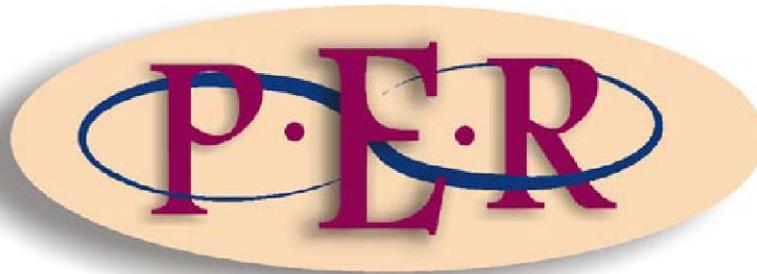


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A PANORAMIC VIEW OF THE SOCIAL SECURITY AND SOCIAL PROTECTION PROVISIONING IN LESOTHO

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1 Introduction

One of the most important social policy achievements of the 20th century was the development of social security programmes and systems in many countries of the world. However, for many countries the enhancement and extension of social security have remained among their major challenges. In the context of Lesotho in particular, very little ink has been spilt on the subject of social security provisioning. The purpose of this article is to discuss the various social security and social protection mechanisms in place in Lesotho. The analysis is conducted through adopting a panoramic view.

The paper is divided into four main sections. The first section briefly deals with the conceptualisation of social security in Lesotho. The second section carries out an overview of the current social security system of Lesotho with a view to determining its status and the extent to which it needs improvement. The third step will be to evaluate the system from a social policy perspective with the object of identifying its strengths and weaknesses, employing some critical social security benchmarks. Lastly, by way of conclusion, some salient issues resulting from the discussion in this article will be highlighted.

2 Conceptualising social security in Lesotho

In general there is no uniform concept of social security. The concept varies from country to country, depending on a country's traditions, experiences and level of economic development.¹ Lesotho has no official conceptual framework of social security. One has to glean its characteristics from the broad spectrum of social protection measures existing in the country, as well as the definitions and concepts

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¹ Flutz *et al Social Security Schemes* 1.

available in the international, regional and state jurisdictions discussed here. Such a conceptual framework will then have to inform the recommendations and conclusions of this article.

3 An overview of the existing social security system in Lesotho

3.1 General

Lesotho has a number of social security measures in place, but these measures are fragmented, scattered and uncoordinated, and cover various social risks, categories of the population, and benefits. The social security measures are governed by various constitutional and statutory provisions, collective agreements, and contracts of service, as well as by policy documents and informal arrangements. These various sources of social security are discussed in the next section.

3.2 Constitutional provisions

The *Constitution of Lesotho* does not expressly provide for the right to social security. It does, however, contain a variety of human rights provisions divided into two categories, namely the fundamental rights and freedoms (*Constitution of Lesotho*, 1993, Chapter II)² and the principles of state policy (*Constitution of Lesotho*, 1993, Chapter III).³ The following three fundamental rights are particularly relevant to the present study.

3.2.1 The right to life

The *Constitution* provides that "[e]very human being has an inherent right to life. No one shall be arbitrarily deprived of his life".⁴ The South African Constitutional Court once held that the right to life is in one sense antecedent to all the other rights in the *Constitution*. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the *Constitution* not simply to enshrine the right to existence. It is not life as mere

² See Ch II of the *Constitution of Lesotho*, 1993.

³ See Ch III of the *Constitution of Lesotho*, 1993.

⁴ See s 5(1)(a) of the *Constitution of Lesotho*, 1993.

organic matter that the *Constitution* cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of Lesotho's constitutional values. The *Constitution of Lesotho* seeks to establish a society where the value of each individual member of the community is recognised and treasured. The right to life is central to society. It incorporates the right to dignity. The two rights are intertwined. The right to life is more than mere existence; it is a right to be treated as a human being with dignity. Thus, without dignity, human life is substantially diminished. Without life there cannot be dignity.⁵

It is clear therefore that the right to life is foundational to human rights and its constitutional significance is itself primary.⁶ Given the importance of this right, it is regrettable that there is no fundamental right to social security in the *Constitution of Lesotho*. It has even been held in Lesotho that the right to life does not include the right to a livelihood.⁷

3.2.2 *The right to equality*

Another important right in the *Constitution* is the right to equality: "[e]very person shall be entitled to equality before the law and to the equal protection of the law."⁸ These provisions are of enormous relevance to a large variety of social security benefits such as those determined by reference to familial relationships, as such benefits may be challenged for treating different classes of parents, spouses, and children differently. They may be of importance to widows' and widowers' insurance benefits, which entitle a surviving spouse to his or her deceased spouse's primary old-age insurance benefit. Provisions of this nature apply to resolving issues of the

⁵ *S v Makwanyane* 1995 3 SA 391 (CC) paras [326]-[327].

⁶ *Khathang-Tema-Baits'okoli v Maseru City Council* LAC (2005-2006) 85 para 6.

⁷ *Khathang-Tema-Baits'okoli v Maseru City Council* LAC (2005-2006) 85 paras 17, 18. The Court of Appeal of Lesotho refused to follow the Indian decision in *Tellis v Bombay Municipal Corporation* 1987 LRC 351 (Const). However, the Indian approach is different and is of comparative interest. The broad interpretation of the right to life does not, of course, purport that the right to work or livelihood, for example, is absolute. It is subject to the availability of resources. This limits the scope within which the right to work or livelihood could be secured (see *Delhi Development Horticulture Employees' Union v Delhi Administration* 1992 4 SCC 99). In *KRajendran v State of Tamil Nadu* 1982 2 SCC 273 294 para 34.

⁸ See s19 of the *Constitution of Lesotho*, 1993.

entitlement to social security involving nationals and non-nationals. This section has to be interpreted and understood in the light of the principle of state policy on equality and justice⁹. Lesotho is enjoined to adopt policies aimed at promoting a society based on equality and justice for all its citizens.¹⁰ The *Constitution* directs Lesotho to take appropriate measures in order to promote equality of opportunity for disadvantaged groups in society, to enable them to participate fully in all spheres of public life.¹¹ The *Constitution* does not impose any limitation on the right to equality. It is arguable that the reason for this is the desire to confer absolute equality of opportunity and treatment on all persons. It may be argued therefore that all persons in Lesotho should benefit from social security, irrespective of their nationalities.

3.2.3 Freedom from discrimination

The *Constitution* provides for freedom from discrimination.¹² It provides that the enjoyment of the rights and freedoms set forth in the *Constitution* should be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The question is, if these provisions can be invoked to protect persons in respect of their social security benefit entitlement. The *Constitution* prohibits a law from making any provision that is discriminatory either in itself or in its effect.¹³ Discrimination on the ground of nationality is of special interest in social security law as it helps to define the scope and the contents of several legal instruments relating to a person's relation to social advantages. The application of this condition may be different from that under the *International Labour Organisation Convention 102*¹⁴ and therefore it is worthwhile studying this issue.

The term "law" includes any instrument having the force of law, made in exercise of a power conferred by a law, including the customary law of Lesotho and any other

⁹ See s 26 of the *Constitution of Lesotho*, 1993.

¹⁰ See s 26(1) of the *Constitution of Lesotho*, 1993.

¹¹ See s 26(2) of the *Constitution of Lesotho*, 1993.

¹² See s 18 of the *Constitution of Lesotho*, 1993.

¹³ See s 18 of the *Constitution of Lesotho*, 1993.

¹⁴ See Art 68 of the *Social Security (Minimum Standards) Convention* 102 of 1952.

unwritten rule of law.¹⁵This provision relates to social security in the sense that it would be unacceptable for persons to be discriminated against by laws in Lesotho with respect to benefitting under the social security measures available to persons in the country. This provision supplements the provisions on equality discussed above.

3.3 Enjoyment of the fundamental rights and freedoms

The *Constitution* provides that persons should not be deprived of the enjoyment of their fundamental rights to a greater extent than is necessary in a practical sense in a democratic society.¹⁶ The phrase "to a greater extent than is necessary in a practical sense in a democratic society" permeates the various limitation clauses to the fundamental rights and freedoms.

It has been held that, where this phrase has been used, the interpretation of the *Constitution* must be guided by the values and principles essential to a free and democratic society, embodying, to name but a few, respect for the inherent dignity of the human person, commitment to social justice, and equality.¹⁷The courts in Lesotho should read into the provisions relating to fundamental rights as well as into the principles of state policy an entitlement of persons to benefit from the social security and public assistance measures available in Lesotho.

The *Constitution* provides for principles of state policy,¹⁸ most of which constitute the so-called second- and third-generation rights in international human rights law, and they cannot, strictly speaking, be categorised as constitutional rights.¹⁹ These principles form part of the public policy of Lesotho.²⁰Regard being had to this important constitutional role, it is arguable that these principles should inform the

¹⁵ See s 154 of the *Constitution of Lesotho*, 1993.

¹⁶ See ss 7(3)(a) and (h);10(3);11(3);13(6);14(3); 15(3);16(3);17(3);18(6)(e) and 21(1) of the *Constitution of Lesotho*, 1993.

¹⁷ *R v Oakes* 26 DLR (4th) 200. See also *Obbo v Attorney General* 2004 UGCA 1 (11 February 2004). See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21.

¹⁸ See ss 25-35 of the *Constitution of Lesotho*, 1993.

¹⁹ See Mubangizi 2006 *AJLS* 1-19.

²⁰ See Ch III of the *Constitution of Lesotho*, 1993. Some commentators point out that principles of state policy represent the ideal of the welfare state. For example, see Ahmadi 1997 <http://www.ebc-india.com/lawyer/articles/97v2a4.htm>.

content of the fundamental rights as far as relates to issues of social security and the delivery of social assistance.

These principles guide the authorities and agencies as well as other public authorities of Lesotho in the performance of their functions, with a view to progressively achieving, by legislation or otherwise, the full realisation of those principles.²¹ It is arguable that the phrase "or otherwise" imposes a duty upon the authorities and agencies, as well as other public authorities in the performance of their functions, to seek to achieve the principles of state policy through measures such as social policy and social welfare mechanisms. This implies that the state must not only refrain from interfering with the enjoyment of such socio-economic rights, but must act to protect, enhance and realise their enjoyment.²²

In giving effect to the spirit and purpose of the *Constitution*, regard must be had to the special relationship between the principles and the fundamental rights chapter.²³ The principles cannot override or inhibit the provisions of the *Constitution* on fundamental rights;²⁴ they have to conform to and run subsidiary to the fundamental rights.²⁵ The full extent of the content of the principles of state policy contained in the Lesotho *Constitution* has not as yet received adequate judicial consideration. A number of Commonwealth²⁶ constitutions contain "directive principles of state policy", which have been accepted in various Commonwealth jurisdictions as a legitimate guide to interpreting substantive provisions of the *Constitution*.²⁷ It is arguable that Lesotho should adopt the same approach.

Lesotho is obliged to adopt policies aimed at providing all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction

²¹ See s 25 of the *Constitution of Lesotho*, 1993.

²² See Brand "Introduction to Socio-economic Rights" 9.

²³ *Attorney General v Whiteman* [1991] 2 WLR 1200 1204 (Lord Keith) (Judgment of the Privy Council, Appeal from the Court of Appeal of Trinidad and Tobago).

²⁴ *Archbishop Okogie v Attorney-General of Lagos State* [1981] 2 NCLR 337 350-1 (Mamman Nasir, PCA) (Judgment of the Federal Court of Appeal of Nigeria).

²⁵ *State of Madras v Champakam* 1951 SCR 252 (judgment of the Supreme Court of India).

²⁶ Lesotho is a member of the Commonwealth.

²⁷ A number of African countries have recently adopted Constitutions containing "directive principles of state policy". See, for example, the *Constitution of Namibia*, 1990; the *Constitution of Ghana*, 1992; the *Constitution of Uganda*, 1995; the *Nigerian Constitution*, 1979.

of any kind. In particular, women must be guaranteed conditions of work, including pension or retirement benefits, not inferior to those enjoyed by men, with equal pay for equal work.²⁸ It is arguable that such policies aim to ensure equality of treatment, thus allowing people to have meaningful livelihoods.

3.5 Other constitutional provisions

The *Constitution of Lesotho* protects the pensions of some high-ranking state officials.²⁹ It provides that, upon the appointment of such officials, any pension payable in respect of their service in that office shall not be altered to their disadvantage after their appointment.³⁰ The *Constitution* also facilitates the portability of the pension rights and benefits due to persons who are later appointed to such positions, as well as those who were receiving pensions under a law in force prior to the coming into force of the *Constitution*.³¹ All pension benefits are charged to the Consolidated Fund.³² In this section "pension benefits" means any pensions, compensation, gratuities or other like allowances for persons in respect of their services as public officers, or for the widows, children, dependants or personal representatives of such persons in respect of such service.³³

4 The legislative framework for social security

4.1 Social legislation

Lesotho has a fragmented collection of social protection legislation.³⁴ It covers various areas, ranging from labour and employment to basic social security issues. These statutes are considered below.

²⁸ See s 30 of the *Constitution of Lesotho*, 1993.

²⁹ These include President of the Senate, the Speaker of the National Assembly, judges of the Court of Appeal, judges of the High Court, members of the Constituency Delimitation Commission, members of the Public Service Commission, appointed members of the Judicial Service Commission, the Chief Electoral Officer, the Attorney-General, the Director of Public Prosecutions, the Auditor-General and the Ombudsman.

³⁰ See s 115 of the *Constitution of Lesotho*, 1993.

³¹ See s 150(1) of the *Constitution of Lesotho*, 1993.

³² See s 150(4) of the *Constitution of Lesotho*, 1993.

³³ See s 150(4) of the *Constitution of Lesotho*, 1993.

³⁴ The legislation includes the *Labour Code Order* 24 of 1992 as amended from time to time, the *Workmen's Compensation Act* 13 of 1977, the *Pension Scheme (Corporate Bodies) Act* 6 of 1979,

4.2 *Labour Code Order 24 of 1992*

The *Labour Code* is the principal law on labour and employment in Lesotho. It applies to any employment in the private sector and to any employment by or under the government, or by or under any public authority.³⁵ Unless otherwise specified in the Code, it also applies to apprentices. It does not apply to any person (other than a person employed in a civil capacity) who is a member of the Royal Lesotho Defence Force, the Royal Lesotho Mounted Police, or any other disciplined force.³⁶ It does not apply to such categories or classes of public officer, public authority or an employee thereof as the Minister of Labour may by order specify³⁷ and to the extent therein specified.³⁸ This indicates that the Code falls short on one of the cardinal principles underpinning social security provisioning: universal coverage. The Code proscribes discriminatory practices in employment,³⁹ and seeks to eradicate unfair discrimination and harassment and to promote the achievement of equality. It does not define sexual harassment, however, and this is a serious shortcoming.

The Code further promotes employment by prohibiting unfair dismissals⁴⁰ of employees, and by allowing orders of reinstatement⁴¹ and/or compensation⁴² in cases of unfair dismissals. This is a way of promoting employment protection.⁴³ Unemployment needs to be prevented by adequate employment protection, such as protection against unfair dismissal. It should not come as a surprise therefore that

the *Pensions Fund: Statutory Bodies Regulation 12 of 1976*, the *Police Service Act 7 of 1998*, the *National Security Service Act 11 of 1998*, the *Nurses and Midwives Act 12 of 1998*, the *Lesotho Defence Force Act 4 of 1996*, the *Public Dismissed Public Servants Pensions Act 22 of 1975*, and the *Teachers' Pensions Act 9 of 1994*.

³⁵ See s 2(1) of the *Labour Code Order 24 of 1992*.

³⁶ See s 2(2)(a) and (b) of the *Labour Code Order 24 of 1992*.

³⁷ For example, the Minister exempted persons engaged as watchkeepers from the *Labour Code*. This was done in terms of the *Normal Hours of Work Labour Code (Exemption) Regulations 108 of 1995*. It provided that their hours of work shall be 12 hours a day, 5 days a week. In terms of the *Labour Code (Exemption) Order 22 of 1995*, the Minister provided that Part III, Division D and Part V of the *Labour Code Order 1992* shall not apply to a public officer and revoked the *Labour Code Exemption Order 9 of 1995*.

³⁸ See s 2(2)(a) and (b) of the *Labour Code Order 24 of 1992*.

³⁹ See s 5 of the *Labour Code Order 24 of 1992*.

⁴⁰ See s 66 of the *Labour Code Order 24 of 1992*.

⁴¹ See s 73(1) of the *Labour Code Order 24 of 1992*.

⁴² See s 73(2) of the *Labour Code Order 24 of 1992*.

⁴³ In general terms, this refers to a wide range of measures and policies that are aimed at ensuring the continued employment of employed persons, such as the procedures to be followed prior to a dismissal.

employment protection laws such as the unfair dismissal provisions were enacted. Generally, there are three internationally recognised grounds embodied in the *Labour Code* upon which an employer may dismiss an employee, namely dismissal for misconduct, dismissal for incapacity and dismissal for operational requirements.⁴⁴

The Code provides for severance pay.⁴⁵ The severance payment benefit is payable where termination occurs at the initiative of the employer, or at the end of a contract of employment with fixed duration, or upon resignation by an employee.⁴⁶ Severance payments are supplementary to and separate from payment in lieu of notice and other entitlements. They thus constitute a significant employment protection mechanism in the Lesotho unemployment protection system. Severance payments are "meant to cushion the blow of unemployment, as a gratuity for services rendered, and as compensation for employees who have lost their jobs through no fault of their own"⁴⁷ and are payable to retrenched employees and employees who have not been dismissed for misconduct. Where an employee is dismissed for serious misconduct, he or she forfeits this entitlement. While it may be argued on the one hand that this forfeiture discourages employees from engaging in acts of serious misconduct, on the other hand it may be submitted that it is unfair for an employee to lose all benefits resulting from his or her long service simply because he or she committed a single act of misconduct after a long period of good behaviour. It might be advisable for the legislature to re-visit this issue, especially because the employee will have already been punished for the misconduct by dismissal. Summary dismissal is equivalent to capital punishment for an employee. Thus, to deprive an employee of the severance payment benefit would appear to amount to unfairness in the nature of double jeopardy.

⁴⁴ See the *Termination of Employment Convention* 158 of 1982.

⁴⁵ See s 79 of the *Labour Code Order* 24 of 1992.

⁴⁶ See s 79 of the *Labour Code Order* 24 of 1992.

⁴⁷ Grogan *Workplace Law* 237. See *Young v Lifegro Assurance* 1990 11 *ILJ* 1127 (IC); *Commercial Catering and Allied Workers Union of SA v Status Hotel* 1990 11 *ILJ* 167 (IC) 171A; *Hlongwane v Plastix (Pty) Ltd* 1990 11 *ILJ* 171 (IC); *Imperial Cold Storage & Supply Co Ltd v Field* 1993 14 *ILJ* 1221 (LAC).

The Code also provides for sick pay⁴⁸ and maternity benefits⁴⁹ as social protection measures. An employee is entitled to sick leave on full pay subject to the production of a certificate of incapacity signed by a registered medical practitioner.⁵⁰ Sickness benefits are payable when an insured person has to stop work because of some medical condition which usually entails the reduction or suppression of earnings, and the cash benefit is designed to replace the earnings so lost. The question of incapacity for work is an important one, as a sick person may be unable to resume work in the future. In such a case, an awkward question may arise as to what should happen to such a person. Unfortunately the *Labour Code* does not assist us in answering this question, and is therefore lacking. When an employee has been away from work for a number of days due to illness, he or she ceases to be entitled to a sickness benefit under the Code. It is clear that the intention is to save expenses, because a brief illness may account for a larger percentage of the total sickness benefit. It may be argued that no appreciable hardship is caused to a person who occasionally goes without wages for a few days, but one who suffers a number of short spells of incapacity in quick succession may be unfairly penalised by the waiting days rule.⁵¹ These benefits are relevant only in as far as they offer protection. It is arguable that long-term illness and permanent incapacity are the only issues that cause problems in this regard.

As indicated above, the Code provides for maternity protection, which is available for six weeks before and six weeks after confinement, with a possibility of a further two weeks after confinement.⁵² There is no express provision imposing an obligation on an employer to pay wages to a female employee during her absence from work owing to confinement, but it is arguable that, when the section is interpreted to

⁴⁸ See s 123 of the *Labour Code Order 24* of 1992.

⁴⁹ See s 136 of the *Labour Code Order 24* of 1992.

⁵⁰ See s 123 of the *Labour Code Order 24* of 1992. This benefit is calculated in the following manner: (i) during the first six months of employment, any absence due to illness may be unpaid; (ii) after six months, an employee is entitled, as a minimum, to sick leave on full pay for up to twelve days; (iii) after twelve months, an employee is entitled to sick leave on full pay for up to twelve days, and thereafter to sick leave on half pay for up to twenty-four days in each period of twelve months' continuous employment. Entitlement to the above benefits is subject to the incapacity's not having been self-inflicted by an employee.

⁵¹ See ILO *Introduction to Social Security* 38.

⁵² See s 133 of the *Labour Code Order 24* of 1992.

conform to the International Labour Organisation (ILO) Conventions and Recommendations, this benefit is payable.⁵³ Maternity benefits are a measure of international concern for the working mother, who was covered by one of the earliest conventions to be adopted by the ILO.⁵⁴ The purpose of the convention was to ensure that a working mother should be able to sustain and care for herself and her baby over the period immediately before and after her confinement.⁵⁵ It is arguable that the Labour Code has to be interpreted so as to embody the provisions of the *Maternity Protection Convention* of the ILO.⁵⁶ This would help to relate the provision of the *Labour Code* to the level of benefit provided by the said Conventions, which should be not less than two thirds of previous earnings when the system is one of earnings-related social insurance. It is regrettable, however, that the *Labour Code* does not provide in express terms for the application of the *Maternity Protection Convention*.

The Code further permits deductions to be made for the purpose of the contributions due from an employee to any provident, medical or pension fund or any other fund or scheme approved by the Minister.⁵⁷ It enables trade unions or employers' organisations to litigate in respect of a contract for the provision of benefits to members under a contributory provident or benevolent fund, or pension scheme or other similar scheme.⁵⁸ It protects provident, benevolent or pension fund moneys held by a registered trade union or employers' organisation from execution processes consequent upon litigation.⁵⁹ Furthermore, trade unions and employers' organisations are required to keep all moneys received or paid to them in respect of any contributory provident fund or pension scheme in a separate fund.⁶⁰ However, disappointingly, the Code does not provide for the administration of

⁵³ See s 4 of the *Labour Code Order* 24 of 1992, which provides for the principles used in the interpretation and administration of the Code to be in conformity with the ILO Conventions and Recommendations.

⁵⁴ See the *Maternity Protection Convention* 3 of 1919.

⁵⁵ ILO *Introduction to Social Security* 41.

⁵⁶ See s 4 of the *Labour Code Order* 24 of 1992. This section provides that the *Labour Code* should be interpreted in line with the ILO Conventions and Recommendations.

⁵⁷ See s 85(2) of the *Labour Code Order* 24 of 1992.

⁵⁸ See s 219(2)(b) of the *Labour Code Order* 24 of 1992.

⁵⁹ See s 222(4) of the *Labour Code Order* 24 of 1992.

⁶⁰ See s 8 of the Second Schedule of the *Labour Code Order* 24 of 1992.

provident, medical aid or pension funds. It leaves this to be determined by market forces. It is arguable that the legislature should intervene so as to ensure that the funds are properly managed. The Code does not provide for any pension for an employee or his or her beneficiary/beneficiaries. The *Labour Code* excludes employees in the public service and persons who are not in formal employment. It is arguable that the Code falls short of adhering to the principle of universal coverage in labour matters.

4.3 *The Labour Code (Amendment) Act 5 of 2006*

The HIV and AIDS pandemic constitutes a formidable threat to Lesotho inasmuch as it threatens to decimate the citizens. The government has implemented several HIV and AIDS prevention strategies, including the enactment of the *Labour Code (Amendment) Act 5 of 2006*, the main purpose of which is to provide for the treatment of HIV-positive persons and AIDS sufferers in the workplace. The Act came into operation on 4 August 2006. It provides for the testing⁶¹ and counselling of employees, as well as for the provision of medical treatment. It addresses the educating of employees on HIV and AIDS,⁶² testing,⁶³ confidentiality and non-disclosure,⁶⁴ discrimination⁶⁵ in employment,⁶⁶ eligibility for employee benefits,⁶⁷ the termination of employment,⁶⁸ risk assessment and management,⁶⁹ protection against victimisation,⁷⁰ care and support, and workplace HIV and AIDS policy.⁷¹ It requires every employer, in consultation with its employees or their organisations, to develop and implement a workplace policy on HIV and AIDS.⁷²

⁶¹ See s 235C of *Labour Code (Amendment) Act 5 of 2006*.

⁶² See s 235B of the *Labour Code (Amendment) Act 5 of 2006*.

⁶³ See s 235C of the *Labour Code (Amendment) Act 5 of 2006*.

⁶⁴ See s 235D of the *Labour Code (Amendment) Act 5 of 2006*.

⁶⁵ In *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 53, it was held that discrimination must be on a specified ground; otherwise whether or not there is discrimination will depend upon whether or not, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

⁶⁶ See s 235E of the *Labour Code (Amendment) Act 5 of 2006*.

⁶⁷ See s 235F of the *Labour Code (Amendment) Act 5 of 2006*.

⁶⁸ See s 235G of the *Labour Code (Amendment) Act 5 of 2006*.

⁶⁹ See s 235H of the *Labour Code (Amendment) Act 5 of 2006*.

⁷⁰ See s 235I of the *Labour Code (Amendment) Act 5 of 2006*.

⁷¹ See s 235J of the *Labour Code (Amendment) Act 5 of 2006*.

⁷² See s 235B of the *Labour Code (Amendment) Act 5 of 2006*.

It is arguable that the introduction of this legislation is a commendable move, since the policy states that the epidemic is regarded as a serious workplace issue, it defines rights and responsibilities, and provides information about the available services for affected staff, and so on.⁷³ This Act should promote human rights since it integrates HIV-related human rights – particularly the principle of non-discrimination – into programme tools such as national AIDS policies, strategic plans and labour codes, all of which are based on constitutional law. A rights-based approach to HIV and AIDS is always important, especially within the workplace. In effect, the Act provides for the further development of HIV and AIDS policies in the workplace: it enjoins employers to see to the registration of such employees and proscribes discriminatory practices against such employees.

However, the Act has several weaknesses. Firstly, the Act does not provide for the introduction of reliable measures for compliance by employers. Secondly, the Act does not compel employers to introduce a particular administrative infrastructure for the benefit of affected employees. Thirdly, there are no monitoring mechanisms in place. It is arguable that, while the policy consideration behind the Act is laudable, in the absence of monitoring mechanisms the Act does not appear to provide for the adequate protection of workers.

4.4 The Pensions Scheme (Corporate Bodies) Act 6 of 1979, Statutory Bodies Pension Fund Regulations No 12 of 1973 and the Finance Act 11 of 1973

The *Pension Scheme (Corporate Bodies) Act 6 of 1979* was enacted in order to provide for the transfer of the Statutory Bodies Pension Fund to the Lesotho National Insurance Company and for the regulation of the operation by that company of a pension's scheme for employees of corporate bodies.⁷⁴ The fund was established in 1976⁷⁵ by means of Regulations. The Regulations provide for the establishment of categories of eligible persons to join the Fund. They establish a tripartite board of

⁷³ Government of Lesotho *HIV and AIDS Guide*.

⁷⁴ This is in terms of the long title of the Act.

⁷⁵ See Reg 3 of the *Statutory Bodies Pensions Fund Regulations 12 of 1976*. The Regulations were made in terms of s16 of the *Finance Act 11 of 1973*.

trustees consisting of the accountant general, who is the chairman, a representative of employers and a representative of employees.⁷⁶ They further provide for contributions that should be made to the Fund.⁷⁷ The Regulations further provide for the benefits payable out of the Fund.⁷⁸ These Regulations have to be read in line with *The Pensions Scheme (Corporate Bodies) Act 6 of 1979*. These Regulations provide for the establishment of pension schemes for employees employed by public policy-driven corporate bodies (parastatals). They cover employees employed on permanent terms of service or on month-to-month terms of service.

The extent of coverage of persons under the Regulations is not satisfactory. The Regulations do not cover employees below the age of 17 or male employees who have not attained the age of 50. Furthermore, they do not cover female employees who have not attained the age of 45. It should be understood, however, that this provision contemplates a pension and it should be borne in mind that it is a fund aimed at retirement provisioning. An employee would have to contribute to this fund. It seems sensible therefore that an employee younger than 17 would hardly have contributed to such a Fund and should actually still be at school. However, the effect of this provision is that fewer persons are covered. Furthermore, the Regulations provide few benefits: old age pensions, widows' pensions, death benefits or gratuities, and retirement on the grounds of ill health. Old age pensions are payable to male employees who have reached the retirement age of 65, and to female employees who have reached the retirement age of 60. This pension is calculated on the basis of 2 percent of pensionable emoluments for every pensionable year of service during which the employee has contributed to the scheme. The widow's pension is payable to a pensioner's widow, who is entitled to 50 percent of the pensioner's pension. Where the widow dies or re-marries and leaves a child below the age of 16, this benefit is payable to a guardian of the child until the child attains the age of 16. If there is more than one child under the care of different guardians, the money is divided equally among them.

⁷⁶ Reg 5(1) of the *Statutory Bodies Pensions Fund Regulations 12 of 1976*.

⁷⁷ Reg 5 (2) of the *Statutory Bodies Pensions Fund Regulations 12 of 1976*.

⁷⁸ Reg 7 of the *Statutory Bodies Pensions Fund Regulations 12 of 1976*.

The death benefit or gratuity is payable where an employee dies in service before reaching retirement age. It is paid to the beneficiary and is equal to twice the deceased employee's annual basic salary at the date of death. There is also a retirement benefit payable to an employee who retires on grounds of ill-health. The retiree can choose that the benefit be paid in any one of the following ways: either a pension that he or she has earned to date can be paid, or a refund of both his or her own contributions and the employer's contributions together with the compound interest (3 percent per annum) can be paid. The main shortcoming of this Act's pension scheme is its inadequacy in terms of its coverage regarding persons, contingencies and benefits structure. The Act does not cover a number of categories of employees. It does not cover an employee who is below the age of 17, and it does not cover an employee who is not yet 50. What has been said about contributions by younger workers in the preceding paragraph should also apply here. It does not provide for portability arrangements. It is apparent from the foregoing discussions that the Act discriminates against many employees by excluding them from coverage.

4.5 Public Servants' Compensation Scheme

Public servants are entitled to claim compensation.⁷⁹ The state is liable to a public servant in respect of the servant's death or personal injury sustained while on duty. The quantum of compensation is, however, not objectively fixable. It may be agreed between the servant and his or her legal representative on the one hand, and by the Minister, on the other.⁸⁰ Failing such an agreement, the liability of the state is determined according to law. This is a serious weakness.

The compensation may be claimed by a servant if the servant is injured while on duty and incurs hospital expenses in connection with such an injury, and if such expenses cannot be partially or fully reimbursed by a medical aid scheme.⁸¹ In such a case the state will reimburse the expenses subject to the concurrence of the Principal Secretary to the Ministry responsible for Health.

⁷⁹ See s 1201 of Ch XII of the *Public Service Regulations* of 1969.

⁸⁰ See s 1201(1) of the *Public Service Regulations* of 1969.

⁸¹ See s 1201(2) of the *Public Service Regulations* of 1969.

If a public servant sustains injuries as a result of an accident while on duty, the accident should be reported to the Principal Secretary (PS).⁸² The PS may then appoint a board of enquiry, which should be tasked with determining if the accident occurred in the actual performance of the duties of the servant and without his or her negligence and also if the accident was specifically attributable to the nature of the servant's duty.

This scheme has other shortcomings. Firstly, the Act does not expressly provide for the objectives and purposes of the chapter on claims for compensation by servants. Secondly, there are no guidelines as to the procedures that have to be followed in determining compensation. Thirdly, the Act does not even specify which categories of public servants are covered. Lastly, the formula used for calculating the compensation that is due to a servant needs to be revised as it is derived from the *Workmen's Compensation Act* 13 of 1977, which Act is not itself comprehensive on the subject.

4.6 *Workmen's compensation*

The Lesotho workers' compensation scheme was established in 1977 under the *Workmen's Compensation Act*.⁸³ A "workman" is defined as any person who has entered into, or works under a contract of service or apprenticeship with an employer.⁸⁴ The main statutory exclusions are: a person whose employment is of a casual nature and who is employed other than for the purpose of the employer's trade or business; a person who is employed for the purpose of any game or recreation and engaged or paid through a club; domestic workers; outworkers; and family workers; and any person whose services are rewarded in kind according to Sesotho custom, including shepherds; and such persons as may be excluded from the application of the Act by the Minister.⁸⁵ The Act requires an employer to purchase compulsory insurance with a private carrier, subject to approval by the Minister. While the workmen's compensation scheme has proved to be an adequate

⁸² See s 1201(3) of the *Public Service Regulations* of 1969.

⁸³ *Workmen's Compensation Act* 13 of 1977.

⁸⁴ See s 2(1) of the *Workmen's Compensation Act* 13 of 1977.

⁸⁵ See s 2(2) of the *Workmen's Compensation Act* 13 of 1977.

and acceptable method of dealing with complex issues in Lesotho, it still has a number of weaknesses.

Firstly, as indicated above, the coverage of the Act excludes some categories of employees. Secondly, the benefit structure provided for under the Act is based on prescribed amounts which are payable in a lump sum. The disadvantage is the reduction of a worker's entitlement if the latter exceeds the stipulated amount. Furthermore, the one-off payment may not benefit the employee or his or her beneficiary/beneficiaries if it is not properly invested. Thirdly, the Act does not cover workers in the informal sector. Fourthly, the system is cumbersome and plagued by delays due to queries from insurance companies. Lastly, the Act does not provide continuous invalidity benefits or survivor benefits.

4.7 Public servants' pension scheme

At independence on the 4th day of October 1966 Lesotho inherited the *Pensions Proclamation* 1964, which provides that all pension obligations for public servants are paid by the government from the Consolidated Fund. No contributions are made by members. Pensionable servants are eligible for pension after they have worked for ten years and/or have reached the age of 40. Pensions are paid in monthly instalments and they cease when a pensioner dies. If a pensioner is imprisoned for any offence, his or her pension is suspended for the duration of the imprisonment.

The *Pensions Proclamation* covers both permanent and pensionable government servants, as well as servants on non-pensionable terms (temporary month-to-month or daily paid servants). It contains rules and regulations relating to the determination of pensions and gratuity payments. The four benefits under the Proclamation are retirement pensions, death pensions for widows, death benefits and gratuities, and compulsory retirement. The retirement pension is payable in five instances, namely when a servant has served continuously for ten years, when a servant has attained the compulsory retirement age of 55 years or the voluntary retirement age of 40 years, on the abolition of the servant's office, on the servant's retirement on grounds of public interest, and on the servant's retirement on medical grounds. A widow's death pension is payable to a widow of a servant and a child

below the age of 26 if in full-time study. The death gratuity provided for in the Proclamation is a benefit payable to a beneficiary of a servant who has died in government service or after retirement.

Four types of benefits are payable under the scheme. First, pension benefits are payable to pensionable servants who have reached retirement age. A servant may retire voluntarily at 45, or compulsorily at 55. The benefit payable under the compulsory retirement category differs according to the terms of employment of a servant. Thus, a servant employed on permanent and pensionable terms gets a full pension or a reduced pension plus a gratuity. Secondly, a gratuity is payable to non-pensionable servants who have served for ten or more years and who are above 40, and for contract servants at the end of their contracts. A contract employee is paid a gratuity based on a percentage of his or her salary earned during the contract period, and no pension is payable in this regard. A daily paid servant is paid a gratuity based on the number of years of service. A servant employed on temporary month-to-month terms gets a benefit not exceeding his or her annual salary, and no pension is payable. Thirdly, a death gratuity is payable to servants who die while still in service. Lastly, a dependant's pension is payable to dependants of servants who die as a result of injuries incurred or diseases contracted in the discharge of their duties.

The scheme covered by the *Pensions Proclamation* 1964 has a number of shortcomings. It is discriminatory since it does not provide pensions for some employees on the basis of grade and/or their terms of employment. Non-pensionable servants and temporary servants are not eligible for pension when they retire. They are entitled only to a gratuity if they leave or retire after ten years of continuous service, or to a death gratuity if they die while still in service. The scheme offers few benefits, is too expensive for government, and imposes a heavy burden on taxpayers.⁸⁶ The pension benefits that are payable are insufficient to maintain the same living standards the pensioner was accustomed to while still employed. The pension ceases when the pensioner dies, thus leaving the

⁸⁶ Thulo "Budgets For Pensions Payments".

dependants without support. The scheme restricts labour mobility because people forfeit their benefits if they change jobs before they reach retirement age. Payments are suspended if a pensioner is imprisoned, thus disregarding the interests of those who depend on that pension for their daily bread. No provision is made for the dependants of a pensionable servant who dies in service or after the pension has been paid out in cases where the death is not related to the person's employment. In the case of the death of a servant, the benefits due to a "widow" are not regarded as due to a "widower". This may be challenged as being unconstitutional on the grounds of discrimination on the grounds of gender. The maximum number of years that a servant can possibly be employed in government and which will count towards his or her pension entitlement is 37 years, but the Proclamation takes into account only a maximum period of service of 33 years and four months. Finally, in the event of emergency demands in a given year's budget, government may suspend or reduce the pension, thereby causing undue hardship to the pensioner.⁸⁷

4.8 *Teachers' Pensions Act No 9 of 1994*

The *Teachers' Pensions Act* provides for pensions, gratuities and other allowances to teachers.⁸⁸ The Act covers only teachers whose salary is paid by the government.⁸⁹ The *Pensions Proclamation 1964* applies *mutatis mutandis* to the grant of pensions, gratuities and other allowances to such teachers.⁹⁰ The Act specifically prohibits a construction whereby the provisions of any Act, which amends the *Pensions Proclamation 1964*, are rendered applicable to the grant of pensions, gratuities and other allowances to teachers, if such an Act is enacted after the passing of the *Teachers' Pensions Act*.⁹¹ Such an amending Act can apply to teachers only if the Minister so notifies in the *Gazette*.⁹² In the application of the *Pensions Proclamation 1964*, only service from 1 October 1982 is taken into account as pensionable

⁸⁷ Minister of Finance and Development Planning "Race for Jobs".

⁸⁸ *Teachers' Pensions Act 9 of 1994*.

⁸⁹ See s 3(1)(a) of the *Teachers' Pensions Act 9 of 1994*.

⁹⁰ See s 10(1) of the *Teachers' Pensions Act 9 of 1994*.

⁹¹ See s 10(2) of the *Teachers' Pensions Act 9 of 1994*.

⁹² See s 10(3) of the *Teachers' Pensions Act 9 of 1994*.

service.⁹³ A teacher dismissed for misconduct is disqualified from receiving pensions and gratuities under the Act.⁹⁴

Several points of criticism can be levelled against the teachers' pension scheme in Lesotho. Firstly, the value of the benefits is too low. Secondly, the *Teachers' Pensions Act* is too limited in its coverage. It does not allow teachers who are employed by private schools to benefit under the Act. The distressing thing is that teachers who are employed by private schools are not covered elsewhere either in this Act or in any other legislation. Thirdly, there is no clear justification for excluding teachers who could become pensionable as of 31 September 1982. The date of 1 October 1982 appears to have been arbitrarily decided upon.

4.9 The Lesotho Old Age Pension

In November 2004, a universal non-contributory pension was introduced for all citizens of Lesotho aged 70 and over, and it was set at a level of M150.⁹⁵ The *Old Age Act* was passed in January 2005, with retrospective operation from November 2004.⁹⁶ The purpose of the Act is to introduce social protection in the form of an old age pension scheme for the benefit of all senior citizens aged 70 and above.⁹⁷ The pension is financed entirely from the Consolidated Fund. The Minister determines the amount of the pension and publishes this determination by notice in the *Gazette*.⁹⁸ The scheme aims to improve living standards and reduce poverty, in line with the development strategies of Lesotho as outlined in the National Vision 2020 and the Poverty Reduction Strategy Programme.⁹⁹

⁹³ See s 10(4) of the *Teachers' Pensions Act* 9 of 1994.

⁹⁴ See s 3(1) of the *Teachers' Pensions Act* 9 of 1994.

⁹⁵ The currency in Lesotho is called the maloti and 1 maloti is equivalent to 1 South African rand. When the pension was introduced M6 was equivalent to US\$1.

⁹⁶ See s 3(1) of the *Old Age Pension Act* 3 of 2005.

⁹⁷ See the long title of the *Old Age Pension Act* 3 of 2005.

⁹⁸ See Government Notice 10 of 2005.

⁹⁹ At the time of its introduction, the pension amount (M150 per month) was almost exactly equal to the official national poverty line in Lesotho, set at M146 in 2002. In the 2007/2008 budget speech, government announced that the pension would increase from M150 to M200 (US\$29) a month.

In terms of the population covered, the scheme covers all senior citizens.¹⁰⁰ By May 2005 the pension was reaching 69046 beneficiaries, or roughly 3.3 percent of the total population of Lesotho.¹⁰¹ It is estimated that 72000 people were covered in 2007.¹⁰² Although it is not clear why government decided on the age of 70 years as a threshold of the Lesotho old age pension, this age was probably chosen on account of fiscal affordability, with regard being had to the numbers covered. The old age pension is an entitlement, and as such it is justiciable. The scheme has a few exclusions, which comprise social groups covered by other state transfers existing before it came into force, namely recipients of public service pensions, African Pioneer Corps pensions, and the public assistance programme.

The Lesotho old age pension displays a number of important strengths, as a means of addressing chronic poverty and vulnerability in a very poor country.¹⁰³ These strengths are:

- the pension is an entitlement not a privilege, which can thus be withdrawn arbitrarily, and it reaches all citizens over the age of 70; thus, it is justiciable;
- pension incomes are spent for the benefit of all the pensioner's household members and therefore improve the food security, nutritional status and school attendance of children, and access to health care by all household members, and not just the welfare of the pensioners themselves;
- the social pension has a single targeting criterion, assisted in Lesotho by the possession of voter registration cards by all citizens, giving details of their place and date of birth;
- as with other old age pensions, it has a positive social impact on the status, independence and dignity of older people; and

¹⁰⁰ A "senior citizen" means a citizen of Lesotho aged 70 years and above.

¹⁰¹ RHVP 2007 http://www.wahenga.net/sites/default/files/briefs/REBA_Case_Study_Brief_3.pdf.

¹⁰² RHVP 2007 http://www.wahenga.net/sites/default/files/briefs/REBA_Case_Study_Brief_3.pdf.

¹⁰³ RHVP 2007 http://www.wahenga.net/sites/default/files/briefs/REBA_Case_Study_Brief_3.pdf.

- the overhead costs of delivering pensions have been minimised by utilising the existing network of post offices.

The scheme, of course, has some weaknesses as well.¹⁰⁴ These weaknesses are as follows:

- there is considerable policy debate about the threshold age of this pension, and the government has to justify this choice;
- the age of 70 is too high a threshold;
- people who are younger than 70 but are too old for productive employment are excluded;
- vulnerable households without a member aged 70 or above are negatively affected;
- the duration of the pension entitlement in affected households may be quite short due to the fairly low remaining life expectancy of individuals over 70;
- the value of the benefits is too low;¹⁰⁵ and
- finally, it has been reported that there is little awareness of the state's social assistance scheme for the elderly.

There are several challenges regarding coverage. One major problem is registration. Pensioners must be registered in order to receive their pensions, and pension registration represents one of the most difficult challenges in introducing the scheme and ensuring its coverage of all eligible citizens.¹⁰⁶ Most senior citizens have no valid identification documents as until the beginning of April 2013 Lesotho did not have a programme of national identity cards. A passport was the most common identification document in Lesotho. In order to circumvent this problem, senior citizens were allowed to use voters' cards. However, not all senior citizens had

¹⁰⁴ RHVP 2007 http://www.wahenga.net/sites/default/files/briefs/REBA_Case_Study_Brief_3.pdf.

¹⁰⁵ It is now M300.

¹⁰⁶ RHVP 2007 http://www.wahenga.net/sites/default/files/briefs/REBA_Case_Study_Brief_3.pdf.

voters' cards. A system of national identity documents may go a long way towards improving the situation. Another problem is that most illiterate Basotho do not know their dates of birth. This is partly due to the poor birth registration system that has been in place in the country.

In order to minimise delivery costs, the government uses the existing post office network as its principal institutional mode of delivery. It also uses other public premises such as chiefs' offices, schools and health centres. The Lesotho Defence Force and the Lesotho Mounted Police provide security at the pay points. In some mountainous areas, where there are no roads, the pensions are distributed by military helicopters.¹⁰⁷

4.10 African Pioneer Corps (Pensions) Act 2 of 1973

World Wars I and II witnessed the establishing in Lesotho (formerly Basutoland) of an African auxiliary pioneer corps comprising "volunteers", between 1914 and 1918 and again between 1 July 1941 and 31 December 1947. That corps joined the British Army in Lesotho. The volunteers were later pensioned with the assistance of the British government, and the pension scheme for volunteers started operating in Lesotho in 1973.¹⁰⁸ The Lesotho government later enacted a new statute that provides for the volunteers' pensions.¹⁰⁹ In terms of the Act, a monthly pension of such an amount as the Minister may determine by notice published in the *Gazette* is to be paid to a volunteer or the widow of the volunteer.¹¹⁰ Any pension granted to the widow of a volunteer is to be reduced on her remarriage by such a fraction as the Minister may determine.¹¹¹ The pension is neither assignable nor executable.¹¹² In practice, a volunteer or his widow who is receiving a pension under the Act is not permitted to receive a pension under the *Old Age Pensions Act*.¹¹³

¹⁰⁷ Devereux *et al Making Cash Count*23.

¹⁰⁸ *African Pioneer Corps (Pensions) Act 2 of 1973*.

¹⁰⁹ *African Pioneer Corps (Pensions) Act 15 of 2000*.

¹¹⁰ See s 3(1) of the *African Pioneer Corps (Pensions) Act 15 of 2000*.

¹¹¹ See s 4 of the *African Pioneer Corps (Pensions) Act 15 of 2000*.

¹¹² See s 6 of the *African Pioneer Corps (Pensions) Act 15 of 2000*.

¹¹³ The Commissioner of Pensions, Mr Thulo, explained that this is done so as to save the meagre resources at the disposal of the pensions department.

It appears that the philosophy behind the approach is that, since the volunteers or their widows receive M200 a month, they would be unjustifiably enriched if they received an additional M200, which is the sum received by senior citizens. In any event, the contention could be that some of the volunteers or their spouses are younger than the requisite 70-year threshold for old age pensions. It is arguable that on policy grounds it is difficult to see why there is no policy allowing other elderly persons of a lower age into the old age pension scheme.

It is very unlikely that there are now any spouses of volunteers who are below the age of 60. It is arguable that there is a need to examine ways of amalgamating the two pension schemes, not only to rationalise administrative costs, but also to extend coverage to other elderly people who do not qualify for either of these pensions today. The other challenges inherent in this pension scheme are not very different from those referred to in relation to the old age pension above. The strengths and weaknesses listed with regard to old age pensions apply *mutatis mutandis* to this pension.

4.11 Migrant labourers' pensions

The advent of democracy in South Africa brought with it many benefits for migrant mine labourers from Lesotho, including becoming permanent residents in South Africa. Miners and their families are in general somewhat better off than typical Basotho families, primarily because of their migrant labour income.¹¹⁴ The highest proportion of miners work in Anglo-American mines in South Africa, and most of them work in underground jobs, with the category "miner" being the single largest category of employment.¹¹⁵ These men work for an average of 15.6 years, and visit their homes in Lesotho regularly – an average of 9.8 times in 12 months – while more than half the wives have visited their husbands at the mines.¹¹⁶ According to a study conducted by Sechaba Consultants,¹¹⁷ only a relatively small proportion of the miners in fact intend taking up permanent residence in South Africa.

¹¹⁴ Sechaba Consultants *Riding the Tiger* 7.

¹¹⁵ Sechaba Consultants *Riding the Tiger* 7.

¹¹⁶ Sechaba Consultants *Riding the Tiger* 7.

¹¹⁷ Sechaba Consultants *Riding the Tiger* 7.

Miners need better information about the legal requirements for permanent residence or their rights as miners. Rights to pensions for those who do not take up permanent residence must be clarified for them. There seems to be a contradiction between the relatively small number of miners who would like to take up permanent residence and the broad desire for pensions after the completion of their mine service.¹¹⁸ The difference between state pensions, as provided by the South African government, and work pensions, as provided by the mines and/or the provident fund, should be made clear to migrant miners.

Despite the fact that Lesotho has a high number of migrant labourers in South Africa, the issue of how these labourers can benefit under the more advanced and better organised South African social security system is one of vital importance. There are no international agreements between Lesotho and South Africa in terms of which Lesotho migrant workers might enjoy South African social security benefits. It is arguable that it is time for Lesotho to examine this issue. Furthermore, many South African insurance companies operate in Lesotho¹¹⁹ and many Basotho working in South Africa are insured with them in Lesotho for a wide variety of insurance benefits, but there are no portability arrangements in place between the two countries to enable the migrants to enjoy these benefits when in South Africa. Once again, Lesotho must investigate this issue to ensure that its migrants are adequately protected. Lastly, Lesotho should consider legislating for the enjoyment of such benefits as a pre-condition for the South African insurance companies that intend to operate in Lesotho.

5 Informal social security arrangements in Lesotho

It is important for the purposes of maintaining a strong theoretical framework to begin the discussion in this section by examining the concept of "informal social security". Traditionally, both the ILO and general literature on employment have used the concept of "formality" as a criterion to distinguish labour market activities between jobs. There is no precise definition of "informal social security". More

¹¹⁸ Sechaba Consultants *Riding the Tiger* 7.

¹¹⁹ These include Metropolitan Life, AON Insurance, Alliance Insurance and so on.

recently, the ILO indicated that "[e]mployees are considered to have informal jobs if their employment relationship is not subject to standard labour legislation, taxation, social protection or entitlement to certain employment benefits".¹²⁰

Dekker defines "informal social security" as referring to social security provisions for those who work informally, and as referring to informal forms of social security which are based on a kinship relationship and are community- or family-based, relying heavily on the principle of social solidarity.¹²¹ These include all forms of social security outside the formal (governmental) social security framework.¹²² Olivier and Dekker define it as the counterpart of formal social security, covering social protection mechanisms outside the formal social security paradigm.¹²³ Others have said that the distinction between informal and formal social security arrangements can be mapped out on the bases of coverage, benefits, financing and administration.¹²⁴

It is apparent that the term is definable in terms of its constituents. As Olivier *et al* point out, informal social security arrangements are those self-organised informal safety nets which are based on membership of a particular social group or community, including but not limited to family, kinship, age group, neighbourhood, profession, nationality, ethnic group, and so forth.¹²⁵ Two types of informal social security have been identified, namely traditional support systems and self-organised mutual support systems.¹²⁶ The functional distinction between these two systems is that:

[t]raditional support systems operate on the basis of solidarity and generalised reciprocity and revolve around kinship and family ties. Kinship and family ties bind people together and enable them to develop a sense of belonging and togetherness. The values and beliefs underpinning family and kinship ties enable members to provide mutual support in the event that they are exposed to life cycle crises. Self-organised mutual support systems, on the other hand, transcend kinship boundaries and are community- or neighbourhood-based and intended to respond

¹²⁰ ILO *Decent Work*.

¹²¹ Dekker "Social Security for Those Who Work Informally" 248.

¹²² Dekker "Social Security for Those Who Work Informally" 248.

¹²³ Olivier and Dekker "Informal Social Security" 562.

¹²⁴ Olivier and Kaseke "Informal and Formal Social Security" 11.

¹²⁵ Olivier, Kaseke and Mpedi "Formulating an Integrated Social Security Response" 4.

¹²⁶ Olivier, Kaseke and Mpedi "Formulating an Integrated Social Security Response" 4.

to specific risks as determined by the membership. These mutual support systems operate on the basis of the principle of solidarity but unlike traditional support systems they observe balanced reciprocity. In other words, the assistance is rendered on the understanding that it would be reciprocated in the same form.¹²⁷

Thus, informal social security essentially rests on any one or any combination of four security pillars: individual provision based on individual economic activities, membership of traditional solidarity networks, membership of co-operatives or social welfare associations, and access to public benefit systems.¹²⁸ As shown above, informal social security has a variety of manifestations, which are discussed in the next sections.

5.1 Household-based systems

The concept of *botho* is a golden thread that runs through a number of analyses by many African scholars on African philosophical and ethical issues.¹²⁹ The concept of *botho* is a community-based mind-set opposed to Western libertarianism and individualism but close to communitarianism. It is within this broad philosophical framework that the informal traditional support systems among the Basotho of Lesotho have to be understood. The Basotho have a social mind-set based on social symbiosis. This may be gleaned from such aphorisms as *motho-ke-motho-ka-batho* (literally, "a person is a person through other people"),¹³⁰ meaning that our humanity makes us all human. This aphorism signifies that people must work together to solve their social problems because that makes them fully human. A related proverb is *ntja-peli-ha-e-hlolo-ke-sebata* (literally, "two dogs cannot be defeated by a beast"). This means that if a joint effort is exerted nothing can defeat the nation. In all these cases, various levels of society are involved, from the chief to the common person, in order to build sustainable peace and social assistance and protection.

Basotho society is both patriarchal and patrilineal. The traditional support systems in Basotho society are based on kinship or family ties, and are mainly informed by the

¹²⁷ Olivier, Kaseke and Mpedi "Formulating an Integrated Social Security Response" 4-5.

¹²⁸ Olivier, Kaseke and Mpedi "Formulating an Integrated Social Security Response" 4-5.

¹²⁹ See for example Mbiti *African Religions and Philosophy*; Gyekye *African Cultural Values*; Mutombo 1997 <http://astro.temple.edu/~dialogue/Center/mutombo.htm>; Mlilo and Soédé *Doing Theology and Philosophy*; Bidima "Ethik" 157-159.

¹³⁰ The English equivalent is "unity is strength".

principle of solidarity and generalised reciprocity. The head of the family has general responsibility over all other members of the family. All members of the kinship and family have social obligations towards one another. The resources of the extended family system are mobilised to support members who are exposed to crises which they cannot address on their own. The problems experienced by an individual as a result of exposure to a contingency such as the death of a member of his or her immediate family are shouldered jointly by the extended family. Children born within the extended family are not only reared and raised for the benefit of their nuclear family parents but also for the common benefit of the extended family.

If some members of the extended family have domestic animals, such as sheep, cattle, goats, horses *et cetera*, but no children to look after them, those that have children make their children available to herd them, and will in return benefit variously from their children's labour. Those who have fields for the cultivation and growing of crops but have no cattle for ploughing enter into traditional ploughing partnerships (known as *seahlolo*) with those who have them, and they join hands for the common benefit of both parties.

5.2 *The mafisa system*

One of the most important traditional support systems used by the Basotho to ensure social protection and assistance is the *mafisa*¹³¹ system. This system is one of the oldest systems used by the founder of the Basotho nation, Moshoeshe I. He worked closely with his people to identify the needs of his community.¹³² Under this system, animals (cattle, sheep, goats, horses, *et cetera*) are loaned to a poorer family to look after them, so that they can plough, obtain milk and use them for various activities. Under the system, once cattle have been loaned to a person, such a person is permitted to earmark the first progeny of such animals for the original owner and the next for himself or herself. The borrower is permitted to do this continually for as long as the animals continue to be in his/her possession. When the

¹³¹ Gill *Short History of Lesotho* defines *mafisa* as cattle loaned by a chief or a wealthy commoner to others who may make use of the animals for milk, ploughing, etc. The cattle's offspring remain the property of the original owner.

¹³² Thompson *Survival in Two Worlds* 53-62 passim.

progeny grows up and produces more progeny, the same practice continues with respect to the progeny. In addition, the person to whom the domestic animals are loaned continues to enjoy all the benefits associated with such an animal, including eating its meat when it dies, as if he or she were the owner of the animal. However, the original animals and the progeny earmarked for the original owner can be recalled at any time the owner so wishes. The philosophy behind this custom is to ensure that the poor acquire animals for themselves to be able to survive with their families.

This system still exists among those Basotho who own domestic animals, most of whom live in the rural areas. This is a way of redistributing wealth throughout society. It appears that this system was originally used by Moshoeshe I as an instrument of nation building,¹³³ but it ultimately spread among his people as a traditional practice.

The *mafisa* system represented the redistributive justice of social security. The poor were able to benefit from the resources coming from the rich. The *mafisa* system therefore promoted vertical redistribution as it enabled the poor to meet their basic needs, and had a positive impact on poverty alleviation. Although the system seems most appropriate in traditional pastoral societies, it can still be reinvigorated today by passing a statute that would provide for its proper working and administration. The *mafisa* system could thus constitute a vertical redistribution whereby the contributions of the high-income groups could be used to support the benefits of low-income members.

Notwithstanding the importance of the above system, a number of criticisms may be levelled against it. Firstly, this is admittedly a primitive system of social security provisioning. It addresses only a few contingencies – unemployment and family benefits – and is aimed only at assisting in the alleviation of poverty. Secondly, the challenge facing the system is one of how integration and inclusiveness can be achieved. Efforts to develop an integrated and inclusive *mafisa* system should start with extending coverage of the existing system. In order to increase coverage the

¹³³ Thompson *Survival in Two Worlds* 53-62passim.

government would need to adopt policies that would make the system more inclusive, such as passing a statute in terms of which those who would like to engage in the system would be motivated, for example, by creating some additional benefits that would encourage the system to thrive even better. As a form of informal social security, the *mafisa* system has low coverage because it works on the basis of the privileged few assisting the majority poor. It is based on mutual aid arrangements; there are no linkages in the operation of the system because it is an individual contractual arrangement. The absence of linkages suggests that the government still has to find ways of making the system operate across the entire nation if it is to be a nationwide social assistance arrangement. The *mafias* system needs to be fortified further and strengthened because the Basotho are still largely pastoral.

5.3 *The ts'imoea lira (enemy field) system*

Under this system, every chief was required to set aside a portion of land that was cultivated to provide food for refugees from other chiefdoms. Every villager used to be responsible for participating in the cultivation of that field on an appointed day. These fields were intended to provide refugees with enough food for their survival and development until they became integrated into the community. Under this system, the needy of the community were provided with food by the chiefdom. The *ts'imoea lira* system was able to address human needs. As a result of modernisation, this practice is rare now.

Like the *mafias* system, the *ts'imoea lira* system is a mechanism of redistributive justice. The chiefs used the harvest from the fields to feed the poor and the underprivileged. It is a mechanism of vertical redistribution, albeit of a traditional African nature. Nowadays, Basotho no longer have as many cattle as they used to have for ploughing the enemy fields. This means that government should consider formulating a policy to boost the system, thus alleviating poverty nationwide. This is because chiefs and commoners alike need to buy fertiliser and seed. Government may have to devise a way of promoting productivity from these fields so as to combat famine and poverty in the country.

5.4 *Traditional reciprocity in times of bereavement*

Basotho society has a long tradition of people assisting one another in times of bereavement because *lefu ke ngoetsi ea malapa'ohle* (literally, "death is a daughter-in-law to all households"), which means that death is sure to visit all families at any time.¹³⁴ It is the social obligation of the extended family to provide social and moral support to a bereaved nuclear family. Some families provide, for example, a kind of burial insurance, taking into account the high costs associated with the death of a family member. And the family will provide assistance to those members who are not self-supporting, which may be in cash or in kind.¹³⁵ The community provides social and moral support in various ways, i.e. by bringing food during the period of mourning, providing labour for the burial of the deceased, being available to talk to the bereaved, and providing help in the running of the household of the deceased.

It is clear from the discussion above that this system is based on principles of social solidarity. This means that a way of strengthening the social solidarity theory underlying the system must be found. As indicated above, social solidarity in African society, for example in the Basotho nation, is based on the concept of the extended family and its mutual care, concern and support (*botho*). How can government step in to strengthen this important aspect of social security provisioning? Some ways have to be found to save the disintegrating extended family system. Fields have the effect of binding the family together as the produce from them is used to maintain the extended family members so that they remain within the family circle. However, families are disintegrating and social reciprocities are disappearing because there is no longer a way of holding families together, and families are becoming poorer as a result. Therefore, one way of saving the extended family may be by legislating against the easy alienation of landed properties such as fields.

¹³⁴ Mapetla, Matobo and Setoi *Hunger Vulnerability* 7.

¹³⁵ Maes 2003 *ISSR* 45.

5.5 Nursing of and catering for the vulnerable

The nursing of and catering for the aged, the invalid, the sickly, the unemployed and the disabled are traditionally the social responsibilities of the head of the family and the extended family. The elderly would assist the head of the household in this regard. Today, the devastating effects of HIV and AIDS impose even more burdensome responsibilities upon the elderly. Lesotho's HIV and AIDS prevalence rate is estimated at 23.2 percent.¹³⁶ The responsibility to look after HIV and AIDS sufferers today largely rests with the elderly members of the families. It is not surprising therefore that studies conducted in Lesotho have revealed that older respondents were more likely than younger respondents to be willing to take their ill and HIV-positive relatives into their own homes and care for them.¹³⁷ These forms of social assistance are dependent on the availability of resources and not on contributions.¹³⁸ They are akin to "privatised" social assistance.¹³⁹ The policy issues raised in respect of the *mafias* system, the *ts'imoea lira* system and the traditional reciprocity systems above should apply *mutatis mutandis*.

5.6 Organisation-based systems

5.6.1 Self-help associations with common funds and resources for emergencies

Mutual aid arrangements that are not based on kin but which promote the common interests of their members also exist. Most self-organised mutual support systems in Lesotho are small women's clubs. These promote savings among members, but also allow members to take out loans from the funds generated. The member organisation-based systems are based on the principle of solidarity but differ from kinship-based support systems in that they offer balanced reciprocity. These are usually stock-fare and *mechaellano* groups, which work like credit unions. At the beginning of each year, members pay membership fees. The money is then borrowed by members or outsiders at fixed interest rates (for example, 20 percent

¹³⁶ Fenwick, Kalula and Landau *Labour Law*11.

¹³⁷ Bureau of Statistics *Lesotho Reproductive Health Survey*128.

¹³⁸ As to similar forms of informal social security arrangements in other Southern African countries, see Olivier and Kaseke "Informal and Formal Social Security"5.

¹³⁹ Olivier and Kaseke "Informal and Formal Social Security"5.

interest). The money lent attracts compound interest every month if not repaid at the end of the month. At the end of the year, the money is used to purchase groceries, or is sometimes divided between members of the group. This enables members to raise money which they can use to meet their basic needs, such as health, education and food. These support systems operate like privatised social assistance mechanisms which help to evenly spread the risks precipitated by life contingences among members. As Olivier *et al*¹⁴⁰ correctly point out, these self-organised mutual support arrangements have a major advantage over formal social security systems. They are able to focus on both the immediate and future needs of members, unlike formal social security systems, which focus primarily on future needs. Sharing risks and pooling resources is an important principle in social security, but it has not been given sufficient attention in Lesotho.

5.7 *Burial clubs and societies*

Another type of member-based support system prevalent in Lesotho is the typical informal burial society or club known as *mpatesheleng* (literally, "bury me my shilling"). These are not kinship-based. They are found mainly in the rural areas, and are usually village-based. These informal community-based social security arrangements have taken the place of the necessary but absent formal social security arrangements. These arrangements are poorly organised, unfortunately, because of the members' lack of management skills. However, they play a significant role in providing social security benefits to the ordinary Mosotho in remote rural areas. They are able to focus on both the immediate and future needs of members.¹⁴¹ They enable members to meet their day-to-day needs, and are relevant in poverty alleviation.¹⁴²

Secondly, they are able to provide social protection against social risks,¹⁴³ such as deaths, which occur frequently.¹⁴⁴ Community-, village-, or chiefdom-based societies are registered with the local chief, with regular subscriptions by all members, and

¹⁴⁰ Olivier and Kaseke "Informal and Formal Social Security"6.

¹⁴¹ See Olivier and Kaseke "Informal and Formal Social Security"7.

¹⁴² Olivier and Kaseke "Informal and Formal Social Security"7.

¹⁴³ Olivier and Kaseke "Informal and Formal Social Security"7.

¹⁴⁴ The death rate has increased as a result of the prevalence of HIV and AIDS.

there are rules governing what occurs if members miss payments, and the level of support that members should expect in the event of a death. There are also work-based burial groupings that draw their members from places of work, and that are generally confined to those who are employed in the formal sector of the economy. Self-organised mutual support arrangements have characteristics which are similar to those of social insurance instruments, in that there is a strong link between contributions and benefits.¹⁴⁵

6 Social allowances and public assistance programmes

6.1 Public assistance (PA)

Public assistance (PA) is needs-based assistance which is given to destitute people after a home assessment has been conducted by a social worker. PA was introduced to contribute to and complement government poverty reduction strategies. It is meant to strengthen the resource mobilisation of social welfare and to advocate and provide social services to disadvantaged people. The overall objective of this programme is to alleviate human suffering and improve the quality of life of disadvantaged people. It aims *inter alia* to advocate for and provide social services to disadvantaged people. Its specific scope of coverage includes orphans, the severely disabled, the severely ill, the elderly (60 to 69 years of age), and the needy.

There are a number of challenges facing the PA programme. First, the amount of public assistance provided is not enough for the daily living needs of the beneficiaries. Second, it is not possible to increase PA due to budgetary constraints. Third, there is a very long waiting list of eligible persons. Fourth, there is a serious lack of social workers available to perform home assessments. Lastly, there is no statute in place for operating this scheme.

It is important to note that the following criticisms of the public assistance programme apply *mutatis mutandis* to the other forms of public assistance programmes and social allowances discussed below as well. The first point relates to the legal sources of these allowances and programmes. The *Constitution of Lesotho*

¹⁴⁵ See Olivier and Kaseke "Informal and Formal Social Security"7.

does not stipulate that the government is obliged to provide these programmes and allowances. As indicated above,¹⁴⁶the principles of state policy are not justiciable. Lesotho's constitutional provisions relating to the principles of state policy provide significant possibilities for the development of more enhanced and properly targeted social security measures in the country. However, the way in which provision is made in these principles indicates that there is no intention to grant the enjoyment of these principles. The citizens of Lesotho can at best enjoy these constitutional principles of state policy when such principles are interpreted by the courts. Broader social security has to be inferred from the principles outlined above. It is important, however, to underscore the point that the *Constitution* places little emphasis on the position of vulnerable and excluded groups and communities.

The second criticism levelled against the public assistance and allowance systems discussed below is that there is no statutory framework for their enjoyment. The third issue is the problem of the adjudication and enforcement of the programmes and allowances: there is no institutional framework – either internal or external – in place for the programmes and allowances. No case has yet been heard on this subject. The fourth point here is that there is no uniform approach to the administration of public assistance and allowances. Finally, there is no national co-ordination of these programmes. These points of criticism show that the legislature needs to intervene as a matter of urgency to remedy the situation.

6.2 Cash allowances

The Department of Social Welfare dispenses cash social allowances, which are intended to provide a safety net for all vulnerable groups. Cash allowances are funded from public coffers, and the transfer period and frequency depend on requirements. Cash allowances target the elderly, orphans, the chronically ill and the disabled. The targeting method depends on the assessment of vulnerability. The transfer is means-tested. Commendable as this programme appears to be, a number of criticisms may be levelled against it. Firstly, there is no real legal entitlement to this grant. It is true that the government makes budget allocations in respect of

¹⁴⁶ See para 2.3.2(c).

these allowances, but the difficulty is that no one can approach the courts to enforce the payment of this grant to him or her. The money is given to a fortunate few who are destitute. There are no legally established procedures governing which poor persons should receive such cash allowances. This matter is left to the Ministry of Social Welfare, which works with the chiefs through the District Administrators' Offices.

6.3 Disability allowances

The Department of Social Welfare administers a monthly disability allowance which is usually paid in cash. Coverage is national and the allowances are funded from public coffers. This programme is open to criticism because there is no statutory framework governing its operations. There are no clear records of the number of disabled in the country. Consequently, whether a person benefits from the allowances or not depends on that person's by sheer chance attracting the attention of a particular administrative authority. In addition, the funds to pay these allowances are limited.

6.4 Lesotho Fund for Community Development

This fund started operating in the year 2000. The objective of the scheme is to reduce poverty through casual employment. It is financed by government through royalties derived from the Lesotho Highlands Water Project. It has a monthly transfer period and frequency, and has national coverage. The fund targets the unemployed. This scheme may be criticised with regard to the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.5 Minimum Threshold Allowance

This scheme started in 1997. Its objective is to enhance the household income of resettled households and those who have lost all their arable land as a result of their resettlement from the Highlands Water Project area. The scheme is implemented by the Lesotho Highlands Development Authority, and is financed with the assistance of the World Bank. The scheme has an annual transfer period and frequency and its

spatial coverage extends over the Lesotho Highlands Water Project phase 1b: it covers resettled households and households that lost arable land under phase 1b.

6.6 Food programmes

At least eight food programmes exist in Lesotho, which may be summarised as follows:

6.7 Conditional transfers – food

There are two main programmes. The first conditional food transfer scheme started in 1977. Its objective is to make food transfers to both the chronically ill and the transitorily vulnerable as a safety net.¹⁴⁷ It is financed by the United Nations Council of Non-Governmental Organisations. It has a monthly transfer period and frequency, and also has national coverage. Its target group includes schoolchildren, pregnant and lactating mothers, and the chronically and transitorily food-insecure. Its targeting method is vulnerability assessments.

The second conditional food transfer scheme aims to provide supplementary feeding to needy children. It is run by the Ministry of Education and Training, and is sponsored by the World Food Programme. It has a daily transfer period and frequency during school terms. It has national coverage. It targets primary school children, and the condition of transfer is school attendance. This scheme is subject to the same criticisms as those outlined above, regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.8 Emergency relief

The scheme's main form of transfer is food,¹⁴⁸ and the scheme's objective is to provide free food to needy households.¹⁴⁹ It also has national coverage. The transfer

¹⁴⁷ It is implemented by the World Food Programme, C-SAFE (World Vision, Catholic Relief Service, CARE, etc).

¹⁴⁸ Grain, pulses and cooking oil.

¹⁴⁹ It is implemented by the Disaster Management Association, the Food Agricultural Organisation, the Food Management Unit, the World Food Programme, LVAC and non-governmental

is means-tested. This scheme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.9 Food for Work Programme

The main form of transfer of this programme is the provision of food. Its objective is to provide free food to needy households. It is aimed at promoting conservation farming and providing temporary safety nets.¹⁵⁰ It targets households with no access to labour or those without access to land. Its targeting method is community participation. The scheme is short of funds. It lacks co-ordination, a regulatory statutory framework, adjudicative and enforcement mechanisms.

6.10 Orphaned and Vulnerable Children (OVCs) support programmes

This scheme is implemented by the Office of the First Lady¹⁵¹ under the Department of Social Welfare. The objective of the programme is to protect OVCs and to ensure that they have a good quality of life and education. The main form of transfer is food. Its coverage is national and means-tested.¹⁵² The scheme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.11 Targeted Vulnerable Group Feeding

The objective of this programme is to improve access to micronutrients, rich fruit, gardening, fruit tree planting and animal husbandry. Its main form of transfer is food.¹⁵³ Its target group is food-insecure households. It has a monthly transfer

organisations (NGOs). It is sponsored by the World Food Programme and the Food Agricultural Organisation.

¹⁵⁰ It is sponsored through the donorship of the World Food Programme, and the Protracted Relief and Recovery Operation.

¹⁵¹ A title given to the Prime Minister's wife.

¹⁵² It receives donations from the World Food Programme.

¹⁵³ It is donor-sponsored by the World Food Programme and the Protracted Relief and Recovery Operation.

period and frequency. The scheme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.12 OVC Support – Secure the Child (STC)

This programme's main form of transfer is food.¹⁵⁴ Its principal objective is to promote sustainable food safety nets for OVCs and to uphold their basic right to food.¹⁵⁵ Its coverage extends over Mokhotlong (nine primary schools) and Mphahle'sHoek (twelve mixed primary and high schools). It targets districts where there are vulnerable children, and it targets schools in most food-insecure areas.¹⁵⁶ It is funded from public coffers. This scheme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.13 Food for Assets Programme

The objective of this programme is to improve or maintain nutritional status, to meet immediate food needs concurrently with longer-term agricultural rehabilitation and food security resilience, to protect productive assets, and to build productive agricultural assets in targeted vulnerable communities.¹⁵⁷ It covers four southern districts and foothills. It targets vulnerable rural households, and its targeting areas are food-insecure areas. This scheme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.14 Lesotho AIDS Programme Co-ordinating Authority

¹⁵⁴ It is donor-funded by CARE SA Lesotho.

¹⁵⁵ It is implemented by two local agricultural NGOs: RSDA in Mphahle'sHoek and GROW in Mokhotlong.

¹⁵⁶ It works in partnership with the Ministry of Education and Training.

¹⁵⁷ It is implemented by CARE SA Lesotho, Catholic Relief Services, World Vision and the Employment Bureau for Africa Development.

The main forms of transfer of this programme are testing, counselling, home care and medication. The programme started in 1991, and its principal objective is to arrest the rate of HIV and AIDS infection. It is a continuous programme with national coverage. Its target group is people living with HIV and AIDS. The programme serves as the HIV sentinel surveillance system, and concentrates on voluntary testing. The programme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.15 Disaster management

The term "disaster" denotes a progressive or sudden widespread or localised, natural or man-made event which impacts with such severity that the nation or the affected community has to respond by taking exceptional emergency measures.¹⁵⁸ The term "disaster management" denotes a continuous and dynamic multi-sectoral and multi-disciplinary process of planning and management which seeks, by the systematic study and analysis of disasters, to improve measures relating to prevention, mitigation, preparedness, emergency response and post-disaster recovery.¹⁵⁹ Lesotho is prone to a wide variety of sporadic disasters, including large-scale snowfalls, droughts, destructive rainfalls, thunderstorms, crop-destroying frosts, flash floods, poverty, and high rates of HIV and AIDS. The high levels of HIV and AIDS have not only led to an increase in mortality in all age groups, but have also led to the disorganisation of families and households, the creation of a pool of orphans and vulnerable children, and increased pressure on health resources.¹⁶⁰

¹⁵⁸ Government of Lesotho *National Disaster Management Plan* iii.

¹⁵⁹ The expression "disaster management, disaster relief and post-disaster recovery" is employed in the Lesotho National Disaster Management Plan. It implies that the first term (disaster management) is mainly a process, as defined above, which is continuously active in times of non-emergency and emergency. It also implies that the second term (disaster relief) is confined to a disaster-induced emergency. The third term (post-disaster recovery) incorporates the reconstruction and rehabilitation measures needed to ensure a full recovery from the effects of a disaster.

¹⁶⁰ Bureau of Statistics *Lesotho Reproductive Health Survey* Vol I, Analytical Report, Ch 5, para 5.0.

The country has established a number of disaster management mechanisms to combat the threat of disasters, but with limited results. Disaster reduction is dealt with as part of the country's overall socio-economic development process, and alongside other pressing issues such as poverty and HIV and AIDS.

6.16 Free health services

Lesotho operates a free nationwide health programme for HIV and AIDS and tuberculosis patients. This programme targets those attending health care facilities, and provides medication free of charge to such patients. With effect from 1 January 2008 the Lesotho government introduced a universal free health service programme. In terms of this programme, patients obtain free health services from all filter clinics and health centres. The programme is not means-tested. However, there is as yet no statute regulating this programme. This programme is subject to the same criticisms as those outlined above regarding the availability of funds, a lack of co-ordination, the lack of a regulatory statutory framework, and the lack of adjudicative and enforcement mechanisms.

6.17 Free primary education

Lesotho has operated a free primary education (FPE) programme since January 2000.¹⁶¹ The main goal of this endeavour is to provide basic education to all Basotho children¹⁶² and to eliminate disparities and inequalities in education. This programme ensures that education is accessible to all children. The objective of this programme is to promote development and to equip pupils with the basic skills and knowledge that lead to a meaningful life.

The programme covers all Basotho children attending government-owned and church-owned schools. The FPE programme in Lesotho was strategically implemented in phases so as to make it financially affordable and sustainable. At its

¹⁶¹ This is in accordance with s 28(b) of the *Constitution of Lesotho*, 1993 read with the *Education Act* 10 of 1995.

¹⁶² However, in practice, government sponsors only those primary school children who attend government-owned and church-owned schools. It does not sponsor those who attend private schools.

inception in 2000 there were 118843 pupils enrolled in Standard 1.¹⁶³ Over the following six years the number has increased considerably, so that in 2006 there were 424855 pupils enrolled in Lesotho primary schools, of whom 128257 were orphans and vulnerable children (OVCs).¹⁶⁴ The number has kept on increasing to date. In implementing FPE, government assists schools with regard to teachers' salaries, the provision of textbooks, the provision of classrooms and equipment, and the provision of meals. Consequently, the Ministry of Education and Training's budget has increased substantially over the years.¹⁶⁵

The foregoing discussion of social allowances and public assistance programmes has revealed that the allowances and programmes lack a formal statutory basis. Social security is seriously fragmented, at least from a legal perspective. The government is not statutorily compelled to take action in this area. Consequently, the courts are not able to monitor government action in the absence of clear legal objectives, standards and provisions. Furthermore, a legal obligation to allocate part of the national budget to public assistance is clearly absent, and public assistance is consequently under-funded. It is clear from the discussion that individuals and communities in need of protection are exposed to arbitrary and discretionary selection and decision-making. The discussion has revealed that there is little incentive to target vulnerable groups as a matter of public assistance priority.

7 New developments in social security provisioning

7.1 Lesotho Public Officers' Pension Scheme

As indicated above, government employees currently receive a defined benefit pension on retirement. Under the current arrangement, the individual's pension is calculated according to a formula, which depends on the years of service and the salary of the member at retirement. There are plans in place to shift from a non-contributory to a contributory public servants' pension scheme. In January 2008 an

¹⁶³ See Government of Lesotho *Education Statistical Bulletin*.

¹⁶⁴ Government of Lesotho *Education Statistical Bulletin*.

¹⁶⁵ For instance, the ministerial budget for the fiscal years 2005/2006 and 2006/2007 was M967,5 million and M1013,4 billion respectively.

actuarial valuation report on the new scheme made a number of recommendations:¹⁶⁶

- The existing scheme should consider improving the benefit rights of those members who leave the scheme prior to retirement.
- The current situation, wherein a member has to wait at least ten years to accrue a withdrawal benefit, is possibly unfair. Rectifying this would require an amendment to the current rules of the scheme and would accord with modern thinking, where pension benefits are considered as deferred wages.
- The current scheme should consider insuring some of the death-in-service benefits. For example, the spouse's death-in-service pension should be insured, because these benefits result in extreme fluctuations in the scheme's cash flow from year to year. Insuring the benefit would stabilise the costs in respect of death benefits and make it easier to budget and forecast the scheme's cash flow.
- The required employer contribution rate to fund the future benefits of the scheme under the current structure would be 11.2 percent of a member's annual salary. This is after allowing for the contribution of 5 percent of a member's annual salary to be paid by the member.
- The government should consider starting a new defined contribution fund. It could offer existing members the option of becoming members of the new defined contribution fund, while all new entrants would be members of the new defined contribution fund.
- The new scheme would need to consider developing an investment strategy to handle the assets set aside for the members of the scheme. The investment strategy would need to take into account the liability profile of the scheme.
- Another option would be to transfer the accrued benefits of all the members below the age of 40 years to the new, defined contribution fund. The liability in

¹⁶⁶ NBC *Report on the Actuarial Valuation*.

respect of younger members is much smaller; hence, the employer could fund the past service liability with a lump sum.

- There are 21681 active members below the age of 40, which means that 59 percent of the active members are below the age of 40. As a percentage of the total membership including the members above the normal retirement age, pensioners and spouses, the members below the age of 40 are 49percent of the total membership.
- The accrued liability of the members below the age of 40 is M533 million. This liability is 22percent of the past service liability for active members and 14 percent of the total past service liability, including pensioners, beneficiaries and members over the normal retirement age. This liability for members below the age of 40 can be funded over a five-year period by contributions of M114 million per annum.
- Government is advised to consider improving risk management strategies on the scheme. The current unfunded scheme is expected to result in increasing outgo, which could become a problem at a later stage. A projection of the future cash flows and outgo will be required in order to optimise the scheme's cash flow strategy in any future restructuring period.
- The implementation of a funded scheme and any increase in the contribution rate and the requirement for members to contribute should be timed to coincide with the annual salary review date in order to allow the strain of increased members' contributions to be absorbed by a salary increase.
- The report identified some problems with the data employed for its valuation exercise, and urged the administrators of the scheme to check the problems highlighted and to rectify them before the next valuation, so as to give a more accurate representation of the financial position of the scheme.
- Lastly, the report observed that the governance structure of the scheme is not adequate. It pointed out that it understood that there were efforts to draft a new *Pension Funds Act*, but that the government should nevertheless consider putting

together an independent board to manage the scheme, with tripartite representation being recommended. This ultimately materialised in 2008 and 2011 when two pieces of relevant legislation were passed.

The scheme was scheduled to commence operation on 1 April 2008. Instead it started in October 2008, when a governing statute was passed.¹⁶⁷ There are still, in 2014, a number of issues worth considering:

- It is not clear what impact the implementation of the scheme will have on employees who are about to retire at 45 years of age. The question is whether their benefits will be computed as if they had been contributing to the new scheme from the start of their employment in the public service.
- It is not clear whether or not the employees who join the public service for the first time at the age of 40 will be eligible.
- It is not clear what role government will play in the functioning of the proposed board.
- Lastly, it is not clear whether or not teachers' pensions will be affected by this new arrangement.

7.2 Social Health Insurance Scheme

- The government is working on establishing social health insurance (SHI).¹⁶⁸ The World Health Organisation (WHO) appointed a team to undertake the task of investigating the feasibility of SHI and to report on its work.¹⁶⁹ The report made a number of recommendations on key issues:

¹⁶⁷ *Public Officers' Defined Contribution Fund Act 8 of 2008.*

¹⁶⁸ The government enlisted the services of the World Health Organisation (WHO) to undertake a feasibility assessment and financial projection for the SHI. The formulation of the SHI programme was intended to cover public servants.

¹⁶⁹ *WHO Report of the Technical Support Mission.*

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- First, it recommended that the Ministry of Health and Social Welfare's budget for curative care should be maintained (in constant prices).¹⁷⁰
 - The report recommended that the existing resources of the Ministry of Health should not be replaced but complemented by those to be mobilised under SHI.
 - The formal sector coverage had to be extended rapidly, whereas informal sector coverage had to be increased in phases as quickly as was technically feasible.
 - Members of the formal sector had to pay their contributions at a uniform rate based on their salaries, which had to be linked to SHI expenditure. The poor had to be exempted from contributions.
 - Membership of SHI had to be mandatory.
 - The benefit package had to comprise all essential outpatient care at Government of Lesotho (GOL) and Christian Health Association of Lesotho (CHAL) health centres. The same had to apply to GOL and CHAL hospitals and private providers, as well as inpatient care at GOL and CHAL facilities, including the Queen Elizabeth II Tertiary Hospital. Specialised care for specific cases had to be obtained in South Africa on the basis of referral by the Queen Elizabeth II Hospital.
 - A payment mechanism was an important factor that had to be linked to improvements in quality. Thus, providers could be remunerated through a combination of capitation and flat case payments, the latter serving for high-cost services. There could be an element of better payments for increased performance.
 - The existing accreditation scheme had to be extended to all health care providers.

¹⁷⁰ This has been addressed by splitting the Ministry of Health and Social Welfare into two separate ministries.

- On the issue of governance, the report recommended that the SHI fund had to be owned and governed by semi-public bodies (parastatals) or autonomous bodies. The supervisory board had to encompass a wide range of different stakeholders representing different social groups. The management of the SHI fund had to be undertaken by a parastatal or contracted out to a private company.
- A law had to be passed to govern the SHI.

The further progress of developing and implementing a better health financing system is currently in the hands of the MOHSW. To make use of this opportunity, the SHI should be extended. As of the beginning of the year 2014 there are no visible signs of this having been done. The report recommends that development partners should be involved in future consultations and discussions on SHI to ensure their support. An awareness campaign needs to be developed, tailored to the specific information needs and group interests of the various target groups.

8 Conclusion

The foregoing discussion has revealed that the experience of Lesotho confirms the need for innovative forms of social security to address the needs of those working in non-formal sectors in both traditional informal and rural sectors and in atypical forms of employment linked to the formal sector. One aspect of this challenge is the need to extend forms of social security prevalent in the formal sector to those in informal sectors. Another aspect concerns the need to innovatively rationalise informal forms of social security provisioning so as to make them more resilient and sustainable. Bearing the above discussion in mind, the following important points are worth highlighting:

- The definition of Lesotho's social security system has to be broadened to embrace her peculiar litany of social risks.¹⁷¹

¹⁷¹ See para 2.5 above.

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- Lesotho's social security system is too fragmented and is in need of consolidation and co-ordination.
 - An initiative to co-ordinate and link both social insurance and public assistance to tackle poverty alleviation is necessary and would greatly benefit the poor.
 - The various formal social security systems in Lesotho do not cover an adequate percentage of the population and an adequate number of social risks. The definition that characterises social security as "the protection of standards which the worker has secured for himself and his family in his employment"¹⁷² is not appropriate for Lesotho as it does not include the non-working section of the population. The lack of adequate protection against the full range of contingencies implies that individuals have to make their own private arrangements and are excluded from the said definition. It disadvantages the poor as they cannot afford to make their own private arrangements.¹⁷³ A drive towards integration and inclusiveness in social protection arrangements is urgently needed.
 - An examination of the social security system of Lesotho has revealed that coverage of the population is very patchy, and this inadequate coverage subverts the principle of redistributive justice. The situation is exacerbated by the low employment rates. This means that more than 50 percent of the population remains uncovered because they are not employed. The statutory provisions relating to social security coverage exclude various categories of employees from eligibility for most social security schemes. As indicated above, the universal old age pension covers senior citizens only over the age of 70, and most unemployed elderly people who have not reached the age of 70 remain uncovered. The inadequate coverage of the public assistance programmes is largely attributable to the inadequate budgetary allocations that are a result of the country's poor economic situation.

¹⁷² Walley *Social Security* 9.

¹⁷³ Kaseke "Social Protection in SADC" 3.

- The existing labour statutory enactments on social security in Lesotho do not provide for portability arrangements for social security rights and benefits. There are no provisions allowing social security beneficiaries to carry benefits from one pension system to another. This may be a result of the fact that labour law has been unable to keep pace with changes in employment relationships, which have led to the flexibilisation, casualisation and informalisation of work.¹⁷⁴ For example, one has to work for a long time in the public service to be eligible for a pension. This not only interferes with the incidence of flexibilisation, casualisation and informalisation of work, but also inhibits labour mobility for fear *inter alia* of the loss of terminal and other social security benefits.
- The existing social security arrangements in Lesotho show instances of gender discrimination. For example, the old age pension (corporate bodies) benefit is payable to male employees who have reached the retirement age of 65 and female employees who have reached the retirement age of 60. A female employee who has reached the age of 45 is not covered by the *Pensions Scheme (Corporate Bodies) Act*. A male employee who has reached the age of 50 is also not covered by the Act. The Act provides for a widow's pension, but not for a widower's pension. Further, the Labour Code Order provides for maternity benefits but not for paternity benefits. These gender disparities undermine endeavours aimed at achieving an integrated, inclusive and comprehensive social security system.
- The discussion further revealed the existence of both public and private initiatives in social security provisioning. Both of these initiatives are uncoordinated and are not uniformly regulated. Since persons involved in public pension arrangements are not prohibited from making private arrangements as well, it is arguable that a mix of these two would enhance social security for those who can afford it. This may promote the integration and inclusiveness of the country's scattered social security schemes.

¹⁷⁴ Benjamin "Beyond the Boundaries"181-204. See Fenwick, Kalula and Landau *Labour Law*2.

- The new initiatives – the public officers' pension scheme and the social health insurance scheme – perpetuate the undesirable fragmentation, lack of co-ordination and lack of regulation of social security schemes in the country. The social security system of Lesotho therefore needs to be reorganised. A legal framework is necessary to harmonise, consolidate and uniformly regulate the system, and the extent to which Lesotho has tried to develop this framework needs to be examined.

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LIST OF ABBREVIATIONS

AJLS	African Journal of Legal Studies
CHAL	Christian Health Association of Lesotho
FPE	Free primary education
GOL	Government of Lesotho
ILO	International Labour Organisation
ISSR	International Social Security Review
OVCs	Orphaned and vulnerable children
PA	Public assistance
PS	Principal Secretary
RHVP	Regional Hunger and Vulnerability Programme
STC	Secure the Child
SHI	Social health insurance
WHO	World Health Organisation

A PANORAMIC VIEW OF THE SOCIAL SECURITY AND SOCIAL PROTECTION PROVISIONING IN LESOTHO

KE MOSITO*

SUMMARY

Social security is one of the most important areas of social policy. As part of its social policy, the government of Lesotho has promulgated various pieces of legislation and introduced an assortment of public assistance programmes for the benefit of the people of the country. There are also various informal social security measures which are the result of coordinated activities by individuals and groupings in Lesotho. These initiatives together provide a broad spectrum of social security provisioning for the people of Lesotho. This article sets out to discuss the said social security provisioning measures and appraises the efficacy of their interventions.

Lesotho is a constitutional state. The *Constitution of Lesotho* came into force on 2 April 1993. It provides for a Bill of Rights as well as principles of state policy. There is, however, no express provision in the *Constitution* for a right to social security. This is regrettable. Thus, the intersection between constitutional law and social security within the context of Lesotho can be achieved only through the interpretation of the fundamental rights as well as the principles of state policy provided in the *Constitution*. While the provisions relating to fundamental rights help to establish entitlements to social security, the principles of state policy play an important role in giving direction to service delivery.

Understanding the link between the various governmental and social initiatives is crucial if interventions are to be designed which will enhance the provision of social security for the benefit of the people of Lesotho.

KEYWORDS: Social security provisioning; 1993 *Lesotho Constitution*; the Bill of Rights; principles of state policy; social legislation; informal social security.

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