

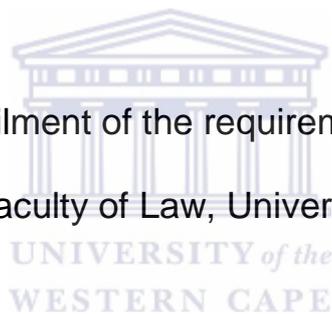
THE RIGHT TO SOCIAL SECURITY OF PERSONS WITH DISABILITIES  
IN SOUTH AFRICA

BY

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A thesis submitted in fulfilment of the requirements for the degree Doctor  
Legum (LL.D) in the Faculty of Law, University of the Western Cape



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May 2015

## Declaration

I

.....  
hereby declare that 'The right to social security of persons with disabilities in South Africa' is my original work, and that it has not been submitted to any other forum for assessment. Where another person's work has been used, it has been duly acknowledged.

Student

Signature : .....

Date : .....



## KEY WORDS

Social security

Social protection

Disability

Labour legislation

Equality

Human rights

Poverty

Constitution

Convention on the Rights of Persons with Disabilities

Adequate standard of living



## LIST OF ABBREVIATIONS AND ACRONYMS

AFP	Pension Fund Administrators (Chile)
AU	African Union
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
BPLR	Butterworths Pension Law Reports
BSP	Basic State Pension (UK)
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CESCR	Committee of Economic, Social and Cultural Rights
CLP	Chilean Peso
CRPD	Convention on the Rights of Persons with Disabilities
CS	Community Survey (South Africa)
DSD	Department of Social Development
DWA	Decent Work Agenda
DWP	Department of Works and Pensions (UK)
EEA	Employment Equity Act
ESA	Employment Services Act
ESA	Employment and Support Allowance
GBD	Global Burden of Disease
GG	Government Gazette

ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ISSA	International Social Security Agency
MDG	Millennium Development Goals
OAU	Organisation of African Unity
OECD	Organisation of Economic Co-Operation and Development
PAJA	Promotion of Administrative Justice Act
PBSI	Pensión Básica Solidaria de Invalidez
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
S2P	State Second Pension (UK)
SAA	Social Assistance Act
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UF	Unidad de Fomado
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Economic, Social and Cultural Organisation
WGDS	Washington Group on Disability Statistics

WHO

World Health Organisation

WHS

World Health Survey



## ABSTRACT

In recent years, the rights of persons with disabilities have received substantial attention both in South Africa and internationally. While certain rights have received widespread coverage, other rights have not yet been examined to determine the importance thereof for persons with disabilities and to establish the best way in which these rights can be implemented.

A right which has not yet been examined in detail is the right to social protection, as guaranteed by Article 28 of the United Nations Convention on the Rights of Persons with Disabilities. Social protection involves the provision of financial support as well as certain services in order to ensure that persons with disabilities are able to participate in society on an equal basis with others. One of the essential components of the right to social protection is the provision of adequate social security for persons with disabilities.

Since detailed research on the scope and content of Article 28 has not yet been undertaken, this thesis will investigate what is required of states in relation to the provision of social security in terms of Article 28 of the Convention on the Rights of Persons with Disabilities. In addition, the current provision made for social security for persons with disabilities in South Africa will be examined and evaluated. The investigation into the current social security measures for persons with disabilities in South Africa will commence with the Constitution and proceed to a detailed examination of relevant legislation.

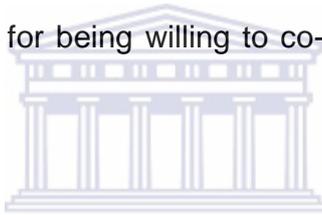
Similar legislation and policies from other jurisdictions will also be considered in order to gauge whether any lessons may be learned from the approach taken in these jurisdictions where they differ from the South African approach.



## Acknowledgements

First and foremost, I give all the praise and honour to God for giving me the strength and determination to complete this thesis to the best of my ability.

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Finally, I dedicate this thesis to my beloved family members who passed on before I completed this thesis: my grandfather Martin van Zyl, my grandmother Nellie van Zyl, and my mother, Marlene Wiid.



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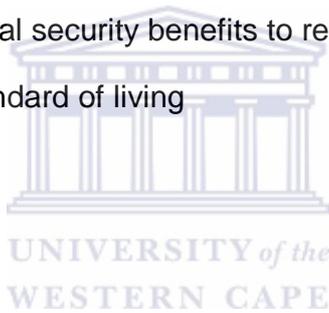
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# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND TO THE THESIS

The rights of persons with disabilities have received much attention both locally and internationally in recent years. The introduction of the United Nations Convention on the Rights of Persons with Disabilities (hereafter CRPD) in 2006<sup>1</sup> has resulted in a heightened awareness of the adequacy of measures aimed at reducing the level of marginalisation experienced by persons with disabilities. The founding principle of the CRPD is the creation of conditions under which persons with disabilities can participate equally in society, despite their particular disability.<sup>2</sup> To this end, the CRPD provides for a number of rights to be prioritised by States Parties which have signed and ratified it. These rights include the right to equality<sup>3</sup> and the right to adequate social protection.<sup>4</sup>

The growing recognition of the challenges faced by persons with disabilities is evident in the preamble of the Convention, which provides that 'persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world'. The rights in the Convention are generally aimed at improving the quality of life of persons with disabilities not only from a financial perspective, but also from a social perspective.

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<sup>1</sup> United Nations Convention on the Rights of Persons with Disabilities A/61/611 of 2006.

<sup>2</sup> Preamble to the United Nations Convention on the Rights of Persons with Disabilities A/61/611 of 2006.

<sup>3</sup> Article 5.

<sup>4</sup> Article 28.

The clearest evidence of this objective can be found in Articles 20 to 30 of the Convention, all of which provide for the equal participation of persons with disabilities in various spheres of society. For purposes of this thesis, Article 28 will be discussed and analysed.

Article 28(1) and (2) read as follows:

States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right...

WESTERN CAPE

Article 28 therefore recognises the importance of the right to social protection (including social security) and an adequate standard of living.<sup>5</sup> The CRPD further requires that signatory states take positive action to ensure that these rights are promoted and implemented. South Africa is indeed a signatory state, and has ratified the CRPD and is therefore bound by the provisions of Article 28, which must be implemented within the framework of the South African Constitution.

In terms of section 27(1)(c) of the Constitution of the Republic of South Africa,

[e]veryone has the right to have access to ...social security, including, if they are unable to support themselves and their dependants, appropriate social

---

<sup>5</sup> The concepts 'social protection' and 'adequate standard of living' will be explained in greater detail in Chapter 2 of the thesis.

assistance'.<sup>6</sup> The right of access to social security is one of the most important socio-economic rights in the Bill of Rights.<sup>7</sup>

Social security in South Africa consists of two main branches, namely social assistance and social insurance. Social assistance consists of a number of social grants administered by the state paid to qualifying individuals. The payment of a social grant is linked to the meeting of certain criteria by an applicant for a particular grant.<sup>8</sup> The categories of persons eligible to apply for social grants in South Africa are older persons, children, war veterans and persons with disabilities.<sup>9</sup> Social insurance in South Africa is inextricably linked to employment. Social insurance measures include unemployment insurance, compensation for occupational injuries and diseases and retirement funds.

Considering that both the Constitution and the CRPD oblige South Africa to make specific provision for social security for persons with disabilities, an investigation into whether the current social security benefits available to persons with disabilities comply with these instruments is necessary. This investigation will be conducted in this thesis, with specific reference to establishing the specific obligations created by the CRPD.

## **1.2 RESEARCH QUESTION**

The focus of this thesis is the right to social protection (particularly social security) in terms of international law and the corresponding right of access to social security in

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<sup>6</sup> Section 27(1)(c) Constitution of the Republic of South Africa, 1996.

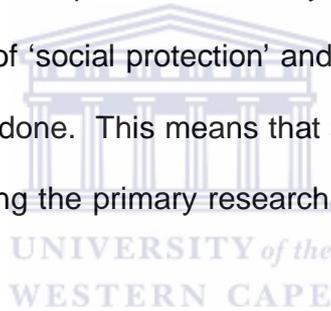
<sup>7</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11 at para 114.

<sup>8</sup> The eligibility criteria will be discussed in Chapter 5 of the thesis.

<sup>9</sup> Social Assistance Act 13 of 2004.

terms of domestic law in South Africa. The research done will therefore focus on the scope and content of both these rights and culminate in a determination of whether South Africa is in compliance with the international law in this respect. The research question may therefore be framed as follows: is South Africa complying with its obligations under international law in respect of the social security rights of persons with disabilities, specifically considering the obligations introduced by Article 28 of the United Nations Convention on the Rights of Persons with Disabilities?

As mentioned previously, this question can only be answered once preliminary research into the meaning of 'social protection' and 'adequate standard of living' as they appear in Article 28 is done. This means that a number of sub-questions arise which will assist in answering the primary research question. These sub-questions are as follows:



- What are the standards set in international human rights law and the South African Constitution regarding state obligations related to the scope and coverage of social security?
- How does the current legal and policy framework in South Africa address the social security rights of persons with disabilities with reference to the question of ensuring that all appropriate beneficiaries receive benefits?
- How does the right of access to social security align with the right to an adequate standard of living in South Africa?

### **1.3 AIMS OF THESIS**

The primary aim of this thesis is to determine whether South Africa is currently in compliance with the international law relating to the right to social protection and an adequate standard of living of persons with disabilities. To this end, the scope and content of this right will be discussed and analysed. In the event that South Africa is found to be non-compliant with its obligations in this regard, potential solutions to the non-compliance will be explored.

Secondary aims of the thesis are to assess the efficacy of the current measures in place in South Africa to promote and facilitate access to social security for persons with disabilities (including the manner in which persons with disabilities are able to gain access to social insurance), the general standard of living of persons with disabilities in South Africa and how the right to an adequate standard of living is provided for in South Africa legislation.

The overarching emphasis of the thesis is to investigate ways in which the financial and social standing of persons with disabilities can be better provided for in South Africa, considering the relevant international law provisions in conjunction with the Bill of Rights in the Constitution.

## 1.4 SIGNIFICANCE OF THESIS

The field of disability law is relatively new.<sup>10</sup> Some research has been done on particular aspects of the rights of persons with disabilities, but since the field is new certain rights have received more attention than others in terms of research, such as the right to equality. The focus is now shifting to the other rights which have been identified as being significant to persons with disabilities, such as the rights to social protection and to an adequate standard of living.

Internationally, the right to social protection as a general entitlement of all persons has been highlighted.<sup>11</sup> However, no comprehensive research has yet been undertaken which examines the right to social protection and an adequate standard of living in terms of Article 28 of the CRPD. In other words, the right of persons with disabilities to social protection and an adequate standard of living has not yet been analysed and given content. As such, this thesis is the first work of its kind.

The thesis addresses the current situation of persons with disabilities in South Africa in terms of access to social security benefits.<sup>12</sup> Any difficulties related to accessing social security benefits by persons with disabilities in South Africa will have an impact on their right to social protection and an adequate standard of living. This thesis thus aims to identify whether there are shortfalls in the current social security system in South Africa (particularly those benefits available to persons with

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<sup>10</sup> Ngwena C 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative law: Part I (Defining Disability)' (2005) 16(2) *Stellenbosch Law Review* 210.

<sup>11</sup> This is evident from the numerous international instruments providing for social security benefits. See Chapter 4 below.

<sup>12</sup> This will be discussed in Chapter 5 of the thesis. The term 'access to' will be clarified in Chapter 3.

disabilities) and, where shortcomings are identified, suggest possible solutions or improvements.

Essentially, the thesis will suggest solutions which would lead to improved access to social security benefits for persons with disabilities in South Africa, in order to comply with the constitutional mandate to respect, protect, promote and fulfil<sup>13</sup> the right of access to social security of persons with disabilities and have a positive impact on the standard of living of persons with disabilities, as envisaged in Article 28 of the United Nations Convention on the Rights of Persons with Disabilities.

## **1.5 METHODOLOGY**

The thesis will be completed by way of literature review. Since there are a number of different areas of law included in the scope of this thesis, numerous sources must be consulted. Primary sources such as legislation and case law will be discussed and analysed, and secondary sources such as articles and analysis by authors of the primary sources are also included in the thesis.

International human rights instruments will be examined to establish the scope and content of the right to social protection and an adequate standard of living.<sup>14</sup> The works of leading international human rights authors will be consulted. In addition, documents forming part of the negotiation process preceding the compilation of the

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<sup>13</sup> See 3.2 below.

<sup>14</sup> Sections 39 and 132 of the Constitution of the Republic of South Africa, 1996 require that international law be considered when the law of South Africa is being developed. The most important of the international instruments considered in this thesis is the CRPD.

CRDP will be examined in order to establish the content and context of the rights which are relevant for this thesis.

Since the primary research question relates to the implementation of a particular right of persons with disabilities in South Africa, relevant South African legislation will be analysed in this thesis.<sup>15</sup> The Constitution of the Republic of South Africa plays a particularly important role in this research, and an entire chapter of the thesis will be dedicated thereto. Relevant social assistance, social insurance, and other legislation will be discussed as well as the work of leading authors in these fields. A number of other official documents will also form part of this study, including bills, white papers<sup>16</sup> and discussion documents.<sup>17</sup> The case law dealing with persons with disabilities and social security is limited, but these cases will be considered where relevant.<sup>18</sup>

In addition to international law sources and sources from South Africa, literature from the chosen comparator jurisdictions will be discussed. The chosen comparator jurisdictions in this instance are Chile and the United Kingdom.

Chile has often been used for comparative purposes in South African social security research.<sup>19</sup> Elements of the pension system in Chile have been earmarked as

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<sup>15</sup> This includes social security legislation and employment legislation.

<sup>16</sup> The Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) in particular provides essential information on the situation of persons with disabilities in South Africa and will be referred to throughout the thesis.

<sup>17</sup> For example, the Department of Social Development National Disability Rights Policy (2014), the Social Assistance Amendment Bill 2010 and the Office of the President *White Paper on Integrated National Disability Strategy* (1997).

<sup>18</sup> The law and policy discussed in this thesis is accurate as of 31 December 2014.

<sup>19</sup> For example, the National Treasury *Retirement Fund Reform: a discussion paper* (2004) referred to Chile as a comparator jurisdiction.

having potential for implementation in the South African context.<sup>20</sup> In addition, Chile experiences similar social and economic challenges to South Africa and the levels of inequality experienced in these jurisdictions are similar.<sup>21</sup> The Chilean pension system incorporates disability benefits into its mandatory retirement scheme and this is of particular importance for purposes of this thesis.

The social security system in the United Kingdom is well-established and has also been used as a comparator for South African social security research.<sup>22</sup> Many elements of the current social security system in the United Kingdom have been incorporated into the social security systems of other jurisdictions.<sup>23</sup> A wide range of social security benefits are available to persons in the United Kingdom. The social security benefits for persons with disabilities in the United Kingdom include benefits not only to persons with disabilities but also for funding for persons who are involved in providing assistance or care to persons with disabilities and this element of the social security system is important for purposes of this thesis.

## **1.6 LIMITATIONS OF THESIS**

The primary focus of the thesis is to determine how the South African state can better respect, protect, promote and fulfill the extension of social security to persons with disabilities in light of the international law guaranteeing the right to social protection. For this reason, the scope of the thesis will be limited to determining how access to

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<sup>20</sup> In particular, the implementation of a compulsory national social security fund. See National Treasury *Retirement Fund Reform: a discussion paper* (2004) 13.

<sup>21</sup> See 6.2 below.

<sup>22</sup> Department of Social Development *Reform of Retirement Provisions Discussion Document* (2007).

<sup>23</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (unpublished LL.D thesis, University of the Western Cape, 2009) 522.

social security can be respected, protected, promoted and fulfilled for persons with disabilities who are of working age. In other words, the thesis will not consider the measures needed to promote the right of access to social security for children with disabilities (that is, persons under the age of 18) and frail older persons (that is, persons over the age of 60).

The importance of the right of access to social security for children with disabilities and frail older persons in South Africa is not denied. However, considering the complexity of the primary research question, the investigation into the right of access to social security for children with disabilities and frail older persons is beyond the scope of this thesis.



## **1.7 IMPORTANT CONCEPTS**

A number of concepts are used repeatedly throughout this thesis. For purposes of clarity and for ease of reading, the most used terms will be identified and explained below.

### **1.7.1 Social protection and social security**

The primary focus of this thesis is the right of access to social security for persons with disabilities in South Africa. However, the international law which is relevant to this issue generally refers to social protection. The terms are not interchangeable, and therefore need to be clarified and distinguished.

In South Africa,

[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.<sup>24</sup>

Social protection is not limited to financial support, but extends to goods, services and programmes aimed at realising full participation in society for all persons.<sup>25</sup>

The term social security is undefined in South African law.<sup>26</sup> The reason for the lack of a definition of 'social security' is a simple one: the concept is too fluid and dynamic to be confined to a single, structured definition.<sup>27</sup> In addition, the understanding of social security as a concept may also differ from person to person and from country to country.<sup>28</sup> It would therefore be difficult to construct a definition of social security that encompasses each individual component that comprises social security.

Despite the general consensus that social security cannot be defined, numerous institutions have put forward explanations of the term in order to provide some clarity as to what social security means in a particular context. The preferred South African description was suggested in 1997 by the Department of Welfare (now known as the Department of Social Development).<sup>29</sup>

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<sup>24</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) *Transforming the Present – Protecting the Future* 41.

<sup>25</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) *Transforming the Present – Protecting the Future* 41.

<sup>26</sup> Olivier MP et al *Introduction to Social Security* (2004) 13.

<sup>27</sup> Strydom EL et al *Essential Social Security* (2006) 6.

<sup>28</sup> Pieters D *Social Security: An Introduction to the Basic Principles* (2006) 1.

<sup>29</sup> Department of Welfare 'White Paper for Social Welfare: Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa' (1997).

According to the erstwhile Department of Welfare,

[s]ocial security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children.<sup>30</sup>

The White Paper considers that social security measures are to include cash benefits as well as benefits that are 'in-kind'. Such benefits could include the provision of healthcare, housing and other social services. Social security measures are therefore not limited to the provision of financial benefits to persons. While the importance of the provision of these services for persons with disabilities cannot be denied, the focus of this thesis is the adequacy of cash benefits provided to persons with disabilities in terms of the social security system applicable in South Africa.

The White Paper's explanation of social security refers to 'public and private measures' that are aimed at providing financial and other types of support to individuals in need thereof. These measures are based on the notion of solidarity, that is, the collective sharing of resources between those who are in need of social security measures and those who are able to (at least partially) fund such measures.<sup>31</sup> The source of such assistance depends on the type of social security measure in place, but is usually the individual themselves, the state or a combination of both.<sup>32</sup>

The primary objective of social security legislation is to provide a framework in terms of which financial support can be provided to individuals in need of such financial

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<sup>30</sup> Department of Welfare *White Paper for Social Welfare* (1997) 49.

<sup>31</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (unpublished LL.D thesis, University of the Western Cape, 2009) 3.

<sup>32</sup> Strydom EL et al *Essential Social Security* (2006) 6.

assistance in order to have some form of income in situations where they are unable to provide for their own financial needs.<sup>33</sup> Social security legislation encompasses a number of schemes and measures in terms of which individuals are provided with the aforementioned financial assistance.<sup>34</sup>

Social protection is therefore a broader concept than social security. However, social protection includes social security benefits and it is this aspect of social protection that will form the focus of this thesis.

### 1.7.2 Social assistance and social insurance

From the outset, it must be understood that the classification of social security schemes in terms of the chief categories of social security measures is not as simple as identifying 'public' schemes and 'private' schemes. The two most frequently used categories of social security measures in South Africa are social assistance and social insurance.<sup>35</sup>

As mentioned previously, social security measures are funded by various parties, either alone or in combination with each other. Social assistance measures are funded solely by the state, using funds generated by general revenue.<sup>36</sup> For purposes of the

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<sup>33</sup> ILO *Introduction to Social Security* (1984) 3.

<sup>34</sup> Examples of these include the provision of financial support by the state to persons who are unable to care for themselves; the provision of benefits for persons who are compelled to take time off from work and are not earning an income; and the provision of financial support by the state to persons in times of personal or community disaster.

<sup>35</sup> Department of Welfare *White Paper for Social Welfare* (1997) 50

<sup>36</sup> Strydom EL et al *Essential Social Security* (2006) 7.

present discussion, the best example of social assistance is the social grant paid by the state to qualifying disabled persons.<sup>37</sup>

Social insurance measures are funded largely by contributions made by or on behalf of individuals who are formally employed.<sup>38</sup> As a result of social insurance schemes being linked to employment, a link exists between social insurance legislation and labour legislation. A number of the provisions in legislation regulating social insurance schemes deal with employment specific situations,<sup>39</sup> and for that reason it is important to have a basic understanding of the labour legislation which impacts social insurance benefits.

A distinction must be drawn between schemes that pay benefits regardless of whether a beneficiary has contributed towards the scheme, and those schemes where benefits are contingent upon such contributions. Non-contributory schemes are almost exclusively those which are provided through public funding and administered by the state.<sup>40</sup> Such benefits are often means-tested and only certain categories of individuals qualify for benefits in terms of these schemes.<sup>41</sup> The categories of person most often covered by such schemes are older persons, families raising children and persons with disabilities. Contributory schemes operate within the sphere of

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<sup>37</sup> See 5.2.1 below.

<sup>38</sup> Olivier MP & Mpedi G 'The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean' (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)* 150 – 152.

<sup>39</sup> For example, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 refers to employees, and the Unemployment Insurance Act 63 of 2001 refers to contributors, who are also employees. See 5.2.2.2 and 5.2.2.3 respectively below.

<sup>40</sup> See 5.2.1, 6.2.4.2 and 6.3.4.1 below for specific examples of such schemes.

<sup>41</sup> These categories of persons include older persons, persons with disabilities, war veterans and families with children – sections 6 – 11 of the Social Assistance Act 13 of 2004.

employment, since it is unlikely that individuals who are unemployed (or have never worked) are in a position to make regular financial contributions to a third party, since social insurance contributions are deducted from the salary of an employee.<sup>42</sup>

### **1.7.3 Defining disability**

The question of defining disability has long been a contentious one. Many approaches can be taken to this issue, which include having no definition at all, having a very broad definition or having multiple definitions. For purposes of this thesis, the approach taken to defining disability in international law is discussed in detail in Chapter 4. In addition, the definitions applicable in various areas of South African law will also be discussed. This thesis does not prefer one approach over the other, although problematic aspects of the definitions will be highlighted where appropriate.

In addition to the question of definition, a question of terminology must also be raised at this stage. The preferred terminology relating to a person who has a disability is 'a person with a disability' (rather than a disabled person) and the collective, 'persons with disabilities' (rather than disabled people). The reason for this preference is that it is the chosen language of the CRPD.<sup>43</sup> This phrase has also been identified by the draft National Disability Rights Policy (NDRP) as the preferred terminology of the Department of Social Development.<sup>44</sup> However, many international instruments and legislation do not make use of this terminology. Where these instruments and

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<sup>42</sup> See 5.2.2.1 and 5.2.2.3 below.

<sup>43</sup> See 4.4.5 below.

<sup>44</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 13.

legislation are discussed, the terminology used in the particular instrument will be adhered to.

For purposes of brevity, any references to persons with disabilities in this thesis will refer only to the masculine. Any references to the masculine will incorporate the feminine by inference.

#### **1.7.4 Models of disability**

There are a number of different models of disability. The two models used more often, particularly in a legal context, are the medical model and the social model. The other models have been given status distinct from the social model and the medical model, although each of those can be linked to more widely used models. In order to understand the different approaches to disability, these models must be fully explained. From the outset it should be noted that international disability law has undergone a paradigm shift in relation to the use of these models.<sup>45</sup> Earlier international law dealing with disability has relied almost exclusively upon the medical model.<sup>46</sup> However, the newest international law (namely the CRPD) has made the shift from the traditional medical model towards a model based on human rights<sup>47</sup> and the recognition that persons with disabilities possess the same fundamental human rights as non-disabled persons.<sup>48</sup>

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<sup>45</sup> DPI Disability Convention Daily Update: August 15, 2006 (Day Two) [http://www.dpi.org/l\\_english/resources/newsletter-details.php?page=279](http://www.dpi.org/l_english/resources/newsletter-details.php?page=279) (accessed on 25/04/2012).

<sup>46</sup> See 4.3 below.

<sup>47</sup> Stein MA 'Disability Human Rights' (2007) (95)75 *California Law Review* 84.

<sup>48</sup> The term non-disabled persons will be used throughout this thesis when referring to persons who do not have any disability according to the current understanding of what a disability is. The term –non-disabled persons is preferred by the International Labour Organisation as an organ of the United Nations.

The paradigm shift from the medical model to the social model in international law is particularly significant in light of the fact that the two models represent polar opposites in terms of the perception of persons with disabilities.<sup>49</sup> The social model reflects the increasing emphasis on and importance attributed to the recognition of fundamental human rights,<sup>50</sup> whereas the medical model largely avoids the issue of human rights of persons with disabilities.<sup>51</sup> The social model is more appropriate generally as a result of the pluralistic nature of society in the present and the increasing emphasis on acceptance of the inherent characteristics of persons.<sup>52</sup>

In the following paragraphs, the medical model and the social model will be discussed in detail and reference will also be made to the other, more recent, models of disability where appropriate. The purpose of this discussion is to provide background on the development of the approaches taken to disability and to identify the influences of these models on the current approach taken to disability in international law. Reference to these models is used throughout the thesis and an understanding of each must be explained at the outset.

#### 1.7.4.1 Medical model

In terms of the medical model, disability is considered a question of medicine and welfare.<sup>53</sup> This means that persons with disabilities are considered weaker and vulnerable members of society who are unable to provide adequately for themselves

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<sup>49</sup> Grobbelaar – Du Plessis I *Gestremdheidsreg: 'n Internasionaalregtelike en regsvergelykende analise* (2010) (unpublished LL.D thesis, University of Pretoria) 21.

<sup>50</sup> Carey AC 'Beyond the Medical Model: A reconsideration of 'feeble-mindedness', citizenship, and eugenic restrictions.' (2003) (18)4 *Disability and Society* 424.

<sup>51</sup> See 1.7.4.1 below.

<sup>52</sup> Grobbelaar – Du Plessis I *Gestremdheidsreg: 'n Internasionaalregtelike en regsvergelykende analise* (2010) (LL.D thesis, University of Pretoria) 29.

<sup>53</sup> Office of the President *Integrated National Disability Strategy White Paper* (1997) 13.

and consequently require the assistance of other persons, in particular that of medical professionals.<sup>54</sup> Such assistance would take the form of financial support and care services provided by the community as part of the welfare system of the particular community as well as medical treatment. The focus, in terms of the medical model, is on the 'treatment' and 'assistance' of persons with disabilities by others<sup>55</sup> and, as such, creates the impression that persons with disabilities induce feelings of sympathy and are not 'complete' human beings as a result of their particular medical condition.<sup>56</sup>

The language used to describe persons with disabilities where the medical model is used is particularly negative. The medical condition itself is considered an obstacle which must be overcome and the person with the medical condition is therefore subjected to medical interventions related to the treatment of their condition, often to the detriment of their other wants and needs.<sup>57</sup> The terms used to describe persons with disabilities are therefore indicative of this perception of persons with disabilities as being of lesser value than non-disabled persons. These terms include 'handicapped', 'impaired', 'abnormal', 'retarded' and 'deficient'. All of these terms portray persons with disabilities in a negative way. However, it must be noted that the medical model has been in existence and use for much longer than the social model. The use of the aforementioned terms may thus be attributed to the outdated understanding of

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<sup>54</sup> Quinn G and Degener T (2002) *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* 10.

<sup>55</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 31.

<sup>56</sup> Grobbelaar-Du Plessis I *Gestremdheidsreg: 'n Internasionaalregtelike en regsvergelykende analise* (unpublished LL.D thesis submitted at the University of Pretoria, 2010) 32.

<sup>57</sup> Office of the President *Integrated National Disability Strategy White Paper* (1997) 13.

disability in terms of the medical model as well as the fact that the thinking related to disability had not yet evolved to the point where alternative terms were available.<sup>58</sup>

In addition to the use of negative terms to label persons with disabilities, the perception of the quality of life of persons with disabilities is also markedly negative in terms of the medical model. There is an assumption that persons with disabilities have a lower quality of life than non-disabled persons and that the person with the disability is disadvantaged as a result of their medical condition.<sup>59</sup> The intervention of medical professionals and persons providing welfare is thus aimed at rehabilitating persons with disabilities. The involvement of medical professionals in 'dealing with' disabilities is therefore central to the medical model.

The result of treating persons with disabilities as lesser individuals who are facing a problem which needs to be overcome through the intervention of others leads to the disempowerment and marginalisation of persons with disabilities and deprives them of the opportunity to participate fully and equally in society.<sup>60</sup> This approach is in direct conflict with the emerging human rights movement, which emphasises the need to view all persons as equals, irrespective of their inherent differences.<sup>61</sup> It is clear that the use of the medical model as the only approach to disability can no longer be justified. However, that is not to say that taking cognisance of a person's medical

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<sup>58</sup> See 1.7.3 above for a discussion on the use of (now) outdated terminology related to persons with disabilities.

<sup>59</sup> Kanter AS 'The Law: What's disability studies got to do with it OR An introduction to disability legal studies' (2010) 42 *Columbia Human Rights Law Review* 412.

<sup>60</sup> Office of the President *Integrated National Disability Strategy White Paper (1997)* 14.

<sup>61</sup> Office of the President *Integrated National Disability Strategy White Paper (1997)* 14.

condition is entirely without purpose. In certain situations it may be necessary to determine the consequences of a medical condition on a person's ability to work.<sup>62</sup> That is, it may at times be necessary to determine which activities a person is not able to do as a result of his particular medical condition. It is nonetheless problematic for the medical model to form the basis of legislation related to the rights of persons with disabilities, independent of the influence of the other models.

Other models of disability which are offshoots of the medical model of disability are:

- The professional model
- The charity model
- The moral model
- The economic model<sup>63</sup>



Each of these models uses the medical model as a basis and then elaborates upon that model depending on the particular aspect which is relevant in the particular context. The professional model focuses on the involvement of medical professionals in identifying and assessing disability; the charity model emphasises the status of persons with disabilities as victims of their own health problems; the moral model allows for the attitude that each person is responsible for their own disability; and the economic model involves the assessment of a person's ability to

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<sup>62</sup> See, for example, 5.2.1 below.

<sup>63</sup> Disabled World 'Definitions of the models of disability' <http://www.disabled-world.com/definitions/disability-models.php> (accessed on 23/02/2013).

do work.<sup>64</sup> These models are used in the context in which they are most appropriate, but the essence of each of these approaches remains a reliance on the medical model.

Since there has been a paradigm shift in international law away from the medical model,<sup>65</sup> it is important that the application of the social model and human rights model be discussed and the consequences of the paradigm shift from the medical model to the social model be understood.

#### 1.7.4.2 Social model

The social model differs vastly from the medical model in that the primary focus of the medical model is the involvement of medical professionals in the lives of persons with disabilities to treat their medical conditions,<sup>66</sup> whereas the social model approach places less emphasis on the physical bodies of persons with disabilities.<sup>67</sup> The approach in terms of the social model is more holistic and is aimed at eliminating the perception that a disability is inherent to the person.<sup>68</sup> The social model recognises that a disability is the result of a medical condition added to certain attitudinal and environmental factors which create the situation in which a person with a particular

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<sup>64</sup> Disabled World 'Definitions of the models of disability' <http://www.disabled-world.com/definitions/disability-models.php> (accessed on 23/02/2013).

<sup>65</sup> See 4.4 below.

<sup>66</sup> See 1.7.4.1 above.

<sup>67</sup> Shakespeare T & Watson N 'The social model of disability: An outdated ideology?' in Barnartt S & Altman B (ed) *Exploring Theories and Expanding Methodologies: Where we are and where we need to go* (2001) *Research in Social Science and Disability, Volume 2* 11.

<sup>68</sup> Shakespeare T & Watson N "The social model of disability: An outdated ideology?" in Barnartt S & Altman B (ed) *Exploring Theories and Expanding Methodologies: Where we are and where we need to go* (2001) *Research in Social Science and Disability, Volume 2* 11.

medical condition is not able to participate fully and equally in society.<sup>69</sup> The importance of eliminating attitudinal barriers in society is highlighted in the NDRP, and such elimination is considered key in realising full participation of persons with disabilities in society.<sup>70</sup>

The purpose of the medical model is to create medical interventions which address the medical condition experienced by a particular person, whereas the social model is aimed at removing environmental and social factors which, together with a medical condition, result in a person being considered disabled.<sup>71</sup> In terms of the medical model, a person with a disability is, in a sense, blamed for their circumstances. The social model, on the other hand, makes it clear that the person with a particular medical condition is in no way responsible for the situation in which they find themselves and that such situations are created by society.<sup>72</sup> In other words, the blame is shifted for the person with the disability to the rest of society. The solutions, then, are not sought from the person with a disability. For example, in terms of the medical model a person with a disability would be rehabilitated in order to be able to participate in certain activities. In terms of the social model, the activity would be adapted in order to accommodate the person with a disability.

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<sup>69</sup> Goering S 'Beyond the medical model? Disability, Formal Justice, and the Exception for the "Profoundly Impaired"' (2002) 12(4) *Kennedy Institute of Ethics Journal* 374.

<sup>70</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 26.

<sup>71</sup> Silvers A, Wasserman DT *et al* *Disability, difference, discrimination: Perspectives on justice in bioethics and public policy* (1998) 75.

<sup>72</sup> Stein MA 'Disability Human Rights' (2007) 95 (75) *California Law Review* 86.

Besides the abovementioned change resulting from the shift away from the medical model, the social model places emphasis on the valuable contribution which persons with disabilities make to their communities and society at large.<sup>73</sup> The medical condition the person has is thus placed in the background and the personhood of the individual is given greater importance. Greater emphasis is also placed on changing the attitude of society to persons with disabilities as opposed to trying to treat the person with a disability in order for them to conform to the non-disabled part of society.<sup>74</sup> The individual autonomy of persons with disabilities is of much more importance in terms of the social model than it is in terms of the medical model, where decisions may be made for the person with a disability irrespective of their wishes.<sup>75</sup> The right of persons with disabilities to equality, privacy, bodily integrity, dignity, education and so forth are of great importance in terms of the social model. This can be discerned from the preamble to the CRPD which reiterates

...the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination...<sup>76</sup>

In order to properly understand how the shift from the medical model to the social model incorporating the human rights model came about, the development of international law will be examined in detail in Chapter 4 of the thesis.

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<sup>73</sup> Goering S (2002) 'Beyond the medical model? Disability, Formal Justice, and the Exception for the "Profoundly Impaired' (2002) 12(4) *Kennedy Institute of Ethics Journal* 382.

<sup>74</sup> Oliver M *The politics of disablement: A sociological approach* (1990) xiv.

<sup>75</sup> Carey AC 'Beyond the Medical Model: A reconsideration of 'feble-mindedness', citizenship, and eugenic restrictions.' (2003) 18(4) *Disability and Society* 413.

<sup>76</sup> Preamble to the United States Convention on the Rights of Persons with Disabilities A/61/611 of 2006.

### 1.7.4.3 Human rights model

Disability is essentially a human rights issue.<sup>77</sup> This means that the approach taken to disability must address the rights of persons with disabilities and the development of their fundamental rights. In terms of the human rights model, much emphasis is placed on the needs of the individual and less emphasis is placed on the medical aspects of the disability.<sup>78</sup> Essentially, the human rights model identifies disability as a result of societal attitudes and external factors, rather than only the medical condition of the particular individual.<sup>79</sup>

It has been suggested that a human rights based approach to development for persons with disabilities should result in participation, inclusion and the fulfillment of state obligations in relation to persons with disabilities.<sup>80</sup> The human rights model evolved from the social model and therefore has much in common with the social model; however, the human rights model is indicative of the movement towards greater accountability for states to ensure that the rights of persons with disabilities are realised.

The NDRP provides that terminology related to persons with disabilities should be adapted and developed within a human rights context.<sup>81</sup> This includes the elimination of 'harmful' terminology in legislation and policy and extends to language used in

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<sup>77</sup> WHO '10 facts on disability' <http://www.who.int/features/factfiles/disability/en/> (accessed on 27/10/2014).

<sup>78</sup> Quinn G & Degener T et al *Human Rights and Disability* (2002) 14.

<sup>79</sup> Quinn G & Degener T et al *Human Rights and Disability* (2002) 14.

<sup>80</sup> See Department for International Development *White Paper Eliminating poverty: Making Globalization work for the poor* (2000).

<sup>81</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 14.

public information pamphlets.<sup>82</sup> This commitment is indicative of the influence of the human rights model in South Africa.

## 1.8 CHAPTER OUTLINE

Chapter one provides a background to the thesis, as well as lists the objectives of the thesis. The background and the aims of the thesis will serve to inform the reader of the need for an in-depth study of existing legislation impacting on the rights of persons with disabilities in South Africa. Chapter one includes a detailed chapter outline for the rest of the thesis and an explanation of the methods used in order to reach conclusions on various topics. Important terminology that is used throughout the thesis is also explained in Chapter 1.

Chapter two consists of a study of statistics related to disability and poverty. This analysis considers statistics gathered both by international bodies as well as South African statistics. The concept of poverty is discussed and explained, and the conceptualisation of poverty chosen for purposes of this thesis is explained. In addition, statistics related to unemployment of persons with disabilities are examined to determine the extent of the link between unemployment and disability.

The constitutional rights that are of specific importance for persons with disabilities in South Africa are discussed in chapter three. The scope and content of these rights are first clarified since they will recur throughout the thesis. Certain rights are

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<sup>82</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 14.

analysed in detail while others are clarified for purposes of this thesis. Of particular importance is the explanation of the right of access to social security enshrined in the South African Constitution and which forms the focus of this thesis as it relates to persons with disabilities.

International guidelines relating to disability are considered in chapter four. Various conventions and recommendations relating to disability are considered in order to determine the effect of these instruments on domestic legislation and policies relating to disability. Various human rights instruments are analysed, as well as social security conventions and recommendations. Particular attention is paid to any obligations created by the relevant international instruments relating to the introduction of legislation providing for the rights of persons with disabilities. The primary (although not exclusive) focus of this chapter is a detailed analysis and interpretation of Article 28 of the CRPD.

In chapter five, the existing and historical South African social security legislation is discussed in order to illustrate the approach of the legislature to persons with disabilities in this context. The measures used to identify persons with disabilities for purposes of social security schemes and for the creation of employment opportunities will be considered. The criteria for access to benefits of various branches of the social security system in South Africa for persons with disabilities are discussed, as well as the level of benefit provided by these schemes. The chapter concludes with an

evaluation of the South African social security benefits for persons with disabilities in light of the obligations created by Article 28 of the CRPD.

The comparative study is found in chapter six of the thesis. This chapter examines the approach of the chosen jurisdictions to the extension of social protection for persons with disabilities. For each of the chosen jurisdictions, a brief description of the legislation related to the social security benefits for persons with disabilities is given. The purpose of this chapter is to compare and contrast the approach of other jurisdictions bound by the same international law obligations to the approach taken by South Africa in providing social security benefits to persons with disabilities.

Chapter seven is the conclusion of the thesis, which will include a short summary of the findings made in the thesis. This chapter addresses the questions raised in the introduction related to the scope and content of Article 28 of the CRPD and the constitutional obligations related to the right of access to social security for persons with disabilities. The answers to the research questions posed in chapter are provided and recommendations resulting from these answers are made.

## CHAPTER 2

### SITUATIONAL ANALYSIS OF PERSONS WITH DISABILITIES

#### 2.1 INTRODUCTION

One of the purposes of social security is to provide for financial assistance in the event of a loss of earnings or the incurring of additional costs as a result of a range of contingencies.<sup>83</sup> One of these contingencies is disability. Certain persons with disabilities may be faced with particularly high costs related to their disability,<sup>84</sup> and this has an impact on their social security needs. This chapter will attempt to provide insight into the social security needs of persons with disabilities in both the global and local context. This will be done by way of examination of statistical data related to the socio-economic status of persons with disabilities, specifically data concerning the prevalence of disability and its connection with poverty, dependence on social security benefits and unemployment. The nexus between disability and poverty will be examined in order to establish the effect of poverty on the standard of living of persons with disabilities. To this end, scholarly research related to the link between disability and poverty will be considered.<sup>85</sup>

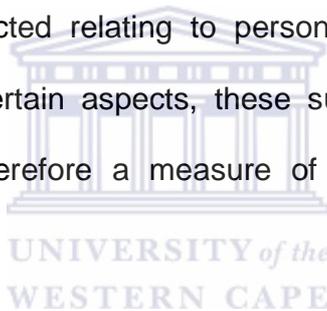
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<sup>83</sup> Pieters D *Introduction to the Basic Principles of Social Security* (1993) 2.

<sup>84</sup> Mitra S, Findley PA & Sambamoorthi U 'Healthcare expenditures of living with a disability: Total expenditures, out of pocket expenses and burden, 1996-2004' (2009) 90 *Archives of Physical Medicine and Rehabilitation* 1533; Saunders P *The costs of disability and incidence of poverty* (2006) 3.

<sup>85</sup> For example, She P & Livermore GA 'Material hardship, poverty and disability among working-age adults' (2007) 88 *Social Science Quarterly* 970 – 989; Saunders P *The costs of disability and incidence of poverty* (2006); *Sickness, Disability and Work: Keeping on Track in the Economic Downturn* (2009) Paris, Organisation for Economic Co-operation and Development.

It must be noted from the outset that the gathering of statistical information related to persons with disabilities is fraught with problems.<sup>86</sup> The UN General Assembly has expressed concern about the accuracy of data collected in relation to persons with disabilities as a result of these difficulties.<sup>87</sup> One of the major problems identified in this regard is the uncertainty related to the definition of disability.<sup>88</sup> On a global scale, there is no fixed, single definition of disability which is used consistently when gathering statistical data. This means that persons may be included or excluded from the study as a result of misidentification either by the data collectors or self-identification.<sup>89</sup> Although the issue of definition of disability has not been settled and, as such, the surveys conducted relating to persons with disabilities may provide inconsistent information in certain aspects, these surveys are the only sources of information available and therefore a measure of reliability will be assumed for purposes of this thesis.



It is at this stage that the approach to the issue of disability becomes relevant. The traditional approach to disability is that of the medical model, which considers a person disabled merely as a result of his medical condition (or impairment).<sup>90</sup> The medical model does not take surrounding circumstances into consideration when assessing whether a person has a disability, nor does it consider that individuals with the same

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<sup>86</sup> The UN General Assembly has identified the issues of definition of poverty, disability and approaches and methods of collecting data as problematic. See, for example Realizing the Millennium Development Goals for Persons with Disabilities [A/RES/64/131].

<sup>87</sup> Realizing the Millennium Development Goals for persons with disabilities through the implementation of the World Programme of Action concerning Disabled Persons and the Convention on the Rights of Persons with Disabilities [A/RES/63/150].

<sup>88</sup> Madans JH, Altman BM & Rasch EK *et al* 'Washington Group Position Paper: Proposed Purpose of an Internationally Comparable General Disability Measure' Third Meeting of the UN Washington Group on Disability Statistics (Brussels, 2004).

<sup>89</sup> WHO and World Bank *World Report on Disability* (2011) 24.

<sup>90</sup> See 1.7.4.1 above.

medical condition may have different levels of functioning amongst them. The medical model also does not consider the impact of individual circumstances and the availability of resources in determining the effect of a medical condition on a person's ability to provide for their own maintenance.<sup>91</sup>

Another model of thinking which relates to disability is the social model.<sup>92</sup> In terms of this model of thinking, a disability is considered a result of societal conditions and circumstances, and a person with a disability should not be treated as if he were vulnerable but should be provided with support in order to occupy his rightful place in non-disabled society.<sup>93</sup> In contrast to the emphasis of the medical model, the emphasis with the social model is not the lack of ability of the person suffering a particular condition, but rather the discovery of ways in which that person could be enabled to lead a life of the same qualitative value as a non-disabled person.<sup>94</sup> Human rights such as the right to dignity and equality form the core of the social model.<sup>95</sup> Figures relating to the prevalence of disability will be influenced by the approach of the data collectors – should the medical model be preferred, the prevalence of disability will be higher, since it is based purely on the presence of a medical condition. Since not all medical conditions necessarily lead to disability, this could lead to a false inflation of the prevalence of disability.

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<sup>91</sup> The ability to ensure that one's own maintenance needs are met is usually one of the major qualifying criteria for social security benefits, particularly social assistance benefits. See 5.2.1 where this is discussed in further detail.

<sup>92</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 9 and 37; Office of the President (1997) *White Paper on Integrated National Disability Strategy* 15.

<sup>93</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 9 and 37; Office of the President (1997) *White Paper on Integrated National Disability Strategy* 15.

<sup>94</sup> Oliver M *The politics of disablement* (1990) 47.

<sup>95</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 10. See 1.7.4.3 above for a discussion of the human rights model.

Another difficulty in the collection of information related to persons with disabilities and poverty is the approach taken to poverty.<sup>96</sup> Most of the surveys conducted by the UN aim to provide information on the economic challenges experienced by persons with disabilities throughout the world.<sup>97</sup> This includes the position of persons with disabilities in developing countries, where poverty is widespread. The term poverty can be used in either an absolute sense or a relative sense.<sup>98</sup> For this reason, the chosen definition of poverty is discussed below<sup>99</sup> prior to any statistical data and research related to the socio-economic position of persons with disabilities.

It is important that data collection related to persons with disabilities be conducted in a consistent manner, in order that studies from around the world may be compared with each other. At present, most studies (local or international) are not directly comparable with each other, since different methods of data collection are used as well as different approaches to disability.<sup>100</sup> While the Article itself does not make mention of the need for comparable data from different studies, the UN and its affiliate organisations has emphasised the importance of the collection of such data. Attempts

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<sup>96</sup> World Report on Disability (2011) 39.

<sup>97</sup> For examples of such studies, see UN Department of Economic and Social Affairs <http://unstats.un.org/unsd/pubs/gesgrid.asp?mysearch=disabled>.

<sup>98</sup> United Nations Economic, Social and Cultural Organization 'Poverty' <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty> (accessed on 21/02/2014).

<sup>99</sup> See 2.1.1 below.

<sup>100</sup> Elwan A 'Poverty and Disability: A Survey of the Literature' (1999) *World Bank* 2. Article 31 of the CRPD provides that States Parties must undertake to collect and maintain information relating to the status and situation of persons with disabilities in their respective regions. This information must then be used to identify barriers to equal participation and generate solutions to those barriers. It is thus apparent that the collection of detailed and accurate information is a CRPD imperative, and States Parties are compelled to adhere to the duties imposed by Article 31.

have been made to standardise data collection but these have not been fully implemented to date.<sup>101</sup>

In the following paragraphs, various approaches taken to the concept of poverty will be discussed and explained. Since the concept of poverty is complex and not defined universally, a number of different types of poverty will be identified after which the approach to poverty for this thesis will be identified.

### 2.1.1 Defining poverty

Poverty is a complex concept, which encompasses a number of factors and variables.<sup>102</sup> For this reason, it is important to clarify the meaning of the word 'poverty' as it will be used throughout this thesis. As is discussed below, poverty does not necessarily consist only of a measure of income of a family or individual and is extended to include factors such as employment, housing and basic amenities of life.<sup>103</sup>

A number of different approaches to poverty may be taken. The UN Educational, Scientific and Cultural Organization (UNESCO) refers to income poverty as well as extreme poverty, both of which consider poverty of families in a purely economic

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<sup>101</sup> World Report on Disability (2011) 24; United Nations Economic and Social Commission for Asia and the Pacific Training Manual on Disability Statistics (2008). The most popular approach is the use of the International Classification of Functioning guidelines as developed by the World Health Organisation – see WHO and World Bank World Report on Disability (2011) 24.

<sup>102</sup> Foster JE 'Absolute versus relative poverty' (1998) 88(2) *American Economic Review* 335.

<sup>103</sup> United Nations Economic, Social and Cultural Organization 'Poverty' <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty> (accessed on 21/02/2014).

sense.<sup>104</sup> In other words, income poverty refers to the situation in which a family (as a unit) is unable to provide for its own financial needs. A universal measure of adequate financial means is used to determine whether that family unit lives in extreme poverty (with an income of less than \$1 per day).<sup>105</sup>

Poverty is more often defined in either absolute terms or relative terms. Generally, poverty is a measure of resources available to meet needs experienced.<sup>106</sup> Absolute poverty, then, considers that a person experiences poverty if they are unable to meet a certain pre-determined standard of consumption. In other words, should a person have less resources available than the pre-determined acceptable standard, that person is considered to experience poverty. The approach of absolute poverty is thus linked to the development and use of a 'poverty line' or threshold, below which all persons are deemed to experience poverty.<sup>107</sup> One of the major disadvantages of the absolute poverty approach is that it only takes into account the position of a person or family in relation to the established poverty line, regardless of the specific resources available to that person or family.<sup>108</sup> This approach also does not consider the position of persons or families in relation to each other, in a realistic comparison. Absolute poverty is not concerned with an adequate standard of living, but rather focuses on financial need exclusively. The social and cultural needs of persons and families are

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<sup>104</sup> United Nations Economic, Social and Cultural Organization 'Poverty' <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty> (accessed on 21/02/2014).

<sup>105</sup> Bhalla SS *Imagine there's no country: Poverty, inequality, and growth in the era of globalization* (2002) 58; Foster JE 'Absolute versus relative poverty' (1998) 88(2) *American Economic Review* 337.

<sup>106</sup> Foster JE 'Absolute versus relative poverty' (1998) 88(2) *American Economic Review* 335.

<sup>107</sup> Hagenars AJM & Van Praag BMS 'A synthesis of poverty line definitions' (1985) 31(2) *Review of Income and Wealth* 139.

<sup>108</sup> United Nations Economic, Social and Cultural Organization 'Poverty' <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty> (accessed on 21/02/2014).

not taken into consideration when measuring absolute poverty. Absolute poverty is preferred when studying developed countries whereas the relative poverty approach is preferred when studying developing countries.<sup>109</sup> The relative poverty approach provides that persons experience poverty if their standard of living is below that of others in the same societal context.<sup>110</sup> While this approach takes into consideration the economic status of persons similarly to the absolute approach, the relative approach also takes into consideration other factors which contribute to a specific standard of living of persons.<sup>111</sup> It is the relative approach which is preferable and is used throughout this thesis, since this approach provides information on whether a person experiences greater or less poverty than others in a similar situation.

Poverty and disability are inextricably linked, in that poverty contributes to the likelihood of occurrence of disability, and disability increases the likelihood of poverty.<sup>112</sup> To address the challenges faced by persons with disabilities, the poverty experienced by persons with disabilities must be carefully considered.

In the following paragraphs, surveys related to the relative poverty experienced by persons with disabilities in the global context will be discussed. Thereafter, South African data related to the socio-economic position of persons with disabilities will be

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<sup>109</sup> OECD Development Centre 'On the relevance of relative poverty for developing countries' (2012) *Working Paper No 314* 5.

<sup>110</sup> Chen S & Ravallion M 'More relatively poor people in a less absolutely poor world' (2013) 59(1) *Policy Research Working Paper* 1.

<sup>111</sup> These factors include ethnicity, marital status and geographical area. See Speder Z & Kapitany B 'Poverty and deprivation: assessing demographic and social structural factors' *Demographic Research Institute, Budapest Working Papers On Population, Family and Welfare* No 8 (2005).

<sup>112</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 6; Elwan A 'Poverty and Disability: A Survey of the Literature' (1999) *World Bank* 1.

examined. Particular attention will be paid to the level of employment amongst persons with disabilities as well as the reliance on social security benefits.

## 2.2 GLOBAL CONTEXT

It is widely recognised that persons with disabilities are a marginalised group and that special attention should be paid to the socio-economic needs of persons with disabilities.<sup>113</sup> Poverty has been identified by the UN as a challenge for all persons and the eradication of poverty and the improvement of living conditions of all persons (including persons with disabilities) worldwide is a priority for the UN.<sup>114</sup>

The Millennium Development Goals (MDGs) are a component in the improvement of living conditions of persons with disabilities which must be noted. The MDGs were developed in 2001 and comprise an agreement between a number of developed and developing countries to improve the living conditions of their inhabitants.<sup>115</sup> The objectives of the MDGs include the:

- eradication of extreme poverty and hunger;
- combating HIV, malaria and other diseases
- achievement of universal primary education; and
- reduction of child mortality.<sup>116</sup>

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<sup>113</sup> Arnardottir OM & Quinn G *Extracting Protection for the Rights of Persons with Disabilities* (2009) 171.

<sup>114</sup> The eradication of poverty is one of the objectives of the Millennium Development Goals of the UN.

<sup>115</sup> UN Enable 'Millennium Development Goals' <http://www.un.org/disabilities/default.asp?id=1470> (accessed on 21/02/2014).

<sup>116</sup> UN 'We can end poverty' <http://www.un.org/millenniumgoals/poverty.shtml> (accessed on 21/02/2014).

While neither the MDGs nor its accompanying implementation guidelines mention persons with disabilities expressly, the 2010 MDG Report provides that special attention must be paid to the achievement of MDG objectives for persons with disabilities and, particularly, women and children with disabilities.<sup>117</sup> While a detailed analysis of the MDGs is beyond the scope of this thesis, it is important to remember that the improvement of living conditions for persons with disabilities is a global priority.<sup>118</sup>

Before positive measures can be taken to address the levels of poverty experienced by persons with disabilities, the existing conditions must be examined. The responsibility to provide reliable and accurate statistics on persons with disabilities worldwide rests with the Washington Group on Disability Statistics (WGDS). The WGDS was established by the UN in 2001 following the UN International Seminar on the Measurement of Disability.<sup>119</sup> The rationale for forming the WGDS is the need for collection of data related to disability throughout the world in a manner which allows for meaningful comparison between countries. The objectives of the WGDS are the generation of a set of questions which may be posed to persons participating in

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<sup>117</sup> UN 'Millennium Development Goals Report 2010' (2010) 5 available at <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20low%20res%2020100615%20-.pdf>

<sup>118</sup> For further reading on the MDGs and persons with disabilities, see Van Reenen T & Combrinck H 'International financial institutions and the attainment of the UN Millenium Development Goals in Africa – with specific reference to persons with disabilities' in Grobelaar-du Plessis I & Van Reenen T *Aspects of disability law in Africa* (2011).

<sup>119</sup> United Nations Statistics Division 'Washington Group on Disability Statistics' <http://unstats.un.org/unsd/methods/citygroup/washington.htm> (accessed on 21/02/2014).

surveys and censuses in order to gauge the prevalence of disability more accurately.<sup>120</sup>

In addition to the WGDS, a number of other institutions have collected data related to the prevalence of disability worldwide and the levels of poverty, unemployment and inequality faced by persons with disabilities. These include the World Health Organisation (WHO) and the World Bank, and the research done by these institutions will also be referred to in the following paragraphs. For purposes of this thesis, a brief overview of these categories will be given and compared to the same data for non-disabled persons worldwide.

### 2.2.1 Prevalence of disability

The UN estimates that 15% of the world's population live with a disability.<sup>121</sup> This figure is steadily increasing as a result of 'population growth, medical advances and the ageing process'.<sup>122</sup> In numbers, this means that approximately 1 billion persons are currently living with a disability. This makes persons with disabilities the largest minority in the world.<sup>123</sup> The occurrence of disability is significantly higher in developing countries, since 80% of the world's persons with disabilities are found in developing countries.<sup>124</sup> Some conflicting data in this regard has been reported.<sup>125</sup>

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<sup>120</sup> Center for Disease Control and Prevention 'Washington Group on Disability Statistics' [http://www.cdc.gov/nchs/washington\\_group/wg\\_objectives.htm](http://www.cdc.gov/nchs/washington_group/wg_objectives.htm) (accessed on 20/02/2014).

<sup>121</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18> (accessed on 16/02/2015).

<sup>122</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18> (accessed on 16/02/2015).

<sup>123</sup> Disabled World 'Disability Statistics' <http://www.disabled-world.com/disability/statistics> (accessed on 23/04/2015).

<sup>124</sup> WHO 'Disability and Rehabilitation' (2007) 1 available at [http://www.who.int/nmh/donorinfo/vip\\_promoting\\_access\\_healthcare\\_rehabilitation\\_update.pdf.pdf](http://www.who.int/nmh/donorinfo/vip_promoting_access_healthcare_rehabilitation_update.pdf.pdf).

<sup>125</sup> World Report on Disability (2011) 25.

For example, the disability rate in the United States of America has been reported as 15% whereas the disability rate in Bangladesh has been reported as less than 1%.<sup>126</sup> This discrepancy is thought to be a result of different means of identifying persons with disabilities and the methods of data collection used.<sup>127</sup> It is thus impossible to provide precise figures related to the prevalence of disability worldwide.

The World Bank has analysed a number of global disability prevalence studies and has compiled statistics based on an average of the examined statistics.<sup>128</sup> The primary studies relied upon are the World Health Survey<sup>129</sup> and the Global Burden of Disease.<sup>130</sup> These surveys cannot be compared directly with each other, since the approach and emphasis in each is different.<sup>131</sup> That is not to say that the data collected is not valuable. Indeed, these surveys are considered the leading sources of information relating to the prevalence of disability worldwide.<sup>132</sup>

The World Health Survey (WHS) was conducted by the WHO from 2002 to 2004.<sup>133</sup> The WHO surveyed households in 70 countries, using a standard set of questions and consistent data collection methods throughout. Of the 70 countries included in the survey, 59 had 'weighted data sets' used in determining the prevalence of disability

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<sup>126</sup> World Report on Disability (2011) Technical Appendix A.

<sup>127</sup> World Report on Disability (2011) 25.

<sup>128</sup> World Report on Disability (2011) 25 and 28.

<sup>129</sup> World Health Organisation 'World Health Study' <http://www.who.int/healthinfo/survey/en> (accessed on 18/02/2015).

<sup>130</sup> World Health Organisation 'Global Burden of Disease' [http://www.who.int/topics/global\\_burden\\_of\\_disease/en](http://www.who.int/topics/global_burden_of_disease/en) (accessed on 18/02/2015).

<sup>131</sup> World Report on Disability (2011) 25.

<sup>132</sup> World Report on Disability (2011) 24.

<sup>133</sup> World Health Organisation <http://www.who.int/healthinfo/survey/en> (accessed on 18/02/2015).

amongst persons aged 18 years and older.<sup>134</sup> The average prevalence of disability in these 59 countries was found to be 15.6%.<sup>135</sup>

The Global Burden of Disease (GBD) was initially conducted by the World Bank in 1990, but was reviewed by the WHO from 2000 – 2004.<sup>136</sup> The GBD provides information on the prevalence of certain conditions worldwide and further expands this information by investigating the severity of those conditions. Essentially, the GBD provides that approximately 18% of the population experienced moderate or severe disability.<sup>137</sup> However, the World Bank notes that the GBD findings are based on the medical model approach to disability; that is, the GBD findings are based purely on medical conditions and impairments. For this reason, the findings of the GBD are still regarded with some uncertainty.<sup>138</sup>

The World Report on Disability uses the data collected through both the World Health Survey and the GBD and compiles a more accurate summary of the prevalence of disability worldwide. In doing so, the World Bank recognises that both of these surveys have shortcomings and that there are inconsistencies in the questionnaires used and that the emphasis in developed country questionnaires is different from that of questionnaires used in developing countries.<sup>139</sup> The World Bank also emphasises the need for data which is comparable internationally, which requires the use of a

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<sup>134</sup> Ustun TB et al 'The World Health Surveys' in Murray CJL & Evans DB (eds) et al *Health systems Performance assessment: debates, methods and empiricism* (2003) Geneva.

<sup>135</sup> World Report on Disability (2011) 27.

<sup>136</sup> World Report on Disability (2011) 28.

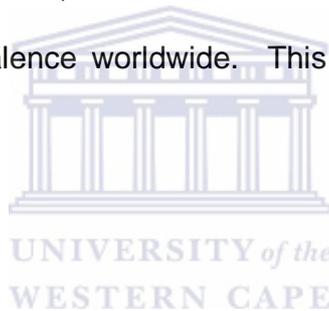
<sup>137</sup> UN Department of Economic and Social Affairs Demographic Yearbook 2004 (2007) available at <http://unstats.un.org/unsd/demographic/products/dyb/dybsets/2004%20DYB.pdf>. See also Table 2.2 in the World Report on Disability (2011) 30.

<sup>138</sup> World Report on Disability (2011) 29.

<sup>139</sup> World Report on Disability (2011) 25.

uniform approach to collecting data concerning persons with disabilities. There is also a need for better knowledge related to the 'prevalence, nature and extent of disability' both locally and internationally.<sup>140</sup> As far as possible, the World Bank has attempted to use information which is based on the International Classification of Functioning, Disability and Health as developed by the WHO.<sup>141</sup> Using the ICF guidelines, some measure of consistency is possible and the result is the collection of information which is more suitable for comparison.

After taking into consideration the figures provided by the World Health Survey and the GBD and independent research, the World Bank has generated an estimated percentage of disability prevalence worldwide. This investigation is reflected in the table below.<sup>142</sup>

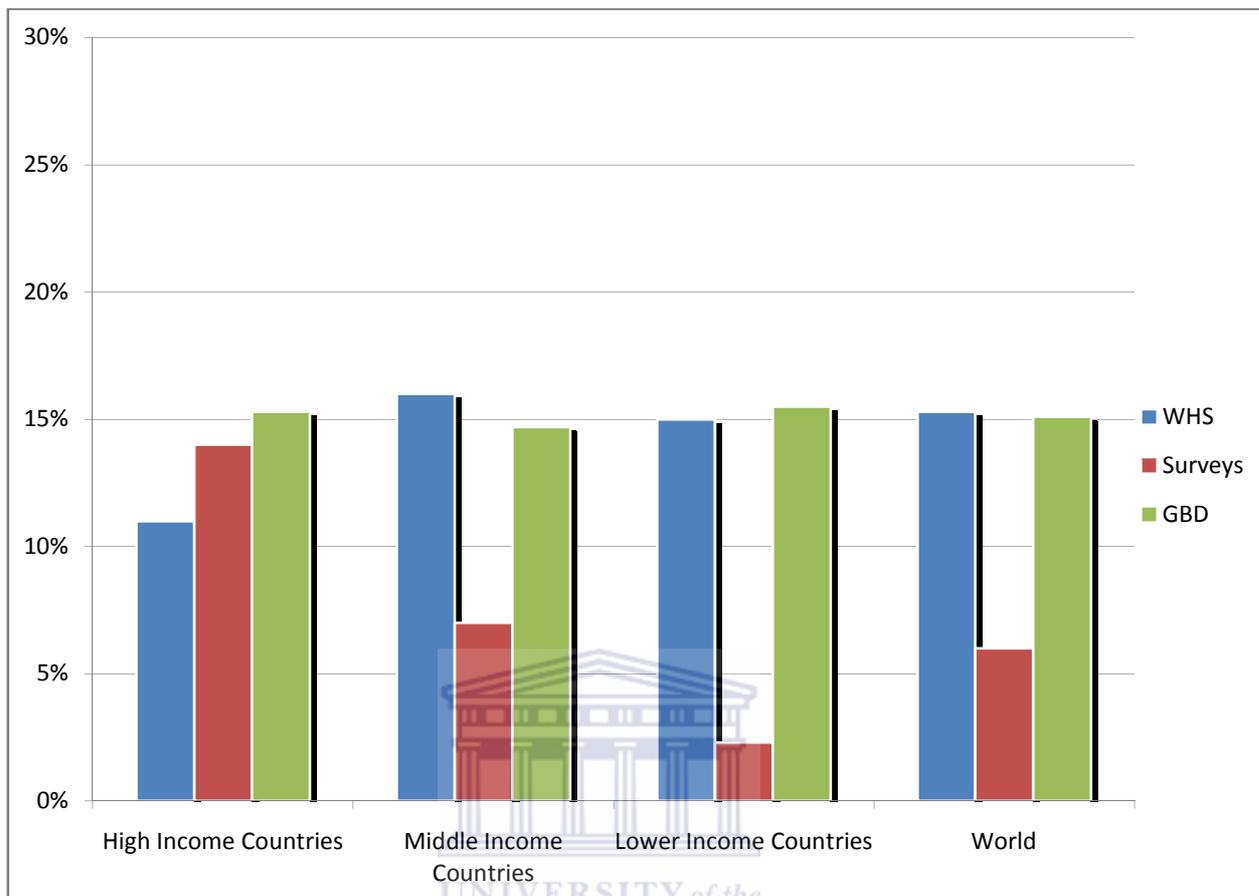


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<sup>140</sup> World Report on Disability (2011) 31.

<sup>141</sup> World Report on Disability (2011) 81.

<sup>142</sup> This table has been reproduced from the World Report on Disability (2011) 31.



The data provided in this table appears to contradict the statement above that disability is more prevalent in lower income countries. The reason given for the lower incidence of disability in lower income countries as per the given table is that lower income countries place emphasis on impairment in their surveys, whereas developed countries focus on broader issues such as social inclusion and the availability of resources.<sup>143</sup> The World Bank emphasises the fact that the data represented in the table above is not definitive, although it is based on current knowledge and available data and are therefore the best figures available at present.<sup>144</sup> As was stated above, it

<sup>143</sup> World Report on Disability (2011) 22.

<sup>144</sup> World Report on Disability (2011) 31.

is thought that around 1 billion persons are currently living with some form of disability worldwide.<sup>145</sup>

## 2.2.2 Poverty and disability

Poverty is more than a lack of access to resources.<sup>146</sup> A lack of access to resources may be a result of disability. Such exclusion from resources amounts to discrimination and is a direct cause of poverty.<sup>147</sup>

As mentioned previously, disability and poverty are inextricably linked. Poverty is not only a cause of disability, but it also exacerbates the effects of disability.<sup>148</sup> Conversely, disability is more prevalent in developing countries that are developing that do not have consistent economic growth).<sup>149</sup> It is therefore important to consider the poverty of persons with disabilities in relation to non-disabled persons in the same societal context. This is in accordance with the relative approach to poverty.<sup>150</sup>

There is a general perception that persons with disabilities tend to be the most impoverished within their respective societal contexts.<sup>151</sup> This is confirmed to some extent by the World Bank, which provides that persons with disabilities are considered

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<sup>145</sup> See 2.2.1 above.

<sup>146</sup> Department for International Development 'Disability, Poverty and Development' (2000) 3. The Department for International Development in the United Kingdom aims to reduce poverty. See <https://www.gov.uk/government/organisations/department-for-international-development>.

<sup>147</sup> She P & Livermore GA 'Material hardship, poverty and disability among working-age adults' (2007) 88 *Social Science Quarterly* 971; Department for International Development 'Disability, Poverty and Development' (2000) 3.

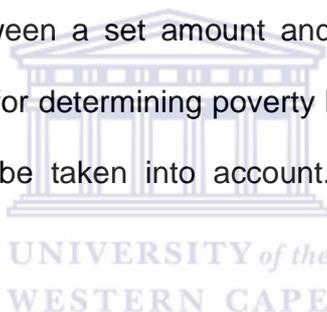
<sup>148</sup> Elwan A 'Poverty and Disability: A Survey of the Literature' (1999) *World Bank* 2.

<sup>149</sup> This may be attributed to the use of different definitions of disability. See 2.2.1 above.

<sup>150</sup> See 2.1.1 above.

<sup>151</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18>

by their non-disabled peers to be the most disadvantaged within their communities.<sup>152</sup> As mentioned previously, there are a number of different approaches which may be taken when measuring the poverty experienced by a certain group of persons. In addition, there are various poverty indicators which may be used to determine the type of poverty experienced by a particular group.<sup>153</sup> For example, the World Bank recognises the use of the gross national income of a country divided by its mid-year population to determine the average wealth of persons in that country.<sup>154</sup> Another example of a mechanism used to measure poverty is the investigation of the poverty gap between persons and a pre-determined amount.<sup>155</sup> This method consists of determining the shortfall between a set amount and a particular group of persons. However, these mechanisms for determining poverty levels cannot be considered in a vacuum; other factors must be taken into account. These factors include social exclusion and inequality.



The approach taken to gauge the levels of poverty experienced by persons with disabilities cannot consist merely of a numerical assessment. It must take into consideration the distribution of resources, the level of inequality experienced as well as the level of social exclusion experienced.<sup>156</sup> Only then can a well-balanced finding be made regarding the position of persons with disabilities in relation to other members of the same society (as per the relative poverty approach). It must also be

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<sup>152</sup> She P & Livermore GA 'Material hardship, poverty and disability among working-age adults' (2007) 88 *Social Science Quarterly* 971.

<sup>153</sup> World Bank 'Poverty Indicators' <http://data.worldbank.org/indicator#topic-11> (accessed on 20/02/2014).

<sup>154</sup> World Bank 'World Development Indicators: Distribution of income or consumption' <http://wdi.worldbank.org/table/2.9> (accessed on 16/02/2015).

<sup>155</sup> World Bank 'Poverty gap at \$1.25 a day' <http://data.worldbank.org/indicator/SI.POV.GAPS> (accessed on 16/02/2015).

<sup>156</sup> World Report on Disability (2011) 10.

noted that poverty in and of itself creates additional exclusion. Poverty and disability are therefore not only linked, but cyclical and it is this cycle which must be addressed when introducing poverty reduction schemes for persons with disabilities. For purposes of this thesis, a distinction will be made between purely economic poverty and poverty in the broader social sense.<sup>157</sup>

In addition to the complex nature of the concept of poverty, it must be noted that economic poverty takes two forms in relation to persons with disabilities. The first is the effect of disability on income. In the event that disability prevents a person from working, the disability has an adverse effect on the person's income and affects the income available for that person's maintenance needs.<sup>158</sup> The other form of economic poverty experienced by persons with disabilities involves the incurring of expenses related to the disability experienced by a person.<sup>159</sup> These expenses are typically medical expenses and expenses incurred to adapt the living environment of the person with a disability.<sup>160</sup>

Data related to the incidence of poverty amongst persons with disabilities is not freely available, and estimates related to the levels of poverty experienced by persons with disabilities are done in a piecemeal manner, usually based on country case studies.<sup>161</sup>

The available data relating to the poverty levels experienced by persons with

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<sup>157</sup> The UN itself recognises that purely economic poverty cannot be used as an accurate reflection of the socio-economic position of persons with disabilities, and that poverty must be considered with reference to other factors as well. See UNESCO 'Poverty' <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty/> (accessed on 19/02/2015).

<sup>158</sup> She P & Livermore GA 'Material hardship, poverty and disability among working-age adults' (2007) 88 *Social Science Quarterly* 978.

<sup>159</sup> World Report on Disability 42.; Saunders P *The costs of disability and incidence of poverty* (2006) 4.

<sup>160</sup> Saunders P *The costs of disability and incidence of poverty* (2006) 4.

<sup>161</sup> World Report on Disability (2011) 39.

disabilities worldwide is piecemeal and generally inconclusive, although certain findings based on the information available have been made by various institutions. Amongst these findings is the fact that an estimated 80% of the total number of persons with disabilities live in developing countries which implies that the incidence of disability is high in countries with generally high levels of poverty.<sup>162</sup> There is also evidence to suggest that persons with disabilities are considerably more likely to experience poverty than non-disabled persons.<sup>163</sup> In addition, the prevalence of disability amongst the world's poorest population is estimated at 20%,<sup>164</sup> which serves to prove the theory that disability and poverty are linked, since this is higher than the average rate of prevalence of disability.<sup>165</sup> While the information relating to poverty and disability is meagre and individual country studies are not comparable, it has emerged that persons with disabilities in developed countries are twice as likely to be unemployed as their non-disabled peers.<sup>166</sup> In developing countries, there is anecdotal evidence to suggest that households including a person with a disability experience higher levels of poverty than households without a person with a disability.<sup>167</sup>

While precise statistics cannot be provided on the poverty experienced by persons with disabilities, it can be said with some certainty that poverty levels are higher

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<sup>162</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18>

<sup>163</sup> She P & Livermore GA 'Material hardship, poverty and disability among working-age adults' (2007) 88 *Social Science Quarterly* 971.

<sup>164</sup> She P & Livermore GA 'Material hardship, poverty and disability among working-age adults' (2007) 88 *Social Science Quarterly* 971.

<sup>165</sup> See 2.2.1 above.

<sup>166</sup> World Report on Disability (2011) 39.

<sup>167</sup> Groce N, Khembavi G & Wirs S et al *Poverty and Disability: A Critical review of the literature in low and middle – income countries* (2011) Working Paper Series: No 16 University College London 13; Mitra S, Posarac A & Vick B. *Disability and poverty in developing countries: a snapshot from the world health survey* (2011) Washington, Human Development Network *Social Protection Discussion Paper No 1109*.

amongst persons with disabilities and that persons with disabilities are more likely to be amongst the poorest section of their societies.<sup>168</sup>

### 2.2.3 Employment

Before an analysis of the employment of persons with disabilities can commence, certain terms must be explained. The first of these is the labour force, or work force. The labour force consists of persons of working age who are willing and capable of work and are actually working or seeking work.<sup>169</sup> The unemployment rate is the percentage of persons of working age who are not employed.<sup>170</sup> The employment rate is the percentage of persons of working age who are working in exchange for remuneration.<sup>171</sup>

The measurement of the rate of employment for persons with disabilities has been difficult to date.<sup>172</sup> As mentioned above, persons with disabilities who are of working age are twice as likely to be unemployed as their non-disabled counterparts.<sup>173</sup> The ILO provides that around 400 million of the world's working population live with some form of disability.<sup>174</sup> The UN further provides that 80% - 90% of persons with disabilities are unemployed in developing countries, and 50% - 60% of persons with

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<sup>168</sup> Groce N, Khembavi G & Wirs S et al *Poverty and Disability: A Critical review of the literature in low and middle – income countries* (2011) 13.

<sup>169</sup> Yeo R & Moore K 'Including disabled people in poverty reduction work: "nothing about us, without us"' *World Development* (2003) 31.

<sup>170</sup> Mitra S 'Employment challenges and successes in low- and middle-income countries' in Heymann J, Stein MA & Moreno G (eds) *Disability and equity at work* (2014) 295.

<sup>171</sup> World Report on Disability (2011) 236.

<sup>172</sup> UN Enable 'Disability and Employment Fact Sheet 1' <http://www.un.org/disabilities/default.asp?id=255> (accessed on 23/04/2015).

<sup>173</sup> See 2.2.2 above.

<sup>174</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18>

disabilities in industrialised countries are unemployed.<sup>175</sup> While the available data focuses on the unemployment rate of persons with disabilities, an argument for using the employment rate instead has been put forward. According to Mitra,

[t]he unemployment rate is the number of unemployed persons as a percentage of the labor force. Because many non-working persons with disabilities do not look for jobs and are thus out of the labour force, the unemployment rate is not an adequate measure of their integration in the labor market. Instead the employment rate is typically used as an indicator.<sup>176</sup>

Using the employment rate as an indicator, it is still apparent that persons with disabilities experience lower rates of employment than non-disabled persons.<sup>177</sup> This is true of both developed and developing countries.<sup>178</sup> These lower rates of employment amongst persons with disabilities are considered one of the ways in which disability can lead to poverty.<sup>179</sup>

The World Health Survey provides that, across the 51 countries included in the survey, the employment rate for men with disabilities is approximately 53%, whereas the employment rate for non-disabled men is approximately 65%.<sup>180</sup> For women with disabilities, the employment rate is approximately 20%, and for non-disabled women the employment rate is approximately 30%.<sup>181</sup>

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<sup>175</sup> UN Enable 'Disability and Employment Fact Sheet 1' <http://www.un.org/disabilities/default.asp?id=255> (accessed on 23/04/2015).

<sup>176</sup> Mitra S 'Employment challenges and successes in low- and middle-income countries' in Heymann J, Stein MA & Moreno G (eds) *Disability and equity at work* (2014) 295.

<sup>177</sup> World Report on Disability (2011) 39.

<sup>178</sup> World Report on Disability (2011) 235.

<sup>179</sup> World Report on Disability (2011) 235.

<sup>180</sup> World Report on Disability (2011) 237.

<sup>181</sup> World Report on Disability (2011) 237.

When persons with disabilities find employment, this employment tends to be part-time.<sup>182</sup> In order to determine why persons with disabilities are more likely to be unemployed, it is necessary to consider the education to which persons with disabilities have access, since education is a major factor in attaining employment.

In developing countries, up to 97% of children with disabilities do not attend school.<sup>183</sup>

The literacy rate for persons with disabilities worldwide was investigated by the UN Development Programme in 1998.<sup>184</sup> The actual literacy rate was determined to be 3%.<sup>185</sup> This topic was again investigated in 2009, where the literacy rate amongst persons with disabilities was established as low as 3% overall and 1% for women with disabilities.<sup>186</sup> If the levels of education of persons with disabilities remain this low, the employment prospects of persons with disabilities will similarly remain low. According to the ILO Decent Work Agenda, all persons should be afforded the opportunity to attain 'decent' work.<sup>187</sup> It may be difficult for persons who are illiterate or who have little or no formal education to obtain decent work. Until this lack of adequate education for persons with disabilities is remedied, there will be no significant improvement in the number of persons with disabilities who are unemployed.

Unemployment has specific economic repercussions. Excluding persons with disabilities from employment essentially contributes to the level of economic poverty

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<sup>182</sup> World Report on Disability (2011) 39.

<sup>183</sup> Groce N & Bakshi P 'Illiteracy among Adults with Disabilities in the Developing World: An UnExplored Area of Concern' (2009) *Working Paper Series No 9 3*.

<sup>184</sup> UN *UN Development Report* (1998) available at [http://hdr.undp.org/sites/default/files/reports/259/hdr\\_1998\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/259/hdr_1998_en_complete_nostats.pdf).

<sup>185</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18>

<sup>186</sup> Groce N & Bakshi P 'Illiteracy among Adults with Disabilities in the Developing World: An UnExplored Area of Concern' (2009) *Working Paper Series No 9 3*.

<sup>187</sup> See 4.3.4 below for a discussion of the Decent Work Agenda.

experienced by persons with disabilities as a group, since employment usually is the primary source of income for the working age population. In addition, exclusion from employment leads to exclusion from employment-related social security schemes, such as retirement funding and unemployment insurance schemes. The consequences of the level of unemployment of persons with disabilities are therefore far-reaching and addressing the level of unemployment amongst persons with disabilities would contribute greatly to a reduction in the level of economic poverty experienced by persons with disabilities. In addition to a reduction in economic poverty, providing employment opportunities where persons with disabilities are able to interact and participate on an equal basis with others and enjoy greater social inclusion would contribute to a sense of dignity and worth of each person, thereby contributing to a reduction in poverty in the broader sense as well.<sup>188</sup>

Education and employment of persons with disabilities are both prioritised in terms of the CRPD. Article 24 provides that inclusive education should be implemented in States Parties in order to enable persons with disabilities to participate effectively in a free society and Article 27 provides that persons with disabilities have a right to work on an equal basis with others. It is apparent that these two items should work in conjunction with each other, and that education should be used as a tool to ensure that persons with disabilities are given ample access to employment opportunities.<sup>189</sup>

As mentioned above,<sup>190</sup> it is imperative that persons with disabilities be given

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<sup>188</sup> World Report on Disability (2011) 236.

<sup>189</sup> Arnade S & Haefner S 'Standard Interpretation of the UN Convention on the Rights of Persons with Disabilities (CRPD) from a Female Perspective: Position and Reference Paper on the Significance of References to Women and Gender in the Convention on the Rights of Persons with Disabilities' (2011) 79.

<sup>190</sup> See 2.2.3 above.

meaningful access to employment, since employment increases the range of social security benefits that persons with disabilities have access to as well as providing a regular source of income. The link between employment and social security in the South African context is explained in greater detail in Chapter 4 of this thesis.

### **2.3 SOUTH AFRICAN CONTEXT**

From the foregoing discussion, it is seen that persons with disabilities experience high levels of relative poverty worldwide. This is a result of a number of factors, one of which is the high unemployment rate of persons with disabilities. Although the statistical information related to this information is not necessarily completely accurate,<sup>191</sup> it is nevertheless apparent that persons with disabilities are not experiencing full participation in society. In the following paragraphs, the situation of persons with disabilities in South African will be discussed. Since one of the aims of this thesis is to determine whether South Africa is meeting its obligations in terms of Article 28 of the CRPD in terms of social security coverage and benefits,<sup>192</sup> the current level of coverage and benefits must be known and borne in mind.<sup>193</sup> To this end, the prevalence of disability in South Africa is discussed in this chapter, and Chapter 5 below will establish the current coverage of persons with disabilities by social security (consisting of social assistance and social insurance). The rate of unemployment of persons with disabilities will also be considered, since formal employment is linked to social security coverage.<sup>194</sup>

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<sup>191</sup> See 2.2.1 above.

<sup>192</sup> See 1.2 above.

<sup>193</sup> These are discussed in Chapter 5 of this thesis.

<sup>194</sup> See 1.7.2 above.

### 2.3.1 Prevalence of disability

One of the difficulties in collecting data on the prevalence of disability worldwide is the question of definition of disability.<sup>195</sup> Since different countries have different approaches to disability, the information on national prevalence is not comparable. Similar difficulties occur in South Africa. There are a number of co-existing definitions of disability in South Africa, and the definition differs according to both purpose and context.<sup>196</sup> For instance, the definition used in determining eligibility for social assistance is different to the definition used in population censuses.<sup>197</sup> It is therefore difficult to gauge social assistance coverage as a percentage of total disability prevalence, since the different sets of figures are based on different definitions of disability. Notwithstanding this difficulty, the information available proves invaluable in providing an overall picture of the coverage of social assistance for persons with disabilities. The coverage of social insurance will be discussed when discussing the rate of unemployment, since employment and social insurance are inextricably linked.<sup>198</sup>

Statistics South Africa provides the following information from the 2001 general population census: approximately 5% of the total population lived with 'various forms'

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<sup>195</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 21.

<sup>196</sup> Definitions of disability are found in many different contexts, including employment and social security.

<sup>197</sup> The definition of 'disabled person' for purposes of social assistance is found section 9(b) of the Social Assistance Act 13 of 2004 and provides that a disabled person is a person who 'owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance'. The definition used for population censuses is found in the 2001 Statistics South Africa publication Prevalence of Disability in South Africa and asked participants whether they had a disability which prevented them from 'full participation in life activities' (page 11).

<sup>198</sup> See 5.2.2 for further discussion on this point.

of disability.<sup>199</sup> Statistics South Africa undertook a Community Survey (CS) in 2007, which consisted of a survey of approximately 950 000 persons across South Africa.<sup>200</sup> The results obtained in this CS were then weighted, and the prevalence of disability was found to be 4% at the national level.<sup>201</sup> This percentage would consist of approximately 2 million persons. However, the CS disability statistics are based on self-identification which has proved problematic in data collection historically.

The 2007 CS also provides statistics related to social assistance coverage of persons with disabilities. According to the Survey, 10% of the total social assistance coverage consisted of the disability grant.<sup>202</sup> 1.2 million persons were receiving the grant in 2007. This figure is supported somewhat by the findings of a 2009 study conducted jointly by the Institute of Land and Agrarian Studies (PLAAS) and the Economic Policy Research Institute, which provides that 1.3 million persons received the disability grant in 2008. According to the 2007 CS figures, social assistance provided for the income of approximately 60% of persons with disabilities in South Africa in 2007.<sup>203</sup> The level of coverage of social assistance is particularly high when it is considered that social assistance is currently seen as the only alternative to employment for persons with disabilities. If the level of social assistance coverage is 60%, this effectively means that the unemployment rate amongst persons with disabilities is at least 60%.<sup>204</sup> This

<sup>199</sup> Statistics South Africa *Census 2001 Prevalence of Disability in South Africa* 1.

<sup>200</sup> Statistics South Africa 'Community Survey 2007 Basic Results' [http://www.statssa.gov.za/community\\_new/content.asp](http://www.statssa.gov.za/community_new/content.asp) (accessed on 20/02/2014).

<sup>201</sup> Statistics South Africa 'Community Survey 2007 Basic Results' [http://www.statssa.gov.za/community\\_new/content.asp](http://www.statssa.gov.za/community_new/content.asp) (accessed on 20/02/2014).

<sup>202</sup> Community Survey 2007 Statistical Release (2007) 42.

<sup>203</sup> This figure is obtained by calculating 1.2 million as a percentage of 2 million.

<sup>204</sup> See 5.2.1 below for a discussion of the requirements for the disability grant related to the ability of the applicant to work to support himself and / or his family.

figure is high, although the accuracy of this figure will be discussed at a later stage in this chapter.

The latest available figures from Statistics SA provide that the number of persons with 'impairments' has increased since 2001, with the 2011 National Census providing that approximately 7.5% of persons experience some form of impairment in South Africa.<sup>205</sup> This percentage equates to approximately 3.8 million persons with impairment in South Africa.

According to the South Africa Social Security Agency's 2012 – 2013 annual report, approximately 1.4 million persons were receiving disability grants in 2007.<sup>206</sup> This figure is higher than the weighted figure arrived at in the 2007 CS. The South African Social Security Agency also provides that, in 2012 – 2013, the number of disability grant recipients has decreased to approximately 1.16 million.<sup>207</sup> The reason for this decrease in grant recipients is not known.

The statistics provided by these local sources are contradicted substantially by the findings of the World Bank, which provides that the prevalence of disability in South Africa is upwards of 18%.<sup>208</sup> This is another example of how the differing approaches to disability may influence the results obtained in a particular study.

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<sup>205</sup> Statistics South Africa *Census 2011 Statistical Released P0301.4 46*.

<sup>206</sup> SASSA Annual Report 2012 / 2013 22.

<sup>207</sup> SASSA Annual Report 2012 / 2013 22.

<sup>208</sup> World Report on Disability (2011) Technical Appendix A.

### 2.3.2 Employment

Unemployment in South Africa has historically been and remains a challenge, even after the transition to democracy in 1994. According to the World Bank, the employment rate for persons with disabilities in South Africa was approximately 12% in 2006.<sup>209</sup> The Commission for Conciliation, Mediation and Arbitration (CCMA)<sup>210</sup> stated in 2008 that the employment rate for persons with disabilities was less than a third of the employment rate for non-disabled persons,<sup>211</sup> which corresponds with the World Bank findings. A comparison of the percentage of disabled and non-disabled persons who had been employed in 2001 was undertaken by Statistics South Africa in its General Population Survey in 2001. According to their findings, the percentage of non-disabled persons who had worked at some stage during their lives (albeit temporarily) was 35%, whereas the figure for persons with disabilities was only 18%.<sup>212</sup> This appears to be in accordance with the World Bank findings that unemployment amongst persons with disabilities is around twice that of non-disabled persons of working age.<sup>213</sup>

The levels of education of persons with disabilities are also significantly lower than for their non-disabled peers. 30% of disabled persons have had no formal education whatsoever according to Statistics SA. This is in contrast to the 13% of non-disabled

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<sup>209</sup> This is compared to the employment rate for non-disabled persons in 2006, which was approximately 41%. World Report on Disability (2011) 238.

<sup>210</sup> The CCMA is an independent dispute resolution body created for the resolution of certain labour disputes in terms of the Labour Relations Act 66 of 1995.

<sup>211</sup> *Standard Bank of South Africa v CCMA and others* 2008 4 BLLR (LC) para 61.

<sup>212</sup> Statistics South Africa Census 2001 *Prevalence of Disability in South Africa* 35.

<sup>213</sup> See 2. above.

persons with no formal education.<sup>214</sup> Statistics SA also provides information which links the incidence of disability to the level of formal education received. The prevalence of disability decreases as the level of education received increases.<sup>215</sup> This is evidence of a cyclical relationship between disability and education in the same vein as the symbiotic relationship between disability and poverty as described above.<sup>216</sup>

In purely numerical terms, one may use the following figures to arrive at the unemployment rate for persons with disabilities in South Africa: according to the 2011 National Census which provides the latest data in this regard, there are approximately 3.8 million persons with disabilities in South Africa. Of these, 1.2 million receive the disability grant – this equates to approximately 30%. 18% of this 1.2 million are unemployed according to Statistics SA.<sup>217</sup> This means that a total of almost 50% of the persons with disabilities in South Africa are not employed at a level which enables them to support themselves financially. The general unemployment rate in South Africa is around 24%.<sup>218</sup> The rate of unemployment amongst persons with disabilities is thus twice the rate of unemployment amongst non-disabled persons. This also concurs with the World Report on Disability and the ILO's finding that rates of unemployment amongst persons with disabilities are significantly higher than for persons with no disabilities.<sup>219</sup> This high rate of unemployment also means that persons with disabilities who have never worked or whose social insurance benefits

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<sup>214</sup> Statistics South Africa Census 2001 *Prevalence of Disability in South Africa* 20.

<sup>215</sup> Statistics South Africa Census 2001 *Prevalence of Disability in South Africa* 13.

<sup>216</sup> Eide AH & Ingstad B *Disability and poverty: A global challenge* (2011) 177.

<sup>217</sup> Statistics South Africa Census 2001 *Prevalence of Disability in South Africa* 20.

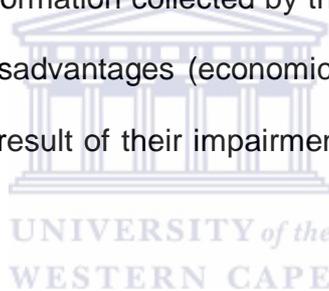
<sup>218</sup> Statistics South Africa *Quarterly Labour Force Survey Quarter 4* (2014) v.

<sup>219</sup> UN Fact Sheet on Persons with Disabilities available at <http://www.un.org/disabilities/default.asp?id=18>; see 2.2.3 above.

have been exhausted are largely excluded from a range of important social security benefits which take the form of social insurance and are linked to employment.<sup>220</sup>

## 2.4 CONCLUSION

The collection of accurate statistical information related to the prevalence, unemployment and poverty experienced by persons with disabilities is extremely challenging. While certain international bodies have attempted to collect data from countries and regions which is comparable, this has not been completely possible to date and, as such, the data collected is not particularly enlightening for comparative purposes.<sup>221</sup> However, the information collected by the World Bank is helpful in that it provides a snapshot of the disadvantages (economic and otherwise) experienced by persons with disabilities as a result of their impairment as measured according to the ICF.



In summary, the prevalence of disability worldwide is thought to range from 10 – 12%. This is a substantial number and makes persons with disabilities the largest minority in the world. The economic poverty experienced by persons with disabilities is higher than the economic poverty experienced by their non-disabled peers, and this is similarly true for poverty in the broader sense which includes levels of inequality and social exclusion.<sup>222</sup>

The South African position of persons with disabilities is somewhat worse. While precise information on the levels of poverty experienced by persons with disabilities is

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<sup>220</sup> See 5.2.2 for a further discussion of this point in the South African context.

<sup>221</sup> See 2.2.1 above.

<sup>222</sup> See 2.2.2 above.

not forthcoming, it is apparent that persons with disabilities experienced elevated levels of unemployment and low levels of education.<sup>223</sup> These figures and the literature discussed on the employment of persons with disabilities provide sufficient evidence to support the finding that persons with disabilities are not currently being given the opportunity to compete and participate on an equal basis with others. Simply put, persons with disabilities in South Africa are operating at a distinct disadvantage in comparison with their non-disabled peers.

One of the stated aims of this thesis is to establish whether South Africa is compliant with its international law obligation to provide persons with disabilities with an adequate standard of living and sufficient social protection.<sup>224</sup> Since the relevant parts of the socio-economic context of persons with disabilities have been considered, the next step is establishing which measures have been put in place to improve upon this position. To this end, in the following chapters the constitutional framework for the social security rights of persons with disabilities in South Africa will be discussed.<sup>225</sup> Thereafter, the international law framework related to an adequate standard of living and social protection will be discussed.<sup>226</sup> These frameworks must work in conjunction with each other, and from an analysis of each, a number of indicators will be established for use in determining whether South Africa is currently providing social security benefits to persons with disabilities in a manner which satisfies both the Constitution and the international law.<sup>227</sup>

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<sup>223</sup> See 2.2.3 above.

<sup>224</sup> See 1.3 above.

<sup>225</sup> Chapter 3 below.

<sup>226</sup> Chapter 4 below.

<sup>227</sup> Chapter 5 below.

## CHAPTER 3

### CONSTITUTIONAL FRAMEWORK

#### 3.1 INTRODUCTION

The Constitution of the Republic of South Africa<sup>228</sup> is the cornerstone of the democracy of the country.<sup>229</sup> South Africa subscribes to the notion of constitutional supremacy,<sup>230</sup> which means that the Constitution is considered the supreme law of South Africa and is the yardstick against which any laws must be measured.<sup>231</sup> If any law is found to be incompatible with the provisions of the Constitution, it is considered invalid.<sup>232</sup> The importance of the Constitution in the legislative composition of South Africa cannot be overemphasised and it is therefore fitting that the provisions of the Constitution which are relevant for persons with disabilities be discussed and explained.

Any new legislation or amendments to existing legislation must comply with the Constitution.<sup>233</sup> This includes additions to legislation made in terms of international law obligations and the implementation of international law.<sup>234</sup> For this reason, the constitutional framework for selected rights of persons with disabilities is discussed first in this thesis and the international law obligations related to persons with disabilities are examined and discussed in the next chapter.

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<sup>228</sup> Constitution of the Republic of South Africa, 1996.

<sup>229</sup> Section 7(1) of the Constitution of the Republic of South Africa, 1996.

<sup>230</sup> Section 2 of the Constitution provides that the Constitution 'is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

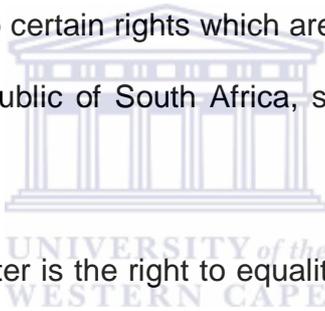
<sup>231</sup> *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para 62.

<sup>232</sup> Section 2 of the Constitution.

<sup>233</sup> International law must be implemented in accordance with section 231 of the Constitution.

<sup>234</sup> Section 2 of the Constitution read with section 231.

One of the aims of the Constitution is 'to improve the quality of life of all citizens and to free the potential of each person'.<sup>235</sup> An efficient social security system is a mechanism that may be utilised to further this aim.<sup>236</sup> The South African Constitution guarantees a right of access to social security,<sup>237</sup> which is a socio-economic right.<sup>238</sup> In *Government of the Republic of South Africa and Others v Grootboom and Others*, Yacoob J states that socio-economic rights need to be considered in conjunction with each other.<sup>239</sup> The rights chosen for discussion in this chapter are thus the rights which are relevant to and which may potentially be infringed in the administration of social security.<sup>240</sup> However, the discussion in this chapter is not limited to socio-economic rights but extends to certain rights which are considered part of the founding values of the democratic Republic of South Africa, such as the rights to dignity and equality.<sup>241</sup>



The starting point of this chapter is the right to equality, since the Constitutional Court found that inequality has not yet been eliminated in South Africa. This is because millions in South Africa are still living in poverty stricken conditions, which are

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<sup>235</sup> Preamble to the Constitution.

<sup>236</sup> Olivier MP 'Towards Social Protection: Lessons from a Comparative Perspective' in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millenium* (2001) 278.

<sup>237</sup> Section 27(1)(c) provides that 'everyone has right to have access to... social security'. See 3.5 below for a detailed discussion of this right.

<sup>238</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 19. See also *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 40.

<sup>239</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 19.

<sup>240</sup> There are a number of other rights in the Bill of Rights which are of particular importance for persons with disabilities. However, these rights do not add to the present discussion, bearing in mind the aims of this thesis which are stated at 1.3 above.

<sup>241</sup> The rights considered are the right to equality and the right to dignity, whose importance is emphasised by section 1 of the Constitution. Section 1(a) provides that 'the Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms.' See 3.1 below.

exacerbated by unemployment, inadequate social security and inadequate access to resources.<sup>242</sup> The means chosen to transform South Africa from a country where poverty and inequality are rife to a new society based on human dignity, freedom and equality was the guarantee of these rights by means of adopted the Constitution when South Africa came to democracy.<sup>243</sup>

It is well-known that social inequality has deep historical roots in South Africa.<sup>244</sup> A discussion related to the improvement of socio-economic conditions for a marginalised group therefore requires an understanding of the commitment to achievement of equality in South Africa. The equality clause, section 9 of the Constitution, is of particular importance for persons with disabilities, since it underpins a number of laws related to improving the socio-economic position of persons with disabilities in South Africa.<sup>245</sup> After a discussion of the content of the right to equality, the selected rights related to the administration of social security are discussed to the extent that they are relevant to persons with disabilities.

Before a detailed discussion of individual rights takes place, it is important to understand the broader approach which must be taken in interpreting the rights in the Bill of Rights. For this reason, the general interpretive approach taken to the Constitution and the content of sections 7 and 39 of the Constitution are discussed in the paragraphs preceding the detailed discussion of individual rights.

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<sup>242</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8.

<sup>243</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8.

<sup>244</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 33.

<sup>245</sup> Christianson M 'People with disabilities inside (and outside) the South African workplace: The current status of the constitutional and statutory promises' (2012) *Acta Juridica* 291.

### 3.2 INTERPRETATION OF THE BILL OF RIGHTS

When interpreting the Bill of Rights, a number of principles must be borne in mind.

Section 1 provides that

[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values:

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

Section 1 establishes the principle of constitutional supremacy which is expanded upon in section 2 and which has important repercussions for the implementation of legislation in South Africa.<sup>246</sup> The importance of equality is emphasised in section 1, as is the commitment to advancing human rights. The advancing of human rights in section 1 links to the progressive realisation of rights, which is particularly important for the right of access to social security.<sup>247</sup> The principle of constitutional supremacy is established in terms of section 2 of the Constitution, which provides that ‘the Constitution is the supreme law of the Republic...’. Constitutional supremacy is therefore imperative in interpreting rights in the Bill of Rights,<sup>248</sup> and it is this principle which compels a discussion of constitutional provisions prior to a discussion of

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<sup>246</sup> See 3.1 above regarding the content of section 2 of the Constitution.

<sup>247</sup> See 3.5 below.

<sup>248</sup> See 3.1 above.

selected international law. Since the Constitution is the supreme law of South Africa, international law is subject to the provisions of the Constitution, and the constitutional obligations must therefore be explained before any discussion of international law can commence. The method of constitutional interpretation used in South Africa has been developed by the courts over time. A number of judgments have identified principles which should be used when interpreting the Constitution.<sup>249</sup> These judgments reveal that the Constitution generally must be interpreted 'generously, purposively, and in context'.<sup>250</sup>

### 3.2.1 Generous, purposive and contextual interpretation

A generous interpretation of the Constitution requires that rights be given as broad a meaning as is possible, considering the language used to describe them and the context in which they are used.<sup>251</sup> The approach of purposive interpretation provides that the purpose for which a right was included in the Bill of Rights determines the scope thereof.<sup>252</sup> In order to interpret the Constitution in context, the constitutional rights cannot be interpreted in a vacuum; they must be interpreted in light of the founding values of the Constitution and in conjunction with each other.<sup>253</sup> In short, the

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<sup>249</sup> Such as *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 11; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40 and *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) para 24.

<sup>250</sup> *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 32. See 3.2.1 below.

<sup>251</sup> *S v Zuma* 1995 (2) SA 642 (CC) para 14. See also *S v Mhlungu* 1995 (3) SA 391 (CC) para 8.

<sup>252</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 137.

<sup>253</sup> *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC) para 36.

rights in the Constitution must be given meaning which takes into consideration the purpose of the right and the relationship with other rights in the Constitution.<sup>254</sup>

The aforementioned approach is that which must be taken in interpreting the Constitution generally. However, this thesis is concerned with a particular right enshrined in the Bill of Rights (namely the right of access to social security) and the rights identified as ancillary thereto. As mentioned earlier, the right of access to social security is a socio-economic right<sup>255</sup> and, as such, requires a specifically tailored approach to interpretation which incorporates the general approach to constitutional interpretation in South Africa.

According to Yacoob J in *Government of the Republic of South Africa and Others v Grootboom and Others*, interpreting the content of a socio-economic right involves



the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.<sup>256</sup>

This means that the inter-relatedness of all the rights in the Bill of Rights cannot be ignored. The rights discussed in this chapter have thus been selected as a result of their inter-relatedness in the context of social security. Considering the importance of 'social and historical context' in interpreting rights in the Bill of Rights, the context of the selected individual rights is also referred to.

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<sup>254</sup> Rautenbach IM & Malherbe EFL *Constitutional Law* 5ed (2009) 41.

<sup>255</sup> See 3.5 above.

<sup>256</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 para 22.

### 3.2.2 Section 7

Section 7 of the Constitution emphasises the particular importance of the rights in the Bill of Rights. Further, section 7 provides important information on how the rights in the Bill of Rights are to be treated by the state. Section 7(2) provides that '[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights'. This provision is peremptory and creates a positive obligation on the state through the use of the word 'must'.<sup>257</sup>

The obligation created by section 7(2) to 'respect, protect, promote and fulfill' rights are imperative for purposes of discussing constitutional rights. According to Ngcobo CJ,

[t]his obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights.<sup>258</sup>

It was also found in *Glenister v President of the Republic of South Africa* that, in interpreting the content of the obligation created by section 7(2), it was not necessary to prescribe exactly which steps the state has to take to meet its obligation in terms of the section. However, the chosen steps must be reasonable and effective, and must be steps that would be taken by a reasonable decision-maker in the circumstances.<sup>259</sup>

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<sup>257</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 134.

<sup>258</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 105.

<sup>259</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 191.

Since the Constitutional Court has chosen to remain silent on the content of this obligation, the meaning of the individual elements must be sought elsewhere.<sup>260</sup>

According to the South African Human Rights Commission (SAHRC),<sup>261</sup> the obligation to respect a right means that the state must not hinder the exercising of that right.<sup>262</sup>

This includes an obligation not to limit the enjoyment of a particular right already in existence.<sup>263</sup> The protection of a right entails the state preventing violations of that

right by third parties<sup>264</sup> (the violation of the right by the state is already prohibited through the obligation to respect the right). The state must also promote rights in the

Bill of Rights, which involves the provision of information about the right to persons entitled to it.<sup>265</sup> In other words, the state must educate persons about which rights

they are entitled to and the scope and content of those rights. Finally, the obligation to fulfill rights obliges the state to take appropriate legislative and other measures which

contribute to the full realisation of the rights in the Bill of Rights.<sup>266</sup> The obligation to

fulfill rights is somewhat curtailed by the principle that such fulfillment must be progressively realised using the resources available to the state.<sup>267</sup>

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<sup>260</sup> Du Plessis M & Penfold G et al 'Bill of Rights Jurisprudence' (2011) *Annual Survey of South African Law* 81.

<sup>261</sup> The South African Human Rights Commission was constituted in terms of the Human Rights Commission Act 54 of 1994. In terms of section 184 of the Constitution, the mandate of the SAHRC is to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights and to monitor and assess the observance of human rights in the Republic of South Africa.

<sup>262</sup> SAHRC 'Know your rights' 22.

<sup>263</sup> SAHRC 'Know your rights' 22.

<sup>264</sup> SAHRC 'Know your rights' 23.

<sup>265</sup> SAHRC 'Know your rights' 23.

<sup>266</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 107.

<sup>267</sup> The concepts of progressive realisation within available resources is discussed in detail at 3.5.2 below.

While the abovementioned sections provide information on the obligations on the state and other parties related to the rights enshrined in the Constitution, none of these sections are of assistance in the interpretation of the individual rights in the Constitution.<sup>268</sup> Rather, these sections establish the measures which must be put in place when respecting, protecting, promoting and fulfilling the individual rights. The approach which must be taken to interpreting the rights in the Constitution is thus not evident from the Constitution itself. In essence, the method of interpretation has been established in constitutional jurisprudence.

### 3.2.3 Section 39

Another interpretive tool which is important for constitutional interpretation is the use of sources outside of the South African legal framework. Section 39 of the Constitution provides that certain sources of law are to be taken into consideration when interpreting the rights in the Bill of Rights.<sup>269</sup> In relation to international law, section 39(1)(b) provides that any court, forum or tribunal must take into consideration any applicable international law when interpreting any rights in the Bill of Rights. In other words, international law cannot be ignored when dealing with any constitutional right since the section is peremptory in nature.<sup>270</sup> It is therefore clear that international law plays an important role in giving content to constitutional rights.

However, it must be remembered that international law will always remain subordinate to the Constitution. This means that international law must be considered when

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<sup>268</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 134.

<sup>269</sup> Whilst Section 39(1)(b) provides that international law must be considered in interpreting any right in the Bill of Rights, section 39(1)(c) only stipulates that foreign law may be considered.

<sup>270</sup> Note the use of the word 'shall' in the section; see Rautenbach IM & Malherbe EFJ *Constitutional Law* 5ed (2009) 45.

interpreting constitutional rights, but that any provisions inconsistent with the Constitution may be disregarded.<sup>271</sup> Should a court, forum or tribunal consult international law to assist in interpreting any right in the Bill of Rights and that international law is found to be inconsistent with the values of the Constitution, that section of the international law cannot be used to give content to rights in the Bill of Rights.<sup>272</sup>

In addition, the application of international law in South Africa is shaped by the Constitution. Besides the disregarding of any incompatible sections of international law, any international law must operate within the parameters of the Constitution.<sup>273</sup> In other words, the Constitution remains the supreme law of the country and is the final arbiter against which laws and conduct are measured. When any international law becomes law through enactment into national law, any provisions therein which are inconsistent with the Constitution are not considered binding.<sup>274</sup>

The position of international law in relation to the Constitution was explained by the Constitutional Court as follows:

[a] distinction must be drawn between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and obligations, on the other. The purpose of section 39(1)(b), as its heading, 'Interpretation of Bill of Rights', makes clear, is to provide courts with an interpretive tool when interpreting the Bill of Rights. It does not purport to incorporate international agreements into our Constitution. Nor can it be used to create constitutional obligations that do not exist in our Constitution.<sup>275</sup>

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<sup>271</sup> Sections 231(4) and 232 of the Constitution; *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 62.

<sup>272</sup> Sections 231(4) and 232 of the Constitution; *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 62.

<sup>273</sup> Section 231(4) and 232 of the Constitution; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 108.

<sup>274</sup> Sections 231(4) and 232 of the Constitution, read with section 2 of the Constitution.

<sup>275</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 108.

The overriding principle, then, is that the Constitution itself remains supreme and is the final arbiter against which law and conduct must be measured.<sup>276</sup> In the following paragraphs, the constitutional rights for persons with disabilities relevant for this thesis will be discussed in interpreted. Particular attention will be paid to the content of each right and how these rights must be 'respected, protected, promoted and fulfilled'<sup>277</sup> by the state.

### 3.2.4 The limitation clause

Section 36 of the Constitution does not guarantee any additional rights, but it does ensure that existing rights are not unduly compromised. The text of section 36 reads as follows:

[t]he rights in the Bill of Rights may be limited only in terms of a 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...<sup>278</sup>

This means that the rights in the Bill of Rights are not absolute and can be limited, but only when very specific criteria are met. These criteria are that the limitation must be found in a law of general application (that is, national legislation, common law or customary law)<sup>279</sup> and that it is reasonable and justifiable in an open and democratic society based on a number of fundamental rights and freedoms.<sup>280</sup> In other words, any limitation of a right in the Bill of Rights must be connected to a legitimate purpose.<sup>281</sup> The form of the limitation must contribute clearly towards the achievement

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<sup>276</sup> See 3.1 above.

<sup>277</sup> Section 7(2) of the Constitution of the Republic of South Africa, 1996.

<sup>278</sup> Section 36(1) of the Constitution.

<sup>279</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) paras 44 and 136.

<sup>280</sup> Section 36(1) of the Constitution.

<sup>281</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 163.

of that purpose or the limitation will not be considered reasonable and justifiable in an open and democratic society based on the values named within the section.<sup>282</sup> A number of rights that are of particular importance for persons with disabilities may therefore be limited in terms of section 36, provided that such limitation is reasonable and justifiable. It must be borne in mind that few rights in the Bill of Rights are absolute,<sup>283</sup> and may therefore be limited, despite the fact that they are aimed at the protection or advancement of a marginalised group.

### 3.3 VERTICAL AND HORIZONTAL APPLICATION OF THE CONSTITUTION

The aforementioned discussion has presupposed the application of the selected rights between individuals and the state. This is called 'vertical application' of the Constitution. However, the application of rights in the Bill of Rights takes two forms, which are vertical application and horizontal application.

Vertical application of the Constitution refers to the application of constitutional rights between individuals and the state.<sup>284</sup> In other words, the vertical application of the Constitution is evident in those rights where there is a responsibility on the state to promote and fulfil the rights concerned.<sup>285</sup> On the other hand, the Constitution also applies horizontally, that is, between individuals.<sup>286</sup> Each person has the duty to

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<sup>282</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

<sup>283</sup> In *S v Makwanyane* 1995 (3) SA 391 (CC) para 84. According to the Constitutional Court in this case, the only absolute rights in the Constitution are the rights to life and dignity.

<sup>284</sup> Bill of Rights Compendium *Private law and the Bill of Rights: A threshold issue of 'horizontal' para 3A. Section 8(1) provides that the legislature, the executive and all organs of state are bound by the Bill of Rights. See also section 7(2) of the Constitution.*

<sup>285</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 41.

<sup>286</sup> Bill of Rights Compendium *Vertical versus horizontal application of the Bill of Rights* para 6A. Section 8(2) of the Constitution provides that natural and juristic persons may also be bound by the Bill of Rights in light of the nature of the right.

respect the constitutional rights of other individuals. It is therefore possible for an individual to infringe another individual's constitutional rights and for the harmed party to take action against the individual responsible. Considering that one of the stated aims of this thesis is to determine whether South Africa is compliant with the United Nations Convention on the Rights of Persons with Disabilities in certain respects,<sup>287</sup> it is vertical application of the Constitution that is most important. However, certain aspects of the investigation into compliance consist of studying the relationships between certain individuals, particularly in the contexts of employment relationships and retirement funds.<sup>288</sup> For that reason, the operation of horizontal application of the Constitution will now be discussed further.

As mentioned above, constitutional rights are applicable to certain relationships between persons. 'Persons' in this sense includes both natural and juristic persons.<sup>289</sup> In other words, where two natural persons are in a relationship in terms of which one must respect the constitutional rights of the other, that relationship is an example of horizontal application of the Constitution. Similarly, a relationship between a natural person and a juristic person in terms of which one person must respect the constitutional rights of the other is an example of horizontal application.

In the context of persons with disabilities, a vertical relationship exists in respect of each of the rights discussed in this chapter. The state is therefore obliged to respect,

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<sup>287</sup> See 1.3 above.

<sup>288</sup> See 5.2.2 below.

<sup>289</sup> Section 8(2) of the Constitution provides that 'a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable...'

protect, promote and fulfil the rights of persons with disabilities to equality, access to social security, dignity, privacy and just administrative action. Other natural and juristic persons are also required to respect, protect, promote and fulfil these rights of persons with disabilities.

An example of vertical application of the right of access to social security for persons with disabilities is the potential receipt of the disability grant, paid by the state to qualifying persons. An example of the horizontal application of the right of access to social security is the relationship which exists between a person with a disability and his retirement fund. The decision to pay benefits to a person with a disability is made on behalf of a juristic person. In the event that benefits are unfairly denied, a person with a disability may then approach a court for remedies based on the horizontal infringement of their constitutionally guaranteed right of access to social security.<sup>290</sup>

### 3.4 THE RIGHT TO EQUALITY

Equality is one of the most important values underlying the Constitution.<sup>291</sup> The principles embodied in section 9 provide one indicator against which new or proposed legislation are measured. Section 9 provides that 'everyone is equal before the law and deserves the equal protection of the law'.<sup>292</sup> Section 9(3) further provides that no person may be discriminated against based on their 'race, gender, sex, pregnancy,

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<sup>290</sup> See *Joubert v National Commissioner for the South African Police Services & another* [2006] JOL 17095 (T).

<sup>291</sup> Equality is confirmed as a fundamental value underlying the Bill of Rights in section 7(1) of the Constitution; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 22.

<sup>292</sup> Section 9(1) of the Constitution of the Republic of South Africa, 1996.

marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth'.<sup>293</sup>

The purpose of section 9 is manifold.<sup>294</sup> The legal system that existed in South Africa during apartheid was based on inequality and the deprivation of rights of groups of persons.<sup>295</sup> The systematic discrimination against these groups of persons has resulted in significant levels of inequality within South African society.<sup>296</sup> Section 9 has therefore been included in the Constitution to address the consequences of the discrimination experienced by marginalised groups in the past, and allows for special measures to be taken to avoid the repetition of such discrimination today.<sup>297</sup>

Section 9 is thus aimed rather at ensuring that 'everyone' is guaranteed a standard of treatment that is not influenced by any of his / her unalterable personal characteristics.<sup>298</sup> In addition, section 9 protects those persons who, as a result of their particular unalterable personal characteristic, are considered vulnerable to abuse by other members of society.<sup>299</sup> In other words, section 9 aims to protect not only society as a whole, but in particular those members of society who are deemed to

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<sup>293</sup> My emphasis. Section 9(3) of the Constitution of the Republic of South Africa.

<sup>294</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41.

<sup>295</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 211.

<sup>296</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40.

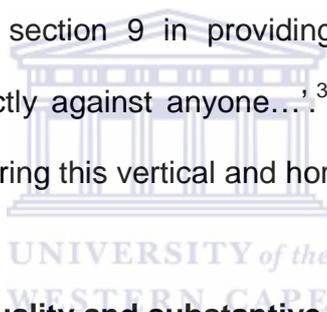
<sup>297</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 211.

<sup>298</sup> *Harksen v Lane* 1998 (1) SA 300 (CC) para 47.

<sup>299</sup> *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 32.

require extra protection in order to ensure that their basic rights are not limited or infringed unjustifiably.<sup>300</sup>

Disability is expressly included in section 9(3), and a person may therefore not be discriminated against as a result of their disability. The drafters of the Constitution clearly recognised that persons with disabilities require legislative and other measures in order to permit them to participate fully and equally in society. Importantly, the drafters recognise and affirm the vertical application of section 9 in providing that ‘the state may not unfairly discriminate directly or indirectly against anyone...’<sup>301</sup> as well as the horizontal application of section 9 in providing that ‘no person may unfairly discriminate directly or indirectly against anyone...’<sup>302</sup> The discussion of section 9 below must be read whilst bearing this vertical and horizontal application in mind.



### **3.4.1 Formal equality and substantive equality**

Section 9(1) provides that everyone is entitled to the equal benefit and protection of the law. This involves two processes: the elimination of existing laws that are discriminatory so that all persons are afforded the same rights (known as formal equality)<sup>303</sup> and ensuring that the rights of persons are equally respected, protected,

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<sup>300</sup> The prevention of the unjustifiable limitation of rights is part of the greater purpose of the Bill of Rights, including section 9. See Govender K ‘Power and constraints in the Constitution of the Republic of South Africa 1996’ (2013) 13 *AHRLJ* 84.

<sup>301</sup> Section 9(3) of the Constitution.

<sup>302</sup> Section 9(4) of the Constitution.

<sup>303</sup> Scales AC ‘The emergence of feminist jurisprudence: an essay’ in Smith P (ed) *Feminist Jurisprudence* (1993).

promoted and fulfilled (known as substantive equality).<sup>304</sup> Essentially then, there are two elements to the realisation of the right to equality for all persons. In addition, section 9(2) of the Constitution provides that the state may take legislative and other measures designed to protect or advance persons who have previously experienced discrimination. This section not only affirms existing rights, but requires that positive steps be taken to promote and realise the right to equality of all. This provision has been described as requiring 'restitutionary equality'.<sup>305</sup>

#### 3.4.1.1 Formal equality

Formal equality is based on the notion that in order for persons to be equal they must be treated exactly the same, irrespective of individual circumstances.<sup>306</sup> Formal equality is essentially a theory of equality which does not take into consideration the fact that certain situations may demand that persons be treated differently in order for them to have equality in practice and that treatment which is the same may have an indirect discriminatory impact.<sup>307</sup> The theory of formal equality is based on the notion that inequality can be addressed by merely recognising that all individuals have the same rights.<sup>308</sup> Prima facie, formal equality already exists in South Africa. Considering the scope and content of section 9 of the Constitution and the repeal of numerous discriminatory statutes,<sup>309</sup> all persons are guaranteed the same rights. That is not to say, however, that all persons currently enjoy the full realisation of these

<sup>304</sup> Albertyn C 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253.

<sup>305</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 60.

<sup>306</sup> De Waal J & I Currie *Bill of Rights Handbook* 6ed (2013) 213.

<sup>307</sup> *Botha and Another v Mthiyane and Another* 2002 (4) BCLR 389 (W) para 67.

<sup>308</sup> *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) para 28.

<sup>309</sup> Examples of discriminatory legislation that were repealed include the Group Areas Act 41 of 1950; the Prohibition of Mixed Marriages Act 55 of 1949 and the Separate Representation of Voters Act 46 of 1951.

rights.<sup>310</sup> According to the Constitutional Court, the purpose of section 9 is to realise substantive and transformative equality.<sup>311</sup> Formal equality on its own, then, is not sufficient for the realisation of the right to equality envisaged in section 9.<sup>312</sup>

The major criticism of formal equality is that it fails to take into consideration the individual social and economic differences between persons and merely requires that all persons possess the same rights.<sup>313</sup> That is not to say that there is no place for formal equality in the new South African legal landscape. In fact, formal equality is in a sense a pre-condition for substantive equality. Since substantive equality involves the equal enjoyment of rights by persons, it is logical that the rights must first be guaranteed to everyone before they can be equally enjoyed by everyone.

#### 3.4.1.2 Substantive equality

The South African Constitution is widely regarded as a transformative Constitution.<sup>314</sup> Transformative constitutionalism requires that a 'process of transformation' be implemented to realise an equal society.<sup>315</sup> This includes taking legislative and other measures to ensure that equality is realised for those persons who have experienced

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<sup>310</sup> This evidenced by the fact that persons with disabilities in South Africa still experience relative poverty, and that education and employment levels are lower for persons with disabilities than persons who do not have a disability. See 2.3 above.

<sup>311</sup> Ngwena C 'Developing juridical method for overcoming status subordination in disablism: the place of transformative epistemologies' (2014) *SAJHR* 279.

<sup>312</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W) para 13.

<sup>313</sup> *Pillay v KwaZulu-Natal MEC of Education and Others* 2006 (10) BCLR 1237 (N) para 41; Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 213.

<sup>314</sup> Klare K & Davis DM 'Transformative Constitutionalism and the common and customary law' (2010) 26(3) *SAJHR* 404; Roux T 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.

<sup>315</sup> *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 74.

unfair discrimination historically.<sup>316</sup> The Constitutional Court recognises that formal equality on its own cannot ensure the fulfilment of the right to equality.<sup>317</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court states that

[i]t is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.<sup>318</sup>

The purpose of substantive equality is to eradicate entrenched inequalities between groups and persons.<sup>319</sup> Substantive equality does not operate on the theory that all persons require precisely the same treatment in order for them to be *de facto* equals.<sup>320</sup> Where formal equality virtually ignores differences in individual circumstances, substantive equality take cognisance of them and addresses them in order to ensure equality between individuals.<sup>321</sup> In order to illustrate the difference between the theories of formal equality and substantive equality, an example may be used. Suppose that two individuals live in an informal settlement. One has a physical disability, and the other does not. Formal equality merely requires that each one have access to public transport. The person with a disability may have more difficulty making use of the public transport than the other person. Formal equality does not

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<sup>316</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others Bengwenyama-ye-Maswati Royal Council Intervening* 2011 (3) BCLR 229 (CC) para 3.

<sup>317</sup> Ngwena C 'Developing juridical method for overcoming status subordination in disablism: the place of transformative epistemologies' (2014) *SAJHR* 278; C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253.

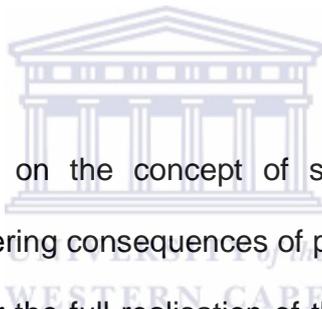
<sup>318</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 60.

<sup>319</sup> *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) para 22; *Botha and another v Mthiyane and another* 2002 (4) BCLR 389 (W) para 67.

<sup>320</sup> De Waal J & I Currie *Bill of Rights Handbook* 6ed (2013) 213.

<sup>321</sup> *Minister of Finance and another v Van Heerden* 2004 (11) BCLR 1125 (CC) para 43; *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) para 136; Loenen T 'The Equality Clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 405.

require any more intervention than the fact that both have access to public transport. However, should the theory of substantive equality be applied to the situation, the person with a disability would be given the additional support he requires to have meaningful use of the public transport, for example the provision of a wheelchair. With formal equality, both persons were given the same benefit in theory but because individual circumstances were ignored one of them was still effectively denied the enjoyment of the benefit. Substantive equality, then, provides one person with what appears to be unjustified different treatment but the outcome of such different treatment merely ensures that he is now able to enjoy the right given, on the same basis as his peer.<sup>322</sup>



Restitutionary equality builds on the concept of substantive equality and further requires the remedying of lingering consequences of past discrimination through active and positive measures.<sup>323</sup> For the full realisation of the right to equality for everyone, these three theories of equality must be used in conjunction with each other. Persons with disabilities, in particular, are still suffering discrimination in many spheres despite the guaranteed right to equality in the Constitution.<sup>324</sup>

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<sup>322</sup> *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) para 62. See example discussed in De Waal J & I Currie *Bill of Rights Handbook* 5ed (2005) 233.

<sup>323</sup> *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) para 32; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 60.

<sup>324</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 2. See Chapter 2 above for examples of the continuing marginalisation of persons with disabilities and Chapter 5 below for specific examples of discrimination.

### 3.4.1.3 Social equality and economic equality

It should also be noted that two different types of equality have been recognised in South Africa,<sup>325</sup> based on the context in which the equality is debated. One is social equality and the other is economic equality. In the following paragraphs, the importance of these types of equality will be discussed as they relate to substantive equality.

As mentioned above, substantive equality is based on the notion that persons should be allowed equal opportunities and this is not limited to identical treatment. The notion of substantive equality thus aims at 'inclusion and transformation'.<sup>326</sup> For persons with disabilities, inclusion addresses social inequality and transformation addresses economic inequality.<sup>327</sup> Inclusion consists of ensuring participation of members of a marginalised group in society on an equal basis with others, which is one of the primary goals of the Constitution and of the disability rights movement.<sup>328</sup> Social equality therefore requires that persons with disabilities be given the means and opportunity to participate fully in society. According to the Constitutional Court in *Bato Star Fishing v Minister of Environmental Affairs and Tourism*, transformation is generally concerned with achieving equality amongst all members of society. For persons with disabilities then, it is submitted that transformation is concerned with equitable representation of persons with disabilities in environments ordinarily

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<sup>325</sup> The distinction between these types of equality is made by Albertyn in 'Substantive equality and transformation in South Africa' (2007) 23 SAJHR.

<sup>326</sup> Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23 SAJHR 255.

<sup>327</sup> Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23 SAJHR 256. See also Fraser N *Justice Interruptus* (1997) 23.

<sup>328</sup> See 1.7.4.3 above for a brief explanation of the emergence of the disability rights movement in South Africa.

dominated by non-disabled persons, including the workplace.<sup>329</sup> The exclusion of persons with disabilities from the workplace impacts the economic equality of persons with disabilities relative to their non-disabled peers. This exclusion of persons with disabilities from social and economic equality further provides evidence that the inherent right to equality of persons with disabilities in South Africa is not yet being recognised<sup>330</sup> and that persons with disabilities are being denied full participation in society at present.<sup>331</sup> This recognition of the social identity and values of persons with disabilities can only occur once both meaningful inclusion and transformation<sup>332</sup> have been given priority in both the social and economic contexts of persons with disabilities in South Africa.

### 3.4.2 Test for unfair discrimination

As mentioned above, section 9(3) of Constitution provides that no person may be discriminated against on the basis of disability.<sup>333</sup> The question of how to determine whether a person has been unfairly discriminated against was addressed by the Constitutional Court in 1997. In *Harksen v Lane*,<sup>334</sup> the Constitutional Court established a general test for determining whether unfair discrimination has taken

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<sup>329</sup> *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 74.

<sup>330</sup> Fraser N *Justice Interruptus* (1997) 56.

<sup>331</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 13.

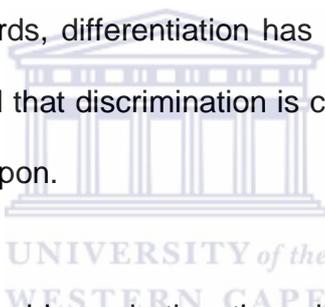
<sup>332</sup> Albertyn C & Goldblatt B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; Pieterse M 'What do we Mean when we Talk about Transformative Constitutionalism?' (2005) 20 *SAPL* 155.

<sup>333</sup> See 3.4 above.

<sup>334</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC).

place.<sup>335</sup> The test consists of a number of stages and each of these stages leads to a finding of whether a persons' right to equality has been infringed or not.

The first stage of the test involved a determination as to whether differentiation between categories of people has taken place.<sup>336</sup> If this question is answered in the affirmative,<sup>337</sup> the next stage of the test involves a dual investigation. The first aspect is whether the proven differentiation amounts to discrimination and the next is whether this discrimination (if proven) is unfair.<sup>338</sup> The onus of proof falls upon the person alleging the existence of unfair discrimination to prove such discrimination as per the *Harksen* test.<sup>339</sup> Provided that all three of the aforementioned questions are answered in the affirmative (in other words, differentiation has been proven; that differentiation amounts to discrimination; and that discrimination is considered unfair), the final stage of the test may be embarked upon.



The final stage of the test considers whether there is any justification for any of the types of treatment established in the first three steps.<sup>340</sup> In other words, the final stage determines whether the actor has any valid reason for differentiating between persons, discriminating against persons or unfairly discriminating against persons.

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<sup>335</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 53. While this is the general test for unfair discrimination, there are a number of statutory tests for unfair discrimination as well. For example, Chapter 2 of the Employment Equity Act 55 of 1998 provides information on the nature of unfair discrimination in the workplace. This is discussed in Chapter 5 of this thesis.

<sup>336</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 53. See also Motala Z & Ramaphosa C *Constitutional Law: Analysis and cases* (2002) 265 for a discussion of the test.

<sup>337</sup> Providing proof that differentiation has taken place and that it is based on a prohibited ground of discrimination has been notoriously difficult in practice, particularly in the employment context. See Garbers C 'The prohibition of discrimination in employment' in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 23.

<sup>338</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 216.

<sup>339</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 60.

<sup>340</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 50.

In order that the test is fully understood, the meanings of certain terms must be explained. In the first stage of enquiry, the investigator must determine whether differentiation has taken place. Differentiation itself is not prohibited by law;<sup>341</sup> however, the differentiation must be linked rationally to a justifiable purpose. This leads to the second stage of the inquiry, which establishes whether discrimination has taken place. Differentiation amounts to discrimination if it is not linked to a legitimate government objective.<sup>342</sup> Discrimination will be considered unfair if it is proved that the discrimination is not rationally connected to a legitimate government purpose.<sup>343</sup> Discrimination on a number of grounds is considered automatically unfair,<sup>344</sup> and this second section of stage two does not need to take place if the discrimination is prima facie on these recognised prohibited grounds. Grounds that render discrimination automatically unfair include race, gender, sex, birth, nationality and disability. When automatically unfair discrimination has been proven prima facie, the onus of proof shifts from the alleged to the actor.<sup>345</sup> When a person with a disability alleges that he or she has been discriminated against, that discrimination is considered automatically unfair until the actor can prove that the alleged discrimination either did not occur or that it was based on something other than the complainant's disability.<sup>346</sup>

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<sup>341</sup> De Waal J & Currie I *Bill of Rights Handbook* 6ed (2013) 216.

<sup>342</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 42; See also *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC) para 10.

<sup>343</sup> *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 50; See also *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC) para 11.

<sup>344</sup> As listed in section 9(3) of the Constitution, section 6 of the Employment Equity Act 55 of 1998 and sections 7 – 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>345</sup> Olivier MP et al *Social Security: general principles* (1999) 508.

<sup>346</sup> Garbers C 'The prohibition of discrimination in employment' in Malherbe K & Sloth-Nielsen J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 33.

While the test established in *Harksen* remains the general test for unfair discrimination, a different test was used by the Constitutional Court in *Khosa and Others v Minister of Social Development and Others*.<sup>347</sup> In the latter case, the Court recognises that differentiation itself does not necessarily amount to unfair discrimination.<sup>348</sup> In the event that the differentiation is based on a listed ground, it is presumed to be unfair. The Court referred to a former judgment which provides that the impact of a particular action must be examined and

[t]o determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.<sup>349</sup>

Factors to consider in determining whether the impact of the discrimination is unfair include former experiences of disadvantage; the purpose of the discrimination and the ground upon which the discrimination is based.<sup>350</sup>

### 3.4.3 National legislation enacted to prevent unfair discrimination

Section 9(4) of the Constitution provides that national legislation must be enacted to prevent or prohibit unfair discrimination. Such legislation has been enacted in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Employment Equity Act 55 Of 1998. The provisions of these acts that are relevant for this thesis are discussed in Chapter 5.

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<sup>347</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC).

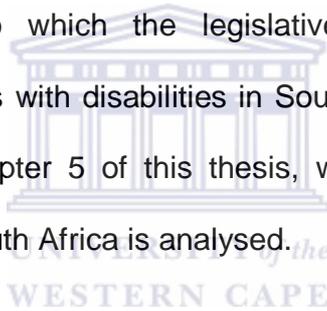
<sup>348</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 53.

<sup>349</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 43.

<sup>350</sup> These factors are quoted by the court in *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 72 from *Harksen v Lane* 1997 (11) BCLR 1489 para 51.

### **3.4.4 Substantive equality for persons with disabilities**

Formal and substantive equality for persons with disabilities is addressed through the guarantee of rights in the Constitution<sup>351</sup> as well as other legislation, such as the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>352</sup> In the specific context of employment, the Employment Equity Act<sup>353</sup> also provides for the substantive equality of persons with disabilities. The Constitution and these other laws all require that positive measures be taken to ensure that equality for persons with disabilities is respected, protected, promoted and fulfilled.<sup>354</sup> Laws which unfairly discriminate against persons with disabilities have thus been eradicated to some extent. An evaluation of the extent to which the legislative provisions prohibiting unfair discrimination against persons with disabilities in South Africa provide for substantive equality is conducted in Chapter 5 of this thesis, wherein legislation applicable to persons with disabilities in South Africa is analysed.



### **3.5 THE RIGHT OF ACCESS TO SOCIAL SECURITY**

In terms of section 27 of the Constitution, '[e]veryone has the right to have access to ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.<sup>355</sup> The Constitution does not guarantee a direct right to social security, but rather a right of access to social security. In the following paragraphs, the meaning of the right to have access to social security in the

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<sup>351</sup> Section 9 of the Constitution.

<sup>352</sup> Section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>353</sup> Employment Equity Act 55 of 1998.

<sup>354</sup> As per section 7(2) of the Constitution.

<sup>355</sup> Section 27(1)(c) Constitution of the Republic of South Africa, 1996.

South African context is discussed. Thereafter, the manner in which the right is to be respected, protected, promoted and fulfilled<sup>356</sup> is discussed with particular reference to constitutional jurisprudence dealing with the right of access to social security.

It is a well-established fact that adequate social security measures are used as a tool to allow persons a measure of financial security and support in the event of certain contingencies.<sup>357</sup> Historically, disability has been one of the 'core' contingencies, which is covered by social security schemes.<sup>358</sup> The purpose of social security in providing for this contingency is to compensate for income lost or reduced as a result of disability.<sup>359</sup> In many cases, social security is the only source of income for a person with a disability who is unable to work (either because of their disability or because there are no viable employment opportunities available).<sup>360</sup> In the following paragraphs, the general right of access to social security in South Africa is discussed and the specific application of the right to persons with disabilities is also included.

### **3.5.1 'Everyone' has the right of 'access to' social security**

The right of access to social security is guaranteed for 'everyone' in terms of section 27(1)(c) of the Constitution. In the case of *Khosa and Others v Minister of Social*

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<sup>356</sup> See 3.1 above for an explanation of the meaning of the duty to 'respect, protect, promote and fulfil' the rights in the Bill of Rights.

<sup>357</sup> Berghman J *Basic Concepts of Social Security* (1991) 9; Dreze JP & Sen AK *Social security in developing countries* (1991) 15.

<sup>358</sup> Employment injury, sickness and invalidity were all included in the International Labour Organisation Social Security (Minimum Standards) Convention 102 of 1952 as contingencies for which financial support must be provided.

<sup>359</sup> ILO Social Security (Minimum Standards) Convention 102 of 1952.

<sup>360</sup> Olivier M (ed) et al *Social Security: A legal analysis* 313.

*Development and Others*,<sup>361</sup> the Constitutional Court considered the meaning of the word 'everyone' for purposes of the right of access to social security. The word 'everyone' was considered in light of the founding values of the Constitution, specifically equality.<sup>362</sup> The Court found that the restriction of the word 'everyone' to citizens did not comply with the guarantee of constitutional rights to 'all people in our country' as per section 7(1) of the Bill of Rights.<sup>363</sup> Consequently, it was held that 'everyone' refers both to permanent residents of South Africa as well as citizens.<sup>364</sup> Following the reasoning of the court in this case, it is implicit in the use of the word 'everyone' that the right of access to social security is guaranteed to persons with disabilities who are permanent residents or citizens of South Africa.

As mentioned above, the Constitution guarantees a right to access to social security, which includes social assistance. This does not mean that everyone may insist upon the receipt of social security benefits.<sup>365</sup> The meaning of the section is rather that everyone is guaranteed the opportunity to apply for social assistance, and may be awarded social assistance benefits based on whether they meet certain qualifying criteria.<sup>366</sup> In addition to providing opportunities for persons to apply for social security,

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<sup>361</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>362</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 42.

<sup>363</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 47.

<sup>364</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 49.

<sup>365</sup> *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) para 39; see also Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (LL.D thesis submitted at the University of the Western Cape, 2009) 66.

<sup>366</sup> One of these qualifying criteria is implicit in section 27(1)(c) of the Constitution, namely the inability to provide for their own maintenance needs. The other criteria are discussed with specific reference to social assistance for persons with disabilities in Chapter 5 below.

the state also has an obligation not to interfere in the exercising of an existing right.<sup>367</sup> This is a general principle of the exercise of socio-economic rights,<sup>368</sup> and applies to the right of access to social security.

In the context of persons with disabilities, the right of access to social security means that persons with disabilities should be provided with opportunities to access both social assistance and social insurance. In other words, persons with disabilities must be given opportunities to apply for the disability grant payable by the state as well as opportunities to become members of social insurance schemes (which are inevitably linked to employment).<sup>369</sup> In addition, persons with disabilities who are already fully realising their right of access to social security are not to be deprived of the benefits they are already receiving. Persons with disabilities in receipt of the disability grant may thus not be unlawfully deprived of the grant and persons with disabilities who are members of social insurance schemes may not be unlawfully deprived of the benefits of such membership. It must, however, be borne in mind that all rights in the Bill of Rights may be limited in terms of section 36 of the Constitution.<sup>370</sup> This includes the right of access to social security.

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<sup>367</sup> This is implicit in the obligation of the state to 'respect, protect, promote and fulfil' the rights in the Bill of Rights – see 3.2 above; see also Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (LL.D thesis submitted at the University of the Western Cape, 2009) 67.

<sup>368</sup> Iles K 'Limiting socio-economic rights; Beyond the internal limitations clauses' (2004) 20 *SAJHR* 459.

<sup>369</sup> See 1.7.2 above.

<sup>370</sup> See 3.2.4 above.

### 3.5.2 Realising the right of access to social security

Besides the fact that the right of access to social security is not a absolute one and may be limited in terms of section 36, the right is further qualified by the manner in which it should be implemented. According to section 27(2), '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. The terms 'reasonable measures', 'available resources' and 'progressive realisation' have specific meanings for the right of access to social security, which are discussed in the paragraphs hereafter. *Government of the Republic of South Africa and others v Grootboom and others*<sup>371</sup> is the landmark case in relation to these terms. The case dealt with the right of access to housing,<sup>372</sup> which is couched in terms identical to those used in section 27 of the Constitution in relation to the right of access to social security.<sup>373</sup> Since the same internal limitations apply to the right to have access to housing,<sup>374</sup> the explanation of these terms applies to the right of access to social security as well, and will be the basis of the explanation of these concepts.

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<sup>371</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

<sup>372</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 1.

<sup>373</sup> Section 26 provides that 'everyone has the right to have access to adequate housing'.

<sup>374</sup> Section 26(2) provides that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right.' This is identical to section 27(2), which applies to the right of access to social security.

### 3.5.2.1 Reasonable measures

Section 27(2) provides that the state must take 'reasonable legislative and other measures' in order to fulfil the rights in section 27, which includes social security.<sup>375</sup> According to the Constitutional Court, in evaluating measures taken by the state to ensure access to social security the court is not concerned with the availability of 'more desirable' measures, but rather with whether the measures taken were 'reasonable'.<sup>376</sup> The court recognises that many different measures may be considered reasonable in any set of circumstances and, as long as the particular measures chosen can be considered reasonable in the circumstances, this requirement is met.<sup>377</sup> There is thus no established test for reasonableness, and the reasonableness of a series of measures must be considered on a case by case basis. In determining whether a particular programme is reasonable, the programme must be considered in the context of the problem it aims to address, and the programme itself must be balanced and flexible.<sup>378</sup>

In addition to the requirement of reasonableness, section 27(2) provides that the measures implemented are not restricted to legislative measures.<sup>379</sup> The court in *Grootboom* found that legislative measures on their own are not likely to meet the

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<sup>375</sup> Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996.

<sup>376</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 41.

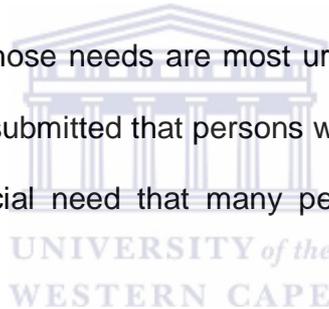
<sup>377</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 41.

<sup>378</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 43.

<sup>379</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 42.

requirements of section 27. Any legislative measures implemented in order to fulfil the right of access to social security 'will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive'.<sup>380</sup> The court is entitled to question the choice of measures by the state and the state may be asked to provide reasons why it has chosen the specific measures.<sup>381</sup>

The overarching principle with this requirement, then, is whether the chosen means of addressing the problem in question is reasonable. The existence of 'more desirable' alternatives is not strictly relevant, as long as the chosen measure can be considered reasonable in the circumstances.<sup>382</sup> The Court also emphasises the importance of realising rights for persons whose needs are most urgent, and whose ability to enjoy rights is most in peril.<sup>383</sup> It is submitted that persons with disabilities are such persons, considering the urgent financial need that many persons with disabilities in South Africa experience.<sup>384</sup>



### 3.5.2.2 Progressive realisation

The term 'progressive realisation' has been defined by the UN Committee on Economic and Social Rights, and this definition has been met with some criticism.<sup>385</sup> According to the Committee on Economic and Social Rights, progressive realisation is creates an obligation on a state 'to move as effectively

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<sup>380</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 42. See also Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 74.

<sup>381</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 575.

<sup>382</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 41.

<sup>383</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 44.

<sup>384</sup> See 2.3 above.

<sup>385</sup> Barbeton C "'Progressive realization" of socio-economic rights' (1999) 2(2) *ESR Review* 2.

and expeditiously as possible to securing its ultimate goal'.<sup>386</sup> The criticism of this explanation of progressive realisation in the context of socio-economic rights is that it pre-supposes that the mechanisms in place to realise socio-economic rights are efficient and target those persons most in need of such realisation.<sup>387</sup>

It was previously said that the right of access to social security cannot be enforced (or realised) upon demand,<sup>388</sup> and this is echoed in the requirement that the right be progressively realised. According to the Constitutional Court in the *Grootboom* case,

the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.<sup>389</sup>

It is submitted that progressive realisation of social security is not limited to increasing the level of coverage and benefits. This view is supported by the statement that achieving progressive realisation of socio-economic rights consists of more than increasing the finances allocated to the realisation of a particular right.<sup>390</sup> The focus should rather be on how many people have actually seen the benefit attached to a particular socio-economic right.<sup>391</sup> Progressive realisation of social security may also be implemented by increasing access to social

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<sup>386</sup> Barbeton C "'Progressive realization" of socio-economic rights' (1999) 2(2) *ESR Review* 2.

<sup>387</sup> Barbeton C "'Progressive realization" of socio-economic rights' (1999) 2(2) *ESR Review* 3.

<sup>388</sup> *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) para 39.

<sup>389</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 45.

<sup>390</sup> Barbeton C "'Progressive realization" of socio-economic rights' (1999) 2(2) *ESR Review* 4.

<sup>391</sup> Barbeton C "'Progressive realization" of socio-economic rights' (1999) 2(2) *ESR Review* 4.

insurance by way of increasing access to employment.<sup>392</sup> While this may involve some expenditure (for example through skills training and development) it is submitted that economic concerns should not hamper the progressive realisation of the right of access to social security, particularly considering that progressive realisation is limited within section 27(2) which requires progressive realisation 'within available resources'.<sup>393</sup>

The cancellation of existing disability grants has been the subject of a number of judgments in South Africa.<sup>394</sup> These judgments involve not only the progressive realisation right of access to social security,<sup>395</sup> but also the right to just administrative action, which is discussed later in this chapter.<sup>396</sup> In *Mdodisa v Minister of the Executive Council for Social Development, Eastern Cape*,<sup>397</sup> the applicant was in receipt of a disability grant for a period of approximately two years. She discovered, without prior notification, that her grant had been cancelled with immediate effect in May 2007. She then approached the High Court for a review of the apparent decision to cancel her grant. The respondent averred that the grant had been awarded on a

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<sup>392</sup> The requirement of progressive realisation has been described as obligation to develop a plan to give effect to the relevant fundamental right over time – see Olivier M (ed) *et al Social Security: A Legal Analysis* (2003) 75.

<sup>393</sup> See 3.5.2.3 below.

<sup>394</sup> For example, *Nomala v Permanent Secretary, Department of Welfare and Another* 2001 (8) BCLR 844 (E); *Ngxuzo v The Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E); *MEC for Social Development v Mdodisa* [2011] 2 All SA 150 (SCA); *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (7) BCLR 728 (E).

<sup>395</sup> This is because the cancellation of a social grant that already exists is not a progressive step, but rather a regressive one (unless it is justified in terms of section 36 of the Constitution- see 3.2.4 above). Since the right of access to social security requires progressive realisation, an evaluation of whether the right is being progressively realised must include any measures which hamper such progressive realisation.

<sup>396</sup> See 3.8 below.

<sup>397</sup> *Mdodisa v Minister of the Executive Council for Social Development, Eastern Cape* Case 1033/07 (unreported).

temporary basis, and would consequently have expired after 12 months of the initial grant payment. The court found that the cancellation of the grant was invalid and ordered the reinstatement thereof, as well as the payment of all grant payments which were in arrears.<sup>398</sup> Similar findings were made in a number of cases, and the principle underlying these judgments is that the 'unlawful deprivation' of rights by the state is not justifiable.<sup>399</sup>

In essence, the progressive realisation of the right of access to social security requires that more persons be given opportunities to receive benefits from or to become members of social security schemes over time. It is submitted that increased access to social security for persons with disabilities should take the form of increased access to social insurance, in addition to increased access to social assistance. Increasing the number of persons receiving social assistance will inevitably lead to greater expenditure by the state in this area, which raises the question of 'available resources'.<sup>400</sup> However, increased access to social insurance would not require this greatly increased expenditure, since social insurance is largely funded by the members of the funds and their employers.<sup>401</sup> As mentioned previously, employment is a pre-condition for social insurance in most cases.<sup>402</sup> Increasing access to social insurance therefore requires

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<sup>398</sup> *Mdodisa v Minister of the Executive Council for Social Development, Eastern Cape Case 1033/07* (unreported) para 15.

<sup>399</sup> *Ngxuza and Others v The Permanent Secretary, Department of Welfare, Eastern Cape 2001 (2) SA 609 (E)*.

<sup>400</sup> See 3.5.2.3 below. Barbeton suggests that the progressive realisation of rights requires increased funding which is not sustainable in the long term. See Barbeton C 'Paper tigers? Resources for Socio-Economic Rights' (1999) *ESR Review* 2(1) 1.

<sup>401</sup> For an explanation of the funding of social insurance in South Africa, see Chapter 5 generally.

<sup>402</sup> See 1.7.2 above.

increasing access to employment for persons with disabilities. This is already a state imperative, as is evident from the provisions of the Employment Equity Act.<sup>403</sup> While the Employment Equity Act is primarily aimed at 'promoting the constitutional right of equality'<sup>404</sup> it also plays a significant role in promoting access to social insurance for persons with disabilities. One of the objectives of the Employment Equity Act<sup>405</sup> is to implement section 9(2) of the Constitution, which provides that 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' Accordingly, the Employment Equity Act requires that persons with disabilities be given preference in certain circumstances when applying for employment.<sup>406</sup> Since employment and social insurance are inextricably linked, the importance of the Employment Equity Act in increasing access to employment and consequently to social insurance cannot be denied.<sup>407</sup> It is submitted that progressive realisation of social insurance can be achieved in conjunction with increased access to employment for persons with disabilities.

### 3.5.2.3 Available resources

Section 27(2) provides that the right of access to social security must be progressively realised within the resources available to the state. The problem of funding social

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<sup>403</sup> Employment Equity Act 55 of 1998.

<sup>404</sup> Preamble to the Employment Equity Act 55 of 1998.

<sup>405</sup> Preamble to the Employment Equity Act 55 of 1998.

<sup>406</sup> See 5.3.2 below for a discussion of the provisions of the Employment Equity Act.

<sup>407</sup> The Employment Equity Act as a means of realising access to social security for persons with disabilities is discussed in detail in Chapter 5 below.

security measures is ever-present and this has been taken into consideration by the drafters of the Constitution.<sup>408</sup> Essentially, the right of access to social security is limited by the stipulation that the state is only compelled to provide social security benefits where it has the resources to do so.

In terms of section 36 of the Constitution, rights may be limited in certain circumstances.<sup>409</sup> This means that the state may only limit a right in the Bill of Rights when it is reasonable and justifiable to do so.<sup>410</sup> However, if the state is able to prove that it does not have the resources to meet its social security obligations, the resultant (internal) limitation of social security rights is justifiable and the state does not have to prove that the limitation is reasonable and justifiable in terms of section 36.<sup>411</sup> This does not mean that the state can entirely avoid its social security obligations merely by asserting that it does not possess adequate resources.<sup>412</sup> In the *Khosa* case, the court stated that the limitation of the right of access to social security may be justifiable on the basis of a lack of resources, but the manner in which the existing resources are allocated must be consistent with the Bill of Rights in general.<sup>413</sup> In other words, the criteria used to determine which persons receive benefits must comply with the principles underlying the Bill of Rights.

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<sup>408</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 94.

<sup>409</sup> See 3.2.4 above.

<sup>410</sup> See 3.2.4 above.

<sup>411</sup> Olivier M et al (eds) *Introduction to Social Security* (2004) 147.

<sup>412</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 76.

<sup>413</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 45.

### 3.5.2.4 Summary

The right of access to social security is imperative in realising a number of the foundational values of the Constitution, specifically the right to dignity and the right to equality. In short, the right of access to social security for persons with disabilities entails that more persons with disabilities be given access to social security schemes over time. This increased access refers mainly to increasing the coverage of social security measures, although the level of benefit received is also relevant.<sup>414</sup> This access may be limited by the resources available to the state and by the limitations clause in the Bill of Rights.

### 3.6 THE RIGHT TO DIGNITY

The Constitution entrenches the right of 'everyone' to have their 'inherent dignity' 'respected and protected'.<sup>415</sup> Much has been written on the right to dignity generally<sup>416</sup> and a wealth of case law provides content to the right to dignity in South African law.<sup>417</sup> Before any specific aspects of the right to dignity for persons with disabilities can be discussed, the general right to dignity must be explained.

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<sup>414</sup> The levels of benefit paid by the various social security schemes are discussed in Chapter 5 below.

<sup>415</sup> Section 10 of the Constitution.

<sup>416</sup> For example, Liebenberg S 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1; Ackermann L 'Equality and the South African Constitution: The Role of Dignity' (2000) 60 *Heidelberg Journal of International Law* and Woolman S 'Dignity' in Woolman S & Bishop M (eds) *et al Constitutional Law of South Africa* 2ed (2008).

<sup>417</sup> For example, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); *Dendy v University of Witwatersrand, Johannesburg and Others* 2005 (9) BCLR 901 (W); *The Citizen 1978 (Pty) Ltd & others v McBride (Johnstone & others as amicus curiae)* [2011] JOL 27088 (CC) and *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC).

The right to dignity has historically been linked to other rights in the Bill of Rights, in the sense that a life lived in dignity is a life that includes rights and freedoms that have been incorporated into the Constitution.<sup>418</sup> The right to dignity has been described as a 'foundational value' of our Constitution.<sup>419</sup>

According to Currie and De Waal,

[t]hough we can be certain of the pivotal importance of human dignity in the Constitution, we can be less certain of the meaning of the concept.<sup>420</sup>

The right to human dignity has been described by the Constitutional Court as one of the two most important human rights.<sup>421</sup> The Constitutional Court has, instead of providing a definition of human dignity, attributed to the term 'human dignity' a 'wide meaning which covers a number of different values'.<sup>422</sup> In addition, the Constitutional Court has, on a number of occasions, alluded to what is required by persons in respecting the right to human dignity. Ackermann J states that we must 'acknowledge the value and worth of all individuals as members of society'.<sup>423</sup> Further, the right to human dignity is considered the source of many other fundamental rights.<sup>424</sup>

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<sup>418</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 144; Chaskalson A 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 204.

<sup>419</sup> Chaskalson A 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 196.

<sup>420</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 251.

<sup>421</sup> The other is the right to life, as per *S v Makwanyane* 1995 (3) SA 391 (CC) paras 144 and 328.

<sup>422</sup> *Le Roux v Dey* 2011 (3) SA 274 (CC) para 138.

<sup>423</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 29.

<sup>424</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 251. Human dignity is considered the source of the rights to freedom, physical integrity and equality.

The right to dignity was discussed at length in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.<sup>425</sup> The facts in this case dealt with the right of same-sex couples to marry and, on these facts, the right to dignity was described by the Constitutional Court as the link between the rights to equality and privacy. The court also distinguished between dignity as an element of the right to equality and the right to dignity itself. Essentially, dignity as an element of the right to equality is related to the (adverse) impact of a particular measure on a person because they are a member of a particular group of persons, whereas an infringement of the right to dignity is linked to the denial of full participation in society as a result of race, sex, religion or disability.<sup>426</sup> The right to dignity as per section 10 of the Constitution encompasses a large number of situations in which dignity may be infringed (as opposed to the more limited concept of dignity as part of the right to equality). 'Dignity' in terms of section 10 is therefore a wider concept than 'dignity' as an element of the right to equality.<sup>427</sup> The Constitutional Court has emphasised that the rights to dignity and equality are interlinked, particularly in the context of the right of access to social security.<sup>428</sup>

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<sup>425</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

<sup>426</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 42.

<sup>427</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 42.

<sup>428</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC) para 52.

It may be said that the right to dignity is of particular importance for persons with disabilities since this group has been marginalised historically,<sup>429</sup> and has experienced clear violations of the right to dignity.<sup>430</sup> For purposes of this thesis, it is necessary to identify rights in the chosen context which contribute to the realisation of the right to dignity for persons with disabilities.

In the context of persons with disabilities, it is a widely recognised fact that a life lived in poverty is not a dignified one.<sup>431</sup> It is also an established fact that persons with disabilities are more likely to experience poverty and more likely to experience more severe poverty.<sup>432</sup> This means that the levels of poverty amongst persons with disabilities must be addressed in order to fulfil the right to dignity of persons with disabilities. One of the mechanisms which may be used to combat poverty is the provision of adequate social security.<sup>433</sup>

Considering the historical marginalisation of persons with disabilities and the importance of the right to dignity in the context of the South African legal framework, every effort must be made to ensure that the right to dignity of persons with disabilities is respected, protected, promoted and fulfilled.

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<sup>429</sup> Olivier M et al (eds) *Social Security Law: General Principles* (1999) 193.

<sup>430</sup> WHO World Report on Disability 3.

<sup>431</sup> Taylor Committee Report (2002) 40.

<sup>432</sup> See the discussion on the link between disability and poverty in Chapter 2 above.

<sup>433</sup> Olivier M (ed) et al *Social Security: A legal analysis* (2003) 81.

### 3.7 THE RIGHT TO PRIVACY

The importance of the right to privacy for persons with disabilities may not be evident upon a first reading of section 14 of the Constitution, which provides that

Everyone has the right to privacy, which includes the right not to have-

- (1) their person or home searched;
- (2) their property searched;
- (3) their possessions seized; or
- (4) the privacy of their communications infringed.

Once again, the language of the section provides that 'everyone' is entitled to the right to privacy. This includes persons with disabilities. The relevance of section 14 for persons with disabilities becomes apparent in the provision of information as part of an application for social assistance based on disability.<sup>434</sup> The application process is discussed below, but it must be noted that certain sensitive information must be provided by a person making application for the disability grant. Information related to the medical history of the applicant must accompany the application, as well as information related to earning capacity and assets.<sup>435</sup>

The scope of the right to privacy was discussed at length in *Bernstein and Others v Bester NO and Others*,<sup>436</sup> where it was emphasised that the right to privacy is strongly linked with a sense of identity. Essentially, the right to privacy applies only to the

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<sup>434</sup> The use of private information provided for a number of purposes beyond that which is relevant for this thesis is dealt with in the Protection of Personal Information Act 4 of 2013.

<sup>435</sup> Regulations to the Social Assistance Act 13 of 2004 relating to the application for, and payment of, social assistance and the requirements or conditions in respect of eligibility for social assistance (Reg 898 in GG 31356).

<sup>436</sup> *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).

'inner sanctum' of each person.<sup>437</sup> As soon as the persons' activities occur in the public domain, the right to privacy no longer applies to those activities.<sup>438</sup>

In relation to persons with disabilities, this means that a person with a disability has the right to privacy in their relationships and private households.<sup>439</sup> As mentioned previously, the disclosure of certain information is required when making an application for the disability grant. An applicant cannot refuse to provide such information, since the outcome of their application would be compromised by such refusal. However, the information provided by the applicant must be treated in such a manner that does not infringe the right of the applicant to privacy.<sup>440</sup> The right to privacy remains important, since the life of a person with a disability will include some participation of persons not in familial relationships with them<sup>441</sup> (such as medical professionals) and such persons may not act in a manner which violates the privacy of a person with a disability.

Essentially, the right to privacy of persons with disabilities may have to be limited through necessity but every effort should be made not to disregard the right entirely.<sup>442</sup> The right to individual autonomy should also be borne in mind here, since the final

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<sup>437</sup> *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at para 67.

<sup>438</sup> Currie I and De Waal J *Bill of Rights Handbook* 6ed (2013) 298.

<sup>439</sup> This is a general aspect of the right to privacy, which is afforded to 'everyone' including persons with disabilities. For a discussion on the right to privacy in relation to activities within relationships and households, see *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 91.

<sup>440</sup> *Dutch Reformed Church Vergesig v Sooknunan* 2012 (6) SA 201 (GSJ) para 78.

<sup>441</sup> According to Burchell, a balance between the right to privacy and 'the involvement of others in our lives' must be struck – Burchell J 'The legal protection of privacy in South Africa: A transplantable hybrid' (2009) 13(1) *Electronic Journal of Comparative Law* 2.

<sup>442</sup> Office of the President *White Paper on Integrated National Disability Strategy* (1997) 50.

decision about any medical treatment and living situation rests with the person themselves.<sup>443</sup>

### 3.8 THE RIGHT TO JUST ADMINISTRATIVE ACTION

The right to just administrative action is guaranteed in section 33 of the Constitution. Section 33(1) provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'. In other words, any action which qualifies as administrative action must meet the requirements of lawfulness, reasonableness and procedural fairness.

The inclusion of section 33 is a result of historical abuse of power by former governments of South Africa.<sup>444</sup> According to the common law power of judicial review, courts are able to review the exercise of governmental discretion, although this power was limited by legislation during apartheid.<sup>445</sup> In addition to the restriction of the common law power of judicial review, 'apartheid-era courts were often unenthusiastic about exercising their remaining powers of review to constrain administrative power'.<sup>446</sup> Section 33 is thus an attempt to protect and preserve the principle of judicial review of administrative power.

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<sup>443</sup> The right to dignity incorporates the right to physical and bodily integrity, which allows a person to exercise full control over his person.

<sup>444</sup> Hoexter C 'Just administrative action' in Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 645.

<sup>445</sup> The historical background of judicial review in apartheid is discussed fully in a number of books, such as Abel R *Politics By Other Means: Law in the struggle against apartheid 1980 – 1994* (1995).

<sup>446</sup> Hoexter C 'Just administrative action' in Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 645.

Section 33 provides that administrative action must be lawful, reasonable and procedurally fair. This means that any form of administrative action that does not meet these requirements is not just and may therefore be set aside.<sup>447</sup> The requirement of lawfulness ensures that persons taking decisions do so in a manner that is permitted by law.<sup>448</sup> In other words, a person making a decision must be authorised to make such a decision and must obey the law in making that decision. In addition, the principle of lawfulness provides that the power of the court to review administrative action may not be removed by legislation.<sup>449</sup>

Administrative action must also be reasonable. In order for a decision to be reasonable, it must be both rational and proportional.<sup>450</sup> According to the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa*, the process used to reach the decision and the decision itself must be rational.<sup>451</sup> Proportionality requires that a balance be struck between the benefits and adverse effects of a particular action<sup>452</sup> and that the possibility of using less restrictive means to reach the required result.<sup>453</sup> The third requirement, that of procedural fairness, is one which must be determined on a case by case basis.<sup>454</sup> According to the Constitutional

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<sup>447</sup> Section 8 of the Promotion of Administrative Justice Act 3 of 2000.

<sup>448</sup> Hoexter C 'Just administrative action' in Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 666.

<sup>449</sup> Hoexter C *Administrative Law in South Africa* (2007) 224.

<sup>450</sup> Hoexter C *Administrative Law in South Africa* (2007) 340. See also *Medirite (Pty) Ltd v South African Pharmacy Council and Another* (50309/12) [2013] ZAGPPHC 448 para 25.

<sup>451</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 34.

<sup>452</sup> Hoexter C 'Unreasonableness in the Administrative Justice Act' in Lange C & Wessels J (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Act* (2004) 159.

<sup>453</sup> Hoexter C *Administrative Law in South Africa* (2007) 311.

<sup>454</sup> *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39.

Court, it is not possible to lay down a set of firm rules to be followed in each case.<sup>455</sup> However, procedural fairness requires at least that all parties affected by a decision be permitted to make representations and that the person making the decision is impartial.<sup>456</sup> This is in accordance with the common law concept of natural justice. In the event that a decision does not satisfy all these requirements, the decision may be considered invalid and may be set aside.

Further, section 33(3) provides that national legislation must be enacted to ensure the right to just administrative action, and such legislation was enacted in 2000 in the form of the Promotion of Administrative Justice Act (PAJA).<sup>457</sup> PAJA provides for the principles underlying just administrative action and aims to ensure transparency in situations where public power is exercised. Since the national legislation required by section 33(3) has been enacted, the basis of administrative justice rights is now legislation.<sup>458</sup> In other words, persons alleging that their right to administrative justice has been infringed must first rely on PAJA in seeking a remedy for the alleged infringement.<sup>459</sup>

For purposes of this thesis, administrative justice is relevant in the context of both social assistance and social insurance for persons with disabilities. It is well-

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<sup>455</sup> *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41.

<sup>456</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 131.

<sup>457</sup> Promotion of Administrative Justice Act 3 of 2000. The relevance of this act is discussed at 5.2.1 below.

<sup>458</sup> Hoexter C 'Just administrative action' in Currie I & De Waal J Bill of Rights Handbook 6ed (2013) 646.

<sup>459</sup> Hoexter C 'Just administrative action' in Currie I & De Waal J Bill of Rights Handbook 6ed (2013) 646.

established that the decision to approve or reject an application for the disability grant qualifies as administrative action and therefore is subject to judicial review.<sup>460</sup> In relation to social insurance, the decision to pay benefits from an occupational retirement fund in the event of disability before retirement is also subject to judicial review.<sup>461</sup> Both of these situations are covered by PAJA as well as claims made in terms of the Compensation for Occupational Injuries and Diseases Act<sup>462</sup> and the Unemployment Insurance Act,<sup>463</sup> as will be discussed at a later stage.

### 3.9 CONCLUSION

Since the Constitution is the means by which fundamental rights are guaranteed in South Africa, it would be remiss to ignore the implications of the guarantee of these rights for persons with disabilities. Indeed, any work which aims to review and suggest improvements to existing legislation must consider the Constitution and use it as a yardstick against which all legislation is measured. It is important to note that all the rights considered above are interrelated. To effectively implement one is to contribute to achieving another – this is illustrated in the discussion on the right to dignity.<sup>464</sup> One can therefore not separate the rights and examine them in a vacuum, and the rights must be considered in the context of the Constitution as a whole.<sup>465</sup>

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<sup>460</sup> *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para 1.

<sup>461</sup> *Joubert v National Commissioner for the South African Police Services & another* [2006] JOL 17095 (T) 9.

<sup>462</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>463</sup> Unemployment Insurance Act 63 of 2001.

<sup>464</sup> See paragraph 3.6 above.

<sup>465</sup> See 3.2 above.

The importance of the abovementioned rights for persons with disabilities is evident from the individual discussions thereof. Considering this importance and the historical emphasis on protecting marginalised groups within South Africa,<sup>466</sup> it is interesting that no detailed legislation exists which provides comprehensive guidance on how the rights of persons with disabilities are best respected, protected, promoted and fulfilled.

In terms of section 39 of the Constitution, international law must be considered when developing any of the rights in the Bill of Rights.<sup>467</sup> By examining the current legislative protection for persons with disabilities in light of the rights to dignity and equality, this thesis is attempting to provide for ways in which both the dignity and equality of persons with disabilities can better be respected, protected, promoted and fulfilled by fully realising the right of access to social security. For this reason and since the international law related to persons with disabilities has undergone substantial revision in the last decade,<sup>468</sup> it is imperative to consider those developments and compare and contrast the South African approach to the rights of persons with disabilities with such international law. In the next chapter, therefore, relevant international law will be discussed and analysed in order to determine how the state should go about providing greater protection for specific rights of persons with disabilities and how to ensure the full enjoyment of those rights. Once the international law obligations have been established, the current relevant South African legislation will be evaluated to determine whether it is in compliance with the

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<sup>466</sup> Such as the introduction of legislation aimed at respecting, protecting, promoting and fulfilling the rights of children (Children's Act 38 of 2005) and older persons (Older Persons Act 13 of 2006).

<sup>467</sup> See 3.2.3 above.

<sup>468</sup> Specifically, the introduction of the United Nations Convention on the Rights of Persons with Disabilities 2006.

international law.<sup>469</sup> Throughout these investigations, it must be borne in mind that the final arbiter in the question of the extent of protection for the rights of persons with disabilities is the Constitution<sup>470</sup> and any suggestions for improvements to existing legislation will be done in light of this fact.



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<sup>469</sup>See Chapter 5 below.

<sup>470</sup>See paragraph 3.1 above.

## CHAPTER 4

### THE RIGHT TO SOCIAL SECURITY IN INTERNATIONAL LAW

#### 4.1 INTRODUCTION

The role played by international law in guaranteeing the right to social security<sup>471</sup> is an important one.<sup>472</sup> For a number of years, international bodies have aimed to introduce minimum standards of social security which aim to provide for income security for persons in need.<sup>473</sup> In addition, international law has recently turned to the issue of the rights of persons with disabilities, which includes the right to social security. The United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD),<sup>474</sup> was adopted by the General Assembly in December 2006 and entered into force on 3 May 2008. This was the culmination of years of disability rights development globally and the Convention on the Rights of Persons with Disabilities has become the primary international law instrument in realising the rights of persons with disabilities.

The bodies which aim to regulate human rights on an international level adopt documents that provide for certain basic human rights standards and are applicable in various jurisdictions around the world. Two such bodies are the United Nations and the African Union. South Africa is a member of both of these bodies and is also bound by numerous instruments issued by these organisations.<sup>475</sup> According to the South African Constitution, international law must be taken into consideration when

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<sup>471</sup> See 1.1 above.

<sup>472</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 621.

<sup>473</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 623.

<sup>474</sup> United Nations Convention on the Rights of Persons with Disabilities A/61/611 (2006).

<sup>475</sup> Provided that South Africa signs and ratifies the particular instrument.

interpreting the Bill of Rights.<sup>476</sup> In addition, South African courts are obliged to prefer interpretations of legislation that are consistent with international law.<sup>477</sup> The importance of international law in the South African context is thus irrefutable.

For purposes of this thesis, it is important to identify those instruments dealing with social protection and disability related issues that are binding on South Africa through ratification as well as those instruments that have not been signed and ratified but have attained the status of customary international law.

Chapter 4 identifies and examines selected international instruments in order to determine the scope and content of the duty on the state to take measures to 'respect, protect, promote and fulfil'<sup>478</sup> the rights of persons with disabilities. The most important of these instruments for the purposes of this thesis is the CRPD, particularly Article 28 which is analysed in detail in order to establish the implications for States Parties that have signed and ratified the CRPD. The discussion of the CRPD will follow the discussion of the other relevant international instruments, since these instruments inform and contribute to the interpretation and analysis of the CRPD.

Regional instruments applicable to South Africa are also discussed in this chapter. Specifically, instruments applicable to members of the African Union<sup>479</sup> will be examined in order to establish the extent to which they create additional obligations on South Africa regarding the rights of persons with disabilities.

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<sup>476</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>477</sup> Section 233 of the Constitution.

<sup>478</sup> Section 7 of the Constitution of the Republic of South Africa, 1996.

<sup>479</sup> It must be noted that South Africa is not only a member of the African Union, but also of the Southern African Development Community (SADC). However, the SADC does not deal extensively with the right to social security for persons with disabilities and its resolutions have therefore been excluded from this thesis.

The purpose of this investigation into the international law related to the rights of persons with disabilities is to establish the extent of the right of persons with disabilities to social protection in general, and social security in particular. Once the extent of the right has been established, the corresponding duties of the state to realise the right can be determined.

#### **4.1.1 Binding nature of international instruments**

As mentioned previously,<sup>480</sup> not all international law agreements have been signed and ratified by South Africa. However, this does not mean that these agreements are not binding as a result of the lack of signature and ratification. In terms of section 39(1) of the Constitution, international law must be taken into consideration by any 'court, tribunal or forum' when interpreting any right in the Bill of Rights.<sup>481</sup> This section does not make a distinction between instruments that have been ratified and those that have not been ratified. The effect of ratified international instruments on the courts of South Africa is clear: once an instrument has been ratified, the instrument must be considered when interpreting national legislation.<sup>482</sup> An example of such an international instrument is the CRPD.

International instruments that have not been ratified, however, are not irrelevant for purposes of the South African legislature and judiciary. Any such instruments have strong persuasive value and must still be considered when drafting legislation,

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<sup>480</sup> See 1.4 above.

<sup>481</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996. See also 3.2.3 above.

<sup>482</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

delivering judgments or compiling policy documents.<sup>483</sup> In addition, certain international law instruments have attained the status of customary international law. In South Africa, 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.<sup>484</sup> The instruments chosen for discussion in this thesis are therefore those instruments that develop the right of persons with disabilities to social security, regardless of their status as customary international law or ratified international instruments.

In the remainder of this chapter, the most relevant international law instruments relating to the right of persons with disabilities to social security are discussed.<sup>485</sup> The focus of the discussion is the scope and content of Article 28 of the CRPD, so as to address the primary research question of this thesis.<sup>486</sup>

## 4.2 UNITED NATIONS INSTRUMENTS AND SOCIAL SECURITY

A number of the United Nations (UN) human rights instruments deal with the issue of the rights of persons with disabilities. Most importantly, the UN General Assembly has adopted the CRPD and Optional Protocol<sup>487</sup> which deals specifically with the rights of persons with disabilities. In the following paragraphs the CRPD is examined, after an overview of relevant human rights instruments that are not necessarily disability-

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<sup>483</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 35. See also *Government of the Republic of South Africa and others v Grootboom and others* 1995 (3) SA 391 (CC) para 26.

<sup>484</sup> Section 232 of the Constitution of the Republic of South Africa.

<sup>485</sup> It is recognised that many international instruments deal with disability or social security. However, these instruments provide only piecemeal information on each and are therefore not the focus of this thesis. Examples of instruments that have been excluded from this thesis are the World Programme of Action concerning Disabled Persons adopted by General Assembly resolution 37/52 in 1982 and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by General Assembly resolution 48/96 in 1993.

<sup>486</sup> See 1.2 above.

<sup>487</sup> United Nations Convention on the Rights of Persons with Disabilities A/61/611 of 2006.

specific, but provide for and address the general right to non-discrimination, the negative impact of poverty and need for social protection for all persons, including persons with disabilities.<sup>488</sup> It is necessary to research these issues in order to answer both the primary and ancillary research questions of this thesis related to the right of access to social security.

#### 4.2.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly on 10 December 1948.<sup>489</sup> The UDHR endeavours to ensure the inherent dignity and equality of every person and also recognises that every person possesses certain inalienable rights.<sup>490</sup> While the UDHR does not have the same status as a treaty of the UN and would otherwise not be binding on Member States of the UN, the UDHR has (at least in part) attained the status of customary international law.<sup>491</sup> Many of the principles contained in the UDHR have found their way into other international law instruments.<sup>492</sup> Since much of the UDHR is considered customary international law, it is important for purposes of interpretation of South African legislation.<sup>493</sup>

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<sup>488</sup> An overview of the more prominent human rights instruments is also included as an introduction to those instruments dealing with the rights of persons with disabilities.

<sup>489</sup> The Universal Declaration of Human Rights 'History of the document' <http://www.un.org/en/documents/udhr/history.shtml> (accessed on 5/03/2015).

<sup>490</sup> Preamble to the UDHR. Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948. See 4.1.1 above regarding the status of certain human rights instruments in South Africa.

<sup>491</sup> Von Bernstorff J 'The changing fortunes of the Universal Declaration of Human Rights: Genesis and symbolic dimensions of the turn to rights in international law' (2008) 19(5) *European Journal of International Law* 913; Dimitrijevic V 'Customary law as an instrument for the protection of human rights' (2006) *ISPI Working Paper Series WP – 7 9*; Dugard J *International Law: A South African Perspective* (2005) 315; Hannum H 'The status of the Universal Declaration of Human Rights in National and International Law' (1996) 23 *Georgia Journal of International and Comparative Law* 289.

<sup>492</sup> For example, the African Charter on Human and Peoples' Rights incorporates the UDHR in its preamble. See 4.5.1 below.

<sup>493</sup> Section 232 of the Constitution of the Republic of South Africa.

Article 1 of the UDHR provides for the rights of equality and dignity of each human being and Article 2 provides that:

[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

It is important to note that Article 2 makes no express reference to persons with disabilities. However, the Article does make provision for a distinction other than the ones listed therein by mentioning the phrase 'other status'. It has been inferred that the open-ended phrase 'other status' includes disability.<sup>494</sup> Considering the spirit of inclusiveness of the UDHR,<sup>495</sup> Article 2 should be interpreted in a manner which includes persons with disabilities in the scope thereof.

Articles 22 and 25 of the UDHR deal with social security and an adequate standard of living. Article 22 provides that

[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

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<sup>494</sup> This approach has been followed by the UN Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with Disabilities* E/1995/22 - see 4.2.2 below.

<sup>495</sup> Preamble to the UDHR.

In addition, Article 25 guarantees the right to an adequate standard of living, which includes the right to security in the event of certain contingencies such as unemployment and disability.<sup>496</sup>

The inclusion of Article 22 in the UDHR signals the recognition by the international community that social security forms part of the bundle of rights which comprise fundamental human rights.<sup>497</sup> The wording of Article 22 indicates that the primary responsibility for the provision of social security rests with individual states.<sup>498</sup>

While Article 22 does not mention persons with disabilities expressly, it is implicit in the use of the word 'everyone' that persons with disabilities are afforded social security rights. Article 25(1) expressly mentions disability as one of the instances in which a person is entitled to income security. It is therefore indisputable that the UDHR establishes the right of persons with disabilities to social security measures. Article 25 guarantees that each person is entitled to an 'adequate' standard of living. This concept is the cornerstone of many social security systems around the world, and is repeated in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>499</sup> The conjunction of the right to an adequate standard of living with the right to social security in the UDHR (and later instruments<sup>500</sup>) is indicative of the

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<sup>496</sup>Article 25(1) of the UDHR.

<sup>497</sup>Kulke U 'The present and future role of ILO standards in realizing the right to social security' (2007) 60 *International Social Security Review* 120.

<sup>498</sup>Article 22 provides that the realisation of economic, social and cultural rights must be done 'through national effort' and 'in accordance with the organization and resources of each State'.

<sup>499</sup>International Covenant on Economic, Social and Cultural Rights A/6316(1966). This concept is also repeated in the CRPD as having particular significance for persons with disabilities. See 4.2.2 and 4.4 below.

<sup>500</sup>Such as the ICESCR and the CRPD.

recognition that social security is an important tool in realising a better standard of living for persons in impoverished circumstances.

Considering the nature of the UDHR, that is, a far-reaching international instrument that serves as a guideline for the universal protection of human rights, the lack of a definition of disability is unsurprising. Since the UDHR is an inclusive instrument, designed to extend the protection of the fundamental human rights to as many persons as possible,<sup>501</sup> it does not name specific groups of persons entitled to the protection it affords, on the understanding and/or intention that instruments would be introduced in the future that would deal with specific aspects of human rights. In addition, the UDHR was drafted at a time when any definition of disability would be considered unduly restrictive by today's standards.<sup>502</sup>

#### **4.2.2 International Covenant on Economic, Social and Cultural Rights**

After an extensive period of negotiation, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was concluded in 1966 by the UN General Assembly and entered into force in 1976.<sup>503</sup> Approximately 165 countries have signed and ratified the ICESCR, which means that these countries are compelled to

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<sup>501</sup> Preamble to the UDHR.

<sup>502</sup> This is evidenced by the use of language related to disability at the time, as well as the believed causes and effects of disability. See Barnes C 'The social model of disability: Valuable or Irrelevant?' in Watson N, Roulstone A & Thomas C *The Routledge Handbook of Disability Studies* (2012) 12. See generally Hanks JR & Hanks LM 'The physically handicapped in certain non-occidental societies' (1948) 4(4) *Journal of Social Issues* 11-20.

<sup>503</sup> United Nations Human Rights 'International Covenant on Economic, Social and Cultural Rights' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> (accessed on 5/03/2015); Bruce A & Quinn G et al 'Disability and Social Justice: the International Covenant on Economic, Social and Cultural Rights' in Quinn G & Degener T et al *Human Rights and Disability: The Current Use and Future Potential of United Nations human rights instruments in the context of disability* (2002) 53.

implement its provisions into their domestic law.<sup>504</sup> However, a lack of ratification does not mean that countries that have only signed the ICESCR are unaffected by the provisions therein. Countries that have signed and not ratified the ICESCR are obliged to refrain from enacting laws which conflict with the provisions of the ICESCR.<sup>505</sup>

#### 4.2.2.1 Interpretation of social security rights in terms of the ICESCR

The ICESCR provides that each individual should be permitted to benefit from the exercise of his rights, which include economic, social, cultural, civil and political rights.<sup>506</sup> Accordingly, the ICESCR makes provision for the realisation of numerous rights of the aforementioned categories, including labour rights,<sup>507</sup> the right to social security<sup>508</sup> and the right to an adequate standard of living.<sup>509</sup>



<sup>504</sup> Section 27(2) of the ICESCR provides that each state ratifying the ICESCR becomes bound by its provisions three months after such ratification. UN Committee on Economic, Social and Cultural Rights 'Status of the International Covenant on Economic, Social and Cultural Rights' available at <http://www.ohchr.org/Documents/Issues/HRIndicators/DataICESCR.xls> (accessed on 14/05/2014).

<sup>505</sup> Article 18 of the Vienna Convention on the Law of Treaties, 1969. The implementation of the provisions of the ICESCR by states that have ratified it is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). This committee is also responsible for releasing general comments on the ICESCR in order to clarify the obligations created by its various provisions. The CESCR was established in 1985 in terms of the Economic and Social Council Resolution 1985/17. Puta-Chekwe C & Flood N 'From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights' in Merali I & Oosterveld V *Giving meaning to Economic, Social and Cultural Rights* (2001) 47. CESCR was first invited to prepare general comments in 1987 – Economic and Social Council Resolution 1987/5. See also Tomuschat C *Human Rights: Between Idealism and Realism* (2008) 190.

<sup>506</sup> Preamble to the International Covenant on Economic, Social and Cultural Rights 1966.

<sup>507</sup> For example, Article 6(1) provides that '[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'.

<sup>508</sup> Article 9 of the ICESCR provides that '[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'.

<sup>509</sup> Article 11 of the ICESCR provides that '[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

The ICESCR does not make express provision for persons with disabilities, although the protection of the rights of persons with disabilities can be inferred by not only the language of the ICESCR,<sup>510</sup> but also from the spirit and objects of the ICESCR.<sup>511</sup> Since the ICESCR applies equally to all persons, persons with disabilities are protected by the ICESCR by implication. The link between the ICESCR and persons with disabilities has been recognised<sup>512</sup> and, as such, the ICESCR is an instrument which must be considered when discussing the rights of persons with disabilities.

The ICESCR prohibits discrimination on a number of grounds, and adds the phrase 'other status' when setting out the grounds upon which discrimination is prohibited.<sup>513</sup> Discrimination on the ground of disability would be prohibited (by inference) in terms of the ICESCR and would be categorised as an 'other status'.<sup>514</sup> The ICESCR compels States Parties thereto to guarantee that 'the rights enunciated in the present Covenant will be exercised without discrimination of any kind'.<sup>515</sup> By inference, then, all persons with disabilities are entitled to exercise and enforce the rights identified in the ICESCR.<sup>516</sup> It has been suggested that the lack of express mention of persons with

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<sup>510</sup> General Comment 19 E/C.12/GC/19 (2008). Item 23 makes special mention of the coverage of 'individuals belonging to the most disadvantaged and marginalized groups'.

<sup>511</sup> General Comment 5 E/C.12/GC/19 (2008) Item 5.

<sup>512</sup> This is evident from General Comment 5. See also Bruce A & Quinn G et al 'Disability and Social Justice: the International Covenant on Economic, Social and Cultural Rights' in Quinn G & Degener T et al *Human Rights and Disability: The Current Use and Future Potential of United Nations human rights instruments in the context of disability* (2002) 84.

<sup>513</sup> Article 2(2) of the ICESCR provides that '[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*' (my emphasis).

<sup>514</sup> Degener T & Koster-Dreese Y *Human Rights and Disabled Persons* (1995) 2.

<sup>515</sup> Article 2(2) of the ICESCR.

<sup>516</sup> General Comment 5 Item 5.

disabilities in the ICESCR is a result of a 'lack of awareness' that such express provisions were necessary at the time.<sup>517</sup>

The ICESCR follows the approach of the UDHR in that 'everyone' has the right to social security.<sup>518</sup> However, the ICESCR provides that social security includes social insurance, which term was purposefully excluded from the UDHR.<sup>519</sup> In addition to the right to social security, the ICESCR guarantees the right to an adequate standard of living for everyone.<sup>520</sup> The right to social security and the right to an adequate standard of living is of particular importance for persons with disabilities, since persons with disabilities often face increased poverty and social exclusion.<sup>521</sup> In the following paragraphs, the interdependence of the right to social security and the right to an adequate standard of living is discussed.

The parameters of a social security system based on the ICESCR are set out in General Comment 19 of the CESCR. According to the CESCR, social security systems should be established in terms of the domestic law of each country and the administration thereof should be the responsibility of a public authority.<sup>522</sup> The CESCR also confirms that there are nine contingencies for which any social security system should provide coverage.<sup>523</sup> One of these contingencies is disability. In fact, although 'everyone' has the right to social security, the CESCR provides that States Parties should give special attention to 'those individuals and groups who traditionally face

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<sup>517</sup> CESCR General Comment 5 Item 6.

<sup>518</sup> Article 9 of the ICESCR.

<sup>519</sup> Morsink J *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999) 200.

<sup>520</sup> Article 11 of the ICESCR.

<sup>521</sup> See 2.2.2 above.

<sup>522</sup> General Comment 19 Part II.

<sup>523</sup> General Comment 19 Item 2.

difficulties in exercising this right' such as persons with disabilities.<sup>524</sup> Therefore, the CESCR has specifically included persons with disabilities within the scope of the ICESCR.

General Comment 19 provides for basic principles which must be present in any social security system. These principles are the availability (or existence) of a social security system to begin with; coverage of persons affected by the various contingencies mentioned above; adequacy of benefits in both the level of benefits and the duration for which they are provided; accessibility of benefits; and the use of social security measures to realise other rights within the ICESCR.<sup>525</sup> Social security benefits intended for persons with disabilities are required to comply with these basic principles.

Article 11 of the ICESCR provides that everyone is entitled to an adequate standard of living. While the right to social security creates the entitlement to adequate income support, the right to an adequate standard of living goes further by guaranteeing access to 'adequate food, clothing and housing and the continuous improvement of living conditions'.<sup>526</sup> The right to an adequate standard of living therefore complements the right to social security by requiring Member States to 'take measures to combat poverty and social exclusion and providing supporting social services'.<sup>527</sup>

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<sup>524</sup> General Comment 19 Item 31.

<sup>525</sup> General Comment 19 Item 31.

<sup>526</sup> Article 11(1) of the ICESCR.

<sup>527</sup> General Comment 19 Item 28.

Although these two rights contained in the ICESCR are complementary, the one cannot substitute the other.<sup>528</sup>

It is not possible to specify what a universal adequate standard of living would be, but the CESCR has established certain guidelines in determining what would be an adequate standard of living in a particular scenario. Full respect should be paid to the principle of human dignity, as contained in the Preamble of the ICESCR, as well as the principle of non-discrimination<sup>529</sup> in determining what would constitute an adequate standard of living and adequate social security.<sup>530</sup>

Essentially, the CESCR provides that an adequate standard of living includes the provision of adequate housing, food and clothing. Social security measures must therefore permit persons in receipt thereof to 'acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.<sup>531</sup> This principle, along with the principles which must be present in any social security system, provide for guidelines for states in establishing their respective social security systems.

#### 4.2.2.2 The rights of persons with disabilities in terms of the ICESCR

From the aforementioned discussion, it is apparent that 'everyone' has a right to social security and an adequate standard of living, including persons with disabilities. In addition, persons with disabilities may have specific social security requirements which differ from the needs of other persons entitled to social security. For example, persons

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<sup>528</sup> General Comment 19 Item 28.

<sup>529</sup> Article 2(2) of ICESCR.

<sup>530</sup> General Comment 19 Item 22.

<sup>531</sup> General Comment 19 (item 59).

with disabilities may have a need to access rehabilitation therapy in order to manage the realities of their particular disability.<sup>532</sup> Social security for persons with disabilities therefore goes beyond the traditional notion of financial support and extends to support services required by the particular individual.

In terms of General Comment 19, social security benefits provided to persons with disabilities 'must be adequate in amount and duration'. This is confirmed by CESCR General Comment 5 on Persons with Disabilities which provides that persons with disabilities are entitled to adequate income support as per the rules of the social security system in that particular country.<sup>533</sup> The provision of adequate social security benefits to persons with disabilities contributes to an adequate standard of living as contained in Article 11 of the ICESCR.<sup>534</sup>

While the interdependence of the rights to social security and an adequate standard of living is considered of general importance,<sup>535</sup> this interdependence is of particular importance in the context of the rights of persons with disabilities. In other words, the provision of income support to persons with disabilities in lieu of other services and/or items is insufficient to guarantee that the quality of life of the person with a disability is of an acceptable standard. While the right to social security encompasses the satisfaction of basic material needs, the right to an adequate standard of living extends beyond the provision of basic items to include the provision of items necessary to allow persons with disabilities a maximum level of independence and exercising of

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<sup>532</sup> World Report on Disability (2011) 9.

<sup>533</sup> General Comment 5 Item 28.

<sup>534</sup> General Comment 19 Item 22. See 4.2.2 above.

<sup>535</sup> General comment 19 Item 28.

their rights. The right to an adequate standard of living therefore includes access to assistive devices, the right to adequate clothing and the right to accessible housing.<sup>536</sup>

The protection afforded to persons with disabilities in terms of the ICESCR therefore goes further than the provision of financial support traditionally associated with social security and resembles the notion of social protection put forward by later instruments.<sup>537</sup>

South Africa has signed the ICESCR,<sup>538</sup> and despite the non-ratification thereof by South Africa,<sup>539</sup> many concepts included in the ICESCR are recognised in South African legislation and the Constitution.<sup>540</sup> Furthermore, the ICESCR has often been considered by South African courts in delivering judgments that relate to the protection of fundamental rights.<sup>541</sup> Campaigns have been launched that argue for the ratification of the ICESCR<sup>542</sup> and, even though there have been moves toward ratification such ratification is still pending at the time of writing.<sup>543</sup>

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<sup>536</sup> General Comment 5 Item 33.

<sup>537</sup> For example, Item 29 of General Comment 5 provides that institutionalising persons with disabilities should be avoided unless absolutely necessary and that the need for social security measures will not be supplanted by the institutionalisation. Institutionalisation of persons with disabilities also has an impact on their Article 11 right to an adequate standard of living, which right is inextricably linked to the right to social security.

<sup>538</sup> Editorial 'Stakeholders unpack state obligations under the ICESCR' (2014) 15(1) *ESR Review* 13.

<sup>539</sup> Subsequent to the completion of this thesis, South Africa ratified the ICESCR. Since this thesis reflects the law as at 31 December 2014, the ratification of the ICESCR has not been taken into account for the purposes of this study.

<sup>540</sup> For example, the right of access to social security has been recognised in section 27 of the Constitution of the Republic of South Africa 1996 as well as the Social Assistance Act 13 of 2004.

<sup>541</sup> Olivier M et al (eds) *The extension of social security protection in South Africa* (2001)98. See, for example, *MEC for Education, KZN & others v Pillay* [2008] JOL 20810 (CC) and *City of Johannesburg v Rand Properties (Pty) Ltd and others* [2006] 2 All SA 240 (W).

<sup>542</sup> Community Law Centre ICESCR Booklet available at <http://communitylawcentre.org.za/search?SearchableText=ICESCR&path> (accessed on 27/04/2015).

<sup>543</sup> People to parliament 'Statements on ratification of ICESCR by South African government' available at <http://www.peopletoparliament.org.za/focus-areas/socio-economic-rights/resources/Statements%20on%20ratification%20of%20ICESCR%20by%20SA%20government.pdf/view?searchterm=government%20statements> (accessed on 15/05/2014).

### 4.3 INTERNATIONAL SOCIAL SECURITY STANDARDS

The International Labour Organisation (ILO) is an organ of the UN.<sup>544</sup> The objectives of the ILO are the promotion of the creation of decent work for each individual and the promotion of social justice and labour and human rights.<sup>545</sup> The ILO has the power to draft international standards which deal with specific aspects of human rights and the relationship between human rights and the labour market.<sup>546</sup> Importantly, the ILO sets minimum standards for the protection of labour rights and related issues, such as social security.<sup>547</sup> The ILO consequently adopts conventions and recommendations in the field of labour law and social security law. ILO conventions are binding on Member States, provided that the relevant convention has been signed and ratified by the particular country.<sup>548</sup> The ILO also issues recommendations, which do not have the same status as conventions and serve as mere guidelines on the issues they cover.<sup>549</sup>

Since the primary responsibility for ensuring adequate social security coverage on an international level lies with the International Labour Organisation (ILO),<sup>550</sup> the content of the right to social protection may be found by examining the ILO conventions and recommendations on that issue, such as the Social Security Minimum Standards

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<sup>544</sup> International Labour Organisation 'Who we are' <http://www.ilo.org/global/about-the-ilo/who-we-are/lang--en/index.htm> (accessed on 16/09/2011).

<sup>545</sup> Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia).

<sup>546</sup> International Labour Organisation 'Mission and Objectives' <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (accessed on 17/09/2011).

<sup>547</sup> International Labour Organisation 'Rights at work' <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/rights-at-work/lang--en/index.htm> (accessed on 17/09/2011).

<sup>548</sup> Article 35 of the Constitution of the International Labour Organisation, 1919.

<sup>549</sup> ILO *Introduction to social security* (1984) 164.

<sup>550</sup> International Labour Organisation 'Social protection' <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm> (accessed on 15/05/2014).

Convention.<sup>551</sup> The right to social protection in the CRPD<sup>552</sup> should therefore be compatible with the right to social security as guaranteed by the ILO. In addition, the ILO is an agency of the UN<sup>553</sup> which has adopted the CRPD, and the content of the various instruments related to the right of persons with disabilities to social security and social protection should correspond. In the following paragraphs, the right to social security in the context of ILO instruments will be discussed.

One of the primary objectives of the ILO is the extension of the right to social security to all persons.<sup>554</sup> The commitment of the ILO to this objective predates even the UDHR, since the Declaration of Philadelphia provides for the achievement of 'the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care'.<sup>555</sup> The importance of the right to social security was emphasised by the International Labour Conference in 2001, where a statement was made that social security is a basic human right.<sup>556</sup>

Since the ILO plays an important role in establishing minimum standards of social security coverage, it is a further responsibility of the ILO to monitor the implementation of social security schemes worldwide.<sup>557</sup> Even though the concept of 'social security' remains undefined,<sup>558</sup> the ILO instruments discussed herein<sup>559</sup> related to social

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<sup>551</sup> Social Security (Minimum Standards) Convention, 1952 (no 102).

<sup>552</sup> See paragraph 4.4.6.4 below.

<sup>553</sup> About the ILO Origins and History <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed on 14/05/2013).

<sup>554</sup> Garcia AB & Gruat JV *Social Protection: A Lifecycle Continuum Investment* (2003) 13.

<sup>555</sup> Part 3(f) of the Declaration of Philadelphia.

<sup>556</sup> International Labour Conference, 89th session (2001) Report of the Committee on Social Security, resolutions and conclusions concerning social security.

<sup>557</sup> Van Ginneken W 'Extending social security: Policies for developing countries' (2003) 142(3) *International Labour Review* 277.

<sup>558</sup> See 1.7.1 above.

security assist in giving content to the right. Of the social security conventions adopted by the ILO, the 1952 Social Security (Minimum Standards) Convention<sup>560</sup> is particularly significant, since it provides information necessary for determining the parameters of the right to social security.

The relevant ILO social security instruments will be discussed below in order to establish the scope and content of the right to social security of persons with disabilities. Conventions and recommendations will be discussed in chronological order. It should be noted from the outset that South Africa has not ratified any of the following instruments, which means that South Africa is not compelled to implement the principles therein.<sup>561</sup> It must also be borne in mind that certain ILO conventions and recommendations provide only for benefits based on a pre-existing employment relationship and that the social security benefits guaranteed by the ILO in the employment context are only available for persons with disabilities who are or have been employed.<sup>562</sup>

#### **4.3.1 Social Security (Minimum Standards) Convention**

In 1952 the ILO adopted the Social Security (Minimum Standards) Convention<sup>563</sup> (Convention 102) which came into force in 1955.<sup>564</sup> Convention 102 is considered the

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<sup>559</sup> Such as the Social Security (Minimum Standards) Convention No 102 of 1952 and the Recommendation concerning National Floors of Social Protection 2012 (No 202).

<sup>560</sup> Social Security (Minimum Standards) Convention, 1952 (No 102).

<sup>561</sup> However, South Africa is not entirely obligation-free in this regard – see 3.2.3 above.

<sup>562</sup> See for example the discussion on the Discrimination (Employment and Occupation) Convention below at paragraph 4.3.3. The implications of the pre-requisite of employment for access to social insurance have been discussed at 1.7.2 above.

<sup>563</sup> Social Security (Minimum Standards) Convention, 1952 (No 102).

<sup>564</sup> ILO 'C102 – Social Security (Minimum Standards) Convention 1952, No 102' [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100\\_instrument\\_id:312247](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312247) (accessed on 10/03/2015).

flagship convention in terms of social security internationally.<sup>565</sup> While Convention 102 does not make express mention of persons with disabilities, many of the social risks listed for which social security benefits are to be provided are relevant to persons with disabilities. For example, Part VI of Convention 102 provides for the payment of benefits in the event of occupational injury which results in an inability to work. In the following paragraphs, the minimum benefits applicable to persons with disabilities will be discussed.

Convention 102 makes provision for persons with disabilities by guaranteeing benefits for sickness,<sup>566</sup> employment injury<sup>567</sup> and invalidity.<sup>568</sup> For each of these contingencies, provision is made for periodical payments for the duration of the contingency impacting on the ability of the person to work and earn income.<sup>569</sup> In certain instances, provision for periodical payments will not be required and periodical payments could be replaced with a lump sum payment to the beneficiary.<sup>570</sup> The lump sum is usually paid in instances where the contingency has not had a major impact on the earning capacity of the person and the periodical payment system is more common in instances where the person is forced to refrain from working as a result of the particular contingency.<sup>571</sup> The periodical payment is most often awarded where

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<sup>565</sup> ILO *Social Security for All: Building social protection floors and comprehensive social security systems* (2012) 27.

<sup>566</sup> Part III.

<sup>567</sup> Part VI.

<sup>568</sup> Part IX.

<sup>569</sup> Periodical payments are provided for as follows: Article 16 for sickness; Article 36 for employment injury; Article 56 for invalidity.

<sup>570</sup> For example, Article 36(3) provides for the payment of a lump sum in the event of employment injury, where the impact on the ability to work is only minor.

<sup>571</sup> Article 36.

the total or partial loss of earning capacity of the person is permanent.<sup>572</sup> The benefits provided for sickness are intended to be temporary and separate provision is made for the situation where an injury or disease becomes permanent.<sup>573</sup> Once the sickness benefit has been exhausted, the beneficiary will then be permitted to make use of the invalidity benefit.<sup>574</sup> The invalidity benefit is payable primarily in those instances where a person's earning capacity is likely to be affected on a permanent basis.<sup>575</sup> The benefits provided for employment injury may be made on a periodical basis or once-off basis, depending on the circumstances of the particular case.<sup>576</sup>

The aforementioned benefits do not require that the persons protected be contributors to the scheme funding the benefits; provision is also made for benefits for portions of the economically active population or all residents who meet the requirements of a means test.<sup>577</sup> The schemes providing the benefits may be contributory or non-contributory in nature.

In short, Convention 102 provides for income support in the event of total or partial loss of earning capacity which may be permanent or temporary in nature which has resulted from sickness or injury. Ratifying Members must therefore make provision for compensation in the event of any of the aforementioned contingencies and may choose to exceed the standards provided for in Convention 102.<sup>578</sup> However, as

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<sup>572</sup> Article 36(1).

<sup>573</sup> Article 18(1) provides that sickness benefits may be limited to 26 weeks. When read with Article 54, it becomes clear that a permanent sickness is considered invalidity for purposes of Convention 102.

<sup>574</sup> Article 54.

<sup>575</sup> Article 54.

<sup>576</sup> Article 36.

<sup>577</sup> Article 15.

<sup>578</sup> Riedel H *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2007) 93.

mentioned previously, South Africa has not signed or ratified Convention 102.<sup>579</sup> The obligations imposed are therefore not binding on South Africa. This does not mean that the provisions of Convention 102 do not find application in South Africa. The ILO Constitution makes provision for situations, in which a country has not ratified an instrument and is not compelled to implement that convention's provisions into domestic law, which compel the particular country to report on the status of the content of the unratified convention therein. Article 19 of the ILO Constitution provides that each Member must report on domestic law related to the subject matter of the relevant (unratified) convention.<sup>580</sup> This report must be made to the Director-General of the International Labour Office when requested to do so. The fact that a Member has not ratified a particular convention does not permit the Member to enact or maintain laws that are inconsistent with the convention. South Africa must therefore ensure that domestic law does not conflict with Convention 102 and other ILO conventions.

Convention 102 does not provide for any means by which persons with disabilities can be identified.<sup>581</sup> The term disability is not defined, nor is the term persons with disabilities defined. Three separate terms related to disability are, however, utilised throughout the instrument. These terms are 'sickness', 'injury' and 'invalidity'. None of these terms is explicitly defined, although the section dealing with employment injury provides some indication as to what would be considered an injury.<sup>582</sup> The approach to disability is therefore very broad in the way it is expressed and through the use of

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<sup>579</sup> See 4.3.1 above.

<sup>580</sup> Article 19(5) of the Constitution of the ILO.

<sup>581</sup> This lack of definition of the more modern term of disability is not problematic, considering the use of other terms related thereto. These terms were in more common use at the time of the drafting of Convention 102.

<sup>582</sup> Article 32.

numerous terms to describe the causes and effects. This broad approach makes sense in light of the overarching objects of the instrument, which are to provide for a minimum level of social security coverage for those Members whose residents are adversely affected by various contingencies and are at risk of being made vulnerable to poverty.

#### **4.3.2 Discrimination (Employment and Occupation) Convention**

The Discrimination (Employment and Occupation) Convention<sup>583</sup> was adopted by the International Labour Conference in 1958 and came into force in 1960.<sup>584</sup> The purpose of the Discrimination (Employment and Occupation) Convention (Convention 111) is to ensure that all persons have equal access to employment and particular occupations. To this end, Members must ensure that no distinctions, exclusions or preferences are made in a manner that nullifies or impairs equality of opportunity between persons in the sphere of employment.<sup>585</sup> In other words, Members may not unfairly discriminate against individuals and thereby curtail their employment prospects. Since Convention 111 is a core convention of the ILO, Member States are compelled to comply with it, even if they have not ratified it.<sup>586</sup>

As discussed previously, social security includes social insurance.<sup>587</sup> Access to social insurance may be gained through employment, since social insurance schemes are

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<sup>583</sup> Discrimination (Employment and Occupation) Convention, 1958 (No 111).

<sup>584</sup> ILO 'C111 – Discrimination (Employment and Occupation Convention, 1958 (No 111)' [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312256](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312256) (accessed on 10/03/2015).

<sup>585</sup> Article 1 of Convention 111.

<sup>586</sup> Article 1 of the ILO Declaration on Fundamental Principles and Rights at work 1998.

<sup>587</sup> See 1.7.1 above.

generally linked with employment.<sup>588</sup> If persons with disabilities are denied equal employment opportunities, they are effectively being denied access to social insurance, unless they are already receiving previously accrued social insurance benefits, for example, compensation for occupational injuries. The investigation into how the social security rights of persons with disabilities are provided for in international social security standards must therefore extend to a brief overview into the ILO standards on employment opportunities for persons with disabilities.

The obligations in terms of Convention 111 are that Members may not discriminate against persons on the basis of 'race, colour, sex, religion, political opinion, national extraction or social origin'.<sup>589</sup> While disability is not mentioned expressly, the nature and purpose of Convention 111 is such that a prohibition against employment discrimination on the basis of disability can be inferred.<sup>590</sup> In addition, Convention 111 allows for each Member to determine the grounds upon which persons may not be discriminated against particular to that Member. In other words, a ratifying Member state may choose to provide in its domestic law that additional categories of persons be protected as per Convention 111.

Article 5 supports the inference that persons with disabilities are included in the scope of Convention 111, in that Article 5 provides that

Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age,

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<sup>588</sup> See Chapter 1 above.

<sup>589</sup> Article 1(a) of Convention 111.

<sup>590</sup> See Preamble and Article 1(b) of the Discrimination Convention.

disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Ratifying Members must therefore ensure that persons with disabilities are not prevented from accessing employment. In ensuring such access, Members will in turn be facilitating the right of persons with disabilities to social insurance. Since South Africa has ratified Convention 111,<sup>591</sup> the duty to ensure equal opportunity employment applies to South Africa.

The abovementioned duties have also been reinforced in the ILO Decent Work Agenda, which is discussed below. The Decent Work Agenda provides that opportunities should be provided for persons to work in conditions of freedom, equity, security and human dignity.<sup>592</sup> One of the principles underlying decent work is the elimination of discrimination related to employment and occupation.<sup>593</sup> This serves to illustrate the emphasis placed on the elimination of discrimination in the workplace, which is imperative for greater social inclusion and participation for persons with disabilities.

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<sup>591</sup> South Africa ratified Convention 111 in 1997 – ILO ‘Ratifications of C111 – Discrimination (Employment and Occupation Convention, 1958 (No 111)’ [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312256](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256) (accessed on 10/03/2015).

<sup>592</sup> International Labour Office Report of the Director-General: Decent Work ‘The new policy emphasis’ 87<sup>th</sup> session of the International Labour Conference, Geneva (1999) available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> (accessed on 11/06/2014).

<sup>593</sup> International Labour Office Report of the Director-General: Decent Work ‘Human Rights and Work’ 87<sup>th</sup> session of the International Labour Conference, Geneva (1999) available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> (accessed on 11/06/2014).

### 4.3.3 Recommendation concerning National Floors of Social Protection

The Recommendation concerning National Floors of Social Protection<sup>594</sup> (the Recommendation) was adopted in 2012 as part of the function of the ILO in ensuring the effective implementation of social security rights worldwide. According to Article 2 of the Recommendation, 'social protection floors are nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion'.

The Recommendation emphasises the importance of social security as a fundamental human right and the strategic use of social security as a means to combat poverty and promote development is highlighted.<sup>595</sup> Since one of the most important functions of social security is to help eradicate extreme poverty and reduce social inequalities,<sup>596</sup> the importance of the Recommendation cannot be disregarded when establishing national social security schemes.

The objectives of the Recommendation include the implementation of

...social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible, guided by ILO social security standards.<sup>597</sup>

The Recommendation therefore provides that it is not only the extent of coverage of social security benefits which is important, but also the level of benefit actually

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<sup>594</sup> ILO Recommendation concerning National Floors of Social Protection, 2012 (No 202).

<sup>595</sup> Preamble to the Recommendation.

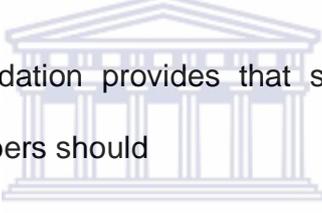
<sup>596</sup> Van Ginneken W 'Extending social security: Policies for developing countries' (2003) 142(3) *International Labour Review* 292.

<sup>597</sup> Article 1 of the Recommendation.

received by beneficiaries. In addition, the Recommendation refers to existing ILO social security standards and provides that the progressive realisation of social security rights must be guided by these standards.

The Recommendation provides that basic social protection guarantees should consist of essential healthcare and basic income security for children, older persons and persons unable to earn an income.<sup>598</sup> The latter category is important for the purposes of this thesis, since persons with disabilities are often unable to earn their own income.<sup>599</sup> The Recommendation refers to 'persons who are unable to earn sufficient income'<sup>600</sup> due to sickness, unemployment, maternity and disability.

Article 10 of the Recommendation provides that social protection should include income support and that Members should



promote productive economic activity and formal employment through considering policies that include public procurement, government credit provisions, labour inspection, labour market policies and tax incentives, and that promote education, vocational training, productive skills and employability...

The Recommendation therefore provides that Members should endeavour to provide income support in the form of social security, as well as services and skills. This holistic approach would permit greater social inclusion for recipients, as well as greater opportunity to participate in society on an equal basis with others. With regard to persons with disabilities, this means that financial assistance should be made available, in addition to services (such as adequate health care) and skills training.

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<sup>598</sup> Article 5 of the Recommendation.

<sup>599</sup> See 2.2.2 above.

<sup>600</sup> Article 5(c) of the Recommendation.

#### 4.3.4 The Decent Work Agenda

The Decent Work Agenda (DWA) was introduced by the ILO via the ILO Declaration on Social Justice for a Fair Globalization<sup>601</sup> to realise the strengthening of individuals and communities through the provision of employment opportunities which meet certain standards.<sup>602</sup> The DWA emphasises the need for work which provides a fair income for workers, security in the workplace as well as social protection for workers and their families.<sup>603</sup> While the DWA is not aimed at the creation of decent work specifically for persons with disabilities, the structure and content of the DWA has relevance for persons with disabilities as will become evident later in the discussion thereof. The DWA does not have the same status as a signed and ratified international instrument.<sup>604</sup> The Decent Work Agenda is essentially a framework for the implementation of certain universal goals related to employment, social protection and social dialogue around these issues.<sup>605</sup> Compliance with the DWA can therefore not be enforced in the same manner as international instruments such as the CRPD.

The DWA has four primary objectives that contribute towards the creation of decent work for all persons.<sup>606</sup> The four pillars are creating jobs; guaranteeing rights at work; extending social protection and promoting social dialogue.<sup>607</sup> From even a cursory

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<sup>601</sup> Adopted at the 97<sup>th</sup> session of the International Labour Conference, Geneva 2008.

<sup>602</sup> ILO Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm> (accessed on 16/06/2014).

<sup>603</sup> ILO Decent Work Agenda <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm> (accessed on 16/06/2014); Hepple B 'Equality and empowerment for decent work' (2001) 140 *International Labour Review* 13.

<sup>604</sup> Rodgers G 'Labour market flexibility and decent work' (2007) *DESA Working Paper No. 477*.

<sup>605</sup> Rodgers G 'Labour market flexibility and decent work' (2007) *DESA Working Paper No. 477*.

<sup>606</sup> ILO Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm> (accessed on 16/06/2014).

<sup>607</sup> ILO Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm> (accessed on 16/06/2014).

reading of the four pillars it is evident that merely providing jobs is not enough to comply with the DWA.<sup>608</sup> According to the ILO,

The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All societies have a notion of decent work, but the quality of employment can mean many things. It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market...<sup>609</sup>

In contrast to international labour standards, the DWA is not concerned with the establishment of minimum standards relating to employment conditions.<sup>610</sup> Rather, the DWA recognises and builds on minimum conditions of employment and levels of social protection as previously established. As mentioned above, the DWA is founded on the premise that minimum standards of treatment in employment do not necessarily result in that employment being decent work.<sup>611</sup>

For purposes of this thesis, the pillars that are of greater importance are those dealing with the creation of employment and the extension of social protection. As mentioned previously, the creation of viable employment opportunities may be considered a prerequisite for meaningful access to social insurance.<sup>612</sup> Although the ways in which decent work opportunities may be created do not form part of this thesis, the

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<sup>608</sup> The emphasis is placed on creating employment opportunities that provide a fair income and which recognises the rights of workers.

<sup>609</sup> Report of the Director-General 'Decent Work' (1999) 87th Session of the International Labour Conference 4.

<sup>610</sup> The ILO has always been tasked with the setting of international labour standards and social protection standards. See Sengenberger W *Decent Work: The International Labour Organization Agenda* (2001) 39.

<sup>611</sup> This concept is discussed in detail in Sengenberger W *Decent Work: The International Labour Organization* (2001) 40.

<sup>612</sup> See 1.7.2 above.

importance of the need for creation of such opportunities must be borne in mind throughout.

In terms of the DWA the creation of decent work is considered to be the most effective way to increase the current level of social protection coverage worldwide.<sup>613</sup> A number of ILO instruments deal with the provision of social protection benefits and some of these have been discussed above. It is important to consider that the ILO instruments discussed above establish certain minimum levels of coverage and provide for access to certain basic, essential social services while the DWA goes beyond those essentials.<sup>614</sup> The DWA provides for increased coverage in social protection (that is, bringing social protection to a greater number of persons) as well as the improvement in the level of coverage per person.<sup>615</sup> It is for this reason that minimum levels of coverage are not the primary focus of the DWA's objectives related to social protection.

According to the ILO, financial support is an essential component of social protection.<sup>616</sup> The ILO has established three objectives which will contribute to the extension of social protection worldwide. These objectives are

1. Extending the coverage and effectiveness of social security schemes
2. Promoting labour protection, which comprises decent conditions of work, including wages, working time and occupational safety and health, essential components of decent work

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<sup>613</sup> ILO 'Social Protection' <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm> (accessed on 16/06/2014).

<sup>614</sup> For example, the ILO National Floors of Social Protection Recommendation discussed at 4.3.3 above is an instrument influenced greatly by the DWA.

<sup>615</sup> ILO 'Social Protection' <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm> (accessed on 16/06/2014).

<sup>616</sup> See 4.3.1 above.

3. Working through dedicated programmes and activities to protect such vulnerable groups as migrant workers and their families; and workers in the informal economy. Moreover, the world of work's full potential will be used to respond to the AIDS pandemic, focusing on enhancing tripartite constituents' capacity.<sup>617</sup>

The DWA does not make specific reference to persons with disabilities. However, the challenges faced by persons with disabilities in gaining employment are well-documented<sup>618</sup> and it is therefore appropriate to consider persons with disabilities as part of the 'vulnerable groups' for purposes of increasing social protection coverage in terms of the DWA.

A particularly important aspect of the DWA is the use of Decent Work Country Programmes (hereafter DWCP) which are used as instruments to facilitate and implement the objectives of the ILO in a particular country.<sup>619</sup> Individual DWCPs consist of an investigation into the cultural, political and social trends of the country involved.<sup>620</sup> A review of national legislation and policies is also undertaken and this review includes establishing which ILO conventions have been signed and ratified by the country.<sup>621</sup> The DWCP then lists the objectives for the country, based on the DWA. The DWCP does not provide a specific timeline for the achievement of the outcomes listed therein, but since the DWCP is usually valid for a specific period, it must be assumed that the objectives are to be achieved within the period of validity of

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<sup>617</sup> ILO 'Social Protection' <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm> (accessed on 16/06/2014); Cohen T & Moodley L 'Achieving 'decent work' in South Africa?' (2012) 15(2) *PER* 320.

<sup>618</sup> See Chapter 2 above.

<sup>619</sup> ILO 'Decent Work Country Programmes' <http://www.ilo.org/public/english/bureau/program/dwcp/> (accessed on 17/06/2014).

<sup>620</sup> ILO *Decent Work Country Programmes: A Guidebook* (2011) 3.

<sup>621</sup> ILO *Decent Work Country Programmes: A Guidebook* (2011) 7.

the DWCP.<sup>622</sup> Examples of outcomes in DWCPs include the ratification of ILO instruments, commitment to job growth for vulnerable groups, the implementation of skills development programmes, the creation of sound social dialogue and greater access to social security benefits.<sup>623</sup>

DWCPs are extremely valuable in addressing the challenges to the creation of decent work and the benefits derived from it. The DWA is therefore intended to be used in a very practical way and has been written as such. While the DWA is not an instrument which is capable of signature and ratification, the individual DWCPs constitute binding agreements between the country and the ILO.<sup>624</sup> The monitoring of the implementation of DWCPs therefore involves representatives from the ILO and greater involvement of ILO constituents.<sup>625</sup>

It must be noted that none of the ILO social security standards and programmes discussed above are binding on South Africa.<sup>626</sup> At best, these standards and programmes can only have an indirect influence in the realisation of the right of access to social security for persons with disabilities in South Africa. In contrast, the CRPD is binding on South Africa, and deals expressly with the right to social protection.<sup>627</sup> This instrument, then, is the most important international law instrument in realisation the right of access to social security for persons with disabilities in South Africa.

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<sup>622</sup> See, for example, *Republic of South Africa Decent Work Country Programme 2010 – 2014* 36.

<sup>623</sup> ILO *Decent Work Country Programmes: A Guidebook* (2011) Item 5b.

<sup>624</sup> See, for example, *Republic of South Africa Decent Work Country Programme 2010 – 2014* available at <http://www.ilo.org/public/english/bureau/program/dwcp/download/southafrica.pdf> (accessed on 17/06/2014).

<sup>625</sup> ILO *Decent Work Country Programmes: A Guidebook* (2011) 5.

<sup>626</sup> The non-binding nature of these instruments was addressed in their respective paragraphs above.

<sup>627</sup> See 4.4.4 below.

## 4.4 UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

### 4.4.1 Brief historical overview

In 2001, the growing recognition by the UN of the need for a comprehensive treaty dealing with the rights of persons with disabilities culminated in the establishment of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (the Committee).<sup>628</sup> The Committee was tasked with deciding whether a convention focusing on the rights of persons with disabilities was necessary; once the necessity had been established, the Committee was asked to negotiate the content of the CRPD with the Member States of the UN.<sup>629</sup> After a substantial period of negotiations, the Committee produced the Convention on the Rights of Persons with Disabilities (CRPD).<sup>630</sup> In negotiating the content of the CRPD, numerous groups were consulted and input was also sought from organisations of persons with disabilities.<sup>631</sup> The

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<sup>628</sup> General Assembly Resolution 56/168 (2001). Third Committee of the UN General Assembly, Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, GA Res 56/119b, UN GAOR, 56th Session.

<sup>629</sup> Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities Resolution adopted by the General Assembly [on the report of the Third Committee (A/56/583/Add.2)].

<sup>630</sup> United Nations Convention on the Rights of Persons with Disabilities A/61/611 of 2006.

<sup>631</sup> Non-governmental organisations, civil society organisations and government representatives all played a role in compiling the CRPD - Kayess R & French P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 81 *Human Rights Law Review Issue 3*; Kanter AS 'The promise of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law and Commerce* 308.

consultation, drafting process and negotiations were finalised after eight meetings of the Committee.<sup>632</sup>

The CRPD is a treaty instrument, which means that once a member state of the UN has signed and ratified it, that member state is obliged to incorporate the provisions of the CRPD into its domestic law.<sup>633</sup> While South Africa has signed and ratified the CRPD, it has yet to fully implement the measures required by the CRPD for the protection of the rights of persons with disabilities.<sup>634</sup>

#### 4.4.2 The purpose of the CRPD

The CRPD was a result of the recognition that discrimination against persons as a result of disability is unacceptable and that there is a need to promote and protect the fundamental human rights of persons with disabilities.<sup>635</sup> The Preamble provides that

...a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote

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<sup>632</sup> Numerous works have been written on the historical background of the CRPD. For a detailed discussion of various aspects of the historical background to the CRPD, see Flynn E *Disabled Justice? Access to Justice and the UN Convention on the rights of Persons with Disabilities* (2015); Harpur DP 'Making Rights a Reality: The UN Convention on the Rights of Persons with Disabilities as an Advocacy Tool' (2013) Presentation at the *5th Disability Advocacy Network Australia National Disability Advocacy Conference, Independent Advocacy: Safeguarding Choice, Control & Well-Being, 2013* available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2343411](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343411) (accessed on 10/03/2015); DeMarco K 'Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and its impact on the use of supermax solitary confinement' (2011) 66(2) *University of Miami Law Review* 529.

<sup>633</sup> Article 4 of the CRPD.

<sup>634</sup> See generally Part 2 of the Draft First Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities (2012). This is discussed further in the context of the right to social protection at 4.4.6.4 below.

<sup>635</sup> Preamble to the CRPD.

their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries...<sup>636</sup>

The CRPD encompasses the most comprehensive list of fundamental rights afforded to persons with disabilities. Many of these fundamental rights have been recognised in UN policy documents prior to the issuing of the CRPD.<sup>637</sup> However, it is important to note that those instruments are not binding on Member States of the UN. The CRPD is therefore the first extensive, binding international instrument dealing with the rights of persons with disabilities. The CRPD consolidates, updates and adds to the existing international law provisions for persons with disabilities<sup>638</sup> and subscribes to the human rights model of disability, which places the focus on the capability of the person with the disability and aims for full inclusion of that person in society.<sup>639</sup> For purposes of this study, the most important provision in the CRPD is Article 28, which guarantees the right of everyone to an adequate standard of living, although other articles are also discussed in order to contextualise Article 28.

#### **4.4.3 General obligations and interpretation**

The nature and content of the obligations created by the CRPD must be established in order to determine what is expected from Member States that have signed and ratified it. Article 4 of the CRPD (entitled 'General obligations') provides the duties of the Member States which must be observed when interpreting the other provisions of the CRPD.

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<sup>636</sup> Item (y) of the Preamble to the CRPD.

<sup>637</sup> For example, the World Programme of Action concerning Disabled Persons (1983) A/RES/38/28.

<sup>638</sup> Preamble to the CRPD.

<sup>639</sup> Melish TJ 'The UN Disability Convention: Historic Process, Strong Prospects and Why the US Should Ratify' (2007) 14(2) *Human Rights Brief* 37. See also 1.7.4.3 above.

Article 4 provides that States Parties must 'ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities'. Articles 4(1)(a)-(i) provide various types of actions which must be utilised by Member States in meeting the obligations created by the CRPD. These actions are: adopting legislative and other measures; repealing legislation; mainstreaming protection and promotion; training personnel; providing specific services or assistance; consulting with representative organisations of persons with disabilities; developing effective awareness campaigns; modifying infrastructures and involving persons with disabilities and their representative organisations in monitoring.<sup>640</sup>

Further, Article 4(2) provides that the rights in the CRPD must be progressively realised within the maximum of the resources of States Parties' available, excluding those obligations in the CRPD which must be implemented immediately according to international law.

The language of the CRPD appears to be peremptory in a number of instances.<sup>641</sup> The use of the word 'shall' is repeated in a number of Articles and is followed by some form of undertaking by the Member State. However, the word 'shall' does not always create firm obligations in the CRPD.<sup>642</sup> The content of the word 'shall' depends upon that which follows it: for example, Article 12(2) reads 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all

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<sup>640</sup> Thornicroft G & Szmukler G (eds) *Oxford Textbook of Community Mental Health* (2011) 233; Allain J *Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities* (2009) 14.

<sup>641</sup> Allain J *Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities* (2009) 10.

<sup>642</sup> Allain J *Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities* (2009) 10.

aspects of life' which indicates a specific obligation to which the Member States must adhere.<sup>643</sup> By contrast, Article 12(3) reads 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity' which does create an obligation, but leaves the Member State itself to choose the form of the obligation.<sup>644</sup>

Put differently, the CRPD as a whole creates obligations related to specific rights; for example, Article 5(2) provides that 'States Parties shall prohibit all discrimination on the basis of disability...' This is a clear obligation on Member States. The manner in which Member States can prohibit such discrimination is then left to each Member State individually and Article 4(1) provides a number of ways in which this prohibition can be achieved. While the items listed in Article 4(1) are the general, primary obligations of the CRPD, the mechanisms listed in Article 4(a) – (i) must be used to ensure the full realisation the specific rights listed in the CRPD.

#### **4.4.4 Article 28 – Introduction**

The need to include an article dealing with the right to social security in the CRPD was clear from the outset of the deliberations preceding and during the drafting of the CRPD.<sup>645</sup> In addition, the Committee acknowledged the need to make provision for an improved standard of living for persons with disabilities around the world.<sup>646</sup>

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<sup>643</sup> Allain J *Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities* (2009) 11.

<sup>644</sup> Allain J *Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities* (2009) 11.

<sup>645</sup> See ['Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities' working paper submitted by Mexico](#) (Draft of a convention submitted by Mexico) (A/AC.265/WP.1) and ['Comprehensive and integral international convention to promote and](#)

Article 28 reads:

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
  
2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures
  - (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
  - (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
  - (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability related expenses, including adequate training, counselling, financial assistance and respite care;
  - (d) To ensure access by persons with disabilities to public housing programmes;

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[protect the rights and dignity of persons with disabilities: position paper' submitted by China\(A/AC.265/WP.3\)](#) which were submitted at the First Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 29 July – 9 August 2002.

<sup>646</sup>Compilation of proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities (A/AC.265/CRP.13), submitted at the Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 16 – 27 June 2003, New Mexico.

(e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 28 confirms the rights to an adequate standard of living and social protection and then goes about providing some indication as to the meaning of those rights. In other words, the article mentions measures that would contribute to the realisation of the rights in question. However, the precise scope and content of these rights has not yet been clarified since no extensive research has been undertaken in this regard.<sup>647</sup> What follows will thus be the first attempt to expand fully upon the meaning of the right to social protection and the right to an adequate standard of living and, importantly, to determine the obligations created by Article 28 for States Parties.

#### **4.4.5 Identifying persons with disabilities for purposes of the CRPD**

Considering the importance of the CRPD, it must be noted that the CRPD itself does not include a definition of disability and related concepts such as impairment. However, the CRPD does make mention of both the World Programme of Action<sup>648</sup> and the Standard Rules<sup>649</sup> and that these instruments play a significant role in

influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities.<sup>650</sup>

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<sup>647</sup> See 1.1 above.

<sup>648</sup> World Programme of Action concerning Disabled Persons 1982, UN General Assembly Resolution A/37/51.

<sup>649</sup> The Standard Rules for the Equalization of Opportunities for Persons with Disabilities 1993, UN General Assembly Resolution 48/96.

<sup>650</sup> Preamble to the CRPD.

The issue of definition was considered important in the negotiations on the content of the CRPD, and much time was spent on considering whether a definition of disability should be included in the CRPD and, if so, the wording of that definition.<sup>651</sup> It was commonly believed that the conceptualisation of disability would have an impact on the rights that would eventually be included in the CRPD.<sup>652</sup> Two approaches to the defining of disability became evident from the meetings of the Committee: either the definition would be included, and be couched in extremely broad language, or a definition would be entirely excluded. The latter approach was a result of the held notion that a definition could limit the scope of applicability of the CRPD, and that other (international) definitions of disability already existed.<sup>653</sup>

Another important consideration in the ultimate decision to exclude a definition of disability was the notion that 'disability is an evolving concept', which is subject to change.<sup>654</sup> Since the CRPD does not include a precise definition of disability, it is evident that the preferred approach was to include as many persons in the scope of the protection of the CRPD as possible. However, the Preamble to the CRPD does incorporate the provisions of the World Programme of Action and the Standard Rules, both of which contain a definition of disability. The CRPD is therefore not entirely silent on the issue of identifying persons with disabilities, but is not limited by a strict definition either. Neither the World Programme of Action nor the Standard Rules are binding on UN Member States and therefore Member States are not compelled to

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<sup>651</sup> Item 12 of the Report of the third session of the Ad Hoc Committee (A/AC.265/2004/5).

<sup>652</sup> Second session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities.

<sup>653</sup> Sixth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities.

<sup>654</sup> Preamble to the CRPD.

adopt the same or a similar definition of disability as found in either of the aforementioned instruments.

The CRPD does include a description of 'persons with disabilities' which provides some indication as to what may be considered a disability for purposes of the CRPD.<sup>655</sup>

Article 1 reads

[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 1 was intended to provide an indication of the scope of application of the CRPD, and not to serve as a definition of persons with disabilities.<sup>656</sup> Article 1 of the CRPD read with the Preamble makes it clear that the CRPD aims for a paradigm shift with regards to the perception of disability.<sup>657</sup> The Preamble provides that

disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The paradigm shift is essentially one from the medical model of disability to the social model.<sup>658</sup> At the very least, then, Member States must ensure that the perception of

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<sup>655</sup> Article 1 of the CRPD.

<sup>656</sup> Sixth session of the Ad Hoc Committee.

<sup>657</sup> DPI Disability Convention Daily Update: August 15, 2006 (Day Two) [http://www.dpi.org/l\\_ang-en/resources/newsletter-details.php?page=279](http://www.dpi.org/l_ang-en/resources/newsletter-details.php?page=279) (accessed on 25/04/2012).

<sup>658</sup> Butlin SF 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40(4) *Industrial Law Journal* 432. See 1.7.4 above.

disability in domestic legislation and policy reflects this changed approach to disability in the CRPD.

#### **4.4.6 Interpretation of Article 28**

As mentioned previously, Article 28 of the CRPD has not yet been analysed in great detail and no preferred approach to interpretation has been developed. In the following paragraphs, the approach to interpreting Article 28 in this thesis will be set out and explained.

##### 4.4.6.1 General interpretation of rights

The CRPD is the first treaty of its kind; that is, a comprehensive treaty dealing specifically and in detail with the rights of persons with disabilities. As such, it must be considered whether the CRPD merely confirms and restates the existing rights of persons with disabilities and adds to our understanding of existing rights, or whether the CRPD creates entirely new rights for persons with disabilities.

The CRPD itself indicates the confirmation of existing rights in the Preamble, in which the principles of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the

Protection of the Rights of All Migrant Workers and Members of Their Families<sup>659</sup> are recalled. Other sections of the Preamble refer to existing international law instruments also dealing with the rights of persons with disabilities.<sup>660</sup> However, the CRPD also emphasises that persons with disabilities face ongoing discrimination and social exclusion, despite the existing international law which attempts to ensure the contrary.<sup>661</sup> In addition, a number of rights in the CRPD have never before been provided for in an international instrument,<sup>662</sup> while certain existing rights have been tailored specifically for persons with disabilities.<sup>663</sup> This tailoring of rights gives new meaning to the particular rights, and can therefore be said to create new obligations.<sup>664</sup> However, none of these rights can be said to be new to persons with disabilities. In reality, the CRPD is merely the first instrument to consolidate and codify all these rights. The CRPD therefore does not create new rights, but merely adapts existing rights and contextualises them for persons with disabilities.<sup>665</sup>

The right to social protection and the right to an adequate standard of living have both been affirmed by the UN in prior international instruments that are not aimed specifically at persons with disabilities.<sup>666</sup> These scope and content of these rights have therefore not been extrapolated for persons with disabilities. It is therefore

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<sup>659</sup> Item (d) of the Preamble to the CRPD.

<sup>660</sup> Items (b) and (f) of the Preamble to the CRPD.

<sup>661</sup> Item (k) of the Preamble to the CRPD.

<sup>662</sup> Murungi LN *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa* (unpublished LL.D thesis submitted at the University of the Western Cape, 2013) 84.

<sup>663</sup> Megret F 'The disabilities convention: human rights of persons with disabilities or disability rights' (2008) 30 2 *Human Rights Quarterly* 508.

<sup>664</sup> Megret F 'The disabilities convention: human rights of persons with disabilities or disability rights' (2008) 30 2 *Human Rights Quarterly* 508.

<sup>665</sup> Kanter AS *The Development of Disability Rights Under International Law: From Charity to Human Rights* (2015) 5.

<sup>666</sup> Such as the UDHR and ICESCR. See 4.2.1 and 4.2.2 respectively above.

submitted that Article 28 of the CRPD does not create new rights for persons with disabilities and corresponding obligations for Member States, although it does contextualise existing rights specifically for persons with disabilities. The research that has been done regarding the meaning of these rights in a general context remains relevant, since that meaning simply needs tailoring for persons with disabilities. For this reason, the starting point of interpretation of these rights in the CRPD will be these existing rights as they are found in other international instruments, as well as commentaries on the interpretation of these rights.

#### 4.4.6.2 Use of existing interpretations of international law

A number of the articles in the CRPD echo the ICESCR. Since only two general comments have been released on the CRPD to date, the general comments on the ICESCR have been used as a guideline for the interpretation of the similar provisions of the CRPD for which there are no general comments.<sup>667</sup> Article 28 of the CRPD is similarly worded to Article 11 of the ICESCR,<sup>668</sup> which means that the two articles may be interpreted similarly.<sup>669</sup> The General Comment applicable to Article 11 of the ICESCR provides insight into the scope and extent of the right to an adequate standard of living for persons with disabilities and simultaneously provides some content to the right to social security in the ICESCR. However, unlike the ICESCR, the CRPD does not have a provision which specifically refers to the social security rights

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<sup>667</sup> The link between the ICESCR provisions regarding mental health and the equivalent CRPD provisions was investigated by Deshraj S *The neglected shadow: enlightening the right to mental health under international human rights law* (LL.M thesis submitted at Utrecht University, 2010). For another example of the ICESCR general comments as an interpretive tool for the CRPD, see Handicap International (2009) *Understanding the UN Convention on the Rights of Persons with Disabilities*.

<sup>668</sup> See 4.2.2 above.

<sup>669</sup> As mentioned above at 4.4.6.1, these general rights must be interpreted in the context of persons with disabilities.

of person with disabilities and therefore the General Comments on Article 9 of the ICESCR are of limited use in interpreting the Article 28(2) of the CRPD.

Article 28 consists of two primary sections, namely Article 28(1) which provides for the right to an adequate standard of living and Article 28(2) which provides for the right to social protection. The Articles will be dealt with as they appear in the CRPD.

#### 4.4.6.3 The interpretation of the right to an adequate standard of living

Article 28(1) provides that persons with disabilities have the right to an adequate standard of living, which includes certain basic necessities (food, clothing, housing) and the continual improvement of living conditions of persons with disabilities. Since the term 'adequate standard of living' has previously been used in a number of international human rights instruments<sup>670</sup> and since the wording of Article 28(1) is not entirely new, the meaning of the article and the rights it creates will not be entirely new either. However, the precise meaning of the term 'adequate standard of living' in the context of persons with disabilities is unclear. The existing understanding of the right to an adequate standard of living must therefore be modified in the context of the rights of persons with disabilities and the objects of the CRPD.

The right to an adequate standard of living has been linked with the right to dignity.<sup>671</sup>

The recognition of the inherent dignity of persons with disabilities is one of the named major principles of the CRPD.<sup>672</sup> It is understood that an adequate standard of living

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<sup>670</sup> These include the UDHR, ICESCR and UN Covenant on Rights of Child, 1989.

<sup>671</sup> See, for example, General Comment 12 of the CESCR (item 4).

<sup>672</sup> This is confirmed by Article 3(a) of the CRPD.

can only be achieved if the person or persons in question are able to live a life of dignity through having their basic needs met – the rights are therefore interrelated. The proper implementation of the right to an adequate standard of living will permit person(s) with disabilities to participate fully and equally with other people on a daily basis.<sup>673</sup> In terms of the obligations created by Article 28(1) of the CRPD, this means that States Parties have a duty to ensure that persons with disabilities are given the means to participate fully and equally in society. In doing so, States Parties must make use of the mechanisms listed in Article 4 of the CRPD as discussed above.

The next question is how States Parties must go about fulfilling the right to an adequate standard of living. It must first be said that 'adequate' is not a fixed concept, in that what is adequate for persons will differ from case to case depending on a number of variables.<sup>674</sup> In ensuring an adequate standard of living, States Parties may be required to provide a range of goods and services to persons with disabilities. Article 28(1) lists a number of these, namely clothing, housing and food. However, it is clear that an adequate standard of living consists of more than simply having access to the aforementioned items. The right to an adequate standard of living therefore requires more from States Parties than the mere provision of these items. A precise list of goods and services contributing to the achievement of an adequate standard of living for persons with disabilities cannot be compiled, because the right is highly

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<sup>673</sup> Icelandic Human Rights Center <http://www.humanrights.is/the-human-rights-project/humanrights-casesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttoanadequatestandardofliving/> (accessed on 19/05/2014). For a plain language explanation of the right to an adequate standard of living in terms of the UDHR, see <http://www.un.org/cyberschoolbus/humanrights/declaration/25.asp> (accessed on 19/05/2014).

<sup>674</sup> Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 16 – 27 June 2003, New Mexico.

subjective and what is required must be determined on a case by case basis.<sup>675</sup>

Certain goods and services can, however, clearly be considered part of the right to an adequate standard of living for persons with disabilities.<sup>676</sup>

Article 28(1) also makes provision for the 'continuous improvement of living conditions' of persons with disabilities. This means that States Parties have an obligation to progressively take measures to provide persons with disabilities with an adequate standard of living. States Parties must therefore evaluate and monitor the standard of living of persons with disabilities within their territory and, importantly, must endeavour to improve on that position.

As mentioned previously, the ICESCR also recognises the right to an adequate standard of living in the same terms used in the CRPD.<sup>677</sup> According to the CESCR, the right to an adequate standard of living involves full social participation, eradication of poverty and access to social services, including social security.<sup>678</sup> The interpretation of that article is thus helpful in establishing what is required in terms of Article 28(1) of the CRPD, and has been taken into consideration in the aforementioned discussion.

#### 4.4.6.4 The interpretation of the right to social protection

Article 28(2) of the CRPD provides for the right of persons with disabilities to social protection. As mentioned above, the right to an adequate standard of living comprises a number of goods and services which add up to an adequate standard of living for a particular person. As will be seen at a later stage, social protection contributes

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<sup>675</sup> Moeckli D & Shah S (eds) *et al International Human Rights Law* (2010) 196.

<sup>676</sup> Food, clothing and housing have been expressly included in Article 28.

<sup>677</sup> See 4.2.2 above.

<sup>678</sup> See 4.2.2 above.

towards an adequate standard of living, but it is a fundamental right on its own and must thus be given due consideration.

From the outset, a terminological clarification must be made. Article 28(2) refers to the right to social protection, whereas former international instruments have made reference to the right to social security.<sup>679</sup> The difference between the concepts is that social security generally refers exclusively to the financial support offered to individuals in situations of need.<sup>680</sup> Social protection, on the other hand, is a broader concept which includes not only social security but also other components such as support services and access to certain amenities of life.<sup>681</sup> The CRPD moves beyond the traditional concept of social security and guarantees a right of social protection for persons with disabilities.

The original suggestion by the drafters of the CRPD was to refer to a right to social security instead of a right to social protection.<sup>682</sup> However, this suggestion was overruled at a late stage of negotiations, although no clear reason for this shift is apparent from the *travaux préparatoires*.<sup>683</sup> It is submitted that reference to a right to social protection was the correct approach. Since the term social protection is a broad one, it entitles persons with disabilities to a wider variety of goods and services in addition to the financial support traditionally provided by social security schemes.

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<sup>679</sup> For example, Article 22 of the UDHR and Article 9 of the ICESCR.

<sup>680</sup> United Nations Economic and Social Council *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World Report of the Secretary-General* (2000) 5.

<sup>681</sup> United Nations Economic and Social Council *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World Report of the Secretary-General* (2000) 5. This is apparent from the description of social protection within the CRPD itself, as well as the various descriptions of social protection which will be discussed herein.

<sup>682</sup> Session 2 of the Ad Hoc Committee on the Rights of Persons with Disabilities.

<sup>683</sup> Session 6 of the Ad Hoc Committee on the Rights of Persons with Disabilities.

Social protection is an umbrella term which incorporates a number of concepts. As such, it is difficult to provide a precise and universally accepted definition of social protection. As a starting point, the list of goods, items and services expressly included in Article 28(2) will hereafter be discussed in order to give content to the right to social protection.

The CRPD provides that the right to social protection includes (but is not limited to): equal access to clean water services; access to public housing schemes; and equal access to retirement benefits.<sup>684</sup> The UN Commission on Social Development<sup>685</sup> describes the purpose of social protection schemes as follows:

[t]he ultimate purpose of social protection is to increase capabilities and opportunities and, thereby, human development. While by its very nature social protection aims at providing at least minimum standards of well-being to people in dire circumstances enabling them to live with dignity, one should not overlook that social protection should not simply be seen as a residual policy function of assuring the welfare of the poorest, but as a foundation at a societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity...<sup>686</sup>

Article 28(2)(a) – (d) provide that ‘appropriate steps’ must be taken by States Parties to ensure the realisation of the right to social protection. These steps include the ensuring of equal access to clean water, access to social protection and poverty reduction programmes, state-provided assistance with disability related expenses, housing schemes and equal access to retirement benefits and programmes. This list

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<sup>684</sup> Article 28(2)(a – d) of the CRPD.

<sup>685</sup> The UN Commission for Social Development is a functional commission of the UN Economic and Social Council, and is provides advice to governments implementing national policies related to social development – see <http://undesadspd.org/CommissionforSocialDevelopment.aspx>

<sup>686</sup> UN Economic and Social Council Enhancing Social Protection and Reducing Vulnerability in a Globalizing World Report of the Secretary General, Thirty-ninth session 13 – 23 February 2001.

of items provides valuable insight into what is expected of States Parties in terms of Article 28(2). The list is not a *numerus clausus*, since the article provides that States Parties shall take measures to realise the right to social protection ‘including’ those which are listed. It is submitted that the word ‘including’ may be read as ‘including, but not limited to’. The nature of the right to social protection is such that some flexibility is required depending on the circumstances in which the social protection is to be delivered.

The ILO has attempted to describe social protection in order to provide some content to the term.<sup>687</sup> The ILO World Labour Report provides that social protection includes

not only public social security schemes but also private or non-statutory schemes with a similar objective, such as mutual benefit societies and occupational pension schemes.<sup>688</sup>

Since the CRPD guarantees that States Parties will take cognisance of every person’s right to social protection and take ‘appropriate steps’ to ensure the enjoyment of the right, it is imperative that States Parties have clarity on what is required of them in terms of this article. Since one of the responsibilities of the ILO is to monitor the implementation of social protection measures,<sup>689</sup> the ILO definition of social protection may offer some clarity as to what is required of States Parties implementing the right to social protection in terms of the CRPD. The ILO definition of social protection will now be discussed and analysed to determine what States Parties need to do in order to ensure compliance with the Article.

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<sup>687</sup> Social protection is a concept which is of particular importance to the ILO in light of the Decent Work Agenda. The role played by the ILO in providing social protection is discussed at 4.3 above.

<sup>688</sup> ILO (2000) World Labour Report: Income security and social protection in a changing world 29.

<sup>689</sup> See 4.3 above.

The description of social protection by the ILO provides for two types of social protection measures, namely public schemes and private schemes. This means that the provision of social protection is the responsibility of the state as well as other parties. If the ILO definition of social protection is read in conjunction with Article 28(2), it may be deduced that the primary obligation to ensure access to a wide range of social protection schemes rests with the relevant State Party. In other words, the final responsibility to ensure that each person has access to an appropriate social protection scheme rests with the state. The state must ensure that it provides basic financial assistance to those individuals who do not have recourse to funds and, more importantly, must ensure that any individuals who have access to other types of social protection schemes are given every opportunity to make use of such schemes.<sup>690</sup>

The ILO definition above does not mention social protection measures other than financial assistance. In contrast, the Social Protection Floors Recommendation provides that social protection consists of basic social security guarantees including health care, education, nutrition and any necessary 'goods and services'.<sup>691</sup> Since the Recommendation includes these goods and services in the description of social protection, it must be accepted that the former ILO definition of social protection has been updated and extends beyond the traditional notion of financial assistance. The CRPD makes it clear that financial assistance alone is not enough for States Parties to discharge their obligations in terms of Article 28(2). As mentioned previously, Article 28(2) refers to a number of goods and services which are considered to form part of

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<sup>690</sup> The importance of these principles of improving both the coverage and the accessibility of social security are emphasised by the ILO. See ILO 'About the social protection department' <http://www.ilo.org/secsoc/about-us/lang-en/index.htm> (accessed on 27/05/2014).

<sup>691</sup> Recommendation Section 5.

the right to social protection, such as clean water, public housing and provision of retirement benefits and programmes. These goods and services generally go beyond the provision of mere financial assistance and address the day-to-day needs of persons with disabilities living in poverty. It is submitted that the list of goods and services in Article 28(2)(a-d) should be considered the minimum level of provision that a State Party may make for persons with disabilities. The list is not exhaustive and is also open-ended in that it is described in terms broad enough that most goods and services that are incidental to the needs of persons with disabilities are included in the obligations created by Article 28(2).

The right to social protection therefore comprises not only the provision of financial support to persons with disabilities, but also the provision of any services or devices needed to ensure that persons with disabilities are able to participate fully and equally in society.<sup>692</sup> It is at this point that the nexus between the right to an adequate standard of living and the right to social protection becomes apparent. In realising the right to social protection, States Parties will provide some of the most important means required for the realisation of the right to an adequate standard of living.

#### **4.4.7 Concluding comments on the right to social protection**

States Parties that have signed and ratified the CRPD are compelled to ensure both the right to an adequate standard of living and the right to social protection for persons

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<sup>692</sup> As mentioned above, the right to social protection read in conjunction with the right to an adequate standard of living consists of more than mere financial support in the form of social security benefits. For purposes of this study, these additional goods and services have been excluded, since the primary research question relates to the provision of access to social security for persons with disabilities. However, the critical importance of items such as clothing, food, housing and rehabilitation services cannot be ignored and are integral to the achievement of an adequate standard of living for persons with disabilities.

with disabilities. As mentioned previously, the way in which obligations may be fulfilled include adopting legislative and other measures, repealing legislation contrary to the CRPD, providing specific services or assistance and modifying infrastructure.<sup>693</sup> Article 28 uses the term 'shall' in reference to the provision of the aforementioned services, thus the obligations created in the Article are peremptory and must be complied with by all ratifying States Parties, including South Africa. Since South Africa has signed and ratified the CRPD, South Africa is bound by the provisions thereof.<sup>694</sup> South Africa must therefore ensure that the primary obligations are given effect to and that the mechanisms listed in Article 4(1)<sup>695</sup> are utilised in the realisation of the primary obligations. It is particularly important that South African law and policy respects the obligations created by Article 28 and does not find itself in breach of any of its obligations in terms of the CRPD. The extent to which South African legislation and policy corresponds with this obligation is the main focus of Chapter 5 below.

#### **4.4.8 Indicators used for measuring compliance with Article 28**

One of the purposes of international law is to set standards to which the states bound thereby must aspire.<sup>696</sup> Generally, the scope and content of rights in international law are interpreted and explained through the release of general comments and the work of experts in the relevant field.<sup>697</sup> As has been mentioned previously, only two general comments on the CRPD have yet been adopted.<sup>698</sup> In addition, certain aspects of the

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<sup>693</sup> See 4.4.3 above.

<sup>694</sup> Article 4 of the CRPD. See also 4.4 above.

<sup>695</sup> See 4.4.3 above.

<sup>696</sup> O'Connell ME *The power and purpose of international law* (2008) 132.

<sup>697</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 8 (2003).

<sup>698</sup> See 4.4.6.1 above.

CRPD have not yet been interpreted and explained by experts in these areas. One of these areas is the right to social protection and the obligations imposed by Article 28 on States Parties. The interpretation of Article 28 above is therefore the first of its kind.

Since international law sets standards to which states must conform, it is logical that international law be used to establish guidelines for the implementation of the rights therein. The interpretation of Article 28 in this thesis (combined with previous research on the rights to social protection and an adequate standard of living) lends itself to the generation of a number indicators which may be used to determine whether a States Party is currently meeting its obligations in terms of Article 28 or not. These indicators are established and discussed in the following paragraphs.

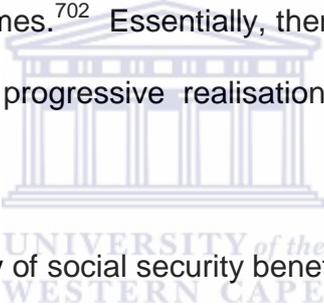
#### 4.4.8.1 Accessibility of social security benefits

One of the purposes of the CRPD generally is to guarantee the full realisation of the rights therein for all persons with disabilities.<sup>699</sup> This extends to the right to social protection, which in turn includes social security. The CRPD therefore provides that all persons with disabilities who are entitled to social protection be given access to such social security benefits. In other words, social security schemes must be in place in States Parties and persons with disabilities must have realistic access to these schemes. It is submitted that persons with disabilities should not be prevented from accessing social security benefits, either through unduly restrictive qualifying criteria or lack of awareness of the availability of these benefits.

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<sup>699</sup> See 4.4.3 above.

It is submitted that unduly restrictive qualifying criteria poses the biggest challenge to persons with disabilities in accessing social security benefits. For example, in South Africa, many social insurance schemes require employment for membership and it has been established that persons with disabilities are often excluded from employment.<sup>700</sup> In addition, the question of identification of persons with disabilities for various social security schemes is also problematic, in that there is no standard definition of disability.<sup>701</sup> It is submitted that, in order for the social security system of a country to be adequately accessible for persons with disabilities, the qualifying criteria should not be unduly exclusionary and that measures be put in place to increase existing levels of access to social security schemes.<sup>702</sup> Essentially, then, the right to social protection in the CRPD must include the progressive realisation of adequate access to social security benefits.



#### 4.4.8.2 Adequacy of social security benefits

While ensuring that the extent of coverage of social security benefits for persons with disabilities is vital for compliance with Article 28 of the CRPD, it is submitted that a further requirement is that the benefits provided in terms of those social security schemes be adequate. While any financial assistance for persons in poverty stricken circumstances is valuable, it is submitted that this financial assistance should permit the recipient to achieve greater participation in society. In situations where state provided financial assistance is the only source of income for a person, it is submitted that such assistance should take into consideration the unique financial needs of each

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<sup>700</sup> See 5.2.2 below.

<sup>701</sup> See 1.7.3 above.

<sup>702</sup> This is of particular relevance for South Africa. See Chapter 5 below.

recipient, in order to alleviate the particular financial burdens that person experiences. While the adequacy of benefits depends on the resources available for distribution from the specific scheme, it is submitted that benefits provided should provide the recipient with income that is able to meet their basic individual needs. It is submitted that these benefits should consist of two components – an income replacement component, since the recipient may not be able to work; as well as a further benefit aimed at relieving the costs borne by the recipient in relation to their disability.

#### 4.4.8.3 Use of social security benefits to realise other rights

The provision of financial assistance to persons with disabilities creates opportunities for social inclusion and better participation in society.<sup>703</sup> For example, the provision of adequate financial assistance may enable a person with a disability to make use of rehabilitation services or create the opportunity for further education. The provision of adequate social security benefits is thus vital for a number of related rights which are provided for in the CRPD.<sup>704</sup>

As mentioned previously, the provision of social security benefits contributes to the attainment of an adequate standard of living for persons with disabilities.<sup>705</sup> While the provision of accessible and adequate social security benefits contributes greatly to the realisation of a number of rights, for purposes of this thesis the focus is the use of

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<sup>703</sup> See Chapter 2 above.

<sup>704</sup> For example, social security plays an important role in realising an adequate standard of living. See 4.4.6.3 above.

<sup>705</sup> See 4.4.6.3 above.

social security benefits to realise an adequate standard of living for persons with disabilities.<sup>706</sup>

#### 4.4.9 Monitoring of implementation of CRPD

The CRPD does not make express mention of mechanisms which will be used to enforce compliance with the provisions therein. However, Article 34 provides for the creation of the Committee on the Rights of Persons with Disabilities (the Committee)<sup>707</sup> which is tasked with, inter alia, collecting reports from each State Party detailing the 'measures taken to give effect to its obligations' in terms of the CRPD.<sup>708</sup> The Committee then studies these reports, and may request further information from a State Party in relation to the implementation of the CRPD<sup>709</sup> and, if a State Party is late in providing its report, the Committee may notify the relevant State Party that there is a need to investigate the implementation of the CRPD in that State Party.<sup>710</sup>

The Optional Protocol to the CRPD provides further information relating to the powers of the Committee in the event of the violation of the CRPD by a State Party. Article 6 provides that the Committee may designate one of its member to 'conduct an inquiry and to report urgently to the Committee'<sup>711</sup> relating to 'grave and systemic violations' of the CRPD by that State Party.<sup>712</sup> After conducting such an inquiry confidentially,<sup>713</sup> the Committee may then make recommendations to the State Party concerning findings of

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<sup>706</sup> See the research questions at 1.2 above.

<sup>707</sup> Article 34(1) of the CRPD.

<sup>708</sup> Article 35(1) of the CRPD.

<sup>709</sup> Article 36(1) of the CRPD.

<sup>710</sup> Article 36(2) of the CRPD.

<sup>711</sup> Article 6(2) of the Optional Protocol.

<sup>712</sup> Article 6(1) of the Optional Protocol.

<sup>713</sup> Article 6(5) of the Optional Protocol.

the inquiry<sup>714</sup> and the State Party must respond to those recommendations within 6 months of receipt thereof.<sup>715</sup> The Committee may invite a State Party to identify measures taken in response to such an inquiry at the expiry of such 6 month period,<sup>716</sup> or to identify these measures in the report the State Party is required to submit in terms of Article 35 of the CRPD.<sup>717</sup>

Neither the CRPD nor the Optional Protocol refers to sanctions which may be taken against a State Party that is persistent in violations of the provisions of the CRPD. It is therefore unclear what the consequences would be for such a State Party.

#### **4.4.10 Concluding remarks on the CRPD**

Since its introduction, the CRPD has become the leading international instrument concerning the rights of persons with disabilities. Since the CRPD is the only directly binding instrument related to the social security rights of persons with disabilities, it is a vital development in realising these rights, in contrast to the other instruments dealing separately with disability and social security. As the obligations therein are binding on States Parties that have signed and ratified the CRPD, it is important that a framework be put in place to measure compliance with the various obligations. While a small number of general comments on the CRPD have been released, no general comments currently deal specifically with the rights to an adequate standard of living

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<sup>714</sup> Article 6(3) of the Optional Protocol.

<sup>715</sup> Article 6(4) of the Optional Protocol.

<sup>716</sup> Article 7(2) of the Optional Protocol.

<sup>717</sup> Article 7(1) of the Optional Protocol.

and social protection.<sup>718</sup> For this reason, a detailed interpretation of those rights is necessary and the discussion of the rights in this chapter is intended to provide clarity on the scope and content of the obligations contained in Article 28. It is submitted that the indicators compiled in this chapter provide a sound basis for measuring compliance with Article 28 by Member States.

While the CRPD contains the primary international law guarantee of the right to an adequate standard of living and the right to social protection, it is by no means the only instrument guaranteeing rights of this kind to persons with disabilities. Selected international law containing similar guarantees has already been discussed in this chapter,<sup>719</sup> but this discussion must be supplemented by an overview of relevant regional human rights instruments. Considering that South Africa is bound by both the international law instruments discussed above and numerous regional instruments, it would be remiss to ignore the relevant provisions of the latter in this thesis. An overview of selected regional human rights instruments is provided below, with specific emphasis on the provisions concerning the rights of persons with disabilities.

#### **4.5 REGIONAL HUMAN RIGHTS STANDARDS**

The obligations created in terms of international law instruments are often similar to those created by regional authorities, namely the Organisation for African Unity and the African Union. The notion of creating an African Union (AU) was conceived by the

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<sup>718</sup> There are currently two general comments on the CRPD – see UN Committee on the Rights of Persons with Disabilities <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (accessed on 17/06/2014).

<sup>719</sup> See 4.2 and 4.3 above.

Organisation of African Unity (OAU) in 1999.<sup>720</sup> Both the AU and the OAU have adopted human rights instruments which guarantee rights of particular importance for persons in the African context. One of the objectives of the AU is to '[p]romote and protect human and peoples' rights in accordance with the African (Banjul) Charter on Human and Peoples' Rights (African Charter)<sup>721</sup> and other relevant human rights instruments'.<sup>722</sup> To this end, various instruments relating to the protection of fundamental human rights have been issued by the OAU and the AU,<sup>723</sup> including the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an Africa Court on Human and Peoples' Rights<sup>724</sup> and the African Charter on Democracy, Elections and Governance.<sup>725</sup>

#### 4.5.1 Articles in the African Charter relating to disability

Very little mention is made of disability in the African Charter, and no mention at all of social security. However, the African Charter is of such importance that the provisions therein relating to disability cannot be disregarded for purposes of this thesis. Article 2 of the African Charter provides that

[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

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<sup>720</sup> The idea to create the AU was conceived at a summit of the Organisation for African Unity in Libya in 1999 in the form of the Sirte Declaration. The AU was only launched in 2002 – Makinda S and Okumu FW *The African Union: Challenges of globalization, security and governance* (2008) 32.

<sup>721</sup> African (Banjul) Charter on Human and Peoples' Rights, OAU Document CAB/LEG/67/3/Rev. 5 (1981).

<sup>722</sup> Article 3(h) of the Constitutive Act of the African Union adopted at the Lome Summit (Togo) in 2000.

<sup>723</sup> A number of these instrument have been excluded from this study, since they do not make reference to persons with disabilities.

<sup>724</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an Africa Court on Human and Peoples' Rights 1998.

<sup>725</sup> African Charter on Democracy, Elections and Governance 2007.

While persons with disabilities are not expressly included in the scope of Article 2, they are included under the umbrella term 'other status'.<sup>726</sup>

The only express mention of disability occurs in Article 18, which provides that '[t]he aged and disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.<sup>727</sup> This section has been interpreted in the light of the prevailing medical model approach to disability, which emphasises the vulnerability of persons with disabilities rather than aiming for social inclusion and empowerment.<sup>728</sup> Despite this outdated approach to the rights of persons with disabilities, the African Charter guarantees many important rights to persons with disabilities on an equal basis with others, according to Article 2.

#### 4.5.2 African Charter obligations

Article 1 of the African Charter provides

The Member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

South Africa, as a Member State of the Organisation of African Unity, is bound by Article 1 of the African Charter to 'adopt legislative or other measures' in order to protect the rights contained in the African Charter. It is apparent that South Africa has complied with the obligation imposed by Article 1 to 'recognise the rights, duties and freedoms' in the African Charter in a general manner by enacting the Constitution of

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<sup>726</sup> Viljoen F 'The Architecture for an African Disability Rights Mechanism' (2011) *49th Session of the African Commission on Human and Peoples' Rights NGO Forum 5*; *Purohit and Moore v. The Gambia*. Cited as: Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII.

<sup>727</sup> Article 18(3) of the African Charter.

<sup>728</sup> *Purohit and Moore v. The Gambia*. Cited as: Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII para 80; Viljoen F 'The Architecture for an African Disability Rights Mechanism' (2011) *49th Session of the African Commission on Human and Peoples' Rights NGO Forum 5*.

the Republic of South Africa which guarantees all the rights contained the African Charter as well as certain others not included therein.<sup>729</sup> However, Article 1 further requires that legislative and other measures be taken to give effect to these rights.<sup>730</sup> The measures taken by South Africa in this regard are discussed and evaluated in Chapter 5 of this thesis.

When Article 18 of the African Charter is read with Article 1, it is apparent that South Africa is obligated to make provision for the protection of the rights of disabled persons by implementing legislative or other measures to that effect. To date, South Africa has not enacted legislation dealing specifically with the rights of persons with disabilities although that issue is dealt with in a piecemeal manner in related legislation.<sup>731</sup>

Parties to the African Charter are compelled to submit reports on the level of compliance with the African Charter every two years.<sup>732</sup> South Africa has not submitted a report in terms of Article 62 since 2005 and consequently has a number of reports outstanding.<sup>733</sup> It is submitted that this failure to report on the status of

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<sup>729</sup> An example of a fundamental right that is included in the Constitution of the Republic of South Africa, 1996 and not in the Banjul Charter is the right to privacy (section 14).

<sup>730</sup> This is echoed by the CRPD in Article 4.

<sup>731</sup> Examples of legislation that deal with disability in a cursory manner include the Social Assistance Act 13 of 2004, the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. A number of policy documents exist that provide guidelines for the treatment of persons with disabilities. Policy documents include the 2009 Policy on Disability by the Department of Social Development, the 2002 Report by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa and the 1997 White Paper on the Integrated National Disability Strategy. Since policies are not afforded the same status as legislation, they cannot be enforced in the same manner as legislation. However, Article 1 of the African Charter requires 'legislative *and other measures*' and it is submitted that the policies related to disability satisfy this aspect of Article 1.

<sup>732</sup> Article 62 of the African Charter.

<sup>733</sup> African Commission on Human and Peoples' Rights 'State Reporting' <http://www.achpr.org/states/> (accessed on 2/06/2014).

implementation of the provisions of the African Charter is indicative of a lack of prioritisation of the rights contained therein.

#### **4.5.3 Resolution on Economic, Social and Cultural Rights in Africa**

Part 2 of the African Charter provides for the creation of the African Commission on Human and Peoples' Rights (hereafter the Commission), which is tasked with, inter alia, the promotion and protection of human and peoples' rights.<sup>734</sup>

The Commission may draft and adopt instruments which have an effect on the manner in which human and peoples' rights are enforced. By implication this includes the enforcement of the rights of disabled persons. It is therefore necessary to establish whether any resolutions of the Commission deal with any issues related to disability.

Only one of the Commissions' resolutions has direct bearing on the rights of persons with disabilities, namely the Resolution on Economic, Social and Cultural Rights in Africa (hereafter the Resolution).<sup>735</sup> The Resolution aims to facilitate the implementation of a number of articles in the African Charter relating to economic, social and cultural rights.<sup>736</sup> Several items in the Resolution relate to the protection of the rights of persons with disabilities, all of which provide that persons with disabilities

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<sup>734</sup> Article 5 of the Banjul Charter. The Commission is granted the power '[t]o formulate and lay down principles and rules aimed at solving legal problems relating to human peoples' rights and fundamental freedoms' – Article 45(1)(b) of the Banjul Charter.

<sup>735</sup> Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004.

<sup>736</sup> All of the rights in the African Charter are guaranteed to persons with disabilities (see 4.5 above) including the economic, social and cultural rights, such as the right to work.

are entitled to additional and/or special measures which ensure the enjoyment of their rights.<sup>737</sup>

In terms of the Resolution, certain Articles in the Banjul Charter are expanded and clarified. The Resolution provides as follows:

6. The right to work in article 15 of the Charter entails among other things the following: Equality of opportunity of access to gainful work, including access for refugees, disabled and other disadvantaged persons.

7. The right to health in article 16 of the Charter entails among other things the following: Access to humane and dignified care of the elderly and for persons with mental and physical disabilities.

8. The right to education in article 17 of the African Charter entails among other things the following: Provision of special schools and facilities for physically and mentally disabled children.

11(a)(xi). States parties should...address the economic, social and cultural rights of vulnerable and marginalised groups including...the disabled.

Essentially, the Resolution confirms the obligation placed on Member States of the AU (including South Africa) to make special provision for the protection of the rights of persons with disabilities.<sup>738</sup> The Resolution expands on the obligation found in Article 18 of the African Charter, by identifying the particular areas relating to the rights of persons with disabilities as requiring attention.

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<sup>737</sup> Items 6, 7, 8, and 11 deal with the rights of persons with disabilities.

<sup>738</sup> The obligation is to be found in Article 18 read with Article 1 of the Banjul Charter.

While the African Charter does not make express reference to the right to social security, the Commission provides that reading the articles in the African Charter related to economic, social and cultural rights together with the rights to life and respect for human dignity imply that the right to social security is also guaranteed in terms of the African Charter.<sup>739</sup>

#### **4.5.4 Protocol on the Rights of Persons with Disabilities in Africa**

In 2014, the draft protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities<sup>740</sup> was publicised for purposes of public comment. The protocol is the result of debate sparked by the adoption of the CRPD.<sup>741</sup> The need for and efficacy of such a protocol has been confirmed by the use of protocols reflecting UN treaties in the past.<sup>742</sup> This protocol is evidently another measure taken in terms of the CRPD in order to realise the rights for persons with disabilities therein.<sup>743</sup> Article 15 is a verbatim restatement of Article 28 of the CRPD, and affirms the undertaking by members of the AU to realise the right to an adequate standard of living and the right to social protection of persons with disabilities in Africa. The protocol is thus indicative of an ongoing commitment to realise these rights.

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<sup>739</sup> Pretoria Declaration on Economic, Social and Cultural Rights (2004) Article 10.

<sup>740</sup> Protocol to the Africa Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities updated at the meeting of the Working Group on Older Persons and Persons with Disabilities (WG) held in Banjul, The Gambia, on 28 February-1 March 2014.

<sup>741</sup> Viljoen F & Biegon J 'The feasibility and desirability of an African Disability Rights Treaty: Further norm-elaboration or firmer norm-implementation?' (2014) 20 *SAJHR* 347.

<sup>742</sup> Oyaro LO 'Africa at crossroads: The United Nations Convention on the Rights of Persons with Disabilities' (2015) 30(2) *American University International Law Review* 360.

<sup>743</sup> See 4.4.3 above.

## 4.6 CONCLUSION

From the aforementioned discussion, it has been established that South Africa is obligated, in terms of various international and regional human rights instruments, to adequately protect and promote the right of persons with disabilities to an adequate standard of living and social protection.<sup>744</sup> Since the right to social protection includes a right to social security, this has a direct impact on the South African right of access to social security.<sup>745</sup> These duties include, but are not limited to, the taking of 'legislative and other measures' to ensure the realisation of these rights, the provision of support, services and training, the promotion of awareness of important issues and the involvement of persons with disabilities in decision making which affects them.<sup>746</sup> In this chapter, a number of indicators for compliance with the obligations of States Parties to realise the right to an adequate standard of living and the right to social security (as part of the broader right to social protection). The obligations created by Article 28 are by no means straightforward and will require, at the very least, a review of current provisions (legislation, policy and other) in order to gauge whether the obligations are being met. If not, further investigation needs to be made to determine how South Africa could proceed in such a manner as to be more compliant with the obligations.

In the following chapters, the existing South African social security and labour law<sup>747</sup> will be reviewed and evaluated in order to determine the extent of compliance with the

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<sup>744</sup> See 4.2, 4.3 and 4.4 above.

<sup>745</sup> See 3.5 above.

<sup>746</sup> See 4.4.3 above.

<sup>747</sup> Only those aspects of labour law which have affect the right of access to social security of persons with disabilities will be discussed, in accordance with the identified research questions for this thesis.

obligations created by the international and regional human rights instruments discussed in this chapter. The subject matter for the review will include legislation, policy and examples of practical difficulties arising from the current social security and labour law. In order to determine whether the approach of the South African legislature is appropriate, it will then be compared and contrasted with that of other countries that are bound by the same international and/or regional obligations.<sup>748</sup>



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<sup>748</sup> See Chapter 6 below.

## CHAPTER 5

# SOCIAL SECURITY FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

### 5.1 INTRODUCTION

In chapter 4, the concepts of social protection and social security as provided for in international law were discussed. In particular, the obligations imposed by the CRPD on States Parties were established.<sup>749</sup> Considering the stated aims of this thesis which include an evaluation of whether South Africa is in compliance with certain provisions of the CRPD,<sup>750</sup> relevant South African legislation and policy must now be evaluated. Particular attention will be paid to the provision of social security to persons with disabilities since the provision of adequate financial support and support services play a significant role in the larger system of comprehensive social protection.<sup>751</sup>

#### 5.1.1 Social protection policy in South Africa

The South African understanding of social protection is detailed in the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Taylor Committee Report). As per the Taylor Committee Report,

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<sup>749</sup> See 4.4 above.

<sup>750</sup> See 1.3 above.

<sup>751</sup> Social protection consists of the provision of financial assistance as well as support services including health care and the provision of assistive devices. See 1.7.1 above. However, the primary research area of this thesis is the provision of financial assistance in the form of social security benefits for persons with disabilities and this financial assistance is therefore the focus of this chapter.

[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.<sup>752</sup>

This description provides that a system of comprehensive social protection should consist not only of financial support but also other 'developmental strategies and programmes' which should provide a minimum standard of living to all citizens. Attempts to ensure minimum standards of living form part of a rights-based approach to disability, which has been adopted by South Africa.<sup>753</sup> As mentioned previously, however, the state's duty in terms of section 27 of the Constitution regarding the provision of social security in South Africa is not to provide minimum levels of benefits to persons, but rather to provide benefits that are reasonable.<sup>754</sup> This constitutional principle must be borne in mind when discussing the provision of financial support to persons with disabilities in South Africa as well.

The focus in the foregoing chapter was the international instruments dealing with disability and the rights of persons with disabilities. It was shown that the UN General Assembly (by means of the CRPD) has recognised that better and more extensive measures need to be put in place in a number of countries in order that the rights and

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<sup>752</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) *Transforming the Present – Protecting the Future* 41.

<sup>753</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 10.

<sup>754</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) at para 33. See 3.5.2.1 above.

freedoms of persons with disabilities living in those countries are adequately protected and promoted.<sup>755</sup>

South Africa does not currently boast any dedicated disability legislation. Disability is thus dealt with in a piecemeal fashion in a number of pieces of legislation which have different areas of application.<sup>756</sup> As a point of departure, the Constitution recognises disability as a ground upon which persons may not be discriminated against.<sup>757</sup> Arguably, all of the legislation presently applicable in South Africa that deals with disability can be interpreted as giving effect to the entitlement of persons with disabilities to the right to equality, since they attempt to provide benefits for persons with disabilities on an equal basis with other marginalised groups and these benefits are often intended to allow for better participation in society.

There are a number of categories of legislation that deal with disability and related matters. For purposes of this thesis, only two of these categories will be considered. One of these is social security legislation, the purpose of which is to provide financial and in-kind assistance through a number of schemes and programmes to financially disadvantaged persons (including persons with disabilities) in order to ensure that they are not deprived of the financial means to participate equally in society.<sup>758</sup> As has been discussed previously, social security measures can be further divided into two types, social assistance and social insurance, depending on the nature and source of

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<sup>755</sup> See 4.4.3 above.

<sup>756</sup> For example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Social Assistance Act 13 of 2004, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, and the Employment Equity Act 55 of 1998.

<sup>757</sup> Section 9(3) of the Constitution of the Republic of South Africa, 1996.

<sup>758</sup> Strydom E *Essential Social Security Law* (2006) 3; Olivier M & Jansen Van Rensburg L 'Protection and enforcement of the right to social security' (2000) 4(1) *Law, Democracy and Development* 87.

funding of the scheme in question.<sup>759</sup> The other category is labour legislation. Labour legislation in South Africa provides a detailed framework in terms of which a number of issues relevant to employers and employees are addressed and resolved.<sup>760</sup> In order to determine whether social security and labour legislation make adequate provision for the realisation of the rights of persons with disabilities, both of these types of legislation will be discussed briefly below. For purposes of this thesis, in light of the research questions identified in Chapter 1, this discussion will be limited to those aspects of labour law that have a direct impact on the right of access to social security for persons with disabilities.

### 5.1.2 The African Union Decade of Disabled Persons

A number of developments at the international level relating to disability have taken place in recent years. Starting in 1999, the African Union (AU) declared the first decade of the new millennium to be the Decade of Disabled Persons.<sup>761</sup> The Decade of Disabled Persons initiative has since been extended until 2019.<sup>762</sup> South Africa has adopted number of recent legislative measures to address disability and other important related issues.<sup>763</sup> There is also a movement within the community of disability focus groups to attract media and government attention to the key issues and

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<sup>759</sup> See 1.7.2 above.

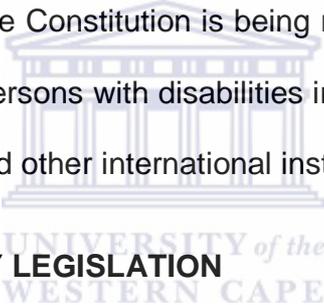
<sup>760</sup> Du Toit D et al *Labour Relations Law* (2006) 5.

<sup>761</sup> The Secretariat of the African Decade of Persons with Disabilities <http://african-decade.org/about-2/> (accessed on 30/01/2012).

<sup>762</sup> The Secretariat of the African Decade of Persons with Disabilities <http://african-decade.org/about-2/> (accessed on 30/01/2012).

<sup>763</sup> For example, the Employment Equity Amendment Act 47 of 2013, the Employment Services Act 4 of 2014 and the Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014).

challenges facing persons with disabilities in South Africa.<sup>764</sup> In the following paragraphs, the current and proposed legislation and policy documents related to social security and employment that have a direct impact on the right of access to social security of persons with disabilities in South Africa are discussed and critically analysed. The analysis will allow for the identification of those areas in which the current and proposed law and policy may be lacking. The positive aspects of the law and policy documents are also identified in order to determine how these could be used as a foundation for improvement in the future. The conclusion of this chapter includes an analysis of whether the right of access to social security of persons with disabilities as guaranteed in the Constitution is being realised and whether the current social security measures for persons with disabilities in South Africa are in compliance with Article 28 of the CRPD and other international instruments.



## 5.2 SOCIAL SECURITY LEGISLATION

Many of the legislative provisions relating to the protection of the rights of persons with disabilities can be found in social security legislation.<sup>765</sup> Since social security law is a specialised area of law, a thorough explanation of the components that comprise social security law in South Africa is necessary. In the following paragraphs, the content of the two main branches of social security in South Africa will be discussed to the extent that they provide benefits for persons with disabilities.

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<sup>764</sup> For a list of a number of programmes intended to mainstream issues relating to persons with disabilities, see Disabled People South Africa <http://www.dpsa.org.za/projects/> (accessed on 28/10/2014).

<sup>765</sup> Specifically the Social Assistance Act 13 of 2004, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001.

### 5.2.1 Social assistance

Section 27(1)(c) of the Constitution provides that

[e]veryone has a right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Social assistance is expressly recognised as a branch of social security in South Africa by the Constitution and must be considered for the purposes of this thesis. Social assistance has been recognised as an important tool in the alleviation of poverty in South Africa.<sup>766</sup> It must be noted from the outset, however, that the focus of this thesis is not only the social assistance aspect of social security, but rather the promotion of access to social security for persons with disabilities on a larger scale. For this reason, the discussion of the social assistance as well as social insurance benefits available for persons with disabilities will be discussed in greater detail below. In addition, it must be noted that it is preferable for persons with disabilities to be given equal opportunity to participate in society rather than creating a system of over-reliance on social assistance benefits.<sup>767</sup>

The Social Assistance Act of 2004 (the SAA) is the definitive legislation governing social assistance in South Africa.<sup>768</sup> The purposes of the SAA are

to provide for the rendering of social assistance to persons; to provide for the mechanism of rendering such assistance; to provide for the establishment of an inspectorate for social assistance; and to provide for matters connected herewith.<sup>769</sup>

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<sup>766</sup> Mpedi G 'Charity begins – but does not end – at home *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC)' (2005) 26(1) *Obiter* 174.

<sup>767</sup> Olivier MP et al *Social Security: general principles* (1999) 204.

<sup>768</sup> Social Assistance Act 13 of 2004. See also *Ngalo v South African Social Security Agency* [2013] JOL 30079 (ECM) para 4.

The SAA identifies the persons who are entitled to apply for various social grants, and the types of grants themselves are listed along with the respective eligibility criteria. Section 9 of the SAA establishes the criteria for the disability grant and reads as follows:

A person is, subject to section 5, eligible for a disability grant, if he or she-

(a) has attained the prescribed age; and

(b) is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

The complete list of requirements which must be met in order for an application for the disability grant to be successful can thus be found in sections 5 and 9 of the SAA, and these requirements are explained in, and supplemented by, the 'Regulations relating to the application for and payment of social assistance and the requirements of conditions in respect of eligibility for social assistance' (the Regulations).<sup>770</sup> The eligibility criteria for the grant may be summarised as follows: the applicant must be at least 18 years of age;<sup>771</sup> the applicant must not be able to provide for his own maintenance as a result of a physical or mental disability;<sup>772</sup> the applicant must be resident in South Africa at the time of making the application;<sup>773</sup> the applicant must be a South African citizen or permanent resident;<sup>774</sup> and the applicant must meet the requirements of a means test.<sup>775</sup>

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<sup>769</sup> Preamble to the SAA.

<sup>770</sup> Regulations relating to the application for and payment of social assistance and the requirements of conditions in respect of eligibility for social assistance GN R898 in GG 31356 of 22 August 2008.

<sup>771</sup> Regulation 3.

<sup>772</sup> Section 9(b) of the SAA.

<sup>773</sup> Section 5(1)(b) of the SAA.

<sup>774</sup> Section 5(1)(c) of the SAA provides that only South African citizens may apply for social grants. The Regulations, however, provide that permanent residents and refugees may also apply for the disability grant. See also *Khosa and others v Minister of Social Development and others, Mahlaule and another v*

In addition, the applicant may not be cared for in a state institution,<sup>776</sup> nor may they receive another social grant for themselves.<sup>777</sup>

In relation to the requirement that the applicant have a physical or mental disability, the Regulations provide that disability must be confirmed by means of an assessment which confirms that the disability is permanent (that is, will continue for longer than 12 months) or temporary (that is, will last for at least 6 but no more than 12 months).<sup>778</sup> In addition, the applicant must prove that he is unable to enter the open labour market considering his skills and ability to work;<sup>779</sup> that he does not unreasonably refuse employment which he is capable of doing and which would permit him to support himself;<sup>780</sup> and that he does not refuse to undergo medical treatment as suggested by a medical officer.<sup>781</sup>

In theory, there are two 'types' of person who could potentially be eligible to apply for the disability grant. The first is a person with a disability who has never worked and therefore does not have access to employment and / or social insurance benefits. The other is a person who has had access to social insurance as a result of an acquired disability, but has exhausted his benefits. In both instances, the person does not have access to the funds required for his maintenance and the only social security benefit available to them is social assistance.

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*Minister of Social Development* 2004 (6) SA 505 (CC) and section 27(b) of the Refugees Act 130 of 1998.

<sup>775</sup> Section 5(2)(b) of the SAA. The formula for the means test is found in the Regulations to the SAA. The requirements related to means are discussed 5.2.1.1 below.

<sup>776</sup> Regulation 3 read with regulation 2(d).

<sup>777</sup> Regulation 3 read with regulation 2(e).

<sup>778</sup> Regulation 3(b).

<sup>779</sup> Regulation 3 (c).

<sup>780</sup> Regulation 3(d).

<sup>781</sup> Regulations 3(e).

### 5.2.1.1 Problems associated with the disability grant

The disability grant provides much-needed financial assistance for persons with disabilities with no recourse to other funds. However, certain elements of the grants have created difficulties related to the awarding and administration of the grant. These will now be identified and discussed in greater detail.

#### 5.2.1.1.1 Defining disability for social assistance

An aspect of the disability grant criteria which has proved problematic is that of definition.<sup>782</sup> An applicant must prove that he is a 'disabled person' in terms of the SAA.



A 'disabled person' is defined as a person who

owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance...<sup>783</sup>

The emphasis in this definition is on functional limitation experienced by the applicant and is based on clinical impairment.<sup>784</sup>

This definition of disabled person provides no indication as to which specific medical conditions may be considered disabilities for purposes of the grant. However, if the condition results in the person being unable to obtain the means to provide for his or

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<sup>782</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 314; see generally *Mabethu v MEC, Eastern Cape Government* [2006] JOL 18846 (E).

<sup>783</sup> Section 9(b) of the SAA.

<sup>784</sup> Ngwena C 'Deconstructing the definition of disability under the Employment Equity Act: Social Deconstruction' (2006) 22 *SAJHR* 621.

her own maintenance,<sup>785</sup> the condition will be considered a disability for purposes of section 9.

The number of social grants should not be allowed to increase rapidly in order to prevent undue strain on government revenue. Social assistance is based on the principle of solidarity, which means that some persons share the responsibility of funding social assistance for the good of others who receive social assistance.<sup>786</sup> In the context of persons with disabilities, the current working population essentially fund the disability grant.<sup>787</sup> Whilst this system currently provides the funding required for the disability grant, the state must be wary of testing the solidarity of these persons through extending the disability grant beyond the available resource capabilities of the persons providing such funding. While the number of grant recipients should not be actively decreased, caution must be exercised to allow only those persons who genuinely satisfy the criteria related to disability to claim the grant. The challenge, then, is to ensure that the definition requirements of the grant are broad enough to provide benefits to those who genuinely need them, but to exclude persons who are able to provide for their own maintenance.<sup>788</sup>

It is well-established that there is no single definition of disability in South Africa.<sup>789</sup> Any definition relating to disability in South African legislation at the moment refers to either a 'disabled person' (social assistance) or 'people with disabilities' (labour

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<sup>785</sup> See 5.2.1.1 for a discussion on who makes this determination.

<sup>786</sup> Liffmann et al "Scope of application" in Olivier et al (eds) *Social security law – general principles* (1999) 50.

<sup>787</sup> Social assistance is funded through general revenue, ie tax. This includes income tax paid by employees. National Treasury (2007) *Social Security and Retirement Fund Reform: Second discussion Paper* 11.

<sup>788</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 327.

<sup>789</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 313.

legislation). While these definitions are not identical, it is submitted that it is appropriate to have different definitions related to persons with disabilities, provided that the context in which the definition is used supports the language used within the particular definition. This is the case for the definition of 'disabled person' used for purposes of determining which persons are eligible for the grant and it is therefore submitted that the definition is not unreasonable.

#### *5.2.1.1.2 The means test*

Section 9 read with section 5 of the SAA requires that applicants for the disability grant meet the requirements of a means test. The means test consists of an investigation into the financial position of the applicant, both in terms of income and assets.<sup>790</sup> Annexure A of the Regulations to the SAA explains how the means test is to be applied for purposes of the older persons' grant, the war veterans grant and the disability grant. The formula used in the assessment of means is  $D = 1,4A - 0,4B$ ,<sup>791</sup> where A is the maximum payable for the particular grant per annum; B is the annual income of the applicant; and D is the annual social grant amount payable.<sup>792</sup> D must not be greater than A. The annual income of the applicant (variable B) is determined according to Regulations 19 and 20, which provide that certain income and assets may be excluded from the applicant's annual income for purposes of the means test. For example, the primary dwelling of the applicant is excluded in determining the

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<sup>790</sup> Regulation 19.

<sup>791</sup> Item 2 of Annexure A to the Regulations.

<sup>792</sup> Item 2 of Annexure A to the Regulations.

applicant's annual income.<sup>793</sup> If the amount calculated (variable D) is less than R100, no grant is payable.

SASSA converts the formula described above on an annual basis into income and asset thresholds that assist it in the application of the means test. If these thresholds are exceeded, no grant is payable.<sup>794</sup> If amounts below these thresholds are received, then a reduced grant is payable.

The use of the means test has been met with substantial criticism.<sup>795</sup> Although the means test is intended as a tool to determine which persons are most in need of social assistance,<sup>796</sup> it effectively discourages persons from accumulating savings and provides a disincentive to work.<sup>797</sup> This disincentive to work in turn deprives persons of access to membership of social insurance schemes that are linked to employment. If the use of the means test persists, and the disincentive to work remains, efforts to create feasible employment opportunities for persons with disabilities will not have a significant effect on the number of persons with disabilities with access to social insurance.

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<sup>793</sup> Regulation 19(4).

<sup>794</sup> At the time of writing, the income threshold for an unmarried applicant is R49 920 per annum and the asset threshold is R831 600. SASSA 'Your and Your Grant 2013 / 2014' (2013) 7.

<sup>795</sup> Taylor Committee Report (2002) 24; Nyenti M & Mpedi LG 'The impact of SADC social protection instruments on the setting up of a minimum social protection floor in South African countries' (2012) 15(1) PER 269.

<sup>796</sup> Economic Policy Research Institute 'Social Security take-up and the means test in South Africa' (2001) *EPRI Research Paper #24* 3.

<sup>797</sup> Walker A, Sinfield A & Walker C (eds) et al *Fighting poverty, inequality and injustice* (2011) 145. See also Standing G & Samson M *A Basic Income grant for South Africa* (2003) 21 and Ringen S 'Social security, social reform and social assistance' in Pieters D *Social Protection of the Next Generation* (1998) 40.

### 5.2.1.1.3 Dependence on social assistance

In 2002, it was suggested by the Taylor Committee that certain short-term social security measures should be introduced as a means to address income poverty.<sup>798</sup> However, this suggestion was strongly opposed by Cabinet, since it was felt that the extension of social security in this way would lead to unnecessary dependence on social assistance.<sup>799</sup> According to Cabinet, 'only the disabled or sick should receive hand-outs, while able-bodied adults should enjoy the opportunity, the dignity and rewards of work'.<sup>800</sup> This statement can be interpreted as meaning that persons with disabilities are excluded from the 'the dignity of work' and thereby the statement offends the dignity of persons with disabilities. In addition, the statement implies that social assistance is seen as a form of charity (in referring to social grants as 'hand-outs'), rather than an entitlement of a large number of persons (not only those with disabilities) in terms of the Constitution.<sup>801</sup>

While it is not ideal that the majority of persons with disabilities are dependent on the disability grant, many persons with disabilities do not have access to employment opportunities for various reasons.<sup>802</sup> Social assistance can, in these instances, not be considered a hand-out but rather a fulfilment of an affirmative constitutional right<sup>803</sup> of access to social security for those persons who are unable to provide for their own

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<sup>798</sup> Report by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (Taylor Committee report) *Transforming the past – Protecting the future* (2002) 154.

<sup>799</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (unpublished LL.D thesis submitted at the University of the Western Cape, 2009) 217.

<sup>800</sup> Hassim S 'Social justice, care and developmental welfare in South Africa: a capabilities perspective' (2008) 34 (2) *Social Dynamics* 111.

<sup>801</sup> See 3.5 above for a discussion of section 27(1)(c) of the Constitution.

<sup>802</sup> See 5.2.2 below.

<sup>803</sup> See 3.1 above for an explanation of the transformative nature of the South African Constitution.

maintenance needs. Essentially, then, the disability grant should be made available to those persons with disabilities who do not have access to employment or the social insurance benefits available via employment.<sup>804</sup> However, efforts should be made to provide employment opportunities to persons with disabilities, as discussed below.<sup>805</sup>

#### *5.2.1.1.4 Application and appeal procedure*

Section 14 of the SAA provides that any application for a social grant must be made in the prescribed manner. Chapter 2 of the Regulations then stipulates how the application is to be made and which documents should accompany such application. Regulation 10 provides that an applicant<sup>806</sup> must attend an office of SASSA and must complete prescribed forms in the presence of a designated officer of SASSA. These forms must be signed by both the applicant and the designated officer, and the designated officer must certify that all the application requirements have been met.<sup>807</sup> This certification is then verified by another designated officer of SASSA<sup>808</sup> and the applicant must then be issued with a receipt acknowledging the submission of the application. SASSA is compelled to maintain a register of all grant applications received,<sup>809</sup> and must notify the applicant of the outcome of his or her application within three months of the submission of the application.<sup>810</sup> The outcome must be communicated to the applicant in writing. If the application is successful, the details relating to the payment of the grant must also be communicated. If the application is

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<sup>804</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 340.

<sup>805</sup> See 5.3 below.

<sup>806</sup> Or his or her procurator, which is a person who may be appointed by the applicant by means of a power of attorney if the applicant is unable to appear at the offices of SASSA in person. Regulation 24.

<sup>807</sup> Regulation 10(4).

<sup>808</sup> Regulation 10(5).

<sup>809</sup> Regulation 10(7).

<sup>810</sup> Regulation 13.

not successful, the reasons for the rejection of the application must be communicated to the applicant, as well as the fact that the applicant has the right to appeal the decision.<sup>811</sup>

In the event that applicant is dissatisfied with the outcome of his or her application, the applicant has 90 days from gaining knowledge of the outcome to lodge a written appeal with SASSA.<sup>812</sup> An applicant or beneficiary then has 90 days from gaining knowledge of the outcome of that written appeal to lodge a further written appeal to the relevant Minister.<sup>813</sup> The Minister may then vary, set aside or confirm the decision of SASSA, or appoint a tribunal to consider the appeal and then vary, set aside or confirm the decision.<sup>814</sup> An appeal may be lodged if an application has been rejected, or if the application has been approved but the applicant is dissatisfied in relation to the amount he or she has been awarded.

If the applicant has followed the abovementioned appeal procedure and is dissatisfied with the outcome, the applicant may then invoke the provisions of the Promotion of Administrative Justice Act (PAJA). The decision to approve or reject an application for the disability grant is considered administrative action, as is the decision as to the amount awarded.<sup>815</sup> Such decisions are therefore subject to the provisions of PAJA.

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<sup>811</sup> Regulation 13(4).

<sup>812</sup> Section 18(1) of the SAA as amended by section 2 of the Social Assistance Amendment Act 6 of 2008.

<sup>813</sup> Section 18 (1A) of the SAA as amended by section 2 of the Social Assistance Amendment Act 6 of 2008.

<sup>814</sup> Section 18(2) of the SAA.

<sup>815</sup> See 3.8 above.

#### 5.2.1.1.5 *Placing difficulties related to the disability grant in perspective*

Despite the problems that currently exist in the administration of the application for the disability grant,<sup>816</sup> the grant itself remains an essential component of social security for persons with disabilities. The unemployment rate for persons with disabilities is significant higher than the unemployment rate for non-disabled persons<sup>817</sup> making the need for financial support evident. The grant therefore serves an important purpose and plays its part in relieving the widespread poverty experienced by persons with disabilities in South Africa.<sup>818</sup>

#### 5.2.1.2 The grant-in-aid

The grant-in-aid is a supplementary social grant which is made available to persons already in receipt of selected social grants.<sup>819</sup> Section 12 of the SAA provides that the grant-in-aid may be paid to a person 'if that person is in such a physical or mental condition that he or she requires regular attendance by another person'. Section 12 of the SAA must also be read with section 5, which has been discussed above.<sup>820</sup> In addition to compliance with sections 5 and 12 of the SAA, an applicant for the grant-in-

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<sup>816</sup> See 5.2.1.1 above for a discussion of these problems.

<sup>817</sup> See 2.3.2 above.

<sup>818</sup> As discussed in Chapter 2 above.

<sup>819</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 217. See also Wiid Y 'The practical implications of the Social Assistance Amendment Bill 2010 for persons with disabilities' (2011) 12(3) *ESR Review* 14.

<sup>820</sup> See 5.2.1 above.

aid must already be in receipt of one of the following social grants: the war veterans grant, the older persons grant, the care dependency grant or the disability grant.<sup>821</sup>

A person with a disability who is in receipt of the disability grant may therefore apply for the grant-in-aid if he or she is not able to care for themselves and requires the assistance of another person. The grant-in-aid, is however, not payable to persons who are in care facilities that are subsidised by the state.<sup>822</sup> The purpose of the grant-in-aid is to alleviate the burden of the extra costs involved in requiring regular care by another person. This grant is therefore an important aspect of social assistance for persons with disabilities, since persons with disabilities may find themselves in situations where they are in need of care and assistance.<sup>823</sup>

#### 5.2.1.3 Social relief of distress

The SAA and its Regulations make provision for the awarding of a temporary grant in times of individual or community crisis which results in financial hardship.<sup>824</sup> This benefit is known as social relief of distress. With regards to persons with disabilities, social relief of distress may be awarded in instances where a person becomes disabled and has no immediate access to income or other forms of social security.<sup>825</sup> Since disability is usually unforeseen, the provision of temporary financial assistance by the state ensures some form of income while the person with a disability adjusts to the reality of living with their disability. In particular, social relief provides for some income while the recipient thereof attempts to return to employment if they were

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<sup>821</sup> Regulation 5(1)(a).

<sup>822</sup> Regulation 5(2).

<sup>823</sup> See 2.2.2 above.

<sup>824</sup> Section 13 of the SAA and Regulation 9.

<sup>825</sup> Regulation 15(1)(e).

employed prior to their disablement. In addition, social relief of distress can be used as an interim source of income while the recipient's application for the disability grant is pending if they are not able to secure employment and have no access to social insurance.<sup>826</sup> Social relief of distress is thus paid to the individual in order to partially alleviate the financial need of the recipient in his time of crisis.<sup>827</sup>

#### 5.2.1.4 Compliance of social assistance with the Constitution

Section 27(1)(c) of the Constitution provides that everyone has a right of access to social security, including social assistance.<sup>828</sup> According to the Constitution, the state must provide access to social security progressively and within available resources.<sup>829</sup> In addition, any social security measures implemented by the state must be reasonable.<sup>830</sup> In the following paragraphs, the current social assistance available to persons with disabilities will be tested against these indicators for compliance with the Constitution.

##### 5.2.1.4.1 'access to'

The primary social assistance available to persons with disabilities is the disability grant. In principle, any person with a disability may make an application for social assistance benefits. However, the state is permitted to make use of eligibility criteria to determine (and effectively limit) which persons are awarded social assistance benefits. These eligibility criteria have proved problematic in practice, and two in

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<sup>826</sup> Regulation 9(1)(b)(1) and 9(1)(b)(ii).

<sup>827</sup> LAWSA *Social Security: Core Elements* (2002) 13(3) at para 188.

<sup>828</sup> See 3.5 above for a discussion of this right.

<sup>829</sup> Section 27(2) of the Constitution. See also *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

<sup>830</sup> Section 27(2) of the Constitution.

particular create obstacles to persons with disabilities wishing to access social assistance.

One of these criteria is the definition of 'disabled person' for purposes of the grant. An applicant must be considered a 'disabled person' in order to become eligible for the grant. This raises the question of assessment of disability. The person who is tasked with deciding whether a person is disabled and therefore unable to work is a medical officer appointed by the Department of Social Development.<sup>831</sup> The assessment of disability by the medical doctor is thus based almost exclusively on the medical model.<sup>832</sup> A number of authors have suggested that the assessment of disability for purposes of the grant should take into account not only the details of the particular applicant's condition but also be focused on the individual circumstances of each applicant (this approach is in accordance with the social model).<sup>833</sup> In addition, the outcome of the application itself should not rest solely on the assessment of disability but also take into account the training and competencies of each applicant.<sup>834</sup>

The means test has been identified as a significant obstacle in the current application process for the disability grant.<sup>835</sup> The purpose of the means test in social assistance

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<sup>831</sup> Government Notice R898 of 2008; SASSA Disability Grant <http://www.sassa.gov.za/index.php/social-grants/disability-grant> (accessed on 01/02/2014).

<sup>832</sup> See 1.7.4.1 above for a discussion of the medical model. Ngwena C 'Deconstructing the definition of disability in the Employment Equity Act: Social Deconstruction' (2006) 22 *SAJHR* 622. See also Oosthuizen S & Meel B 'More about: disability grants' (2006) 24(2) *Continuing Medical Education* 84.

<sup>833</sup> This is in accordance with the social model. See Ngwena C 'Deconstructing the definition of disability in the Employment Equity Act: Social Deconstruction' (2006) 22 *SAJHR* 631; Kelly G 'Regulating access to the disability grant in South Africa, 1990 – 2013' (2013) *Centre for Social Science Research Working Paper* 15. See also Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 340; Schneider M & Marshall S *Social security for people with disabilities* (1998) Research Report for the Department of Welfare.

<sup>834</sup> Oosthuizen S & Meel B 'More about: disability grants' (2006) 24(2) *Continuing Medical Education* 84.

<sup>835</sup> Economic Policy Research Institute 'Social Security take-up and the means test in South Africa' EPRI Research Paper 24 (2001) 20.

is to determine whether applicants' income is sufficient to support them and their dependants and therefore whether they require financial support from the state.<sup>836</sup> However, the income and asset thresholds<sup>837</sup> in the means test are so low that they have been seen as a disincentive for persons to accumulate savings and assets.<sup>838</sup> The asset and income thresholds should not permit large numbers of persons who are in practice able to meet their maintenance needs to claim social assistance benefits. On the other hand, the asset threshold should not prohibit persons who have any savings or assets from claiming social assistance where those assets do not provide them with any current income.<sup>839</sup>

The means test for the older person's grant is intended to be phased out by July 2016.<sup>840</sup> The intention behind this phasing out is to simplify the administrative process linked to the older person's grant, as well as removing the disincentive to save which the means test has contributed to.<sup>841</sup> In the context of the disability grant, the means test may not only act as a disincentive to save,<sup>842</sup> but a disincentive to work, since income earned through employment either reduces the amount that can be claimed or

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<sup>836</sup> Economic Policy Research Institute 'Social Security take-up and the means test in South Africa' EPRI Research Paper 24 (2001) 3.

<sup>837</sup> SASSA 'You and Your Grant 2013 / 2014' (2013) 7.

<sup>838</sup> Walker A, Sinfield A & Walker C (eds) et al *Fighting poverty, inequality and injustice* (2011) 145. See also Standing G & Samson M *A Basic Income grant for South Africa* (2003) 21 and Ringen S 'Social security, social reform and social assistance' in Pieters D *Social Protection of the Next Generation* (1998) 40.

<sup>839</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 329.

<sup>840</sup> Minister of Finance 2013 *Budget Speech* (2013) 17 available at <http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>. See also National Treasury *Retirement Fund Reforms for Further Consultation* (2013) 2.

<sup>841</sup> Minister of Finance 2013 *Budget Speech* (2013) 17 available at <http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>. See also National Treasury *Retirement Fund Reforms for Further Consultation* (2013) 2.

<sup>842</sup> See 5.2.1.1 above.

may make an applicant entirely ineligible for the disability grant.<sup>843</sup> The means test can therefore legitimately be seen as a barrier of access to employment and, consequently, certain social insurance schemes.<sup>844</sup>

As has been discussed above,<sup>845</sup> the aim of the state should aim to include persons with disabilities in employment, thereby creating an environment in which social assistance for persons with disabilities is a last resort remedy in the absence of more favourable benefits derived from employment. Any such initiative would, however, potentially be thwarted by the unintended barrier to employment created by the means test since income earned through employment reduces or eliminates the social assistance available to persons with disabilities. In the hypothetical situation where a person with a disability is employed and is permitted to claim the full disability grant from the state, it is submitted that the disability grant would alleviate the burden of extra costs incurred as a result of disability.<sup>846</sup> By continuing the use of a means test as an eligibility criterion for the disability grant, the state is effectively discouraging persons with disabilities from seeking opportunities to earn income that may negatively impact their social assistance benefits.

Both the definition of 'disabled person' and the use of the means test provide barriers to persons accessing the disability grant. It is submitted that the definition of 'disabled person' does not unduly limit the right of access to social security. However, the means test currently poses a real barrier to accessing social insurance, since it acts as

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<sup>843</sup> See 5.2.1.1 above.

<sup>844</sup> See 5.2.1.1 above.

<sup>845</sup> See 5.2.2 below.

<sup>846</sup> For an explanation of the cost implications related to disability, see 2.2.2 above.

a disincentive to save or work. It is therefore submitted that the means test is unduly limiting the right of persons with disabilities to access social insurance, which is included in the scope of section 27(1)(c) of the Constitution through employment.

#### *5.2.1.4.2 'progressive realisation'*

Progressive realisation of the right of access to social security requires that more persons be given opportunities to receive benefits from a particular scheme over time.<sup>847</sup> In the case of the disability grant, the number of grant recipients has decreased slightly over the last few years.<sup>848</sup> This decrease is largely attributed to the cancellation of grants for persons who no longer met the eligibility criteria for the grant.<sup>849</sup> Despite this decrease, the number of disability grant recipients is expected to stabilise in the next few years, and this has been taken into consideration by the state.<sup>850</sup> This is indicative of a commitment by the state to sustain the payment of the disability grant.

In addition, the amount paid to recipients of the grant is increased on an annual basis to counter inflation.<sup>851</sup> It is therefore submitted that the right of access to social security is being progressively realised through the awarding of a substantial and increasing number of disability grants as well as the regular increase in the amount received.

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<sup>847</sup> See 3.5.2.2 below.

<sup>848</sup> SASSA 'Annual Report 2013 / 2014' (2014) 20; SASSA 'Annual Report 2012 /2013'(2013) 22.

<sup>849</sup> SASSA 'Annual Report 2012 / 2013' (2013) 23. See also Minister of Finance *2014 Budget Speech* 13.

<sup>850</sup> National Treasury 'Estimates of National Expenditure' (2014) 418.

<sup>851</sup> Minister of Finance *2014 Budget Speech* 13.

Considering the importance of the requirement that the right of access to social security be progressively realised in a manner that is reasonable, additional measures to make the grant available to more recipients must be considered.<sup>852</sup> As has been discussed above, the means test currently excludes persons with disabilities who earn an income above a certain threshold from receiving the disability grant, and a reduced disability grant is payable to persons who meet the other eligibility criteria and earn above that threshold.<sup>853</sup> The abolition of the means test would result in greater numbers of persons having access to this financial assistance provided by the state, and this financial assistance would alleviate the costs related to disability that are currently borne entirely by the person with the disability.

The current measures used to progressively realise the right of access to social assistance (namely the commitment to increase and sustain the number of recipients of the disability grant) do contribute to such progressive realisation. However, it is submitted that the gradual abolition of the means test would result in greater numbers of persons having access to social security and the right would therefore be realised more effectively in a much shorter time. In addition, persons with disabilities would no longer be deterred from seeking employment. The disability grant would then play a much bigger role in the alleviation of costs related to disability, and the current barrier to employment and the consequent access to social insurance measures would be removed. It is therefore submitted that the abolition of the means test should be considered as a measure through which the progressive realisation of the right of access to social security for persons with disabilities will be achieved.

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<sup>852</sup> See 3.5.2.2 above.

<sup>853</sup> See 5.2.1.1 above.

#### 5.2.1.4.3 'within available resources'

The Constitution requires that access to social security be realised within the resources available to the state.<sup>854</sup> The state is thus not compelled to provide social assistance benefits if it does not have the financial resources to do so. However, the resources that are available must be allocated to persons in a manner which is consistent with the Bill of Rights.<sup>855</sup>

The budget allocated for social spending in South Africa is substantial.<sup>856</sup> One of the criticisms that have been raised against an increase in the coverage of social assistance is that the state does not have the financial resources to sustain the payment of large numbers of grants.<sup>857</sup> The means test and 'disabled person' eligibility criteria serve an important function in this regard, in that it prevents persons from receiving the grant who are able to provide for their own maintenance needs and who are meeting those needs.<sup>858</sup> The current level of spending on disability grants is therefore sustainable and not unduly burdensome on the state. In addition, the fact that persons with disabilities receive a substantial portion of the funds available for social spending<sup>859</sup> is indicative of an intention by the state to address the financial hardship historically experienced by persons with disabilities in South Africa, and it is

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<sup>854</sup> Section 27(2) of the Constitution. See also 3.5.2.3 above.

<sup>855</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 45.

<sup>856</sup> As of April 2014, the budget for the payment of social grants had increased to approximately R110 billion – see National Treasury 'Estimates of National Expenditure' (2014) 420.

<sup>857</sup> See 5.2.1.1 above.

<sup>858</sup> Economic Policy Research Institute 'Social Security take-up and the means test in South Africa' EPRI Research Paper 24 (2001) 3.

<sup>859</sup> In 2013 / 2014, the disability grant accounted for almost 18% of the expenditure on social assistance. See National Treasury 'Estimates of National Expenditure' (2014) 424.

submitted that this allocation of benefits is compatible with the values underlying the Bill of Rights.<sup>860</sup>

Since it has been established that the expected rate of increase in the number of disability grant recipients satisfies the requirement of progressive realisation and that the state is currently able to maintain its spending related to the disability grant, it is submitted that the current disability grant system does not exceed the available resources of the state and can be expected to be sustained.

#### 5.2.1.4.4 *Reasonable measures*

The Constitution requires that the legislative and other measures taken to realise the right of access to social security be reasonable.<sup>861</sup> The determination of reasonableness is made on a case by case basis. The measures used must be reasonable in the circumstances of the case and must be balanced and flexible.

In the case of the disability grant, additional measures to increase the accessibility of the grant to persons with disabilities to the ones currently used are available. These include the use of a broader definition of 'disabled person' and an accompanying medical assessment, and the use of a means test. Specifically, the abolition of the means test would allow every person with a disability who meets the other criteria to claim the grant, in addition to any other income they may receive.

It is submitted that the disability grant as a measure to realise access to social security is reasonable, despite the existence of problematic elements related to the eligibility

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<sup>860</sup>These values are human dignity, equality and freedom – section 7(1) of the Constitution. See 3.2.2 above.

<sup>861</sup> Section 27(2) of the Constitution. See also 3.5.2.1 above.

criteria. The disability grant provides income for persons with disabilities with no recourse to other income and who face an urgent need for financial assistance. As such, the disability grant addresses the financial need of a particularly vulnerable group and complies with the test for reasonableness as established in *Grootboom*.

### 5.2.2 Social insurance

Social insurance is the branch of social security which comprises measures aimed at providing financial security for employees in the event that they become unable to work.<sup>862</sup> Participation in most social insurance schemes is only available to persons who are (or have been) employed.<sup>863</sup> Social insurance measures include occupational retirement funds,<sup>864</sup> the Compensation for Occupational Injuries and Diseases Fund<sup>865</sup> and the Unemployment Insurance Fund.<sup>866</sup> In the following paragraphs, the provision of social insurance benefits to persons with disabilities will be discussed.

It must again be noted that two 'types' of persons with disabilities can be identified for purposes of social insurance. The first is a person who has never been disabled and is employed, and then becomes disabled and as a result can no longer work. The second is an employed person with a disability who needs access to social insurance when his disability has an impact on his ability to work, or his reaching retirement age. For either of these, social insurance could prove to be the only source of income for him when the person with a disability is no longer able to work (either permanently or

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<sup>862</sup> Berghman J 'Basic Concepts of Social Security' in *Social security in Europe* (1991) 15; Office of the President *White Paper for Social Welfare* (1997) 48.

<sup>863</sup> The Road Accident Fund which technically forms part of social insurance does not require that a claimant be an employee or former employee. See the Road Accident Fund Act 56 of 1996.

<sup>864</sup> Established in terms of the Pension Funds Act 24 of 1956.

<sup>865</sup> Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>866</sup> Established in terms of section 4 of the Unemployment Insurance Act 63 of 2001.

for a limited period), other than social assistance. As has been discussed above, a situation of overreliance on social assistance for persons with disabilities is not considered ideal<sup>867</sup> and the generally higher benefits provided through social insurance schemes are preferable.<sup>868</sup>

### 5.2.2.1 Occupational retirement funds

South Africa does not currently boast a national retirement fund,<sup>869</sup> as is the case in many other countries around the world. Provision for retirement is therefore made by individuals themselves on a private basis, or is linked to employment.<sup>870</sup> Funds which are linked to employment are called occupational retirement funds.

Occupational retirement funds are pension funds<sup>871</sup> or provident funds<sup>872</sup> which are linked to employment.<sup>873</sup> Employment is thus a pre-requisite of membership of such a fund,<sup>874</sup> although membership may not be compulsory for all employees.<sup>875</sup>

Occupational retirement funds are funded by contributions by employers and

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<sup>867</sup> See 5.2.2.1 above.

<sup>868</sup> See 1.7.2 above.

<sup>869</sup> The implementation of such a national retirement fund has been considered since 2003, although very little progress in the actual implementation thereof has been made. See National Treasury *Retirement Fund Reform: a discussion paper* (2004) 20.

<sup>870</sup> National Treasury *Retirement Fund Reform: a discussion paper* (2004) 10.

<sup>871</sup> Section 1 of the Income Tax Act 58 of 1962 distinguishes between pension funds and provident funds. Section 1 of the Pension Funds Act 24 of 1956 further provides that a pension fund is one which pays a lump sum to the member at retirement, as well as a monthly sum for life, called an annuity.

<sup>872</sup> Section 1 of the Income Tax Act 58 of 1962. A provident fund is one which makes a single lump sum payment to the member at retirement.

<sup>873</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 250; Marx G & Hanekom K *The Manual on South African Retirement Funds and other Employee Benefits* (2009) 10.

<sup>874</sup> Liffman R, Mlalazi M & Moore V et al 'Those who have and those who don't: an investigation into the limited scope of application of social security in South Africa' (2000) 4(1) *Law, Democracy and Development* 18.

<sup>875</sup> While certain employers may compel membership of a particular retirement fund, membership of occupational retirement funds is voluntary – see Department of Social Development *Reform of Retirement Provision* (2007) 61.

employees.<sup>876</sup> Occupational funds are voluntary, and employers are not compelled to create a fund or participate in a particular fund.<sup>877</sup> This means that an employee's access to retirement funding may be limited by the employer's non-participation in a retirement fund.

There are currently approximately 3000 active occupational retirement funds in South Africa.<sup>878</sup> According to the Pension Funds Act, the primary object of these funds is to provide for income to persons who retire from their occupation and will therefore no longer be earning a regular salary and to provide for death benefits where members die before retiring.<sup>879</sup> The Pension Funds Act does not stipulate that retirement funds should provide benefits in the event of disability before retirement.<sup>880</sup> However, funds are not prohibited from providing for disability benefits. Funds are permitted to provide benefits to members in the event of permanent disablement.<sup>881</sup> Many retirement funds now provide for the payment of benefits in the event of permanent disablement.

The benefits paid by retirement funds for disability are usually limited to 75% of the employee's monthly earnings prior to disability.<sup>882</sup> Benefits may be awarded until the

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<sup>876</sup> Smit N & Mpedi LG 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy and Development* 3.

<sup>877</sup> Malherbe K 'Implementing domestic workers' social security rights in a framework of transformative constitutionalism' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic Workers and the realisation of their rights* (2013) 132.

<sup>878</sup> Financial Services Board 'Active Funds' available at <https://www.fsb.co.za/Departments/retirementFund/searches/Pages/dataSearches.aspx> (accessed on 29/10/2014).

<sup>879</sup> Section 1 of the Pension Funds Act 24 of 1956.

<sup>880</sup> According to section 1 of the Pension Funds Act 24 of 1956, the primary purpose of a pension fund is to provide benefits in the event of the retirement or death of its members.

<sup>881</sup> Marx G & Hanekom K *The Manual on South African Retirement Funds and other Employee Benefits* (2009) 86.

<sup>882</sup> Jeram N 'Disability Benefits' (2012) Presentation at Pension Lawyers Association Annual Conference available at <http://www.pensionlawyers.co.za/2012-conference-presentations-available-for-download/>.

employee returns to work or reaches retirement age, or any other fixed period agreed upon.<sup>883</sup>

Disability benefits provided by occupational retirement funds are not always linked to occupational injuries or diseases.<sup>884</sup> Occupational injuries and diseases are governed by separate legislation, which is discussed below.<sup>885</sup> The determination of whether a person is disabled for purposes of claiming disability benefits from their fund occurs according to the guidelines established in the rules of the fund.<sup>886</sup> Each fund is permitted to create its own concept of disability for purposes of paying disability benefits. This concept is usually linked to whether the person is able to perform his occupational duties and is accompanied by a medical assessment.<sup>887</sup> In the following paragraphs, the assessment of disability and procedures for purposes of claiming benefits from occupational retirement funds is discussed.



5.2.2.1.1 *Assessment of disability*

As mentioned above, the determination of disability for purposes of occupational funds is usually linked to the extent to which the person can perform his or her duties. Disability in this context is therefore a legal concept, and the determination is made

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<sup>883</sup> Jeram N 'Disability Benefits' (2012) Presentation at Pension Lawyers Association Annual Conference.

<sup>884</sup> A number of Pension Funds Adjudicator determinations have dealt with the award of benefits where the cause of disablement occurred outside the scope of employment. See *Gxotiwe v Private Security Sector Fund and Another* [2007] 3 BPLR 303 (PFA) at para 4; *HTN v Municipal Gratuity Fund* [2002] 1 BPLR 2946 (PFA) at para 3; *Munnik v Cape Joint Retirement Fund (1)* [2000] 11 BPLR 1257 (PFA) at para 3.

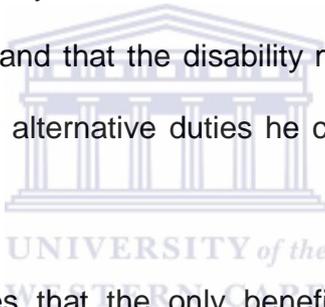
<sup>885</sup> See 5.2.2.2 below.

<sup>886</sup> See *Adonis v Hortors Group Provident Fund and Others* [2004] 5 BPLR 5658 (PFA) at para 9; *Bhartu v Metal and Engineering Industries Permanent Disability Scheme* [2002] 11 BPLR 4015 (PFA) at para 4; *Erasmus v Johannesburg Chamber of Commerce and Industry Pension Fund and Others (2)* [2001] 8 BPLR 2353 (PFA) at para 12.

<sup>887</sup> See *Sefako v First National Bank Group Pension Fund (2)* [2002] 2 BPLR 3103 (PFA) at para 2; *Tobin v Motor Industry Pension Fund (2)* 5 BPLR 3488 (PFA) at para 6.

according to the rules of the fund and made by the trustees of the fund.<sup>888</sup> Disability is, however, necessarily linked to impairment.<sup>889</sup> Impairment is a medical concept, and a finding of disability is made by a medical professional who certifies that a person's impairment has negatively affected their ability to perform their duties.<sup>890</sup>

Once a finding of impairment has been made, a person wishing to claim disability benefits from his occupational fund must prove that the impairment results in disability according to the rules of the fund.<sup>891</sup> While each fund has its own definition of disability, occupational fund rules generally include certain basic requirements before their members can claim disability benefits. These requirements are that the disability must be total and permanent and that the disability must prevent the employee from performing his usual duties or alternative duties he could reasonably be expected to perform.<sup>892</sup>



The Income Tax Act provides that the only benefits that may be provided by a retirement fund are retirement benefits, death benefits and withdrawal benefits.<sup>893</sup>

Retirement funds are therefore only permitted to provide for disability benefits where

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<sup>888</sup> Trustees are responsible for the management of retirement funds according to Chapter III of the Pension Funds Act 24 of 1956. Trustees are compelled to adhere to the rules of the particular fund in terms of section 13 of the Pension Fund Act 24 of 1956. See also *Jacobz v Altron Group Pension Fund and Others* [2003] 8 BPLR 5071 (PFA) at para 16.

<sup>889</sup> *Jacobz v Altron Group Pension Fund and Others* [2003] 8 BPLR 5071 (PFA) at para 16; Jeram N 'Disability Benefits' (2012) Presentation at Pension Lawyers Association Annual Conference.

<sup>890</sup> *Jacobz v Altron Group Pension Fund and Others* [2003] 8 BPLR 5071 (PFA) at para 16; *Harmse v Municipality Gratuity Fund* [2003] 8 BPLR 5059 (PFA) at para 14.

<sup>891</sup> See *Blumenau v MISA Pension Fund* [2005] 1 BPLR 28 (PFA) at para 6; *IMP v Altron Group Pension Fund* [2003] 5 BPLR 4677 (PFA) at para 5; *Konstabel v Metal and Engineering Industries Permanent Disability Scheme and Another* [2002] 7 BPLR 3637 (PFA) at para 6.

<sup>892</sup> Jeram N 'Disability Benefits' (2012) Presentation at Pension Lawyers Association Annual Conference.

<sup>893</sup> Section 1 of the Income Tax Act 58 of 1962.

the disability results in early retirement.<sup>894</sup> An example of such a requirement can be found in *Sithebe v Iscor Employees Provident Fund and Another* and reads as follows:

If the Member has become permanently incapable of performing his duties efficiently as a result of ill health, the Trustees will at their sole and absolute discretion, decide on paying the Member an ill-health early retirement benefit.<sup>895</sup>

The other basic requirement is that the employee be incapable of performing his own duties, or any alternative duties which he could reasonably be expected to perform. This requirement takes into consideration the skills and training of the employee. Put differently, the employee must be incapable of performing his own or a similar occupation. This requirement was discussed in the Pension Fund Adjudicator determination *Munnik v Cape Joint Retirement Fund (1)*.<sup>896</sup> A 'similar' occupation is one which utilises the same skills as those utilised in performing the primary occupation.<sup>897</sup> In casu, the employee was employed as a firefighter. He suffered a heart attack and was consequently incapable of performing his duties as such. The employee applied for a disability benefit from his retirement fund, and the application was rejected on the basis that he did not satisfy the requirement of being unable to perform his own or a similar occupation.<sup>898</sup> The PFA found that the alternative positions offered to the employee<sup>899</sup> were not similar to his own occupation, and,

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<sup>894</sup> Marx G & Hanekom K *The Manual on South African Retirement Funds and other Employee Benefits* (2009) 86.

<sup>895</sup> *Sithebe v Iscor Employees Provident Fund and Another* [2002] 10 BPLR 3990 (PFA) at para 9.

<sup>896</sup> *Munnik v Cape Joint Retirement Fund (1)* [2000] 11 BPLR 1257 (PFA).

<sup>897</sup> *Honey v Central South African Railways* 1910 TPD 592.

<sup>898</sup> *Munnik v Cape Joint Retirement Fund (1)* [2000] 11 BPLR 1257 (PFA) at para 7.

<sup>899</sup> The alternatives were a position as an administrative officer or as a driver.

since there were no similar alternatives available, the employee was entitled to the disability benefit.<sup>900</sup>

In summary, then, the employee must prove that he is, due to an injury or illness, totally and permanently unable to complete his own or a similar occupation in order to qualify for a disability benefit provided by a retirement fund. While each fund is entitled to implement its own unique requirements for eligibility for disability benefits, these requirements are essentially standard and commonplace.<sup>901</sup>

#### 5.2.2.1.2 Application and appeal procedure

The application procedure for disability benefits depends on the rules of each individual fund. It is therefore not possible to discuss a single application procedure for disability benefits generally. However, numerous examples of applications for disability benefits can be found in PFA determinations.<sup>902</sup> One such example is *Barry v Standard Bank Group Retirement Fund*.<sup>903</sup> In this determination, the complainant (Barry) began experiencing chronic pain which could not be relieved through medical intervention. As a result of this chronic pain, she was unable to complete her employment duties. Accordingly, she applied for early retirement as a result of incapacity in accordance with the fund rules.<sup>904</sup> The fund rules provided that the procedure to be followed in lodging this application consisted of a finding that the

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<sup>900</sup> *Munnik v Cape Joint Retirement Fund (1)* [2000] 11 BPLR 1257 (PFA) at para 49.

<sup>901</sup> Jeram N 'Disability Benefits' (2012) Presentation at Pension Lawyers Association Annual Conference.

<sup>902</sup> Such as *Gxotiwe v Private Security Sector Fund and Another* [2007] 3 BPLR 303 (PFA); *Blumenau v MISA Pension Fund* [2005] 1 BPLR 28 (PFA) and *Canhavano v Metorex Pension Fund and Another* [2000] 7 BPLR 718 (PFA).

<sup>903</sup> *Barry v Standard Bank Group Retirement Fund* [2005] 3 BPLR 242 (PFA).

<sup>904</sup> *Barry v Standard Bank Group Retirement Fund* [2005] 3 BPLR 242 (PFA) para 3.

employee is 'incapacitated' followed by an investigation by the employer into the incapacity of the employee.<sup>905</sup> The employer would then take a decision related to the incapacity in accordance with its own employment policies. Having taken the decision that an employee was incapacitated in accordance as per the employment policy, the employer would then request from the trustees of the fund that the employee should be allowed to retire early on the grounds of incapacity. The trustees had the discretion whether to allow such early retirement or not.<sup>906</sup>

The dispute resolution procedure is prescribed by the Pension Funds Act.<sup>907</sup> Once the application is made to the relevant fund and the fund has responded, the member may lodge a complaint with the fund within 30 days if he is dissatisfied with the outcome of the application.<sup>908</sup> The fund then has 30 days in which to respond to the complaint.<sup>909</sup> If the complaint is ignored or remains unresolved, the complaint falls under the jurisdiction of the Office of the Pension Funds Adjudicator (PFA).<sup>910</sup> The Office of the Pension Funds Adjudicator was established in terms of section 30B of the Pension Funds Act 24 of 1956 'to dispose of complaints lodged in terms of section 30A (3) of this Act in a procedurally fair, economical and expeditious manner'.<sup>911</sup> The PFA will then consider the matter and make a determination. In the event that the member is still dissatisfied with the decision of the PFA, the member may then institute

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<sup>905</sup> Rule 6.1(a) of the fund in casu provides that 'an employer may, following an investigation and having taken a decision in terms of its employment practice with regard to incapacity, as adopted and amended from time to time, request the Trustees to permit a Member in its employ to retire prematurely on the grounds of incapacitation before attainment of his Normal Retirement Age.'

<sup>906</sup> Rule 6.1(c) provides that 'the Trustees may, in their sole discretion, permit a Member to retire prematurely on the grounds of incapacitation...'

<sup>907</sup> Chapter VA of the Pension Funds Act 24 of 1956 prescribes the procedure for the resolution of complaints.

<sup>908</sup> Section 30A(1) of the Pension Funds Act 24 of 1956.

<sup>909</sup> Section 30A(2) of the Pension Funds Act 24 of 1956.

<sup>910</sup> Section 30A(3) of the Pension Funds Act 24 of 1956.

<sup>911</sup> Section 30D of the Pension Funds Act.

proceedings in the High Court within six weeks of the PFA determination.<sup>912</sup> The High Court may then make any order it deems fit.<sup>913</sup>

#### 5.2.2.2 Compensation for Occupational Injuries and Diseases Act

Workmen's compensation made its first appearance in South Africa law in 1941.<sup>914</sup> The purpose of workman's compensation was to provide financial support for employees who were injured as a result of injury or disease sustained through their employment.<sup>915</sup> Payments were also made to the financial dependents of employees in the event of their death as a result of workplace injury or disease.<sup>916</sup> Since then, significant developments have been made in compensation legislation and the administration of compensation for occupational injuries and diseases.

The Compensation for Occupational Injuries and Diseases Act (COIDA)<sup>917</sup> was introduced in 1993 in order to regulate the provisions in place for providing compensation to employees<sup>918</sup> who were injured or contracted a disease as a result of

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<sup>912</sup> Section 30P(1) of the Pension Funds Act 24 of 1956.

<sup>913</sup> Section 30P(2) of the Pension Funds Act 24 of 1956.

<sup>914</sup> Workmen's Compensation Act 30 of 1941.

<sup>915</sup> Preamble to the Workmen's Compensation Act 30 of 1941.

<sup>916</sup> Section 4 of the Workmen's Compensation Act 30 of 1941.

<sup>917</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>918</sup> An 'employee' is defined as '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, and includes-

(a) a casual employee employed for the purpose of the employer's business ;

(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

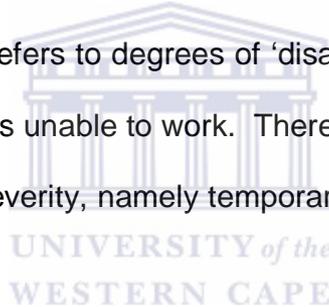
(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work , and for which service or work such person is paid by the labour broker;

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

but does not include-

an accident.<sup>919</sup> COIDA is the primary legislation relating to compensation for occupational injuries and diseases in South Africa.<sup>920</sup> COIDA established a fund (the Compensation Fund) to which all employers are compelled to pay contributions on behalf of their employees.<sup>921</sup> In the event of an employee being injured or becoming ill 'out of and in the course of' his employment, the employee is entitled to claim compensation in terms of COIDA.<sup>922</sup> A number of conditions are applicable to the process of the claim, including the manner in which the injury was sustained or the illness contracted and the extent of the injury or disease.<sup>923</sup>

COIDA does not refer to 'disability' or 'disabled person' as is the case with social assistance. Instead, COIDA refers to degrees of 'disablement'. Disablement refers to the degree to which a person is unable to work. There are four types of disablement in terms of COIDA, in order of severity, namely temporary partial disablement, temporary



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- (i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act No. 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;
  - (ii) a member of the Permanent Force of the South African Defence Force while on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;
  - (iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act No. 7 of 1958), on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;
  - (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;
  - (v) a domestic employee employed as such in a private household.' Section 1(xix) of COIDA.

<sup>919</sup> An 'accident' is defined as an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee – section 1(i) of COIDA.

<sup>920</sup> Myburgh P, Smit N & van der Nest D 'Social security aspects of accident compensation: COIDA and RAF as examples' (2000) 4(1) *Law, Democracy and Development* 44. Health and safety in the workplace is regulated by the Occupational Health and Safety Act 85 of 1993 and the Mine Health and Safety Act 29 of 1996.

<sup>921</sup> Section 15 of COIDA; see also Marx G & Hanekom K *The Manual on South African Retirement Funds and other Employee Benefits* (2009) 37.

<sup>922</sup> Section 22 of COIDA.

<sup>923</sup> Section 22(3) of COIDA. In the case of a deceased employee, his or her dependants may claim compensation in terms of section 1(xix)(d) of COIDA.

total disablement, permanent disablement and death.<sup>924</sup> The benefits to which an employee becomes entitled depend on the degree of disablement he experiences as well as his earnings prior to disablement.<sup>925</sup> The different degrees of disablement will now be defined and discussed.

#### *5.2.2.2.1 Temporary total disablement*

Temporary total disablement is defined as

The temporary total inability of such employee as a result of an accident or occupational disease for which compensation is payable to perform the work at which he was employed at the time of such accident or at the commencement of such occupational disease or work similar thereto.<sup>926</sup>

Essentially, an employee must be completely unable to perform any of his former duties for a period of time in order to have temporary total disablement. Benefits for temporary total disablement may be paid for as long as the disablement lasts or for 12 months, whereafter the Director-General may decide to extend the payment period up to a maximum of 24 months.<sup>927</sup> The compensation paid for temporary total disablement is 75% of the monthly earnings of the employee,<sup>928</sup> which is paid monthly for as long as the disablement lasts or for a maximum of 24 months, as mentioned above.

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<sup>924</sup> Section 47 provides for compensation in the event of temporary partial disablement and temporary total disablement; section 49 for permanent disablement and section 54 for death.

<sup>925</sup> Schedule 2 of COIDA. Earnings are calculated according to section 63 of COIDA.

<sup>926</sup> Schedule 2 of COIDA.

<sup>927</sup> Section 47(5)(a) of COIDA.

<sup>928</sup> Item 1 of Schedule 4 to COIDA.

#### 5.2.2.2.2 Temporary partial disablement

Temporary partial disablement is defined as

the temporary partial inability of such employee as a result of an accident or occupational disease for which compensation is payable to perform the whole of the work at which he or she was employed at the time of such accident or at the commencement of such occupational disease or to resume work at a rate of earnings not less than that which he or she was receiving at the time of such accident or at the commencement of such occupational disease.<sup>929</sup>

The definition of temporary partial disablement refers to a partial inability to do the whole of the work in which the person was employed at the time of accident. When a person has a temporary partial disablement, they are often placed on 'light duty', that is, they are able to complete some but not all of their usual duties.<sup>930</sup>

The compensation for temporary partial disablement is based on the earnings of the employee prior to disablement. While the compensation for temporary total disablement is a maximum of 75% of the monthly earnings of the employee in terms of section 47(1), the compensation for temporary partial disablement consists of 'such portion of the amount calculated in terms of subsection (1) as the Director- General may consider equitable'. In other words, the employee will receive a percentage of 75% of the monthly earnings prior to disablement.<sup>931</sup>

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<sup>929</sup> Item 1 of Schedule 4 to COIDA.

<sup>930</sup> *Vena and Secureco (Pty) Ltd* [2003] 10 BALR 1208 (CCMA).

<sup>931</sup> This percentage is left to the discretion of the Director-General - Section 47(2) of COIDA.

### 5.2.2.2.3 Permanent disablement

Permanent disablement is defined as

the permanent inability of such an employee to perform any work as a result of an accident or occupational disease for which compensation is payable.<sup>932</sup>

In order for a determination of permanent disablement to be made, it must be proved that the employee can no longer do 'any work'. To assist in such a determination, certain types of disablement have been pre-assigned degrees of disablement in accordance with the nature of the injury he has sustained.<sup>933</sup>

The compensation payable depends on the degree of permanent disablement experienced by the employee. COIDA distinguishes between four categories of permanent disablement.<sup>934</sup> Permanent disablement may be a maximum of 100%, 31-99%; 30%; or less than 30%. If an employee has permanent disablement of 30% or less, he will receive a lump sum payment,<sup>935</sup> based on his particular degree of permanent disablement and his earnings prior to disablement.<sup>936</sup> If an employee has permanent disablement of 31% or more, he will receive a pension for the rest of his life, based on the particular degree of permanent disablement and his earnings prior to disablement.<sup>937</sup> Although Schedule 2 to COIDA provides for degrees of permanent

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<sup>932</sup> Section 1 of COIDA.

<sup>933</sup> Schedule 3 of COIDA lists a number of injuries which result in permanent disablement. These involve the loss of the use of a part of the body which will never be regained.

<sup>934</sup> Items 2 – 5 of Schedule 4 to COIDA.

<sup>935</sup> For 30% permanent disablement, the lump sum is 15 times the monthly earnings of the employee. For less than 30% permanent disablement, the lump sum bears the same proportion to 15 times the monthly earnings as the percentage disablement bears to 30%. Items 2 and 3 of Schedule 4 to COIDA.

<sup>936</sup> Items 2 and 3 of Schedule 4 to COIDA.

<sup>937</sup> If the employee has 100% permanent disablement, he will receive 75% of his monthly earnings as a pension for life. If the disablement is between 30% and 100%, the pension will bear the same

disablement only in the event of the loss of a limb or the use thereof, such a loss is not a requirement for a finding of permanent disablement.<sup>938</sup> Examples of injuries leading to a finding of permanent disablement without the loss of a limb include back injuries<sup>939</sup> and post traumatic stress disorder.<sup>940</sup>

#### *5.2.2.2.4 Application and appeal procedure*

Once an accident has occurred, the employee must give verbal or written notice of the accident to the employer as soon as possible.<sup>941</sup> Once the employer has been given notice of the accident or becomes aware of the accident, the employer must notify the Compensation Commissioner<sup>942</sup> of the accident within seven days.<sup>943</sup> Once the Commissioner has been given notice of the accident or becomes aware of the accident, he may make any inquiry which is necessary to make a decision related to a claim in terms of COIDA.<sup>944</sup> This includes the authority to request further particulars related to the accident from the employee or employer. Any documents provided by the employee in support of his claim must be forwarded by the employer to the Commissioner within seven days of receipt thereof.<sup>945</sup> Any claim related to an

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proportion to 75% of the monthly earnings as the degree of disablement to 100%. Items 4 and 5 of Schedule 4 to COIDA.

<sup>938</sup> See *Kirtley v The Compensation Commissioner & another* [2006] JOL 14087 (E) where the plaintiff was found to have permanent disablement as a result of a lower back injury and high blood pressure.

<sup>939</sup> *Basson v Ongevallekommissaris* [2000] 1 All SA 67 (C).

<sup>940</sup> *Mouton v Compensation Commissioner* [2008] JOL 22397 (C).

<sup>941</sup> Section 38(1) of COIDA. Failure to give such notice does not generally result in the claim being forfeit – see section 38(2) of COIDA which provides that failure to give notice to the employer will not bar a claim, provided it can be proved that the employer became aware of the accident in some other manner.

<sup>942</sup> COIDA refers to the duties of the Director – General. However, the Director – General is permitted to delegate his duties in this regard to the Compensation Commissioner, and this delegation has taken place in practice. Section 3(1) of COIDA.

<sup>943</sup> Section 39(1) of COIDA.

<sup>944</sup> Section 40(1) of COIDA.

<sup>945</sup> Section 41(1) of COIDA.

accident must be lodged within 12 months after the date of the accident.<sup>946</sup> If a claim is not brought in that time period, the claim will prescribe.<sup>947</sup> As part of this application process, the employee must submit to a medical examination.<sup>948</sup> The medical practitioner responsible for the examination then makes a determination about the severity of the employee's disablement.

The procedure is slightly different for occupational diseases. If the employee proves that he has contracted one of the occupational diseases listed in Schedule 3, it is presumed that the disease was contracted out of and in the course of his employment.<sup>949</sup> The burden proof related to the contracting of listed diseases is therefore lesser than for occupational injuries. However, in the event that an employee claims compensation for a disease that is not listed in Schedule 3, the burden of proof remains the same as for occupational injuries and the employee must still prove that the disease has arisen out of and in the course of the employment.<sup>950</sup>

If the employee is dissatisfied with the decision of the Commissioner in relation to his claim, he has 180 days from the date of decision to lodge an objection against that decision.<sup>951</sup> The objection will then be heard by a presiding officer sitting with two assessors who may either confirm the decision of the Commissioner or refer the matter to the High Court for adjudication.<sup>952</sup>

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<sup>946</sup> Section 43(1) of COIDA.

<sup>947</sup> Section 44 of COIDA.

<sup>948</sup> Section 42 of COIDA.

<sup>949</sup> Section 66 of COIDA.

<sup>950</sup> Section 65(1)(b) of COIDA read with section 66 of COIDA.

<sup>951</sup> Section 91(1) of COIDA.

<sup>952</sup> Section 91(3) of COIDA.

In addition to the objection procedure outlined above, a person affected by a decision of the Commissioner may appeal to the High Court against that decision, provided that the appeal is based on: the interpretation of COIDA; the cause of the accident or occupational disease being outside the scope of the claimant's employment; the amount of compensation awarded; or the right to increased compensation.<sup>953</sup>

Many of the appeals related to the COIDA system relate to the delay in processing claims although the vast majority of cases relate to dissatisfaction with the assessment of disablement of applicants for benefits.<sup>954</sup>

### 5.2.2.3 Unemployment Insurance

The levels of unemployment experienced in South Africa are high when compared to other middle income countries.<sup>955</sup> In the event of unemployment and a number of other contingencies, unemployment insurance provides for the payment of benefits which partially and temporarily replace income.<sup>956</sup> The South African Unemployment Insurance Fund (UIF) was established by the Unemployment Benefit Act in

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<sup>953</sup> Section 91(5) of COIDA.

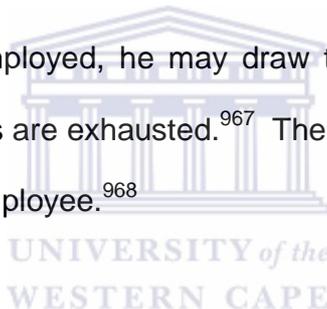
<sup>954</sup> Ehrlich R 'Persistent failure of COIDA system to compensate occupational disease in South Africa' (2012) 102(2) *South African Medical Journal* 96. Examples of cases relating to the assessment of disablement include *Pretorius v Compensation Commissioner & another* [2008] JOL 21550 (O); *Mouton v Compensation Commissioner* [2008] JOL 22397 (C) and *Odayar v Compensation Commissioner* [2005] JOL 16306 (N).

<sup>955</sup> Govindjee A & Dupper O 'Constitutional perspectives on employment security and a right to work in South Africa' (2011) 3 *Stellenbosch Law Review* 775; Borat H 'Unemployment in South Africa: Descriptors and Determinants' (2007) Developmental Policy Research Unit, University of Cape Town.

<sup>956</sup> Govindjee A & Dupper O 'Constitutional perspectives on employment security and a right to work in South Africa' (2011) 3 *Stellenbosch Law Review* 776.

1937.<sup>957</sup> Unemployment insurance is currently governed by the Unemployment Insurance Act (UIA)<sup>958</sup> and the Unemployment Insurance Contributions Act (UICA).<sup>959</sup>

UIF contributions are generally compulsory for employees, named 'contributors', in South Africa.<sup>960</sup> The contributor must contribute 1% of his gross salary to the UIF.<sup>961</sup> This contribution is then matched by the employer,<sup>962</sup> and a total of 2% of the gross salary of the contributor contributed to the UIF each month.<sup>963</sup> A contributor accumulates credits in the UIF, depending on how long he has worked and contributed to the UIF.<sup>964</sup> Credits are accumulated at a rate of 1 credit per 6 days worked.<sup>965</sup> The accumulation of credits is subject to a maximum of 238 credits per employee.<sup>966</sup> Once the employee becomes unemployed, he may draw these credits until he finds new employment or until the credits are exhausted.<sup>967</sup> The value of each credit depends on the earnings of the specific employee.<sup>968</sup>



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<sup>957</sup> Unemployment Benefits Act 25 of 1937.

<sup>958</sup> Unemployment Insurance Act 63 of 2001.

<sup>959</sup> Unemployment Insurance Contributions Act 4 of 2002.

<sup>960</sup> Certain groups of employees are specifically excluded, such as employees working less than 24 hours per month; employees under a contract of employment contemplated in terms of the Skills Development Act 97 of 1998; government employees; and certain migrant workers – see section 3 of the UIA. Other persons are indirectly excluded from the UIF system by virtue of being atypically employed – see Dupper O, Oliver M & Govindjee A 'Extending coverage of the unemployment insurance system in South Africa' (2010) 21(3) *Stellenbosch Law Review* 438.

<sup>961</sup> Section 6(1)(a) of the UICA.

<sup>962</sup> Section 6(1)(b) of the UICA.

<sup>963</sup> Contributions may be paid in two ways: either through payroll or directly to the UIF. See sections 7, 8 and 9 of the UICA.

<sup>964</sup> A 'contributor' is defined as a natural person who is or was employed, to whom the UIA applies and who can satisfy the Commissioner that he or she has made contributions to the UIF.

<sup>965</sup> Section 13(3) of the UIA.

<sup>966</sup> Section 13(3) of the UIA. This is not the case for female contributors, who simultaneously accumulate credits towards maternity benefits at the same rate as for other benefits in terms of section 13(5) of the UIA.

<sup>967</sup> Section 13(1) of the UIA. It must also be noted that maternity benefits are paid to female employees in addition to other UIF benefits. In other words, maternity benefits do not affect the number of credits available to female employees in the event of unemployment due to other circumstances covered by the UIF – see Schedule 2 to the UIA.

<sup>968</sup> Schedule 3 to the UIA provides that benefits are payable on a sliding scale.

### 5.2.2.3.1 Illness benefits

Benefits are paid from the UIF for certain recognised social risks. These are unemployment, illness, maternity, adoption and death.<sup>969</sup> For purposes of this thesis, the UIF illness benefit is most significant.<sup>970</sup> Section 20 of the UIA provides that

a contributor is entitled to the illness benefits contemplated in this Part for any period of illness if

(a) the contributor is unable to perform work on account of illness;

(b) the contributor fulfils any prescribed requirements in respect of any specified illness; and

(c) application is made for illness benefits in accordance with the prescribed requirements and the provisions of this Part.

A contributor who becomes disabled or a person who is disabled and consequently has to take significant time off work is entitled to claim illness benefits from the UIF. The illness benefit is not payable when the contributor has taken less than 14 days off from work.<sup>971</sup> This exclusion is because all employees are entitled to paid sick leave in terms of the Basic Conditions of Employment Act.<sup>972</sup> The benefit paid from the UIF is also not intended as permanent income replacement but rather as an emergency measure to provide some form of income while they are not working.<sup>973</sup> The level of benefit received depends on the salary of the person prior to their unemployment. Benefits are calculated on a sliding scale, with higher earners receiving a lower percentage of their salary as a benefit. For example, a person earning R2000 per

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<sup>969</sup> Parts B, C, D, E, and F of the UIA respectively.

<sup>970</sup> The eligibility criteria for the illness benefit are established in Part C of the UIA.

<sup>971</sup> Section 20(2)(a) of the UIA.

<sup>972</sup> Section 22 of the Basic Conditions of Employment Act 75 of 1997.

<sup>973</sup> Govindjee A & Dupper O 'Constitutional perspectives on employment security and a right to work in South Africa' (2011) 3 *Stellenbosch Law Review* 776.

month will receive 48.24% of their salary as benefit whereas a person earning R10 000 per month will receive 30.78% of their salary as a benefit.<sup>974</sup>

The significance of this benefit for persons with disabilities cannot be denied.<sup>975</sup> Certain medical conditions may predispose a person to periods of illness or medical treatment and consequently persons with these conditions may require time off work regularly. Once their statutory allocation of sick leave has been exhausted, any time off work for medical treatment would have to be unpaid,<sup>976</sup> and this is where UIF illness benefits become relevant. The UIF illness benefit plays a vital role in ensuring a measure of income security where a person's continued employment or capacity to work is threatened as a result of their disability. As will be seen at a later stage,<sup>977</sup> if an employee is continually absent from work due to illness he may be dismissed if he is unable to satisfactorily complete his duties. Such a dismissal may be fair since employers cannot be compelled to retain an employee whose performance is seriously negatively affected due to his medical condition.<sup>978</sup>

#### *5.2.2.3.2 Application and appeal procedure*

A contributor wishing to claim illness benefits must complete a prescribed form and must lodge this application in person or via a person appointed by the claims officer.<sup>979</sup>

The period of illness is calculated from the day the employee ceases work as a result

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<sup>974</sup> Schedule 2 to the UIA.

<sup>975</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 323.

<sup>976</sup> An employer may offer a longer period of sick leave than the minimum period of sick leave made compulsory in terms of the Basic Conditions of Employment Act 75 of 1997, although any time off work due to illness in excess of this increased period would also be unpaid.

<sup>977</sup> See 5.3.1 below.

<sup>978</sup> A dismissal based on an employee's incapacity must be substantively and procedurally fair. See paragraph 5.3.1 below.

<sup>979</sup> Section 22(1)(a) and (b) of the UIA. The claims officer is appointed to assist in the processing of claims in terms of the UIA – section 46 of the UIA.

of the illness.<sup>980</sup> The claims officer must investigate the claim<sup>981</sup> and, if the application complies with the eligibility criteria, must approve the application.<sup>982</sup> If the application is not approved, the claims officer must inform the applicant of this decision in writing and must provide the reasons for the rejection of the application.<sup>983</sup>

In the event that an applicant is dissatisfied with the decision of the claims officer in relation to the outcome of the application, the applicant may appeal to a regional appeals committee.<sup>984</sup> The regional appeals committee may then decide on the matter. If the applicant is unhappy with the decision of the regional appeals committee, the applicant may refer the matter to the Commission for Conciliation, Mediation and Arbitration.<sup>985</sup>

#### 5.2.2.4 Remarks on social insurance benefits

In practice, four principal avenues of social security are available to persons with disabilities in South Africa currently. These are the disability grant (with the potential of an additional grant-in-aid), occupational retirement fund disability benefits, COIDA benefits and UIF benefits. However, occupational retirement fund disability benefits, COIDA benefits and UIF benefits are only available to persons who were actively employed before acquiring a disability. This means that persons with disabilities who do not (or cannot) work or have exhausted their social insurance benefits have

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<sup>980</sup> Section 19(1) of the UIA.

<sup>981</sup> Section 22(3) of the UIA.

<sup>982</sup> Section 22(4) of the UIA.

<sup>983</sup> Section 22(5) of the UIA.

<sup>984</sup> Section 30 of the UIA.

<sup>985</sup> Section 37(2) of the UIA.

recourse only to the disability grant. As mentioned above,<sup>986</sup> efforts should be made to include persons with disabilities in employment. An effort thus needs to be made to move away from a reliance solely on social assistance and instead focus on creating opportunities for persons with disabilities to gain access to social insurance.<sup>987</sup> Until the barriers to persons with disabilities having real and consistent access to social insurance are removed, it may prove problematic to fully realise their right of access to social security in terms of section 27(1)(c) of the Constitution using other mechanisms. In addition, the question arises whether South Africa is in compliance with the requirements of Article 28 of the CRPD. An evaluation of whether the current social insurance provisions for persons with disabilities are compliant with the Constitution will be conducted next.

#### 5.2.2.5 Compliance of social insurance with the Constitution

As established previously, social insurance forms an integral part of the right of access to social security as per section 27(1)(c) of the Constitution.<sup>988</sup> Consequently, social insurance measures must progressively realise the right of access to social security for persons with disabilities within the available resources and the current social insurance measures must also be reasonable.<sup>989</sup> While it is difficult to assess the compliance of the social insurance system for persons with disabilities without simultaneously assessing the availability of feasible employment opportunities for persons with

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<sup>986</sup> See 5.2.2 above.

<sup>987</sup> Christianson M 'People with disabilities inside (and outside) the workplace: The current status of the constitutional and statutory promises' (2012) *Acta Juridica* 298.

<sup>988</sup> See 3.5 above.

<sup>989</sup> See 3.5.2 above.

disabilities since the two are inextricably linked, the current social insurance schemes available to persons with disabilities will now be measured against the Constitution.

#### 5.2.2.5.1 'access to'

A number of factors have been identified above that hinder access to social insurance for persons with disabilities. These include the use of a means test as a criterion for receiving social assistance; the voluntary nature of occupational retirement funds as well as groups of persons being statutorily excluded from certain social insurance schemes.

As explained above, the means test effectively prevents persons with disabilities currently in receipt of the disability grant from accessing social insurance via employment. As long as the means test is used to determine which persons with disabilities are eligible for the disability grant, this situation will not improve. It is therefore submitted that the means test must be abolished in order to give all persons with disabilities access to social assistance as well as removing the disincentive to work that the means test currently creates.

A number of persons are also excluded from social insurance in terms of the legislation applicable to the particular scheme. For example, domestic workers and self-employed persons are excluded from COIDA<sup>990</sup> and migrant and government workers are excluded from the UIF.<sup>991</sup> These exclusions also affect persons with disabilities who fall within these groups. These persons are thus barred from

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<sup>990</sup> Section 1(xix) of COIDA.

<sup>991</sup> Section 3(1) of the UIA.

accessing these social insurance schemes despite the fact that they may be employed.

Since social insurance is largely accessed via employment, one must also consider the high levels of unemployment amongst persons with disabilities in South Africa. Unemployment amongst persons with disabilities is currently at 18% in South Africa.<sup>992</sup> This means that a significant proportion of persons with disabilities do not have access to social insurance through employment. Those persons who are excluded from social insurance for other reasons (as mentioned above) also need to be provided access to social insurance. In addition, 1.2 million persons with disabilities are currently not earning enough to meet their own maintenance needs and are receiving the disability grant. These recipients may never have had access to social insurance, or they may have exhausted their social insurance benefits.<sup>993</sup>

Significantly, the National Disability Rights Policy provides that access to social insurance will be addressed by increasing the employment prospects of persons with disabilities.<sup>994</sup> In addition, the policy emphasises that the social grant for persons with disabilities will be reviewed in order to provide greater benefits to alleviate the costs associated with disability.<sup>995</sup> It is respectfully submitted that this approach is not the correct one, in that it retains the current 'poverty trap' for persons with disabilities

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<sup>992</sup> See 2.2.3 above.

<sup>993</sup> There are currently 1.2 million disability grant recipients in South Africa. It may safely be assumed that most of these persons are not employed. See 2.2.3 above.

<sup>994</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 65.

<sup>995</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 65.

receiving the disability grant who are discouraged from seeking work to avoid a reduction in social assistance benefits.

Another measure that is being implemented to address the issue of access is the introduction of a national retirement / social security fund. This national fund is intended as a solidarity measure and membership will be compulsory.<sup>996</sup> The purpose of this fund is to provide for a range of benefits to persons who may not necessarily be able to contribute significantly to the national fund (such as workers in informal employment and self-employed persons),<sup>997</sup> but will require benefits to meet their financial needs either at retirement or as a result of pre-existing or acquired disability.<sup>998</sup> The implementation of the national fund poses a number of problems, such as the availability of resources to fund benefits for persons who cannot contribute towards the national fund regularly. In addition, the national fund will only be phased into operation from 2017.<sup>999</sup> This makes no difference to the current situation, and will also provide no relief to persons who cease working as a result of disability before the fund comes into operation. However, the implementation of this national fund, once effected, will contribute significantly to the progressive realisation of the right of access to persons with disabilities who currently have limited or no access to social security benefits.

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<sup>996</sup> National Treasury Social Security and Retirement Fund Reform: Second Discussion Paper (2007) 1.

<sup>997</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (unpublished LL.D thesis submitted at the University of the Western Cape, 2009) 323.

<sup>998</sup> National Treasury Social Security and Retirement Fund Reform: Second Discussion Paper (2007) 3.

<sup>999</sup> National Treasury Media Statement 'Revised Draft Taxation Amendment Bill, 2014, Revised Draft Tax Administration Laws Amendment Bill, 2014 and Response Document' 16 October 2014 available at [http://www.treasury.gov.za/comm\\_media/press/2014/Default.aspx](http://www.treasury.gov.za/comm_media/press/2014/Default.aspx).

Considering the extent of the exclusion of persons from social insurance, and considering also that the measures used to counter this exclusion are not yet effective, it must be said that access to social insurance for persons with disabilities is restricted and not adequate at this stage. However, the question of access to social security is not the only constitutional requirement for compliance with section 27(1)(c). While access forms an integral part of realising the right, the right must also be progressively realised in terms of section 27(2) of the Constitution.<sup>1000</sup> The measures currently used to progressively realise of the right of access to social security will now be discussed.

#### 5.2.2.5.2 *'progressive realisation'*

The Constitution requires that the right of access to social security be progressively realised. Practically, this means that both the number of beneficiaries and the level of benefits must be improved over time.

In terms of the number of beneficiaries of social insurance, one must consider that access to social insurance has been found to be problematic for persons with disabilities.<sup>1001</sup> In order for this aspect of progressive realisation to be met, persons with disabilities must be given realistic access to social insurance schemes which is primarily accomplished through the provision of employment. There is recent legislation that aims to firmly enforce the measures required to boost the numbers of persons with disabilities employed which takes the form of the Employment Equity Amendment Act.<sup>1002</sup> A clear effort is thus being made to include persons with

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<sup>1000</sup> See 3.5.2.2 above.

<sup>1001</sup> See 5.2.2.5 above.

<sup>1002</sup> See 5.3.2 below.

disabilities in the workforce and thereby promote access to social insurance although such efforts will be hampered by the retention of the means test for social assistance, as explained above.

In addition, there has also been movement towards the implementation of a national retirement / social security fund which will attempt to extend the coverage of social insurance to all vulnerable and previously excluded workers.<sup>1003</sup> Membership of this fund will be mandatory and currently available discussion documents show that it will most likely allow for irregular contributions. In this way, persons who are often unable to work may still make some provision for their own retirement. This includes persons with disabilities who may often be out of work as a result of their disability. This will improve the numbers of persons with disabilities having access to this aspect of social insurance once it is implemented.

In terms of the level of benefit received in terms of social insurance, the benefits tend to be more substantial than those received in terms of social assistance since they are based on the recipient's former earnings.<sup>1004</sup> While the benefits are not often reviewed or increased, the potential benefit which may be received is increased with an increase in the earnings of the employee.<sup>1005</sup> It is submitted that the level of benefit received through the various schemes is satisfactory and, in conjunction with the attempt to include more persons in the scope of coverage and the abolition of the means test for

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<sup>1003</sup> National Treasury *Retirement Fund Reform: A Discussion Paper* (2004) 20.

<sup>1004</sup> See 5.2.2.2 and 5.2.2.3 above.

<sup>1005</sup> This is because social insurance benefits from COIDA and the UIF are based on the earnings of the particular employee. See 5.2.2.2 and 5.2.2.3 above.

social assistance, satisfies the requirement that the right of access to social security be progressively realised.

#### 5.2.2.5.3 *'within available resources'*

The requirement that access to social security must be provided within available resources is not strictly relevant to social insurance. This is because the resources which fund social insurance are generally provided by the members of the scheme themselves.<sup>1006</sup> In other words, the contributory nature of social insurance distinguishes it from social assistance in this regard. It must however, be noted that the availability of resources may prove problematic in the event that the proposed national retirement / social security fund becomes operative.<sup>1007</sup>

#### 5.2.2.5.4 *Reasonable measures*

Considering that certain aspects of social insurance for persons with disabilities are not currently effectively compliant with section 27(1)(c) of the Constitution, it must be concluded that the measures currently being taken to include persons with disabilities in the scope of coverage of social insurance are falling short of the standard established by the Constitutional Court.<sup>1008</sup> The Constitution requires that the measures used to progressively realise the right of access to social security within the available resources be reasonable.<sup>1009</sup> As has been proven above, the current access persons with disabilities have to social security is inadequate in various respects.

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<sup>1006</sup> Although this is not the case for COIDA. See 5.2.2.2 above.

<sup>1007</sup> See 5.2.2.5 above.

<sup>1008</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) at para 43.

<sup>1009</sup> See 3.5.2 above.

Particularly since the measures limit access to social security, the measures not reasonable.<sup>1010</sup> The test for reasonableness established in *Grootboom* require that the measures to realise a right be balance and flexible, and must take into consideration the historical, social and economic context of the relevant right for the group in question. This means that the measures taken to realise the right of access to social security must take into consideration the historical, social and economic position of persons with disabilities and the measures taken must be balanced and flexible.<sup>1011</sup> Considering that persons with disabilities have historical been marginalised and still experience economic and social hardship, it is submitted that the measures taken to realise the right of access to social security are not reasonable. In particular, it is submitted that the social insurance measures currently available for persons with disabilities do not meet the constitutional standard of reasonableness and therefore are not in compliance with section 27(1)(c) read with section 27(2) of the Constitution.

### 5.3 LABOUR LEGISLATION

As mentioned previously, there are two primary types of legislation relevant to this thesis that provide specifically for the rights of persons with disabilities in South Africa.<sup>1012</sup> The first is social security legislation, and the other is labour legislation. Labour legislation and social security legislation are linked in a number of ways. One of these is that access to an important component of social security (that is, social insurance) is gained through employment;<sup>1013</sup> similarly, a lack of employment

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<sup>1010</sup> See 5.2.1.4 and 5.2.2.5 above.

<sup>1011</sup> See 3.5.2.1 above.

<sup>1012</sup> See 5.1 above.

<sup>1013</sup> Mpedi LG 'The evolving relationship between labour law and social security' (2012) *Acta Juridica* 272.

opportunities bars access to social insurance.<sup>1014</sup> In this section, current and proposed provisions related to the rights of persons with disabilities in labour legislation will be examined in order to determine how the state intends to increase access to social insurance by means of employment for persons with disabilities.

### 5.3.1 Labour Relations Act

The purpose of the Labour Relations Act (LRA) is 'to advance economic development, social justice, labour peace and the democratisation of the workplace'.<sup>1015</sup> Section 185 further provides that every employee has the right not to be unfairly dismissed.<sup>1016</sup> A dismissal is considered automatically unfair if it is based on any arbitrary ground, including disability.<sup>1017</sup> In addition to an automatically unfair dismissal, a dismissal will be considered unfair if the employer cannot prove that it is based on a fair reason<sup>1018</sup> or that the dismissal was not effected in accordance with a fair procedure.<sup>1019</sup> However, a dismissal based on disability may be considered fair if the disability prevents the employee from performing duties which are inherent to the job.<sup>1020</sup>

In the event that an employee has been fairly dismissed as a result of incapacity due to ill-health or injury, the employee may become entitled to UIF unemployment

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<sup>1014</sup> Mpedi LG 'The evolving relationship between labour law and social security' (2012) *Acta Juridica* 274.

<sup>1015</sup> Section 1 of the LRA.

<sup>1016</sup> Section 185(a) of the LRA.

<sup>1017</sup> Section 187(1)(f) of the LRA. See also Reyneke JM & Oosthuizen H 'Are the rights of the disabled a reality in South Africa? Part two' (2004) 29(1) *Journal of Juridical Science* 89.

<sup>1018</sup> Section 188(1)(a) of the LRA.

<sup>1019</sup> Section 188(1)(b) of the LRA.

<sup>1020</sup> Section 187(2)(a) of the LRA.

benefits.<sup>1021</sup> In the event that an employee has been unfairly dismissed, he may similarly be entitled to UIF unemployment benefits while challenging the dismissal.

### 5.3.2 Employment Equity Act

The Employment Equity Act (EEA) was enacted in 1998 with the express purpose of achieving equity in the workplace.<sup>1022</sup> The elimination of unfair discrimination<sup>1023</sup> and the implementation of affirmative action policies<sup>1024</sup> are utilised as mechanisms for achieving this purpose.<sup>1025</sup> In the following paragraphs, both the elimination of unfair discrimination against persons with disabilities and the implementation of affirmative action policies benefitting persons with disabilities will be discussed in order to demonstrate the measures in place to include and advance persons with disabilities in the workplace.

#### 5.3.2.1 Elimination of unfair discrimination

Section 5 of the EEA provides that 'every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'. Further, section 6 provides that

[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour,

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<sup>1021</sup> Provided that they comply with the eligibility criteria for the benefits they wish to claim.

<sup>1022</sup> Section 2 of the EEA. See also Dupper O & Garbers C 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' in Rycroft A & Le Roux R (eds) *Reinventing Labour Law* (2012) 244.

<sup>1023</sup> Section 2(a) of the EEA.

<sup>1024</sup> Section 2(b) of the EEA.

<sup>1025</sup> Du Toit D et al *Labour Relations Law* (2006) 629.

sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary ground.<sup>1026</sup>

These provisions essentially confirm the constitutional right to equality<sup>1027</sup> and tailor the right for the workplace. Any employment policy or practice which unfairly discriminates on any of the listed grounds or any other arbitrary ground will therefore not be permitted and must be rescinded.<sup>1028</sup>

### 5.3.2.2 Affirmative action measures

The use of affirmative action measures to achieve employment equity is alluded to in section 9(2) of the Constitution which provides that 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.<sup>1029</sup> Such measures are therefore intended to promote substantive equality in the workplace and to accurately represent the demographics of various groups in the South African population.<sup>1030</sup> Affirmative action measures are defined as

measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.<sup>1031</sup>

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<sup>1026</sup> Section 6(1) of the EEA was amended by section 3 of the Employment Equity Amendment Act 47 of 2013 to include the phrase 'or any other arbitrary ground'.

<sup>1027</sup> Ngwena C 'Interpreting aspects of the intersection between disability, discrimination and equality: Lessons for the Employment Equity Act from comparative law' (2005) 16(3) *Stellenbosch Law Review* 210.

<sup>1028</sup> *Hoffmann v South African Airways* [2000] 12 BLLR 1365 (CC).

<sup>1029</sup> *Dudley v City of Cape Town and another* [2004] 5 BLLR 413 (LC) at para 70; see also Deane T 'The regulation of affirmative action in the Employment Equity Act 55 of 1998' (2006) 18 *SA Merc Law Journal* 382; Ngwena C 'Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue' (2004) 29(2) *Journal for Juridical Science* 168.

<sup>1030</sup> *Solidarity and others v Department of Correctional Services and others* [2014] 1 BLLR 76 (LC) at para 30; Mushariwa M 'UNISA v Reynhardt' [2010] 12 BLLR 1272 (LAC): Does affirmative action have a lifecycle?' (2012) 15(1) *PER* 412.

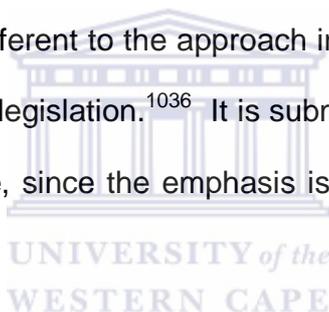
<sup>1031</sup> Section 15(1) of the EEA, as amended by section 7 of the Employment Equity Amendment Act 47 of 2013.

The EEA defines designated groups as 'black people,<sup>1032</sup> women and people with disabilities'.<sup>1033</sup> People with disabilities must therefore be given preferential opportunities for employment as well as advancement within the workplace.<sup>1034</sup> The EEA is thus a crucial part of the protection of the rights of persons with disabilities within the sphere of labour law.

Section 1 of the EEA defines 'people with disabilities' as

people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.<sup>1035</sup>

The approach of the legislature in defining 'people with disabilities' for purposes of labour legislation is entirely different to the approach in defining a 'disabled person' for purposes of social assistance legislation.<sup>1036</sup> It is submitted that the approach taken in labour legislation is preferable, since the emphasis is placed on the individual, rather than the disability.<sup>1037</sup>



Another notable difference in the definitions is that the social assistance definition defines 'disabled person' from the perspective of their intrinsic inability to provide for

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<sup>1032</sup> 'Black people' is defined as 'a generic term which means Africans, Coloureds and Indians'. Section 1 of the EEA.

<sup>1033</sup> Section 1 of the EEA.

<sup>1034</sup> *Harmse v City of Cape Town* (2003) ILJ 1130 (LC) at para 38; see also Thompson D 'Affirmative action: Only a shield? Or also a sword?' (2007) 28(3) *Obiter* 639.

<sup>1035</sup> Section 1 of the Employment Equity Act 55 of 1998.

<sup>1036</sup> See 5.2.1.1 above.

<sup>1037</sup> This is evident from the use of the phrase 'people with disabilities' which is considered preferable to the term 'disabled person' – see, for example, Ngwena C 'Deconstructing the definition of disability under the Employment Equity Act: Social Deconstruction' (2006) 22 SAJHR 615. See also Department of Works and Pensions 'Inclusive language: words to use and avoid when writing about disability' <https://www.gov.uk/government/publications/words-to-use-and-avoid-when-writing-about-disability/inclusive-language-words-to-use-and-avoid-when-writing-about-disability> (accessed on 29/08/2014).

their own maintenance.<sup>1038</sup> Labour legislation defines 'people with disabilities' from the perspective of their inability to be given employment opportunities as a result of the perception that they would not be able to perform their duties effectively as a result of their particular disability. Otherwise put, the social assistance definition is based on the oft-criticised medical model and the labour definition is based, at least in part, on the human rights model.<sup>1039</sup> This is a positive step, since the human rights model provides greater recognition for individual circumstances (as per the approach of substantive equality)<sup>1040</sup> and the importance of fulfilling the basic human rights of each person.<sup>1041</sup>

#### 5.3.2.3 Code of Good Practice: Key Aspects on the Employment of People with Disabilities

The EEA provides that the Minister of Labour may issue or amend codes of good practice.<sup>1042</sup> Such codes will provide information on matters related to the elimination of unfair discrimination and the implementation of affirmative action measures in the workplace. The Code of Good Practice: Key Aspects on the Employment of Persons with Disabilities (the Code) provides pertinent information for employers who intend to employ persons with disabilities within their workplace as well as for persons with disabilities themselves.<sup>1043</sup> For employers, the Code identifies persons with disabilities for purposes of employment equity measures as well as information on how to

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<sup>1038</sup> Ngwena C 'Deconstructing the definition of disability under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal of Human Rights* 271.

<sup>1039</sup> See 1.7.4 above.

<sup>1040</sup> Ngwena C 'Equality for people with disabilities in the workplace: An overview of the emergence of disability as a human rights issue' (2004) 29(2) *Journal for Juridical Science* 172.

<sup>1041</sup> See 1.7.4.3 above.

<sup>1042</sup> Section 54 of the EEA.

<sup>1043</sup> Du Toit D et al *Labour Relations Law* (2006) 649.

accommodate persons with disabilities in the workplace.<sup>1044</sup> For persons with disabilities, the Code provides information on their existing rights<sup>1045</sup> related to applications for employment or advancement in a particular workplace.

The Code provides that employers must reasonably accommodate persons with disabilities in their workplace, during recruitment and selection processes. This reasonable accommodation may take the form of making changes in the working environment; acquiring new equipment or making adaptations to existing facilities and equipment; changing the way work is done and evaluated; and adjusting work time and leave.<sup>1046</sup> Reasonable accommodation includes reorganising work stations, changing training and assessment materials and restructuring jobs so that non-essential functions are reassigned.<sup>1047</sup> It is submitted that these requirements of reasonable accommodation are in accordance with the human rights model, which provides that persons with disabilities are entitled to measures which would create greater participation in society (including the workplace).<sup>1048</sup> Employers are not required to implement reasonable accommodation in situations where doing so would inflict 'unjustifiable hardship' on the employer through being significantly difficult or expensive.<sup>1049</sup>

The protection afforded to persons with disabilities in the workplace by the Code of Good Practice therefore consists of a prohibition of dismissal where the ill-health or

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<sup>1044</sup> For example, Item 6 provides for the implementation of reasonable accommodation by employers.

<sup>1045</sup> Item 3 of the Code provides that the Code does not create additional rights and obligations.

<sup>1046</sup> Item 6.9 of the Code. This approach places more emphasis on accommodation of the person with a disability in order for them to participate fully in the workplace in accordance with the human rights model.

<sup>1047</sup> Item 6.9 of the Code.

<sup>1048</sup> See 1.7.4.3 above.

<sup>1049</sup> Items 6.12 and 6.13 of the Code.

injury of the employee does not impact their ability to perform their duties.<sup>1050</sup> However, the Code of Good Practice also recognises that it is not reasonable to expect an employer to retain an employee who can no longer do the work that is required of them.<sup>1051</sup>

The Code of Good Practice places a further emphasis on the, respecting, protecting, promoting and fulfilling of the rights of persons with disabilities in South Africa and is indicative (along with the EEA) of a dedication to fully including persons with disabilities in society. In so doing, numerous rights of persons with disabilities are being further realised.

### 5.3.3 Employment Services Act

The Employment Services Act (ESA) was promulgated in 2014, and provides that one of its aims is to provide for the establishment of schemes to promote the employment of young workers and other vulnerable persons.<sup>1052</sup> The ESA formalises a number of institutions already existing in South Africa and simultaneously introduces a number of new concepts. Examples of the former include the provisions dealing with Productivity South Africa,<sup>1053</sup> and examples of the latter include the establishment of the Employment Services Board.<sup>1054</sup>

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<sup>1050</sup> Or where the work of the employee may be adapted in such a manner that they can perform their duties – see *NUM v Libanon Gold Mining Co Ltd* (1994) 15 ILJ 585 (LAC).

<sup>1051</sup> *NEHAWU v SA Institute for Medical Research* [1997] 2 BLLR 146 (IC).

<sup>1052</sup> Preamble to the Employment Services Act 4 of 2014.

<sup>1053</sup> Chapter 5 of the ESA.

<sup>1054</sup> Section 20 of the ESA.

The ESA makes extensive provision for the employment of persons with disabilities in the form of Supported Employment Enterprises (SEE), established as a component of national government.<sup>1055</sup> These SEE are intended to

(a) facilitate supported employment;

(b) *provide work opportunities for persons with disabilities;*

(c) *develop and implement programmes that promote the employability of persons with disabilities, including persons with permanent disablement as defined in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in the light of their evolving needs in a changing economy; and*

(d) perform any other function as may be prescribed by the Minister.<sup>1056</sup>

The SEE are intended to be a modification of an existing scheme providing specifically for the employment of persons with disabilities<sup>1057</sup> in South Africa, namely Sheltered Employment Factories (SEFs). While the description of the SEE above is not very informative, the functions of SEFs are well-established and will now be discussed, since these functions will henceforth be the responsibility of the SEE.<sup>1058</sup>

SEFs have been in existence in South Africa for a number of years.<sup>1059</sup> There are currently twelve SEFs in existence, spanning across seven of the nine provinces in South Africa.<sup>1060</sup> According to the Department of Labour, the SEFs have been extremely successful in the provision of skills to persons with disabilities and have provided employment opportunities for persons with disabilities that may not have

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<sup>1055</sup> Section 42(1) of the ESA.

<sup>1056</sup> My emphasis.

<sup>1057</sup> Memorandum to Employment Services Bill 2010.

<sup>1058</sup> Memorandum to Employment Services Bill 2010.

<sup>1059</sup> Department of Labour - Sheltered Employment Factories <https://www.labour.gov.za/contacts/statutory-bodies/sheltered-employment-factories/> (accessed on 30/10/2014).

<sup>1060</sup> Department of Labour - Sheltered Employment Factories <https://www.labour.gov.za/contacts/statutory-bodies/sheltered-employment-factories/> (accessed on 30/10/2014).

been available otherwise.<sup>1061</sup> Despite the proclaimed success of the SEFs, it must be noted that the target for employment of persons with disabilities in the public sector has not been met.<sup>1062</sup> It can therefore be inferred that the SEF concept is not necessarily fully efficient in its current incarnation, although the volume of products and value added to the economy by the SEFs is evident.<sup>1063</sup>

The ESA places an emphasis on making it easier for persons with disabilities to enter employment by providing skills and training,<sup>1064</sup> rather than making existing employment more accessible to persons with disabilities. Since there are legislative measures that encourage employers to prioritise the employment and advancement of persons with disabilities,<sup>1065</sup> it is submitted that the implementation of the ESA is a positive movement towards the empowerment of persons with disabilities in South Africa. The ESA is, through the use of SEE, providing an additional avenue for persons with disabilities to gain skills and training which would make them more attractive to employers.

#### 5.4 COMPLIANCE WITH ARTICLE 28 OF THE CRPD

In Chapter 4 of this thesis a number of indicators were identified that can be used to gauge the extent of compliance with article 28 of the CRPD. These indicators have been largely influenced by the General Comments on the ICESCR, since only a small

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<sup>1061</sup> Department of Labour 'Sheltered Employment Factories' <http://www.labour.gov.za/DOL/contacts/statutory-bodies/sheltered-employment-factories> (accessed on 30/10/2014).

<sup>1062</sup> This target was 2%. Public Service Commission 'Assessment on Disability Equity in the Public Service' (2008) ii.

<sup>1063</sup> See Department of Labour - Sheltered Employment Factories <https://www.labour.gov.za/contacts/statutory-bodies/sheltered-employment-factories/> (accessed on 30/06/2012).

<sup>1064</sup> Section 43 of the ESA.

<sup>1065</sup> Such as the Employment Equity Act, discussed at 5.3.2 above.

number of general comments have to date been released on the CRPD.<sup>1066</sup> These indicators are:

- Accessibility of benefits
- Adequacy of benefits
- Use of social security benefits to realise other rights

For purposes of this thesis, considering the research questions identified in Chapter 1, the indicators which have been selected for evaluation purposes are strictly related to financial aspect of social protection. The compliance of South African law and policy in terms of each of these indicators is evaluated below.

#### **5.4.1 Accessibility of benefits**

As discussed previously, section 27(1)(c) of the Constitution guarantees everyone a right of access to social security, including social assistance.<sup>1067</sup> This right must be progressively realised within the available resources of the state. This is essentially also what is required in terms of Article 28, read with Article 3 of the CRPD.<sup>1068</sup> In order for South Africa to be in compliance with this indicator as per the CRPD, the number of persons covered by social security measures must be reasonable.<sup>1069</sup> While Article 28 itself makes no reference to the word 'everyone', it does refer to

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<sup>1066</sup> See 4.4.3 above.

<sup>1067</sup> See 3.5 above.

<sup>1068</sup> See 4.4 above.

<sup>1069</sup> See 4.4.3 above.

persons with disabilities as a group and it must therefore be inferred that all persons with disabilities must have access to some form of social security.<sup>1070</sup>

From the discussion of social assistance for persons with disabilities in South Africa, there do not appear to be major problems with accessing the disability grant.<sup>1071</sup> While the definition of disability and the means test have proven problematic, it was found that the definition of 'disabled person' serves a unique purpose in the administration of the grant and does not pose major barriers to accessing the grant.<sup>1072</sup>

However, the means test was identified as a substantial barrier of access to social assistance in terms of the numbers of people excluded receiving the disability grant as a result of employment as well as a barrier to accessing employment and therefore social insurance measures.<sup>1073</sup> While there are ongoing endeavours to provide social assistance to more persons with disabilities and to increase these benefits,<sup>1074</sup> these endeavours will not have a substantial impact until the means test is abolished.<sup>1075</sup> It is therefore submitted that persons with disabilities do not have adequate access to social assistance.

A number of problems were related to the access to social insurance. Importantly, a significant number of persons are statutorily excluded from certain social insurance schemes.<sup>1076</sup> Despite the fact that these persons may be employed, the legislation related to the schemes does not currently afford these persons the opportunity to

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<sup>1070</sup> See 4.4.3 above.

<sup>1071</sup> See 5.2.1.1 above.

<sup>1072</sup> See 5.2.1.1 above.

<sup>1073</sup> See 5.2.1.1 above.

<sup>1074</sup> See 5.2.1.4 above.

<sup>1075</sup> See 5.2.1.4 above.

<sup>1076</sup> See 5.2.2.5 above.

benefit in terms of the schemes. The means test used as an eligibility criterion for the social assistance grant for persons with disabilities was also identified as a barrier to access, since it effectively discourages persons in receipt of the disability grant from seeking employment, lest their grant be reduced or rescinded.<sup>1077</sup>

The fact that occupational retirement funds are not compulsory, but entirely voluntary in South Africa poses another problem.<sup>1078</sup> In the event that an employer chooses not to create or join an occupational retirement fund, the employee is prevented from accessing this type of social insurance. Finally, unemployment itself poses a huge problem in accessing membership of social insurance, since social insurance schemes are linked to employment and cannot be accessed by those not currently in formal employment.<sup>1079</sup>

It must be noted that the current lack of a national social security scheme also compounds the problem of access. As will be seen at a later stage,<sup>1080</sup> compulsory national social security schemes provide extensive coverage to persons, both in the form of social assistance and social insurance. The current fragmented administration of social security in South Africa is thus a further problem in providing adequate access to social security.

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<sup>1077</sup> See 5.2.2.5 above.

<sup>1078</sup> See 5.2.2.5 above.

<sup>1079</sup> See 5.2.2.5 above.

<sup>1080</sup> See Chapter 6 below.

In the light of the multitude of barriers which restrict access to social security, it is submitted that South Africa is not currently in compliance with the requirement of providing access to social security as required by Article 28 of the CRPD.<sup>1081</sup>

#### **5.4.2 Adequacy of benefits**

The adequacy of social security benefits refers to the level of benefit received by each person and how this benefit contributes towards the achievement of an adequate standard of living. While it is not helpful to provide large numbers of persons with very low benefits it is simultaneously not feasible to provide high benefits to large numbers persons.<sup>1082</sup> A balance must therefore be struck between the financial needs of persons and the availability of resources. In South Africa, social assistance benefits are quite low.<sup>1083</sup> The amount paid to recipients of the disability grant is insufficient to meet the cost of living of persons in receipt thereof. Consequently, recipients of the disability grant often find themselves living in relative poverty.<sup>1084</sup>

Social insurance benefits are generally higher than social assistance benefits, because benefits for most schemes are calculated on the basis of earnings before acquiring the disability. However, considering that the unemployment rate is high amongst persons with disabilities,<sup>1085</sup> a low and temporary benefit from social insurance schemes may not meet the financial needs of the person (or his dependants). Persons with disabilities may find themselves in a situation where their

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<sup>1081</sup> See 4.4.8.1 above.

<sup>1082</sup> See 5.2.1.1 above.

<sup>1083</sup> See 5.2.1 above.

<sup>1084</sup> See 5.2.1 above.

<sup>1085</sup> See 2.2.3 above.

social insurance benefit has been exhausted and they have no recourse to other income.

From the foregoing discussion, South Africa is currently providing social assistance to persons with disabilities that does not allow for the achievement of an adequate standard of living since the benefit provide is so low. However, social insurance generally provides higher benefits which are linked to the income of the recipient. While these amounts are higher than those received in terms of social assistance, it is submitted that these benefits may still not be adequate to address the maintenance needs of the recipients, although this is difficult to firmly establish since the benefits paid are highly individualised.

#### **5.4.3 Use of social security benefits to realise other rights**

As discussed previously, the right of access to social security is inextricably linked with the right to an adequate standard of living.<sup>1086</sup> In fact, the right of access to social security is a chief contributor to achievement to the right of an adequate standard of living guaranteed in terms of international law.<sup>1087</sup> Considering that aspects of the current South African social assistance measures do not provide adequate coverage for persons with disabilities and that the benefits provided are not sufficient to meet the maintenance needs of persons with disabilities, it is submitted that social assistance alone is not sufficient to realise the right to an adequate standard of living as envisaged in international law.

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<sup>1086</sup> See 4.4.6 above.

<sup>1087</sup> See 4.4.6 above.

It is not as simple to assess whether social insurance benefits are being used to realise an adequate standard of living for persons with disabilities. This is because each recipient of COIDA and UIF benefits receives a benefit that is based on their salary which means benefits are highly individualised.<sup>1088</sup> The level of social insurance benefits available may contribute greatly towards the realisation of an adequate standard of living. However, while access to social insurance remains limited for so many persons,<sup>1089</sup> the level of benefit is irrelevant. It is thus submitted that social insurance benefits are not currently contributing towards the achievement of an adequate standard of living of persons with disabilities since so many are excluded from social insurance schemes.

## 5.5 CONCLUSION

This chapter is concerned with the current social security benefits available to persons with disabilities in South Africa. The social security benefits have been explained and the social security benefits applicable to persons with disabilities were then evaluated against both the constitutional guarantee of access to social security and the international law obligations related to social protection and an adequate standard of living created by the CRPD. For the latter, a number of indicators compiled from international law were used to evaluate the social security benefits available.

Out of the three indicators selected for evaluation purposes, measures taken by the state to realise the right of access to social security is found to be lacking in aspects of each one. The most concerning failure by the state is related to the lack of access to

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<sup>1088</sup> See 5.2.2.2 and 5.2.2.3 above.

<sup>1089</sup> See 5.2.2.5 above.

both social assistance and social insurance. These matters must be addressed as a matter of urgency in order to ensure compliance with section 27(1)(c) of the Constitution. In addition to non-fulfilment of the constitutional right of access to social security, Article 28 of the CRPD is also not currently being fully realised for persons with disabilities.

The non-compliance with the CRPD has been recognised by the state.<sup>1090</sup> The National Disability Rights Policy is the first step in domesticating the CRPD, and aims to bring existing legislation and policy in alignment with the obligations imposed therein.<sup>1091</sup> This policy therefore satisfies the Article 4 requirement that State Parties take 'legislative and other measures' to bring about compliance with the CRPD. However, the National Disability Rights Policy does not mention specific measures aimed at realising the right to social protection (and therefore social security) of persons with disabilities, save to the extent mentioned above. The National Disability Rights Policy is therefore a step in the right direction, but does not improve on the current level of compliance with Article 28 as established in this thesis.

It is prudent to consider the approach taken by other jurisdictions in promoting, protecting, respecting and fulfilling the rights of persons with disabilities. In doing so, important lessons may be learned relating to the most effective way to implement the rights of persons with disabilities (such as dignity and equality), as well as which mechanisms are ineffective in this matter. In the following chapter, the indicators

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<sup>1090</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014)

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<sup>1091</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014)

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compiled from international law<sup>1092</sup> will be applied to the social security systems of Chile and the UK to determine the extent to which they have complied with their international law obligations and to determine whether any lessons can be learned in order to address the aspects of the South African social security that are currently non-compliant with the CRPD.



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<sup>1092</sup> See 4..4.8 above.

## CHAPTER 6

### COMPARATIVE ANALYSIS

#### 6.1 INTRODUCTION

In Chapter 4, the international law obligation to provide social security to persons with disabilities was discussed. Further to that discussion, the current status of the implementation of that obligation in South Africa was considered and found wanting in several respects.<sup>1093</sup> The purpose of this chapter is to consider the social security benefits available to persons with disabilities in selected other jurisdictions, and the extent to which their social security schemes for persons with disabilities comply with the international law, specifically the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>1094</sup> The comparator jurisdictions chosen for this thesis are Chile and Great Britain. These jurisdictions have been selected for a number of reasons that are explained below.

The most important consideration in selecting jurisdictions for purposes of this comparative study was the status of the CRPD in each.<sup>1095</sup> Both of the selected jurisdictions have signed and ratified the CRPD.<sup>1096</sup> This means that they are

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<sup>1093</sup> See generally Chapter 5 above.

<sup>1094</sup> United Nations Convention on the Rights of Persons with Disabilities 2006.

<sup>1095</sup> The obligations created by relevant social security instruments were also taken into account, such as ILO Convention 102 of 1952 (the Minimum Standards Convention). Although other jurisdictions (such as the United States of America) have well-developed social security systems from which lessons may be learned, considering the stated aims of this thesis, choosing comparators that have signed and ratified the CRPD is considered most important.

<sup>1096</sup> Chile signed and ratified the CRPD in 2007, and signed and ratified the Optional Protocol in 2008. The UK signed the CRPD in 2007 and ratified it in 2008 and the Optional Protocol was signed and ratified in 2008. UN Enable 'Convention and Optional Protocol Signatures and Ratification' <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed on 14/03/2014).

compelled to adhere to and implement its provisions including Article 28, which is the focus of this thesis.<sup>1097</sup>

While a number of African countries have signed and ratified the CRPD, the social security systems are often plagued by poor and insufficient coverage.<sup>1098</sup> While an examination of the social security system of an African country may provide valuable information on how certain elements of the South African social security system may be improved, the problems experienced in other African jurisdictions are likely to be similar to those experienced in South Africa. In addition, the South African social security system is very complex and provides for a range of benefits and these may be best improved by considering other systems which are similarly complex but which have been in existence for longer and have already been faced with similar problems to those experienced in South Africa. The aim of this thesis is to generate solutions to problems encountered in South Africa (and possibly in other countries in similar social and economic contexts). For this reason, African jurisdictions have been excluded from the comparative element of this thesis.

Both Chile and the UK have signed and ratified the CRPD and both are members of the International Labour Organisation. This means that both these jurisdictions are bound by the obligations of the CRPD and those instruments of the ILO which they have ratified. In addition, Chile has a comparable Gini co-efficient and similar socio-economic conditions to South Africa. The World Bank makes use of the GINI Index to

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<sup>1097</sup> See 1.3 above. It must also be noted that compliance with other relevant international social security instruments will be considered, but the primary research question of this thesis is related to the satisfaction of Article 28 of the CRPD, and the focus of this chapter will therefore be to determine ways in which other jurisdictions already comply or are moving towards such compliance.

<sup>1098</sup> ILO 'Facts on Social Security in Africa' available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067553.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067553.pdf).

determine the levels of inequality in a particular country.<sup>1099</sup> On a scale of 0 (perfect equality between persons) and 100 (perfect inequality between persons), the GINI Index for Chile in 2011 was 50.8, whereas the GINI Index for South Africa in 2009 is 65. The GINI Index for the UK in 2008 – 2009 is 40.<sup>1100</sup> Chile and South Africa therefore experience very similar levels of income inequality.

An investigation of the social security provisions for persons with disabilities in Chile and the UK provides a number of benefits. This investigation will allow for an analysis of the extent of compliance with relevant international law obligations in these jurisdictions which will put into perspective the level of compliance with such obligations in South Africa. In addition, this investigation will consider the mechanisms used for the implementation of measures intended to achieve compliance with these obligations in the selected jurisdictions, which will similarly allow for a comparison of the chosen mechanisms in South Africa. While this evaluation takes place, it is possible (and desirable, in light of the research questions forming the focus of this thesis) to conduct a comparison of the social security benefits available to persons with disabilities in Chile and the UK and compare them with the benefits available in South Africa. Both of these jurisdictions have been used in research and discussion documents by stakeholders in the current process of reforming the South African social security system.<sup>1101</sup> These jurisdictions are therefore ideal for purposes of comparative study.

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<sup>1099</sup> World Bank GINI Index <http://data.worldbank.org/indicator/SI.POV.GINI> (accessed on 11/05/2015).

<sup>1100</sup> World Bank GINI Index <http://data.worldbank.org/indicator/SI.POV.GINI> (accessed on 11/05/2015).

<sup>1101</sup> Chile was used as a comparator jurisdiction by the National Treasury in 2004 for *Retirement Fund Reform: a discussion paper* and the United Kingdom (of which Great Britain is a member) was referred

Since one of the aims of this chapter is to evaluate the level of implementation of Article 28 of the CRPD in the selected comparators, Chile and the UK, the social security measures catering for persons with disabilities in each jurisdiction will be discussed.<sup>1102</sup> Thereafter, the respective systems will be measured against the indicators for successful implementation as established in Chapter 4.<sup>1103</sup> In conclusion, any lessons which may be learned by South Africa from these jurisdictions will be discussed.

## 6.2 CHILE

Chile has often been used in comparative social security studies in South Africa. The proposed reforms to the South African social security system<sup>1104</sup> in relation to the introduction of a compulsory national retirement fund have been influenced by the system in Chile. In addition to the suitability of Chile's social security system for comparative purposes, the socio-economic position of persons in Chile resembles the socio-economic situation in South Africa.<sup>1105</sup>

The disability benefit system in Chile is considered innovative<sup>1106</sup> and has undergone modification in recent years and it is this modified version which will be used for the comparative purposes in this chapter.<sup>1107</sup>

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to by the Department of Social Development in the 2007 *Reform of Retirement Provisions Discussion Document*.

<sup>1102</sup> See 6.2. and 6.3. below respectively.

<sup>1103</sup> See 4.4.8 above.

<sup>1104</sup> See 5.2.1.1 and 5.2.2.5 above.

<sup>1105</sup> See 6.2 below.

<sup>1106</sup> James E & Iglesias A 'How to integrate disability benefits into an individual account system: The Chilean Model' (2006) 27.

<sup>1107</sup> The Chilean pension system underwent a period of reform starting in the mid-2000s. See 6.2.4.1 below.

### 6.2.1 Poverty and disability

Determining the prevalence of disability in Chile is difficult, since many surveys exist, all of which report different figures related to the prevalence of disability.<sup>1108</sup>

According to the World Report on Disability, the prevalence of disability in Chile was 2.2% in 2002.<sup>1109</sup> However, the First National Study on Disability in 2004 puts the prevalence of disability at almost 13%.<sup>1110</sup> The indicators used in the World Report on Disability are not identical to the indicators used in the First National Study on Disability and these statistics are therefore not directly comparable. The National Study does not provide statistics on the impact of disability on poverty (and vice versa) but does recognise that persons with disabilities do experience obstacles related to poverty and recognises that measures have been put in place to reduce this impact.<sup>1111</sup> In addition, the First Initial Country Report on the CRPD provides that persons with disabilities in Chile experience barriers to full participation in society as a result of numerous socio-economic factors.<sup>1112</sup> There is an established link between link between disability and the economic stability of the family, with a significant percentage of households indicating that they have been negatively affected as a result of the disability.<sup>1113</sup> This means that the incidence of disability has a

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<sup>1108</sup> International Disability Rights Monitor Interview with Georgina Trincado (Documentation Center of the National Statistics Institute), interviewed by author, Chile, 7 October 2003.

<sup>1109</sup> World Report on Disability (2011) 272. Based on the 2002 Chile Population Census.

<sup>1110</sup> National Fund for Disability 'First National Study on Disability' (2004) 13.

<sup>1111</sup> National Fund for Disability 'First National Study on Disability' (2004) 34. These measures include the Official Program for Solidarity (also called Chile Solidario) which aims to improve living conditions and lessen the impact of poverty on persons with disabilities and their families.

<sup>1112</sup> Informe Inicial de aplicación de la Convención sobre los derechos de las personas con discapacidad (2012) 4.

<sup>1113</sup> National Fund for Disability 'First National Study on Disability' (2004) 19.

considerable impact on the financial position of persons and families when it does occur.

According to the International Disability Rights Monitor, the general employment rate in Chile in 2004 was approximately 51%.<sup>1114</sup> By contrast, only approximately 25% of persons with disabilities were in employment at that time.<sup>1115</sup> According to the Chilean Institute of Social Security, as of February 2014 there are 183 000 basic solidarity disability pension<sup>1116</sup> recipients in Chile.<sup>1117</sup> In addition, there are approximately 57 000 recipients of social insurance and mandatory individual account disability benefits.<sup>1118</sup> The total number of persons with disabilities receiving social security benefits in Chile is thus approximately 240 000.<sup>1119</sup> As established in the World Report on Disability 2% of the total population in Chile are persons with disabilities. 2% of the total population (approximately 17.3 million)<sup>1120</sup> would be around 350 000 persons. This means that more than half of the estimated number of persons with disabilities in Chile receives some form of disability benefit.<sup>1121</sup>

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<sup>1114</sup> International Disability Rights Monitor 'Regional Report of the Americas' (2004) 129.

<sup>1115</sup> International Disability Rights Monitor 'Regional Report of the Americas' (2004) 129.

<sup>1116</sup> See 6.2.4.2 below.

<sup>1117</sup> Superintendencia de Pensiones Centro de Estadísticas 'Numero De Beneficiarios y Monto, En \$ De Beneficios Pagados en el mes Total País, Segundo Beneficiario y tipo de Beneficio' available at <http://www.safp.cl/safpstats/stats/pageCCEE.php?menu=sps&item=nbmpm> (accessed on 09/04/2014).

<sup>1118</sup> Superintendencia de Pensiones Centro de Estadísticas 'Numero De Beneficiarios y Monto, En \$ De Beneficios Pagados en el mes Total País, Segundo Beneficiario y tipo de Beneficio' available at <http://www.safp.cl/safpstats/stats/pageCCEE.php?menu=sps&item=nbmpm> (accessed on 09/04/2014). See also 6.2.4.4 below.

<sup>1119</sup> This figure is obtained by adding the number of basic solidarity disability pension recipients to the number of recipients of social insurance and mandatory account benefits.

<sup>1120</sup> UN Data 'Chile' <http://data.un.org/CountryProfile.aspx?crName=CHILE> (accessed on 17/03/2014).

<sup>1121</sup> Since the estimated number of persons with disabilities is 350 000, 240 000 constitutes more than half of that number.

## 6.2.2 Constitutional aspects

Article 19.8 of the Chilean Constitution guarantees the right to social security for all persons.<sup>1122</sup> The Article reads as follows:

The laws regulating the exercise of this right shall be passed by a qualified quorum. The action of the State shall be intended to guarantee access of all inhabitants to uniform basic benefits whether granted by public or private institutions. The law may establish compulsory social security quotations. The State shall supervise the adequate exercise of the right to social security...<sup>1123</sup>

The Chilean Constitution guarantees a right to social security as opposed to the right of access to social security guaranteed by the South African Constitution. This right is written in very broad terms, and has been connected with other principles found in the Chilean Constitution, such as the right to health.<sup>1124</sup>

Article 19.8 refers to state action in creating access to social security for all persons. The state is therefore ultimately responsible for administration, funding and provision of social security benefits in Chile.<sup>1125</sup> As part of this obligation, the state must ensure that access to basic social security schemes is realised, whether such scheme is private or public.<sup>1126</sup> In other words, the state must ensure that all persons have access to both state provided social security as well as privately administered social security. As seen at a later stage, the Chilean social security system consists of

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<sup>1122</sup> Article 19.8 of the Political Constitution of the Republic of Chile, Decree No 1150 of 1980.

<sup>1123</sup> Article 19.8 of the Political Constitution of the Republic of Chile, Decree No 1150 of 1980.

<sup>1124</sup> Couso J, Parmo DL & Coddou A *Constitutional Law in Chile* (2011) 215.

<sup>1125</sup> Couso J, Parmo DL & Coddou A *Constitutional Law in Chile* (2011) 215.

<sup>1126</sup> Article 19 No 8 of the Political Constitution of the Republic of Chile, Decree No 1150 of 1980.

blended private and public schemes which are overseen by the state through various organs.<sup>1127</sup>

### 6.2.3 International law obligations

Chile signed the CRPD in March 2007 and ratified the CRPD in July 2008.<sup>1128</sup> As a result of ratification, Chile is bound by the provisions of the CRPD. Of particular importance for this thesis, is that Chile must comply with the requirements of Article 28 in providing social security and an adequate standard of living for persons with disabilities.

Similar to South Africa, Chile has not yet ratified many of the international social security instruments. This means that Chile is not compelled to meet the obligations imposed by these instruments. However, Chile has ratified the ICESCR which means that it is obliged to implement the provisions thereof into domestic legislation.<sup>1129</sup> This is an important factor in the evaluation of Chile's social security system for compliance with Article 28 of the CRPD, since many of the principles found in Article 28 are also found in the ICESCR.<sup>1130</sup>

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<sup>1127</sup> See 6.2.4 below.

<sup>1128</sup> UN Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?id=166> (accessed on 24/09/2014).

<sup>1129</sup> Chile ratified the ICESCR in 1972 – see United Nations Treaty Collection [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty) (accessed on 03/10/2014).

<sup>1130</sup> See 4.4 above.

#### 6.2.4 Social security legislation

The social security system in Chile is primarily based on individual capitalisation.<sup>1131</sup> Qualifying individuals make contributions to a mandatory individual account which is administered by pension fund managers, known as Administradoras de Fondos de Pensiones or AFPs. AFPs are companies that are responsible for collecting contributions, investing funds on behalf of members and ensure the payment of the correct benefit at a later stage.<sup>1132</sup>

However, social security in Chile is not limited to the individual account system. Essentially, the Chilean social security system is comprised of three pillars:<sup>1133</sup> social assistance (called the poverty prevention pillar), social insurance and the mandatory individual account (contributory pillar) and the third pillar, consisting of voluntary savings and insurance.<sup>1134</sup> The Ministry of Labour and Social Security takes responsibility for the administration of social security benefits in Chile, and the Ministry has a dedicated Superintendent of Pensions (also known as the Chile Pensions Supervisor) who oversees the pension system.<sup>1135</sup> There are a number of institutions involved in the broader pension system in Chile, namely, the Institute of Social Security, Pension Fund Managers and the Unemployment Funds Manager.<sup>1136</sup>

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<sup>1131</sup> Yagizi AF *The Chilean Pension System based on Individual Capitalization* (2003) 53.

<sup>1132</sup> Mesa-Lago C 'Social protection in Chile: Reforms to improve equity' (2008) 147 (4) *International Labour Review* 387.

<sup>1133</sup> Superintendencia de Pensiones *The Chilean Pension System* (2010) 9.

<sup>1134</sup> De Mesa AA, Bravo D & Behramm JR et al 'The Chilean Pension Reform turns 25: lessons from the social protection survey' (2006) *National Bureau of Economic Research Working Paper No 12401* 7.

<sup>1135</sup> Superintendencia de Pensiones <http://www.safp.cl/portal/institucional/578/w3-propertyvalue-5925.html> (accessed on 09/04/2014).

<sup>1136</sup> Superintendencia de Pensiones <http://www.safp.cl/portal/institucional/578/w3-propertyvalue-5925.html> (accessed on 09/04/2014).

Disability benefits paid from the non-contributory and contributory pillars are discussed and explained below. However, certain terminology must be explained before the details of the various benefits available can be discussed.

For purposes of social security in Chile, the terms 'wage earner' and 'salaried employee' are essential. Wage earners as well as salaried employees are employees who hold 'paid employment jobs' and whose earnings are not related to the revenue generated by their employer.<sup>1137</sup> In addition, wage earners work to a fixed term contract whereas salaried employees have indefinite contracts. For purposes of social insurance contributions and benefits, wage earners and salaried employees are treated separately, although the reason for this differentiation is generally not given. These terms are used more frequently in the context of social insurance and the mandatory individual account, rather than social assistance.<sup>1138</sup> The benefit a person is entitled to is contingent upon their status as a wage earner, salaried employee or self-employed person.

#### 6.2.4.1 Chilean pension reform

In the early 2000s, the shortcomings of the Chilean pension system became the focus of much scrutiny and criticism.<sup>1139</sup> An Advisory Council tasked with pension reform was consequently appointed in 2006.<sup>1140</sup> The Advisory Council consulted with

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<sup>1137</sup> Index Mundi 'Chile – Wage and salaried workers' <http://www.indexmundi.com/facts/chile/wage-and-salaried-workers> (accessed on 09/04/2014).

<sup>1138</sup> See 6.2.2.1 and 6.2.2.2. below.

<sup>1139</sup> Malherbe ED 'Intergenerational solidarity and the provision of support and care to older persons' (unpublished LLD thesis, University of the Western Cape, 2009) 511; see also Barreto L 'A report on the status of older people's rights in Latin America' (2009) International Symposium on the Rights of Older People, Background briefing paper.

<sup>1140</sup> The Advisory Council was established by the President as per Supreme Decree No 336 of 2006.

numerous parties in establishing what should be done to improve the pension system<sup>1141</sup> and the changes and improvements identified during these consultations were implemented in 2008, when the Law on Pension Reform was promulgated.<sup>1142</sup> The Chilean pension system then experienced a substantial reform. One of the primary objectives of the reform was to emphasise solidarity within the pension system.<sup>1143</sup> The former social assistance pillar of the Chilean pension system has accordingly been replaced by a solidarity pillar, which was intended to allow older persons to live with dignity.<sup>1144</sup> The emphasis during the reform was on the provision of financial support to various groups of persons that were non-wage earners, including persons with disabilities.<sup>1145</sup>

#### 6.2.4.2 Social assistance

Since the 2008 reform of the Chilean pension system, the social assistance pillar has also been called the New Solidarity Pillar (NSP).<sup>1146</sup> The NSP is non-contributory in nature and is intended to provide for a basic level of income for persons who have little or no other income.<sup>1147</sup> The financial benefit provided by the NSP for persons with disabilities is referred to as a basic disability solidarity pension (Pensión Básica

<sup>1141</sup> ISSA 'Creation of the Presidential Advisory Council for Pension Fund Reform' <http://www.issa.int/country-details?countryId=CL&regionId=AME&filtered=false#> (accessed on 17/09/2014).

<sup>1142</sup> Law on Pension Reform 20,255 of 2008.

<sup>1143</sup> Malherbe ED 'Intergenerational solidarity and the provision of support and care to older persons' (unpublished LLD thesis, University of the Western Cape, 2009) 513; Mesa-Lago C 'Social protection in Chile: Reforms to improve equity' (2008) 147 (4) *International Labour Review* 392.

<sup>1144</sup> ISSA 'Proposed reform of the Chilean pension system' <http://www.issa.int/country-details?countryId=CL&regionId=AME&filtered=false#> (accessed on 22/09/2014).

<sup>1145</sup> Marcel M (chairman) et al 'Report of the Presidential Advisory Council for Pension Reform' (2006) Presentation at Regional Operations Department I, Inter-American Development Bank, Washington DC.

<sup>1146</sup> Forteza A & Apella I et al 'Contributions to Social Security in Argentina, Chile and Uruguay: Densities, Transitions and Duration' (2011) 57 *Económica, La Plata* 132.

<sup>1147</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 21.

Solidaria de Invalidez or PBSI).<sup>1148</sup> The PBSI was introduced specifically as a measure to improve the social assistance benefits available to persons with disabilities in Chile.<sup>1149</sup> The Institute of Social Security (IPS) is responsible for managing the solidarity pensions system in Chile.<sup>1150</sup> Only residents of Chile are eligible to receive the basic disability pension in the event of disability.<sup>1151</sup> Receipt of the PBSI is not contingent upon employment at any stage.

A recipient of the PBSI must be between 18 and 64 years of age; provide a medical assessment of disability; have been resident in Chile for 5 of the preceding 6 years; be ineligible for the basic old-age solidarity pension and the recipient's family must be amongst the poorest 60% of the population according to the Chilean population census information.<sup>1152</sup> The government bears the full costs of providing this PBSI to all recipients. As of August 2014, the PBSI paid an amount of 85 964 pesos per month,<sup>1153</sup> which is substantially less than the legal minimum wage amount.<sup>1154</sup>

#### 6.2.4.3 Social insurance

The second pillar of the Chilean pension system consists primarily of a compulsory

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<sup>1148</sup> Superintendencia de Pensiones *The Chilean Pension System* (2010) 26.

<sup>1149</sup> Informe Inicial de aplicación de la Convención sobre los derechos de las personas con discapacidad (2012) 51.

<sup>1150</sup> Superintendencia de Pensiones <http://www.safp.cl/portal/institucional/578/w3-propertyvalue-5925.html> (accessed on 09/04/2014).

<sup>1151</sup> The Institute of Social Security was created in terms of Law 20,255 of March 2008.

<sup>1152</sup> Superintendencia de Pensiones *The Chilean Pension System* (2010) 26.

<sup>1153</sup> Chile Atiende Personas a tu servicio <http://www.chileatiende.cl/fichas/ver/5178> (accessed on 10/09/2014).

<sup>1154</sup> As of July 2014, the minimum wage amount is 182 000 pesos per month.

defined contribution system.<sup>1155</sup> For purposes of this thesis, this pillar will be referred to collectively as social insurance.

Social insurance for persons with disabilities in Chile is unique, in that it consists of a combination of private and public funding in order to ensure that a person who becomes disabled while working receives some form of income. The contributions are made by the employees themselves while the government regulates the system and provides guarantees related to the level of benefit received upon disability.<sup>1156</sup>

While the NSP is non-contributory and benefits are not linked to employment, social insurance disability benefits are largely contingent upon contributions made by certain employees.<sup>1157</sup> Employees who are covered by social insurance are those who are wage earners, salaried employees as well as those who are self-employed, although the latter group is not compelled to participate.<sup>1158</sup>

The percentage contribution which must be paid by each person depends on his or her particular earnings in relation to the minimum wage.<sup>1159</sup> The government has also imposed a maximum amount which may be contributed, particularly by wage

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<sup>1155</sup> The second pillar also includes a mandatory individual account – see 6.2.4.4 below. Somaguda – Nogantshi A ‘South Africa’s Retirement Reform: lessons from the Chilean reform enacted in 1981’ (unpublished MBA thesis, University of Pretoria, 2008) 6.

<sup>1156</sup> Organisation for Economic Co-operation and Development ‘Maintaining Prosperity In An Ageing Society: the OECD study on the policy implications of ageing: The Chilean Pension System’ (1998) *Working Paper AWP* 5.6 10.

<sup>1157</sup> De Mesa AA, Bravo D & Behramm JR et al ‘The Chilean Pension Reform turns 25: lessons from the social protection survey’ (2006) *National Bureau of Economic Research Working Paper No 12401* 7.

<sup>1158</sup> De Mesa AA, Bravo D & Behramm JR et al ‘The Chilean Pension Reform turns 25: lessons from the social protection survey’ (2006) *National Bureau of Economic Research Working Paper No 12401* 7.

<sup>1159</sup> For persons aged 18 to 65, the minimum wage amount is 225 000 pesos per month as of 1 July 2014 – see Direccion del Trabajo <http://www.dt.gob.cl/consultas/1613/w3-article-60141.html> (accessed on 03/10/2014).

earners.<sup>1160</sup> This maximum is based on the Unidad de Fomento (UF) which is a unit of account which is used in certain financial transactions to convert the Chilean peso into a more practical unit of measurement.<sup>1161</sup>

Employers do not contribute to the social insurance savings of their employees in the Chilean system. However, the state steps in to provide for a guaranteed minimum pension as well as additional benefits in the event that the primary benefit does not meet a prescribed minimum level.<sup>1162</sup>

The level of the benefit paid in terms of the contributory pillar depends on whether the person is disabled temporarily or permanently, as well as whether the disability is partial or total. The benefit is also linked to the 'base wage' or 'base salary' of each person. The base wage is calculated as an average of the monthly wage earned for the last ten years.<sup>1163</sup> The base salary calculation is the same. This means that the amount each person receives is directly proportional to their individual wage or salary.

For permanent disability, there is also a difference in benefit depending on whether the recipient was a wage earner, salaried worker or self-employed. For wage earners with a permanent total disability, the monthly benefit is 50% of their base wage plus an

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<sup>1160</sup> The maximum contribution is 60 UF. See Social Security Administration *Social Security Programmes throughout the World: the Americas* (2005) 81.

<sup>1161</sup> Yagizi AF *The Chilean Pension System based on Individual Capitalization* (2003) 14.

<sup>1162</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 10.

<sup>1163</sup> US Social Security Administration Office of Retirement and Disability Policy 'Chile's Next Generation Pension Reform' <http://www.ssa.gov/policy/docs/ssb/v68n2/v68n2p69.html> (accessed on 13/04/2015).

additional 1% of their wage for every 50 weeks of contributions over 500 weeks.<sup>1164</sup>

For permanent partial disability, the benefit is 50% of the base wage.<sup>1165</sup>

For permanent total disability and permanent partial disability, salaried employees receive 70% of their base salary with an additional 2% of their salary for every year of contributions exceeding 20 years.<sup>1166</sup> A person who has contributed for 25 years will therefore receive 80% of their base salary. The minimum disability pension for former salaried employees is the same monetary amount as for wage earners.

#### 6.2.4.4 Mandatory individual account

The additional component of the second pillar of Chile's social security system consists of the mandatory individual account. Deposits are made by persons into the fund on a defined contribution basis.<sup>1167</sup> The mandatory individual account is a staple in the social security landscape of Chile and was established in 1980.<sup>1168</sup> Persons make contributions towards their own individual account.<sup>1169</sup> Each person who makes these contributions and acquires a disability before retirement is entitled to a defined benefit from their individual account.<sup>1170</sup> If the amount in the individual account is more than this defined benefit, the person remains entitled only to the defined benefit

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<sup>1164</sup> US Social Security Administration Office of Retirement and Disability Policy 'Chile's Next Generation Pension Reform' <http://www.ssa.gov/policy/docs/ssb/v68n2/v68n2p69.html> (accessed on 13/04/2015).

<sup>1165</sup> The minimum monthly disability pension is 111 855 pesos for a recipient younger than 70; 122 305 pesos for a person aged 70 – 75; and 130 495 pesos for a person aged older than 75.

<sup>1166</sup> James E & Iglesias A Integrated Disability and Retirement Systems in Chile (2007) *NCPA Policy Report No 302 2*.

<sup>1167</sup> De Mesa AA, Bravo D & Behramm JR et al 'The Chilean Pension Reform turns 25: lessons from the social protection survey' (2006) *National Bureau of Economic Research Working Paper No 12401 9*.

<sup>1168</sup> Decree Law 3,500 of 1980.

<sup>1169</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 31.

<sup>1170</sup> James E & Iglesias A 'How to Integrate Disability Benefits into an Individual Account System' (2006) *Documento de Trabajo No 18 2*. A defined benefit is one which is calculated according to pre-determined formula. In this instance, the formula is determined by the severity of the disability experienced by the person.

amount.<sup>1171</sup> If the benefits available from a person's individual account do not provide the prescribed minimum benefits,<sup>1172</sup> the benefit can be supplemented with so-called 'top-up' benefits from either social insurance (which is contributory)<sup>1173</sup> or social assistance (which is non-contributory and means tested).<sup>1174</sup>

The mandatory individual account system applies only to wage earners and salaried employees who were employed after 31 December 1982.<sup>1175</sup> Since 1 January 2012, it has also been compulsory to self-employed persons,<sup>1176</sup> although this has proved problematic in practice.<sup>1177</sup> The individual account system therefore straddles the social insurance and voluntary pillars of the pension system. In addition, contributions to the individual account fund both old age benefits and disability benefits.<sup>1178</sup>

Chile provides a guaranteed minimum pension for those persons whose disability pension contributions do not provide sufficient coverage in the event of disability.<sup>1179</sup> If the disability benefit accumulated is less than this minimum, the shortfall is covered by

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<sup>1171</sup> James E & Iglesias A 'How to Integrate Disability Benefits into an Individual Account System' (2006) *Documento de Trabajo No 18* 2.

<sup>1172</sup> The minimum defined benefit for total disability is 70% of the recipients wage; for partial disability the minimum defined benefit is 50%. See

<sup>1173</sup> James E & Iglesias A 'Disability Insurance with Pre-funding and Private Participation: The Chilean Model' (2007) 2.

<sup>1174</sup> James E & Iglesias A 'How to Integrate Disability Benefits into an Individual Account System' (2006) *Documento de Trabajo No 18* 15.

<sup>1175</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 31.

<sup>1176</sup> Pension Reform Law No 20,255 of 2008.

<sup>1177</sup> Problems related to self-employed persons and the mandatory individual account include coverage, income instability and high levels of monthly contributions. See Superintendence of Pensions *The Chilean Pension System* (2010) 159.

<sup>1178</sup> Superintendancy of Pension Fund Administrators *The Chilean Pension System* 4ed (2003) 65.

<sup>1179</sup> This construction is commonly referred to as the 'minimum pension guarantee'.

an insurance policy taken out by the AFP in order to ensure that recipients receive at least the minimum amount per month.<sup>1180</sup>

As with social insurance, the amount contributed to the individual account differs according to the earnings of each employee. For wage earners and salaried employees, the contribution towards the individual account is the basic contribution of 10%<sup>1181</sup> of earnings. Employers also make contributions to the individual accounts of their employees for disability coverage.<sup>1182</sup> Self-employed persons who contribute must make those contributions on 100% of their taxable income.<sup>1183</sup>

The government has introduced certain minimum levels of contribution towards the individual account for wage earners and salaried employees.<sup>1184</sup> Besides the minimum level of contribution, a maximum contribution has also been imposed. The maximum monthly earnings which can be used to calculate contributions is 66 UF.<sup>1185</sup>

In order to qualify for disability benefits paid from the individual account, the employee must have an earning capacity that is reduced by at least 66%.<sup>1186</sup> Benefits are paid for 12 months if the employee has made at least 6 months of contributions in the last

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<sup>1180</sup> James E & Iglesias A 'How to Integrate Disability Benefits into an Individual Account System' (2006) *Documento de Trabajo No 18* 13. Currently, The minimum amount is 111 855.55 pesos (for employees under 70) or 122 305.43 (for employees over 70 but younger than 75) or 130 495.77 (for employees older than 75).

<sup>1181</sup> James E & Iglesias A 'Disability Insurance with Pre-funding and Private Participation: The Chilean Model' (2007) 2.

<sup>1182</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 13.

<sup>1183</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 162.

<sup>1184</sup> This minimum contribution is based on the minimum monthly wage of 182 000 pesos for workers aged 18 to 65. In other words, the minimum contribution made by wage earners and salaried employees is 10% of 182 000 plus a small percentage of the actual earnings for administrative costs. For workers younger than 18 or older than 65, the minimum wage used to determine the minimum contribution is 135 867 pesos.

<sup>1185</sup> See 6.2.4.3 above.

<sup>1186</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 39.

year preceding injury.<sup>1187</sup> If employees have lost 50% to 65% of their earning capacity, they are considered to have a partial disability.<sup>1188</sup> Benefits are provided for the same time period and on the same conditions as for 66% loss of earning capacity.<sup>1189</sup>

For total disability, a person receives a pension from his or her own individual account. If the amount in the individual account is insufficient to finance the permanent disability pension, the amount in the individual account is topped up with social insurance if the person has made contributions thereto. For partial disability, the AFP in charge of the individual account pays a benefit for a period of 3 years from a finding of disability. This benefit consists of 50% of the base monthly salary of the person concerned. For long term partial disability pensions (in other words, permanent partial disability), the same system of individual account benefits supplemented by a social insurance top-up benefit applies.

In addition to the disability pension payable from the individual account, employees also have access to a disability solidarity top-up benefit, which aims to improve the level of income received by a person with a disability.<sup>1190</sup> The requirements for receiving this benefit are that the person must be aged 18 – 64, resident in Chile for 5 of the last 6 years and the pension received from the individual account must be less than the social assistance basic disability pension.<sup>1191</sup> To qualify, the person with disability's family must be amongst the poorest 60% of the population.<sup>1192</sup> This top-up benefit is thus means tested and non-contributory in nature. In receiving a disability

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<sup>1187</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 39.

<sup>1188</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 40.

<sup>1189</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 40.

<sup>1190</sup> See 6.2.4.2 above.

<sup>1191</sup> This amount is currently 78 449 pesos per month.

<sup>1192</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 10.

pension from the individual account and the top-up benefit, a pensioner is essentially benefitting from 2 of the 3 pillars forming the social security benefits for persons with disabilities in Chile.

#### 6.2.4.5 Voluntary disability cover

The third pillar of Chile's social security system consists of voluntary contributions made by a member to his mandatory individual account.<sup>1193</sup> These contributions exceed the compulsory contribution that members must make towards their accounts. Contributions are tax exempt up to a maximum of 50 UF.<sup>1194</sup> The contributions serve to increase the amount available to the member in the event of a claim and allows for early retirement.<sup>1195</sup> A member also has access to a voluntary savings account, which operates independently of voluntary contributions and the mandatory individual account.<sup>1196</sup> Members may make ad hoc deposits into this account and may withdraw funds from the account up to four times a year.<sup>1197</sup>

#### 6.2.4.6 Unemployment insurance in Chile

Unemployment insurance in Chile consists of two components. One of these is essentially private insurance, in terms of which contributions are paid to and benefits are paid from an individual savings account, called the Unemployment Individual

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<sup>1193</sup> De Mesa AA, Bravo D & Behramm JR et al 'The Chilean Pension Reform turns 25: lessons from the social protection survey' (2006) *National Bureau of Economic Research Working Paper No 12401* 7.

<sup>1194</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 61.

<sup>1195</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 61.

<sup>1196</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 62.

<sup>1197</sup> Superintendence of Pensions *The Chilean Pension System* (2010) 62.

Insurance Account (UIIA).<sup>1198</sup> The other consists of a subsidy paid from the Common Fund, which is funded by state and employer contributions.<sup>1199</sup> This system is only applicable to those who hold salaried private sector jobs and who are over 18.<sup>1200</sup>

The Chilean unemployment insurance system does not make specific provision for benefits where unemployment is due to disability. However, any worker who has been making contributions to his mandatory individual account is entitled to benefits when he becomes disabled.<sup>1201</sup> This includes unemployment caused by disability as well as the unemployment of a person with a disability where the reason for unemployment is unrelated to the disability.

### 6.2.5 Compliance with international law

In Chapter 4 of this thesis, the international law applicable to persons with disabilities was discussed and analysed. Thereafter, a list of indicators was compiled which may be used to determine whether there is compliance with the international law right of persons with disabilities to social security.<sup>1202</sup> This list was compiled with specific reference to the CRPD. In order to gauge whether the Chilean system of disability benefits is in compliance with the obligations of the CRPD, the Chilean system will now be measured against those indicators in the following paragraphs.

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<sup>1198</sup> Huneeus C, Leiva S & Micco A 'Unemployment Insurance and Search Effort in Chile' (2012) *IDB Working Paper Series No IDB-WP- 313* 2; Acevedo G, Eskenazi P & Pages C 'Unemployment insurance in Chile: A New Model of Income Support for Unemployed Workers' (2006) *SP Discussion Paper No 0612* 15.

<sup>1199</sup> Acevedo G, Eskenazi P & Pages C 'Unemployment insurance in Chile: A New Model of Income Support for Unemployed Workers' (2006) *SP Discussion Paper No 0612* 15.

<sup>1200</sup> Hartley G, Van Ours J & Vodopivec M 'Incentive Effects of Unemployment Insurance Savings Accounts: Evidence from Chile' (2010) *IZA Discussion Paper No 4681* 7.

<sup>1201</sup> Huneeus C, Leiva S & Micco A 'Unemployment Insurance and Search Effort in Chile' (2012) *IDB Working Paper Series No IDB-WP- 313* 7.

<sup>1202</sup> See 4.4.8 above.

### 6.2.5.1 Accessibility of benefits

The accessibility of benefits indicator refers to the scope of coverage provided by the social security system in a particular jurisdiction.<sup>1203</sup> In other words, the number of persons who are receiving or who can potentially receive benefits is of importance. Generally, the more qualifying persons covered by the social security system, the more accessible the system and its benefits are.

As discussed above, the Chilean disability benefit system consists of three pillars, one of which is run privately and does not form part of the social security system.<sup>1204</sup> It consequently falls outside the scope of this thesis. The three schemes which have formed the focus of this chapter are therefore the non-contributory disability benefit, the contributory disability benefit and the individual account which provides benefits in the event of disability before retirement.<sup>1205</sup>

The non-contributory benefit is available to any person who is disabled, between the ages of 18 and 64 and has been resident in Chile for 5 of the preceding 6 years. In addition, the person must prove that their family are amongst the poorest 60% of the population. It is submitted, then, that the social assistance disability benefit is not unduly exclusionary in its qualifying criteria and that it is reasonably accessible. It must be noted that the new social assistance benefit, the PBSI, significantly increased the number of persons with disabilities that received social assistance in comparison

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<sup>1203</sup> See 4.4.8.1 above.

<sup>1204</sup> See 6.2.4 above.

<sup>1205</sup> See 6.2.4.2; 6.2.4.3 and 6.2.4.4 above.

with the former social assistance benefit that was available prior to the reform of the Chilean pension system.<sup>1206</sup>

The contributory social insurance disability benefit and the benefit paid from the mandatory individual account are both linked to employment.<sup>1207</sup> The other qualifying criteria for the benefits paid from social insurance are linked to the number of years the employee has paid contributions. In the case of social insurance, the number of years of contributions is a minimum of 3 for salaried employees and approximately 4 for wage earners.<sup>1208</sup> The mandatory individual account system is only applicable to employees who were employed after 31 December 1982. Both of these requirements serve effectively to limit the number of persons who are entitled to benefits at any given time. The current unemployment rate in Chile is approximately 6.2%<sup>1209</sup> which is comparatively low. This means that a large number of persons are employed and are therefore contributing to both social insurance and the mandatory individual account. Considering the low rate of unemployment and the compulsory nature of contributions to both social insurance and the mandatory individual account, it is submitted that both of these social security schemes are also reasonably accessible.

The social security benefits for persons with disabilities in Chile are therefore accessible not only to persons with disabilities, but also to employees who may

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<sup>1206</sup> Informe Inicial de aplicación de la Convención sobre los derechos de las personas con discapacidad (2012) 50.

<sup>1207</sup> See 6.2.4.3 and 6.2.4.2 above.

<sup>1208</sup> See paragraph 6.2.4.3 above.

<sup>1209</sup> Trading Economics 'Chile Unemployment Rate' <http://www.tradingeconomics.com/chile/unemployment-rate> (accessed on 3/11/2014).

acquire a disability at some point in the future. This provides support for the hypothesis put forward in this thesis that a high rate of employment provides greater social security coverage by increasing access to social insurance, which is inevitably linked to employment.

#### 6.2.5.2 Adequacy of benefits

While accessibility of benefits is concerned with the number of persons who have access to some form of social security, adequacy of benefits is concerned with the level of benefits received.<sup>1210</sup> While extensive coverage is important, it is equally as important to ensure that the benefits received provide adequate support for those in receipt thereof.

Social assistance disability benefits in Chile are subject to a maximum of 78 449 pesos per month.<sup>1211</sup> Social insurance disability benefits for permanent disability consist of a pension of at least 50% of the base wage for wage earners and at least 70% of the base wage for salaried employees. Both of these groups are protected by statutory guaranteed minimum benefits.<sup>1212</sup>

Benefits paid from the mandatory individual account are also subject to guaranteed minimum amounts.<sup>1213</sup> If the amount in the specific individual account is less than the

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<sup>1210</sup> See 4.4.8.2 above.

<sup>1211</sup> See 6.2.4.2 above.

<sup>1212</sup> These minima are 111 855 pesos for a person younger than 70; 122 305 pesos for a person aged 70 – 75; and 130 495 pesos for a person aged older than 75.

<sup>1213</sup> See 6.2.4.4 above.

applicable minimum, the government funds the shortfall in order to ensure that recipients receive at least the minimum amount per month.<sup>1214</sup>

The amounts paid from social insurance and the mandatory individual accounts are substantially higher than the amount paid for the social assistance disability pension. The benefits provided through social assistance do not make provision for the severity of the disability, nor do they take into consideration the costs implications of living with a disability. This is evidenced by the fact that the PBSI benefit is not adjusted for individual circumstances.<sup>1215</sup>

It is submitted that the social assistance benefits are not adequate, since they do not take into consideration individual needs and the costs associated with living with a disability. In addition, there are no additional social assistance benefits available to assist persons who are severely disabled and require additional care.

The minimum benefits payable through social insurance and the mandatory individual account are higher than the social assistance benefit (PBSI).<sup>1216</sup> However, the AFP system in Chile provides certain challenges and the structure of the system may affect the benefit received. Each AFP makes its own investment decisions, and these decisions combined with potential fraud, hidden administration and management costs could lead to lower returns on member investments.<sup>1217</sup> In other words, the AFP management system could impact the level of benefit received by the member. This

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<sup>1214</sup> These minima are 111 855.55 pesos (for employees under 70) or 122 305.43 (for employees between 70 and 75) or 130 495.77 (for employees older than 75). See paragraph 6.2.4.4 above

<sup>1215</sup> See 6.2.4.2 above.

<sup>1216</sup> See 6.2.4.2 above.

<sup>1217</sup> Mesa-Lago C 'Social protection in Chile: Reforms to improve equity' (2008) 147 (4) *International Labour Review* 39.

lower benefit may impact on the ability of the recipient to meet their own maintenance needs and the additional costs associated with disability. It is therefore submitted that these benefits may in some instances fall short of the CRPD standard of adequacy in terms of Article 28.

#### 6.2.5.3 Use of social security benefits to realise other rights

As established in Chapter 4, the right to social protection in the CRPD is inextricably linked with the right to an adequate standard of living.<sup>1218</sup> It was submitted above that the coverage provided for persons with disabilities in Chile is acceptable, but that that benefit levels are not adequate. The inadequacy of the benefits paid relate to the fact that they do not take into consideration the individual needs of recipients and, in particular, do not make provision for additional payments for persons experiencing severe disability and persons requiring additional care.<sup>1219</sup> The payments are not adapted in any to alleviate the additional costs faced as a result of the disability.

For this reason, it is submitted that the social security benefits available to persons with disabilities do not contribute significantly to the realisation of an adequate standard of living as per Article 28 of the CRPD.

Despite the finding that the social security benefits for persons with disabilities in Chile do not satisfy all the indicators for compliance with Article 28, there are a number of positive aspects of the Chilean social security system that may provide lessons for South Africa. These are identified and discussed in Chapter 7.

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<sup>1218</sup> See 4.4.8.3 above.

<sup>1219</sup> See 6.2.4.2 and 6.2.4.3 above.

### 6.3 UNITED KINGDOM

The social security system in the United Kingdom (UK) provides a range of benefits for persons with disabilities.<sup>1220</sup> That is not to say that the system does not experience any problems or that it is free from criticism. The system has been in place for a substantial amount of time<sup>1221</sup> and provides a wide range of benefits. The social security systems of the UK and South Africa also have many elements in common.<sup>1222</sup> The UK is considered a desirable comparator since its social security expenditure is low, while providing good coverage by way of private schemes.<sup>1223</sup> In addition, the UK has made a concerted effort to ensure that the pension system remains sustainable.<sup>1224</sup> There may thus be valuable lessons to be learned from both the structure and administration of the social security system in the UK.

Social security in the UK consists of non-contributory benefits provided by the state<sup>1225</sup> as well as contributory schemes administered by the state.<sup>1226</sup> Disability insurance first became part of the social security system in 1913, through the promulgation of the National Insurance Act.<sup>1227</sup> The current legislation governing social security includes

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<sup>1220</sup> See 6.3.4 below.

<sup>1221</sup> The National Insurance was established in 1911 in terms of the National Insurance Act 1911 (c.37).

<sup>1222</sup> Dekker A *Informal social security: A legal analysis* (2005) (unpublished LLD thesis, submitted at UNISA) 22.

<sup>1223</sup> Davis EP *Is there a pensions crisis in the UK?* (2004) 2.

<sup>1224</sup> Malherbe ED 'Intergenerational solidarity and the provision of support and care to older persons' (unpublished LLD thesis, University of the Western Cape, 2009) 521.

<sup>1225</sup> These include the attendance allowance, the carer's allowance and the attendance allowance. See section 63 of the Social Security Contributions and Benefits Act (c.4).

<sup>1226</sup> These include the unemployment benefit, the sickness benefit and the invalidity benefit. See Part II of the Social Security Contributions and Benefits Act (c.4).

<sup>1227</sup> National Insurance Act 1911 (c.37). This Act has since been repealed.

the National Insurance Contributions Act<sup>1228</sup> and, specifically for persons with disabilities, the Disability Living Allowance and Disability Working Allowance Act.<sup>1229</sup>

### 6.3.1 Poverty and disability

According to the United Kingdom Office of National Statistics, in 2011 / 2012 approximately 11 million adults with disabilities were living in the UK.<sup>1230</sup> It has been shown that households including a person(s) with disabilities experience higher levels of poverty than households without a person(s) with disabilities.<sup>1231</sup> 19% of households including a disabled member experience relative poverty, whereas only 15% of households without a disabled member experience relative poverty.<sup>1232</sup>

Unemployment in the UK is low, at only 6.2%.<sup>1233</sup> However, when comparing the number of persons with disabilities in employment to those without disabilities in employment, it is evident that persons with disabilities are not experiencing optimal levels of employment. While approximately 76% of non-disabled persons are in employment as of 2012, only approximately 43% of persons with disabilities were

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<sup>1228</sup> National Insurance Contributions Act 2014 (c.7).

<sup>1229</sup> Disability Living Allowance and Disability Working Allowance Act 1991 (c. 21).

<sup>1230</sup> Office for National Statistics 'Disability prevalence estimates 2011/2012' [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321594/disability-prevalence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321594/disability-prevalence.pdf) (accessed on 30/09/2014).

<sup>1231</sup> Department of Works and Pensions Office for Disability Issues 'Disability facts and figures' <https://www.gov.uk/government/publications/disability-facts-and-figures/disability-facts-and-figures> (accessed on 24/09/2014).

<sup>1232</sup> Department of Works and Pensions Office for Disability Issues 'Disability facts and figures' <https://www.gov.uk/government/publications/disability-facts-and-figures/disability-facts-and-figures> (accessed on 24/09/2014).

<sup>1233</sup> Office for National Statistics 'NOMIS Official Labour Market Statistics' <https://www.nomisweb.co.uk/reports/lmp/qor/2092957698/report.aspx> (accessed on 30/09/2014).

employed.<sup>1234</sup> Disability thus has a significant impact on the financial status of persons with disabilities and their families.

### 6.3.2 Constitutional aspects

The 'constitution' of the UK is usually classified as uncodified.<sup>1235</sup> There is no single document which is considered the constitution of the UK.<sup>1236</sup> The sources of constitutional law in the UK therefore consist of legislation, common law, international law and authoritative legal writings.<sup>1237</sup> This makes it difficult to determine exactly what the social security rights in the UK consist of, and in particular, the social security rights of persons with disabilities are not easily ascertainable. However, since the rights found in legislation form part of the uncodified constitution, it is prudent to examine the legislation providing for social security entitlements for persons with disabilities in the UK. This examination will be conducted below.

### 6.3.3 International law obligations

The UK signed the CRPD in March 2007 and ratified the CRPD in June 2009.<sup>1238</sup> The UK is therefore compelled to comply with the obligations established in the CRPD, including those in Article 28 related to the right to social protection and an adequate standard of living.

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<sup>1234</sup> Department of Works and Pensions Office for Disability Issues 'Disability facts and figures' <https://www.gov.uk/government/publications/disability-facts-and-figures/disability-facts-and-figures> (accessed on 24/09/2014).

<sup>1235</sup> Garnett M & Lynch P *Exploring British Politics 3ed* (2012) 122.

<sup>1236</sup> Garnett M & Lynch P *Exploring British Politics 3ed* (2012) 122.

<sup>1237</sup> Williams A *UK Government and Politics 2ed* (1998) 12.

<sup>1238</sup> UN Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?id=166> (accessed on 25/09/2014).

The ICESCR has been ratified by the UK<sup>1239</sup> and the provisions therein therefore find application and are binding on the UK. This is of particular importance considering that Article 28 of the CRPD repeats many of the principles found in the ICESCR. Further, the UK has ratified ILO instruments which related to social security rights, namely the Minimum Standards Convention and the Discrimination Convention.<sup>1240</sup> It is therefore useful to investigate the potential effect of ratification of these instruments and consider whether ratification of these instruments has played a role in the improvement of the provision of social security available to persons with disabilities in the UK.

#### 6.3.4 Domestic legislation

The primary social security legislation in the UK is the Social Security Contributions and Benefits Act<sup>1241</sup> and the Welfare Reform Act.<sup>1242</sup> The provisions of these Acts and their accompanying regulations are vital in understanding the eligibility criteria and benefits payable in relation to persons with disabilities in the UK. As mentioned previously, social security for persons with disabilities in the UK consists primarily of social assistance and social insurance. In the following paragraphs, the structure of these social security schemes, the scope of coverage, eligibility criteria and level of benefits paid will be discussed.

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<sup>1239</sup> The UK ratified the ICESCR in 1976 – see <http://indicators.ohchr.org/>.

<sup>1240</sup> ILO 'Ratifications for United Kingdom' [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102651](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102651) (accessed on 30/09/2014).

<sup>1241</sup> Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1242</sup> Welfare Reform Act 2007 (c.5).

#### 6.3.4.1 Social assistance

Social assistance in the UK takes the form of non-contributory benefits available to selected groups of persons. The administration of social assistance is the responsibility of the Department for Works and Pensions (DWP), whose objectives include the reduction of poverty and the promotion of independent living for persons with disabilities.<sup>1243</sup> Social assistance coverage is generally non-contributory in nature and the full cost of providing benefits is borne by the state.<sup>1244</sup> Certain social assistance benefits (such as the Employment and Support Allowance) are means tested. One of the interesting aspects of social assistance for persons with disabilities in the UK is the range of benefits available. Generally, social assistance disability benefits available consist of a single benefit paid directly to the person with a disability<sup>1245</sup> although this not the case in the UK.

##### 6.3.4.1.1 Disability Living Allowance

The basic social assistance disability benefit available in the UK (called the disability living allowance or DLA) is paid to the person with a disability who has restricted mobility and requires care by another person.<sup>1246</sup> The DLA is not means tested, and payment of this benefit is contingent upon the disability beginning before the recipient

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<sup>1243</sup> The Department for Works and Pensions was established in 2001 after an amalgamation of the (then) Department of Social Security, the Employment Service and certain sections of the Department for Education and Employment. See <https://www.gov.uk/government/organisations/departments-for-work-pensions/about>.

<sup>1244</sup> Certain benefits are not contingent upon National Insurance contributions. See HM Revenue and Customs 'National insurance and state benefits' <http://www.hmrc.gov.uk/ni/intro/benefits.htm#4> (accessed on 29/09/2014).

<sup>1245</sup> This is the case in both Chile (6.2.4.2 above) and South Africa (5.2.1 above).

<sup>1246</sup> Section 71 of the Social Security Contributions and Benefits Act 1992 (c.4).

turns 65.<sup>1247</sup> The DLA is only paid once the disability has lasted longer than 3 months.<sup>1248</sup> The DLA is being gradually replaced by a new type of disability benefit, called the Personal Independence Benefit (PIP).<sup>1249</sup>

The application process and administration of the DLA was problematic and the complexity of the application process and administration led to inconsistencies in the outcomes of applications for the DLA.<sup>1250</sup> As a result of the recognition that the assessment of disability for purposes of a disability benefit should be more objective, the PIP was introduced in 2012 and effectively replaces the DLA from 2013.<sup>1251</sup> PIP is similar to the DLA in that it is neither means tested, nor taxable and is paid to persons in the same age group as the DLA.<sup>1252</sup> However, PIP introduces a requirement of residency in the UK for 2 of the 3 years preceding the claim for PIP.<sup>1253</sup>

The PIP consists of a daily living component as well as a mobility component.<sup>1254</sup> A person may be awarded either or both of these components, depending on which requirements they satisfy.<sup>1255</sup> A person is entitled to the standard rate daily living component if 'the person's ability to carry out daily living activities is limited by the

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<sup>1247</sup> Section 75(1) of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1248</sup> Section 72(2) of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1249</sup> Department of Work and Pensions 'Disability Living Allowance for Adults' <https://www.gov.uk/dla-disability-living-allowance-benefit/overview> (accessed on 29/09/2014).

<sup>1250</sup> UK Initial Report on the CRPD (2011) 51.

<sup>1251</sup> Department of Work and Pensions 'Introducing Personal Independence Payment' <https://www.gov.uk/government/policies/simplifying-the-welfare-system-and-making-sure-work-pays/supporting-pages/introducing-personal-independence-payment> (accessed on 29/09/2014).

<sup>1252</sup> Department of Work and Pensions 'Personal Independence Payment' <https://www.gov.uk/pip/eligibility> (accessed on 29/09/2014).

<sup>1253</sup> Department of Work and Pensions 'Personal Independence Payment' <https://www.gov.uk/pip/eligibility> (accessed on 29/09/2014).

<sup>1254</sup> Section 77(2)(a) and (b) of the Welfare Reform Act 2012 (c.5).

<sup>1255</sup> Section 77(2)(c) of the Welfare Reform Act 2012 (c.5).

person's physical or mental condition'.<sup>1256</sup> A person is entitled to an increased allowance for the daily living component if their ability to complete daily activities is severely limited.<sup>1257</sup> A person is entitled to the mobility component at the standard rate if, inter alia, 'the person's ability to carry out mobility activities is limited by the person's physical or mental condition'.<sup>1258</sup> Similar to the daily living component, a person will be entitled to an increased amount paid for the mobility component if the person's mobility is severely limited.<sup>1259</sup>

#### 6.3.4.1.2 Severe disablement allowance

In terms of the Social Security Contributions and Benefits Act, provision was made for an allowance for persons who experienced severe disablement and were consequently unable to work.<sup>1260</sup> However, this benefit is being phased out gradually. Persons who are receiving this allowance are being re-assessed to determine whether they are capable of work or whether they qualify for the Employment and Support Allowance (ESA).<sup>1261</sup>

#### 6.3.4.1.3 Additional allowances

In addition to these allowances paid for the daily living expenses of persons with disabilities, there are two allowances paid which attempt to relieve the burden of

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<sup>1256</sup> Section 78(1)(a) of the Welfare Reform Act 2012 (c.5). As of September 2014, the standard rate is £54.45 per week – see Department of Work and Pensions 'Personal Independence Payment' <https://www.gov.uk/pip/what-youll-get> (accessed on 01/10/2014).

<sup>1257</sup> Section 78(2)(a) of the Welfare Reform Act 2012 (c.5). The increased (or 'enhanced') rate is £81.30 per week.

<sup>1258</sup> Section 79(1)(b) of the Welfare Reform Act 2012 (c.5). The standard rate is £21.55 per week.

<sup>1259</sup> Section 79(2)(b) of the Welfare Reform Act 2012 (c.5). The increased rate is £56.75 per week.

<sup>1260</sup> Section 68 of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1261</sup> See 6.3.4.2 below. Department of Work and Pensions 'Severe disablement allowance' <https://www.gov.uk/severe-disablement-allowance> (accessed on 01/10/2014).

extra costs incurred as a result of the particular disability experienced, namely, the attendance allowance and the carer's allowance.

The attendance allowance is paid to persons over the age of 65 who require regular attendance in order to care for themselves, where such attendance is required in both the day and the night.<sup>1262</sup> The attendance allowance is non-contributory in nature.<sup>1263</sup>

This allowance is paid only where the disability began after the age of 65 and where the disability has lasted at least 6 months.<sup>1264</sup> The amount payable in terms of the attendance allowance depends on the nature of the attendance by the recipient of the disability benefit. If the recipient requires day and night attendance, a greater amount is payable than if the person requires only day attendance by another person.<sup>1265</sup>

The carer's allowance is a set amount per week and may be supplemented by other benefits if the carer is eligible.<sup>1266</sup> The carer's allowance is paid to a person who removes themselves from full-time employment in order to care for a person with a disability.<sup>1267</sup> The care provided must be at least 35 hours per week and must be

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<sup>1262</sup> Section 64 of the Social Security Contributions and Benefits Act 1992 (c.4). The attendance allowance is similar to the South African grant-in-aid – see 5.2.1.2 above.

<sup>1263</sup> Section 63 of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1264</sup> Section 65(1)(b) of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1265</sup> Schedule 4 to the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1266</sup> The current amount payable in terms of the carer's allowance is £61.35. See Department of Work and Pensions 'Carer's Allowance' <https://www.gov.uk/carers-allowance/overview> (accessed on 02/10/2014).

<sup>1267</sup> Section 70(1) of the Social Security Contributions and Benefits Act 1992 c.4. The carer is not permitted to be under 16 or a full-time student – section 70(3) Social Security Contributions and Benefits Act 1992 (c.4).

provided to a person receiving a disability benefit.<sup>1268</sup> The carer's allowance is also non-contributory.<sup>1269</sup>

It is interesting to note that residence in the UK is not part of the qualifying criteria for any of the abovementioned benefits (with the exception of PIP). Benefits may thus be paid while a recipient is abroad, although the allowed time spent outside of the UK may be limited.<sup>1270</sup>

The amounts paid to recipients of the various benefits above (besides the ESA) are linked to the care requirements of each individual. The benefit system is thus highly individualised and each recipient's needs are assessed when awarding a benefit.

#### 6.3.4.2 Social insurance

Before the social insurance disability benefits payable in the UK can be discussed, a basic understanding of social insurance in the UK is necessary. The administration of social insurance in particular is relatively straightforward, since the vast majority of social insurance benefits are payable from the National Insurance,<sup>1271</sup> which is a centralised fund into which contributions are paid.<sup>1272</sup> Social insurance in the UK is compulsory for certain employees and self-employed persons.<sup>1273</sup> Provided that

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<sup>1268</sup> The disability benefit may be either the DLA or the PIP – section 70(2) of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1269</sup> Section of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1270</sup> For example, a claimant of the attendance allowance must have been in the UK for 2 of the 3 years preceding the application for the allowance. See Department of Works and Pensions 'Attendance Allowance' <https://www.gov.uk/attendance-allowance/eligibility> (accessed on 01/10/2014).

<sup>1271</sup> The National Insurance was established by the National Insurance Act 1911 (c.37).

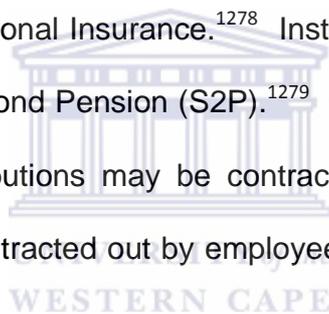
<sup>1272</sup> Gov.uk 'National Insurance' <https://www.gov.uk/national-insurance/overview> (accessed on 11/05/2015).

<sup>1273</sup> Malherbe ED 'Intergenerational solidarity and the provision of support and care to older persons' (unpublished LLD thesis, University of the Western Cape, 2009) 523. The National Insurance was re-

employees and self-employed persons are over the age of 16, contributions to the National Insurance are compulsory for employees over the age of 16 and earning over £149 per week.<sup>1274</sup>

Provided that contributions have been made to the National Insurance, the employee will receive the Basic State Pension (BSP) at retirement.<sup>1275</sup> Based on the number of years contributions have been made to the National Insurance,<sup>1276</sup> a contributor may receive the weekly BSP from the National Insurance for life.<sup>1277</sup>

Should an individual earn less than the specified amount, he will not be required to make contributions to the National Insurance.<sup>1278</sup> Instead, qualifying employees make contributions to the State Second Pension (S2P).<sup>1279</sup> Contributions to the S2P are not strictly compulsory as contributions may be contracted out in certain situations.<sup>1280</sup> S2P contributions may be contracted out by employees in a particular income bracket



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named by the National Insurance Act 1946 (c. 67) as it was formerly known as the 'Old Age Pension' established by the Old Age Pensions Act 1908 (c. 40).

<sup>1274</sup> Gov.uk 'National Insurance' <https://www.gov.uk/national-insurance/overview> (accessed on 11/05/2015).

<sup>1275</sup> Pensions Act 2007 (c. 22).

<sup>1276</sup> HM Revenue & Customs 'Basic State Pension' <http://www.hmrc.gov.uk/nic/basic-state-pension.htm> (accessed on 01/10/2014).

<sup>1277</sup> The retirement age for purposes of the BSP depends on the year of birth of the person. Retirement ages are generally being increased in terms of section 13 of the Pensions Act 2007 (c. 22) read with schedule 3 of the Pensions Act 2007 (c.22).

<sup>1278</sup> HM Revenue & Customs 'National Insurance – the basics' <http://www.hmrc.gov.uk/ni/intro/basics.htm> (accessed on 01/10/2014).

<sup>1279</sup> S2P replaced the State Earnings Related Pension Scheme (SERPS) as per the provisions of the Child Support, Pensions and Social Security Act 2000 (c. 19).

<sup>1280</sup> Malherbe ED 'Intergenerational solidarity and the provision of support and care to older persons' (unpublished LLD thesis, University of the Western Cape, 2009) 525; Directgov [http://www.direct.gov.uk/en/Pensionsandretirementplanning/StatePension/AdditionalStatePension/DG\\_4017827](http://www.direct.gov.uk/en/Pensionsandretirementplanning/StatePension/AdditionalStatePension/DG_4017827) (accessed on 07/12/2010).

who contribute to occupational funds,<sup>1281</sup> stakeholder pensions<sup>1282</sup> or private (also called personal) pension plans.<sup>1283</sup>

Social insurance for persons with disabilities takes the form of a contributory or income based employment and support allowance (ESA). The ESA is available to persons who are compelled to take time off work as a result of sickness. The basic requirements for eligibility of this allowance are that a person must have a limited capacity for work; the person must be older than 16 but not yet attained retirement age; must be resident in the UK and must not be entitled to a jobseeker's allowance<sup>1284</sup> or income support.<sup>1285</sup> Benefits for younger workers are also available and are paid to workers who are younger than 20 or under 25 if a student or trainee.<sup>1286</sup> This benefit is means tested.<sup>1287</sup>

The ESA is divided into two sub-categories, namely a contributory ESA and an income based ESA. The contributory ESA requires that an applicant has made National Insurance contributions for a prescribed period.<sup>1288</sup> The income based ESA is a top-up benefit paid to person in addition to the contributory ESA or whose income is too low.<sup>1289</sup> The income based ESA requires that an applicant not earn income above a

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<sup>1281</sup> Occupational funds are provided by a particular employer to its employees.

<sup>1282</sup> A stakeholder pension scheme is established in terms of a trust and must meet certain requirements as set out in section 1 of the Welfare Reform and Pensions Act 1999 (c. 30).

<sup>1283</sup> The earlier legislation relating to private pension plans was updated by the Pension Schemes Act 1993 (c. 48) and these plans are offered by various financial institutions. See [http://www.pensionsorter.co.uk/pensions\\_how\\_work.html#howdoesppwork](http://www.pensionsorter.co.uk/pensions_how_work.html#howdoesppwork) (accessed on 25/10/2010).

<sup>1284</sup> See 6.3.4.3 below.

<sup>1285</sup> Section 3 of the Welfare Reform Act 2007 (c.5). See 6.3.4.3 below.

<sup>1286</sup> Item 4 of Schedule 2 to the Welfare Reform Act (c.5).

<sup>1287</sup> Section 17 read with item 6 of Schedule 2 to the Welfare Reform Act (c.5).

<sup>1288</sup> Part 1 of Schedule 1 to the Welfare Reform Act 2007 (c.5).

<sup>1289</sup> It is also possible to receive only the income based ESA when the contributory ESA requirements are no longer met - see Department of Work and Pensions 'Employment and Support Allowance' <https://www.gov.uk/employment-support-allowance/what-youll-get> (accessed on 01/10/2014).

prescribed amount; not possess capital above a prescribed amount; is not entitled to the state pension credit;<sup>1290</sup> and is not in full-time education.<sup>1291</sup> This aspect of the ESA is therefore non-contributory.

The ESA payment is related to the income of the person prior to disability as well as other surrounding circumstances.<sup>1292</sup> The amount that is initially paid to a recipient of the contributory ESA<sup>1293</sup> is paid for up to 13 weeks while an assessment is carried out to determine the capacity for work of the recipient.<sup>1294</sup> After the assessment is carried out and the claim is successful, the recipient is placed in either a work-related activity group or in a support group.<sup>1295</sup> The work-related activity group requires that the recipient meets regularly with an adviser to improve skills and set job goals.<sup>1296</sup> The support group does not require meetings with an adviser but such meetings are available on request.<sup>1297</sup> Persons are placed in the latter group if their illness or disability severely limits their ability to work. The allowance payable depends on this placement.<sup>1298</sup>

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<sup>1290</sup> See 6.3.4.1 above.

<sup>1291</sup> Part 2 of Schedule 1 to the Welfare Reform Act 2007 (c.5).

<sup>1292</sup> Section 2 of the Welfare Reform Act (c.5) read with Part 9 of the Employment and Support Allowance Regulations, 2013.

<sup>1293</sup> This amount is up to £56.80 per week for persons under 25 and up to £71.70 per week for persons over 25 – see Part 9 of the Employment and Support Allowance Regulations, 2013.

<sup>1294</sup> This assessment is called the Work Capability Assessment. See section 8 – 10 of the Welfare Reform Act 2007 (c.5).

<sup>1295</sup> Department of Work and Pensions <http://www.legislation.gov.uk/ukpga/2007/5/part/1/crossheading/conditionality> (accessed on 01/10/2014).

<sup>1296</sup> Sections 11 – 15 of the Welfare Reform Act 2007 (c.5).

<sup>1297</sup> Department of Work and Pensions 'Employment and Support Allowance' <https://www.gov.uk/employment-support-allowance/what-youll-get> (accessed on 01/10/2014).

<sup>1298</sup> If the recipient is placed in the work-related activity group, up to £101.15 is payable per week. If the recipient is placed in the support group, up to £108.15 is payable week. These amounts are made up of the initial amount paid in the assessment phase, plus a supplement based on the group placement of the recipient.

### 6.3.4.3 Unemployment insurance

State-provided unemployment insurance in the UK takes the form of an allowance which is paid by the state to persons who are unemployed but actively seeking work. In 1995, the existing unemployment benefit was replaced by the jobseeker's allowance (JSA), which provides financial assistance to persons who are looking for work.<sup>1299</sup> The payment of the JSA may be based on prior contributions of the potential recipient or on the income of the potential recipient.<sup>1300</sup> The eligibility criteria are primarily related to the person's ability to and availability for work.

Persons with disabilities who become unemployed as a result of their disability are not precluded from claiming the JSA, provided that they can prove that they meet the requirements for the JSA (in particular, an assessment that provides that they are able to work despite the disability). Persons with disabilities who are not able to work may thus not claim the JSA. However, these persons may make application for the ESA.<sup>1301</sup>

It must be noted that private unemployment insurance is gaining popularity in the UK.<sup>1302</sup> In these situations, individuals are insured with a private insurer who will pay out a pre-determined benefit in the event of unemployment due to a variety of reasons (which often includes disability).

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<sup>1299</sup> Section 1 of the Jobseeker's Allowance Act 1995 (c.18).

<sup>1300</sup> Sections 2 and 3 of the Jobseeker's Allowance Act 1995 (c.18).

<sup>1301</sup> The ESA is replacing the Incapacity Benefit which was formerly available to persons with disabilities who were unable to work due to their disability. The ESA is therefore the only benefit currently available to persons unable to work as a result of disability.

<sup>1302</sup> This type of insurance is provided by numerous insurers in the UK. For example, see Drewberry Insurance Experts <http://www.drewberryinsurance.co.uk/income-protection-insurance/unemployment-insurance> (accessed on 01/10/2014).

#### 6.3.4.4 Compensation for occupational injuries and diseases

Benefits payable in the event of an industrial injury or disease are governed by the Social Security Contributions and Benefits Act.<sup>1303</sup> Benefits are payable to an 'employed earner' who 'suffers personal injury caused by an accident arising out of and in the course of his employment'.<sup>1304</sup> An employed earner will be entitled to a disablement pension if the accident he experiences results in the loss of physical or mental faculty of at least 14%.<sup>1305</sup>

For purposes of this disablement pension, the process of assessment is set out in Schedule 6 to the Social Security Contributions and Benefits Act. The primary method of assessment takes the form of a comparison between the injured person and a person of the same age and sex 'whose physical and mental condition is normal'.<sup>1306</sup> The assessment does not take into consideration any factors other than the injured person's age, sex and mental and physical condition.<sup>1307</sup>

The level of benefit paid depends on the assessment of degree of disablement for the particular person. In order to qualify for a disablement pension, the degree of disablement must be at least 14%.<sup>1308</sup> For 100% disablement, the amount paid is

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<sup>1303</sup> Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1304</sup> Section 94(1) of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1305</sup> Section 103(1) of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1306</sup> Item 1(a) of Schedule 6 of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1307</sup> Item 1(c) of Schedule 6 of the Social Security Contributions and Benefits Act 1992 (c.4).

<sup>1308</sup> Gov.uk Industrial Injuries Disablement Benefit <https://www.gov.uk/industrial-injuries-disablement-benefit/what-youll-get> (accessed on 12/05/2015).

£168 per week and for 20% disablement, the amount paid is £33.60; the amounts increase in accordance with the severity of the disablement.<sup>1309</sup>

#### 6.3.4.5 Summary of benefits for persons with disabilities in the UK

From the aforementioned discussion, it appears that the primary social assistance benefit currently available for persons with disabilities is the PIP. Similarly, the ESA is the primary social insurance benefit for persons with disabilities. In addition to these benefits, numerous supplementary benefits are available for the person with the disabilities themselves (such as the attendance allowance) or for a person who is involved with the care of a person with a disability (such as the carer's allowance).

In the following paragraphs, the social security benefits available for persons with disabilities in the UK will be evaluated against the indicators for compliance with international law, which were identified in Chapter 4.

#### 6.3.5 Compliance with international law

The analysis of the international law related to the rights of persons with disabilities in Chapter 4 has resulted in the compilation of a list of indicators which may be used to determine whether a jurisdiction is in compliance with such international law.<sup>1310</sup>

Previously, these indicators were applied to the Chilean social security benefits available to persons with disabilities.<sup>1311</sup> This application revealed that the Chilean system does not provide adequate benefits, although the level of coverage is

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<sup>1309</sup> Gov.uk Industrial Injuries Disablement Benefit <https://www.gov.uk/industrial-injuries-disablement-benefit/what-youll-get> (accessed on 12/05/2015).

<sup>1310</sup> See 4.4.8 above.

<sup>1311</sup> See 6.2.5 above.

satisfactory. Similarly, the indicators were applied to the South African social security benefits available to persons with disabilities and similar deficiencies were identified. In the following paragraphs, the indicators will be applied to the social security benefits available to persons with disabilities in the UK in order to determine the extent of compliance with the applicable international law.

#### 6.3.5.1 Accessibility of benefits

From the above discussion of the social security system of the UK, two branches of the social security system have emerged. These are the non-contributory social assistance strand and the contributory social insurance strand. The non-contributory social assistance benefits paid directly to persons with disabilities consist of the DLA / PIP and the attendance allowance.<sup>1312</sup> Neither of these benefits is means tested. In other words, the only requirements which must be proved in claiming these benefits are related to the effect of the disability on the claimant, age and residence in the UK. It must therefore be said that social assistance is widely accessible.

Social insurance benefits consist of payments made from the National Insurance. The primary social insurance benefit for persons with disabilities who are not able to work is called the Employment and Support Allowance (ESA).<sup>1313</sup> The current average rate of unemployment in the UK is approximately 6.2% of the economically active population,<sup>1314</sup> which is slightly lower than the unemployment rate in Chile and

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<sup>1312</sup> See 6.3.4.1 above.

<sup>1313</sup> See 6.3.4.2 above.

<sup>1314</sup> The economically active population consists of persons currently in work, as well as those actively seeking work. See UK Office for National Statistics <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/september-2014/statistical-bulletin.html> (accessed on 02/10/2014).

significantly lower than the unemployment rate in South Africa.<sup>1315</sup> According to the Department of Work and Pensions, approximately 29 million persons were paying National Insurance contributions in 2012.<sup>1316</sup> This means that, out of a population of approximately 61 million, less than half are contributing to social insurance.<sup>1317</sup> However, as of July 2014 there are also approximately 8.93 million persons in the UK who are economically inactive, that is, not currently working or looking for work.<sup>1318</sup>

The total number of recipients of social security benefits (excluding the DLA / PIP) related to disability in February 2014 was approximately 2.5 million.<sup>1319</sup> Considering that the estimated number of persons with disabilities in the UK in 2012 was approximately 11 million, this figure appears low. However, of the estimated 11 million persons with disabilities, only 5 million were of working age, with the rest being past retirement age or children. In other words, of the 5 million persons with disabilities of working age in the UK, at least half were receiving a social security benefit as a result of their disability.<sup>1320</sup> The remaining estimated 2.5 million persons with disabilities of working age therefore include those who are employed. The UK government has emphasised that unemployment rates amongst persons with disabilities are improving

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<sup>1315</sup> See 6.2.1 and 2.2.3 above respectively.

<sup>1316</sup> The figures for 2012 are the latest available figures - see Department for Work and Pensions 'National Insurance Contributions and qualifying years and Second Tier Pension Provision: First Release April 2012' available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/222932/stpp\\_first\\_release\\_apr12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/222932/stpp_first_release_apr12.pdf).

<sup>1317</sup> UK Office for National Statistics <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2011-and-mid-2012/index.html> (accessed on 02/10/2014).

<sup>1318</sup> Office for National Statistics 'UK Labour Market' <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/september-2014/statistical-bulletin.html> (accessed on 03/10/2014).

<sup>1319</sup> Office for National Statistics 'Key out of work benefits' available at <http://www.ons.gov.uk/ons/search/index.html?newquery=out+of+work>. See also Department of Work and Pensions 'DWP Statistical Summary' available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/355460/stats\\_summary\\_Sep14\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/355460/stats_summary_Sep14_final.pdf).

<sup>1320</sup> At a minimum, as the 2.5 million beneficiaries do not include recipients of the DLA / PIP.

and that the gap between employment rates of persons with disabilities and non-disabled persons is shrinking consistently.<sup>1321</sup> In addition, the UK has made clear its intentions to provide benefits in a more objective and transparent manner,<sup>1322</sup> as evidenced by the replacement of the DLA with the PIP.

In short, the number of persons with disabilities who currently have access either to employment or are currently in receipt of one of the numerous disability benefits available in the UK is a significant proportion of the total number of persons with disabilities of working age in the UK. Persons with disabilities not only have access to the specific disability benefits, but also benefits that are generally available irrespective of disability, such as retirement benefits and tax credits.<sup>1323</sup> In light of this, and the fact that accessibility of social security benefits must be realised progressively according to the CRPD,<sup>1324</sup> it is submitted that the UK provides persons with disabilities with adequate access to social security as per the requirements of Article 28.

#### 6.3.5.2 Adequacy of benefits

Social assistance for persons with disabilities consists primarily of the DLA / PIP and social insurance consists primarily of the ESA.<sup>1325</sup> The amount paid from the DLA / PIP ranges from a minimum of approximately £21 per week to a maximum of approximately £138 per week.<sup>1326</sup> The contributory ESA as well as the income based ESA take into consideration the income of the recipient prior to the cessation of their

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<sup>1321</sup> UK Initial Country Report on the CRPD (2011) 47.

<sup>1322</sup> UK Initial Country Report on the CRPD (2011) 51.

<sup>1323</sup> UK Initial Country Report on the CRPD (2011) 92.

<sup>1324</sup> See 4.4.3 above.

<sup>1325</sup> See 6.3.4.2 above.

<sup>1326</sup> See 6.3.4.1 above.

work due to disability. This means that the ESA differs on individual basis, depending on the earnings of the particular recipient.

The DLA / PIP benefit is intended to provide financial assistance for persons whose ability to carry out daily activities is affected by their disability, as well as those whose mobility is affected by their disability. In essence, the DLA / PIP payment is intended to cover the costs incurred through long-term disability.<sup>1327</sup> The DLA / PIP is therefore not intended to assist the recipient thereof meet their own financial maintenance needs. Essentially, then, the DLA / PIP takes the form of income supplement rather than income replacement and for this reason the adequacy of the DLA / PIP cannot be measured according to the current minimum wage. Despite this, the DLA / PIP may be the only source of income for recipients thereof, and the amount must therefore be assessed to determine whether it allows the recipient to meet his cost of living. At this point it must be noted that recipients of the DLA / PIP are permitted to work if they can, and in these situations the DLA / PIP is not the recipient's only source of income but rather a supplement to their existing income.

The situation in which the DLA / PIP is the only source of income for the recipient forms the focus of this evaluation. The DLA / PIP is intended to assist with the costs incurred as a result of living with a disability. Since the UK provides universal free health care, a significant proportion of the medical costs incurred as a result of living with a disability are therefore borne by the state. The DLA / PIP is therefore mostly used for the daily requirements of recipients thereof.

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<sup>1327</sup> Department of Work and Pensions 'Personal Independence Payment' <https://www.gov.uk/pip/overview> (accessed on 02/10/2014).

The minimum amount payable in terms of the PIP is approximately £21 per week. However, the recipient who is entitled to this payment requires no daily assistance from another person and the disability has a small effect on his mobility. In other words, this person may reasonably be expected to work, considering that UK employers are provided incentives for employing persons with disabilities and that the employment of persons with disabilities is a priority in the UK. It is submitted that this £21 payment as a result of slightly limited mobility may be considered adequate for purposes of the CRPD.

It is further submitted that any recipient who receives either the standard daily living component or the standard mobility component (or both) may reasonably be considered able to work (particularly in light of the aforementioned prioritisation of the employment of persons with disabilities) and that the amounts paid in terms of these components of the PIP are therefore adequate.

The PIP benefit is also paid to persons who require daily assistance and whose mobility is severely limited.<sup>1328</sup> It is submitted that such a recipient cannot reasonably be expected to work, and the amount paid must accordingly be increased so as to meet the costs of living of the recipient. The amount payable to a recipient who requires daily assistance and whose mobility is severely restricted is currently approximately £138 per week which is slightly more than half the National Minimum Wage. Since such a recipient has access to free health care,<sup>1329</sup> this amount must

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<sup>1328</sup> See 6.3.4.1 above.

<sup>1329</sup> The National Health Service was introduced in 1946 in terms of the National Health Service Act 1946 (c.81). The purpose of the National Health Service is to provide a range of health services to persons throughout the UK, which must be provided free of charge as far as possible. See the National Health Service Act 2006 (c.41).

cover the cost of daily living of the recipient (which includes the services of an attendant as per the daily living component). Since the PIP could potentially be the only source of income for the recipient, the PIP would have to cover the daily subsistence needs of the recipient. As has been shown above, the weekly PIP payment is relatively low and does not take into account the financial needs of the recipient. It is therefore submitted that the PIP would not adequately meet either the daily subsistence needs of the recipient nor the additional expenses incurred as a result of the recipient's disability.

As mentioned previously, the amount payable to recipients of the ESA depends on the individual circumstances of each recipient.<sup>1330</sup> However, the maximum amounts payable to recipients of the ESA range from approximately £101 to approximately £108 per week. Since the ESA payment is not intended to replace income, it cannot be considered inadequate if it does not do so.<sup>1331</sup> Considering that recipients of the ESA face similar circumstances to those receiving the PIP (that is, a potential lack of employment income and the potential for increased costs related to their disability) it is submitted that the ESA payment by itself may not be adequate for purposes of Article 28 of the CRPD.

It must be noted that recipients of the ESA may have recourse to other income and forms of support from sources other than social assistance or social insurance. However, since it is not possible to know the details of such individual circumstances,

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<sup>1330</sup> See 6.3.4.2 above.

<sup>1331</sup> See 6.3.4.2 above.

this assessment is carried out on the assumption that recipients of the ESA only have recourse to financial and support benefits from the state.

The unique structure of benefits in the UK allows for persons to receive many combinations of benefits. For example, recipients of the DLA / PIP and the Attendance Allowance have access to a further allowance in the event of severe disability.<sup>1332</sup> Persons with a lower degree of mobility also have access to benefits that are not paid in cash, including preferred parking and exemptions on certain vehicle taxes.<sup>1333</sup> In addition to the specific benefits for persons with disabilities, there are also benefits available to everyone that persons with disabilities may receive, such as the retirement benefits paid from the National Insurance.<sup>1334</sup> It is these combinations of benefits that provide substantial income for persons with disabilities, and assist in alleviating the costs related to disability. It is therefore submitted that the benefits available to persons with disabilities in the UK are adequate, and are consequently in compliance with Article 28 of the CRPD.

#### 6.3.5.3 Use of social security benefits to realise other rights

The level of coverage of the current social security benefits for persons with disabilities in the UK satisfies the requirements of Article 28 of the CRPD.<sup>1335</sup> Similarly, the overall value of the combination of benefits (cash or otherwise) available to persons with disabilities has been found to take into account the needs of individuals as well as

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<sup>1332</sup> UK Initial Country Report (2011) 91.

<sup>1333</sup> UK Initial Country Report (2011) 91.

<sup>1334</sup> UK Initial Country Report (2011) 92.

<sup>1335</sup> See 6.3.5.1 above.

the severity of the disability in each case and are therefore adequate.<sup>1336</sup> As established previously, social security plays a significant role in the achievement of an adequate standard of living. Since social security benefits are intended to assist in the realisation of the right to an adequate standard of living, the level of benefit provided must allow recipients thereof to participate and integrate into society.

It is submitted that the social security benefits available to persons with disabilities make a significant contribution towards the realisation of an adequate standard of living for persons with disabilities, since these benefits are made available to a wide range of people and the benefits are awarded in accordance with the needs of each recipient.

#### **6.4 CONCLUSION**



From the above discussion as well as the analysis of South African law and policy in South Africa, it has become apparent that certain problems related to social security benefits are not unique. One area of concern in all three jurisdictions is the adequacy of benefits provided to persons with disabilities. This also has an impact on the right to an adequate standard of living.

However, both of the selected comparator jurisdictions have committed to the continued improvement of the standard of living for persons with disabilities. The CRPD reporting and monitoring mechanisms are an important component to ensure that this commitment produces results, in that it forces States Parties to consider the

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<sup>1336</sup> See 6.3.5.2 above.

shortcomings in their respective legal systems.<sup>1337</sup> On the other hand, a mere commitment to improvement without a genuine effort to ensure such improvement must be guarded against.

From the above discussion, it is clear that there are areas of overlap between South Africa, Chile and the UK in the realisation of the right to social protection and an adequate standard of living for persons with disabilities. In addition, these jurisdictions also face similar challenges in realising these rights, although the degree to which each experiences the challenge may differ. In the next chapter, the lessons which are learned from the comparative study of Chile and the UK will be consolidated and recommendations made for the improvement of the social security benefits of persons with disabilities in South Africa.



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<sup>1337</sup> See 4.4.9 above.

## CHAPTER 7

### CONCLUSION AND RECOMMENDATIONS

#### 7.1 INTRODUCTION

In chapter one of this thesis, the historical marginalisation of persons with disabilities was discussed and current challenges facing persons with disabilities highlighted.<sup>1338</sup>

It was consequently seen that persons with disabilities experience major obstacles in participating fully in society. One such obstacle was identified as the perceived inadequacies in current social security provisions for persons with disabilities. In determining whether the current international and local social security provisions for persons with disabilities meet the needs of these persons, a primary research question and a number of ancillary research questions were generated.<sup>1339</sup>

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is the first international law instrument dealing specifically with the rights of persons with disabilities. In addition, it is the only international law instrument dealing with the social security rights of persons with disabilities that has been ratified by South Africa at the time of writing.<sup>1340</sup> The CRPD is therefore the most important international law tool in respecting, protecting, promoting and fulfilling the social security rights of persons with disabilities in South Africa. The binding nature of the CRPD adds to the

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<sup>1338</sup> See 1.1 above.

<sup>1339</sup> See 1.2 above.

<sup>1340</sup> See 4.4 above.

already compelling and binding nature of the obligations contained in section 27(1)(c) of the Constitution related to the right of access to social security in South Africa.<sup>1341</sup>

In answering the research questions identified at the commencement of the study, the point of departure was to establish the socio-economic position of persons with disabilities.<sup>1342</sup> This was done on an international level, as well as locally. Statistical information was analysed and the socio-economic position of persons with disabilities was established to be significantly diminished relative to persons without disabilities. The South African constitutional framework for the rights of persons with disabilities was discussed and explained.<sup>1343</sup> Further, international law was examined and the right to social security in international law (particularly the CRPD) was interpreted. The purpose of such interpretation was to determine the scope and content of the duty on states to provide social security benefits for persons with disabilities. A series of indicators was compiled through which compliance with the relevant international law could be measured. The South African social security measures for persons with disabilities was then established and measured against these indicators. In order to gauge the degree of compliance of South Africa in relation to other states, a comparative study was then undertaken. The social security provisions for persons with disabilities in Chile and the United Kingdom were then discussed, explained and measured against the aforementioned indicators to establish the degree of compliance with the relevant international law. The entirety of this study has lead to the production

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<sup>1341</sup> See 3.5 above.

<sup>1342</sup> See Chapter 2 above.

<sup>1343</sup> See Chapter 3 above.

of answers to the original primary and ancillary research questions, which will now be restated and resolved.

## **7.2 RESEARCH QUESTIONS**

In chapter one of this thesis, a number of research questions were identified which are related to the social security rights of persons with disabilities.<sup>1344</sup> These questions were prioritised and a detailed analysis of international, foreign and domestic law and policy was then conducted in order to answer these questions. The primary research question can be answered only once the ancillary research questions are answered, since the ancillary research questions each deal with a specific aspect of the primary research question. Here follows the answers to those ancillary questions that have been obtained throughout the course of this study.

### **7.2.1 What are the standards set in international human rights law and the Constitution regarding state obligations related to the scope and coverage of social security?**

Since the primary obligations related to the right of access to social security are found in the Constitution,<sup>1345</sup> the constitutional standards for realisation of that right were discussed and explained in Chapter 3, along with other rights that are affected by and linked with the right of access to social security. The scope and content of the right of access to social security was established and the requirements for compliance with the Constitution were explained in the context of the rights of persons with

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<sup>1344</sup> See 1.2 above.

<sup>1345</sup> See 3.5 above.

disabilities.<sup>1346</sup> To this end, it was affirmed that persons with disabilities must be given access to social security measures (both social assistance and social insurance) which is progressively realised within available resources and that any measures to progressively realise this right must be reasonable.<sup>1347</sup>

In answering further establishing the obligations related to the implementation of social security rights of persons with disabilities, relevant international law was set out, discussed and analysed to determine the extent of the obligations placed on South Africa as per these instruments.<sup>1348</sup> In Chapter 4 of this thesis, prominent human rights instruments dealing with the right to social security and the right to an adequate standard of living were discussed as a precursor to analysing those rights as established in the CRPD.<sup>1349</sup> As a result of the analysis of other relevant instruments as well as a detailed interpretation of Article 28 of the CRPD, indicators for compliance with Article 28 of the CRPD were developed.<sup>1350</sup> These indicators provide valuable insight into what is required of States Parties to the CRPD in order to realise the right to social security (as part of the broader right to social protection) and the right to an adequate standard of living of persons with disabilities. The precise requirements for each indicator were established in the interpretation of the right to social security (as part of the broader right to social protection) in terms of Article 28 of the CRPD.

The indicators for compliance with international law were established as: the accessibility of social security benefits; the adequacy of social security benefits; and

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<sup>1346</sup> See 3.5 above.

<sup>1347</sup> See 3.5.2 above.

<sup>1348</sup> See Chapter 4.

<sup>1349</sup> These instruments include the UDHR and the ICESCR. See Chapter 4 above.

<sup>1350</sup> See 4.4.8 above.

the use of social security benefits to realise other rights.<sup>1351</sup> Amongst these indicators are overlaps with the requirements for compliance with the Constitution, such as the level of access to benefits, the amount paid in terms of those benefits and a continued commitment to ensuring that more persons with disabilities have access to some form of social security which allows for greater inclusion and participation in society.

### **7.2.2 How does the current legal and policy framework in South Africa address the right to social security of persons with disabilities with reference to the question of ensuring that all appropriate beneficiaries receive benefits?**

The Constitution provides that 'everyone has the right of access to social security'.<sup>1352</sup>

There are certain limitations related to which persons qualify for certain social security schemes<sup>1353</sup> and the right of access to social security may be limited in terms of section 36 of the Constitution.<sup>1354</sup>

The social security measures available to persons with disabilities consist of social assistance (in the form of the state administered disability grant) and social insurance (consisting of compensation for occupational injuries and diseases, unemployment insurance benefits for illness, and disability benefits from occupational retirement funds). As explained above, one of the indicators developed to gauge compliance with international law is the accessibility of social security measures for persons with

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<sup>1351</sup> See 4.4.8 above.

<sup>1352</sup> Section 27(1)(c) of the Constitution. See 3.5 above.

<sup>1353</sup> See generally Chapter 5 above.

<sup>1354</sup> See 3.2.4 above.

disabilities. This indicator was discussed in the context of the South Africa social security system in Chapter 5.

#### 7.2.2.1 Social assistance

The primary legislation governing social assistance in South Africa is the Social Assistance Act 13 of 2004. This Act and its accompanying regulations establishes the eligibility criteria for all social grant currently paid by the state. For purposes of social assistance for persons with disabilities, only individuals who meet the eligibility criteria will be awarded the disability grant.<sup>1355</sup> These eligibility criteria have been discussed and examined and it has been found that the means test creates a substantial barrier of access to social security, both in terms of discouraging seeking employment and saving and excluding persons with disabilities that are working from receiving additional financial assistance to offset the costs related to disability.<sup>1356</sup> Persons who are receiving the disability grant are thus not able to meet their own maintenance needs as result of not having recourse to adequate income and are then further discouraged from seeking employment as a result of the consequences of the means test.

#### 7.2.2.2 Social insurance

In terms of social insurance, it has been established that there are significant numbers of persons with disabilities who are being excluded from accessing social insurance benefits.<sup>1357</sup> The reasons for this exclusion are varied, but it has been found that the

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<sup>1355</sup> See 5.2.1 above.

<sup>1356</sup> See 5.2.1.1 above.

<sup>1357</sup> See 5.2.2.5 above.

most significant reason for this exclusion are direct statutory exclusion of certain groups from certain schemes<sup>1358</sup> and the voluntary nature of occupational retirement schemes.<sup>1359</sup> For this reason, it can be said that there are numerous persons who should be contributing towards social insurance with a view to receiving benefits from the various social insurance schemes who are currently excluded as a result of the existing legislative and policy framework.

### **7.2.3 How does the right of access to social security align with the right to an adequate standard of living in South Africa?**

In defining and contextualising the elements which must be met for compliance with section 27(1)(c) of the Constitution<sup>1360</sup> and establishing indicators which measure compliance with Article 28 of the CRPD,<sup>1361</sup> it was shown that the right to social security plays a significant role in the achievement of an adequate standard of living with persons with disabilities.

In order to determine whether the state's current social security measures in South Africa are effectively realising an adequate standard of living for persons with disabilities, it must be considered whether the social security benefits available for persons with disabilities are adequate and allow for full participation in society.

It has been determined that the number of persons currently having access to social assistance and social insurance is satisfactory; however, it must also be noted that more can be done to extend the scope and coverage of social insurance to persons

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<sup>1358</sup> See 5.2.2.5 above.

<sup>1359</sup> See 5.2.2.5 above.

<sup>1360</sup> See 3.5.2 above.

<sup>1361</sup> See 4.4.8 above.

who are excluded from the current system.<sup>1362</sup> With regards to the level of benefit received in terms of social assistance, the amount paid to recipients of the disability grant does not allow for full participation in society as a result of it not taking into consideration that recipients may have more severe disabilities and that persons with disabilities bear a burden of costs related to their disability.<sup>1363</sup> It can therefore not be said that the disability grant allows for the achievement of an adequate standard of living for recipients thereof.

Social insurance benefits, on the other hand, are substantially more complex and therefore more difficult to evaluate. However, it can be said that social insurance benefits are generally higher than social assistance benefits since they are linked to the pre-disability earnings of the recipient.<sup>1364</sup> In addition, certain social insurance schemes provide for higher benefits if the disablement is more severe.<sup>1365</sup> However, since social insurance benefits are highly individualised (based on individual earnings and, in some instances, the degree of disablement<sup>1366</sup>) it is not possible to make a general statement as to the adequacy or otherwise of social insurance benefits in South Africa.

### **7.3 PRIMARY RESEARCH QUESTION**

The primary research question of this thesis concerns the level of compliance of South African legislation and policy with Article 28 of the CRPD. The indicators that were

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<sup>1362</sup> See 5.2.2.5 above.

<sup>1363</sup> See 5.2.1.1 above.

<sup>1364</sup> See 5.2.2 above.

<sup>1365</sup> This is true of COIDA benefits. See 5.2.2.2 above.

<sup>1366</sup> This is the case for COIDA benefits and disability benefits from occupational funds – see 5.2.2.2 and 5.2.2.1 respectively above.

identified in Chapter 4 were applied to the relevant law and policy currently applicable in South Africa. While the relevant law and policy in South Africa is, in fact, compliant with the CRPD in some respects, it was found certain areas needed attention in order to achieve a greater level of compliance where compliance was lacking.

The particular areas of concern identified in Chapter 5 were the following:

- the barrier to accessing social security created by the means test
- the need for social assistance to take into consideration individual circumstances and severity of disability
- the failure to utilise social security benefits as a mechanism to achieve an adequate standard of living.

It is in the light of these areas of non-compliance that a comparative study was undertaken in order to gauge the compliance of other, carefully selected, jurisdictions to search for solutions to these problems. The results of this comparative study have been incorporated into the recommendations for improvements to the South African social security benefits for persons with disabilities.

## **7.4 RECOMMENDATIONS**

Various recommendations have been made throughout the thesis when areas of concern have been established. However, the focus at this stage is to consolidate the overarching recommendations that require implementation in order to fully respect,

protect, promote and fulfil the right of access to social security for persons with disabilities.

#### **7.4.1 Access to and the level of social security benefits**

As mentioned previously, the level of benefit paid in terms of social assistance for persons with disabilities in South Africa is problematic in that it fails to take into consideration the individual circumstances and severity of the disability of the applicant.<sup>1367</sup> This has not been the case in the UK, since the social assistance available for persons with disabilities is supplemented by free healthcare and state provided housing.<sup>1368</sup> The social assistance benefits available to persons with disabilities in the UK are therefore only expected to cover daily living expenses.<sup>1369</sup> In South Africa, the social assistance payment essentially has to cover all expenses associated not only with daily life, but also the costs incurred as a result of living with a disability.<sup>1370</sup> It is therefore suggested that the social assistance payment made to persons with disabilities must be reformed to include a component for general daily living expenses as well as a component which attempts to alleviate the costs of living with a disability. The need for such a reform has been acknowledged by the South African Department of Social Development, which has endeavoured to investigate the feasibility of such reform.<sup>1371</sup> It is submitted that, as in the UK, any component related

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<sup>1367</sup> See 5.2.1.4 above.

<sup>1368</sup> See 6.3.4 above.

<sup>1369</sup> See 6.3.4.1 above.

<sup>1370</sup> See 5.2.1.1 above.

<sup>1371</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 65.

to the alleviation of the costs of living with a disability should be based on the severity of the disability experienced.<sup>1372</sup>

While neither Chile nor the UK (the chosen comparators for purposes of this thesis) has proved to be fully compliant with the CRPD,<sup>1373</sup> the areas in which each of these jurisdictions are achieving substantial compliance provide valuable insights into how South Africa could remedy its shortcomings related to Article 28.

One element which is common to both comparators was the use of a single, national retirement fund which is compulsory to persons in formal employment as well as in atypical employment.<sup>1374</sup> This fund is then the source of numerous benefits, including retirement, unemployment and disability benefits. The administration of the fund in the UK is left to a single organisation that is responsible for ensuring that contributions are made and that persons receive their benefits when they become entitled to them.<sup>1375</sup> An important aspect of this universal fund in both jurisdictions is that, when benefits payable to an individual do not meet a certain prescribed minimum, those benefits can be 'topped up' by the state until the person is in receipt of that prescribed minimum amount.<sup>1376</sup>

A national fund addresses not only the level of coverage of social security benefits (and therefore increasing access to such benefits), but also addresses the question of the level of benefits paid to recipients. It is submitted that the introduction of such a

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<sup>1372</sup> See 6.3.4.1 above.

<sup>1373</sup> See 6.2.5 and 6.3.5 above respectively.

<sup>1374</sup> See 6.2.4.3 and 6.3.4.2 above respectively.

<sup>1375</sup> In Chile there are a number of AFPs responsible for the administration of contributions and benefits.

See 6.2.4 and 6.3.4 above respectively.

<sup>1376</sup> See 6.2.4.2 and 6.3.4.1 above respectively.

national fund in South Africa would lead to a greater level of compliance with the CRPD and would, most importantly, provide a measure of income security for persons with disabilities who are not able to save adequately for their retirement and who may not contribute regularly to the fund.

While a national social insurance fund has been considered for implementation in South Africa,<sup>1377</sup> it is not clear whether the minimum benefit guarantees would also be implemented. Such a guarantee has significant budgetary implications if shortfalls in benefits are to be funded by the state and, as such, may not be feasible in the current economic climate in South Africa. However, it is submitted that such a system would be ideal for persons who are financially marginalised and greater efforts should be made to move towards the implementation of such a system. These greater efforts are in fact required, in that the right of access to social security must be progressively realised.<sup>1378</sup> In order to remain compliant with the requirement of progressive realisation, continuous efforts must be made to realise the right of access to social security, and it is submitted that the introduction of a single, national social security fund would make a substantial contribution towards the realisation of the right of access to social security for persons with disabilities in South Africa.

#### **7.4.2 Use of social security benefits to realise the right to an adequate standard of living**

While this aspect of the indicators has been addressed in answering one of the ancillary research questions above, it must be emphasised that social security benefits

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<sup>1377</sup> See 5.2.2.5 above.

<sup>1378</sup> See 3.5.2 above.

are an extremely important tool in realising the right to an adequate standard of living for persons with disabilities. This is true both in terms of the number of persons who are covered by some form of social security as well as the level of benefit they may become entitled to.

While the right to an adequate standard of living does not depend only on the level of financial security of an individual,<sup>1379</sup> it is evident that financial assistance does allow for greater participation in society in a number of ways. Adequate financial support should, at the very least, attempt to eliminate relative poverty and the marginalisation that inevitably accompanies it.<sup>1380</sup> For this reason, every effort should be made by the state to ensure that persons with disabilities who urgently require such financial assistance receive it through the social security system.

## 7.5 CONCLUSION

The importance of the CRPD in realising the right of access to social security for persons with disabilities cannot be denied. Not only is it the first international law instrument dealing with this matter that has been ratified by South Africa, it is also the first instrument that has contextualised the right specifically for persons with disabilities. In addition, the CPRD has made it clear that the rights therein are interrelated and linked to the extent that neglecting one would have a negative impact on the other. As has been seen throughout this thesis, the right to social security and an adequate standard of living are inextricably interwoven with other rights inherent

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<sup>1379</sup> See 4.4.6.3 above.

<sup>1380</sup> Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014) 64.

and of particular importance to persons with disabilities, such as the rights to dignity and equality.

Since the CRPD has been ratified by South Africa, it provides a clear instruction to South Africa to progressively realise the socio-economic rights therein. The CRPD requires regular reporting by States Parties on the status of the rights in each jurisdiction, and the CRPD also provides for the manner in which the implementation thereof is to be monitored.<sup>1381</sup> A situation of non-compliance with the CRPD by a State Party will therefore be not be condoned, and will be re-assessed on a regular basis. It must be noted that compliance with the South African Constitution takes priority over the provisions of the CPRD, but, as has been mentioned, there are areas of overlap between the CRPD and the Constitution and the CRPD is currently the focus of much local and international attention.<sup>1382</sup> Such focus must be utilised, and the opportunity taken to realised the rights of persons with disabilities.

The CPRD further provides for international co-operation in the implementation of programmes aimed at implementing the provisions thereof by States Parties.<sup>1383</sup> This means that States Parties are not only accountable to the UN, but also to each other.<sup>1384</sup> This manner of enforcement and monitoring must be utilised in order to ensure that there is no complacency regarded the implementation of the rights in the CRPD.

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<sup>1381</sup> See 4.4.9 above.

<sup>1382</sup> On a local level, the new Draft National Disability Rights Policy has highlighted the need for compliance with the CRPD – see 5.4 above. On an international level, the submission of the various country reports ensures that compliance with the CRPD remains under scrutiny.

<sup>1383</sup> See 4.4.9 above.

<sup>1384</sup> See 4.4.9 above.

In conclusion, the right to social security and the right to an adequate standard of living of persons with disabilities are fundamental rights which require urgent realisation. However, sight must not be lost of the importance of the CRPD on a larger scale, which is to fully realise all the basic human rights of persons with disabilities in order to ensure that this group no longer experiences marginalisation and discrimination, but is able to achieve full inclusion and participation in society.



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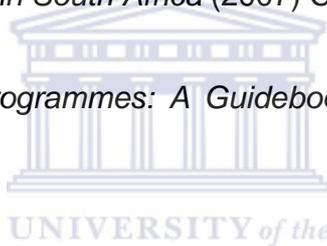
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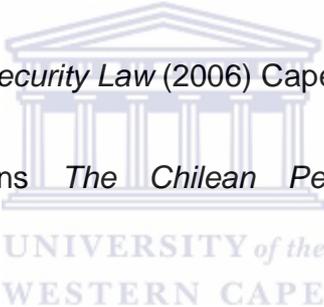
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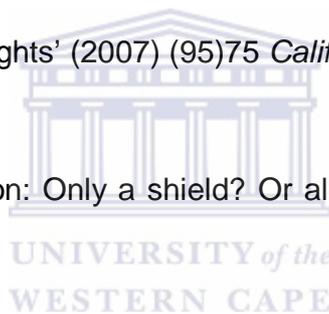
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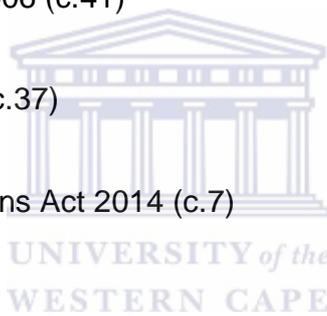
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