

# CHAPTER 7

## ALLEVIATING POVERTY THROUGH RETIREMENT REFORMS

*Kitty Malherbe\**

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### Abstract

*Older persons in South Africa may be described as a sizeable but vulnerable group requiring specific protection. One of the ways in which the country can provide for the socio-economic needs of its older population is through social security benefits. This chapter provides an overview of the current deficits in the provision of social security to older persons. The aims of this chapter are to explain why reforms of the current retirement income system are necessary and to illustrate how retirement reforms may be utilised to address poverty not only of older persons, but other members of their households as well. The argument is made that this goal can only be achieved if retirement reforms form part of comprehensive social security reforms that are based on the realisation of the right of access to social security.*

### 1 Introduction

With the current emphasis on the protection and development of the youth,<sup>1</sup> the reader may be forgiven for questioning the need to focus on older persons, and retirement reforms in particular, in a publication dealing with ways of addressing the widespread poverty in South Africa. The aims of this chapter are to explain why reforms of the current retirement income system are necessary and to illustrate how retirement reforms may be utilised to address poverty not only of older persons, but other members of their households as well. The argument is made that this goal can only be achieved if retirement reforms form part of comprehensive social security reforms that are based on the realisation of the right of access to social security.

### 2 Poverty among older persons

The age at which a person becomes an 'older person' in South Africa is not entirely clarified by legislation. Before 2008 both the Social Assistance

\* Associate Professor, Department of Mercantile and Labour Law, University of the Western Cape, South Africa.

1 One of the priorities for national development listed in the National Development Plan is 'building a future for South Africa's youth'. National Planning Commission *National Development Plan 2030 Executive Summary* (2011) 20.

Act<sup>2</sup> and Older Persons Act<sup>3</sup> used to define older persons as women aged 60 years or older and men aged 65 or older. In 2008 Parliament, under pressure from litigation by a group of men claiming that the statutory pensionable age set in the Social Assistance Act unfairly discriminated against men who would have to wait until the age of 65 to access the older person's grant,<sup>4</sup> amended the qualifying age for the older person's grant to 60 years for both men and women.<sup>5</sup> However, steps to amend the Older Persons Act in the same manner were not initiated until recently,<sup>6</sup> with the result that at the time of writing men only obtained the protection provided to older persons in terms of the Act at age 65.

The South African population is gradually ageing,<sup>7</sup> even though the projected growth rate of the older population in South Africa is lower than in most other countries, which is attributed to the high mortality rate due to the HIV pandemic.<sup>8</sup> The number of older persons in South Africa has increased from 2,8 million in 1996 to 4,6 million in 2017.<sup>9</sup> It is estimated that the number of older persons will increase to 6,7 million by 2030, and to 8 million by 2065.<sup>10</sup>

The proportion of older persons living in poverty in South Africa declined from 55 per cent of older persons in 1996, to 36,2 per cent in 2011,<sup>11</sup> but showed a marginal increase again between 2011 and 2015.<sup>12</sup> Together with women, children, the youth, persons with disabilities and families living with HIV, older persons are regarded as one of the groups worst affected by poverty.<sup>13</sup>

The reasons for so many older persons living in poverty have been summarised as follows:<sup>14</sup>

- 2 Act 13 of 2004, sec 10.
- 3 Act 13 of 2006, sec 1.
- 4 *Christian Roberts v Minister of Social Development* Unreported Case 32838/05 (2010) TPD.
- 5 Sec 10 was amended by the Social Assistance Amendment Act 6 of 2008, sec 1.
- 6 Sec 1 of the Older Persons Amendment Bill, GN 426 in GG 40883 of 2 June 2017 equalises the age at which a person becomes an 'older person' at 60 years of age or older for men and women.
- 7 National Planning Commission *National Development Plan – Vision for 2030* (2011) 78; M Olivier 'Old age and retirement' in M Olivier et al (eds) *Introduction to social security* (2004) 270.
- 8 UN Economic Commission for Africa, African Centre for Gender and Social Development *The state of older people in Africa – 2007: Regional review and appraisal of the Madrid International Plan of Action on Ageing* (2007) 24.
- 9 Statistics South Africa *Mid-year population estimates, 2017* (2017) 1. Older persons as a proportion of the population increased from 7,1% in 1996 to 8,1% in 2017.
- 10 Statistics South Africa *Census 2011: Profile of older persons in South Africa* (2014); Inter-Departmental Task Team on Social Security and Retirement Reforms (IDTT) 'Comprehensive social security in South Africa: Discussion Document' (2012) 12.
- 11 Statistics South Africa *Poverty trends in South Africa: An analysis of absolute poverty between 2006 and 2011* (2014) 29.
- 12 Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017) 60.
- 13 'Understanding poverty and development' <http://www.etu.org.za/toolbox/docs/development/poverty.html> (accessed 2 September 2017).
- 14 As above.

Older people are usually not working anymore and have to be taken care of by the rest of society. In South Africa most poor older people survive on the monthly pensions paid by the state ... Because of high unemployment many families share the pensions meant for the elderly and it ends up being insufficient for their needs. Older people also often look after grandchildren and continue to perform unpaid domestic work for their families. This especially applies to older women.

Poverty among older persons, therefore, seems to be linked to a loss of income as a result of retirement and the socio-economic situation of the rest of their households, which in many cases may translate into limited financial support for older persons by family members.<sup>15</sup>

Older persons in South Africa, therefore, may be described as a sizeable but vulnerable group requiring specific protection.<sup>16</sup> One of the ways in which a country can provide for the socio-economic needs of its older population is through social security benefits. In terms of section 27(1)(c) of the South African Constitution,<sup>17</sup> '[e]veryone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Section 27(2) of the Constitution obliges the state to take reasonable legislative and other measures within available resources to progressively realise the right of access to social security. The next part of this chapter briefly outlines the current social security benefits available to older persons in order to determine whether there is a need for reform of social security for older persons in South Africa.

### 3 Current social security provision for older persons

The majority of older persons in South Africa rely on non-contributory social grants from the state for income.<sup>18</sup> The older person's grant is a means-tested, flat rate,<sup>19</sup> monthly grant payable in terms of section 10 of the Social Assistance Act.<sup>20</sup> The scale of the older person's grant is unique in the developing world<sup>21</sup> and has been credited with the reduction of

15 Statistics South Africa *Vulnerable Groups Series II: The Social Profile of Older Persons, 2011-2015* (2017) 58.

16 Statistics South Africa *Social profile of vulnerable groups in South Africa 2002-2010* (2011) 92; Statistics South Africa *Vulnerable Groups Indicator Report 2016* (2017).

17 The Constitution of the Republic of South Africa, 1996.

18 According to Statistics South Africa (n 15) 57, 69,8% of South African older persons were accessing grants in 2015.

19 The grant amount in 2017 is R1 600 per month. The grant amount for a given year is usually declared by the Minister of Finance in the annual budget speech.

20 The requirements to qualify for an older person's grant are found in secs 5 and 10 of the Social Assistance Act, as well as the regulations in GN R898 in GG 30356 of 22 August 2008.

21 MP Olivier & E Kalula 'Scope of coverage' in MP Olivier et al (eds) *Social security: A legal analysis* (2003) 127.

poverty among older persons in South Africa.<sup>22</sup>

In addition to the older person's grant, an additional amount, the grant-in aid, is payable to recipients of the older person's grant who are so severely physically or mentally disabled that they need care at home.<sup>23</sup> The role of social assistance in addressing poverty in old age is twofold: First, it raises the income of persons who had no or a very low income before retirement age; and, second, it addresses the fall in income of those who had pre-retirement income, but no or little retirement savings. The aim of social assistance for older persons, therefore, is to ensure that individuals 'do not fall below a certain basic minimum level of existence'.<sup>24</sup>

South Africa is in the unique position that it has no compulsory national retirement fund system similar to those found in other countries with advanced social security systems. Instead, social insurance for retirement is provided by just over 5 000 privately administered funds and the retirement funds for employees of the state and state-owned enterprises.<sup>25</sup> The occupational retirement funding system is voluntary, as no employer is compelled by legislation to join or create a fund on behalf of its employees.<sup>26</sup> As a result, many formally-employed employees are not members of retirement funds and have to rely on the older person's grant for retirement income; the same is true for informally-employed workers.

Finally, self-employed persons and employees who wish to top up the retirement savings provided by occupational retirement funds can voluntarily make use of private retirement savings vehicles, for example, retirement annuity funds.<sup>27</sup>

#### 4 Arguments for the reform of the current retirement income system

A closer examination of specific components of the social security system leads one to the conclusion that it needs an urgent overhaul. Unless this is done, poverty will remain intractable and many will continue to have no access to socio-economic rights in South Africa.<sup>28</sup>

22 *Black Sash Trust v Minister of Social Development & Others* [2017] ZACC 8 para 1; Statistics South Africa (n 12) 9; The World Bank *Fiscal policy and redistribution in an unequal society* (2014) 35.

23 Sec 12 Social Assistance Act.

24 N Smit & LG Mpedi 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy and Development* 3.

25 Financial Services Board *Annual Report 2016* (2016) 27. These funds are regulated by a variety of legislations, including the Pension Funds Act 24 of 1956, the Income Tax Act 58 of 1952 and the Acts creating each of the funds for employees of the state or state-owned enterprises.

26 National Treasury *Retirement fund reform* (2004) 18.

27 Retirement annuity funds are also regulated in terms of the legislation cited in n 25, including the Pension Funds Act 24 of 1956.

28 LG Mpedi *Pertinent social security issues in South Africa* (2008) 37.

The Constitution is the supreme law of South Africa. As a result, the yardstick to measure whether the current retirement income system is in need of reform is compliance with the Constitution and, specifically, the extent to which it affords everyone the right of access to social security in terms of section 27 of the Constitution.<sup>29</sup>

As shown above, there is no comprehensive social security or coordinated retirement income system in South Africa.<sup>30</sup> The completely fragmented nature of social security for older persons means that access to retirement income through social security (if any) is limited to only one of the forms of social security to the exclusion of access to the other.<sup>31</sup> For example, the means test for social assistance either disqualifies persons with some retirement savings entirely from receiving a grant or reduces the amount payable.<sup>32</sup> Hence, the means test for the older person's grant acts as a disincentive for low-income earners to save for retirement, as accumulating any personal wealth could lead to a loss of the right to an older person's grant or a reduction in the grant amount.<sup>33</sup> In addition, the means test is difficult to efficiently administer.<sup>34</sup> Therefore, one of the most urgent reforms of the retirement funding system required is to create a universal (and thus non-means-tested) non-contributory grant for citizens and permanent residents aged 60 years and older.<sup>35</sup>

Apart from the state's constitutional duty to provide access to social assistance, currently in the form of grants paid to the majority of older persons who did not have the means to save for their old age, it also has the duty to create an environment that enables individuals to save for their retirement. As was stated above, participation in the current occupational retirement funding system is voluntary, and the state's only role is to regulate the industry and to provide a dispute resolution mechanism. As a result of the voluntary nature of the occupational retirement funding system, many employees, whether through their own myopic views on saving for retirement or their employers' reluctance to participate in a fund, are excluded from the scope of social insurance in the form of

29 Although the human rights approach to social security would require the current social security system to be measured against all constitutional values and rights (Mpedi (n 28) 10-11), this chapter focuses only on the extent to which the right of access to social security is currently realised.

30 Mpedi (n 28) 14; IDTT (n 10) 4.

31 With the exception of the limited number of employees belonging to an occupational retirement fund and who also are able to make use of the private retirement savings vehicles.

32 The formula for the means test for the older persons' grant is found in Annexure A to GN R898 in GG 30356 of 22 August 2008, as amended in 2011 and 2014. In terms of this formula, post-retirement income reduces the maximum grant payable, and assets worth 55 times the maximum grant payable disqualify applicants from receiving the grant at all.

33 IDTT (n 10) 13.

34 A Asher & MP Olivier 'Retirement and old age' in MP Olivier MP et al (eds) *Social security: A legal analysis* (2003) 249; Mpedi (n 28) 24.

35 Department of Social Development *Reform of retirement provisions* (2007) 12; National Treasury *2013 Retirement reform proposals for further consultation* (2013) 8; IDTT (n 10) 4.

retirement benefits.<sup>36</sup>

The absence of legislation mandating retirement fund membership effectively denies those workers who prefer to take extra cash home, instead of contributing to a pension or provident fund, access to a social insurance-type of funding for retirement.<sup>37</sup> As early as 2002, the Committee of Inquiry into a comprehensive system of social security for South Africa (Taylor Committee) recognised the pitfalls of the current voluntary retirement system and recommended minimum mandatory contributions to retirement savings by all persons employed in the formal sector.<sup>38</sup>

Not only do only about half of the formal labour force have access to membership of occupational retirement funds, but the nature of the current retirement funding system also means that informal workers are denied access to membership of these funds and thus to social insurance-type benefits upon retirement. The National Treasury has acknowledged that extending the scope of coverage of the retirement funding system will depend on reaching workers with 'a tenuous connection to the formal labour force', and that providing them with access to social insurance-type retirement benefits should be addressed in broader social security reforms.<sup>39</sup>

The third available option for retirement income, private retirement savings, is too costly for most South African workers, as no matching employer contribution is involved.<sup>40</sup>

It therefore may be argued that the current fragmented system of social security aimed at the provision of income in old age relies too heavily on the older person's grant with limited access to occupational retirement funds.

The state's duty to take reasonable measures to realise the right of access to social security upon retirement is not limited to the scope of coverage of the retirement funding system, but extends also to ensure access to adequate benefits upon retirement. A number of issues affect the adequacy of benefits from occupational retirement funds, but the two issues that recently have received the attention of the National Treasury are the lack of preservation of benefits acquired before retirement and a preference for lump sum retirement benefits with a resultant lack of

36 According to the National Treasury, only around half of formally-employed workers are members of employer-sponsored retirement funds. National Treasury (n 35) 12.

37 Conditions of service often make retirement fund membership compulsory, but this is not necessarily the case.

38 Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the present – Protecting the future* (2002) 94.

39 National Treasury (n 35) 12.

40 It can even be questioned whether private retirement savings constitute social security at all, as there is no solidarity or pooling of risks involved. Taylor Committee Report 3 'Constitutional framework of social security in South Africa' (2002) 45 <http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/taylor/report3.php> (accessed 2 September 2017).

preservation of post-retirement benefits.<sup>41</sup>

Both these problems are a result, once again, of the voluntary nature of the system. Just as there is no statutory compulsion to become a member of a fund, there are no statutory measures to compel occupational fund members to preserve savings for retirement upon withdrawal from a fund, which may lead to a lack of adequate accumulated savings at retirement.<sup>42</sup> These difficulties particularly arise when individuals change jobs or are dismissed and they take their retirement benefits in cash in order to fund periods of unemployment. Their retirement benefits are consequently neither transferred to another fund, nor reinvested in any other retirement savings vehicle.

The issue of the post-retirement preservation of benefits arises because of the preference of many employees for membership of provident funds due to the lump sum payments upon retirement that these funds provide. The perceived advantages of a lump sum payout, such as having the freedom to decide where to invest the amount or being able to settle debts, unfortunately, may in some instances lead to its main disadvantage, which is a less than adequate monthly income during retirement.<sup>43</sup>

Section 27 of the Constitution requires the state to take reasonable measures within its available resources to realise the right of access to social security. Much emphasis has been placed on the track record of social assistance in reducing poverty.<sup>44</sup> The relatively generous level<sup>45</sup> of the older person's grant means that the financial burden on the state to provide grants for older persons is enormous. Concerns have been raised over the government's available resources to expand the grant system.<sup>46</sup> The limited resources available for the expansion of the older person's grant have necessitated reforms that integrate the public grants system and the occupational retirement funding system. An integrated retirement funding system will enable the state to continue paying grants to those older persons who cannot provide for their own retirement, as the responsibility for the provision of retirement benefits for those individuals who can afford to contribute to saving for their own retirement would be shifted to other parts of the system.

41 See below part 5.2.

42 According to the National Treasury *Social security and retirement reform: Second discussion paper* (2007) 5, less than 10% of people leaving retirement funds preserve their benefits.

43 IDTT (n 10) 19. See also National Treasury (n 26, n 35 & n 42).

44 World Bank (n 22) 2. According to Statistics South Africa (n 16) 9, '[a]lthough initially seen as a short-term measure to address poverty, social grants have increasingly become a source of livelihood in South Africa and have played an instrumental role in reducing poverty levels'.

45 N Natrass 'Disability and welfare in South Africa's era of unemployment and AIDS' CSSR Working Paper 147 (2006) 7; J Seekings & E Moore 'Kin, market and state in the provision of care in South Africa' CSSR Working Paper 327 (2013) 12.

46 In his 2014 Budget Speech, the then Minister of Finance, Pravin Gordhan, acknowledged that in a period of weak economic growth, the sustainability of government spending on the social wage 'is inevitably tested'. See also World Bank (n 22) 46-47; Mpedi (n 28) 26.

## 5 Proposed retirement reforms

There currently are two retirement reform processes in South Africa: the complete overhaul of the current retirement funding and social security system, and the interim reforms of retirement fund legislation to deal with the lack of preservation of benefits.

### 5.1 Comprehensive social security and retirement reform process

The complete overhaul of the current retirement funding and social security system was announced by President Mbeki in 2007. The initial aims with the reform process were to –

- encourage higher levels of retirement savings, including measures to assist lower-income employees to save for their retirement;
- create a single national retirement fund to ‘take advantage of economies of scale’ and reduce costs;
- support current fund members’ efforts to save for their retirement;
- build on current retirement legislation;<sup>47</sup> and
- create a sustainable pension structure.<sup>48</sup>

Although the Discussion Document on ‘Comprehensive social security in South Africa’, prepared by the Inter-Departmental Task Team on Social Security and Retirement Reforms (IDTT), was compiled in 2012,<sup>49</sup> it was only made publicly available at the end of 2016. The discussion paper is (at the time of writing) under discussion by the social partners (government, business, community and labour) at the National Economic Development and Labour Council (NEDLAC) and the outcome of the discussions on the proposed model of the reformed social security system is not yet known.

However, based on the various discussion documents that have been published to facilitate the reform process, which give some indication of the form the reformed system will take,<sup>50</sup> the reformed system will most likely be made up of a number of ‘pillars’, more or less based on

47 Joint press statement on Retirement Reform by Government, COSATU, FEDUSA and NACTU issued on 27 June 2008.

48 ‘SA’s new retirement structure takes shape’ *Personal Finance* 20 January 2008, <http://www.persfin.co.za> (accessed 7 September 2017).

49 IDTT (n 10).

50 The discussion documents that have been made available to date include the Taylor Committee Report (2002); National Treasury *Retirement reform: A discussion paper* (2004); National Treasury *Social security and retirement reform: Second discussion paper* (2007); National Treasury *2013 Retirement reform proposals for further consultation* (2013); Department of Social Development *Reform of retirement provisions* (2007); Department of Social Development *Creating our future: Strategic considerations for a comprehensive system of social security* (2008); IDTT (n 10).



the multi-pillar models of the World Bank<sup>51</sup> and the International Labour Organisation (ILO).<sup>52</sup> Central to the proposed reforms is the creation of a National Social Security Fund (NSSF).<sup>53</sup>

The first pillar of the reformed social security system is planned to consist of a non-means-tested grant for older persons.<sup>54</sup> It is envisaged that the role of the second pillar, the retirement funding pillar, will be fulfilled by the NSSF in the form of a mandatory contributory pension scheme offering defined benefits for all workers,<sup>55</sup> with government meeting part of the contribution costs of lower-income employees.<sup>56</sup> A simplified contribution arrangement for informal workers and self-employed persons is also proposed.<sup>57</sup>

Much of the uncertainty surrounding the final form of the reformed social security system centres on the role of existing occupational retirement funds in the proposed supplementary retirement saving schemes intended to boost retirement income received from the NSSF.<sup>58</sup> To ensure adequate income during retirement, workers who earn above the ‘contribution ceiling’ for the NSSF will be encouraged to make supplementary contributions to those of the current retirement funds that are approved in terms of the proposed ‘approved funds framework’. The IDTT proposes a system of automatic enrolment which will oblige employers to enroll employees in one of the approved funds in addition to their mandatory contributions to the NSSF.<sup>59</sup> Tax incentives for voluntary contributions to occupational retirement funds or private retirement vehicles on top of mandatory participation in the NSSF are also being considered.<sup>60</sup>

The most important aspect of the latest discussion document on the proposed reforms<sup>61</sup> is its focus on a comprehensive social security system and not only on retirement reforms. A close interaction between the NSSF and social assistance is envisaged, with social assistance serving as ‘the foundation of an integrated social security system rather than as

51 For more on the World Bank model, see R Holzmann & J Stiglitz (eds) *New ideas about old age security* (2001); R Holzmann & R Hinz *Old-age income support in the 21st century: An international perspective on pension systems and reform* (2005).

52 For a description of the ILO’s multi-pillar retirement income model, see C Gillion *The development and reform of social security pensions: The approach of the International Labour Office* (2000) 53 *International Social Security Review* 35.

53 IDTT (n 10) 5.

54 IDTT (n 10) 25.

55 The IDTT discussion document proposes that workers earning below an agreed amount (the contribution floor) be exempted from contributing to the NSSF and that those earning in excess of a threshold amount (the contribution ceiling) will be required to contribute to supplementary retirement savings. IDTT (n 10) 5-6.

56 IDTT (n 10) 21; National Planning Commission (n 1) 43.

57 IDTT (n 10) 5.

58 The IDTT (n 10) 19 acknowledges that there are ‘considerable strengths’ in the current retirement saving system.

59 IDTT (n 10) 28.

60 IDTT (n 10) 28; National Treasury (n 42) 18.

61 Although the IDTT discussion paper (n 10) was compiled in 2012, it served in its original form at NEDLAC in November 2016. It therefore is the most recent discussion document related to comprehensive social security and retirement reforms.

a last resort for those on the margins of the productive economy'.<sup>62</sup> The retirement reforms are also not occurring in isolation – the other social insurance schemes are also being overhauled and the IDTT envisages a single department responsible for overseeing social security in order to unify policy making on social security.<sup>63</sup> Greater coherence between social security arrangements and labour-market policies, as well as between social security arrangements and the proposed National Health Insurance (NHI) system, is also proposed.<sup>64</sup>

## 5.2 Reforms proposed by National Treasury

Precisely because the complete overhaul of the social security system has taken far longer than originally estimated, the National Treasury has introduced some interim reforms of the occupational retirement fund system to address the lack of preservation measures in the current system.

The obvious solution to the problem of lack of preservation of benefits, and consequent poverty during retirement, is the creation of a single national fund with compulsory membership where the issue of transferring accrued benefits from one fund to the other will not arise, as has been proposed in the discussion documents on the social security and retirement reforms. In the interim, the National Treasury has proposed amending existing retirement fund legislation to incorporate elements of compulsory preservation of benefits.

It is proposed that, from a date specified in the amending legislation, members of retirement funds will not be entitled to cash withdrawal benefits and their withdrawal benefits will have to be paid into a preservation fund.<sup>65</sup> Depending on the extent to which employees who become unemployed and struggle to find new employment will be allowed to withdraw benefits from the preservation funds, compulsory pre-retirement preservation of benefits will go a long way towards ensuring that employees receive adequate benefits upon retirement.

To deal with the issue of the lack of preservation of post-retirement benefits, the National Treasury proposed legislative amendments to harmonise the annuitisation requirement of pension and provident funds, that is, to incorporate some measure of periodical payments during retirement for provident fund members, similar to those received by pension fund members.<sup>66</sup> The aim was that these amendments, as introduced by the Taxation Laws Amendment Act 25 of 2015, would be implemented

62 IDTT (n 10) 25.

63 IDTT (n 10) 34.

64 IDTT (n 10) 18.

65 National Treasury (n 35) 5. See also National Treasury *Preservation, portability and governance for retirement funds* (2012).

66 National Treasury (n 35) 7-9.

as from 1 March 2016.<sup>67</sup> However, fierce opposition to the amendments by organised labour has led to the postponement of the implementation of the provisions relating to the annuitisation requirements to 1 March 2019.<sup>68</sup>

## 6 Constitutional principles guiding reforms

In the context of determining whether measures are taken to realise the right of access to housing, the Constitutional Court found that '[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.'<sup>69</sup> Therefore, the aim of this part of the chapter is not to analyse the details of the proposed reforms and whether they offer the most 'desirable or favourable measures',<sup>70</sup> but rather to argue that the reforms, as measures to progressively realise the right of access to social security, must result in a reasonable framework for the social security system.

South Africa is in a unique position with regard to retirement reforms. Not only is the social security system unlike those found in other countries, but the constitutional framework is also unique. Any reforms of the social security system in South Africa occur within the context of section 27 of the Constitution and the duty of the state to take reasonable measures to realise the right of access to social security it creates. Whenever retirement reforms are considered and implemented in other countries, no guidelines similar to those found in section 27 and the jurisprudence on its interpretation are available, apart from the provisions of international law.

Therefore, the outcomes of any South African retirement reforms will have to be tested against section 27 and applicable international law and the extent to which the reforms increase access to social security. Issues such as political and economic expediency that in many instances are the bases of reforms in other countries should, therefore, be shifted into the background. Therefore, even though the reforms in the comparator countries mentioned in some of the discussion documents are definitely worth studying as examples of models to be adopted,<sup>71</sup> comparisons have to be approached with caution, as similar constitutional requirements do

67 Taxation Laws Amendment Act 25 of 2015, sec 3(p).

68 Fin 24 'Treasury seeks further delay in provident fund tax change' 15 August 2017, <http://www.fin24.com/Money/Retirement/treasury-seeks-further-delay-in-provident-fund-tax-change-20170815> (accessed 3 September 2017).

69 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 41.

70 For a more detailed analysis of the reforms proposed in the discussion documents prior to the IDTT discussion paper, see ED Malherbe 'Intergenerational solidarity and the provision of support and care to older persons' unpublished LLD thesis, University of the Western Cape, 2010.

71 The discussion documents outlined the retirement income systems and legislation and retirement reforms of a number of countries, including Chile, Sweden, the United Kingdom and the United States of America.

not apply in those countries.

The Constitution requires any court, tribunal or forum to consider international law when interpreting the Bill of Rights.<sup>72</sup> When courts are interpreting any other legislation, a reasonable interpretation that is in line with international law must receive preference over alternative interpretations that are inconsistent with international law.<sup>73</sup>

South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2015 and, therefore, has direct international law obligations to give effect to the right to social security in terms of ICESCR. Article 9 of ICESCR provides for ‘the right of everyone to social security, including social insurance’. In addition to the right to social security, article 11 also provides for ‘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 United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) has produced General Comments that have become authoritative guidelines on the scope and content of the socio-economic rights included in ICESCR.

The following list of principles to guide reforms in South Africa is based on section 27 of the Constitution and the interpretation thereof by the courts,<sup>74</sup> as well as on the clarification of the content of social security rights and older persons’ rights as found in the relevant General Comments of the ESCR Committee.

## 6.1 Coordinated approach

General Comment 19<sup>75</sup> defines the right to social security in terms of article 9 as

the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependants.<sup>76</sup>

72 Sec 39(1)(b).

73 Sec 233.

74 Although it is recognised that the rights contained in the Bill of Rights are ‘inter-related and mutually supporting’ (*Grootboom* (n 69) para 23), the focus in this part of the chapter is on the guidelines provided in sec 27(2), as interpreted by the courts. For a discussion of the broader constitutional principles to be considered when redesigning the South African social security system, see Taylor Committee (n 40) 38-40.

75 General Comment 19 ‘The right to social security’ (2008) para 2.

76 For the purposes of General Comment 19, social security programmes include social insurance and social assistance schemes.

State parties are obliged to adopt legislative measures, national strategies and plans of action to realise the right to social security.<sup>77</sup> It does not matter whether state parties have single social security systems or a variety of systems to provide for various contingencies, as long as public authorities 'take responsibility for the effective administration or supervision of the system'.<sup>78</sup>

One of the main obstacles to accessing adequate retirement income in South Africa identified above is the lack of coherence between the older person's grant and the occupational retirement funding framework. Poverty during retirement is a single contingency and there currently is no public authority taking responsibility for the effective administration and supervision of all retirement income measures (social assistance and social insurance) as required by General Comment 19. One of the main goals of reforms should be to create one national retirement income system, as part of a comprehensive social security framework, to deal with the problems associated with the fragmented nature of the current system.<sup>79</sup>

Most of the reform proposals make provision for a continued role for occupational retirement funds in providing supplementary benefits to those employees who can afford additional contributions, as 'public social security arrangements cannot provide full income protection for every worker'.<sup>80</sup> It is important that this future role envisaged for retirement funds does not once again result in a fragmented retirement income framework and, therefore, one of the main reform challenges is 'to find an optimal mix of statutory, pooled and standardised social security mechanisms, alongside supplementary voluntary and occupational arrangements'.<sup>81</sup>

## 6.2 Inclusivity

Section 27(1)(c) of the Constitution guarantees 'everyone' access to social security. Retirement reforms, therefore, should aim for inclusivity,<sup>82</sup> by providing for mandatory participation in the retirement savings pillar(s), at least for all formally-employed workers. Article 9 of ICESCR has been interpreted as requiring state parties to 'take appropriate measures to establish general regimes of *compulsory* old-age insurance'.<sup>83</sup> The voluntary nature of the current South African retirement funding system raises serious concerns regarding the enjoyment of article 9 rights. However, the proposals for the reform of the social security system make provision for a

77 Paras 67 & 68.

78 Paras 11 & 46.

79 In *Grootboom* (n 69) para 78, it was held that sec 27 requires the state to provide access to social security 'on a programmatic and coordinated basis, subject to available resources'.

80 IDTT (n 10) 19.

81 IDTT (n 10) 19-20.

82 Taylor Committee Report (n 40) 35.

83 General Comment 6 'The economic, social and cultural rights of older persons' (1995) para 27.

compulsory retirement insurance pillar, thereby showing intent to dispose of this obstacle to complying with article 9.

### 6.3 Progressive realisation

In terms of section 27(2) the state is required to progressively realise the right of access to social security. The reform process will not necessarily be flawed if the reformed system, as a transitional measure, initially focuses on access to retirement income for all employees in the formal economy, as long as the design of the reformed system and the founding legislation make provision for the extension of protection to informal workers and self-employed persons at a later stage.<sup>84</sup>

To ensure the progressive realisation of the right of access to retirement income, the reformed system will also have to be based on the principle of solidarity or pooling of risks to facilitate the participation of low-income and informal workers.<sup>85</sup> Therefore, the principles of inclusivity and progressive realisation must be read together.

### 6.4 Governance and accountability

Section 27(2) requires the state to take reasonable legislative *and other* measures to ensure the progressive realisation of the right of access to social security. It was held in *Grootboom* that the reasonableness of measures to progressively realise socio-economic rights is not assessed merely on the conception of the measures, but also on the implementation thereof.<sup>86</sup>

Issues such as governance and accountability, as well as the institutional capacity to implement the reformed system, therefore, have to be taken into account to ensure that the reformed retirement and social security system will be in line with constitutional requirements.<sup>87</sup>

### 6.5 Availability of resources

The state's responsibility in terms of section 27 is limited to what it can

84 The requirement of progressive realisation means that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time'; *Grootboom* (n 69) para 45.

85 Taylor Committee (n 40) 45; National Treasury (n 42) 6; Social Development (n 35) 101.

86 *Grootboom* (n 69) para 42.

87 Taylor Committee (n 40) 39; IDTT (n 10) 34. The importance of governance and accountability to ensure the realisation of social security rights was recently emphasised by the Constitutional Court in reaction to the 'extraordinary conduct' of the Minister of Social Development and of the South African Social Security Agency that placed the continued payment of social assistance after 31 March 2017 in jeopardy. See *Black Sash Trust* (n 22).

achieve within its 'available resources'. The slow-down in economic growth and rise in levels of unemployment have increased the burden on the working population, and less money is available to pension schemes. Even worse consequences of the low economic growth are decreases in tax revenue and increases in unemployment compensation.

With unemployment figures at their current high (and growing) level,<sup>88</sup> South Africa's ability to manage an old-age income security system relying mainly on public funds and, therefore, tax revenue, is severely curtailed. The government's inability to collect taxes from the large number of South Africans working in the informal economy worsens the burden on the already-limited state funds that have to be applied to competing interests.<sup>89</sup> As was held in *Khosa & others v Minister of Social Development & Others*, 'limiting the cost of social welfare is a legitimate government concern'.<sup>90</sup>

According to the ESCR Committee, older persons 'feature prominently among the most vulnerable, marginal and unprotected groups. In times of recession and of restructuring the economy, older persons are particularly at risk.'<sup>91</sup> Paragraph 12 of General Comment 3 obliges state parties to protect vulnerable members of society even when facing resource constraints.<sup>92</sup> Read together, these provisions indicate that older persons are entitled to protection by the state even when resources are limited. The availability of resources, therefore, should not be the overriding principle driving the reforms to the detriment of universal access to social security.<sup>93</sup>

As was stated above, an integrated retirement income and social

88 In terms of the Quarterly Labour Force Survey (QLFS), the official unemployment rate in the second quarter of 2017 (April-June 2017) was 27,7%, <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf> (accessed 7 September 2017). Note that the expanded definition of unemployment, which includes the so-called 'discouraged jobseekers', may far exceed the unemployment rate quoted above (according to the QLFS, there were just under 2,3 million discouraged jobseekers in the second quarter of 2017).

89 The state's constitutional obligation in terms of sec 27 requires at the minimum provision of basic levels of social security to the most vulnerable groups in South Africa, which include not only older persons, but also persons with disabilities and HIV/AIDS, caregivers of poor children and people who are destitute and cannot support themselves and their dependants. S Liebenberg 'The right to social security: Response' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 158. See Malherbe (n 70) 438-444 for a critical analysis of the concept of 'intergenerational equity' which criticises spending on older persons under circumstances where children remain impoverished.

90 2004 6 BCLR 569 (CC) para 64.

91 General Comment 6 (n 83) para 17. In the 'Initial Report by South Africa on the Measures Adopted and Progress Made relating to the International Covenant on Economic, Social and Cultural Rights (ICESCR)' (2017) para 81, the South African government highlighted the vulnerability that comes with old age and highlighted the current reform process as part of the measures taken to realise art 9 rights.

92 General Comment 3 'The nature of states parties' obligations' (1990) para 12.

93 In the context of the right of access to housing, Yacoob J stated in *Grootboom* (n 69) para 94: 'I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress, however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them.'

security system as envisaged in the discussion documents will enable the government to continue paying grants to older persons, as the responsibility for the provision of retirement income would be shared with the other proposed 'pillars' of the integrated national social security system.

## 6.6 'Lifespan' view to addressing poverty

Finally, although one of the main goals of the retirement and social security reforms is to ensure access to retirement income, a 'lifespan' view must be taken. Hence proposed reforms, such as the compulsory preservation of retirement savings, should not serve to impoverish workers that face pre-retirement financial crises and prolonged periods of unemployment.

Unforeseen pre-retirement contingencies constitute one of the main reasons why the entire social security system should be reformed and not only the retirement income part, so that measures such as improved unemployment protection and death and disability cover can be included in the reformed system.<sup>94</sup> Ultimately, 'addressing poverty should be adopted as one of the key goals of a comprehensive social security system',<sup>95</sup> and reform proposals should be evaluated on the basis of the extent to which they make provision for the alleviation of poverty.

## 7 Potential impact of social security and retirement income reforms

In the initial stages of the retirement reform process detractors noted that there are more pressing social protection issues than retirement reforms, such as social security for informal workers, job creation and unemployment insurance. Olivier stated:<sup>96</sup>

Concentrating attention on reforming that part of the social security system which covers only a small part of the labour force at the expense of the informal sector and those who are unemployed is inherently unequal, as it directs the attention of government and other stakeholders away from a huge segment of the population with no or little social security coverage.

However, it may be argued that it does not necessarily follow that retirement reforms are not urgently required. It only means that retirement reforms cannot occur in isolation from comprehensive social security reforms that include measures to extend social protection to informal workers and

94 National Treasury (n 42) 10; IDTT (n 10) 19 & 21-26.

95 Taylor Committee (n 40) 43.

96 M Olivier *Regional overview of social protection for non-citizens in the Southern African Development Community* (2009) 42.



reforms of other social insurance schemes.<sup>97</sup>

The reform process, and particularly the introduction of the proposed NSSF, will inevitably have a significant impact on the current occupational retirement funds, 'especially those catering for lower-income workers who will struggle to make contributions over and above their NSSF obligations'.<sup>98</sup> Although the retirement funding industry has seen a decrease in the number of active funds due to a shift from stand-alone to umbrella funds,<sup>99</sup> concerns have been raised over the far-reaching impact that the proposed reforms will have on the industry and the national economy as a whole.<sup>100</sup>

The abovementioned concerns regarding the effect of the reforms on the economy have to be weighed against the positive impact that the reforms can have on existing levels of poverty and inequality. Reforms resulting in access to social insurance-type benefits in addition to non-means-tested social grants for low-income workers who reach retirement will result in increased old age income. The inclusion of low-income workers in the NSSF will serve the Constitution's transformative agenda, as they will become 'members' of a national scheme, rather than mere 'beneficiaries' of social assistance.<sup>101</sup> Making participation in the NSSF compulsory will also ensure that employees who currently are not members of funds due to their own myopic choices or their employers' reluctance to contribute will no longer have to rely solely on the older person's grant and will receive increased social security benefits upon retirement.

One of the best arguments in favour of reforms aiming to increase retirement income is the intergenerational effect of reducing poverty among older persons.<sup>102</sup> It is estimated that 6 per cent of South African households are 'skip-generation', where a grandparent lives with his or her grandchildren in the absence of their parents.<sup>103</sup> Increasing the income of older persons heading skip-generation households is likely to improve the standard of living of the children in those households. Based on the role that the older person's grant already plays in providing a source of income and alleviating poverty in many households where older persons live

97 National Planning Commission (n 1) 343; IDTT (n 10). Organised labour has been vehemently opposed to reforms of the current retirement funding system before the comprehensive social security reform process has run its course. 'Cosatu pension battle rages on' *Business Day* 25 July 2017, <https://www.businesslive.co.za/bd/national/labour/2017-07-25-cosatu-pension-battle-rages-on/> (accessed 7 September 2017).

98 IDTT (n 10) 33.

99 Financial Services Board *2015 Annual report of the Registrar of Pension Funds* (2016) 10.

100 K Hanekom 'Discussion paper on comprehensive social security in South Africa', <http://www.simekaconsult.co.za/comprehensive-social-security/> (accessed 7 September 2017). The IDTT (n 10) 22 aims to preserve the best attributes of the existing retirement funding system in the design of the new social security framework.

101 See K Malherbe 'Implementing domestic workers' social security rights within transformative constitutionalism' in D du Toit (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 152.

102 IDTT (n 10) 13.

103 Statistics South Africa *Social profile of vulnerable groups in South Africa 2002-2012* (2013) 75. Almost 10% of all female-headed households are skip-generation.

with unemployed family and children,<sup>104</sup> the intergenerational effect of increasing the income of older persons through the proposed reforms will also be experienced by households where older persons live with multiple other generations.

In summary, retirement reforms based on the guiding principles identified above can result in increased access to social security for older persons. The available discussion documents indicate that the reform processes are aiming for inclusivity for groups that are currently excluded from retirement funding schemes, such as low-income workers, informal workers and the self-employed. In addition, low-income workers who currently are discouraged from saving for their retirement due to the means test for the older person's grant will be able to participate in the NSSF and accumulate additional retirement savings, without forfeiting the grant. The reforms will also address the reduction of retirement income due to pre- and post-retirement preservation of contributory benefits. The effect that the retirement reforms will have on older persons and their households can best be summarised as follows:<sup>105</sup>

These are reforms that will take several phases to be fully implemented. Their contribution to poverty reduction and income security will take time, their impact reinforced and magnified from one generation to the next. These are investments in social cohesion that will be felt long into the future.

104 Statistics South Africa (n 15) 58.

105 National Treasury (n 42) 39.

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