

# Social Protection Law in the Republic of South Africa

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## Abstract

The South African social protection system makes provision for all the nine standard branches contained in the International Labour Organisation (ILO) Social Security (Minimum Standards) Convention 102 of 1952, namely: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and survivors' benefit. Provision for the aforementioned branches is established and regulated by law. The article critically assesses the social protection legislative framework in the Republic of South Africa. It does that by largely focusing on the constitutional foundation of the social protection system, the design of the legal entitlements to social benefits, and pertinent administrative procedures and accountability mechanisms. This is followed by some concluding observations.

## A. Introduction

### *I. Social Protection: A conceptual clarification*

The Asian Development Bank defines 'social protection' as "the set of policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, and enhancing their capacity to protect themselves against hazards and interruptions/loss of income."<sup>1</sup> According to the South African National Planning Commission, social protection has five functions, namely:

*"Protective – Measures are introduced to save lives and reduce levels of deprivation. Preventive – Acts as an economic stabiliser that seeks to help people avoid falling into deeper poverty and reduce vulnerability to natural disasters, crop failure, accidents and illness. Promotive – Aims to enhance the capabilities of individuals, communities and institutions to participate in all spheres of activity. Transformative – tackles inequities and vulnerabilities through changes in policies, laws, budgetary allocations and redistributive measures. Developmental and generative – Increases*

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<sup>1</sup> Asian Development Bank, Social Protection, <https://www.adb.org/sites/default/files/institutional-document/32100/social-protection.pdf> (accessed on June 26 2017).

*consumption patterns of the poor, promoting local economic development and enabling poor people to access economic and social opportunities.”<sup>2</sup>*

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa (hereinafter the Committee) has offered a much broader approach known as ‘comprehensive social protection’. The notion of ‘comprehensive social protection’ is deemed to be broad mainly because:

*“Comprehensive social protection seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.”<sup>3</sup>*

## *II. Legislative framework: A brief overview*

Social protection in the Republic of South Africa (hereinafter South Africa) is, as it is shown below, regulated by law. The social protection legislative framework comprises the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution), social insurance laws and social assistance laws. These laws are influenced by relevant international social protection norms and standards. In addition, there are other laws which are not social protection laws in the true sense of the word but which have direct relevance and impact on how social protection is administered and regulated in South Africa.<sup>4</sup> In addition, the role of and importance of the common law, customary law and religious law in the social protection provisioning endeavours of South Africa should be recognised. The formal legislative framework of the South African social protection system can be illustrated in a tabular form as follows:

Table 1: Legislative Framework<sup>5</sup>

2 *National Planning Commission (Republic of South Africa)*, National Development Plan 2030: Our Future – Make it Work, <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed 26 June 2017).

3 *Committee of Inquiry into a Comprehensive System of Social Security for South Africa*, Transforming the Present – Protecting the Future: Consolidated Report, [http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming\\_the\\_Present.pdf](http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf) (26 June 2017).

4 These laws include the Promotion of Access to Information Act 2 of 2000 and Promotion of Administrative Justice Act 3 of 2000.

5 *Letlhokwa George Mpedi and Mathias Ashu Tako Nyenti*, Social insurance in South Africa: Are there Lessons to be learnt from the German Experience? Paper presented at the Augsburg-Johannes-

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996			
PUBLIC SCHEMES		PRIVATE SCHEMES	
Social Assistance	Social Insurance		Informal Social Security
	Statutory Funds	Voluntary Funds	
Social Assistance Act 13 of 2004 South African Social Security Agency Act 9 of 2004 Military Pensions Act 84 of 1976. Special Pensions Act 69 of 1996	Compensation Fund: Compensation for Occupational Injuries and Diseases Act 130 of 1993. Unemployment Insurance Fund: Unemployment Insurance Act 63 of 2001 and Unemployment Insurance Contributions Act 4 of 2002. Road Accident Fund: Road Accident Fund Act 56 of 1996.	Medical Schemes: Medical Schemes Act 131 of 1998. Pension Funds: Pension Funds Act 24 of 1956.	Informal Social Security: Friendly Societies Act 25 of 1956.

## B. Constitutional foundation of social protection in South Africa

### I. Constitutional values and rule of law

South Africa is founded on, among others, the following constitutional values: human dignity, non-racialism and non-sexism, and supremacy of the constitution and the rule of law.<sup>6</sup> The constitutional value of the rule of law<sup>7</sup> has been delineated as follows:

*"The rule of law...means the value-neutral principle of legality. It also has implications for the content of law and government conduct. In this regard it has both procedural and substantive components. The procedural component forbids arbitrary decision-making. Not only the executive, but Parliament itself may not act capriciously or arbitrarily. This is why, for example, the rule of law is violated when a non-judicial officer is given the power to order someone to be detained: lack of independence may result in arbitrary decision-making...The substantive component dictates that the government must respect the individual's basic rights. It is not clear what kinds of basic rights will qualify for protection under the rule of law. Respect for human dig-*

burg Conference on the Transnational Impacts of Law: Perspective from South Africa and Germany, 23 June 2016, Augsburg, Germany.

6 Section 1 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

7 See *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para. 85 and *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC).

*nity, equality and freedom are repeatedly emphasised in the Bill of Rights. It seems logical that these ought also to be the rights protected by the rule of law.”<sup>8</sup>*

The courts are enjoined by the Constitution to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>9</sup> These values underpin social protection provisioning endeavours in South Africa. The point is that they formulate the conceptual foundation from endeavours to *provide, transform and develop* social protection in South Africa should be based.<sup>10</sup> Furthermore, they give meaning to the socio-economic rights enshrined in the Bill of Rights.<sup>11</sup> As appositely asserted by the Constitutional Court:

*“There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”<sup>12</sup>*

The effect of the supremacy of the Constitution is that law or conduct inconsistent with the Constitution is invalid<sup>13</sup> and the obligations imposed by it must be complied with.<sup>14</sup> As put differently by the Constitutional Court in *Du Plessis and Others v De Klerk and Another* “...the Constitution is elevated to supremacy over all law, and then all organs of state are enjoined to honour and enforce that supremacy.”<sup>15</sup>

In addition to the abovementioned values,<sup>16</sup> there are other equally significant values such as those that originate from culture. One such value, which was also mentioned in the

8 *Johan de Waal* et al., The Bill of Rights Handbook (4<sup>th</sup> ed.), 2001 Lansdowne 14-15.

9 Section 39(1)(a) of the Constitution.

10 *Letlhokwa George Mpedi*, Pertinent Social Security Issues in South Africa, 2008 Cape Town 11.

11 *Ibid* 10.

12 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 at para. 23.

13 The effect of the supremacy of the Constitution was explained in section 4(1) of the Constitution of the Republic of South Africa 200 of 1993 (the Interim Constitution) as follows: “This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.”.

14 Section 2 of the Constitution. See, for further reading on the concept of supremacy of the constitution, *Jutta Limbach*, The Concept of the Supremacy of the Constitution, *The Modern Law Review* 64 (2001) 1.

15 1996 (3) SA 850 at para. 128.

16 See, for further reading about the South African constitutional values, *Athur Chaskalson*, Human Dignity as a Fundamental Value of our Constitutional Order, *South African Journal on Human Rights* 16 (2000) 193, *Hiroshi Nishihara*, The Significance of Constitutional Values, *Potchefstroom Electronic Law Journal* 4 (2001) 1, *Dawid Van Wyk*, Values, Values, Values or mere Words,

postscript of the interim constitution, is *ubuntu*. *Ubuntu* is an important constitutional value which “broadly means that an individual’s humanity is expressed through his relationship with others and theirs in turn through a recognition of his humanity.”<sup>17</sup> According to Judge Langa:

*“The concept [of ubuntu] is of some relevance to the values we need to uphold. It is culture which places some emphasis on community and on the interdependence of the members of the community. It recognises a person’s status as human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of the community. More importantly, it regulates exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”*<sup>18</sup>

## II. Social protection rights

### 1. Access to social security

Chapter 2 of the Constitution is the Bill of Rights. The Bill of Rights recognises social protection as an enforceable human right.<sup>19</sup> It, at section 27(1)(c) of the Constitution, provides every person in South Africa with “the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.” The state has a constitutionally imposed duty to *respect, protect, promote* and *fulfil* the rights in the Bill of Rights, inclusive of the right of access to social security.<sup>20</sup> The afore-

Words, Words?: Values in the 1996 Constitution, [http://www.kas.de/wf/doc/kas\\_4904-1522-2-30.pdf?040624093307](http://www.kas.de/wf/doc/kas_4904-1522-2-30.pdf?040624093307) (accessed on 01 July 2017), *Nazeem Goolam*, Human Dignity – Our Supreme Constitutional Value, [http://www.kas.de/wf/doc/kas\\_4904-1522-2-30.pdf?040624093307](http://www.kas.de/wf/doc/kas_4904-1522-2-30.pdf?040624093307) (accessed on 01 July 2017), and Francois Venter, Utilising Constitutional Values in Constitutional Comparison, [http://www.kas.de/wf/doc/kas\\_4904-1522-2-30.pdf?040624093307](http://www.kas.de/wf/doc/kas_4904-1522-2-30.pdf?040624093307) (accessed on 01 July 2017).

17 *George Barrie*, Ubuntu Ungamuntu Ngabanye Abantu: The Recognition of Minority Rights in the South African Constitution, TSAR 2 (2000) 271. See, for the meaning of the concept of *ubuntu* and social values it represents, *Yvonne Mokgoro*, Ubuntu and the Law in South Africa, Paper presented at the first Colloquium Constitution and Law held in Potchefstroom, South Africa, 31 October 1997.

18 *S v Makwanyane* 1995 3 SA 391 (CC) para. 224.

19 Section 38 of the Constitution. See *Pierre de Vos*, Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution, South African Journal on Human Rights 13 (1997) 67 and *Pierre de Vos*, The Economic and Social Rights of Children and South Africa’s Transitional Constitution, SA Public Law 10 (1995) 233. Also see, for a discussion on who may approach a court in the Constitution, *Ferreira v Levin* 1996 (1) BCLR 1 (CC).

20 *Sandra Liebenberg*, The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor, in *Eibe Riedel* (ed.), Social Security as Human

mentioned right of access to social security is not absolute. The point is that it is subject to the so-called '*internal limitation*' and the '*external limitation*' clauses.

The internal limitation, which is contained in section 27(2) of the Constitution, limits the right of access to social security by subjecting it to the availability of resources and permitting the state to strive towards its realisation progressively. This provision is drafted along the lines of article 2(1) of the International Covenant on Economic, Social and Cultural Rights.<sup>21</sup> This article provides that:

*“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*

Secondly, the provision could be viewed as an acknowledgement that South Africa is not a wealthy country and, as a result, it cannot (be expected to) realise the right of access to social security overnight. The external limitation clause is contained in section 36 of the Constitution. It provides that:

*“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”*

## 2. Pertinent children's rights

Children's rights are specifically entrenched in the section 28 of the Constitution. The Constitution provides every child<sup>22</sup> in South Africa with the right to "family care or parental

Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges, 2007 Heidelberg 76-77.

- 21 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. South Africa has signed the Covenant in 1994 and ratified it in 2015.
- 22 Section 28(3) of the Constitution defines 'child' as "a person under the age of 18 years." this definition is consistent with that contained in article 1 of the United Nations Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989) and art. 5 of the African Charter on the Rights and Welfare of the Child (Adopted by the African Member States of the Organization of African Unity (now African Union), 11 July 1990).

care, or to appropriate alternative care when removed from the family environment; to basic nutrition, shelter, basic health care services and social services; to be protected from maltreatment, neglect, abuse or degradation; [and] to be protected from exploitative labour practices.”<sup>23</sup> In contrast to the right of access to social security, the abovementioned children’s rights are not provided subject to the availability of resources.

### *III. Other relevant fundamental rights*

The right of access to social security and applicable children’s rights are supported by other rights contained in the Bill of Rights. These rights include the right to equality,<sup>24</sup> the right to human dignity,<sup>25</sup> the right to life,<sup>26</sup> the right to privacy,<sup>27</sup> the right of access to housing,<sup>28</sup> the right of access to health care,<sup>29</sup> the right of access to food and water<sup>30</sup> and right to education.<sup>31</sup> These rights are interconnected and, as a result, reinforce one another.<sup>32</sup> For example, the Constitutional Court pointed out in *S v Makwanyane*<sup>33</sup> that: “The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.”

23 Section 28(1)(b)-(e) of the Constitution.

24 Section 9 of the Constitution. It provides that: “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”.

25 Section 10 of the Constitution. See *Arthur Chaskalson*, Human Dignity as a Fundamental Values of our Constitutional Order, 16 South African Journal on Human Rights (2000) 193.

26 Section 11 of the Constitution. See *S v Makwanyane* 1995 3 SA 391 (CC).

27 Section 14 of the Constitution.

28 Section 26 of the Constitution.

29 Section 27(1)(a) of the Constitution.

30 Section 27(1)(b) of the Constitution.

31 Section 29 of the Constitution.

32 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) at para. 41 and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 at para. 23.

33 1995 (3) SA 391 at para. 326.

In addition, the socio-economic rights entrenched in the Bills of Rights are justiciable<sup>34</sup> and the provisions of the Bill of Rights bind both natural and juristic persons.<sup>35</sup> Furthermore, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.<sup>36</sup> Section 239 of the Constitution defines an ‘organ of state’ as “(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

#### *IV. International and comparative law*

South Africa is a member of several international organisations. As a result it has signed and ratified a variety of international instruments dealing with social protection.<sup>37</sup> These instruments impose duties that South Africa has to comply with. In addition, South Africa has to ensure that its social provisioning endeavours dovetail with the provisions of the soft law of these international organisations. It is, therefore, notable that the Constitution directs courts to consider international law when interpreting the Bill of Rights.<sup>38</sup> International law includes binding and non-binding law.<sup>39</sup> Further to section 39(1)(b), section 233 of the Constitution directs every court to, when interpreting any legislation, prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Customary international law is, in accordance with section 232 of the Constitution, law in South Africa unless it is inconsistent with the Constitutional or an Act of Parliament.<sup>40</sup>

34 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para. 77.

35 Section 8(2) of the Constitution.

36 Section 8(1) of the Constitution.

37 For example, the International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990).

38 Section 39(1)(b) of the Constitution.

39 The Constitutional Court has made reference to international instruments in several of its judgments. See, for example, *S v Makwanyane* (constitutionality of death penalty), *S v Williams* 1995 (5) SA 125 (CC) (constitutionality of corporal punishment), *Coetze v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) (constitutionality of imprisonment for judgment debts), *Ferreira v Levin* (rule against self-incrimination and right to a fair trial), *S v Rens* 1996 (1) 5A 1218 (CC) (right of appeal), *Ex Parte Gauteng v Provincial Legislature In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 42 (C) (language and religious rights of minorities) and *Grootboom* case (access to housing).

40 See, for further reading, *John Dugard*, International Law and the South African Constitution, *European Journal of International Law* 8 (1997) 77, *Dermott Devine*, The Relationship between

Courts have been granted the discretion to consider foreign law.<sup>41</sup> This is, it is opined, a useful inclusion in the Constitution. The point is that the South African Bill of Rights is relatively new and it can, particularly in the area of socio-economic rights, learn from the comparable constitutional jurisprudence of other countries. The Constitutional Court has exercised its discretion on a number of occasions and referred to foreign laws and court decisions.<sup>42</sup> On the other hand, it has issued a word of caution against the use of foreign law and cases in interpreting the South African Constitution. The chief reason for the warning is the “different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being.”<sup>43</sup>

### C. Design of legal entitlements to social benefits

The South African social protection system makes provision for the nine social risks enunciated in the International Labour Organisation (hereinafter the ILO) Social Security (Minimum Standards) Convention,<sup>44</sup> namely: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and survivors’ benefit. It caters for these contingencies largely through the social assistance scheme and social insurance system. As useful as the formal social protection schemes may be, they are imperfect. For instance, there are groups and categories of persons that are excluded and marginalised from the ambit of protection offered of the formal programmes. As a result, they rely on rudimentary traditional coping strategies. These three interventions are discussed in detail below.

#### I. Social assistance

##### 1. Legislative framework

Social assistance is defined as “state provided basic minimum protection to relieve poverty, essentially subject to qualifying criteria on a non-contributory basis.”<sup>45</sup> The key social as-

International Law and Municipal Law in the Light of the Interim South African Constitution 1993, International and Comparative Law Quarterly 44 (1995) 1 and *John Dugard*, The Role of International Law in Interpreting the Bill of Rights, South African Journal on Human Rights 10 (1994) 208.

41 Section 39(1)(c) of the Constitution.

42 See, for example, *S v Makwanyane* 1995 3 SA 391 (CC).

43 *Park-Ross v Director, Office of Serious Economic Offences* 1995 (2) SALR 148 (CC) at 160.

44 Convention 102 of 1952.

45 *Committee of Inquiry into a Comprehensive System of Social Security for South Africa*, Transforming the Present – Protecting the Future: Consolidated Report, [http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming\\_the\\_Present.pdf](http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf) (26 June 2017).

sistance legislation in South Africa is the Social Assistance Act.<sup>46</sup> The Social Assistance Act has been enacted to (a) give effect to the rights of access to social security as contained in the Constitution, ensure effective provision of social assistance based on uniform norms and standards, standardised delivery mechanisms and a national policy for the efficient, economic and effective use of the limited resources available for social assistance and for the promotion of equal access to government services; (b) prevent the proliferation of laws, policies and approaches from materially prejudicing the beneficiaries or recipient of social assistance; (c) and assist in securing the well-being of the people of South Africa and to provide effective, transparent, accountable and coherent government in respect of social assistance for the country.<sup>47</sup>

The legal provisions pertaining to the institutional and administrative framework of social assistance are set out in the South African Social Security Agency Act.<sup>48</sup> The South African Social Security Agency Act has been enacted to “provide for the establishment of the South African Social Security Agency as an agent for the administration and payment of social assistance” in South Africa.<sup>49</sup>

## 2. Social grant programme

Social grants are the mainstay of the social assistance programme in South Africa. This is the largest social assistance programme on the African continent in terms of the number of persons covered by the scheme. According to the South African Social Security Agency (hereinafter SASSA), South Africa had slightly over 17 million social grants recipients as at 31 May 2017.<sup>50</sup> This is a non-contributory programme as it is financed through taxes.<sup>51</sup> Its legislative framework is set out in the Social Assistance Act. The programme makes provision for the following social grants: child support grant, care dependency grant, foster child grant, disability grant, older person’s grant, war veteran’s grant, and grant in aid.<sup>52</sup> Social grants are, with the exception of the foster child grant and grant-in-aid, disbursed subject to a means-test. Social grants in South Africa are not universal. They are targeted at needy individuals, subject to qualifying conditions such as age, who are unable to participate mean-

46 Act 13 of 2004.

47 Preamble of the Social Assistance Act.

48 Act 9 of 2004.

49 Preamble of South African Social Security Agency Act.

50 *South African Social Security Agency (SASSA)*, Fact Sheet: Issue no 5 of 2017 – 31 May 2017, <http://www.sassa.gov.za/index.php/knowledge-centre/statistical-reports> (accessed on 23 June 2017).

51 Section 4 of the Social Assistance provides that the Minister of Social Development has a duty to, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for that purpose make available the social grants.

52 Section 4 (a)-(g) of the Social Assistance.

ingfully in the labour market due to their age (being too young (from birth up to the age of 18 years) or too old (from the age of 60 years and above) or disability.

### 3. Challenges and possible solution

There are several points of criticisms that may be levelled against the social grant system in South Africa. Firstly, the scope of coverage of the scheme is limited. Persons who are not too young, too old or too disabled to work but who are nonetheless indigent are excluded and marginalised. They are at the mercy of poverty. Those that are fortunate survive on informal support provided by their next of kin or the communities within which they live. Secondly, the social grants are provided largely based on the means-test. The means-test has been criticised for the reason that it is expensive to administer. This refers to the costs associated with the administration of the means-test by SASSA. The means-test has also been labelled as an ineffective targeting mechanisms. The point is that often the prospective beneficiaries cannot afford the travel costs associated with the commute to the offices responsible for the administering of the means-test. It must be recalled that some of the most indigent persons in South Africa live in the so-called deep rural areas. This problem is made worse by the fact that the SASSA offices are largely situated in urban areas, the rural poor are largely illiterate and requisite documents such as identity documents and birth certificates are often difficult to acquire for those who live in remote areas.

It should be pointed out that the abovementioned problems have not gone unnoticed by the relevant authorities. As a result, there are efforts to address them. For example, there are discussions about universalising the child support grant and older person's grant. Secondly, there are proposals to extend the child support grant beyond the age of 18 for those beneficiaries who are still in school. Furthermore, SASSA has introduced the so-called Integrated Community Registrations Outreach Programme (ICROP). This programme entails reaching out to the rural poor via mobile service units. 570 ICROP interventions were conducted during the 2015/2016 financial year.<sup>53</sup> ICROP is to be welcomed, particularly when one notes that 320 000 applications for the CSG were completed since its introduction in 2007.<sup>54</sup> However, ICROP should not be sentimentalised as a universal remedy for the abovementioned problem. The truth of the matter is that it has its own inadequacies. For example, it has been reported that "[t]he mobile units and services in farms do not have the same level of automation and sophistication as those offered at regular SASSA offices..."<sup>55</sup> Additionally, ICROP stands accused of diminishing the human resource capacity at local

53 *South African Social Security Agency*, Annual Report 2015/16, 2016 Pretoria 15.

54 *International Labour Organisation*, ICROP: Reaching Out to Rural Poor through Mobile Service Units, <http://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=51861> (accessed on 23 June 2017).

55 *Department of Social Development (Republic of South Africa)*, Comprehensive Report in the Review of the White Paper for Social Welfare, 1997, 2016 Pretoria 230.

offices. The key issue is that existing staff members are redeployed to mobile offices.<sup>56</sup> A more permanent solution should be found to ensure easy access to the social grant system by the rural poor. This should include the establishment of permanent offices staffed by well-trained personnel.

## *II. Social insurance*

### 1. Legislative framework

The South African social insurance system comprises public insurance funds and private insurance funds. It is legislated in a variety of contingency specific pieces of legislation. Chief among these social insurance statutes are the following:

#### a) Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993

The principal goal of this act is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.<sup>57</sup>

#### b) Unemployment Insurance Act (UIA) 63 of 2001 and the Unemployment Insurance Contributions Act (UICA) 4 of 2002

These acts deal specifically with unemployment insurance in South Africa. The UIA has been enacted to, *inter alia*, establish the Unemployment Insurance Fund (UIF); provide for the payment from the Fund of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependant's benefits related to the temporary unemployment of such employees; and provide for the establishment of the Unemployment Insurance Board (UIB), the functions of the Board and the designation of the Unemployment Insurance Commissioner.<sup>58</sup> The UICA, on the other hand, has been enacted to provide for the imposition and collection of contributions for the benefit of the Unemployment Insurance Fund and to provide for procedures for the collection of such contributions.<sup>59</sup> The UICA, therefore, unlike the UIA, makes provision for the collection of benefits.

#### c) Pension Funds Act 24 of 1956

The primary aim of this legislation is to provide for the registration, incorporation, regulation and dissolution of pension funds.

56 *South African Social Security Agency*, Annual Report 2007/ 2008, 2008 Pretoria 17.

57 Preamble of the COIDA.

58 Preamble and section 2 of the UIA.

59 Preamble and section 2 of the UICA.

d) Medical Schemes Act 131 of 1998

The main purpose of this act is to consolidate the laws relating to registered medical schemes; to provide for the establishment of the Council for Medical Schemes as a juristic person; to provide for the appointment of the Registrar of Medical Schemes; to make provision for the registration and control of certain activities of medical schemes; to protect the interests of members of medical schemes and to provide for measures for the co-ordination of medical schemes.<sup>60</sup>

e) Road Accident Fund Act 56 of 1996

This act was legislated to, among others, provide for the establishment of the Road Accident Fund.

## 2. Social insurance programme

The overall social insurance programme in South Africa is, in the true form of social insurance, contributory in nature. It has public social insurance funds that are employment-based. These funds include the Unemployment Insurance Fund and the Compensation Fund and are funded through employer-employee contributions and employer contributions respectively. The Road Accident Fund is a public insurance fund which is funded by means of fuel levies. The public insurance funds in South Africa largely cover the following risks: employment injuries and diseases, unemployment, disability, sickness, family, maternity and traffic accident-related injuries and death. Alongside the public insurance funds there are private social insurance funds. These funds include the retirement funds and medical schemes. These funds mainly protect the individuals that fall under their scope of coverage against social risks such as sickness, disability and old age.

## 3. Challenges and possible solutions

The social insurance programme in South Africa makes provision for all the nine social risks enunciated in the ILO Social Security Minimum (Standards) Convention. However, it is far from perfect. As it can be deduced from the preceding discussion, social insurance is provided for by different funds. As part of South Africa's efforts to craft a comprehensive social security system, Cabinet of the government of South Africa has supported the proposal on the establishment of a National Social Security Fund to administer the social insurance benefits.<sup>61</sup> In addition, the social insurance legislation is not consolidated. There is a need for the codification of the South African social insurance legislation to ensure that it is systemised. Thirdly, participation in social insurance programmes is generally not legally

60 Preamble of the Medical Schemes Act.

61 *African National Congress*, Social Transformation: Discussion Document, 2017 Johannesburg 5.

mandatory. To put it differently, there is generally not a legal duty to participate in social insurance schemes. The Unemployment Insurance Act does impose a duty to participate in the unemployment insurance scheme to qualifying individuals. Albeit it not being a legal duty, it is common in South Africa for employees to be compelled to belong to a retirement scheme and medical aid fund by means of an employment contract or a collective agreement. To remedy this problem, the Cabinet of the government of South Africa has accepted the proposal that there be mandatory contributions for retirement, death and disability benefits.<sup>62</sup> The Minister of Social Development and the Minister of Finance have been mandated to consult the relevant stakeholders and report back to Cabinet in 2018.<sup>63</sup> Furthermore, the scope of coverage of the social insurance funds is limited. For instance, the scope of protection of employment-based social insurance schemes is mainly restricted to qualifying individuals who are employed in the formal sector. As a result, the informal sector workers and their dependants are left vulnerable to social risks. In addition, some of the social insurance funds are in a bad financial state. The Road Accident Fund is the case in point. To address the financial and administrative challenges facing that Fund there are plans which are at an advanced stage to replace the fund with a sustainable benefit scheme for road users.<sup>64</sup> Another challenge to be noted is that South Africa does not have a national retirement and national health insurance schemes. It should be acknowledged that great progress has been registered towards the realisation of the aforementioned schemes. The National Health Insurance scheme has been piloted and the white paper regarding that scheme has been publicised.

### *III. Informal forms of social protection*

#### 1. Concept of informal social protection

The concept of informal social protection essentially refers to those self-organised and self-managed unofficial strategies used by individuals and communities to cope with social risks. These strategies can be kinship-based or community-based. Unlike the social insurance and social assistance approach which follows a top-down approach, informal social protection interventions largely adopt a bottom-up approach. These interventions are widespread in South Africa and many other developing countries. The reasons for this state of affairs are manifold. Nevertheless, the bottom line is that the extent to which the reach of tax-financed social security interventions can be broadened depends on the political will of the state of the day and, most importantly, the fiscal might of the state in question. To this end, the lack of resources, which is one of the traits of most developing countries – inclu-

62 *Ibid.*

63 *Ibid.*

64 See *Department of Transport (Republic of South Africa)*, Draft Policy Paper: Restructuring of the Road Accident Fund on a No-Fault Basis and as Compulsory Social Insurance in Relation to the Comprehensive Social Security System, 2010 Pretoria.

sive of South Africa, restricts the reach of the tax-financed social security measures to most *personae miserabiles* (vulnerable groups). Secondly, most social insurance schemes were designed with a formal sector worker and his family in mind. This is problematic in South Africa where a majority of bread winners eke a living in the informal economy. The point is it results in the exclusion and marginalisation of informal sector workers from social insurance coverage.<sup>65</sup> It is true that there are alternatives, such as voluntary coverage, which could be used to widen the scope of social insurance coverage to these categories of workers. However, the low contributory capacity of informal sector workers, which is mostly caused by the meagre wages often paid and unreliable income generated in this sector, habitually prevents them for taking advantage of such alternatives. As a result, solace is sought from informal social protection measures where the contributions paid are invariably linked to the low contributory capacity of the participants.

## 2. Challenges facing informal social protection

It is true that, to some, participation in informal social protection schemes is more of a lifestyle than anything else. The point is that informal social protection in South Africa is embedded in African traditional values such as *Ubuntu*.<sup>66</sup> These values treat social risks as a burden that should be shared irrespective of ones means.<sup>67</sup> However, it must be said that in a majority of instances informal social protection is an important prop for the exclusive support of those excluded and marginalised by the formal social protection system. Marginalisation, in this context, could imply that the persons are not or cannot be covered at all due to, for example, the qualifying conditions for paying social insurance contributions or for drawing social protection benefits. On the other hand, marginalisation could mean that the type of cover and benefits the vulnerable are interested in are not afforded by the formal social protection schemes. It must be borne in mind that one typical feature of informal coping strategies is to combine cash benefits with benefits in kind. Burial societies, for instance, often merge cash benefits with non-pecuniary benefits such as labour services (preparing food for the mourners, grave digging etc.) and relevant equipment used during funerals (e.g. tents, chairs, tables etc.).

As an acknowledgement of the widely used phrase that necessity is the mother of all inventions, it could thus be argued that contributory informal coping strategies are an innovation by the vulnerable intended at ensuring that their (or what they perceive as) social risks are met to the best of their (financial) abilities. In any event, this is how social protec-

65 National Planning Commission (Republic of South Africa), National Development Plan 2030: Our Future – Make it Work, <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed 2 July 2017).

66 Letlhokwa George Mpedi and Barbara Darimont, The Dualist Approach to Social Security in Developing Countries: Perspectives from China and South Africa, *Journal of Social Development in Africa* 22 (2007) 24-25.

67 *Ibid.*

tion evolve(d). A social risk is identified and appropriate measures are devised to prevent and/or cushion it. Nevertheless, it must be noted that this innovation (i.e. informal social protection) is far from perfect. Firstly, there are limitations to the extent to which the poor can share poverty. Secondly, the values that underpin the informal social protection mechanisms are in some instances easily eroded by factors such urbanisation. Furthermore, informal social protection strategies are susceptible to widespread calamities such as draught and floods. In addition, risks associated with the provision and administration of social protection such as overexposure to risks, corruption and fraud are also present in informal social protection interventions. This is compounded by the high illiteracy rate among most of the informal social protection participants.

### 3. Harnessing informal social protection to its fullest potential

The question that requires attention is how best can this imperfect innovation by the vulnerable be perfected to better deal with social risks facing the poor and most importantly extend social protection coverage to this group of persons? There is no easy answer to this question. Nevertheless, it is fundamental that informal social protection interventions be acknowledged by the state, particularly in developing countries, as a part and parcel of a social protection system. This should pave a way for the integration and consideration of informal coping strategies in social protection reform endeavours and policy initiatives. Informal social protection is generally overlooked in social protection reform activities and where it is considered it often handled in an unsatisfactory manner. In addition, there is a serious need for state intervention which should rest on three roles. Firstly, the state should use its regulative function and regulate the informal social protection system. This could involve the setting of (uniform) norms and standards for the informal social protection system. However, these norms and standards should be developed in consultation the stakeholders.

Furthermore, the state may serve as a provider. This role should, depending on the availability of resources, be focussed on capacity development in the informal social protection sector. Much emphasis should be placed on imparting much needed skills such as bookkeeping and related financial skills. The state could provide monetary support so as to reinforce the financial base of informal social protection schemes. This would ensure that the benefits they provide are of better quality.

In addition, the state may serve as a facilitator and play a leading role in efforts aimed at building links between the informal social protection sector, the state and private role players (e.g. financial and insurance organisations). It must be noted that in most instances informal social protection schemes have some pre-existing direct and/or indirect interactions with formal establishments such as banking and insurance institutions. This relationship needs to be harnessed into something more beneficial to the informal sector schemes. Measures such as micro-insurance and micro-finance could be useful in that regard. They could play a meaningful role in addressing perceptions often embraced by the private sector

institutions that the informal social protection participants are a high risk group that does not worth the trouble. This is a misplaced myth which has been blown out of proportion. Much can be learnt from the South African approach to micro-financing. Before it was regulated, micro-finance was largely run by unsavoury characters. This invariably resulted in a great deal of unhappiness, especially among the indigent members of the society. The state's regulatory interventions, did not only instil order and a sense of security for the poor, but also led to a situation where private institutions started rendering micro-financial products and services. This greatly improved access to finance to a majority of the poor who did and/or could not open bank accounts. As pointed out by the National Development Plan – 2030:

*"The private market has an important role to play. There are already indications that poor South Africans are willing and able to save if the incentives are appropriate, and the products are flexible and responsive to their needs. One of the major banks launched a savings product which illustrates the capacity and appetite to save among South Africans. Approximately 750 000 accounts were opened, collecting R1.2-billion in deposits, and about 20 percent of the people who opened accounts had never had a bank account before. People didn't take their money out when the programme closed down. The product had two incentives: there were no fees charged and people could invest small amounts, and there was the possibility of winning a big pool of money without losing the initial investment. There are other private sector products in the insurance market, including medical insurance schemes which replace income loss during hospitalisation and insurance for loss of income as a result of losing a job. Most of these address the needs of those who do not participate in the formal sector contributory schemes and have great potential to improve coverage of those in the informal sector. Government needs to explore using such mechanisms to incentivise wider participation and provide matching contributions to those below a particular threshold."*<sup>68</sup>

The potential role that can be played by informal social protection has been acknowledged in several policy documents in South Africa. For example, the National Development Plan – 2030 provides that:

*"South Africa has a long tradition of stokvels, which are said to form a sizeable part of the informal savings schemes. Alongside these there are cooperatives, although these are generally small in size. These community based mechanisms show that there is a culture of saving as well as managerial and financial expertise. This expertise could be used in developing social protection schemes that will reach out to workers in the informal economy. The government should use these existing mechan-*

68 National Planning Commission (Republic of South Africa), National Development Plan 2030: Our Future – Make it Work, <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed 2 July 2017).

*isms as a basis for establishing and developing appropriate institutional support to promote social protection for the informal sector.”<sup>69</sup>*

The National Development Plan – 2030 states further that: “Community-based insurance provides a powerful mechanism for developing the organisational capabilities of civil society, with long term benefits for enhancing accountability and governance as well as welfare provision.”<sup>70</sup>

In addition, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (hereinafter the Committee) cautioned against the introduction of social protection measures that had the propensity of undermining the traditional support mechanisms. It advised that reform endeavours directed at the present social protection system should endeavour to support and strengthen the existing informal coping strategies. In that regard it argued that:

*“In the first instance this requires considering ways to integrate currently excluded groups into formal schemes. This includes embarking on pilot schemes aimed at supporting informal social security mechanism; removing unnecessary legal restrictions in relation to access to schemes; devising tailor-made schemes to cater for these excluded and marginalised categories and groups; introducing compulsory membership of private or public social schemes; and campaigns to promote private insurance and savings. Further, there is a need to consider broader interventions and programmes that bolster the overall ability of communities and informal systems to cope with and manage increased levels of risk and hardship.”<sup>71</sup>*

The foregoing views of the Committee are lucid and spot on. However, it is regrettable to note that to date very little has been done in South Africa to bring the Committee’s progressive ideas to fruition.

## **D. Administrative procedures and accountability mechanisms**

### *I. Administrative justice principles*

Social protection administrative processes in South Africa must comply with administrative justice principles. These principles are set up in section 33 of the Constitution. This section, which deals with the right to just administrative action,<sup>72</sup> provides every person with the right to administrative action that is lawful, reasonable and procedurally fair and with the

69 *Ibid.*

70 *Ibid.*

71 *Committee of Inquiry into a Comprehensive System of Social Security for South Africa, Transforming the Present – Protecting the Future; Consolidated Report, [http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming\\_the\\_Present.pdf](http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf) (26 June 2017).*

72 According to section 1(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) ‘administrative action’ means “any decision taken, or any failure to take a decision, by – (a) an organ

right to written reasons, where that person's rights have been adversely-affected by the administrative action in question. Furthermore, section 33 of the Constitution obliges the state to enact national legislation, in order to give effect to the foregoing rights and to provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;<sup>73</sup> impose a duty on the state to give effect to the rights in subsections (1) and (2); and promote an effective administration.<sup>74</sup> The right to just administrative action may appear straight forward. Nonetheless, in practice social protection institutions do not always comply with this right. The series of cases brought against the various provincial departments of social development for their failure to conform with the right to just administrative action are the case in point.<sup>75</sup>

The non-compliance with the right to just administrative action was not only observed in the social assistance sphere but in the social insurance field as well. For example, in *Tseleng v The Chairman, Unemployment Insurance Board & Another*<sup>76</sup> the Court held that failure on the part of the Unemployment Insurance Board to bring policy to the attention of the applicant that no further benefits are payable to applicants who failed to seek employment is unjust and contrary to the right to procedurally fair administrative action. It argued that: "Perhaps the policy is a sound one, but if a statutory body considers that such a consideration is so material as of itself to determine the fate of an application, then it should at the

of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...".

73 Section 33 of the Constitution, in essence, reinforces the common law administrative law framework developed over the years in South Africa. In *President of the Republic of South Africa v South African Rugby Football Union* 1999 *BCLR* 1059 (CC) the Constitutional Court pointed out at 1117E-F that: "the principal function of section 33 is to regulate conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades".

74 In consequence of section 33 of the Constitution, the legislature enacted the PAJA.

75 See, for example, *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA); *Ntame v MEC, Department of Social Development, Eastern Cape*; *Mnyaka v MEC, Department of Social Development, Eastern Cape*; *Mnyaka v MEC, Department of Social Development Eastern Cape* [2005] 2 All SA 535 (SE); *Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* 2005 (6) SA 229 (SE); *Jayiya v MEC for Welfare, Eastern Cape Government and another* [2003] 2 All SA 223 (SCA); *Mbanga v Member of the Executive Council for Welfare and Another* 2001 (8) *BCLR* 821 (SE); *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and Another* 2001 (9) *BCLR* 889 (SE); *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another* 2000 *BCLR* 728 (E); *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T); and *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* 1998 1 All SA 525 (E).

76 (1995) 16 *ILJ* 830 (T).

very least afford an applicant the opportunity of dealing with its difficulty and not keep the policy to itself...To hold otherwise would be to countenance injustice since persons who might otherwise be fully able to justify their application would be deprived of the opportunity of doing so.”<sup>77</sup>

## *II. Adjudication and enforcement procedures and institutions*

The adjudication and enforcement procedures and institutions in the South African social security system are regulated by law. These procedures (e.g. review and appeal) and institutions are, as shown below, provided for by various social assistance and social insurance statutes as well as the common law. The institutions that can be approached to enforce social security rights and/or duties include the following: Courts: e.g. Constitutional Court, High Court, Labour Courts and Magistrates Court;<sup>78</sup> Boards: e.g. Special Pensions Board, Special Pensions Review Board, and Appeals Committee of the Unemployment Insurance Board; Tribunals: e.g. Pensions Fund Adjudicator and Independent Tribunal in terms of the Social Assistance Act; Offices: e.g., Public Protector and Auditor General<sup>79</sup> and Commissions: e.g., Commission for Conciliation, Mediation and Arbitration; South African Human Rights Commission.

## *III. Supervisory bodies*

There is a variety of supervisory bodies in South Africa which (should) ensure that (public) social security institutions are accountable. These supervisory bodies include the following: Office of the Public Protector, South African Human Rights Commission, Auditor-General, Public Service Commission and Public Service Commission.

### 1. Office of the Public Protector

The Office of the Public Protector, which is cited as one of the state institutions that strengthens constitutional democracy in South Africa,<sup>80</sup> has the power to: investigate any

77 At 846.

78 It should be recalled that South Africa, unlike countries such as Germany, has no specialised social security courts or administrative tribunals.

79 The Public Protector, South African Human Rights Commission, Commission for Gender Equality and Auditor General form part of the so-called state institutions supporting constitutional democracy (Chapter 9 of the Constitution). These institutions, which are independent and impartial, can act out of their own initiative or after being approached by an interested party investigate a complaint in their areas of jurisdiction and, in some instances, order that remedial action be taken (see, for example, sections 182 and 184 of the Constitution).

80 Section 181(1)(a) of the Constitution.

conduct regarding state affairs, or the public administration in any sphere of government,<sup>81</sup> that is alleged or suspected to be improper or to result in any impropriety or prejudice; report on that conduct; and take appropriate remedial action.<sup>82</sup> As is apparent from the powers of the office of the Public Protector, its main concern revolves around administration, whereas investigation of crimes, and related issues, are referred to the police.

## 2. South African Human Rights Commission

The South African Human Rights Commission has a Constitutional duty to: promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in South Africa.<sup>83</sup> It has the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate.<sup>84</sup> Incensed by the inefficiency of the Department of Social Development (Eastern Cape) in its administration of the social assistance scheme, the Court in *Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases*<sup>85</sup> ordered that a copy of the judgment be served on the Chairperson of the Human Rights Commission.<sup>86</sup> In addition, the South African Human Rights Commission has an obligation

81 Public Protector South Africa *Report on an Investigation into an Allegation that the South Africa Social Security Agency Suspended Payment of a Child Support Grant without Furnishing Written Reasons*, Report No 23 of 2009/10; Public Protector South Africa *Report on an own Initiative Investigation into an Allegation that the South African Social Security Agency suspended the Social Security Grant of MS NS Mphephu without Good Cause*, Report No 27 of 2008/09; Public Protector South Africa *Report on an Investigation into Allegations of Maladministration against the National Department of Social Development and the KwaZulu-Natal Provincial Department of Social Services and Population Development*, Report No 4 of 2008/9.

82 Section 182(1) of the Constitution. It should be noted, however, that in terms of section 182(3), the office of the Public Protector has no power to investigate Court decisions. This provision is in line with section 165 of the Constitution, which guarantees the independence of the judiciary.

83 Section 184(1) of the Constitution.

84 Section 184(2) of the Constitution.

85 2005 (6) SA 229 (SE).

86 In this decision, Plasket J stated at paragraph [18] that: "I am aware of the fact that when a previous crisis in the administration of social assistance in the province was brought to the Human Rights Commission, it concluded that, despite trying, there was nothing it could do but to support a class action for the reinstatement of a substantial number of disability grants. Many would have expected that the attention that that crisis has received would have spurred the respondent and her officials out of their lethargy and indifference and instilled in them a sense of responsibility and commitment. That has not happened. As the crisis deepened, I have decided that it is appropriate to order that a copy of this judgement be served on the chairperson of the Human Rights Commission so that he can consider whether to institute an investigation into the conduct of the respondent's department, with a view to proposing concrete steps to ensure that it begins to comply with its constitutional and legal obligations and ceases to infringe fundamental rights on the present grand scale."

to require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.<sup>87</sup> Pursuant to this requirement, the South African Human Rights Commission compiles and releases reports on the economic and social rights in South Africa.<sup>88</sup> This, however, has throughout the years proved not to be an easy task. As Khoza points out: “The [South African Human Rights Commission] has consistently reported that government departments have not always been co-operative in giving information required for the reports – often providing inadequate and/or incorrect information or submitting it late – and this has led the [South African Human Rights Commission] to invoke its powers to subpoena government officials. Such problems doubtless influence the quality of the reports...”<sup>89</sup>

### 3. Auditor-General

The Auditor-General has an obligation to audit and report on the accounts, financial statements and financial management of: all national and provincial state departments and administrations; all municipalities; and any other institution to be audited by the Auditor-General.<sup>90</sup> Furthermore, the Auditor-General has discretion to audit and report on the accounts, financial statements and financial management of: any institution funded by the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or any institution that is authorised in terms of any law to receive money for a public purpose.<sup>91</sup>

### 4. Public Service Commission

The Public Service Commission (PSC), established in accordance with section 196 of the Constitution, is a: “constitutionally-mandated, national body responsible for the important tasks of: promoting the democratic values and principles enshrined in the Constitution of the Republic of South Africa; investigating, monitoring and evaluating the organisation, administration and personnel practices of the public service, and advising national and provincial organs of the state accordingly; providing directions to ensure that personnel procedures comply with constitutional values and principles; proposing measures to ensure effective and efficient performance within the public service; investigating employee

<sup>87</sup> Section 184(3) of the Constitution.

<sup>88</sup> Soft copies of the South African Human Rights Commission’s reports on economic and social rights can be accessed at <http://www.sahrc.org.za>.

<sup>89</sup> *Sibonile Khoza*, Review of the Sixth report of the South African Human Rights Commission: An Introduction, *Economic and Social Rights in South Africa Review* 8 (2007)16-17.

<sup>90</sup> Section 188(1) of the Constitution.

<sup>91</sup> Section 188(2) of the Constitution.

grievances; and reporting on its activities and performance.”<sup>92</sup> In light of the foregoing important tasks of the PSC, it may be asserted that the PSC: “promotes the development of ethics and accountability, in that it ensures that government departments follow the sound principles of public administration to ensure efficient, economic and effective use of resources, and that people’s needs are responded to.”<sup>93</sup> It is, indeed, clear that public administration in South Africa is not at liberty to act as it pleases. Institutions such the PSC are there to ensure that. Accordingly, it is not surprising that the Court in *Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* deemed it appropriate to, in addition to the South African Human rights Commission, serve a copy of its judgment on the PSC.<sup>94</sup>

The aforementioned supervisory bodies are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their function without fear, favour or prejudice.<sup>95</sup> In addition, the Constitution proscribes any interference with the functioning of these institutions be it from natural and juristic persons or from an organ of state.<sup>96</sup>

- 92 *Report on the State of the Public Service* (November 2001), [http://www.gov.za/sites/www.gov.za/files/spservice\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/spservice_0.pdf) (accessed on 2 July 2017).
- 93 *Mutuwafshethu John Mafunisa*, Enhancing Accountability and Ethics in the Public Service: The Case of the Republic of South Africa, in Kwame Frimpong and Gloria Jacques (eds.), *Corruption, Democracy and Good Governance in Africa: Essays on Accountability and Ethical Behaviour*, Gaborone 1999 244.
- 94 Justifying such a move, Plasket J pointed out (at paragraphs [19], [21]-[22]) that: “In my view it is also necessary to bring the crisis to the attention of the Public Service Commission because a large part of the problem in the respondent’s department appears to be maladministration and inefficiency in the administration of social assistance. The Public Service Commission is created as an independent and impartial institution with the express purposes of maintaining an ‘effective and efficient public administration’ and ‘promoting a high standard of professional ethics in the public service’...As with the Human Rights Commission, it seems to me to be appropriate to have this judgement served on the chairperson of the Public Service Commission so that he can consider instituting an investigation into the respondent’s department. There appears to me to be no reason why both institutions, with their complementary focuses and expertise should not conduct joint investigation. I stress, however, that much as I hold the view that an investigation by these institutions is appropriate and necessary, I am not making an order to that effect: the decision to investigate or not is one that is vested in the institutions concerned and must be taken by them...the time for talk and no action has long passed. Something drastic and concrete must be done to remedy a serious, systemic infringement of the Constitution and law – and the principles of good administration – by the respondent’s department.”.
- 95 Section 181(2) of the Constitution.
- 96 Section 181(4) of the Constitution.

#### IV. Basic values and principles governing public administration

The Constitution makes provision for basic values and principles governing public administration which public social protection institutions should respect and uphold. In accordance with section 195(1) of the Constitution:

*“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: A high standard of professional ethics must be promoted and maintained. Efficient, economic and effective use of resources must be promoted. Public service must be development-oriented. Services must be provided impartially, fairly, equitably and without bias. People’s needs must be responded to, and the public must be encouraged to participate in policy-making. Public administration must be accountable. Transparency must be fostered by providing the public with timely, accessible and accurate information. Good-human resource management and career-development practices, to maximise human potential, must be cultivated. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”*

The above-mentioned principles apply to administration in every sphere of government; organs of state; and public enterprises. Accordingly, the national, provincial and local spheres of government<sup>97</sup> have to abide by these principles in their social provisioning endeavours. The same applies to those organs of state that administer both social assistance (e.g., the South African Social Assistance Agency) and social insurance schemes (e.g., the Unemployment Insurance Fund, the Road Accident Fund and the Compensation Fund).

In light of the objectives of the Promotion of Administrative Justice Act (PAJA) and the Promotion of Access to Information Act (PAIA)<sup>98</sup> and the position of public administration under the Constitution,<sup>99</sup> it can be opined that the PAJA and PAIA are in conformity with

97 In terms of section 40 of the Constitution the Government of the Republic of South Africa is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

98 Such as giving effect to the constitutional obligations of the state of promoting a human rights culture and social justice (section 9(c) of PAIA) as well as promoting transparency, accountability and effective governance of all public and private bodies (section 9(e) of PAIA).

99 The position of public administration under the Constitution has been highlighted by the Constitutional Court, in *President of the Republic of South Africa v South African Rugby Football Union* 1999 10 BCLR 1059 (CC) 1115B-D (at paragraph 133), in the following terms: “Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which,

the basic values and principles governing public administration, as stipulated in s 195 of the Constitution, as well as with the eight principles of *Batho Pele* (i.e., People First)<sup>100</sup>

### E. Concluding observations

The South African social protection system is well evolved and, most importantly, it caters for all the social risks embraced by the ILO Social Security (Minimum) Standards Convention. This system, which is built on a strong human rights and value-based constitutional foundation, is divided mainly into social assistance and social insurance schemes. These schemes are well developed for an emerging economy such as that of South Africa. Notwithstanding the foregoing observations, it has to be acknowledged that the system is imperfect. For instance, there are challenges, such as the limited scope of coverage, that have to be addressed. These invariably result in the marginalised individuals and their families left destitute or compelled to rely on the less than perfect informal coping strategies. On the other hand, it is pleasing to note that the legislative and related challenges highlighted in this article are generally not going unnoticed. It will take some time before all of them are effectively addressed. Nevertheless, it can be observed that, as part of its ongoing endeavours to craft a comprehensive social protection system, South Africa is on the right path towards the progressive realisation of social protection for her population.

amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.”.

100 The eight principles of *Batho Pele* are as follows: *Consultation* – Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered. *Service Standards* – Citizens should be told what level and quality of public services they will receive, so that they are aware of what to expect. *Access* – All citizens should have equal access to the services to which they are entitled. *Courtesy* – Citizens should be treated with courtesy and consideration. *Information* – Citizens should be given full and accurate information about the public services they are entitled to receive. *Openness and transparency* – Citizens should be told how national and provincial departments are run, how much they cost, and who is in charge. *Redress* – If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response. *Value for Money* – Public services should be provided economically and efficiently in order to give citizens the best possible value for money.