



**FINANCIAL SECURITY OF CHILD- AND YOUTH-HEADED HOUSEHOLDS IN  
SOUTH AFRICA**

**BY**

**NKULULEKO PRAISEGOD NDLOVU**

**216074856**

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**SUPERVISOR: MS WILLENE HOLNESS**

### Declaration


I, NKULULEKO PRAISEGOD NDLOVU (VELI), hereby declare that this dissertation is my original work. Other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: ...  .....

Date: ... 28 October 2021 .....

Supervisor:

Ms Willene Holness: University of KwaZulu-Natal

Signed: ...  .....

Date: ... 28/10/2021 .....

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## **Abbreviations and Acronyms**

<b>ACERWC</b>	African Committee of Experts on the Rights and Welfare of the Child
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>AIDS</b>	Acquired Immune Deficiency
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CINDI</b>	Children in Distress
<b>COVID-19</b>	Coronavirus
<b>CRC</b>	Convention on the Rights of the Child
<b>CSG</b>	Child Support Grant
<b>DoBE</b>	Department of Basic Education
<b>EE</b>	Equal Education
<b>EELC</b>	Equal Education Law Centre
<b>FCG</b>	Foster Care Grant
<b>FET</b>	Further Education and Training
<b>HIV</b>	Human Immunodeficiency Virus
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights

<b>ILO</b>	International Labour Organisation
<b>ITSAA</b>	Independent Tribunal for Social Assistance Appeals
<b>KZN DoE</b>	KwaZulu-Natal Department of Education
<b>KZN DoT</b>	KwaZulu-Natal Department of Transport
<b>MEC</b>	Member of the Executive Committee
<b>NSNP</b>	National School Nutrition Programme
<b>OP-ICESCR</b>	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
<b>PSNP</b>	Primary School Nutrition Programme
<b>SADC</b>	Southern African Development Community
<b>SAHRC</b>	South African Human Rights Commission
<b>SASSA</b>	South African Social Security Agency
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCRC</b>	United Nations Convention on the Rights of the Child

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## **Abstract**

There is a growing number of child and youth-headed households in South Africa. Illnesses such as Tuberculosis, Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) are main factors that cause mortality and morbidity of parents. The indigenous South African family system that used to absorb orphans and care for them is no longer coping because many extended families are without parents. South Africa was the first country to give legal recognition to child-headed households. Thus, these households are recognised as a form of alternative care. However, children living in these households strive for survival in the midst of their limited means to generate income. Social grants are the main source of their income. Nevertheless, children living in these households are exposed to poverty. This brings about a question of the financial security of these households in South Africa. This study analysed the domestic, regional and international law applicable to the protection of the financial security of these children from the perspective of a human rights-based approach. It found that the definition of child-headed households exclude youth who also head these households, prejudicing their rights. Children in child and youth-headed households receive insufficient state support towards their financial security.

**Keywords:** Child and youth-headed households/child-headed-households, financial security, social security, social assistance, poverty, international law, regional law, domestic law, policies; programmes

## **Chapter One: Introduction**

### **1.1 Introduction**

This study seeks to understand the financial security of child and youth-headed households in South Africa. Financial security refers to “having enough income to provide for oneself...” (Söderholm, Söderberg & Nordin, 2011:688). Ahmad, Sabri, Abd Rahim and Osman (2017:26) maintain that “financial security is often linked to level of savings...and the availability of income”. In this context the study refers to financial security as the availability of enough income to provide for oneself and dependants. In attempt to understand this phenomenon, this research study is a socio-legal study that explores:

first, literature that illustrate the gaps in the measures that the South African government employ to ensure that children living in child and youth-headed households access social assistance;

second, international and regional law obligations on the South African state in relation to the financial security of child-headed households;

third, South African legislative and policy framework in relation to the social security and any other financial measures provided by the state to meet child and youth-headed households' financial needs;

fourth, gaps between the legislative, policy and other measures for the economic care of children in child and youth-headed households in relation to international and regional law obligations on the South African state and

fifth, conclude and make recommendations in relation to this study.

## **1.2 Background**

### **1.2.1 *The origin of child and youth-headed households***

Nowadays, numerous factors contribute to the mortality of parents exposing children to life challenges without enough care from their parents. The Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) pandemic has been identified as the leading factor contributing to such mortality in South Africa, secondary is Tuberculosis. Naidoo (2016: 2) maintains that tuberculosis infection “contributes extensively to morbidity and remains a leading infectious cause of death among patients with HIV”. Therefore, despite massive gains in access to treatment, the concomitant epidemics of HIV/Aids and tuberculosis remain terminal in South Africa. Consequently, children on their own are confronted by responsibilities that should be carried out by their parents (Ibebuike, Van Belkum & Maja, 2014).

Hall and Mokomane (2018) assert that factors such as migration of parents to urban areas for job opportunities usually results in households being headed by children or youth. In such instances, these child-headed households are of temporary arrangements because parents/caregivers occasionally leave urban areas to spend some time with children in these households. Consequently, children living in these child-headed households are not characterised as being ‘parentless’. Mturi (2012) maintains that deaths and/or severe illnesses of parents exacerbate the incidence of child-headed households in South Africa because these factors leave children without parental support.

Shava, Gunhidzirai and Shava (2016) add that abandonment by parents or caregivers is another factor leading to child-headed households in South Africa. When children are confronted by a state of being 'parentless' due to the deaths of parents; terminal illnesses and or abandonment, the provisions of section 28(1)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which seeks to provide social assistance to vulnerable children serves as a legislative response to such phenomenon. Ngconjana, Kwizera and Umejebsi (2017) also outline factors contributing to child-headed households making it indisputable that these households have existed for years and are increasing in prevalence. These authors maintain that extended families used to absorb orphans as an indigenous South African family system that was avoiding children to head households. However, in modern days this system is overwhelmed by an increasing number of orphans, single parenting and high rate of divorce making it difficult for this system to curb child and youth-headed households.

An indigenous measure of caring for orphans where children without parents were taken in by extended families and nurtured under their care, known as kinship care, has been impaired by the mortality of parents and adults in families. This has led to children occupying households on their own. The absence of parental figures in these households obliges older children to assume parental responsibilities over the younger siblings. The assumption of parental duties by older children does not afford them early adult attainment. Consequently, the children who head households remain children but with extra responsibility for the day-to-day upkeep of these households without having adult support or financial means to sustain life (Ngconjana et al. 2017).

The Constitution maintains that a person under the age of 18 is a child (section 28(3)). Treaties such as the Convention on the Rights of the Child (UNCRC) which was promulgated 1990 and the African Charter on the Rights and Welfare of the Child (ACRWC) which was promulgated in 1999, provide children with special protection and priority care as a vulnerable group of people existing in a developmental phase of their lives (Rosa & Dutschke, 2006). The South African legislature has given credence to the existence of child-headed households and has regulated this form of alternative care in terms of section 137 of the Children's Act 38 of 2007.

Phillips (2011:165) explains that the South African legal system recognises "child-headed households as a form of alternative care". Child-headed households are also viewed as a solution to the lack of available vacancies in residential care, adoption and fostering. Therefore, her argument is that the legal recognition of child-headed households constitutes an infringement to children's right to alternative care is relatively irrelevant in the South African context. Kruger (2014:126) maintains that "South Africa was the first country in Africa to legally recognise child-headed households as a protective measure".

Fritz, Van der Westhuizen and Mokgatlhe-Nthabu (2011) argue that, in the South African context, morbidity and mortality does not only contribute to houses being headed by 'children' but also by 'youth'. These researchers maintain that youth also attend school whilst being confronted with the responsibility of caring for sickly adults and rearing their siblings. Therefore, due to the increasing number of morbidity and mortality of adults, the needs and responsibilities of youth are equal to those of children. In attestation of this, section 176 of the Children's Act makes provisions for extension of court orders for people

beyond the age of 18 years old to remain in alternative care provided they have not reached the age of 21. Here the Children's Act stretches its provisions to accommodate youth with needs equal to those of children. The legislative framework defines a 'child' as a person under the age of eighteen (18) (section 1 of the Children's Act). If read in isolation, this definition may limit the scope of studies conducted in relation to households headed by people other than adults. Thus, in this study, this definition is read together with the provisions made by section 176 of this Act in order to eliminate elements that may exclude youth mentioned in the preceding paragraph. Therefore, the term child and youth-headed households broadens the scope of this study, allowing inclusion of youth that are with similar needs and responsibilities as those of children heading and or living in child-headed households.

Children from child and youth-headed households, like other children in South Africa, retain their constitutional rights as stipulated in section 28 of the Constitution. The Constitution, in (section 28(1)(b)) awards the right to basic nutrition, shelter, health care services and social services. The question of how to ensure these rights flowing from the needs that these children have, remains unclear where children are living on their own. Section 28(1)(c) of the Constitution further makes provision for social assistance if parents or guardians are unable to provide for children. However, the Constitution itself is silent on how the provision of social services accrues to children in a household with no active adult-parent or guardian. This may leave the question of the financial security for the child and youth-headed households unattended.

Katherine Hall of the Children's Institute quoted by Underhill (2015: para 31) identifies the challenges with the definition of child-headed households:

"The definition of child-headed households contained in section 137 of the Children's Act includes a household in which a child over the age of 16 has assumed the role of caregiver, even if there is an adult living in the household who, for instance, is very old or terminally ill and is unable to take responsibility for 'heading' the household, whatever that means. The whole notion of headship is messy and controversial...The definition of such child-headed households is dependent on their identification by welfare services and a discretionary decision by the provincial head of social development that it is in the best interest of the children in the household for it to be defined as a child-headed household. This construction of 'child-headed household' is therefore conferred administratively; it is not a household form that can be quantified through national survey data and should not be conflated with the statistical estimates".

Access to financial assistance in the form of social grants is therefore subject to the discretion of these officials.

### ***1.2.2. Social and financial security of child-headed households***

The legal recognition of child-headed households relies on concomitant social security assistance in the form of social grants (section 137(5)(a) of the Children's Act and the Social Assistance Act 13 of 2004). Statistics South Africa (2013:12) reports that the main source of income for child-headed households are remittances from family members (68.4%), with social grants accounting for only 21.5% of child-headed households.

A positive development is the rollout of the Child and Youth-Headed Household Register by the Department of Social Development aimed at formalising assistance for child-headed households (Polity, 2016). However, the absence of a White Paper in this regard leaves a policy gap for the monitoring and evaluation of actual assistance offered to this vulnerable group of young people. Therefore, the financial situation of child and youth-headed households remains in question as to whether or not the South African government's legal and policy framework adequately addresses the financial security of child and youth-headed households, in line with its international and regional law obligations related to protecting the rights of children in a household (older caring siblings as well as the younger cared for siblings).

This unique family structure is declared a social phenomenon due to the challenges encountered by children living in it. When faced with being 'parentless', children normally prefer remaining in their homes and preserving their unit rather than being placed in different institutions when they are orphaned (Phillips, 2011). In attempt to meet socio-economic needs such as safety, health, hygiene, clothing, nutrition and education; these 'parentless' children lack legitimate ways of generating income resulting in them being exposed to sexual exploitation, and pick pocketing and gangsterism (Mogotlane, Chauke, Van Rensburg, Human and Kganakga, 2010).

Nxumalo (2015) maintains that young girls from child-headed households are vulnerable to unsafe sex. This author links girls' school dropouts with their pregnancies. After dropping out, they are confronted with caring for their own children amidst poverty. Nxumalo (2015) further correlates absenteeism with children from child-headed households. Children from child-headed households also experience hardships when



teachers harass them for school fees whilst they are known to be 'parentless' and come from households headed by people with limited income (Marongwe, Sonn & Mashologu, 2016). Nevertheless, Mkhathshwa (2017) asserts that teachers are more lenient with girls' dependency whilst intolerant of boys' lack of independence. Girls from child-headed households get better support from teachers whilst the same teachers expect boys from these households to be more independent resulting in these boys' failure to cope with their schoolwork (Mkhathshwa, 2017).

Government makes provision for social assistance if children are unable to provide for themselves with socio-economic rights stipulated in section 28(1)(b) of the Constitution. The South African Social Security Agency (SASSA) is an institution entrusted by the government to ensure efficient & effective management, administration and payment of social assistance in the form of social grants; to vulnerable inhabitants of the republic as categorised by the Department of Social Development. Three social grants, namely; the Child Support Grant, Care Dependency Grant and the Foster Care Grant are meant for vulnerable children in South Africa subject to eligibility as per SASSA requirements (Neves, Samson, van Niekerk, Hlatshwayo and Du Toit, 2009).

The grants mentioned above are provided by the government to protect children from poverty (Mpedi, 2012). However, children living in child-headed households have reported experiencing challenges in accessing social grants. Children's inability to access birth documents due to the deaths of parents and the Department of Social Services' delays in processing children's grants are factors that hinder them from accessing these grants, resulting in poverty (Mturi, 2012). Indeed, Nicholson (2007:411) maintains that "...limited resources and the bureaucracy surrounding access to social grants have

rendered current measures inadequate at meeting the needs of this marginalised and exceptionally vulnerable group”. Consequently, children living in child-headed households are either forced to seek employment or engage in illegal ways of generating an income. As legitimate as seeking employment may look, children’s exploitation in the labour market calls for labour law interventions as child labour is by no means legal nor is it sufficiently regulated (Budeli, 2012). The pressure to provide necessities without legitimate ways to generate an income is a reason they resort to criminal behaviour, including prostitution and other forms of sexual exploitation (Nicholson, 2007). Therefore, the literature makes it clear that the rights of children living in child-headed households are continuously violated (Phillips, 2011).

Mturi (2012) applauds the government for taking the right direction in acknowledging the existence of child-headed households as children in these households are extremely vulnerable. Government has formulated guidelines to follow when dealing with statutory service for child-headed households (SA Department of Social Development *National Guidelines for Statutory Services to Child-Headed Households*, 2010:7). This is the government’s initiative aimed at protecting the rights of children living in child-headed households and overcoming the challenges of accessing children’s grants. However, these guidelines do not provide specific/ separate information about initiatives geared to address the complications that exist for these exceptionally vulnerable and marginalised children with no legitimate ways of generating an income.

These guidelines omit measures that address the financial position of children heading child-headed households. With regards to social assistance, this document lists social grants that underprivileged children can apply for, not that it reflects social grant(s)

that every child living in child-headed households is guaranteed to receive solely because they are living in a child-headed households. Instead, these guidelines make a general restriction of 'eligibility' which reflects that the grants listed in it are for underprivileged children in general.

Literature provides information that South Africa recognises child-headed households as a protective measure. However, children in child-headed households are still exposed to poverty and different forms of exploitation. Furthermore, researchers maintain that poverty impairs reasonable cohesion in child-headed households resulting in them being dysfunctional (Mogotlane et al. 2010).

Mogotlane et al. (2010) asserts that youth-headed and child-headed households are economically challenged. Some households migrate from child-headed households to youth-headed households with the same challenges/burdens remaining. Researchers state that 'a process of being orphans' is more traumatic than being 'orphans' based on the fact that children/youth are to care for their sickly parents with limited resources as a result of their parents' inability to generate income due to their illness(es)'. This is another factor that causes of the psychological breakdown of people living in child and youth-headed households (Moffett, 2007).

Blaauw, Viljoen and Schenck (2011:139) assert that the lack of financial assistance and protection of children's rights "increases the children's socio-economic vulnerability and exposes them to exploitation in the form of child abuse, child labour and even human trafficking." Literature provides sufficient information indicating that the violation of the children's rights living in child and youth-headed households results from

their inability to legitimately earn an income, thus existing in severe economic deprivation. Yet, there is no specific social grant that specifically addresses the financial constraints of children and youth living in these households.

### ***1.2.3. International law and regional law***

Both international and regional law obligates state parties to provide special protection for children aimed at ensuring their development in a conducive environment (Kruger, 2014). The Convention on the Rights of the Child (United Nations 1989: article 20) sets out obligations for state parties to ensure alternative care for children who are deprived of their family environment. When article 25(1) is read together with article 25(2)(a) of this treaty, the obligation to provide special protection and assistance for 'parentless' children is placed on the state parties. The African Charter on the Rights and Welfare of the Child (African Union 1990: article 25(2)(a)) also calls for alternative placement for 'parentless' children. The African Charter on the Rights and Welfare of the Child (African Union 1990: article 3) ensures full enjoyment of African children's rights and freedoms recognised and guaranteed by this charter. Article 1 of this charter obliges ACRWC signatories to adhere to all stipulations of this treaty.

The CRC Committee, in its first concluding observation of South Africa issued in 2000, noted the existence and the increase of child-headed households. The financial impact on children living in these households was also noted. Consequently, the Committee further intensified the state party's obligation to ensure social security for children living in child-headed households by recommending that South Africa study and evaluate the impact this alternative care has on children (United Nations, 2000: par 22).

The Committee, in its second concluding observation of South Africa issued in 2016, welcomed the country's initiatives on expanding social security for children. However, barriers hindering children's access to social security benefits, the country's inadequate arrangements for children rearing their siblings and the amount of the child support grant remained a matter of concern. The Committee further recommended that the country revise the Social Assistance Act for the benefit of families caring for orphans, remove barriers hindering children from accessing social security benefits and review the amount of child support grant aligning it with the needs of children living in poverty (United Nations, 2016: par 42 & 56). Nevertheless, child-headed households are mentioned in this concluding observation reflecting that the country omitted to report on its progress related to these households.

Beside provisions of binding international and regional treaties, in relation with social security for disadvantaged children including children from child and youth-headed households, this study further considers provisions of non-binding international and regional instruments such as the International Covenant on Economic, Social and Cultural Rights 1996; the Universal Declaration of Human Rights 1948; the ILO Convention No 102 Social Security (Minimum Standards) Convention 1952; the ILO Recommendation No 202 on National Floors of Social Protection 2012 and the Code on Social Security in the SADC 2007.

#### ***1.2.4. Domestic law and policy***

Regarding child-headed households or child and youth-headed households, this study discusses social security narrowing it to social assistance as provided for in the Constitution, the Children's Act 38 of 2005, the Social Assistance Act of 2004 and the

South African Social Security Agency Act 9 of 2004. The School-Fees Exemption policy will be discussed as stipulated in the South African Schools Act 84 of 1996. The No-Fees Schools' Policy, School Transport Policy, National Policy on Food and Nutrition Security Policy and Child Support Grant Policy will also be discussed in relation with disadvantaged children, mainly children from child-headed households or child and youth headed households.

### ***1.3 Research problem and objectives***

Children in child-headed households are still experiencing challenges in accessing social grants due to factors such as unavailability of birth documents and delays by the Department of Social Development in processing these grants. Consequently, literature shows that these children are exposed to poverty with no alternative means to generate income whilst enduring these challenges (Mturi, 2012).

Literature reflects that challenges experienced by children living in child-headed households emanates from the lack of finances in these households and this increases the vulnerability of these children (Blaauw et al. 2011). Government is obligated to protect children's rights and ensure social assistance to curb poverty amongst needy children including those living in child-headed households. Yet, the government's contribution towards income for children living in child-headed households was confirmed to be only 21.5% (Statistics South Africa, 2013). This study seeks to scrutinise the South African government's realisation of child and youth-headed household's financial security.

Research objectives are "the steps one has to take, one by one, realistically at grass-roots level, within a certain time-span, in order to attain the dream" (De Vos,

Strydom, Fouche & Delport, 2002: 108). The term 'objective' refers to "something which you plan to do" (Cambridge Advanced Learner's Dictionary, 2008: s.v. "objective"). The researcher's objectives in this study are as follows:

- a. To identify the South African legislative and policy framework in relation to the financial needs of child and youth-headed households.
- b. To explore the efficacy of this legislation and policy in addressing the daily needs of child and youth-headed households.
- c. To determine a possible approach the government can implement to eradicate poverty and adequately meet the financial needs of child and youth-headed households.

#### ***1.4 Research questions***

Maree (2007: 60) asserts that both "(g)eneral and specific research questions bring down things to the next level of specificity, further narrowing the focus of the proposed research". General research questions are non-concrete, broader and are not directly answerable because of their broad nature. However, the rationale for utilising general research questions is to guide the researcher's thinking and keep the research project organised. The general research question in this research study is the following: Does the South African government's legal and policy framework adequately cover the basic financial needs of child and youth-headed households?

Unlike general research questions, specific research questions are directly answerable due to their explicit nature which makes it possible to identify data that is

necessary to answer them. Specific research questions complement general research questions and normally come after general research questions. As specific as specific research questions are, they are not as narrow as data collection questions which are normally used in empirical research projects to collect data at the most specific level (Maree, 2007).

The specific research questions in this research study are as follows:

1. What are the international and regional law obligations of the South African State to give effect to the financial security of child and youth-headed households?
2. Are the legislative provisions and social security measures meeting South Africa's international law obligations aimed at the economic care of children in child and youth-headed households?
3. What measures can the South African government employ to ensure that children living in child and youth-headed households, access enough social assistance to reduce household poverty?

### ***1.5 Research design***

Hesse-Biber and Leavy (2011:4) assert that "Qualitative research is an exciting interdisciplinary landscape comprising diverse perspectives and practices of generating knowledge". Research design in a qualitative context is "the entire process of research from conceptualising a problem, to writing the narrative, while the tradition of enquiry is the term used to refer to an approach to qualitative research that has a distinguished history in one of the disciplines and that has spawned... distinct methodologies that characterise its approach" (De Vos, Strydom, Fouché & Delport, 2005:268). Neuman



(1997) maintains that an explorative mode of inquiry is used to explore a new topic or learn more about issues which little is known about.

Since little is written about the influence of the legislative framework on financial security for child and youth-headed households and the South African government's realisation of the financial need for child and youth-headed households, the researcher employs a qualitative research design and selects an explorative mode to follow up on the latest developments, explore, gain new insights and formulate ideas to generate more knowledge about this issue. The research design is socio-legal in nature, seeking to combine the understanding of social scientists and lawyers of this phenomenon. Therefore, this study scrutinises the legislative framework of financial security for child and youth-headed households to locate law in context. In this study the researcher first, identifies the South African legislative and policy framework in relation with child and youth-headed households' financial needs; second, explores the efficacy of this legislation and policy in addressing child and youth-headed household daily needs and third, determines a possible approach the government can implement to ensure eradication of poverty and the adequate meeting of the financial needs in child and youth-headed households.

### ***1.6 Research methodology***

This study employs non-empirical desktop research. This print-based research study is aimed at exploring provisions made by primary and secondary sources in relation to financial security for children, particularly those living in child and youth-headed households. The review includes searches of electronic academic database for literature found on journal articles and book chapters published after 1996 (when the final

Constitution of the country was introduced and it is the same year in which South Africa ratified the UNCRC (SA Department of Women, Children and People with Disabilities 1998-2013) and online platforms such as Google Scholar, LexisNexis, Sabinet, Taylor Francis, Ebscohost and Juta. Search terms utilised included social grants, child-headed households, youth-headed households, the Children's Act, Social Assistance Act, financial security, social security, social assistance and other relevant policies, legislation and international law. An exploration of the legislative and policy provisions and an in-depth analysis will be conducted to determine the stance of the South African government in recognition of financial need for child and youth-headed households.

When data collected from these sources answers the research questions to a stage that what is concealed and/or left out in these sources is clearly communicated, it will be concluded that saturation of data is reached. Subsequently, conclusions and recommendations will be made based on the data gathered from primary and secondary sources.

## ***1.7. Theoretical framework***

### ***1.7.1 Introduction***

The Children's Act 38 of 2007 recognises and regulates child-headed households as a form of alternative care. Nevertheless, the literature maintains that children living in these households are exposed to poverty due to the fact that children heading these households are with limited means to generate income. This brings about the question of the financial security of these households. In this research study, the researcher employs the right-based approach to reflect entitlements of children living in child and youth-

headed households and the duty of the state to ensure such entitlements to these children.

### ***1.7.2 Right-based approach***

Nyamu-Musembi and Cornwall (2004:13) defines right-based approach as “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights”. These authors maintain that the right-based approach provides citizens with a platform to make claims from the state and hold the state accountable for realisation of their rights in compliance with the international law obligations. On this premise, Uvin (2007) maintains that the right-based approach entails a legal and ethical authority to the international redistribution of resources. This author distinguishes the right-based approach from the need-based approach on the basis that need-based approach is associated with charity that can be rendered by anyone in the society whilst the right-based approach is associated with matters of state policy and accountability.

Therefore, the legal aspect of the right-based approach enables a critical discuss international and regional law obligations of the state to ensure financial security of child and youth-headed households. Whilst, the ethical aspects enables the study to determine the country’s adherence to stipulations of binding treaties.

## **1.8. Chapter outline**

### **Chapter One: Introduction**

Chapter One sets out the research topic, background & outline of the research problem, the research problem & objectives, the design, methodology and the dissertation outline.

### **Chapter Two: Literature review**

Chapter Two is the analysis of literature that illustrates the gaps in the measures that the South African government employs to ensure that children living in child and youth-headed households, access social assistance.

### **Chapter Three: The international and regional law obligations**

Chapter Three is a description of the international and regional law obligations of the South African state in relation to the financial security of child-headed households.

### **Chapter Four: The South African legislative and policy framework**

Chapter Four sets out the South African legislative and policy framework in relation to social security and any other financial measures provided by the state to meet child-headed households' financial needs. It seeks to also determine the extent to which the legislative and policy provisions address the financial needs of child-headed households and identify possible gaps.

## **Chapter Five: The implementation gap between the legislation, policies and relevant programmes**

Chapter Five considers the implementation gap between the legislative, policy and other measures for the economic care of children in child-headed households in relation to international and regional law obligations on the South African state.

## **Chapter Six: The recommendations and conclusion**

Chapter Six concludes the findings of this research study and further outlines on relevant recommendations.

## **Chapter Two: Literature review**

### **2.1 Introduction**

Child and youth-headed households are characterised by the absence of adult(s) or limited support from adults mainly due to illnesses, often terminal illness. The children living in these households are extremely vulnerable and their rights in these households are usually compromised (Human & van Rensburg, 2011). Although older children and/or youth assume adult responsibilities in these households, their inability to generate income further compromises their financial security as they are required to provide basic needs on a daily basis. This is one of the challenges that prompted policy responses and government interventions for child and youth-headed households (van Dijk & van Driel, 2009).

Although, there is less literature on other Southern African Develop Community (SADC) countries' initiatives on financial security of child and youth-headed households, the literature on South Africa's response to this phenomenon is going to be discussed. The Social Assistance Act 13 of 2004 is a legislative response to social security in compliance with section 27 of the Constitution. Provisions made by this legislative framework are aimed at alleviating poverty to the disadvantaged inhabitants of the Republic including children. Despite social assistance intended for vulnerable groups, children living in child and youth-headed households have challenges in accessing social grants intended for their financial security (Mturi, 2012).

Van Dijk (2008: 102) maintains that, in practice, policies designed to alleviate poverty to vulnerable children are "severely constrained and difficult to access". Apart from children's inability to produce the documentation required for social grants'

administration, means tests attached to government programmes are found to not accommodate every vulnerable child. As much as a child support grant is aimed at enabling vulnerable families with access to what is referred to as a minimum level of income, it is indicated that the amount of a child support grant per individual is too little and is not directly proportional to inflation (Van Dijk, 2008).

The literature clearly indicates that, in comparison with child support grants, the process of applying for a foster care grant takes longer and it requires social workers' interventions before it is approved in court. This is likely to create a conflict of interest and impact on the choices available to child and youth-headed households considering their vulnerability and their inability to generate an income. Therefore, there is a likelihood of children from child and youth-headed households ignoring the 'youth figure' (which qualifies them for a foster care grant) due to the difficulties and delays in accessing the foster care grant and rather opting for a child support grant, although it is characterised by a smaller amount than a foster care grant (Van Dijk, 2008).

The absence of a youth figure in child-headed households also confines these households to child support grants. In child-headed household(s), even if a child heading a house needs to raise the household income by applying for a foster care grant, it will not be granted to him/her merely because the oldest child is under the age of 18 (Van Dijk, 2008). However, a child and youth-headed household is an exception because of the presence of the 'youth figure' as opposed to child-headed households.

This complexity brings about a question of a single or a universally accepted definition of a household headed by a child or youth (youth is between 19 and 21 years

old), the legislative framework on the age factor pertaining to the head of a child-headed household, the stance of an adult supervisor of the child-headed household as designated by relevant authorities and social assistance for child-headed households.

## ***2.2 The lack of a universally accepted definition***

There is a consensus in the literature that the greatest challenge for the government to address issues related to child and youth-headed households is that the universally accepted definition of either child-headed household or child and youth-headed household is extinct (van Brenda, 2008). A survey conducted in Gauteng in 2008 reveals that the absence of a single or universally accepted definition of child-headed/child and youth-headed households hinders government and local government from retaining accurate data pertaining to households headed by people other than adults. This study further maintains that researchers adopt their own definitions designed to accommodate the scope of their studies pertaining to child-headed/child and youth-headed households. However, all these definitions are guided by the definition of a child provided by the legislation. Nevertheless, the term 'child-headed households' excludes underprivileged youth that is protected by section 176 of the Children's Act because a child is defined as a person under the age of 18 whilst the Children's Act protects children and youth under the age of 21 as per section 176. Therefore, without explicit legal recognition of 'youth' measures such as those to protect financial security of child and youth-headed households cannot be mandated by law.

The above brings about a need for a single/ universally accepted definition of child and youth-headed households rather than striving for a definition of child-headed



households. This recommendation is based on the idea that the definition of child-headed households will exclude the youth that is protected by the Children's Act.

### ***2.3 The legislative framework on the age pertaining to the head of the child-headed households***

Section 137(1)(c) of the Children's Act 38 of 2005 states that "a provincial head of social development may recognise a household as a child-headed household if a child over the age of 16 has assumed the role of a caregiver in respect of the younger children in the household". The maturity of the child is by no means mentioned as a reasonable factor that should be considered by the provincial head of Social Development in recognising the household as a child-headed household. This means that households where a 15 year-old-child(ren) or younger have assumed an adult responsibility due to circumstances mentioned in section 137, are not officially considered to be child-headed households. In short, no matter how stable the household cohesion had been, no matter how much effort a 15 year-old child or younger had executed to maintain the household on his/her own, the household can never be recognised formally as a child-headed household when its existence is reported to the department of social development. Whereas a 12-year-old child's mental capacity, maturity and with the assistance of a parent, guardian or other designated person are factors considered by medical practitioners when seeking a child's consent to medical assistance (Strode, Slack & Essack, 2010).

Strode et al. (2010) outlines the ages of consent of children for different medical aspects pertaining to their own health. Their study reflects that children can give consent to medical treatment from the age of 14 years; contraceptives and contraceptive advice

from the age of 12; consent to a termination of pregnancy at any age and; to HIV testing from the age of 12 years in consideration of the child's best interests. According to these scholars, the elements attached to the ages of eligibility are the particular child's best interest, sufficient maturity and a reasonable mental capacity. Here, mental capacity is described as an ability to understand the benefits, risks, social & other implications thereof. According to the authors, the right of a 12 year-old-child to consent to surgical operations independently is under consideration.

In contrast with the above, when it comes to the recognition of child-headed households, a child's maturity and a reasonable mental capacity are elements that are not considered. The legislative framework confines eligibility to ages 16 and 17. Couzens and Zaal (2009:310) argue that in the case of child-headed households, maturity of a child should be a priority "rather than arbitrarily fixed age limit". Their argument is in line with the findings of the Gauteng study mentioned earlier which maintains that children are confronted by being orphans way below the age of 16 whilst being eager to preserve their precious belongings including remaining in their houses (van Brenda, 2008). Therefore, the age of 16 as stipulated in section 137 of the Children's Act 38 of 2005 excludes the vast number of households that should be recognised as child-headed households and fit into the category of households that are covered and protected by the provisions of section 137(9) of this Act.

One of the duties of children heading households is to collect social security grants for people living in these households. However, the position of a child heading a household is not clearly communicated in the legislation when the child turns 18. This leaves the question of whether the legislative framework abandons these households

when a child turns 18 without the availability of a 16/17-year-old child in the family. This further raises a concern about the provisions of section 137 being confined to child-headed households rather than child and youth-headed households.

Furthermore, with regards to the financial security of child-headed households, it is unclear what happens when a child heading a household turns 18 whilst still confronted with adult responsibilities including providing basic needs and making day-to-day decisions for the household without having a source of income. Van Dijk & Van Driel (2009: 919) maintain that:

[a] child-headed household can become an adult-headed household overnight without any alteration in composition or reference to the special status it may have acquired in receiving state and other support... and turning 18 does not necessarily make a young person an adult.

With reference to the above, a child-headed household that loses the status of being a 'child-headed household' due to a child turning 18 without any alteration to the structure, needs or demands of the household, the legislative framework provisions remain unclear about a particular household facing such a transition. This further leaves an unclear government stance in relation to the financial security of these households.

Apart from challenges brought by the age transition from 17 to 18 of children heading child-headed households as discussed, age 16 as a legally recognised minimum age for a child to head a child-headed household is of great concern. It is considered malicious to the 'best interest of the child' should children under the age of 16 be of the

view that they want to preserve the cohesion of their households whilst enjoying being protected and provided for by the legislation (Lim, 2011).

#### ***2.4 An adult supervisor of the child-headed household as designated by relevant authorities***

Children living in child-headed households are deemed to be in need of care and protection as stipulated in section 150(2) of the Children's Act. It is clearly stated in this section that child-headed households are to be investigated by a designated social worker. Apart from a designated social worker, the legislative framework further requires adult's supervision for these households to function. This Act makes no exclusions or limitations with regards to the presence of terminally ill adult(s)/ parent(s) in these households, leaving child-headed households being the government's 'priority' regardless of its composition.

The Children's Act in section 137(5) makes provision for the designation of an adult to supervise a child-headed household. The said, mandatory inclusion of a designated adult in child-headed households is aimed at ensuring a supervisory role including collection and administering of any social grant intended for child-headed households. However, the legislative framework does not make any provision for such adults to be professional individuals who are bound by professional values and ethics. The Children's Act only places accountability on the organs of the state and non-government organisations responsible for the designation of a particular adult. This leaves the question of the ethically regulated behaviour of these adults towards children such as the proper administration of monies intended for child-headed households. On the other

hand, social work professionals are regulated by Social Services Professions Act and bound by the code of ethics (Seyisi & Jamieson, 2009).

Furthermore, it is not stated whether or not a child who had been a head of a child-headed household can be appointed as an adult supervising his or her household considering his/her consanguinity or kinship with the younger siblings and a terminally ill adult living in the same household, if any.

## ***2.5 Social assistance for child- and youth-headed households***

Despite South Africa giving child-headed households legal recognition, the government has not ensured the financial security specifically for child-headed households. It is well said that the government offers grants to vulnerable children ranging from a child support grant to a foster grant to a care dependency grant. When these grants are specifically discussed, it becomes clear that children from child-headed households are only entitled to child support grants regardless of their vulnerability.

One of the requirements for a foster parent is that he/she must be 18 years or older (You and Your Grants, 2017). Therefore, foster placement is impossible in child-headed households because these households are headed by people under the age of 18. If an older sibling aged 18 or above assumes parental responsibility over the younger siblings, the household is not deemed a child-headed household (Children's Act: section 137). Therefore, this alone makes it clear that children living in child-headed households are not entitled to a foster care grant.

Care dependency grants are aimed at vulnerable children with severe disabilities or acute illnesses which requires substantial care and attention (Chennells & Hall, 2010).

Children living in child-headed households but without disabilities are not eligible for this grant as per the care dependency grant requirement stipulated by the government. This makes it clear that the general statement that ‘there are three grants available for children’ is very vague and it may give an incorrect impression that every underprivileged child is entitled to all three grants namely; a child support grant, a foster grant and a care dependency grant. Therefore, having discussed a foster care grant and care dependency grant, children living in child-headed households have the child support grant as the primary social grant at their disposal. There is a consensus in the literature that this grant alone is not accessible to every vulnerable child, especially in the case of children living in child-headed households where parents are deceased (Neves et al. 2009).

Section 46 of the Children’s Act outlines orders that the children’s court may make concerning children. The alternative care placement orders that Children’s courts may make include foster care placement, placement to child and youth care centres and placement in child-headed households. With regards to financial security for alternative care, allowances or subsidies provided for as per section 11 of Non-Profit Organisations Act 71 of 1997 complements placement orders to non-profit organisations/child and youth care centres whilst foster care placement orders are complemented by a foster care grant. However, there is no specific grant or subsidy that complements court orders that places children in child-headed households. Therefore, children living in child-headed households experience challenges in accessing grant(s) like any other orphan that is not placed in an alternative care placement. The only social assistance available to child-headed households is the child support grant that is known lesser than any other social grant provided by the government (Van Dijk, 2008).

## **2.6 Conclusion**

Given the legal recognition in South Africa, the concept of child-headed households is left without a universally accepted definition. In consideration of section 137 of the Children's Act, the government has not yet worked on looking at the different composition of households headed by people other than adults/parents to identify common factors that may lead to a single definition of these houses. The current description of these households reflecting on section 137 of the Children's Act leaves out needy youth (aged 18-21 years old) mentioned in section 176 of this Act.

The credibility of an adult designated to supervise child-headed households is not subject to regulations of any ethical board as they are not registered with a recognised council. This alone may be prejudicial to children's rights which are prioritised and protected by the UNCRC globally.

According to the Children's Act, a child below the age of 16 years cannot be legally appointed to head a child-headed household regardless of his or her maturity. This situation is in contrast with healthcare related consent where maturity of a child below 16 years is considered enough to give consent independently to treatment(s) and may consent independently to surgical operations. The literature maintains that there are houses headed by children under the age of 16 although these houses are not legally recognised as child-headed households. Consequently, child-headed households are not accurately studied in South Africa.

Declared a phenomenon, child-headed households are not allocated a specific social grant aimed at ensuring financial security for needy children and youth living in

these households. The child support grant is the only grant available for children living in child and youth-headed households. These households experience barriers in accessing these child support grants. Consequently, some children who should be receiving such grants are excluded from enjoying their constitutional right to social assistance. Therefore, the literature maintains that despite the government's current responses to financial security of child and youth-headed households, children living in these households are still exposed to poverty.



## **Chapter Three: The international and regional law obligations**

### ***3.1 Introduction***

In this chapter, the international and regional law obligations on the South African state in relation to the financial security of children is critically discussed. The focus is on the stipulations obligating State Parties to ensure social security and provide for children's protection from financial constraints that may compromise their social inclusion. The ratification of international law by State Parties makes it incumbent for State Parties to adhere to the stipulations of the international law when working on promulgation of domestic law (Williams, 2012). Therefore, stipulations of such international law remain obligatory to signatory countries. Plagerson and Ulriksen (2016) assert that the Constitution also recommends consideration of stipulations provided for by non-binding treaties when courts and tribunals interpret the Bill of Rights. Therefore, stipulations of non-binding treaties will also be discussed.

Provisions of the Universal Declaration of Human Rights, 1948; ILO Convention 102 on Minimum Standards of Social Security, 1952; the United Nations Declaration of the Rights of the Child, 1959; the International Covenant on Economic, Social and Cultural Rights, 1966; the United Nations Convention on the Rights of the Child, 1989; and the ILO Recommendation No 202 on National Floors of Social Protection, 2012 will be discussed outlining international law obligations to the South African state in relation with social security for children. These provisions will be narrowed down to those providing for financial security for child-headed households.

Subsequently, regional law obligations on the South African state in relation to the financial security of child-headed households will be discussed as stipulated in African

regional treaties such as the Declaration and Treaty of the Southern African Development Community; the Charter of Fundamental Social Rights in the Southern African Development Community, the Code on Social Security and the African Charter on the Rights and Welfare of the Child.

### ***3.2 International treaties providing for children's right to social security***

The International Labour Organization (ILO) (2016) maintains that the ILO founded in 1919 was mandated to promote and improve occupational human resources' labour conditions and ensure their right to social security. However, the ILO mandate was subsequently extended to ensure social security for everyone. Since then, this organisation establishes an international legal framework in the form of international conventions and further makes recommendations ensuring *inter alia* the right to social security for everyone. Another international organisation is the United Nations which has since 1945 drafted international human rights instruments, including child-focused treaties that entrench *inter-alia* social protection for children (Conforti & Focarelli, 2016). The relevant treaties will be discussed in turn below.

#### ***3.2.1 The Universal Declaration of Human Rights, 1948***

The Universal Declaration of Human Rights, 1948 (UDHR) brought about a paradigm shift in practices that violated human rights during the Second World War (Hughes, 2011). This treaty further brought about stability between human rights and human dignity subsequent to the same inhumanity that was practiced by some races and ethnic groups during the Second World War. Such inhumanity perpetuated a notion that some people were subhuman beings with no rights and these people were indeed exterminated in Nazi death camps. The Universal Declaration of Human Rights 1948

remained remarkable in outweighing any law that undermines human rights and its influence can be traced down to promulgation of various domestic laws including the Constitution of the Republic of South Africa, 1996 (Hughes, 2011).

Amongst human rights stipulated in the UDHR, the right to social security is provided for in Article 22 of the UDHR and made for everyone (United Nations, 1949). In this article, the provision for the right to social security is made for everyone. This provision is not limited to a certain category of people but to every member of society. Here, the right to social security is made based on an individual's dignity and the free development of his/her personality.

Article 25(1) of this treaty provides for the right to an adequate standard of living for every person including his/ her family. This provision directly fits the child heading the child-headed household and his/ her siblings. Article 25(2) further provides for special care and assistance to every child, guaranteeing social protection for children. Article 7 provides for equal protection of the law, equality before the law and further prohibits any kind of discrimination in violation of the provisions of this declaration.

Despite having UDHR in place, a need to have a human rights instrument advocating for children's rights gained momentum. The idea was that such instruments had to be founded on the premise that children are to be recognised exclusively as a special group of vulnerable people requiring special protection (Phillips, 2011).

### **3.2.2 The ILO Convention No. 102 Social Security [Minimum Standards] Convention, 1952**

Article 40 of the ILO Convention No. 102 Social Security [Minimum Standards] Convention (1952) provides for the right to social security for children. Provisions of this article may also be interpreted as calling for social assistance because social assistance is accepted as forming part of social security (Kulke, 2007). This article influences state parties' stance in relation to social assistance for underprivileged children. Adhering to article 40 of this Convention, Mongolia which is a signatory country of this Convention, implemented non-contributory social welfare programmes including the Child Money Program aimed at ensuring social security to vulnerable children (ILO, 2016).

Xakaxa (2018) argues that South Africa's stance and efforts towards social security are relatively in line with provisions of the ILO Convention No. 102 Social Security [Minimum Standards] Convention, 1952. However, South Africa has not ratified this Convention. As a member of the international community, South Africa is expected to ratify this Convention and adhere to the provisions stipulated therein.

### **3.2.3 The United Nations Declaration of the Rights of the Child, 1959**

The United Nations Declaration of the Rights of the Child, 1959 was approved by the United Nations General Assembly in 1959 subsequent to the rejection of the reaffirmation of the Declaration of the Rights of the Child, 1924 [also known as the Declaration of Geneva] (Moody, 2015). Moody maintains that the Declaration of Geneva was criticised for mentioning the principle of non-discrimination only in the preamble, for making no reference to juvenile justice, no reference to the family and no reference to social security.

Principle 4 of the United Nations Declaration of the Rights of the Child provides for the child's enjoyment of the benefits of social security (UN General Assembly, 1959). However, as much as this Declaration places no direct obligation on State Parties, principle 2 of this Declaration does call for law to ensure the child's special protection whilst principle 7 calls for public authorities to attempt to promote the child's rights.

Phillips (2011) asserts that the United Nations Declaration of the Rights of the Child was characterised by its non-binding status and the proposal to award a legal binding status to this declaration was substituted by that of converting it to a Convention.

### ***3.2.4 The International Covenant on Economic, Social and Cultural Rights, 1966***

The ICESCR is an international human rights instrument that was adopted in 1966 and came into force in 1976. It is one of the human rights instruments that received a greater ratification compared to the ILO Conventions (Langford, 2009). Assim (2015) asserts that since its inception, the ICESCR has remained non-binding on the South African state until 2015 where South Africa finally ratified it. In relation to the ratification of this Covenant, this writer further asserts that the South African Government entered a declaration stating that "(t)he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources" (Assim, 2015:9). This writer points out a 'grey area' in this declaration maintaining that the right to education is not subject to progressive realisation as per the provisions of the South African Constitution. Neither the right to social security nor the right to an adequate standard of living are subject to reservations by South Africa.

Another 'grey area' pointed by this writer is that of the South African Government's refusal to consider the dual ratification of ICESCR and its optional protocol (OP-ICESCR). The OP-ICESCR is deemed an accountability mechanism seeking to address violations of socio-economic rights stipulated in the ICESCR. Assim (2015) maintains that the civil society campaign advocating for the South African Government's ratification of the ICESCR suggests that the South African Government needs to review these 'grey areas'. Nevertheless, South Africa remains bound by the provisions of the ICESCR.

Assim (2015) also maintains that ICESCR provides for social security and further seeks to oblige State Parties to ensure the right to social security for everyone, especially those living in poverty. Firming-up its own stipulations, the ICESCR maintains the idea of a minimum core which is an obligation that suggests that State Parties are obliged to achieve a minimum standard of each socio-economic right at the very least; otherwise, the state is to be viewed as that which is in violation of this Convention (Brockerhoff, 2013).

Article 9 of the ICESCR provides for State Parties to recognise every person's right to social security. Article 11 of this treaty further suggests that State Parties are to recognise every person's right to an adequate standard of living. General Comment No 19 on Article 9 of the ICESCR 'the right to social security' issued by the Committee on Economic, Social and Cultural Rights (CESCR) in 2007 links the right to social security with human dignity stating that "(t)he right to social security is of central importance in guaranteeing human dignity for all persons when faced with circumstances that deprive them of their capacity to fully realise their Covenant rights" (United Nations, 2008: para 1).

The Committee further suggested that poverty and social exclusion are deficiencies that can be prevented, reduced and even alleviated when the right to social security is ensured to everyone (United Nations, 2008: para 3).

### ***3.2.5 The United Nations Convention on the Rights of the Child, 1989***

The UNCRC is the first international legally binding treaty that solely affirms human rights for every child. It became the first international treaty that the South African democratic government ratified on the 16<sup>th</sup> of June 1995 (Abrahams & Matthews, 2011). Article 2 of the UNCRC defines a child as any person under the age of eighteen. Article 26(1) makes provisions for state parties to recognise the right to social security for every child. This article further provides for state parties to take necessary measures geared to ensure full realisation of this right in line with relevant domestic law. Williams (2012) draws special attention to this article remarking on its uniqueness by reflecting that it is the only article in which the UNCRC obliges state parties to undertake ‘necessary measures’ whilst other provisions share similarity in obliging state parties to undertake ‘appropriate measures’, ‘feasible measures’ or ‘legislative, administrative, social & educational measures’. Furthermore, this article does not make any exceptions relating to the child’s gender, race, or any condition that may contribute to the marginalisation of the child. Therefore, state parties are bound to ensure that every person under the age of eighteen retains the right to social security. State parties’ obligation to ensure the right to social security for every child is further intensified by provisions contained in Article 2(2) of this convention which prohibits any form of discrimination against the child.

Article 27 further provides for an adequate standard of living for every child. In ensuring the right to social security and the right to an adequate standard of living, the

convention obliges state parties, in accordance with national conditions and within their means, to assist parents or ‘any other person responsible for the child’ to implement this right. The phrase ‘any other person responsible for the child’ opens for a child heading a child-headed household or a youth heading a child and youth-headed household to receive assistance from the state in order for him/her not to be excluded from these rights and ensure that children under his or her care also have access to these rights aimed at their physical, mental, spiritual, moral and social development.

Article 26(1) of the UNCRC advocates for children to be considered when state parties decide on domestic law pertaining to social security. This article obligates state parties to take necessary measures to ensure that realisation of children’s right to social assistance is in line with international law. It also provides for adherence to national law that calls for children’s entitlement to this right. Affirming children’s right to social security, the UNCRC calls for child sensitive social protection policies geared at addressing unique social disadvantages, risks and vulnerabilities that children may have been exposed to at birth or later as they grow up (Roelen & Sabates-Wheeler, 2012). Such child-sensitive social protection may also mean reaching out to vulnerable groups of children including orphaned children, children living in poor households, and children affected by HIV/AIDS, amongst others. Therefore, programmes aimed at protection of children against economic vulnerabilities reflect the heart of the child-sensitive social protection policies as asserted by the UNCRC.

Subsequent to South Africa’s second periodic report to the CRC Committee, the 2016 CRC Committee raised a concern about the persistent poverty of children aged 1-17 years old compared to other age groups (United Nations, 2016: par 55). The CRC



Committee asserted that access to social security benefits remains a challenge for these children due to administrative barriers. The strict requirement for identity documentation, the lack of clarity around eligibility criteria and the assessment of those criteria, the lack of accessible information of social security benefits and inadequate arrangements for children who have childcare responsibilities are amongst the administrative barriers that the CRC Committee pointed out. The Committee further recommended that the South African state expedites addressing such barriers that hinder the attainment of an adequate standard of living for children.

Despite the legal recognition granted to child-headed households by the South African government in 2010, an explanation of the financial security provided for such households was never given in South Africa's second periodic report submitted to the CRC Committee in 2016. Consequently, the CRC's concluding observations of the second periodic report of South Africa recommends that the South African state addresses the administrative barriers affecting children's access to social security benefits. In this reference, children with childcare responsibilities are included but not necessarily children from child-headed households (United Nations, 2016: par 55).

### ***3.2.6 The ILO Recommendation No 202 on National Floors of Social Protection 2012***

The preamble of the ILO Recommendation No 202 on National Floors of Social Protection 2012 reaffirms the right to social security as a human right. Hagemejer and McKinnon (2013) assert that this treaty recognises social security as an important tool that can be used to prevent and reduce social insecurity, social exclusion, poverty and inequality. The ILO Recommendation No 202 on National Floors of Social Protection

(United Nations 2012: par 4) suggests that Members should, in accordance with national circumstances, expedite their social protection floors that guarantee social security. Paragraph 5(b) of this treaty suggests that such social protection floors should also guarantee basic income security for children aimed at ensuring their adequate standard of living.

As this treaty provides for income security for children, it is of the utmost importance to note that officials of the ILO's Social Security Department also considers the impact that recession has on social security globally. Consequently, there is a global view that social security is not only a human right, but it is also a social and economic necessity (Hagemejer & McKinnon, 2013).

### **3.2.7 Concluding remarks**

Internationally, social security has been prioritised since the inception of UDHR in 1948 after the Second World War. International human rights instruments characterised by a binding nature and those of a non-binding nature are considered instrumental in creating stability between human rights and human dignity for everyone. Stipulations of the UDHR *inter-alia* provide for social security. However, in view that there was no international human rights instrument providing for children as a separate special group of people requiring special attention, the United Nations Declaration of the Rights of the Child was established. This human right instrument was criticised for not sufficiently elaborating on the 'non-discrimination' aspect. The United Nations Declaration of the Rights of the Child was also observed to be characterised by a non-binding status. A proposal to award legal binding status of this declaration was rejected by the United Nations Commission on Human Rights. The United Nations Commission on Human

Rights substituted this proposal by converting the United Nations Declaration of the Rights of the Child to a Convention.

Before a Convention providing for human rights solely for children could be established, the ILO Convention No. 102 Social Security [Minimum Standards] Convention (1952) was established. This International Human Rights Instrument provides for the right to social security for everyone including children. The South African stance in addressing social security is found to be in line with provisions of this Convention; however, South Africa has not ratified this Convention.

After the ILO Convention No. 102 Social Security [Minimum Standards] Convention (1952), the International Covenant on Economic, Social and Cultural Rights which was established in 1966. This Covenant provided for State Parties to recognise social security for everyone. The General Comment No 19 on Article 9 of the ICESCR ‘the right to social security’ issued by the Committee on Economic, Social and Cultural Rights (CESCR) in 2007 further intensified the call for state parties to recognise social security. Paragraph 1 of this General comment proclaims that the right to social security is of “central importance in guaranteeing human dignity for all persons when faced with circumstances that deprive them of their capacity to fully realise their Covenant rights”. The South African State only ratified this Covenant in 2015. The civil society campaign advocating for the South African Government’s ratification of the ICESCR remains concerned about ‘grey areas’ such as the South African State’s refusal to consider dual ratification of ICESCR and its optional protocol.

After the inception of the ICESCR, the UNCRC became the first international legally binding treaty that provides for children's rights. Social security, non-discrimination, and an adequate standard of living are amongst the aspects addressed by the UNCRC. This treaty is detailed to an extent that it even narrows the social security aspect to that of social assistance. The UNCRC is also perceived to be an international treaty that provides State Parties with a clear view of the heart of child-sensitive social protection. The UNCRC suggests that child-sensitive social protection policies should enable concerned parties the ability to address the unique social disadvantages, risks and vulnerabilities that may exist prior to the birth of children or influenced by circumstances they encounter as they grow up. Vulnerable children such as orphaned children, children affected by HIV/AIDS and children living in child-headed or child and youth-headed households should never be discriminated against.

Furthermore, the ILO Recommendation No 202 on National Floors of Social Protection 2012 reflects on the importance of social security maintaining, that it is an important tool that can be used to address social insecurity, social exclusion, poverty and inequality.

### ***3.3 African regional treaties providing for children's right to social security***

Regionally, the origins of South Africa's obligation to ensure financial security for child-headed or child and youth-headed households can be traced from the Southern African Development Community (SADC) social protection-related instruments such as the Declaration and Treaty of the Southern African Development Community; the Charter of Fundamental Social Rights in the Southern African Development Community and the

Code on Social Security in the SADC (Nyenti & Mpedi, 2012). The other children's rights instrument deemed dominant in Africa is the ACRWC (Adu-Gyamfi & Keating, 2013)

### **3.3.1 *The Declaration and Treaty of the SADC***

The Declaration and Treaty of the SADC (also known as the SADC Treaty) holistically seeks to ensure that Member States uphold the SADC's vision and mission (Nyenti & Mpedi, 2012). These authors maintain that the SADC Treaty is characterised by a legally binding status whilst article 6 of this treaty sets obligations specifically binding Member States to the SADC's objectives stipulated in article 5. Nyenti and Mpedi (2012:250) assert that the SADC Treaty *inter-alia* "foresees the development of minimum standards and the establishment of harmonised programmes of social security throughout SADC". As part of social protection, Sibanda (2013) describes the term 'social security' as an umbrella term underpinning social insurance and social assistance.

Therefore, the SADC Treaty provides for social assistance at a broader scope. Nyenti and Mpedi (2017) assert that some of SADC's objectives stipulated in Article 5 of the SADC Treaty are simplified and echoed by stipulations of the Charter of Fundamental Social Rights in the Southern African Development Community.

### **3.3.2 *The Charter of Fundamental Social Rights in the SADC***

The Charter of Fundamental Social Rights in the Southern African Development Community (also known as the Social Charter) was adopted in line with some objectives stipulated in Article 5 of the SADC Treaty and it is also characterised by a legally binding status (Nyenti & Mpedi, 2017). Echoing some of the SADC's objectives, article 10(2) of this charter obligates Member States to render social assistance to any person with no

means of survival. This provision complements the Social Charter's own objective stipulated particularly in article 2(1)(e) obligating Member States to "promote the establishment and harmonisation of social security schemes".

The Code on Social Security in the SADC relatively provides Member States with intensive guidelines and directives aimed at guaranteeing welfare for the underprivileged respectively throughout the region (Nyenti & Mpedi, 2012).

### ***3.3.3 The Code on Social Security in the SADC, 2007***

Nyenti and Mpedi (2012) maintain that the Code on Social Security in the SADC is a non-binding social protection-related instrument that seeks to provide Member States with strategic patterns for development and improvement of social security schemes in SADC countries. This Code is a regional social security tool that is associated with attainment of the SADC's objectives stipulated in article 5 of the SADC Treaty (Nyenti & Mpedi, 2017). These researchers maintain that provisions of this Code are precise making this social security instrument effective in the synchronisation of social security systems in the region.

Article 1 of the Code provides for definitions of concepts drawing a clear distinction between the term social protection, social security, social assistance and social allowances. Social assistance is particularly provided for in article 5(1) which states that "Everyone in SADC who has insufficient means of subsistence to support themselves and their dependents should be entitled to social assistance, in accordance with the level of socio-economic development of the particular Member State". Article 5.2 provides for

social services to every person in need of welfare and development support. Article 5.3 provides for social allowances to the underprivileged.

Nyenti and Mpedi (2012) assert that the Code on Social Security in the SADC provides for different categories of vulnerable people including children and youth. Article 16 of the Code provides for children's rights concurrently with young people's rights, enabling Member States to combine provisions for these two categories when they are of the same need. Child-headed households and orphans are specifically provided for in article 16(16.8) which states that "(m)ember States should provide adequate support to orphans and child-headed households, especially in relation to inheritance and family integration". Article 16(16.1) and (2) of the Code sets a clear directive for Member States to uphold international treaties in promulgation of domestic law concerning children.

### ***3.3.4 The African Charter on the Rights and Welfare of the Child 1990***

Advocating for children's rights solely in African perspective, the African Union adopted the African Charter on the Rights and Welfare of the Child (ACRWC) 1990 (Phillips, 2011; Adu-Gyamfi & Keating, 2013). The literature maintains that ACRWC is a legally binding children's rights instrument with its inception aimed at ensuring the welfare of the African child whilst bridging African countries' underrepresentation during the drafting of the UNCRC (Skelton, 2009). Phillips (2011) maintains that this instrument addresses and protects the African child's rights considering the African socio-cultural and economic situation.

The preamble of this charter outlines the importance of recognising children as a special group of people that requires special attention aimed at ensuring their health,

physical, mental, moral, and social development. In doing so, the ACRWC does not make any provision for early age majority curbing approvals of any status that may impair the African child's entitlement to children's rights (Phillips, 2011). Article 2 of the ACRWC intensifies this by unconditionally declaring a person under the age of eighteen a child. Article 3 further ensures full enjoyment of children's rights and freedoms recognised and guaranteed by this charter.

Notably, none of the ACRWC stipulations solely provides for the child's right to social security or social assistance. However, article 26 of the UNCRC provides for a child's social security whilst article 5 of the ACRWC stipulates that "State Parties to the present charter shall ensure, to the maximum extent possible, the survival, protection and development of the child". When these articles are read with article 3 of the African Charter which prohibits discrimination of a child due to his or her status, an underprivileged African child is unconditionally entitled to social security as a government initiative to ensure the child's survival, protection and development as far as these articles are concerned (Phillips, 2011).

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) during its 32<sup>nd</sup> Ordinary Session held in 2018, the Committee commended the South African State for submitting its first periodic report on the status of the implementation of the ACRWC (African Union, 2019). However, the Committee noted its concern about reports that the South African Government had decreased the South African Human Rights Commission (SAHRC) budget allocated for children's rights issues in 2018. Such decline was deemed detrimental to SAHRC's mandate which includes promotion and protection of children's rights in South Africa. The Committee



recommended that the South African Government ensure an adequate budget to enable SAHRC efficacy in advocating for children's rights.

### **3.4 Conclusion**

Although, international law and regional law do obligate State Parties to ensure social security to underprivileged children, they do not provide an explicit recognition of child and youth-headed households except for the SADC Code which is not binding. The SADC Code only requires to provide 'adequate support to orphans and child-headed households, especially in relation to inheritance and family integration'. In other words, state provision of financial assistance is not identified as needed instead the Code stresses aspects such as family inheritance and family integration. Financial security for child and youth-headed households is highlighted as precarious by the treaty monitoring bodies, but that due to a lack of concrete guidance, governments have not prioritised the financial security of these households.

Therefore, child and youth-headed households do not have sufficient protection under international and regional law to compel governments to support them financially as a separate vulnerable category from other impoverished children. Other poverty stricken children are placed in foster care families where fostering parents can obtain a higher paying Foster Care Grant compared to the Child Care Grant and are also able to generate their own income, which child-headed households cannot do.

## **Chapter Four: The South African legislative and policy framework**

### **4.1 Introduction**

Lombard (2008: 156) maintains that the Bill of Rights in the Constitution of the Republic of South Africa, 1996, (the Constitution) is “(t)he cornerstone and the premise for all policies and legislation in South African democracy”. In relation to this premise, Plagerson and Ulriksen (2016) assert that the establishment of social security policies can be traced back to provisions of the White Paper for Social Welfare, 1997. Therefore, the White Paper for Social Welfare [1997] becomes a crucial tool for the government when formulating policies including social security related policies. Like every policy, social security policies are subject to reviews and revisions aimed at relevant enhancements to give intended efficacy in line with international and regional law obligations over the government of the country (Plagerson & Ulriksen, 2016).

Section 28 of the Constitution specifically provides for the rights of the child. Furthermore, section 137 of the Children’s Act 38 of 2005 makes provisions for child-headed households and section 46(1)(b) of this Act provides for the recognition of these households as alternative care for children deprived of their parental care. The literature maintains that these households are exposed to poverty due to its occupants’ limited means to generate income for survival (Mogotlane et al. 2010).

The social security for child and youth-headed households provided for in the South African legislation and policy is discussed in this chapter. The relevant constitutional provisions are discussed first, followed by the legislative scheme. This scheme focuses on domestic legislation such as the Children’s Act, Social Assistance Act and Schools Act. Thereafter the relevant policy framework is discussed, including the

School Fees Exemption Policy, No Fees Policy, the School Transport Policy, the National Policy on Food and Nutrition Security and the Child Support Grant Policy.

## ***4.2 The Constitution of the Republic of South Africa, 1996***

The Constitution maintains that South Africa is governed by this document which is deemed a supreme law of the country (section 2). Section 28 specifically provides for the rights of the child. This section further defines a child as any person under the age of eighteen. Section 28(1)(c) of the Constitution maintains that children have rights to social services including the right to basic nutrition, shelter and basic health care services.

Section 27 provides for the right to social security for every inhabitant of the Republic, including children. Section 27(1)(c) narrows ‘social security’ down to ‘social assistance’ should any person be unable to support him/herself and his/her dependents.

Section 29 of the Constitution provides for the right to education for everyone, including children. When this section is read in conjunction with section 9 ‘the right to equality’ and section 10 ‘the right to dignity’, marginalisation of underprivileged children is completely prohibited.

## ***4.3 The legislative scheme***

### ***4.3.1 The Children’s Act 38 of 2005***

The legislative response to the provisions of section 28 of the Constitution is the Children’s Act 38 of 2005 (the Children’s Act). Hendricks (2014) maintains that the Children’s Act is a core legislation setting precedent solely for children’s rights in South Africa. Section 137 provides for child-headed households. Child-headed households are recognised as an alternative care as provided for in section 46 of the Act. Section 46(1)(b)

makes provisions for courts to issue an alternative care order placing a child in a child-headed household.

Section 137(5)(a) makes provisions for children heading child-headed households or a supervising adult mentioned in sub-section 3 of this Act, to collect and administer any social security grants that children from these households may be eligible for in terms of Social Assistance Act 13 of 2004. Children's right to social assistance particularly for children heading or living in child-headed households is provided for in section 137(9) of the Children's Act. This section sets obligations for the state to ensure that organs of the state at national, provincial or local government level are not marginalising children heading or living in child-headed households and that these children are not excluded from social grants mainly because they are from houses headed by children.

However, section 137(9) is vague because it provides for children living in child-headed households not to be excluded from social grants mainly because they are from houses headed by children. This section does not make a specific stipulation exempting these children from producing documents required when applying for social grants, given that it is a common characteristic for these children not to have documentation such as death certificates, birth certificates and other official documents required when applying for social grants.

#### **4.3.2 The Social Assistance Act 13 of 2004**

The legislative response to the provisions of section 27 of the Constitution is the Social Assistance Act 13 of 2004). This Act seeks "(t)o provide for the rendering of social assistance to persons... and to provide for matters connected therewith" (preamble). The

Social Assistance Act provides for social assistance specifically with regards to social grants – cash transfers to eligible persons. Three sections of this Act respectively make provisions for grants intended for children. These sections are section 6 for the child support grant, section 7 for the care dependency grant and section 8 for the foster care grant. All these grants are subject to eligibility as per stipulations in section 5 of this Act.

Social grants provided for in terms of the Act are described as a non-contributory tax funded branch of social security aimed at tackling poverty to the underprivileged inhabitants of the country including underprivileged children. The efficacy of this model lies in the legally regulated administration ensuring safe cash flow from government to public entity and from public entity to the intended service users (Brockerhoff, 2013).

In December 2015, the Child Support Grant Top-Up proposal for orphans was approved (Hall, Skelton, Delany, Jehoma & Lake, 2016). These authors maintain that after this approval, in October 2016 the cabinet approved a draft of the Social Assistance Amendment Bill that was to be made available for public comment. At the public hearing held by the Social Development Committee on the 26<sup>th</sup> of February 2020, the Centre for Child Law, Children in Distress (CINDI) and the Children's Institute made submissions acknowledging the strain of Foster Care systems (Parliamentary Monitoring Group, 2020).

These institutions suggested the inclusion of the Child Support Grant Top-Up in the Social Assistance Amendment Bill suggesting that it is made available to all children eligible for a FSG. Whilst those in foster care will continue receiving a FCG, new applicants will be referred to CSG Top-Up avoiding children's exposure to poverty whilst

experiencing delays attached to FCG. Adding a CSG Top-Up to a CSG received by children that are eligible for a FCG, will decrease the need to go through a strained FCG system, easing the burden on the current FCG system whilst increasing social grant aid to those eligible to a FCG. Therefore, a CSG Top-Up will bring the amount of a CSG and that of a FCG into equilibrium. It was further suggested that CSG Top-Up should be more inclusive and accommodate orphans without being bombarded with the burden of producing documents proving their orphan status (Parliamentary Monitoring Group, 2020).

Consequently, in June 2020 the Bill was passed by the National Assembly and conveyed to the National Council of Provinces for confirmation (Parliamentary Monitoring Group, 2020). The rationale for the Social Assistance Amendment Bill is to improve the efficacy of social assistance by empowering the Minister *inter alia* to prescribe additional payments such as CSG top-up for orphans living with relatives and further provide for CSG payments to children heading child-headed households (Social Assistance Amendment Bill, 2020).

#### **4.3.3 The South African Social Security Agency Act 9 of 2004**

Another legislative response to the provisions of section 27 of the Constitution is the South African Social Security Agency Act 9 of 2004. The Public Finance Management Act 1 of 1999 provides for public entities in which the South African Social Security Agency Act is following. The SASSA Act seeks “(t)o provide for the establishment of the South African Social Security Agency as an agent for the administration and payment of social assistance...” (preamble).

Vincent and Cull (2009: 8) maintains that “(c)ash transfers also play an important role in access to education... to purchase peripheral requirements associated with attending school, such as uniforms, books and stationery”. It is submitted that education correlates with essential social services. This brings about consideration of legislation on schools.

#### **4.3.4 The South African Schools Act 84 of 1996**

The South African Schools Act 84 of 1996, in section 39, makes provisions for school fees at public schools. Section 39(c)(ii) provides for conditional, partial, and total school fees exemption. However, this Act makes no exemption related to purchasing peripheral requirements associated with attending school. This means that as much as underprivileged children may be exempted from school fees in public schools however, they still require monies to pay for stationery, school uniforms, extracurricular activities and some may require transport fees for travelling to and from schools (Vincent & Cull, 2009).

The National Guidelines for Statutory Services to Child-headed households outlines the guidelines for statutory services for child-headed households to ensure protection of the rights for children living in these households (SA Department of Social Development *National Guidelines for Statutory Services to Child-Headed Households*, 2010).

These guidelines place an emphasis on the right to education for children living in child-headed households. The South African Schools Act may then be regarded as a legislative response to provisions of these guidelines collectively as it calls for a School-

Fees Exemption policy to fee-charging public schools aimed at maintaining equity amongst privileged and underprivileged children in accessing education.

#### **4.4     *The Policy Framework***

##### **4.4.1   *School Fees Exemption Policy***

In relation with disadvantaged children, including children from child-headed households, the School Fees Exemption Policy read with the provision of section 39(c)(ii) of the South African Schools Act, seeks to ensure that these children are not excluded from accessing their right to education. This section makes provisions for total, partial or conditional exemptions. These types of school fees exemption are determined by a prescribed means test contained in the School Fees Exemption Policy (Pendlebury, Lake & Smith 2011: 35). Parents'/households' income is tested and schools decide on the type of exemption the child should enrol under.

Pendlebury et al. (2011) maintain that this policy ensures the protection of the right to education for underprivileged children. This policy is obligatory and applicable to all public schools but not to private schools. The South African Schools Act Regulation 2006 compels public schools to inform parents about this policy and assist them with a step-by-step criterion of applying for such school-fee exemption. In doing so, this policy seeks to eliminate the exclusion of underprivileged children from fee-charging schools. The most vulnerable children from low-income houses such as child-headed households automatically qualify for full school-fee exemption in fee-charging schools (Pendlebury et al. 2011).



#### **4.4.2 The No-Fees Policy**

The No-Fees schools' policy is another policy aimed at ensuring access to education for disadvantaged children including children from child-headed or child and youth-headed households (Pendlebury et al. 2009). Some public schools, from relevant quintiles (the poverty measurements within which schools fall) and situated in low-income areas are prioritised by the government and funded with a larger amount per learner. As a result, the state enables these schools to sustain themselves without charging school fees (Veriava 2017). This policy is applicable from a primary school level to Further Education and Training (FET) level accommodating children and youth provided for by the Children's Act. However, as exempted from paying school fees as the disadvantaged may be, Vincent & Cull (2009) maintains that children are still left with the burden of buying the necessities for schooling, as indicated earlier.

#### **4.4.3 The School Transport Policy**

The Annual Performance plan of the KwaZulu-Natal Department of Education (2011/2012) reflects that the province's departments of Education and Transport initiated a Learner Transport Programme aimed at providing transport to underprivileged children with difficult to reach schools. However, the expansion of this programme was reported to have encountered some challenges and delays associated with the transfer of the programme to the Department of Transport (KZN Department of Education *the Annual Performance plan 2011/ 2012*: 21). Nevertheless, in 2017, the Pietermaritzburg High Court ordered the KwaZulu-Natal MEC for Education to ensure a Learner Transport Programme to affected schools within the province [*Equal Education v. Department of Basic Education and others* (3662/17P) [2017] (7 November 2017)].

In October 2019, a community and member-based movement known as the Equal Education (EE) and Equal Education Law Centre (EELC) managed to secure a court order from the Pietermaritzburg High Court obliging the KwaZulu-Natal Department of Education to expedite a draft scholar transport policy (Equal Education, 2020). However, EE and EELC described the draft transport scholar policy put forward as vague and incoherent. They pointed out that the Draft fails to give a clear criteria for learners in need, with no provisions for long-term plans to address funding shortages, failing to clearly reflect the KZN DoE and the KZN Department of Transport (KZN DoT) responsibilities pertaining to the Learner Transport Programme as well as lacking vital information on how to apply for scholar transport including clear timeframes.

#### ***4.4.4 The National Policy on Food and Nutrition Security***

The National Policy on Food and Nutrition Security is a policy with a broader scope in relation to securing adequate food and nutrition. The scope of this policy includes “examine key budgeting and planning trends of the NSNP” (McLaren, Moyo & Jeffery 2015: 64). This complements children’s right to basic nutrition as stipulated in section 28(1)(c) of the Constitution. The National School Nutrition Programme (NSNP) previously known as the Primary School Nutrition Programme (PSNP) is a programme aimed at ensuring access to food for underprivileged school children. The PSNP, previously coordinated by the Department of Health, was transformed to the NSNP when its coordination was handed over to the Department of Education in 2004. The rationale for this transformation was to widen the scope for this programme so it could spread to children and youth at secondary school level; enhancing their health & nutritional status and improving their learning capacity (McLaren et al 2015).

The NSNP is aimed at disadvantaged school children and youth including those from child and youth-headed households (McLaren et al 2015). However, this programme strictly remains a school feeding scheme meaning it is aimed at providing meals to children during school hours. It does not provide for take-home food parcels. Nevertheless, this programme is rated highly for attracting children and youth to attend school whilst also curbing likelihoods of school drop-outs due to hunger (Devereux, Hochfeld, Karriem, Mensah, Morahanye, Msimango, Mukubonda, Naicker, Nkomo, Sanders & Sanousi 2018). During the Coronavirus (Covid-19) pandemic while ensuing lockdown regulations in the country, providing food to children during times when they were out of school came under the spotlight.

On the 18<sup>th</sup> of March 2020 the sudden schools' closure due to the COVID-19 outbreak in South Africa led to a complete halt of the NSNP (Equal Education, 2020). The NSNP suspension resulted in an outcry from more than nine million learners that were reported to have been impeded from receiving their NSNP daily meals. These children were reported to have suffered from hunger and malnutrition during this period. Consequently, this was widely condemned as it was perceived to be a violation of various human rights protected by the Constitution.

The Department of Basic Education (DoBE) encouraged children to study online during lockdown but did not restructure NSNP to ensure food security to those disadvantaged school children who were learning from their homes amid the hunger. EE, together with concerned school governing bodies subsequently launched an urgent application to the North Gauteng High Court [*Equal Education and others v. Department of Basic Education and others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102

(GP); 2021 (1) SA 198 (GP) (17 July 2020)] contesting the suspension of the NSNP (Equal Education, 2020).

The applicants, in their submissions argued that the Department of Education was in violation of section 28(1)(c) read with section 27(1)(c) and section 29(1)(a). The applicants further presented that these constitutional rights are reinforced by section 7(2), section 9(1) and (2) of the Constitution. The Applicants rejected that respondents suspended the NSNP on limitations stipulated in section 36 of the constitution solely because it was never mentioned in their statement when announcing NSNP suspension. Subsequently, the applicants expressed their dissatisfaction based on irregularities such as inadequate food supply to schools observed in schools that re-opened in June 2020 (Equal Education, 2020). The court maintained that it is a Minister's constitutional and statutory duty to ensure that the NSNP reaches all qualifying students for their daily meal. The court declared the First Respondent (the Minister) in breach of this duty after suspension of the NSNP amid Covid-19 outbreak. Then, the court ordered an immediate reinstatement of the NSNP, ordering that it reaches all qualifying students, even those that were studying away from school because of the Covid-19 pandemic [*Equal Education and others v. Department of Basic Education and others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020)].

#### **4.4.5. The Child Support Grant Policy**

The term 'social security' is a broad term that can be narrowed to the term 'social assistance' (Kaseke, 2010). Patel (2011) maintains that the term 'social assistance' and the term 'social grant' are used interchangeably. This author further describes a social grant as an income distributed by the government, aimed at prevention and alleviation of

poverty to specific categories of vulnerable people including needy children. In other words, social grants are also aimed at ensuring financial security for needy children including children from child and youth-headed households.

The Child Support Grant Policy emanates directly from the Social Assistance Policy. The Child Support Grant Policy was implemented in 1998 repealing the State Maintenance Grant Policy which was associated with apartheid (Kaseke 2010). The Child Support Grant is a non-contributory tax-funded grant aimed at financial security for underprivileged children, including children from child and youth-headed households (National Development Plan, 2012). It is means-tested, meaning eligibility is subject to prescribed terms and conditions stipulated in the Child Support Grant Policy. In the inception of Child Support Grant pay-outs, this grant was only payable for children under eight years of age. Child Support Grant Policy has been subjected to reviews and revisions which led to the extension of the age limit to age seventeen as from 2018 (Hall and Sambu, 2018).

#### **4.5 Conclusion**

The South African legislative and policy framework provides for social security aimed at poverty alleviation to underprivileged inhabitants of the country including children from child-headed households. Section 27 of the Constitution provides for social security in a broader scope. Social security stipulated in section 27(1)(c) of the Constitution remains on a broader scope but provides for people that are unable to support themselves and their dependents. The Constitution also provides for children's rights at a broader scope. The characteristic of being unable to support oneself and dependent(s) secures children's entitlement to social assistance, especially when deprived of adequate parental

care. The Constitution also upholds the right to dignity and equality for everyone, including children regardless of their status.

Children living in child and youth-headed households are bombarded with the burden to care for their families amid limited means to generate income for survival (Mogotlane et al. 2010). The Children's Act solely provides for children's rights and recognises child-headed households as alternative care. The Act further reiterates underprivileged children's entitlement to social assistance making it feasible for children living in child-headed households to enjoy the benefits of social assistance. The Social Assistance Act provides for a child support grant, a care dependency grant and a foster care grant for disadvantaged children.

In an attempt to enhance the efficacy of social assistance for disadvantaged children, an additional child support grant top-up that remained a subject around 2015 and was subsequently included in a Social Assistance Amendment Bill that was approved by the cabinet in October 2016 and passed by the National Assembly in June 2020. However, these grants are subject to eligibility of beneficiaries. The Draft Social Assistance Amendment Bill consists of twelve clauses in which some empower the Minister *inter alia* to prescribe additional payments such as the CSG top-up for orphans living with relatives and further provide for CSG payment to children heading child-headed households (Social Assistance Amendment Bill, 2020).

The South African Social Security Agency Act is another legislation that is directly connected to the payment of social assistance to disadvantaged people and underprivileged children including children from child-headed households. This Act

regulates the functioning of SASSA which is the public entity responsible for administration and pay-outs of grants to respective beneficiaries including children from child-headed households. The literature maintains that grants play an important role in ensuring education for underprivileged children. Peripheral requirements associated with attending schools for disadvantaged children are said to be purchased with monies collected from grants.

Striving towards education for underprivileged children, the South African Schools Act provides for conditional, partial and total school fees exemption for underprivileged children including children from child and youth-headed households attending public schools. As exempted as these children are, they are not exempted from buying stationery and school uniforms as well as extracurricular activities and some may require transport fees for travelling to and from schools (Vincent & Cull, 2009).

The legislative framework is intertwined with the policy framework giving guidelines for everyone to understand eligibility and step-by-step criterion to adhere to when intending to enjoy benefits provided for by the legislative framework. The school fees exemption policy contains *inter alia* a prescribed means test used to determine the type of school fee exemption a person is entitled to. The school fees exemption policy is obligatory to all public schools. Furthermore, the no-fees school policy is applicable to public schools situated in areas characterised by extensive poverty. This policy seeks to ensure equality in terms of children's access to education irrespective of their disadvantages. This policy enables the most disadvantaged children to enjoy the benefits of children's rights stipulated in the Constitution. Nevertheless, these children are not exempted from buying the necessities for schooling.

The Learner Transport Programme is the other initiative aimed at ensuring access to education for children with difficulties in paying transport fees to and from schools. This programme remains a subject matter because of challenges attached to it. The NSNP is another programme that remains a Minister of Education's constitutional and statutory duty. However, the Minister came under fire for failure to sustain this programme during Covid-19 outbreak in 2020. Policies such as these can mitigate the impact of poverty on child and youth headed households where they are properly implemented.

The CSG policy enables cash-flow from SASSA to CSG beneficiaries as intended by the government of the country. In 1998, the CSG policy repealed the State Maintenance Grant Policy that was encouraging inequality of people. The CSG policy provides prescribed terms and conditions that determine eligibility for CSG beneficiaries. Revisions and reviews of the CSG policy extends the likelihood for most disadvantaged children to access CSG intended for their financial security.

The Legislative framework ensures provision and protection of human rights. The right to social security for children living in child and youth-headed households is amongst the rights provided and protected by the South African legislative framework. Social security entails basic nutrition, shelter and basic health care services. Nutrition, shelter and health are features prioritised by the legislative framework in ensuring children's wellbeing for them to enjoy the right to education as provided by the Constitution. Government relies on prescribed terms and conditions contained by policies to bring about order and fairness for children's access to social security provided and protected by the legislative framework. Therefore, means-tests contained by these policies



relatively serves as a criterion used to determine eligibility to these services and concomitantly, aims to realise these rights.

However, the South African legislative and policy framework makes less emphasis on children living in child and youth-headed households. This includes prioritisation of their financial security. Children from these households are viewed as being on par with any other underprivileged children whose parents are not employed and meet the means test for the child care grant. They are not prioritised as underprivileged children that are already placed in alternative care with no prospect of income generation.

## **Chapter Five: The implementation gap between the legislation, policies and relevant programmes**

### **5.1     *Introduction***

The South African legislative framework recognises child-headed households as alternative care intended to secure children's well-being without removing them from their original households when deprived of parental care (Kruger 2014). Nevertheless, the literature maintains that children from these households are exposed to poverty and exploitation because of their limited means to generate an income (Blaauw et al. 2011).

The literature further maintains that the feasibility for children living in child and youth-headed households to adequately access socio-economic needs such as social security and education is hampered by shortcomings associated with the implementation of relevant legislative provisions, policies and programmes (Van Dijk, 2008; Mturi, 2012).

Studying the implementation gap between legislation, policies and relevant programmes this chapter will focus on the international and regional law obligations on South Africa pertaining to social security for underprivileged children, the schooling measures and coverage on child and youth-headed households.

### **5.2     *The international obligation on South Africa***

In 2000, child-headed households were prioritised by the CRC committee recommending that South Africa assess the impact this alternative care has on or for children (United Nations, 2000: par 22). However, in 2016, the CRC Committee commented on aspects South Africa reported concerning the country's adherence to CRC obligations but did not comment on child-headed households (United Nations, 2016). This

reflects the country's failure to report on its initiatives and developments attached to child-headed households. The Committee relatively further noted the country's inadequate arrangements for children rearing their siblings (United Nations, 2016: par 55(b)). This further reflects the country's passiveness towards child-headed households. Such passiveness is complemented by the country's failure to report on the progress of the child and youth-headed household register announced by President Jacob Zuma in 2016 (Polity, 2016). Administrative barriers hampering children's access to social assistance reported by South Africa to the CRC Committee in 2016 was directed at disadvantaged children in general, not that the country made a special reference to administrative barriers hampering children from child-headed households or child and youth headed households from accessing social assistance as maintained by the literature.

### **5.3 *Social security for underprivileged children***

The right to social security for everyone is provided and protected in section 27 of the Constitution. Section 27(1)(c) provides for social assistance for people who are unable to support themselves and their dependents. Section 28(1)(c) of the Constitution makes a special reference to social security for children. Children from child and youth-headed households are children deprived of parental care whilst faced with a duty to sustain life amid their limited means to generate an income (Mogotlane et al. 2010). The duty to render social assistance to people who are unable to support themselves and their families remains a state obligation as provided for in section 27(2) of the Constitution (Vonk & Olivier, 2019).

Section 137(5)(a) of the Children's Act provides for collection of grants for child-headed households in terms of the Social Assistance Act. Section 6 of the Social

Assistance Act provides for a child support grant subject to eligibility as outlined in section 5 of the Act. This limitation reflects that the child support grant policy complements the implementation of social welfare's selective approach in dealing with social grants. Outlining the social assistance models, Kiabilua (2018:29) asserts that the social welfare selective approach "is less costly to the government, because it covers only the neediest people and households, which means that those who do not meet the predetermined criteria will not receive anything".

Notably, it remains mandatory as per CSG policy that for a CSG application, applicants must produce documentation such as the identity documents or birth certificates of children and death certificate(s) of parent(s) if one or both parents are dead (SASSA, 2014). The literature maintains that it is common for child-headed households to lack such documentation because of absence of parents in these households (Mturi, 2012). Nevertheless, CSG policy does not make any exceptions in consideration of such circumstances child-headed households are usually exposed to. This may be regarded as a shortcoming of the assurance of social assistance to disadvantaged children as proclaimed by the legislation considering that one of the reasons that led to a legal recognition of child-headed households in South Africa was that, these households are also deemed a solution to the lack of availability of vacancies in residential care, adoption and fostering (Phillips, 2011).

The findings of a research study titled 'A situational analysis of child-headed households in South Africa' reflected that national government departments lacked policies intended solely for child-headed households (Mogotlane et al. 2010). These authors also pointed out that policies of NPOs providing services on behalf of the

government did not have policies specific to child-headed households but “children in child-headed households were categorised as orphans or vulnerable or both” (Mogotlane et al. 2010:28). In this view, the Children’s Amendment Act 41 of 2007 includes stipulations providing for child-headed households (section 137 of Children’s Act as amended) including collection of grants in terms of the Social Assistance Act for these households. However, the bill to amend the Social Assistance Act 2004 to provide payments to child-headed households was only passed by the National Assembly in June 2020 (Parliamentary Monitoring Group, 2020).

The literature maintains that social grant applicants have a right to appeal the decision to decline or reject their social grant application (Makhanya, 2016). Devereux (2011: 422) states that the Independent Tribunal for Social Assistance Appeals (ITSAA) recognised in 2008, is the structure aimed at addressing applicants aggrieved by SASSA’s decisions to decline their social grant(s) application(s). Makhanya (2016) asserts that the independent tribunal mainly reviews the merits of decisions made by the agency. The independent tribunal balances the applicant’s rights to social assistance with the application of the social assistance policy. Although the independent tribunal takes the stance of the agency when reviewing matters of concern, the independent tribunal objectively reconsiders the application made by the applicant and the reaction of the agency towards that application. By reviewing the merits of the decision taken by the agency, the independent tribunal may reaffirm, diverge and even set aside the initial decision taken by the agency.

Nyenti (2016) maintains that the independent tribunal is characterised by independence and impartiality because its composition consists of independent

individuals that are not part of the agency. For the benefits of children from child-headed households who may have been declined social grants, it remains a concern that the efficiency of the ITSAA responsible for reviewing the merits of the decisions taken by the agency has been reported to be impaired by the lack of funding from the government (Devereux, 2011). This reflects the government's ability to identify the need to implement remedies aimed at ensuring social grants to the disadvantaged but failing to maintain the structure established to ensure such remedies.

Furthermore, section 18(2) of the Social Assistance Act makes it optional for the Minister to appoint the independent tribunal to hear social grant appeal(s). The Act mandates the Minister to take this option only after considering the agency's reasons to decline social grant(s) application(s). Such administrative delays are associated with factors that expose disadvantaged children to poverty (Mturi, 2012). Only after more than ten years of the Social Assistance Act, did the National Assembly pass the Social Amendment Bill which seeks *inter alia* to mandate the Minister to appoint the independent tribunal to hear social grant appeals from the outset without such appeals having to go via the Minister's considerations (Parliamentary Monitoring Group, 2020).

#### **5.4 The education and nutrition link and scholar transport**

Section 28 of the Constitution provides for the right to an education. The importance of education is universally accepted including that it holistically transforms the lives of people towards a better level of literacy that enables them to escape from poverty (Kiabilua, 2018). Govender (2016) argues that education and basic nutrition are interdependent aspects. He asserts that improved nutrition of school children helps to enhance their academic performance. Basic nutrition for children is one of the social

security aspects provided for in section 28(1)(c) of the constitution. The literature also maintains that the NSNP improves school attendance and class participation (Sanousi, 2019). Section 41(7)(c)(ii) of the South African Schools Act guarantees disadvantaged children's access to nutrition programmes rendered in schools.

In March 2020, the Department of Education announced an indefinite NSNP suspension amidst the COVID-19 outbreak. The NSNP suspension was extensively condemned on the basis that over nine million NSNP beneficiaries were reported to have been impeded from receiving their daily meals due to the suspension of the programme (Equal Education, 2020). It was further reported that NSNP beneficiaries suffered physical, emotional and psychological distress because of the NSNP suspension during the national lockdown. Consequently, the interdependence of education and basic nutrition became evident when NSNP's direct beneficiaries were reported to encounter difficulties with studying from home and keeping up with their curriculum because their daily meals were constrained.

The EE and concerned school governing bodies deemed the NSNP suspension a violation of section 28(1)(c) read with section 27(1)(c) and section 29(1)(a) [*Equal Education and others v. Department of Basic Education and others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020)]. The applicants further presented that these constitutional rights are reinforced by section 7(2), section 9(1) and (2) of the Constitution. Nevertheless, the National Policy on Food and Nutrition Security was never reformed to allow the NSNP to reach disadvantaged school children that were compelled to remain in their homes during the national lockdown. Consequently, the government's constitutional and statutory duty to ensure basic nutrition

to disadvantaged school children for the enhancement of their academic performance through the NSNP was completely compromised (Equal Education, 2020).

Another gap is the delay in implementing a schools' transport policy for children in rural areas. The KZN Department of Education Annual Performance plan 2011/ 2012 has since announced challenges in the Learner Transport Programme. In 2019, it took a member-based movement known as Equal Education and the Equal Education Law Centre to put pressure through a court order from the Pietermaritzburg High Court for the Department of Education to expedite this programme. Consequently, the court order was secured, obligating the Department of Education to publish a draft scholar transport policy in 2020.

### ***5.5 Exclusion of youth-headed households from protection***

Section 49(1)(b) of the Children's Act provides for child-headed households as forms of recognised alternative care. Section 137(1)(c) of the Act limits the age of a child heading the household from 16 to 17 years of age. Whilst, section 176(2) of the Act makes provisions for a person of 18 to 21 years old to remain in alternative care. This reflects that children heading child-headed households may need to remain in these households as stipulated in section 176(2)(a) and (b). However, the legislative framework does not deem such a household as a child-headed household if it is headed by a person of 18 years and older.

Therefore, the Act limits the child-headed households to households headed by people under the age of 18 without any consideration of provisions stipulated in section 176 of the Act. With section 176 of the Act limiting child-headed households to the age of



16 to 18, policies aimed at providing for child-headed households are not providing for children when they turn 18 even if they are subject to section 173 of the Act. Nevertheless, the Children's Act does not provide for child and youth-headed households to enable children heading households to enjoy the benefits of section 176 of this Act.

The literature maintains that child and youth-headed households are households headed by older siblings in their teens and or early twenties (Ruiz-Casares, 2009; Evans, 2012). Nevertheless, child and youth-headed households are not provided for in the South African legislative framework. As the Social Assistance Amendment Bill exists, the Bill limits social grants for children heading households without any provisions intended to complement the provisions of section 176 of the Children's Act.

The Children's Amendment Act 41 of 2007 provides for child-headed households. Section 137 of this Act provides for child-headed households' social assistance. However, the Bill enabling the Minister to pay grants to children heading child-headed households was passed in 2020 (Parliamentary Monitoring Group, 2020).

## **5.6 Conclusion**

In 2000, the CRC Committee directly recommended that the South African state study and assess the impact of child-headed households on children. However, the South African state omitted to report its progress when submitting the second periodic report to the CRC Committee in 2016. Nevertheless, the CRC Committee further recommended that the country expedite on removing the administrative barriers hampering disadvantaged children from accessing social assistance. The country normally merges children from child-headed households with orphans, vulnerable children or both. The

literature maintains that this is a barrier that hinders the country from having enough data on child-headed households or child and youth-headed households.

The literature further maintains that the Independent Tribunal for Social Assistance Appeals was established to hear grievances from dissatisfied social grant applicants (Devereux, 2011; Makhanya, 2016). However, the independent tribunal reported to lack funding which hampers its efficacy in ensuring justice to all social grant applicants. Furthermore, after more than ten years of the Social Assistance Act, the Act has not been amended to call for a direct appointment of the independent tribunal to hear social grant appeal(s). Such an appointment remains optional to the minister. However, this reduces the efficacy of the independent tribunal.

Another shortcoming is the country's failure to successfully implement the Learner Transport Programme for children living in poverty providing free transportation to schools. The country was also criticised for failing to maintain NSNP to eligible school children during the Covid-19 outbreak in 2020. This shortcoming was South Africa's failure to ensure its international and regional obligation to ensure social security to the disadvantaged. The legal recognition of child-headed households in South Africa has also limited the jurisdiction of social assistance over needy youth protected by the Children's Act.

## **Chapter Six: Recommendations and Conclusion**

### **6.1 *Introduction***

This chapter reflects on all five chapters of this research study. Subsequently, recommendations will be made followed by a holistic conclusion of this research study.

### **6.2 *Summary of chapters***

#### **6.2.1 *The emergence of child and youth-headed households***

The first chapter contains the introduction of this study outlining on the background of child and youth-headed households. These households are headed by children or youth due to the death of parents. Mortality and morbidity of parents exacerbate the 'parentless' status of children leaving a burden on older siblings to rear the younger ones. Numerous factors contribute to morbidity and mortality of parents. However, HIV and AIDS are leading factors contributing to the deaths of parents. Tuberculosis is also one of the terminal illnesses associated with morbidity and mortality of parents in South Africa. Migration of parents to urban areas for employment also eliminates parental figures in these households. However, this factor is not as severe as morbidity and mortality because it creates child and youth-headed households only on a temporary basis.

Child and youth-headed household occupants are characterised by limited or no means to generate an income. This exposes them to poverty. Therefore, this study sought to determine if the South African government's legal and policy framework adequately covers the basic financial needs of child and youth-headed households. This was studied in line with the international and domestic obligations of the South African state to ensure

social security in the form of social assistance to those who are unable to provide for themselves and their dependents.

### **6.2.2 *The literature review***

The second chapter reflects on the literature review regarding child-headed or child and youth-headed households focusing on elements that contribute to challenges associated with these households. The first element is that of a single or a universally accepted definition of these households. The literature maintains that there is no single or universally accepted definition of child-headed or child and youth-headed households. However, different definitions for child-headed households emanate from the one contained by the Children's Act. Nevertheless, this is a challenge for the government to study and provide for these households sufficiently.

The second element is that of the age factor pertaining to the child-headed households as contained in the legislative framework. The Children's Act limits the age of the child heading child-headed households from 16 to 17 years old. Child-headed households headed by children of 15 years old or less are not legally recognised as child-headed households or as alternative care. The legislative framework does not allow social development or welfare services to preserve and strengthen these households if they are headed by children under the age of 16. The maturity of children less than 15 years old is out of context as per the legislative framework. Not even the supervision of an adult is considered an enabling factor for child-headed households to be given legal recognition when headed by a person under the age of 16. This situation is unlike health-related matters where 12-year-old children's maturity is considered valid for them to give consents to major decisions concerning their health or wellbeing.

Furthermore, the legislative framework confines the legal recognition for households headed by people other than adults to child-headed households leaving out those households headed by youth with similar needs as that of disadvantaged children. Thus, a legal recognition is given to child-headed households but not to child and youth-headed households. This creates a conflict of interest because the Children's Act provisions are not limited to children but include youth between the ages of 18 years to 21 years when it comes to remaining in alternative care.

The third element is that of an adult supervisor of the child-headed households. It is a requirement that a legally recognised child-headed household functions under the supervision of an adult designated by the organ of the state. This adult supervision is aimed at a proper cohesion in households headed by children. However, these adults are not foster parents and their duty is not that of foster parents. Adults supervising child-headed households are specifically mandated to assist in administering and collecting grants that children living in child-headed households are entitled to. Their duty includes rendering appropriate advice to the children heading child-headed households. However, the legislation is silent about the registration of these adults to any ethical board as is required for every person working with children. Furthermore, the legislative framework is silent about whether a child who had been a head of a child-headed household can be appointed as an adult supervising his or her household.

The last element discussed is that of social assistance meant for children living in child-headed households. There is no social grant intended solely for children living in child-headed households. However, children from child-headed households are entitled to social grants intended for every disadvantaged child. Nevertheless, this study found

that children from child-headed households normally benefit from a CSG. A FCG is not applicable to children living in child-headed households because the house is headed by a person under the age of 18 and these people are not suitable to foster their younger siblings. The requirement of a foster placement clearly states that a child cannot foster a child. A care dependency grant is only payable to those children with disabilities. Therefore, most child-headed households are excluded from this grant because they do not care for child(ren) with disabilities.

Furthermore, it is discussed that child-headed households are recognised as alternative care. However, every court order placing children in alternative care is complemented by a grant or a subsidy; however, an order placing a child in a child-headed household is not complemented by any grant, leaving children to benefit from a CSG like every child who is not placed in alternative care. Children from this alternative placement experience challenges accessing grants like any other orphan that is not placed in an alternative care placement. The CSG amount is less than the amount of other social grants aimed at disadvantaged children. Consequently, children living in child and youth-headed households receive less income from social assistance. Whilst, the literature maintains that these children are with limited means to generate income thus, exposed to poverty.

### ***6.2.3 The international and regional obligations***

The third chapter reflects on a description of the international and regional law obligations on the South African state in relation to the financial security of child-headed households. This study traces the international obligation for South Africa to ensure social assistance to child-headed or child and youth-headed households from the extension of

the ILO's mandate when it was extended to include social security. Subsequently, the Universal Declaration of Human Rights 1948 provided human rights stipulations including that of the right to social security. A further step was taken when the ILO Convention No. 102 Social Security [Minimum Standards] Convention (1952) provisions included social security for children.

Then, the inception of the United Nations Declaration of the Rights of the Child 1959 was entirely aimed at children's rights including social security. Lastly, the ILO Recommendation No 202 on National Floors of Social Protection 2012 reaffirms the right to social security as a human right. It recognises social security as an important tool that can be used to prevent and reduce social insecurity, social exclusion, poverty and inequality. However, obligations stipulated in these international human rights treaties remain merely persuasive on the state of South Africa because the country never ratified these treaties.

The ICESCR binds the South African state, obligating the country to ensure the right to social security for everyone including those living in poverty. However, the first international legally binding treaty that holistically obligates the South African state to ensure children's rights is the UNCRC. It disseminates its obligations regionally and nationally, obligating state parties to take the necessary measures to ensure the protection of children's rights, including social security.

Regionally, South Africa is a SADC member state. The SADC Treaty holistically seeks to ensure that Member States uphold the SADC's vision and mission. The objectives of the SADC Treaty are simplified and echoed by stipulations of the Social

Charter. The Social Charter obligates Member States, including South Africa, to render social assistance to any person with no means of survival. Then, the Code on Social Security in the SADC remains a non-binding social protection-related instrument that seeks to provide Member States with strategic patterns for development and improvement of social security schemes in SADC countries. It further provides social allowances for the disadvantaged. Lastly, the ACRWC is a legally binding children's rights instrument which, at its inception, was aimed at ensuring the welfare of the African child whilst bridging African countries' underrepresentation during the drafting of the UNCRC. The ACRWC stipulations do not provide for children's right to social security or social assistance. However, the Charter prohibits discrimination against children due to their status whilst obligating Member States to adhere to the UNCRC that obligates state parties to ensure children's rights, including the right to social security.

#### ***6.2.4 The South African legislative and policy framework***

The fourth chapter reflects on the South African legislative and policy framework in relation to social security and any other financial measures provided by the state to meet child-headed households' financial needs. The Constitution of the country contains the Bill of Rights. Children's rights, social security in a form of social assistance and the right to an education are amongst other human rights stipulated in the Constitution. This group of human rights is linked with relevant legislative schemes, policies and programmes in this chapter.

Section 137 of the Children's Act provides for child-headed households. This section provides a definition of child-headed households and further states that it must function under the supervision of an adult designated by the organ of the state. Therefore,



this section reflects a legal recognition of child-headed households whilst section 46(1)(b) recognises these households as a form of alternative care. Section 137 further provides for the right to social assistance to children living in child-headed households, including the administration and collection of grants as some of the duties that adults supervising these households must fulfil.

The Social Assistance Act provides for social assistance to eligible persons. Disadvantaged children benefit from respective children's grants. Children from child and youth-headed households normally benefit from a CSG that is governed by the Child Support Grant Policy. To increase the amount of the CSG, there has been a proposal for a CSG Top-Up since 2015. Eventually, the Social Assistance Amendment Bill of 2020 empowers the Minister to determine additional payments linked to social grants. The Bill is in favour of the CSG Top-Up as proposed in 2015. The implementation of the CSG Top-Up relies on a private entity (SASSA at this stage) that is governed by the South African Social Assistance Act.

The South African Schools Act provides for a School Fees Exemption Policy and the No-Fees Policy that enables underprivileged children to enjoy the benefits of an education without the burden of paying school fees. The Act also provides for a nutrition programme that is governed by the National Policy on Food and Nutrition Security. The nutrition programme known as the National School Nutrition Programme provides underprivileged school children with daily meals during school hours. This programme is highly commended for ensuring nutrition to disadvantaged school children. Another programme that aimed to ensure education to disadvantaged school children is the Learner Transport Programme governed by the School Transport Policy. This programme

is to provide free school transport to disadvantaged children who experience difficulties in reaching school due to the long distances they travel to and from schools. Although this programme is not running as desired, the concerned parties are working on amending the programme for its success.

#### ***6.2.5 The implementation gap between the legislation, policies and relevant programmes***

Chapter Five reflects on the implementation gap between the legislative, policy and other measures for the economic care of children in child-headed households in relation to international and regional law obligations on the South African state. The South African state omitted to report to the CRC committee about the country's progress on child-headed households as it was recommended by the Committee in 2000. The CSG remains a means tested form of social assistance. This means that even children from child-headed households are required to produce documents such as the death certificates of their parents to prove their eligibility for CSG. Despite the fact that children from child-headed households experience poverty and that they lack the documents to prove their status, in 2016, the country reported about barriers hindering disadvantaged children from accessing social assistance to the CRC Committee; however, no reference was made to child-headed households.

Furthermore, South Africa does not have separate policies for child-headed or child and youth-headed households. Children from this alternative care group are categorised as orphans, vulnerable children or both. Notably, the country did not make any progress on the child-headed households' register that was announced by the President in 2016. Only the Social Assistance Amendment Bill 2020 seeks to provide

social grants for children heading child-headed households. Nevertheless, this is only included in the Bill, but nothing has been implemented since these households were given legal recognition in 2010. The Social Assistance Amendment Bill also seeks to increase the efficacy of an independent tribunal that has been utilised as an option rather than a priority.

#### ***6.2.6 The education and nutrition link and scholar transport***

The literature maintains that education and nutrition are interdependent. This means that improved nutrition of school children helps to enhance their academic performance. Nevertheless, the government failed to sustain NSNP during the covid-19 pandemic. This shortfall left thousands of school children hungry and facing the prospect of malnourishment. Another shortfall compromising disadvantaged children's education is the government's failure to successfully implement the Learner Transport Programme although there is a serious need for this programme. These programmes assist vulnerable and poverty-stricken children, like those in child and youth-headed households with accessing the right to education as the grants do not provide for sufficient income to address food security and transport to schools.

#### ***6.2.7 The exclusion of youth-headed household from protection***

Child-headed households are limited to being headed by people under the age of 18. Yet, the Children's Act provides for people of 18 to 21 years to remain in alternative care. In this view, the government has not yet broadened the scope of this alternative care to accommodate youth that is protected by the Children's Act. The legislative framework confines the legal recognition to child-headed households instead of child and youth-headed households.

### **6.3 Recommendations**

A legal recognition of child-headed households as alternative care needs to be reconsidered to allow for the legal recognition of child and youth-headed households in South Africa. This will create a platform for children living in these households to claim their right to social security/social assistance and hold the government liable for the realisation of these rights. This can be enhanced by ensuring that the actualisation and declaration of child and youth-headed households should not rely on the discretion of the welfare services and the head of social development, but made possible by the identification of these households.

It is reflected throughout this study that children from child and youth-headed households are with limited means to generate income and that they are exposed to poverty whilst placed in alternative care. Although, the international and regional law do not make explicit recognition of child and youth-headed households the government needs to pay attention to the 2016 CRC Committee's recommendation of evaluating the impact child-headed households have on children and further pay attention to the 'actual cost' aspects when reviewing the CSG amount intended for the needs of children living in poverty. This CRC Committee's recommendation needs to be considered in the implementation of the CSG Top-Up in favour of child and youth-headed households meaning, a separate 'actual cost' of child and youth-headed households needs to be studied separately from that of other disadvantaged children or children living in different alternative care. This will bring a paradigm shift from the generalisation of financial security of child and youth-headed households.

## **6.4 Conclusion**

Child-headed households are legally recognised as alternative care for disadvantaged children in South Africa. Usually, long-term severe illnesses, migration and deaths of parents and adults result in households without parental figures for children. This leaves older children with the burden of caring for the young children amid their limited means to generate an income. Consequently, child and youth-headed households are found to be experiencing high rates of poverty.

As a member of the international community and as a SADC country, South Africa is obligated to ensure social security/social assistance for people who are unable to provide for themselves and their dependents. Nevertheless, the financial security of child and youth-headed households is not prioritised as that of a separate category of children that are placed in this unique alternative care.

Currently, the Child Support Grant, Foster Care Grant and Care Dependency Grant are social grants provided for disadvantaged children in South Africa. The CSG is the most accessible social grant to child-headed/child and youth-headed households. However, this grant is characterised by being of a lesser amount than that of other social grants aimed for disadvantaged children. Therefore, this is one of the factors that compromises financial security of child and youth-headed households.

Beside social grants aimed at financial security for disadvantaged children, the South African legislative and policy framework also provides for policies such as the School Fees Exemption Policy, No-Fees Policy, the School Transport Policy and programmes such as National School Nutrition Programme in which child and youth-

headed households benefit from their basic needs being met. Nevertheless, none of these policies and programmes are intended specifically for child-headed or child and youth-headed households. Children from these households generally benefit from policies and programmes intended for any underprivileged child in South Africa. Therefore, the South African legislative and policy framework is not designed or positioned to specifically recognise the peculiar needs of children from child-headed or child and youth-headed households as children in alternative care when it comes to financial security, particularly as they do not have other means of generating an income.

This study further reflects on the shortcomings associated with the South African legislative and policy provision of financial security for child and youth-headed households. This study maintains that the term 'child and youth-headed household' broadens the scope of provisions intended for households headed by children or youth that are protected by the Children's Act rather than the limited coverage of the term 'child-headed households'. Nevertheless, legal recognition is given to child-headed households in South Africa.

This study asserts that there is no single academic definition for the term 'child-headed households'. The dominant definition of the child-headed households is contained in section 137 of the Children's Act. This definition leaves welfare services and the head of social development to decide if a household headed by a person under the age of 18 can be deemed a child-headed household. This means that, regardless of child-headed households' existence, these households are not deemed child-headed households if they are not given this status by welfare services together with the head of social development. This element hinders the benefits intended for these households

including financial security. Consequently, persistent poverty remains an issue in these households.

The implementation gap between legislative, policy and other measures for economic care of child-headed or child and youth-headed households remains a challenge in assuring the financial security for these households. Thus, these households remain in poverty. The bridging of these gaps and the rectification of other shortcomings discussed in this study may suffice to ensure enough financial security for child and youth-headed households in South Africa.

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