampant corruption, and fraud.⁶⁸⁰ This reduces the efficacy of service delivery and ultimately results in less money going to South Africa's vulnerable population, thus causing a domino effect on ISS.

This subsection evaluated the general factors determining the reasonability of the state's treatment of ISS. At this point in the analysis, the state's neglect of formal social security's shortcomings, and the implications thereof for ISS such as weakening and deterioration of the system, are not reasonable. Before proceeding to finalise the argument that the state's conduct unjustifiably infringes upon ISS participants' right to

⁶⁷⁶ Van den Heever in Motala, Ngandu & Hart (n 643) 78.

⁶⁷⁷ *Grootboom* (n 28) paras 39 & 40, 95; Liebenberg (n 27) 152.

⁶⁷⁸ See heading 6.1.5 above.

⁶⁷⁹ *Grootboom* (n 28) para 42.

⁶⁸⁰ See heading 6.1.5 above.

access (informal) social security, this section discusses the arguments surrounding another crucial factor of reasonability: progressive realisation.

6.2.3 Reasonability assessment: Progressive realisation

Section 27(2) introduces two major factors to the reasonability assessment.⁶⁸¹ The first relates to the state's duty to progressively realise the right to access social security, and the second relates to the state's ability to reasonably realise the right to access social security within its available resources.

The state cannot immediately realise the right to access social security; it is a process which takes time.⁶⁸² However, international and domestic interpretations of the phrase give rise to notable arguments and features. Chenwi summarises these arguments in three points. Firstly, progressive realisation demands that the state must take the basic steps towards realising the right concerned.⁶⁸³ It must at least investigate the hurdles which hinder the realisation of the right and, where possible, reduce those hurdles.⁶⁸⁴ In other words, "it cannot do nothing."⁶⁸⁵

The obligation to reduce the hurdles over time gives rise to *Grootboom's* confirmation that, while progressive realisation limits the pace at which the state must realise the right, the limitation cannot deprive the right of all meaningful content.⁶⁸⁶ *Grootboom*, through its endorsement of the Committee on Economic, Social and Cultural Rights' ('CESCR') explanation of progressive realisation, agreed that the state must improve both the number of people and the *scope* of people covered with time.⁶⁸⁷ The state must improve upon its services to keep pace with the basic needs which arise. Chenwi argues that merely reviewing policies regularly does not fulfil the requirement of progressive realisation.⁶⁸⁸

⁶⁸¹ Constitution (n 13) sec 27(2); Liebenberg (n 27) 154.

⁶⁸² *Grootboom* (n 28) para 45; L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46(3) *De Jure Law Journal* 742–769 at 743; Dekker (n 12) 91.

⁶⁸³ *Grootboom* (n 28) para 45; Chenwi (n 682) 744.

⁶⁸⁴ *Grootboom* (n 28) para 45; Chenwi (n 682); Dekker (n 12) 91.

⁶⁸⁵ Brand (n 27) 124.

⁶⁸⁶ *Grootboom* (n 28) para 45; Dekker (n 12) 91. See also heading 4.1.2 above for *Grootboom's* affirmation of the CESCR General Comment 3 (n 470) regarding the progressive expansion of benefits.

⁶⁸⁷ Chenwi (n 682) 747.

⁶⁸⁸ Chenwi (n 682) 749.

Secondly, progression inevitably implies the rejection of any deliberately retrogressive measures regarding the right's realisation.⁶⁸⁹ Should the state implement retrogressive measures, the courts would require its full justification, including the impact thereof on the "totality of... rights provided for in the [International Covenant on Economic, Social and Cultural Rights] and in the context of the full use of the maximum available resources."⁶⁹⁰ In other words, the courts do not take kindly to the state decreasing its realisation of the socio-economic right concerned.⁶⁹¹

And thirdly, progressive realisation requires the state to implement special measures for the vulnerable in society.⁶⁹² One of the most important considerations *Grootboom* emphasised was whether the state appropriately provided for short-, medium, and long-term needs, particularly emphasised that the state must provide for those living in intolerable conditions and in urgent need.⁶⁹³ Although the Constitutional Court rejected the concept of a minimum, core obligation as endorsed by the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the CESCR, its rulings nevertheless reflect its belief in a basic threshold (or core) which the Constitution entitles individuals to.⁶⁹⁴

Within the context of this research, the question arises as to how long the state can take to realise the right to access (informal) social security?⁶⁹⁵ How has the state progressed in the consideration, accommodation, and protection of ISS participants? As chapter 3 above explained, the ideologies and systems implemented by previous dispensations burdened the new state's social security with numerous challenges. Over the centuries the Dutch, British, Union, and apartheid systems systematically entrenched racial discrimination into social security.⁶⁹⁶ The new constitutional dispensation faced a multi-headed beast of inequality and committed the state to

⁶⁸⁹ Chenwi (n 682) 745.

⁶⁹⁰ *Grootboom* (n 28) para 45; CESCR General Comment 3 (n 470).

⁶⁹¹ Brand (n 27) 100.

⁶⁹² Chenwi (n 682) 746.

⁶⁹³ *Grootboom* (n 28) paras 43, 44, 64, 68, 99; *Treatment Action Campaign* (n 28) para 78; Liebenberg (n 27) 153.

⁶⁹⁴ Chenwi (n 682) 754.

⁶⁹⁵ Dekker (n 12) 91.

⁶⁹⁶ See Chapter 3 above.

upholding and supporting its populace's rights. People were suffering, and the state's social security had to react effectively to help them.⁶⁹⁷

The 1992 Social Assistance Act ('1992 SAA') commenced in 1996 and provided for similar social grants as the 2004 Social Assistance Act ('SAA').⁶⁹⁸ However, many changes have since occurred, such as the shifting of power to administer grants from the provincial Ministers to SASSA.⁶⁹⁹ Since 1996, the child support grant and the provision of additional payments have been added.⁷⁰⁰ The SAA has also become much more inclusive, reflecting a positive development to extend social assistance to those previously excluded. These changes include but are not limited to, the change from "parent" to "primary care giver,"⁷⁰¹ the inclusion of child-headed households,⁷⁰² the extension of social grants from citizens to permanent residents and refugees,⁷⁰³ and the provision (and continued extension of) the COVID-19 SRD grant.⁷⁰⁴ In 2001, about 3.5 million people received some form of grant.⁷⁰⁵ This number has ballooned to about 19 million people (excluding those who receive the COVID-19 SRD grant) in 2024.⁷⁰⁶

The improvements in social insurance are nothing to scoff at. Chapter 4 explained how the 2003 changes within the UIA expanded its definitional scope to domestic workers, who are an already vulnerable group of people.⁷⁰⁷ The Court's optimistic case of *Mahlangu* similarly obliged the state to expand COIDA's definitional scope to domestic workers. These improvements definitively show the state's capacity to progressively realise the right to access social security.

⁶⁹⁷ S Ngandu & S Motala 'Ten years of the South Africa Social Security Agency: The journey 2006-2016' in S Motala, S Ngandu & T Hart (eds) *Social Security Review 2021 – Evolution of Social Security in South Africa: An Agenda for Action* (Department of Social Development: Pretoria 2021) 98-113 at 100.

⁶⁹⁸ The Social Assistance Act 59 of 1992 ('1992 SAA') provided for older persons, persons with disabilities, and war veterans. See 1992 SAA sec 3. It further provided for a "maintenance grant to a parent for the maintenance of a child in his custody; a foster child grant to a foster parent... capitation grants for the care of persons admitted to such an institution or place of safety... a care dependency grant to a parent or foster parent in respect of a care-dependent child." See 1992 SAA secs 2(d)-(g).

⁶⁹⁹ Ngandu & Motala in Motala, Ngandu & Hart (n 697) 100, 102.

⁷⁰⁰ SAA (n 35) secs 6 & 12A.

⁷⁰¹ 1992 SAA (n 698) secs 3(d)-(e); SAA (n 35) secs 6-8.

⁷⁰² SAA (n 35) sec 6(b).

⁷⁰³ 1992 SAA (n 698) sec 3(c); SAA (n 35) sec 5(c); *Khosa & Mahlaule* (n 357) para 59.

⁷⁰⁴ While the 1992 SAA (n 698) provided for a social relief of distress grant, the sheer magnitude of the COVID 19-SRD grant is undoubtedly a positive development. See 1992 SAA (n 698) sec 5(2).

⁷⁰⁵ Taylor Committee (n 18) 58.

⁷⁰⁶ SASSA (n 635).

⁷⁰⁷ See heading 4.1.2 above.

In determining whether the state has progressively realised the right to access (informal) social security, the developments of the formal framework influence the progressive realisation of ISS.

Considering what has been done over the past 30 years, this research cannot and will not understate that the state's improvements reflect people who have been helped and saved by social security benefits. But, central to any system are the critiques thereof. Only by investigating the shortcomings within the social security system can it continue to improve, thus giving effect to the state's commitment to the progressive – in other words, continual – realisation of the right to access ISS.⁷⁰⁸

The first argument surrounding progressive realisation is that the state must investigate and implement plans to realise the right to access social security. As is clear from the discussion in chapter 4 above, and from the shortcomings in the formal system, the state has not investigated any strategies aimed at protecting and advancing ISS.⁷⁰⁹ While SASSA has made significant improvements in the number of people it provides for, it nevertheless has not expanded the *scope* of the people it protects. While social insurance has, at least, broadened its scope to include domestic workers, this is hopelessly too little after 30 years of democracy and considering the sheer magnitude of unprotected people.

As a second point, the state must be able to fully substantiate any deliberately retrogressive decisions it makes. This point is particularly poignant due to the uncertain nature of the COVID-19 SRD grant. This grant is temporary, and there is much uncertainty as to the future thereof. Should the state decide to stop the COVID-19 SRD grant without implementing strategies of an equivalent or improved calibre, the state will be instituting deliberately retrogressive measures, as it will be depriving millions of people of realising their right to access social security.

And as a third point, progressive realisation demands that the state implement measures aimed at the urgent needs of the most vulnerable, and provide for their short-, medium-, and long-term needs. Within the context of this research, the state does not fulfil the requirement to meet the short-term needs of people in two ways. Firstly, the people who *do* receive social grants cannot, in the short term, live dignified

⁷⁰⁸ Constitution (n 13) sec 27(2).

⁷⁰⁹ The state's investigations can provide it with further insight into the most effective methods of assisting ISS without interfering unjustly in the practice.

lives at the current level of benefits provided.⁷¹⁰ Secondly, the state excludes people from receiving social insurance⁷¹¹ and social assistance,⁷¹² and thus does not provide for them in the short-, medium-, or long-term.

Despite the statistical advances in realising the right to access social security, the state nevertheless excludes a great number of already vulnerable groups from both social assistance and social insurance. As Yacoob J wrote in *Grootboom*:

It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁷¹³

It is understandable that the new state in 1994 could not quickly undo centuries of fragmentation and discrimination in a year, or two, or ten. However, central to progressively realising the right to access social security is ISS, and the state must respect and promote its role. Despite the progressive advances in terms of formal social security, the state has never considered ISS in the formulation of policy and the state has thus not progressively realised it in the past 30 years of the new dispensation.

6.2.4 Reasonability assessment: Within available resources

Tshoose referred to this portion of the reasonability assessment as the “elephant in the room,” since the availability of resources often bookends any discussion on the state’s obligation to realise a socio-economic right.⁷¹⁴ Naturally, the state can only take steps to progressively realise rights if it has the resources to do so. But, as Chenwi argues, the availability of resources does not constitute a suitable defence for the state to neglect the development and adoption of a reasonable framework.⁷¹⁵

The slight difference in wording between South Africa and the ICESCR is the number of resources allocated to realising a particular right. The ICESCR advocates for the *maximum* available resources, whereas South Africa merely obliges the state to

⁷¹⁰ See heading 6.1.4 above.

⁷¹¹ See heading 6.1.1 above.

⁷¹² See heading 6.1.3 above.

⁷¹³ *Grootboom* (n 28) para 44.

⁷¹⁴ Tshoose (n 27) 170.

⁷¹⁵ Chenwi (n 682) 749, citing United Nations Committee on Economic, Social and Cultural Rights *General Comment 11: Plans of action for primary education* E/1992/23 (1999) para 9.

realise the right *within* available resources. It is thus unclear whether the Constitution obliges the state to merely make resources available, or whether the state must make *all* the resources with the potential to realise the right available thereto.⁷¹⁶ However, Chenwi argues that the difference in wording does not matter and is instead a mere difference in institutional terminology.⁷¹⁷

The Court's reasonability assessment derives from its refusal to breach the separation of powers doctrine, and from its insistence that the judiciary cannot impose its interpretations of how best to spend money or what measures to adopt onto other branches of state.⁷¹⁸

However, Brand explains that the Court's supposed unwillingness to determine the exact parameters of the other state branches' budgets is mostly a "fiction."⁷¹⁹ The Court has expressed that it will not, itself, reorganise the state's budget. However, if the Court finds the budget unreasonable, it may nevertheless make an order requiring the state to restructure its budget.

Take, for example, the *Khosa and Mahlaule* judgment, which extended social assistance beyond citizens to include permanent residents and refugees. The Court did not, itself, decide on the exact budgetary reorganisation. Nevertheless, "the effect of the decision in *Khosa*... is that the state has to allocate additional resources to an item it did not want to finance."⁷²⁰

It is definitively true that South Africa spends a sizeable portion of its gross domestic product ('GDP') on social security. National Treasury estimated that it would allocate about R217.1 billion to social grants, with a separate R33.6 billion for the COVID-19 SRD grant.⁷²¹ These grants, when combined with social insurance funds and indirect social security measures such as "provincial social development" and "women, youth and persons with disabilities" measure up to about 3,6% of the GDP.⁷²²

Despite the concerns this research raises regarding the levels of benefits, the Department of Social Development and SASSA did increase the benefits in 2024.

⁷¹⁶ Chenwi (n 682) 751.

⁷¹⁷ Chenwi (n 682) 751.

⁷¹⁸ *Grootboom* (n 28) para 41; Currie et al in Currie & De Waal (n 361) 574.

⁷¹⁹ Brand (n 27) 123.

⁷²⁰ Brand (n 27) 133.

⁷²¹ National Treasury Budget (n 638) 52.

⁷²² National Treasury Budget (n 638) 53.

These are not appropriate to sustain a dignified standard of living,⁷²³ but at least the state is attempting to keep up with inflation. Throughout, this research expresses its appreciation and respect for the amount spent on social security and emphasises that – as it stands – social security is the most effective poverty alleviation mechanism for South Africa.

The National Treasury, however, reduced the budgets for many Departments in the 2024/2025 financial year, including that of the Department responsible for SASSA grants.⁷²⁴ In her Budget Vote speech for the 2024/2025 financial year, the Minister of Social Development, Ms Nokuzola Tolashe, expressed her concern regarding the increases in inflation and the fallouts from natural disasters. She stated that: “The revenue decline... is also exacerbated by rising social ills that places a huge demand for social services which requires *more*, not *less* funding.”⁷²⁵ Despite concerns accumulating about reducing the budget on social security, the National Treasury estimates that in future financial years, it will allocate a smaller portion of the GDP to social security.⁷²⁶

One of the key factors in determining the reasonability of the state's implementation of its framework is whether it allocates the necessary resources, both financial and human, to the relevant actors so they can implement their responsibilities and tasks.⁷²⁷ The phrasing of “within available resources” in section 27(2) is a double-edged sword for the state. While resource constraints can serve to justify (or “excuse”) the state's lack of resource provision, the state must *make* or *budget for* the necessary resources, in the first place, to realise the right to access social security.⁷²⁸

The courts will intervene in circumstances where the state commits itself to realising a socio-economic right but does not allocate the necessary resources thereto, as such conduct is an unreasonable implementation of its framework.⁷²⁹

⁷²³ See heading 6.1.4 above.

⁷²⁴ National Treasury Budget (n 638) 53.

⁷²⁵ N Tolashe ‘Speech by the Minister of Social Development, Ms Nokuzola Tolashe, MP on the occasion of the tabling of Budget Vote 19 of the Department of Social Development to the National Assembly’ (17 July 2024) (available at [gov.za/news/speeches/minister-nokuzola-tolashe-social-development-dept-budget-vote-202425-17-jul-2024](https://www.gov.za/news/speeches/minister-nokuzola-tolashe-social-development-dept-budget-vote-202425-17-jul-2024)) (last accessed 30 October 2024). Emphasis added by author.

⁷²⁶ National Treasury Budget (n 638) 53.

⁷²⁷ *Grootboom* (n 28) paras 39, 68.

⁷²⁸ Brand (n 27) 131.

⁷²⁹ *Grootboom* (n 28) paras 39, 68; Brand (n 27) 126.

The state commits itself to realising the right to access social security, as is evident from the sizeable percentage of financial resources assigned thereto. However, its commitment to realise the right falls short in the face of budget withdrawal, and the low benefits paid to the people who rely thereon. The state's commitment to the right to access social security does not resound with its budgetary reduction thereof. The budget reduction that the National Treasury has imposed (and predicts) is unreasonable, as rising unemployment and rising inequality do not demand the state to reduce measures aimed at the basic support of its people. Thus, the state does not allocate the appropriate resources to realising the right to access social security.

Should the state rely on resource constraints as a defence for not realising the right to access ISS, it bears the burden of proving so. However, the state will not be able to discharge this burden, as the overall fragmentation of the system results in significant funds lost.⁷³⁰ As Tshoose stated:

it becomes evident that the government's inability to deal with corruption is also a failure to meet the commitment to maximize available resources. This is due to the fact that resources that have been misdirected or mismanaged are squandered.⁷³¹

The state's available resources thus do not serve as a justifiable limitation of ISS participants' constitutional rights.

6.2.5 Concluding remarks

Grootboom informed its reasonability analysis with the right to human dignity.⁷³² It is undeniable, at this point, that the state's exclusion of so many people from receiving social security deprives them of their rights to human dignity. The state is creating and perpetuating bottlenecks of need and thus deprives people of the means to participate in and rely on ISS. Their economic devastation not only deprives them of living under dignified standards but also deprives them of participating meaningfully with their kin or community networks.

The Constitution obliges the state to negatively and positively give effect to its social security obligations regarding ISS.⁷³³ As it stands, the state does not fulfil its negative

⁷³⁰ See heading 6.1.5 above.

⁷³¹ Tshoose (n 27) 172.

⁷³² *Grootboom* (n 28) para 83.

⁷³³ Constitution (n 13) sec 7(2) obliges the state to respect, protect, promote, and fulfil the rights within the Bill of Rights. See heading 4.1.2 above for its discussion on negative and positive rights.

obligation to *respect* ISS, as it does not allow those in non-formal employment to insure themselves in public schemes.⁷³⁴ While the state need not be the *sole* provider of social security, its duty – at the very least⁷³⁵ – is one of “unlocking the system and providing a legislative framework to facilitate access to social security.”⁷³⁶ Due to the mutually reinforcing shortcomings explained above,⁷³⁷ people's ability to insure themselves through stokvels or burial societies is deteriorating, as they do not have the necessary capital to do so. In a negative sense, the state thus does not fulfil their right to access (informal) social security.

The state furthermore does not *protect* the right to ISS, as it has not established a regulatory framework appropriate for ISS mechanisms such as stokvels or burial societies. Nor does the state *promote* or *fulfil* the right to ISS, as the state neglects the missing middle and provides too low levels of grants. This latter point thus does not place ISS participants in a position to distribute or receive ISS support, as insufficient coverage means people cannot participate fully in ISS .

As explained in chapter 2 above, ISS functions on a basis of reciprocation, co-operation, and trust. While some ISS participants extend assistance based on altruism, ISS primarily organises itself based on its own forms of regulation which, while not established in formal mechanisms, nevertheless establish duties and entitlements.

However, ISS mechanisms are not large-scale and rely on a significantly smaller group of people who can set aside some capital or resources, which ISS then redistributes to those in need. When those in need begin to outnumber the available resources, ISS's ability to help the needy decreases, in what this research has referred to throughout as “bottlenecks of need.”

The state's unreasonable neglect in repairing formal social security's shortcomings, when paired with broader shortcomings such as high unemployment and inefficient economic policy, result in fewer people being able to distribute resources via ISS. This not only deprives people of their right to access *formal* social security but their right to access *informal* social security. In essence, the form of social security which has

⁷³⁴ See heading 6.1.1 above.

⁷³⁵ *First Certification* judgment (n 360).

⁷³⁶ CI Tshoose 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post Grootboom' (2017) 30(1) *Southern African Public Law* 94-111 at 105.

⁷³⁷ See heading 6.1 above.

existed since the precolonial era, one which unifies people through reciprocation, co-operation, and solidarity, is deteriorating due to the bottleneck of need which the state perpetuates. The state's conduct does not protect, nor advance, ISS and thus it is not fulfilling its constitutional mandate in terms of section 27.

6.3 Conclusion

This chapter serves as this research's argument as to how and why the state has a duty to protect and advance ISS. In its approach to the state's section 27 mandate, this chapter outlined the importance of interpreting the right to access social security holistically, with reference to the context of the Constitution and its fundamental rights and principles.

The Constitution affords all persons, regardless of their employment statuses or income thresholds, the right to access a broad range of services and material resources not just merely a right *to* social security, but the right to *access* social security. In determining whether the state fulfils the positive mandate the Constitution imposes thereupon, courts have undertaken a constitutional threshold of a reasonability test. They have evaluated state policies, and have found that, sometimes, the state may unjustifiably infringe upon the very rights it intends to protect, with *Grootboom* as a prime example. Such is the case with ISS. The state attempts to assist those *most* vulnerable and in need within society through, for example, means-testing. However, in the process, it severely limits the ability of those *particularly* vulnerable in society to access social security, who must then turn to ISS for support.

ISS is integral to supporting those who the state does not appropriately protect through formal social security and must thus be respected in such a role. The state's shortcomings within formal social security bleed into an infringement of the right to access ISS, causing kinship and community social security, which have served such important roles throughout history, to face increasing weakness and inability to supplement where the state fails. The state thus has a duty to protect and advance ISS, which – due to its shortcomings – it is not currently fulfilling.

Chapter 6: The South African government's duty to informal social security

The question is: How does the state go about fulfilling its constitutional mandate? The following chapter investigates potential legal reforms which may serve to assist the state in its road to fulfilling the right to access (informal) social security.

Chapter 7

Legal reform proposals to protect and advance informal social security

The previous chapter put forth this research's argument that the South African state unjustifiably infringes upon the right to access (informal) social security, thus not fulfilling its constitutional duty to protect and advance informal social security ('ISS'). The question the previous chapter posed was: how can the state fulfil this constitutional duty?

This chapter proposes legal reforms the state can implement to adjust the shortcomings in the current formal social security structure. While these proposals are not exhaustive, they provide an opportunity to evaluate the measures aimed at protecting and advancing ISS.

The chapter evaluates three primary legal reform proposals, with reference to foreign law examples from India. It begins by discussing the most popular proposal, namely the extension of formal frameworks to include ISS structures.⁷³⁸ Bridging from this proposal, the next legal reform put forth is the cooperative structure, as its organising principals run parallel to those of ISS.⁷³⁹ And lastly, the chapter discusses whether a basic income grant ('BIG') can ameliorate some of the shortcomings in the current formal social security framework, or whether it would be too costly for South Africa.⁷⁴⁰

The table below summarises the legal reform proposals within this chapter, and their benefits to ISS.

⁷³⁸ See heading 7.1 below.

⁷³⁹ See heading 7.2 below.

⁷⁴⁰ See heading 7.3 below.

Table 2: Summary of proposed legal reforms

	Extending formal frameworks⁷⁴¹	Co-operatives⁷⁴²	Basic income grant ('BIG')⁷⁴³
Proposed legal reform	State must extend the current social insurance legislation to allow contributions from those who have contribution capability.	The government must ease the difficulty in registering as a co-operative. Training and skills development in operating a cooperative (for example, closer alignment with the Department of Small Business Development)	Possible amendment of the Social Assistance Act to add the proposed BIG. Possible permanent implementation of COVID-19 SRD grant.
Brief explanation of the proposal	Addresses the formal employment bias in social insurance and creates a reasonable formal framework to include informal workers.	Co-operatives provide a formal framework for otherwise informal structures.	A non-means-tested grant to those not already receiving a social grant.
Benefits of proposal	Encourages formalisation of informal work. More feasible considering case study examples from India.	A formal framework provides formal legal recourse for informal structures.	Provides a reliable source of income, reducing the impoverished people's needs. Encourages economic productivity, due to a decrease in poverty traps.
Drawbacks of proposal	Difficulty in regulation, leading to voluntary contributions without employer support (if there is an employer).	Co-operatives are currently underutilised, a recommendation that future research investigate why.	Affordability. Many models lead to fragmentation of the proposal. Tax increase.
Benefits to ISS	Participants in ISS, who are currently excluded from social insurance, can contribute if they have contribution capability, reducing pressure upon ISS and allowing for future planning for life contingencies.	Participants in ISS have expressed the want to have formal legal recourse, which co-operatives provide.	Decreases reliance and pressure on ISS mechanisms, allowing them to respond more effectively to shocks and risks. Provides a reliable source of income for ISS participants to invest in ISS.

⁷⁴¹ See heading 7.1 below.

⁷⁴² See heading 7.2 below.

⁷⁴³ See heading 7.3 below.

7.1 Extending formal frameworks

This legal reform proposal addresses the formal employment bias shortcoming within the formal social security system, particularly its non-coverage of non-formal employees.⁷⁴⁴ The proposal entails the government's extension of the existing social insurance frameworks to include those who can contribute, but who do not currently fall within the formal definitions of contributor or employee. In other words, the proposal suggests the expansion of said definitions to apply beyond the formal into the informal.

Extending the social insurance framework will alleviate the pressure on ISS systems, as there will be lightened demand for ISS to support the fallouts from life contingencies such as deaths, injuries, diseases, or unemployment.⁷⁴⁵ The various instruments and proposals evaluated below primarily focus on the informal economy and its workers. This remains appropriate as a legal reform proposal to protect ISS, as the support which arises in the informal economy nevertheless constitutes a form of ISS.⁷⁴⁶

This subsection provides select international and regional perspectives regarding States' extension of their formal frameworks to include informal sector workers.⁷⁴⁷ Thereafter, it analyses some lessons to be learned from India's social insurance frameworks, particularly from the Indian Code on Social Security, due to its inclusion of informal and atypical work in social insurance schemes.⁷⁴⁸ Finally, this subsection discusses the legal reform potential in South Africa.⁷⁴⁹

7.1.1 International and regional perspectives

The Committee on Economic, Social and Cultural Rights ('CESCR') recommended that member States' social insurance schemes should include informal workers.⁷⁵⁰ As South Africa has signed and ratified the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the state should consider the CESCR's Comment

⁷⁴⁴ See headings 4.3 & 6.1.1 above.

⁷⁴⁵ Nguluwe (n 128) 68. For more literature on the extension of formal social insurance definitions, see Dekker (n 12), Charles (n 132), Fourie (n 128), Chen (n 128), Van Ginneken (n 24), Smit & Mpedi (n 17), Nkepe (n 128), NT Nhede 'Reflecting on the past, present, and future of social security systems in Africa with specific reference to selected countries' (2021) 43(2) *Strategic Review for Southern Africa* at 103–124, Nguluwe (n 128), Meagher (n 128).

⁷⁴⁶ See heading 2.2.2 above for a more thorough explanation of the difference and similarity between community ISS and informal sector social security.

⁷⁴⁷ See heading 7.1.1 below. This section specifically discusses support offered in the informal sector, as it is a form of informal social security in the form of community social security.

⁷⁴⁸ See heading 7.1.2 below.

⁷⁴⁹ See heading 7.1.3 below.

⁷⁵⁰ CESCR General Comment 19 (n 495) paras 16, 28 & 34.

when extending its contributory social insurance schemes to include those working in the informal economy as this will, in turn, alleviate the burden ISS currently bears.⁷⁵¹

While South Africa cannot ratify the International Labour Organisation's ('ILO') Recommendations, they serve a strong persuasive function and provide South Africa with tools for extending formal frameworks. The ILO's Recommendation 202 implores its member States to foster social inclusion for informal workers through social security extension strategies.⁷⁵² The Recommendation outlines some steps member States should undertake to ensure that they formulate and implement sound social security extension strategies.⁷⁵³ Amongst these steps, the Recommendation advises its member States to close gaps and barriers in protection through

appropriate and effectively coordinated schemes, whether contributory or non-contributory, or both, including through the extension of existing contributory schemes to all concerned persons with contributory capacity.⁷⁵⁴

In its preamble, Recommendation 202 recognises the importance of transitioning from informal to formal employment, which resulted in the Transition from the Informal to the Formal Economy Recommendation 204.⁷⁵⁵ Recommendation 204 recognises that policymaking can facilitate the process of reducing the informal sector's challenges, particularly those related to social protection.⁷⁵⁶ Member States must develop strategies for the transition, whilst ensuring that it preserves and improves people's livelihoods.⁷⁵⁷ These strategies include extending current social insurance frameworks,⁷⁵⁸ whilst maintaining a multi-faceted approach by advocating for decent work in the formal sector, emphasising "the coherence of macroeconomic, employment, social protection and other social policies."⁷⁵⁹ This aligns with the test of reasonability elaborated upon in chapter 6 above, particularly the requirement that a reasonable framework be developed in a "comprehensive, coherent, and cooperative" manner.⁷⁶⁰

⁷⁵¹ ICESCR (n 51). See heading 6.1.1 above for an elaboration on how the formal employment bias in South Africa's social insurance increases the pressure upon ISS.

⁷⁵² Recommendation 202 (n 52) arts 3(e) & 15.

⁷⁵³ Recommendation 202 (n 52) art 14.

⁷⁵⁴ Recommendation 202 (n 52) arts 14(b)-(c).

⁷⁵⁵ Recommendation 202 (n 52) Preamble; Recommendation 204 (n 755).

⁷⁵⁶ Recommendation 204 (n 755) Preamble.

⁷⁵⁷ Recommendation 204 (n 755) Preamble.

⁷⁵⁸ Recommendation 204 (n 755) art 20.

⁷⁵⁹ Recommendation 204 (n 755) art 1(b).

⁷⁶⁰ See heading 6.2.1 above.

The African Union ('AU') recommends that states develop and implement social security frameworks which protect informal workers and that informal workers themselves must be involved in the formulation of these protective mechanisms.⁷⁶¹

The Southern African Development Community ('SADC') has also recommended that member States develop social security schemes aimed at every worker, and not enact schemes that differentiate between types and statuses of employment.⁷⁶² The SADC's Code on Social Security specifically calls on member States to incorporate and consider informal modes of social security – namely, ISS – within formal structures by, for example, providing skills training and other relevant forms of support.⁷⁶³

Thus, both international and regional instruments recognise not only the importance of protecting informal workers but also the specific method of extending formal frameworks to include informal workers. A good example of this framework in practice is that of India, which the following heading discusses.

7.1.2 Case study: India and its protection of informal workers

As of 2017/2018, 90% of India's population (about 415.23 million people) work in the informal sector. Notable categories of informal work, as with South Africa, include informal trade or "street vending," gig- or platform-based work,⁷⁶⁴ and people who recycle waste to turn a profit in what is known as "waste picking."

Due to the extraordinarily high percentage of workers in the informal sector, the Indian state has no choice but to engage therewith, and at least attempt to protect them through national legislation prohibiting arbitrary evictions, and harassment, and promoting collaboration with the formal sector. Its implementation of public social insurance schemes aims to mitigate the shocks from life contingencies for those in the informal sector.

⁷⁶¹ See heading 5.3.1 above.

⁷⁶² See heading 5.3.2 above.

⁷⁶³ SADC Code on Social Security (n 565) art 20.3; Olivier in Harms et al (n 467) para 149.

⁷⁶⁴ Gig work refers to jobs obtained via dedicated markets designed to link consumers with "on-demand commerce." In other words, gig workers agree to provide services to a company's clients quickly (on the clients' requests). In contemporary times, this occurs most frequently via dedicated platforms online, which then refers to platform-based work. See SA Donovan, DH Bradley & JO Shimakukuro 'What does the gig economy mean for workers?' *Congressional Research Service* (Washington 2016) 1. See also Gig Economy Data Hub 'What is a gig worker?' (2024) (available at gigeconomydata.org/basics/what-gig-worker) (last accessed 30 October 2024) which defines gig work as atypical work which "consists of income-earning activities outside of standard, long-term employer-employee relationships."

The state's protection of street vendors serves as an example of national legislation aimed at alleviating adverse conditions for informal workers. The hard work of the National Alliance of Street Vendors of India ('NASVI') since 1998 has resulted in a positive forward movement for street vendors.⁷⁶⁵ The National Policy on Urban Street Vendors was published in 2004,⁷⁶⁶ and the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act ('SVA') was enacted in 2014.⁷⁶⁷ Waste pickers still struggle for recognition and protection, but the Solid Waste Management Rules at least recognise and define waste pickers.⁷⁶⁸ While these forms of protection do not constitute any extension of formal social insurance frameworks, they indicate the attention that the Indian state has begun to pay to informal sector workers in the country.

India, as with South Africa, suffers from a formal employment bias in its social insurance frameworks. For example, in 2006 about 95% of India's formal workforce had access to pension benefits from state funds, whereas only about 1% of the informal workforce had access thereto.⁷⁶⁹

Since 2015, the Indian state began extending formal frameworks to those in the informal sector through public schemes. The central state of India has promoted three types of social insurance for informal workers: the public pension scheme under the Atal Pension Yojana ('APY');⁷⁷⁰ accident insurance under the Pradhan Mantri Suraksha Bima Yojana ('PMSBY'); and life insurance under the Pradhan Mantri Jeevan Jyoti Bima Yojana ('PMJJBY').⁷⁷¹

⁷⁶⁵ National Association of Street Vendors of India 'About NASVI' (2024) (available at nasvinet.org/about-nasvi/) (last accessed 30 October 2024).

⁷⁶⁶ S Sinha & S Roeber 'India's national policy on urban street vendors' *Women in Informal Employment: Globalizing and Organizing* (Manchester 2011) at 1.

⁷⁶⁷ Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014 ('SVA'). The SVA applies throughout India, except or the State of Jammu and Kashmir. See SVA sec 1(2).

⁷⁶⁸ Government of India, Solid Waste Management Rules of 2016 rule 3(58). See also A Reddy 'A law for waste pickers' (5 April 2018) (available at downtoearth.org.in/waste/a-law-for-waste-pickers-60103) (last accessed 30 October 2024).

⁷⁶⁹ S Mehrotra 'Can India universalize social insurance before its demographic dividend ends?' (2024) 29(1) *Journal of the Asia Pacific Economy* 134–153 at 139.

⁷⁷⁰ National Portal of India 'Atal Pension Yojana' (2024) (available at india.gov.in/spotlight/atal-pension-yojana) (last accessed 30 October 2024); The Economic Times 'How to apply for Atal Pension Yojana' (4 January 2024) (available at economictimes.indiatimes.com/wealth/invest/how-to-apply-for-atal-pension-yojana/articleshow/79316799.cms) (last accessed 30 October 2024).

⁷⁷¹ Department of Financial Services 'Pradhan Mantri Jeevan Jyoti Yojana (PMJJBY)' (29 October 2024) (available at financialservices.gov.in/beta/en/pmjjby) (last accessed 30 October 2024)

The APY is a completely voluntary, but contributory, pension scheme. Its eligibility criteria require that persons between the ages of 18 and 40, who earn below a certain income threshold, must create a new bank account – thus promoting financial inclusion – and must contribute ₹1000 (or about R210.00) per year.⁷⁷² In the period of 2015-2020, the state co-contributed up to a maximum of ₹1000.⁷⁷³ Upon reaching the age of 60, contributors will receive between ₹1000 and ₹5000 per month, depending on their level and period of contributions.⁷⁷⁴ The APY runs parallel with the Pradhan Mantri Shram Yogi Maandhan pension scheme instituted in 2019 but is specifically aimed at persons working in the informal sector earning below ₹15,000 per year.⁷⁷⁵

The PMSBY accident insurance requires yearly renewal and contribution of ₹20 (R4.20) in return for ₹200,000 (R42,000) upon any death or disability arising from an accident, defined as “a sudden, unforeseen and involuntary event caused by external, violent and visible means.”⁷⁷⁶ The PMJJBY life insurance pays up to ₹200,000 upon the subscriber’s passing and requires their annual contribution of ₹436.⁷⁷⁷

These developments are positive, as they show intention to move beyond a formal employment bias in social insurance. Although fraught with issues,⁷⁷⁸ including the restriction of scope to Indian citizens only, the progress and potential of these schemes to promote people’s access to social security is undeniable. Formal and informal structures are not dichotomous, mutually exclusive frameworks.⁷⁷⁹ To begin the

⁷⁷² Mehrotra (n 769) 139. The conversion of Indian rupees to South African rands is based on the exchange rate on 24 October 2024. See Forbes Advisor ‘Convert Indian Rupee to South African Rand’ (2024) (available at forbes.com/advisor/money-transfer/currency-converter/inr-zar) (last accessed 24 October 2024).

⁷⁷³ National Portal of India ‘Atal Pension Yojana’ (2024) (available at india.gov.in/spotlight/atal-pension-yojana) (last accessed 30 October 2024).

⁷⁷⁴ National Portal of India (n 773).

⁷⁷⁵ Mehrotra (n 769) 139.

⁷⁷⁶ Department of Financial Services ‘Pradhan Mantri Suraksha Bima Yojana (PMSBY)’ (29 October 2024) (available at financialservices.gov.in/beta/en/pmsby) (last accessed 30 October 2024). The conversion of Indian rupees to South African rands is based on the exchange rate on 24 October 2024. See Forbes Advisor ‘Convert Indian Rupee to South African Rand’ (2024) (available at forbes.com/advisor/money-transfer/currency-converter/inr-zar) (last accessed 24 October 2024).

⁷⁷⁷ Department of Financial Services ‘Pradhan Mantri Jeevan Jyoti Yojana (PMJJBY)’ (29 October 2024) (available at financialservices.gov.in/beta/en/pmjjby) (last accessed 30 October 2024).

⁷⁷⁸ For more criticisms of the limited application of social insurance schemes aimed at informal workers, see Mehrotra (n 769); P Jeggumantri ‘Breaking Down India’s Labour Codes: Unveiling The Impact On Organized And Unorganized Sectors’ (2024) 30(4) *Educational Administration: Theory and Practice* at 8387–8393; GA Khan ‘A critical analysis of vulnerability in informal sector employment in India: Protective mechanisms and adequacy of protection’ (2021) 71(241/242) *International Social Science Journal* at 197–215.

⁷⁷⁹ L Juárez Pastor et al ‘Caste, mistrust and municipal inaction: The interwoven barriers for the integration of waste pickers in India’ (2024) 356 *Journal of Environmental Management* 1-24 at 3. See also Chen (n 128) 10.

process of deconstructing the formal employment bias in social security is no small feat, and South Africa can learn from India's social insurance schemes. India's population is significantly larger than South Africa's, and South Africa cannot incorporate low levels of benefits to the extremes of India. Furthermore, India's restriction in providing support to Indian citizens only will not be feasible in South Africa, particularly since non-citizens in South African informal work is prevalent. However, the primary take-away from India is that it has adapted social insurance frameworks to cater better for informal workers, whose incomes are more unpredictable than those persons in formal work.

A further point of progress for India's extension of formal social insurance frameworks arises from its Code on Social Security.⁷⁸⁰ In 2019-2020, the Indian state consolidated its myriad of labour and social security statutes into four primary Codes.⁷⁸¹ In 2020, the Indian state enacted the Code on Social Security, amending and consolidating India's social security laws.⁷⁸² The Code's purpose is to extend its social security to workers in both the formal and informal ("organised and unorganised") sectors.⁷⁸³

The literature surrounding the Indian Code on Social Security primarily focuses on questioning whether its incorporation and protection of gig- and platform-based workers is appropriate.⁷⁸⁴ While the Indian Code on Social Security does provide for other informal work, it devotes section 114 to gig- and platform-based workers. Since South Africa does not define gig- and platform-based workers as formal employees,

⁷⁸⁰ Government of India, Code on Social Security 36 of 2020 ('Indian Social Security Code'); Mehrotra (n 769) 135.

⁷⁸¹ These includes the Code on Wages 184 of 2019; Occupational Safety, Health and Working Conditions Code 122 of 2020; the Indian Social Security Code (n 780); and the Industrial Relations Code 35 of 2020. See S Sharma & S Ragaur 'Organising the unorganised: A comprehensive review of the Social Security Code 2020' (2021) 12(6) *International Research Journal of Management Science & Technology* 40–52 at 41.

⁷⁸² Sharma & Raguar (n 781) 41.

⁷⁸³ Indian Social Security Code (n 780) chapter X; NV Naik 'Code on Social Security: An Impact Analysis on Labour and Capital' (2023) *Social Science Research Network* (DOI: 10.2139/ssrn.4449967) 1-17 at 5. The Indian Social Security Code (n 780) sec 2(78) includes unorganised workers, gig workers and platform workers in its definition of "social security". The Indian Central Statistics Organisation refers to the informal economy as the "unorganised economy," defining it as "operating units whose operations are not subject to any statutory act or legal provision and/or which do not maintain regular accounting records."

⁷⁸⁴ See Naik (n 783); Sharma & Raguar (n 781) 41; A Raman, S Ramachandran & SK Sasikumar 'India's Social Security Code 2020: A catalyst for promoting and protecting platform labour' (2021) 28(1) *Labour & Development* 1–23.

India's move to protect them serves as an optimal case study on extending formal social insurance frameworks to atypical and informal work.⁷⁸⁵

India's Code on Social Security "delinks social protection from employment"⁷⁸⁶ through legislating for gig- and platform-based workers' social insurance, illustrating its willingness to keep its social security in pace with new developments.⁷⁸⁷ As Raman et al explained, the Indian Code on Social Security indicates the state's willingness to overhaul nine separate statutes and reformulate them to also incorporate informal workers.⁷⁸⁸

While implementation remains an "ultimate litmus test to determine what approaches work for the entire world,"⁷⁸⁹ the Indian Code on Social Security is a step in the right direction. South Africa's social insurance has remained stagnant in the face of emerging technologies and changing workplace behaviours. In contrast to the Indian example where the state extends employee protection to gig workers, South Africa does not extend employee protection to gig workers such as Uber drivers, leaving many people vulnerable in the face of life contingencies.⁷⁹⁰

7.1.3 Application of the proposal to South Africa

By utilising the guidelines provided by international law, and the lessons learned from India's social insurance legislation and schemes, South Africa can implement a national and public social insurance fund for persons with contributory capacity, ensuring that even persons in the informal economy may contribute.

As explained in chapter 6 above,⁷⁹¹ the formal employment bias in social insurance is a prominent and damaging shortcoming in South Africa's social security framework. When informal workers cannot contribute to social insurance, they cannot reap the benefits thereof. In the face of life contingencies such as unemployment, maternity, disability, or even death, where can they turn for support? Other than personal

⁷⁸⁵ Raman, Ramachandran & Sasikumar (n 784) 11.

⁷⁸⁶ Raman, Ramachandran & Sasikumar (n 784) 14.

⁷⁸⁷ Raman, Ramachandran & Sasikumar (n 784) 11-12.

⁷⁸⁸ Sharma & Raguar (n 781) 41. The Indian Social Security Code consolidates nine statutes. See Indian Social Security Code (n 780) sec 164.

⁷⁸⁹ Raman, Ramachandran & Sasikumar (n 784) 14.

⁷⁹⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* 2018 (39) ILJ 903 (LC) (12 January 2018); BPS Van Eck & NE Nemusimbori 'Uber drivers: Sad to say, but no employees in SA' (2018) 81 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473-483 at 482.

⁷⁹¹ See heading 6.1.1 above.

savings⁷⁹² and social assistance – which has its own shortcomings in the form of its categorical approach and the low benefits provided⁷⁹³ – ISS is the only place for people to turn.

The “dual system” of social security currently in operation is fraught with shortcomings, both in the formal and informal frameworks and structures.⁷⁹⁴ Whilst ISS is an important safety net,⁷⁹⁵ it is nevertheless vulnerable to bottlenecks of need. As the number of people who *rely* on ISS increases, and the number of people who can *contribute* to ISS decreases, the entire system begins to break down, with poverty and deprivation rearing their heads much harsher and fiercer than before.

State support remains integral to the continued positive effects (and existence) of ISS.⁷⁹⁶ Through alleviating the pressure on ISS by extending social insurance frameworks to those who can otherwise only rely on ISS, the state fulfils its constitutional mandate to enact measures to realise the right to access (informal) social security for everyone.

The state has extended the scope of social insurance statutes, namely the Unemployment Insurance Act (‘UIA’) and Compensation for Occupational Injuries and Diseases Act (‘COIDA’), to domestic workers in the informal sector. By applying the Constitutional Court’s ruling in *Mahlangu*, the legal reform proposal to extend the scope of social insurance to informal sector workers is optimistic, feasible, and in line with the Constitutional Court’s reasoning.⁷⁹⁷ The problem, as pointed out in chapter 6, is that these amendments are piecemeal, and do not constitute a comprehensive approach to extending formal social insurance.⁷⁹⁸

⁷⁹² There is not much data on personal saving patterns for people in the informal sector. However, some authors have theorised that, precisely due to their lack of predictable income, they save for precautionary reasons. However, the smaller a country’s informal economy, the less likely it is that those in the informal economy will have high levels of savings. See S Dobson, C Ramlogan-Dobson & E Strobl ‘Savings and the informal sector’ (2020) 34(2) *International Review of Applied Economics* 217-234 at 220. See also B Addai, AG Gyimah & WKB Owusu ‘Savings Habit Among Individuals in the Informal Sector: A Case Study of Gbegbeyishie Fishing Community in Ghana’ (2017) 9 *International Journal of Economics and Finance* 262-272 at 268. In their study on savings habits in a Ghanaian fishing village, the authors concluded that, despite 75% of respondents in the informal economy having savings, most of their savings were at low levels.

⁷⁹³ See headings 6.1.3 & 6.1.4 above.

⁷⁹⁴ Dekker (n 12) 284-285; Dekker (n 22) 119.

⁷⁹⁵ See chapter 2 above for an elaboration on the role that ISS plays in people’s lives.

⁷⁹⁶ Dekker & Olivier in Olivier, Smit & Kalula (n 21) 587; Dekker (n 22) 119-120.

⁷⁹⁷ See headings 4.1.2 and 6.1.1 above for elaborations on the UIA (n 80), COIDA (n 80), and the *Mahlangu* case (n 412).

⁷⁹⁸ Dekker (n 12) 285.

This legal reform proposal unfortunately does not entail a simple change of legislative definitions. The needs of people in the informal economy are different than those in formal employment and will require a more nuanced approach to maximise the opportunity to repair the formal employment bias shortcoming in the social security framework. Such a nuanced approach can be informed by a movement akin to that of street vendors in India, as South Africa already has some form of communication with informal workers through the South African Informal Traders Alliance.⁷⁹⁹

What remains uncertain is whether South Africa's proposed national fund would be voluntary (where only workers would contribute) or mandatory (where the worker and employer contribute). In instances where workers have employers, the difficulty with a mandatory fund would be ensuring the employer's contributions. To avoid such problems, the state can encourage co-contributions from either the state itself, or from employers. The Indian APY pension scheme discussed above received co-contribution from the state, although only temporarily. South Africa should take India's example but maintain consistency in its contributions, delineating the amount which the state will co-contribute and the duration thereof.

A method to alleviate the sole pressure placed on workers through voluntary funds would be to require low levels of contributions. India's social insurance schemes that the state aims at informal workers require low levels of contributions, ranging from approximately R4.20 to R436.00 per year.⁸⁰⁰ It is essential that, when extending its social insurance structures, South Africa's state keeps the required contribution levels of beneficiaries as low as possible for two main reasons. Firstly, the lower the contribution, the more likely it is for persons to contribute even during periods of low productivity (and thus low income).⁸⁰¹ Secondly, a lower contribution justifies investment into the future even in the face of short-term needs. In 1997, Kaseke wrote: "The poor cannot worry about how they will survive tomorrow when they are already concerned about how they will survive today."⁸⁰²

⁷⁹⁹ StreetNet International 'SAITA - South Africa Informal Traders Alliance' (available at: streetnet.org.za/organization/saita-south-africa-informal-traders-alliance/) (last accessed 28 January 2025).

⁸⁰⁰ The conversion of Indian rupees to South African rands is based on the exchange rate on 24 October 2024. See Forbes Advisor 'Convert Indian Rupee to South African Rand' (2024) (available at forbes.com/advisor/money-transfer/currency-converter/inr-zar) (last accessed 24 October 2024).

⁸⁰¹ For example, the periods in between seasonal traveling during the holidays.

⁸⁰² Kaseke (n 117) 46.

By implementing a national pension scheme, the state would already make large strides in improving people's quality of life. As it stands, the state provides non-contributory benefits via the Older Persons' Grant. However, this grant is means-tested, thus excluding those who earn too much to qualify for the grant, but too little to substantially contribute to a private pension scheme. By the state implementing a national pension fund, it would begin to progressively realise the right of *everyone* to access social security and align with international standards promoting universal social protection.⁸⁰³

Chapter 6 above evaluated the reasonability of the state's conduct to determine whether its conduct was constitutional. While a reasonable framework entails coordination between branches of state, it also requires the state to make its plans clear to the public. Despite the concept of a national social insurance fund floating on the state's agenda list for years, and the (now withdrawn) Green Paper on Comprehensive Social Security and Retirement Reform,⁸⁰⁴ there is little information thereon and it is unclear why.⁸⁰⁵ In the process of implementing this legal reform proposal, the state must ensure the public has clarity on what such reform would entail.

Both *Grootboom* and *Treatment Action Campaign* emphasised that the state's conduct had been unreasonable because it did not engage with relevant stakeholders, including civil society and affected persons. Thus, to avoid designing an ineffective national social insurance fund that does not benefit those in the informal economy, the state must conduct thorough investigations and consultations into their needs.

Having discussed how the state can open the door for persons within the informal economy, the following section explains how the state's promotion of existing co-operatives structures can fulfil its constitutional duty to protect and advance ISS.

⁸⁰³ Basson (n 593) 870; Fall & Steenkamp (n 632) 6.

⁸⁰⁴ Department of Social Development 'Green paper on comprehensive social security and retirement reform (2021)' Government Notice 741 as published in Government Gazette 45006 (18 August 2021). The Department withdrew the Green Paper two weeks later, but it may serve as some insight into a few of the Department's views and suggestions regarding a proposed national fund. See Department of Social Development 'Green paper on comprehensive social security and retirement reform (2021) notice of withdrawal' Government Notice 789 as published in Government Gazette 45076 (31 August 2021).

⁸⁰⁵ Basson (n 593) 870.

7.2 Cooperatives

This legal reform proposal addresses the high unemployment levels in South Africa and proposes cooperatives to alleviate worsening socio-economic conditions. Chapter 6 above identified unemployment as a broader shortcoming within South Africa's legal framework that weakens ISS. Outside of repairing the shortcomings within the social security sphere, the state should upscale or reinvigorate actions to promote cooperatives as a formal platform for ISS to advance participants' autonomy, self-help, employment opportunities, and smoother legal recourse if needed.

Cooperatives, as the below subsections elaborate, share similar organising characteristics with ISS, and the state has already legislated for cooperatives in South Africa. Thus, utilising the existing framework and promoting it as protection of ISS will alleviate the pressure on ISS to support structurally unemployed workers. The instruments and case studies this subsection discusses focus primarily on how cooperatives serve as a formal platform for those otherwise excluded from formal employment.

The following section elaborates upon the potential of cooperatives to further protect and advance ISS, primarily due to the formalisation of ISS mechanisms. It begins by discussing the primary contributions cooperatives provide to their members and society,⁸⁰⁶ giving insight into the international and regional perspectives on cooperatives,⁸⁰⁷ followed by a case study on India's Self-Employed Women's Association ('SEWA') Cooperative Federation.⁸⁰⁸ Thereafter, the section explains the existing framework for cooperatives in South Africa, and some recommendations to further utilise them in the context of ISS.⁸⁰⁹

7.2.1 Defining Cooperatives via the International Cooperative Alliance

As far back as 1895, cooperatives from thirteen countries gathered at the first meeting of the International Cooperative Alliance ('ICA') to collaborate, define, and protect the Cooperative Principles. These Principles form the basis of most definitions and organising characteristics of cooperatives today, including South Africa's Co-

⁸⁰⁶ See heading 7.2.1 below.

⁸⁰⁷ See heading 7.2.2 below.

⁸⁰⁸ See heading 7.2.3 below.

⁸⁰⁹ See heading 7.2.4 below.

operatives Act.⁸¹⁰ Since its inception, the ICA has increasingly collaborated with countries, the United Nations ('UN'), and the ILO.⁸¹¹

In a cooperative, persons come together in an association to collaborate and coordinate the achievement of socio-economic and cultural needs and wants.⁸¹² They are business structures that function on communal principles, where all participants own the cooperative and have an equal say therein.⁸¹³ The generally accepted definition of a cooperative derives from the ICA:

[a co-operative is] an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.⁸¹⁴

This definition does not specify who the people in cooperatives are, nor their specific purpose, since there are different types of cooperatives, and they do not serve a "one-size-fits-all" purpose.⁸¹⁵

The values of cooperatives determine their organising principles.⁸¹⁶ Over centuries-long developments, improvements, and amendments, the ICA's seven Cooperative Principles, sometimes named the "Rochdale Principles", serve as a foundation for international research and domestic implementation alike.⁸¹⁷ South Africa's Co-Operatives Act includes these Cooperative Principles and emphasises that the Act must be interpreted in line therewith.⁸¹⁸

⁸¹⁰ International Cooperative Alliance 'History of the Alliance' (2024) (available at ica.coop/en/history-alliance) (last accessed 30 October 2024); Co-operatives Act 14 of 2005 secs 1(2), 3.

⁸¹¹ See, for example, the Committee for the Promotion and Advancement of Cooperatives ('COPAC'), wherein various UN organs collaborate with the ICA. The members of COPAC include the International Cooperative Alliance, the United Nations Department of Economic and Social Affairs, the International Labour Organisation, the International Trade Center, the Food and Agriculture Organisation of the United Nations, and the United Nations Research Institute for Social Development. United Nations 'International Day of Cooperatives 2023: Cooperatives for Accelerated Sustainable Development' (11 July 2023) (available at social.desa.un.org/issues/cooperatives/events/coopsday2023) (last accessed 30 October 2024).

⁸¹² Nhede (n 745) 118.

⁸¹³ ES Pugsley 'Co-Operatives' in LTC Harms et al (eds) *The Law of South Africa* (LexisNexis: Pretoria 2017) Volume 10(3) para 2; International Labour Organisation 'Measuring cooperatives: An information guide on the ILO Guidelines concerning statistics of cooperatives' *International Labour Organisation* (Geneva 2022) at 11.

⁸¹⁴ International Co-operative Alliance 'Guidance notes to the co-operative principles' (Brussels 2015) ii. The South African Co-operatives Act (n 785) sec 1 'co-operative' defines a co-operative in a similar manner. See heading 6.2.3 below.

⁸¹⁵ National Cooperative Business Association 'What is a co-op?' (2024) (available at nbcbaclusa.coop/resources/what-is-a-co-op/#) (last accessed 30 October 2024).

⁸¹⁶ International Cooperative Alliance 'Cooperative identity, values & principles' (2024) (available at ica.coop/en/cooperatives/cooperative-identity) (last accessed 30 October 2024).

⁸¹⁷ ICA (n 814) ix, 1.

⁸¹⁸ Co-operatives Act (n 810) secs 1(2), 3.

This research outlines the Cooperative Principles broadly, and it should be noted that many of these statements have greater depth to them. However, for the purposes of this research, the broad strokes of these Principles provide insight into its alignment with the values of ISS and how cooperatives serve as a mechanism for the South African state to protect and advance ISS.

Most of the ICA Principles are already in the ICA's definition of a cooperative, and primarily concern the members of cooperatives, as they are the axis around which these structures turn.⁸¹⁹ Members are not distant from the enterprise they are involved in; they are intrinsic and interwoven into the very fabric of *their* cooperatives.⁸²⁰ It is important to note that many of these Principles coincide with fundamental values of ISS.

The Principles advocate for voluntary, open memberships, as “people cannot be made to be co-operators.”⁸²¹ Due to cooperatives serving their members' needs, and not the traditional concept of profit-generation, members do not have an individual claim on a set portion of the cooperative's capital, which becomes “indivisible” once deposited.⁸²² If viewed from a traditional profit-generation standpoint, this Principle may be concerning. However, the capital a cooperative accumulates belongs to all its members, who have an equal say in how the cooperative distributes profits.

Members' equal say promotes deliberative/participatory democratic governance, where they propose policy and participate in even ordinary or daily decisions of the cooperative.⁸²³ Participation and deliberation must be encouraged, not dampened, which requires fostering a “culture that welcomes and encourages debate.”⁸²⁴ Their democratic participation is particularly relevant when considering whether the cooperative should conclude agreements with external entities, including states. This is because the globalised economy – fraught with market monopolies, acute wealth disparities, and legislation catered toward protecting predominantly investor-owned entities⁸²⁵ – risks cooperatives' autonomous, self-reliant, and independent natures.⁸²⁶

⁸¹⁹ ICA (n 814) 8.

⁸²⁰ ICA (n 814) 85.

⁸²¹ ICA (n 814) 5.

⁸²² ICA (n 814) 29-32.

⁸²³ ICA (n 814) 14-15.

⁸²⁴ ICA (n 814) 16.

⁸²⁵ ICA (n 814) 46.

⁸²⁶ ICA (n 814) 46.

The concept of an autonomous and independent cooperative should not be misunderstood as allowing a state to step away from cooperatives.⁸²⁷ The state's tax regimes, financial support, and regulation of cooperatives should cater for them in a manner that allows them to continue promoting the Cooperative Principles and giving effect to their unique values.⁸²⁸

Communities are the birthplace of cooperatives.⁸²⁹ Members of a cooperative are not the only beneficiaries thereof. Thus, whilst members have an equal say in the cooperative, they must strive to benefit their communities. From an economic perspective, it is sensible for cooperatives to foster concern for the communities in which they conduct business since more prosperous communities will advance economic success.⁸³⁰ But, on a deeper level, these are also *their* communities that they need not only to survive in but live in. The Cooperative Principles promote concern for communities, not only for the current generation but for future generations to come.⁸³¹

If cooperatives form to coordinate those in need, what happens if they do not know their rights, entitlements, and responsibilities within the cooperative due to lack of education? This is where another Cooperative Principle steps in, essentially advocating that knowledge equals power.⁸³² A cooperative's success derives from its members' education, not just in how to democratically participate in the cooperative, but also "basic literacy and numeracy skills."⁸³³

While participation and deliberation in a cooperative requires internal dissemination of knowledge, cooperatives should strive to exchange knowledge with other cooperatives⁸³⁴ and the public. As the ICA explains:

The ingredient that transformed half a century's experimentation with co-operation into a successful business model... was a willingness to share experience and learn from earlier successes, failures, and setbacks. Without such sharing of ideas and experience it is unlikely that today's diverse co-operative movement would have emerged.⁸³⁵

⁸²⁷ ICA (n 814) 46.

⁸²⁸ ICA (n 814) 46.

⁸²⁹ ICA (n 814) 85.

⁸³⁰ ICA (n 814) 86.

⁸³¹ ICA (n 814) 86.

⁸³² ICA (n 814) 57.

⁸³³ ICA (n 814) 58.

⁸³⁴ This is also the sixth Cooperative Principle, namely "Co-operation among Co-operatives." See ICA (n 814) 71-82.

⁸³⁵ ICA (n 814) 57.

7.2.2 International and regional perspectives

The international community has focused on the potential of cooperatives to alleviate poverty, promote employment, and reduce socio-economic challenges. Both the AU and SADC promote cooperatives to foster social inclusion and develop the socio-economic conditions of communities. Whilst the AU's Agenda 2063 does not specifically reference cooperative structures, it nevertheless promotes Africa's prosperity through entrepreneurship and decent work,⁸³⁶ which cooperatives can help foster. Furthermore, although not yet published, the Pan-African Parliament of the AU adopted its Model Law on Cooperatives in July 2024 to advance the development and improvement of cooperative legislation in member States.⁸³⁷ Although the SADC does not explicitly mention cooperatives in its instruments, the SADC's original purpose was to promote the harmonisation of trade and business activities between southern African countries.⁸³⁸ Such trade harmonisation benefits cooperatives and their host countries substantially due to lessening the hurdles cooperatives must navigate in trading.

The 2002 ILO Promotion of Cooperatives Recommendation 193 advances cooperatives for their facilitation in "job creation, mobilizing resources, generating investment and their contribution to the economy."⁸³⁹ Cooperatives are particularly useful in providing informal workers the opportunity to transition into formal work, where the law provides protection.⁸⁴⁰ Aligned with Recommendation 193, the ILO's Recommendation 204 encourages legal and policy frameworks to promote economic units such as cooperatives in the transition from the informal to the formal economy.⁸⁴¹

At its 76th session in 2021, the UN adopted a Resolution on cooperatives,⁸⁴² where the General Assembly recognised their importance through facilitating socio-economic development for communities. The value of cooperatives is their inclusivity for

⁸³⁶ African Union *Agenda 2063: The African We Want* Popular Version (2015) 2. Aspiration 1 advocates for "a prosperous Africa based on inclusive growth and sustainable development"

⁸³⁷ Pan African Parliament 'The Pan-African Parliament adopts the Model law on Cooperatives' (1 July 2024) (available at pap.au.int/en/news/press-releases/2024-07-01/pan-african-parliament-adopts-model-law-cooperatives) (last accessed 30 October 2024).

⁸³⁸ Southern African Development Community *Protocol on Trade* (1996).

⁸³⁹ International Labour Organisation *Promotion of Cooperatives Recommendation 193* (2002) ('Recommendation 193') Preamble.

⁸⁴⁰ Recommendation 193 (n 839) art 9.

⁸⁴¹ Recommendation 204 (n 755) arts 3(c), 4(a)(iii), & 11(g).

⁸⁴² United Nations *Resolution adopted by the General Assembly on 16 December 2021: Cooperatives in social development A/RES/76/135* (5 January 2022) ('UN Cooperatives Resolution').

otherwise vulnerable and socially excluded people.⁸⁴³ Traditional business structures, which are driven by profit and not the principles of solidarity as with cooperatives, are not always the most appropriate to address socio-economic needs. The UN emphasised that developing countries should support policies for cooperatives, as they have the potential to directly contribute to social protection.⁸⁴⁴

Thus, the international community focuses on recognising and promoting cooperatives. For example, each year in July, the Committee for the Promotion and Advancement of Cooperatives organises an International Day of Cooperatives.⁸⁴⁵ In 2023, the UN's General Assembly adopted a resolution concerning cooperatives, and proclaimed 2025 to be the second International Year on Co-operatives ('IYC25'), with the first occurring in 2012.⁸⁴⁶ The IYC25 serves as a dedicated period in which member States and the UN itself promote cooperatives and their positive role in developing socio-economic conditions and implementing the Sustainable Development Goals ('SDG'), in particular SDG 8 relating to economic growth and creation of decent work.⁸⁴⁷ The IYC25 will launch in New Delhi, India in November 2024.⁸⁴⁸ India is a suitable place for launching the IYC25, as its culture of cooperatives has culminated in about 7 million registered cooperatives as of 2023.⁸⁴⁹

7.2.3 Case study: India and the Self-Employed Women's Association

India's culture of cooperatives began not with a statute, nor an official society. It began as with tanks and forests shared by people in villages, communal harvesting of crops,

⁸⁴³ UN Cooperatives Resolution (n 842), in particular art 5.

⁸⁴⁴ UN Cooperatives Resolution (n 842), in particular art 5.

⁸⁴⁵ United Nations 'International Day of Cooperatives, 9 July 2024' (9 July 2024) (available at social.desa.un.org/issues/cooperatives/events/international-day-of-cooperatives-9-july-2024) (last accessed 30 October 2024); United Nations 'International Day of Cooperatives 2023: Cooperatives for Accelerated Sustainable Development' (11 July 2023) (available at social.desa.un.org/issues/cooperatives/events/coopsday2023) (last accessed 30 October 2024).

⁸⁴⁶ United Nations *Resolution adopted by the General Assembly on 19 December 2023: Cooperatives in social development A/RES/78/175* (22 December 2023) art 3; United Nations 'UN General Assembly announces launch of the 2025 International Year of Cooperatives' (20 June 2024) (available at un.org/en/desa/cooperatives-launch-2025-international-year) (last accessed 30 October 2024).

⁸⁴⁷ International Cooperative Alliance 'Future of Work – SDG 8' (2024) (available at ica.coop/en/icett/future-work-sdg-8) (last accessed 30 October 2024).

⁸⁴⁸ International Cooperative Alliance 'ICA Global Cooperative Conference 2024' (2024) (available at icanewdelhi2024.coop/welcome) (last accessed 30 October 2024).

⁸⁴⁹ Ministry of Cooperation 'National Cooperative Database' (5 December 2023) (available at pib.gov.in/PressReleasePage.aspx?PRID=1982672#) (last accessed 30 October 2024).

equitable distribution of resources, and assisting with transporting sellable wares.⁸⁵⁰ In 1904 and 1914 respectively, the Cooperative Credit Societies Act and Cooperative Societies Act gave name to these practices in the form of registering cooperative business structures.⁸⁵¹ After gaining independence, India emphasised and promoted the role of cooperatives in fostering socio-economic and political development in its first eight five-year plans until 1997.⁸⁵² However, legislative and policy protection and development of cooperatives was quite fragmented, which resulted in the Multi-State Cooperative Societies Act in 1984 and the amendment thereof in 2002.⁸⁵³

Since 1972, the Self-employed Women's Association ('SEWA') in India has promoted the social protection of informal (women) workers.⁸⁵⁴ It promoted women's decent work and minimum wages, which led to an increase in these women's unemployment, as they lost their jobs due to their advocacy. SEWA's Cooperative Federation officially began in 1992 to help organise the cooperatives that formed to provide work to these women.⁸⁵⁵ The SEWA Cooperative Federation envisages its work to be

with collectives that are run by, with, and for poor women to help them achieve full employment and self-reliance at the collective and the member level.⁸⁵⁶

However, large cooperatives increase the risk that the women involved will not own and manage them. Thus, cooperatives should preferably be smaller, like ISS networks.⁸⁵⁷ Mirai Chatterjee, the current chairperson for the SEWA Cooperative Federation, emphasised that cooperatives must organise and collectively work toward representation.⁸⁵⁸

The cooperatives under the SEWA Cooperative Federation span across fourteen provinces of India and encompass manual labourers, service providers, home-based

⁸⁵⁰ CJ Njavallil & JJ Thoomkuzhy 'The Cooperatives in India - A Journey over more than 100 Years' (2016) 3(10) *Splint International Journal of Professionals: A Quarterly Peer Reviewed Multi-Disciplinary International Journal* 94–101 at 94.

⁸⁵¹ Njavallil & Thoomkuzhy (n 850) 95.

⁸⁵² Njavallil & Thoomkuzhy (n 850) 97, 100.

⁸⁵³ Njavallil & Thoomkuzhy (n 850) 99.

⁸⁵⁴ International Labour Organisation 'Strengthening women's cooperatives: The experience of SEWA Cooperative Federation' *International Labour Organisation* (Geneva 2024) at 13. See also heading 7.3.3 below for an example of SEWA's contribution to the BIG pilot programmes in India.

⁸⁵⁵ ILO (n 854) 14.

⁸⁵⁶ SEWA Cooperative Federation 'About us' (2024) (available at sewafederation.org/about-us/) (last accessed 30 October 2024).

⁸⁵⁷ ILO (n 854) 14 cites the founder of SEWA's book, wherein she advocated for the creation of 100-mile communities. See ER Bhatt *Anubandh: Building Hundred-mile Communities* (Navajivan Publishing House: Ahmedabad 2015).

⁸⁵⁸ ILO (n 854) 14.

workers, and small producers.⁸⁵⁹ The SEWA Cooperative Federation found that, during and since the COVID-19 pandemic, 74% of persons who sought support from a cooperative linked to the Federation received such support.⁸⁶⁰

7.1.4 Application of the proposal to South Africa

My heart never rested whenever I visited home because of the high numbers of [orphans and vulnerable children] and the levels of poverty in the community. I decided to do something, and that is how this cooperative was formed.⁸⁶¹

Legislation does not birth practice, and just as in India, people in South Africa have cultivated community-saving and mutual aid long before legislation formalised them. However, South Africa has had an existing legislative framework for cooperatives since 1939, with the current Co-operatives Act enacted in 2005.⁸⁶² Compared to 4,000 cooperatives in 2005, it is estimated that about 140,000 cooperatives existed in 2017.⁸⁶³ People were willing – and enabled by legislation – to establish and run cooperatives, but the cooperative landscape became fraught with problems in sustaining them after their initial start-up period.⁸⁶⁴

The Co-operatives Act establishes and defines several kinds of cooperatives, primarily according to their focus: agricultural, consumer, cooperative burial societies, financial, housing, services, social, and worker.⁸⁶⁵ Upon registration of the cooperative, it becomes a juristic person.⁸⁶⁶ The Co-operatives Act determines members' liability as equal to the nominal value of their shares, or if the cooperative does not work with

⁸⁵⁹ International Labour Organisation 'Advancing cooperation among women workers in the informal economy: The SEWA way' International Labour Organisation (Geneva 2018) at 12.

⁸⁶⁰ SM Hiriyur & N Chettri 'Women's cooperatives & COVID-19' *SEWA Cooperative Federation* (Ahmedabad 2020) at 3.

⁸⁶¹ Unnamed manager of the Sedikong sa Lerato Cooperative, as quoted by A Arko-Achemfuor & DY Dzansi 'Business doing well by doing good in the community: The case of Sedikong sa Lerato in South Africa' (2015) 7(2) *Journal of Commerce* 53-68 at 59 in their interviews. Sedekong sa Lerato means "circle of life." See International Cooperative Alliance 'Circle of love becomes circle of life' (15 November 2012) (available at stories.coop/circle-of-love-becomes-circle-of-life/) (last accessed 30 October 2024).

⁸⁶² Co-operatives Societies Act 29 of 1939; Co-operatives Act 91 of 1981; Co-operatives Act (n 810); Co-operative Banks Act 40 of 2007; Pugsley in Harms et al (n 813) para 1.

⁸⁶³ Ntambwe, KL *The impact of the local government support on the sustainability of co-operatives and its role on poverty alleviation in the eThekweni Municipal region* (Doctor of Philosophy: Durban University of Technology) 71.

⁸⁶⁴ Ntambwe (n 863) 72.

⁸⁶⁵ Co-operatives Act (n 810) sec 4(2).

⁸⁶⁶ Co-operatives Act (n 810) sec 8.

shares, then their liability is equal to the amount they owe the cooperative as stipulated in their membership agreement.⁸⁶⁷

In terms of the Co-operative Banks Act, any primary cooperative with 200 or more members that has deposits above a million rand must be registered as a cooperative bank.⁸⁶⁸

There are four tiers of cooperatives under the Co-operatives Act, namely: national apex cooperatives, primary cooperatives, secondary cooperatives, and tertiary cooperatives. Primary cooperatives must consist of at least five natural persons, two juristic persons, or five of any combination of persons.⁸⁶⁹ The subsequent levels of cooperatives serve as “groupings” of the previous level of cooperatives: secondary combines several primary, tertiary combines several secondary, and national apex combines several tertiary.⁸⁷⁰

The intention of the Act is for a national apex cooperative to consist of several sectoral and multi-sectoral tertiary cooperatives, which has proven to be a near-impossible task due to infighting amongst cooperatives. The state furthermore refuses to intervene, as it would result in the Department of Small Business Development (‘DSBD’) “being caught in the politics in the co-operative space.”⁸⁷¹

Mkhumane from the DSBD admitted in a 2023 Committee meeting that the lack of coordination in assisting South African cooperatives is a prominent problem.⁸⁷² The Cooperative Principles stipulate that cooperatives must be independent and autonomous from the state, but this seems to result in the state’s neglect in assisting and training those who participate in cooperatives, under the auspices that cooperatives should not be state-run entities.

The Co-operatives Act establishes two bodies related to cooperatives: the Co-operatives Advisory Council and the Co-operatives Development Agency.⁸⁷³ To date, neither of these bodies has officially been established, and the only other advisory

⁸⁶⁷ Co-operatives Act (n 810) sec 23.

⁸⁶⁸ Co-operatives Act (n 810) sec 5A; Co-operative Banks Act (n 862).

⁸⁶⁹ Co-operatives Act (n 810) sec 6(1)(a).

⁸⁷⁰ Co-operatives Act (n 810) secs 6(1)(b)-(d).

⁸⁷¹ Parliamentary Monitoring Group ‘Co-operatives development support programme: Small business development’ (8 March 2023) (available at pmg.org.za/committee-meeting/36504/) (last accessed 30 October 2024) (‘PMG’).

⁸⁷² PMG (n 871).

⁸⁷³ Co-operatives Act (n 810) chapters 12 & 12A.

body related to cooperatives is the Co-operative Banks Development Agency, which limits its scope to the cooperative banking sector.⁸⁷⁴

It remains uncertain how many of South Africa's cooperatives are truly operational, as there have been instances of abuse where supposed cooperatives registered to obtain funding but are not true cooperatives. Theron explains that new cooperatives oftentimes do not have the full picture of beneficial legislative provisions afforded to them, "probably because they are locked in a struggle to survive economically."⁸⁷⁵

Cooperatives are a difficult matter in South Africa, with failure rates at about 88%.⁸⁷⁶ These cooperatives struggle to continue existing in the long term.⁸⁷⁷ The current legislative landscape for South African cooperatives is struggling to navigate the fine line between easing registration requirements to facilitate the growth of the cooperative landscape and enforcing the registration requirements to prevent abuse of cooperative funding mechanisms. Furthermore, the grouping of cooperatives beneath the banner of small businesses (in the DSBD) fundamentally misunderstands the unique nature of cooperatives, thus worsening their already difficult struggle in a market geared toward investor-owned businesses.⁸⁷⁸

The positive potential of cooperatives to support their members and community's socio-economic development is being wasted in South Africa. Individuals who would otherwise fall into socio-economic destitution can organise under the banner of a cooperative. Despite contemporary cooperatives' recognition in formalised legal instruments, and the requirements arising therefrom, contemporary cooperatives' values and Principles nevertheless resound clearly with ISS. What is ISS if not people with similar problems collaborating to pool resources and improve their socio-economic circumstances?

Through the state bolstering co-operatives as a method of supporting ISS, the state would further align with the third generation rights as in the ACHPR, which obliges

⁸⁷⁴ Co-operative Banks Development Agency 'Co-operative Banks Development Agency (CBDA)' (2024) (available at nationalgovernment.co.za/units/view/211/co-operative-banks-development-agency-cbda) (last accessed 30 October 2024).

⁸⁷⁵ J Theron 'Legal framework analysis: South Africa National Report' *International Cooperative Alliance* (South Africa 2021).

⁸⁷⁶ R Beukman 'Are we ready for platform co-operatives in South Africa?' (2021) (available at lrs.org.za/2021/08/30/are-we-ready-for-platform-co-operatives-in-south-africa/#) (last accessed 30 October 2024).

⁸⁷⁷ Ntambwe (n 863) 40.

⁸⁷⁸ Ntambwe (n 863) 7.

individuals, families, and communities must act in such a way as to fulfil their obligations to one another.⁸⁷⁹

Despite the assortment of challenges for cooperatives in South Africa, the point stands that ISS can utilise the formal platform of cooperatives to organise, obtain funding, and subsequently improve the lives of their members and community. The state must, however, reinvigorate its efforts to support the sustainability of cooperatives, the actioning of a turnaround strategy backed by refined legislation and policies including funding policies,⁸⁸⁰ assistance from DSBD, and reduced regulatory burden.

7.3 Basic income grant

South Africa's unemployment rate, coupled with South Africa's categorical and means-tested social assistance, excludes persons who do not fall within South Africa's formal social security scope but may nevertheless require protection.⁸⁸¹ While the state implemented the COVID-19 Social Relief of Distress grant ('COVID-19 SRD') to assist those persons in need, it is temporary in nature and too low of a benefit.⁸⁸² Thus, this research's legal reform proposal of a BIG, as advocated for by entities such as the Universal Basic Income Coalition,⁸⁸³ aims to address the state's shortcomings related to the level of benefits and the categorical approach to social assistance excluding the missing middle.

The proposed solution to protect ISS is a predictable sum of money into the pockets of people currently excluded from the social security system. The proposed BIG would thus go to people who do not otherwise receive social grants. This legal reform proposal puts forth the BIG as an additional social grant to the current social security structure, catering for people who can otherwise only rely on ISS so that they have the capital to invest into their kin and community networks.

⁸⁷⁹ ACHPR (n 546) art 27. See heading 5.3.1 above in this regard.

⁸⁸⁰ It is noted that the DSBD released a draft policy for cooperative funding in 2023. See Department of Small Business Development 'Draft South African SMMEs and Co-Operatives Funding Policy: Request for Public Comments' Government Notice R3353 as published in Government Gazette 48483 (28 April 2023).

⁸⁸¹ See headings 6.1.2 & 6.1.3 above.

⁸⁸² The state, despite constantly renewing the COVID-19 SDG, still plans for it to stop in 2025. The current value of the benefit is R370, which is lower than the food poverty line. See GNR 4466 (n 441).

⁸⁸³ Institute for Economic Justice 'South Africa's fight for a basic income' (2024) (available at: iej.org.za/blogs/south-africas-fight-for-a-basic-income) (last accessed 28 January 2025).

There are many models of a proposed BIG. Depending on an author's perspective and focus, it can refer to a grant that goes to every person in a country, regardless of income, means, or age. On the other hand, the proposed grant may be targeted in that it will only go to the category of persons this research has referred to as the "missing middle": unemployed, working-aged, and able-bodied adults who do not fall into the current social assistance categories.⁸⁸⁴

This section begins with delineating this research's meaning of the proposed BIG, as the different characteristics thereof require clarification.⁸⁸⁵ Thereafter, the section discusses the universality and guarantees of basic income from an international perspective,⁸⁸⁶ and discusses the BIG pilot programmes conducted in India, particularly the Madhya Pradesh Pilot Programme.⁸⁸⁷ In its final subsection,⁸⁸⁸ the chapter evaluates the conversations on the proposed BIG within a South African context.

7.3.1 Defining and delineating the (universal) basic income grant

The definitions and models surrounding the proposed BIG are plentiful.⁸⁸⁹ The proposed BIG, and its alternative models,⁸⁹⁰ raises questions surrounding the meaning of universality, unconditionality, and what "basic" refers to. Would the proposed BIG replace existing social grants with one singular grant afforded to everyone? Would the proposed BIG only apply to those not currently receiving any other social grant? These are the questions that are difficult to navigate in South Africa, as the state toes a fine line between affordability and the universal guarantee of social security. These factors end up blurring the lines, and result in uncertainty as to what, *exactly*, the proposed BIG refers to.

At its baseline and most ideal, the BIG is a universal, unconditional, untargeted, non-means-tested social grant paid to all people regardless of their employment status,

⁸⁸⁴ In other words, they do not have a disability, do not have children for the children grants, and are not of pensionable age.

⁸⁸⁵ See heading 7.3.1 below.

⁸⁸⁶ See heading 7.3.2 below.

⁸⁸⁷ See heading 7.3.3 below.

⁸⁸⁸ See heading 7.3.4 below.

⁸⁸⁹ M Torry 'The definition and characteristics of basic income' in M Torry (ed) *The Palgrave Handbook of Basic Income* (Palgrave Macmillan: Cham 2023) 2nd edition 17-42 at 17.

⁸⁹⁰ Alternative models such as the participation income, minimum income guarantee, or the negative income tax. See Torry (n 889) 17.

income, or age.⁸⁹¹ The most relevant aspect of this baseline definition is that it disconnects income generation and finances from receipt of support and reduces the likelihood of poverty traps arising from means-testing significantly.⁸⁹²

Sadiq and Du Preez posit the model that all other social grants could be replaced with a singular BIG, thus consolidating the budgets for the existing grants into a singular grant and eliminating the administration costs of different grants and their means-testing.⁸⁹³ This proposed model might constitute a retrogressive measure as discussed in chapter 6 above.⁸⁹⁴

An alternative model to the BIG is the negative income tax model, which maintains the link between income and receipt of support.⁸⁹⁵ Under this model, a person will only receive benefits if his or her income falls beneath a set threshold, thus retaining a means test.⁸⁹⁶ It nevertheless remains popular due to its minimal impact on a country's tax regime when compared with the ideal model of the BIG.⁸⁹⁷

The models on where funding for the proposed BIG derives from vary. If a country can generate its own wealth from state-owned resources, the state simply distributes that wealth among its citizens. If it cannot do so, it must rely on taxes to generate the necessary funds.⁸⁹⁸

This research utilises the model the Taylor Committee formulated, which is a compromise between the two models above, as it maintains the prioritisation of supporting those currently excluded from the system, whilst reducing the need for a complete overhaul of the current system. The Taylor Committee advocated for a BIG that is not means-tested⁸⁹⁹ for those who do not otherwise receive social assistance,⁹⁰⁰ and which is calculated on a per-person basis.⁹⁰¹ Thus, the Taylor Committee

⁸⁹¹ K Sadiq & H du Preez 'The case for a universal basic income in South Africa: A conceptual approach' (2021) 35(3) *South African Journal of Accounting Research* 167–190 at 2, 3-4.

⁸⁹² Sadiq & Du Preez (n 891) 3, 4.

⁸⁹³ Sadiq & Du Preez (n 891) 2.

⁸⁹⁴ See heading 6.2.3 above regarding retrogressive measures.

⁸⁹⁵ Sadiq & Du Preez (n 891) 3.

⁸⁹⁶ Sadiq & Du Preez (n 891) 3.

⁸⁹⁷ Sadiq & Du Preez (n 891) 3.

⁸⁹⁸ Sadiq & Du Preez (n 891) 3.

⁸⁹⁹ "A Basic Income Grant is provided as an entitlement and without a means test." Taylor Committee (n 18) 61.

⁹⁰⁰ The Taylor Committee was sure to state that: "The working assumption in the model used to evaluate the feasibility of the Basic Income Grant is that there is no overlap between different grants. The grant is meant for people currently not receiving social assistance – those who fall through the social safety net." Taylor Committee (n 18) 61.

⁹⁰¹ Taylor Committee (n 18) 61.

formulated a BIG that the state would implement alongside existing social grants, instead of replacing them.

From this definition, the proposed BIG would not be means-tested (that is, distributed based on what an individual's income is), but it would be categorical. It would be categorical due to the proposed BIG only going to those people not currently receiving another social grant. However, it should be noted that the Taylor Committee approached the concept of comprehensive social protection (including the proposed BIG) on an incremental basis, noting that the short-term fiscal constraints would not allow for a complete overhaul of the system.⁹⁰² It maintained that – in 2002 – the state had the fiscal and administrative ability to formulate a medium- to long-term plan to implement a more comprehensive social security system, particularly regarding “adults living in destitution and poverty.”⁹⁰³

7.3.2 International and regional perspectives

As a starting point, it is important to note that there are no international instruments that directly encourage a BIG for the missing middle, other than the ILO's Recommendation 202.⁹⁰⁴ Nevertheless, the benefits the proposed BIG offers align with the UN and ILO's principles, as fostered in their instruments, and thus serve as persuasive to the implementation of the proposed BIG in South Africa.

Both the UN and ILO's instruments encourage notions of universality.⁹⁰⁵ The Universal Declaration on Human Rights ('UDHR') and the ICESCR confer the human right of social security to everyone,⁹⁰⁶ and the ICESCR promotes minimum essential levels of socio-economic rights, including social security.⁹⁰⁷ The ILO's Declaration of Philadelphia advocates for social security systems to provide a “basic income to all in need of such protection,”⁹⁰⁸ and Convention 102 encourages member States to secure social security for all its citizens, albeit in a more flexible and phased manner.⁹⁰⁹

⁹⁰² Taylor Committee (n 18) 66.

⁹⁰³ Taylor Committee (n 18) 66.

⁹⁰⁴ JM Kgaphola *A legal analysis of the feasibility of a basic income grant in South Africa* (Master of Laws: University of Limpopo 2022) at 86.

⁹⁰⁵ Tshoose (n 27) 9.

⁹⁰⁶ UDHR (n 51) art 22; ICESCR (n 51) arts 9-11.

⁹⁰⁷ CESCR General Comment 3 (n 470).

⁹⁰⁸ Declaration of Philadelphia (n 51) art 3(f).

⁹⁰⁹ See heading 5.2.2 above for its explanation of the flexibility measures contained in Convention 102 (n 51).

The ILO's Recommendation 202⁹¹⁰ notably advocates for basic income security for persons who are “active age” that do not earn a sufficient income.⁹¹¹ Recommendation 202 further advocates for the domestic guarantee of social protection floors, as these alleviate poverty, vulnerability, and social exclusion.⁹¹² The ILO recommends that States promote universal social protection based on social solidarity, and that member States must guarantee basic income security to their populace.⁹¹³ The schemes involved in implementing such recommendations may include “universal benefit schemes... [and] negative income tax schemes,”⁹¹⁴ and that the basic income involved must promote dignified standards of living, including the “effective access to goods and services defined as necessary at the national level.”

Poverty and scarcity are known to cause mental and emotional strain.⁹¹⁵ In July 2024, the UN Special Rapporteur on extreme poverty and human rights reported that a BIG would reduce the toll that poverty and scarcity exert on people's mental health.⁹¹⁶ He recommended that domestic states implement the BIG without exclusionary targeting mechanisms and criteria, as this could otherwise perpetuate the very insecurity it seeks to reduce.⁹¹⁷ The BIG, he explained, ensures reliable and regular income security.⁹¹⁸

Thus, from both the UN and ILO, the current standards of South Africa's social security do not meet these requirements, nor does the COVID-19 SRD grant stand as a suitable BIG candidate in its current form. As chapter 6 above explains, the current system in South Africa provides benefits that are too low to maintain a decent standard of living and do not meet its national poverty lines. Thus, implementing a BIG would serve to fulfil these recommendations.

⁹¹⁰ See heading 5.2.2 above for more information about the ILO and South Africa's obligations to its international standards.

⁹¹¹ Recommendation 202 (n 52) art 5(c).

⁹¹² Recommendation 202 (n 52) arts 1(a) & 2. See also K Howson & N Coleman 'Can basic income contribute to inclusive development in South Africa? A review of recent proposals' *Institute for Economic Justice* (Johannesburg 2023) at 15.

⁹¹³ Recommendation 202 (n 52) art 4.

⁹¹⁴ Recommendation 202 (n 52) arts 3(a) & 9(3). See also Charles (n 132) 51.

⁹¹⁵ O de Schutter 'Report of the Special Rapporteur on extreme poverty and human rights: The burnout economy: poverty and mental health' *United Nations General Assembly: Secretary-General A/79//F2404605* (11 July 2024) paras 54-57.

⁹¹⁶ De Schutter (n 915) paras 54-57.

⁹¹⁷ De Schutter (n 915) para 55.

⁹¹⁸ De Schutter (n 915) para 58.

To date, there have been no official comments from the AU or SADC on the BIG. However, from the information presented in chapter 5 above, the principles the AU and SADC advance align with those of the proposed BIG. The AU's emphasis on building partnerships with the youth through social protection, to raise the living standards of all people, speaks to a "missing middle" grant.⁹¹⁹

The SADC's commitments to promote legal frameworks for economic growth and socio-economic development manifested in the SADC's Charter on Fundamental Social Rights ('SADC CFSR'), calling for universal basic human rights, including social security.⁹²⁰ Furthermore, the SADC CFSR specifically states that people who are unable to access the labour market are entitled to social assistance, thus further cementing South Africa's obligation to develop protections for those currently excluded from the formal social security system. Through implementing a BIG, the South African state would fulfil the calls of both the AU and SADC to promote the informal economy and informal mechanisms of support, as the proposed BIG would serve as a reliable sum of money people could invest into ISS.

7.3.3 Case study: India and its pilot programmes

While no country has fully implemented a UBI, many countries have implemented pilot programmes.⁹²¹ In the early 2010s, independent parties conducted two pilot programmes in the Indian provinces of West Delhi and Madhya Pradesh.

Following its independence from the British in the 1940s, the Indian state introduced subsidised items to facilitate the transition. In the late 2000s, despite central sector schemes distributing some direct grants,⁹²² the Indian state still organised its welfare primarily through in-kind benefits such as grain, petroleum, kerosene, and fertilizers.⁹²³

⁹¹⁹ See heading 5.3.1 above.

⁹²⁰ SADC CFSR (n 561) arts 2(3)(1) & 2(1)(e).

⁹²¹ H O'Dell 'Multiple countries have tested a universal basic income – and it works' *Chicago Council on Global Affairs* (available at globalaffairs.org/bluemarble/multiple-countries-have-tested-universal-basic-income-and-it-works) (last accessed 30 October 2024); World Population Review *Countries with Universal Basic Income 2024* (available at: worldpopulationreview.com/country-rankings/countries-with-universal-basic-income) (last accessed 30 October 2024).

⁹²² For example, the Jawaharlal Nehru National Urban Renewal Mission and the Backward Region Grant. See D Kapur; P Mukhopadhyay & A Subramanian 'The case for direct cash transfers to the poor' (2008) 43(15) *Economic and Political Weekly* 37-41 at 37.

⁹²³ V Mehta 'The great Indian basic income debate' *India Network for Basic Income* (New Delhi 2019) at 7.

However, by 2008, Kapur et al argued the state's social security system was fraught with "a culture of immunity in public administration and weakened local governments."⁹²⁴ They argued that some of the shortcomings in the system included the concealing of shortcomings in administration for fear of "adverse remarks,"⁹²⁵ lack of accountability, the benefits not reaching their targeted beneficiaries, corruption and fraud,⁹²⁶ and administration costs. The state's attempts to remedy the shortcomings merely resulted in more programmes which, due to the overburdened and weakened formal systems, ultimately contributed to the problems.⁹²⁷ These conditions are like South Africa's, particularly regarding fragmentation, corruption, and fraud.

Kapur et al argued that the numerous in-kind benefits should be eliminated, and instead replaced with a single direct cash transfer – in other words, a BIG. In the early 2010s, SEWA organised two pilot programmes in West Delhi and Madhya Pradesh.⁹²⁸ The West Delhi programme, backed by the UN Development Programme, conducted a year-long "choice" pilot in 2011, wherein participants could choose between in-kind subsidised food or a monthly cash grant.⁹²⁹ The results indicated that people who chose cash could purchase higher quality food, resulting in better nutrition, and invested in their healthcare more than those who opted for the in-kind benefits, who later expressed they wished to switch to the cash grant.

The Madhya Pradesh programme's duration was longer, between 2011-2013, with support received from the UN International Children's Emergency Fund.⁹³⁰ The pilot evaluated twenty villages, with eight villages receiving a basic income and twelve not receiving one.⁹³¹ The pilot's results found that those persons receiving the basic income were more likely to bring about improvements to their homes, sanitary facilities such as latrines, and water sources.⁹³² Furthermore, the basic income villages were more likely to purchase household assets such as transportation (bicycles,

⁹²⁴ Kapur, Mukhopadhyay & Subramanian (n 922) 37.

⁹²⁵ Kapur, Mukhopadhyay & Subramanian (n 922) 37.

⁹²⁶ As Kapur, Mukhopadhyay & Subramanian (n 922) 38 phrase it: "However, in each case only a small fraction of overall resources reaches the poor due to... leakages (to the non-poor)."

⁹²⁷ Kapur, Mukhopadhyay & Subramanian (n 922) 38.

⁹²⁸ See heading 7.2.2 above. S Davala et al *Basic income: A transformative policy for India* (Bloomsbury Publishing: London 2015) at 32.

⁹²⁹ Davala et al (n 928) 32.

⁹³⁰ Davala et al (n 928) 195.

⁹³¹ Davala et al (n 928) 35.

⁹³² Davala et al (n 928) 71-72, 75, 78.

motorcycles), and furniture.⁹³³ Notably, the basic income villages showed improved nutrition, similar to the West Delhi pilot.⁹³⁴

The researchers who conducted the Madhya Pradesh programme emphasised that the basic income affords people the agency (opportunity) to decide for themselves what they need.⁹³⁵ They explained that the common misconception that a BIG will make people lazy, reduce productivity, or create dependency allows the wealthy to “justify paternalistic policies based on a presumption that ‘the poor’ cannot make rational decisions for themselves.”⁹³⁶ The basic income villages in the pilot programme did not, in fact, reduce their productivity. Almost 75% of these villages credited the basic income for their increased participation in income-earning activities.⁹³⁷

Together, the West Delhi and Madhya Pradesh programmes provided just under 6,000 people with a basic income for between a year and three years.⁹³⁸ South Africa’s numerous social grants, while direct cash transfers, suffer from a categorical approach to the support provided. India’s pilot programmes serve as evidence that the conditions of poor South Africans could substantially improve if they were granted a BIG, as they could decide for themselves what to spend that money on, including on their kin and community in the form of ISS.

7.3.4 Application of the proposal to South Africa

The conversations on the proposed BIG in South Africa are not new. Since the early days of the new dispensation, the BIG has served as a talking point and proposal for poverty alleviation with the state, as early as 1998.⁹³⁹ The interdepartmental task team comprising of the Departments of Labour, Finance, Transport, and Health

⁹³³ Davala et al (n 928) 80.

⁹³⁴ Davala et al (n 928) 89.

⁹³⁵ They tell the story of two women at the beginning of the pilot, who had to sift through their rations of wheat and rice to remove the stones and grit which had been added to falsely increase the weight of the bags. As Davala et al (n 928) 83 explain: “A likely failing of any scheme that makes the recipient a *supplicant*, that is, someone without the capacity to make choices sensibly or to demand that the supplier treats them fairly and with respect. The villagers have had to take the food that they are offered, and if they were to object they would risk losing their entitlement to even that. Either way, it is their children who suffer most.”

⁹³⁶ Davala et al (n 928) 137.

⁹³⁷ Davala et al (n 928) 139.

⁹³⁸ Davala et al (n 928) 45.

⁹³⁹ Makino (n 25) 14.

recommended that the state implement a BIG to alleviate the pressure of structural unemployment.⁹⁴⁰

At the time, the state did not explicitly investigate the BIG, but it was nevertheless a consideration. The Taylor Committee consequently recommended a comprehensive social protection approach, mirroring the international trends from the UN, and discussed the feasibility and model of the proposed BIG.⁹⁴¹ It emphasised that, while programmes aimed at increasing the capabilities and assets of poor persons (medium- and long-term programmes) were important, addressing their incomes first is more short-term and easier to implement.⁹⁴² The Taylor Committee stated that: “The state could buy time for progressive realisation of its other socioeconomic rights if it improved income transfers to the poor in the short term.”⁹⁴³

Around the time of the Taylor Committee’s report, the National Treasury did not support the proposed BIG, with the Minister of Finance emphasising its fiscal unsustainability.⁹⁴⁴ The Department of Social Development supported the proposed BIG, despite its uncertainty surrounding available resources therefor.⁹⁴⁵

The concerns about the fiscal possibility of the BIG proposal remain to this day. Despite the support for BIG expressed by the Standing Committee on Finance on the 2023 Revised and Proposed Fiscal Framework,⁹⁴⁶ the National Treasury remains steadfast in its fiscal conservatism and preference for employment over grants:

Any extension of the [COVID-19 SRD grant], or any replacement thereof, needs to be funded by a new revenue source or reprioritisation of other spending items. Government is still discussing options for a replacement grant and the balance between policy options to support higher employment.⁹⁴⁷

The 2021 Expert Panel on Basic Income Support (‘BIS Report’) investigated whether the proposed BIG would be appropriate for South Africa, and was under the supervision of the ILO, Department of Social Development, and the South African State. The BIS Report found that the state could successfully implement the BIG,

⁹⁴⁰ Makino (n 25) 16.

⁹⁴¹ Taylor Committee (n 18) 41; Makino (n 25) 18.

⁹⁴² Taylor Committee (n 18) 43.

⁹⁴³ Taylor Committee (n 18) 43.

⁹⁴⁴ Makino (n 25) 21.

⁹⁴⁵ Makino (n 25) 21.

⁹⁴⁶ “The Committee welcomes the extension of the SRD Grant and seeks clarification on the potential conversion of the SRD Grant into a Basic Income Grant.” See Standing Committee, as cited in National Treasury Budget (n 638) 109.

⁹⁴⁷ National Treasury Budget (n 638) 109.

whilst maintaining all its positive effects, by using multiple approaches, “including limited debt financing, tax revenue improvements arising from any demand stimulus and carefully calibrated tax increases where required.”⁹⁴⁸ The BIS Report emphasised that the benefit level would have to begin at a low threshold and incrementally increase, but that the level at which the state should implement the BIG must start at the food poverty line, and not below.⁹⁴⁹

In 2002, the state’s spokesperson Mr Netshitenzhe broadcast another common criticism of the proposed BIG, namely that it creates dependency and laziness, and that grants should only go to those who physically cannot work.⁹⁵⁰ The Minister of Agriculture and Land Affairs expressed a similar sentiment. However, the 2021 BIS Report, as well as India’s pilot programmes explained above, clearly indicate that the dependence critique against the proposed BIG is incorrect and inaccurate.⁹⁵¹

From India’s pilot programmes – particularly the Madhya Pradesh pilot programme – and from other studies conducted into poor people’s financial literacy, people who receive the proposed BIG will prioritise basic needs such as nutrition, health care, and shelter.⁹⁵²

South Africa’s legal reforms should consider the possibility of adapting the tax regime through implementing progressive, not retrogressive, taxation.⁹⁵³ Another form of legal reform could consist of a phased introduction of the proposed BIG through, for example, a targeted missing middle grant⁹⁵⁴ or a low-value BIG similar to the COVID-19 SRD grant, but at a value equal to or higher than the national food poverty line.⁹⁵⁵

In short, the proposed BIG serves as a predictable sum of money into the pockets of people to decide, for themselves, how they wish to spend it.⁹⁵⁶ A BIG would allow many

⁹⁴⁸ Expert Panel on Basic Income Support ‘Report into the appropriateness and feasibility of a system of basic income support for South Africa: Executive Summary’ *Department of Social Development* (Pretoria 2021) (‘BIS Report Executive Summary’) at 8.

⁹⁴⁹ BIS Report Executive Summary (n 948) 12, 14.

⁹⁵⁰ Makino (n 25) 21-22.

⁹⁵¹ BIS Report Executive Summary (n 948) 9.

⁹⁵² Sadiq & Du Preez (n 891) 4.

⁹⁵³ Howson & Coleman (n 912) 19.

⁹⁵⁴ Howson & Coleman (n 912) 27.

⁹⁵⁵ Bis Report Executive Summary (n 948) 12, 14.

⁹⁵⁶ Charles (n 132) 52.

more persons to actively participate in community social security and place more people in a position to redistribute finances to their kin.⁹⁵⁷

7.4 Conclusion

This chapter outlines some potential legal reforms which the state can implement to fulfil its constitutional duty to protect and advance ISS. While not exhaustive, these proposals show that there are indeed mechanisms which the state can utilise and elaborate upon to appropriately repair the shortcomings in formal social security, and thus protect ISS.

There is potential for the state to follow the lead on the *Mahlangu* case, as the UIA and COIDA have been amended to include domestic workers. The state can establish voluntary social insurance funds for informal sector workers to mitigate against life contingencies such as unemployment, injury, or disease and must carefully evaluate these voluntary social insurance funds' contribution frequency and level of contributions. The framework for cooperatives already exists in South Africa but is underutilised and may require amendments to render it more accessible to ISS participants. The proposed BIG continues to be hotly debated in South Africa, particularly its funding mechanism models, to whom it will be afforded, and the level of benefits distributed. Investigations into its feasibility *must* continue and must not die out as in the early 2000s.

The following chapter serves as the conclusion to this research and summarises the answers to the research objectives posed in chapter 1.

⁹⁵⁷ H Marais *In the balance: The case for the universal basic income in South Africa and beyond* (Wits University Press: Johannesburg 2022) at 54.

Chapter 8

Conclusion

There is no doubt that South Africa has progressed since 1994, particularly regarding its social security. It has expanded social insurance definitions, reformulated the social assistance framework, and budgeted a notable portion of its gross domestic product to social protection. Despite this progress, however, unemployment and poverty statistics remain stubbornly high, substantial portions of South African society fall outside this developing system and have no other recourse than informal social security ('ISS') for protection.

This research set out to show that the South African state disregards ISS and its participants, neglecting ISS's value in South African society, and that such disregard is a violation of its constitutional mandate to protect and advance ISS.

8.1 Conclusions regarding research objectives

The following section provides an overview of the research objectives as stated in Chapter 1 above, and the conclusions reached regarding each objective. It ends with a discussion of the overall conclusions reached regarding the thesis statement of this research.

8.1.1 Research objective 1

The first research objective sets out to understand why ISS is an important branch of social security to consider. To achieve this objective, this research utilises four definitional elements to outline the aspects of ISS, the types of ISS, the support it provides to its participants, and why – on its own terms – such support matters.

Starting with this research objective is important, as it contextualises the central axis on which this research turns. Any further argument and research objective to follow depends on ISS being a practice that has a positive social function and one which the state should not only respect but also cater for.

Chapter 2 above defines ISS as a practice which, due to its informal nature, can be a difficult concept to grasp. Identifying definitional elements thereof and extracting the meaning therefrom allows a broader picture to come to the fore. Informality does not constitute a lack of organisation, as it can result in obligations and entitlements,

despite not arising from formal agreements. The support which ISS provides can come from networks of kin or community, or a combination of both, and can be either in cash or in kind. The aim of ISS is like that of formal social security, in that it can mitigate life contingencies such as unemployment, injury, disease, or other shocks and risks. It can further provide a passive longer-term maintenance of a baseline quality of life for participants. ISS can either serve as a replacement for formal social security – in instances where participants do not otherwise qualify therefor – or ISS can serve as a complement to formal social security and work in tandem therewith.

In conclusion, ISS serves a profoundly positive function in people's lives and maintains social cohesion in the face of South Africa's increasingly difficult socio-economic circumstances.

8.1.2 Research objective 2

The second research objective contextualises ISS not only in its contemporary practice but in its historical development through prominent changes in ruling powers. To achieve this objective, this research summarises over four centuries of development, spanning from the precolonial era to post-1994 developments. Achieving this research objective provides an understanding of how those in power can profoundly impact ISS, both in a negative and positive sense.

Chapter 3 above elaborates upon South Africa's rich history of culture, conflict, and community. In the precolonial era, while poverty did exist, kin and community support mitigated much of that poverty. The disruption of these mechanisms began when the Dutch permanently settled in the Cape, marking the beginning of the colonial era. The Dutch period of permanent settlement approached "poor relief" in an exclusionary manner, and the subsequent British take-over exacerbated these exclusions. The Union and apartheid states' preoccupation with the Poor White population, and their withdrawal from supporting any population group other than White people, placed immense pressure on ISS systems.

In conclusion, for centuries kinship and community networks served important support functions. As systemic inequalities grew, kinship and community networks continuously relied upon one another to survive. The ruling powers, spanning from the Dutch's permanent colony to a racially exclusionary apartheid state, entrenched

imported Eurocentric ideologies within the social security framework and uplifted the Poor White population, leaving the majority floundering and reliant upon ISS.

8.1.3 Research objective 3

The third research objective evaluates the South African state's duty to ISS. To achieve this objective, this research first analyses the existing formal social security framework at its domestic, regional, and international levels. Thereafter, utilising this framework, this research identifies shortcomings in the formal framework, which contributes to the weakening of ISS. Finally, through analysing the effects of these shortcomings on ISS under duties created within the existing framework, this research argues that the state does not meet its constitutional mandate to respect and advance ISS.

Reaching this research objective not only contextualises the contemporary formal social security framework but holds the South African state accountable to the duties created thereunder.

Chapters 4 and 5 above elaborate upon South Africa's framework for formal social security. The Constitution naturally serves as the interpretative basis of any laws or instruments, as it is South Africa's supreme law. Case law, such as *Grootboom* and *Treatment Action Campaign*, serve as precedent for how to interpret the Constitution's provisions and formulate a reasonability assessment to determine whether the state has infringed a socio-economic right.

The right to access social security, as formulated as a fundamental right in section 27 of the Constitution and in international law, mandates the state to respect, protect, promote, and fulfil the right to access social security. As a member State of the United Nations, and having ratified the International Covenant on Economic, Social and Cultural Rights, South Africa must give effect to this right.

South Africa's social assistance and social insurance structures in place give practical effect to the state's duty to fulfil this right. However, as identified in chapter 6, there are fundamental shortcomings within these systems that exclude significant portions of the population.

Chapter 6 analyses the shortcomings in the formal social security system, and their impact upon ISS. Utilising the Constitutional Court's reasonability assessment, the chapter analyses whether the state's neglect to repair the shortcomings in the formal

social security system constitutes an unreasonable infringement of the right to access (informal) social security.

In conclusion, ISS is a positive practice that is vulnerable to bottlenecks of need. The shortcomings in the formal social security system and in the broader economic models of South Africa result in significant numbers of people falling through the formal system and relying upon the support which ISS provides. If the number of people who can redistribute resources via ISS continues to shrink, and they become significantly outnumbered by the number of people in need, ISS will not be able to perform its positive functions as determined by the first research objective above. In response to the third research objective, the South African state does not protect or advance ISS to a reasonable extent, and thus unjustifiably infringes upon the right to access (informal) social security.

8.1.4 Research objective 4

The final research objective seeks to identify and explain proposals for legal reform which the state can implement to give effect to its constitutional mandate to respect and advance ISS. This research objective provides tangible examples of actions the state can take to strengthen – not weaken – ISS.

By extending the formal social insurance framework to apply to ISS, informal workers can contribute to social insurance funds and receive benefits therefrom when life contingencies such as unemployment, injury, or disease befall them. Implementing such funds will be difficult, particularly if there is insufficient research conducted into the ability of informal workers to contribute to social insurance funds.

If the state reformulates its approach to cooperatives and improves the accessibility thereof, ISS can utilise them as effective formal platforms and will benefit from formal legal protection. The difficulty of cooperatives is the fine line which the state must navigate between reducing registration and funding barriers to facilitate a healthy environment for cooperatives and implementing registration requirements efficiently to reduce the risk of abuse.

And finally, by implementing a basic income grant more people will benefit from a predictable sum of money to invest in ISS mechanisms (if they so wish). The primary difficulty of a BIG proposal is its funding, as South Africa's fiscal conservatism and ability to fund the proposed BIG depends on the model it decides to implement.

In conclusion, the three legal proposals for legal reforms above all have their own benefits and drawbacks. If the state is held to account for its unjustifiable and unreasonable infringement upon the right to access (informal) social security, it must take these proposals seriously and conduct thorough investigations into them to ensure their effectiveness.

8.2 Overall conclusions

For centuries, ISS has adapted to the resource-draining and structural discrimination of colonialism, providing a safety net for all who fall through inadequate and/or exclusionary social security systems. When the new dispensation emerged, there was hope in its declaration that the state is no longer the excluder, but rather a beacon that must respect, protect, promote, and fulfil the rights enshrined in the Constitution, including social security. What this research has concluded is that the state has – despite its efforts – failed to do so in respect of ISS.

This research's thesis statement is that the South African state does not fulfil its constitutional duty to protect and advance ISS. At its conclusion, after fulfilling the research objectives reiterated above, the state unjustifiably and unreasonably infringes upon ISS participants' rights to access social security. However, there are existing instruments and mechanisms available in the country which the state can activate and utilise to protect and advance ISS, addressing the shortcomings in the formal social security system and affording ISS its rightful place within the broader social security framework.

8.3 Summary of contributions

This research has provided a concise and coherent summary of more than four centuries of history in the context of ISS. Furthermore, it has taken the literature's arguments regarding the constitutional right to access social security and applied them not only to *formal* social security but also to *informal* social security. Finally, it has consolidated three legal reform proposals with a perspective of how it can assist ISS mechanisms to not only survive but to grow.

8.4 Recommendations for further research

Any form of research will find aspects which, while beyond its own scope, nevertheless hold optimistic potential for future research.

Firstly, as a broader avenue of research, it will remain integral to investigate ISS structures and their participants' needs. While extending formal social insurance frameworks to include those in the informal sector is one of the proposed legal reforms, further research must be conducted into the capacity of informal sector workers to contribute to social insurance, how much they would be able to contribute and at what frequency.

Secondly, this research has found that the formal social security system excludes those in the informal sector due to them not falling under the formal definition of an employee. It further elaborated upon the value that cooperatives serve in providing a formal platform for informal business structures. Future research can investigate the nuances of who constitutes an “employee” in workers’ cooperatives, and whether such an employee would be able to contribute to social insurance such as unemployment and workplace injury or disease compensation.⁹⁵⁸

⁹⁵⁸ Per Schedule 1 Part 2 of the Co-operatives Act (n 810), the meaning of “employee” is the same as that in the Labour Relations Act (n **Error! Bookmark not defined.**). An employee per the Labour Relations Act (n **Error! Bookmark not defined.**) sec 213 is any person – excluding an independent contractor – who works for another person for remuneration, or who assists in carrying on another person’s business.

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