

# Accessibility of social assistance benefits in indigenous African communities from a South African perspective

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## Background

Deaths caused by AIDS and the escalating rate of unemployment in the adult sector of society impacts dramatically on the degree of poverty<sup>1</sup> and hardships endured by the majority of South African children.<sup>2</sup> Children are increasingly becoming destitute as a result of parents dying of AIDS.<sup>3</sup> Statistics show that by 2010 more than two million children will have been orphaned and will be fending for themselves.<sup>4</sup>

The rate of unemployment is high in South Africa. Statistics show that in 1996, 33% adults of a working age were unemployed. In 2001 this rate had risen to 37% and in 2002 to 41.8%.<sup>5</sup> These statistics of unemployment clearly indicate the degree of poverty under which children of the unemployed live. It is not surprising that six out of ten children grow up in poverty.<sup>6</sup>

Because South Africa has a diverse profile of children living in poverty, it is essential that mechanisms aimed at curbing poverty take into account the various profiles of such children and the circumstances under which they live. Sensitivity to such diversity should be manifested in the manner in which issues of children and poverty are legislated. An analysis of the extent in which child care and social assistance legislation embrace the diverse scope of South African children will be given, looking at how social assistance grants are accessible to benefit such children.

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1 Research shows that between 10 and 14 million children live in deep poverty; see Cassiem & Streak (2001).

2 See Sloth-Nielsen (2003), who describes the nature of the problem caused by HIV and AIDS on the lives of South African children.

3 (ibid.).

4 (ibid.:1).

5 ACCESS (2003).

6 Van Bueren (1999). See also ACCESS (2005).

Until 1983, legislation<sup>7</sup> on protection of children was formulated for the benefit of mainly<sup>8</sup> white children. Very few grants provided under the Child Protection Act reached African parents, let alone those living in rural areas.<sup>9</sup> The enactment of the Child Care Act<sup>10</sup> in 1983 was prompted, amongst other things, by the need to address the inequities that were in the Child Protection Act.<sup>11</sup>

The statutory framework regarding the protection of children is set out in the Constitution<sup>12</sup> and in a number of instruments to which South Africa is a party. Section 28 of the Constitution makes provision for rights relating to children. Rights guaranteed in this section include: the right to family care or parental care or to appropriate alternative care when removed from the family environment;<sup>13</sup> the right to basic nutrition, shelter, basic health care services and social services;<sup>14</sup> the right to be protected from maltreatment, neglect, abuse or degradation.<sup>15</sup>

Furthermore, section 27 provides that everyone has the right to have access to: health care services;<sup>16</sup> sufficient food and water;<sup>17</sup> social security, including appropriate social assistance if they are unable to support themselves and their dependants.<sup>18</sup> Section 27(2) further provides that the state has a duty to take reasonable legislative and other measures within available resources to achieve the progressive realisation of each of the rights contained in section 27(1).<sup>19</sup>

Instruments on child care that South Africa has signed include the Convention on the Rights of the Child (CRC) ratified in 1995 and the African Charter on the Rights and Welfare of the Child ratified in 2002. In terms of CRC every child has the right to social security benefits. The states parties are obliged to take necessary measures to achieve the full realisation of this right in accordance with their domestic laws.<sup>20</sup> The CRC further affords every child the right to a standard of living adequate for his or her physical, mental,

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7 The Act applicable at the time was the Child Protection Act, 1913 (No. 25 of 1913).

8 Coloured children also benefited from this legislation. African women were largely excluded from accessing the SMG. An African woman was eligible for this means-tested grant if she has applied for financial support from her partner or the father of her children through a magistrate's court, and has been unable to get it; or if she was widowed or deserted. See Republic of South Africa (1996).

9 Liebenberg & Tilley (1998).

10 No. 74 of 1983.

11 SALC (2002:73).

12 Constitution of the Republic of South Africa, 1996.

13 Section 28(1)(b).

14 Section 28(1)(c).

15 Section 28(1)(d).

16 Section 27(1)(a).

17 Section 27(1)(b).

18 Section 27(1)(c).

19 *Grootboom v Oostenberg Municipality*, 2000 (3) BCLR 277 (C).

20 Article 26(1), CRC; see also Manamela (2004).

spiritual, moral and social development.<sup>21</sup> The overriding principle of the CRC is that all actions concerning a child must always have the best interests of such child as a primary consideration.<sup>22</sup> Some of the important provisions of the CRC include the following: children must not be separated from their parents, except by competent authorities for their well-being; parents have the primary responsibility for a child's upbringing, but states are required to provide them with appropriate assistance and develop child-care institutions; states shall provide parentless children with suitable alternative care. The adoption process must be carefully regulated and international agreements must be relied upon and assure legal validity if and when adoptive parents intend to move a child from his or her country of birth.

The African Charter on the Rights and Welfare of the Child mandates similar rights for children as the CRC.<sup>23</sup> Standards prescribed by the said instruments require exploitation of domestic laws in securing the best interests of a child. Indigenous African law is a recognised legal system in South Africa and therefore part of such domestic laws. Like any other law, indigenous African law ought to be explored and enforced for the benefit of a child whose interests are at stake.

Certain provisions entrenched by the instruments, particularly the provision in the CRC, that states shall provide parentless children with suitable alternative care is significant because an alternative child care structure within a South African context dictates the type of social assistance grant accessible to the child.

One of the functions of the Child Care Act, as 'mother' legislation on matters concerning a child, was to enforce the provisions of the Constitution and of the conventions ratified by South Africa. The adequacy of the Child Care Act in carrying out the mandate has been questioned, hence its review by the South African Law Reform Commission.<sup>24</sup> A shortcoming of the Child Care Act is that it is not flexible enough to accommodate the diverse needs of South African children in that it does not adequately respond to the emerging socio-economic challenges and the impact these challenges have on children. For instance vast numbers of children are left parentless owing, amongst other things, to AIDS.<sup>25</sup> This state of affairs compels these children to become heads of households.

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21 Article 27(1), CRC.

22 Manamela (2004).

23 African Charter on the Rights and Welfare of the Child (1999). Article 1 provides that the Charter is not permitted to affect State Party laws which are more conducive to the realisation of the rights and welfare of the child. Article 25 provides that any child who is permanently or temporarily deprived of his family environment for any reason is entitled to special protection and assistance. Article 25 further provides that such child be provided with alternative care.

24 SALC (2002:73–74).

25 SALC (2002:215).

The review of the Child Care Act gave rise to the Children's Act<sup>26</sup> and the Children's Amendment Act.<sup>27</sup> The Children's Act is expected to adequately assimilate the principles contained in the Constitution pertaining to children, international instruments ratified by South Africa and legislation on social security.<sup>28</sup> Certain improvements in the new Children's Act and Children's Amendment Act can already be noted. For instance, unlike the Child Care Act, the new Children's Act and the Children's Amendment Act give detailed provisions on foster care and other forms of alternative care. The various alternative care options are individually provided for and not interlinked with each other as is the case in the Child Care Act.<sup>29</sup> The Children's Amendment Act makes reference to child-headed households.<sup>30</sup> Circumstances compel some children to become heads of households or live under the care of people other than their parents. The Child Care Act does not make provision for child-headed households. Such conditions need to be dealt with because they have become a reality in the lives of some children.

Despite the fact that indigenous African law is a recognised legal system and that there is a significant proportion of the South African population that is governed by such law,<sup>31</sup> indigenous African law is not part of the basis upon which social security law and law relating to children is founded. This position puts children who live in alternative child care structures, typical of indigenous African people at a disadvantage. The current legal framework in South Africa makes classification of the alternative child care structures relevant for the purposes of accessing the correct social grant. At present, the different indigenous African child care structures are not recognised in social assistance legislation, as a result children in these alternative child care systems cannot enjoy appropriate benefits derived from such legislation.

### **Child care structures and social assistance benefits**

The government is playing a distinctive role in eradicating poverty and providing a safety net for the poor. It has phased out the state maintenance grant (SMG) which had three major shortcomings. Firstly, it was accessible mainly to white people; secondly, the family model upon which it operated did not represent the meaning of family as understood in indigenous African communities; thirdly, it was not aligned with the needs of African children and the conditions in which they live.

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26 The Children's Act, 2005 (No. 38 of 2005) was signed by the President on 8 June 2006, though only certain provisions have come into operation.

27 The Children's Amendment Act, 2007 (No. 41 of 2007) was passed by Parliament in November 2007, and the President signed it into law in March 2008.

28 Namely, the Social Assistance Act, 2004 (No. 13 of 2004) and the South African Social Security Agency Act, 2004 (No. 9 of 2004).

29 See Chapter 11, Children's Amendment Act.

30 Section 137, Children's Amendment Act.

31 De Koker et al. (2006).

The government has since introduced various social assistance grants aimed at benefitting a spectrum of society regardless of race.<sup>32</sup> These include the grants for old age, disability, child support, foster care, care dependency and war-veterans. For the purposes of this discussion attention will be paid to grants aimed at children. These grants are: the Foster Care Grant (FCG), the Child Support Grant (CSG) and the care dependency grant. The care dependency grant is not relevant for the purposes of this discussion and will, therefore, not be discussed.

In this discussion it will be argued that despite interventions to reach as many children living in poverty, there are still children who cannot adequately benefit from social assistance grants owing to specific qualifiers in legislation which determine when a child may benefit from such grants. African indigenous child care structures are not adequately recognised in our legal system and as a result, children who live within these indigenous structures cannot fully enjoy social assistance benefits as stipulated in legislation.

### **Child Care and the Child Support Grant (CSG)**

The CSG is provided for in sections 4 and 6 of the Social Assistance Act. It is payable to a needy primary caregiver of a child for the benefit of that child. The aim of the CSG is to support primary caregivers of children by making a contribution to supplement their resources to use towards providing for the adequate growth and development of children.<sup>33</sup>

The meaning of a primary caregiver is not restricted to the biological parent of a child, it includes a person related and not related to the child, who is responsible for meeting the daily needs of such child.<sup>34</sup> Therefore members of extended families who are primary caregivers of a child can apply for the CSG to help children in their care.

To qualify for the grant, the primary caregiver is required to meet the income-based criteria set in the means test.<sup>35</sup> Further, both the primary caregiver and the child must be resident in South Africa at the time of the application for the grant and they must both be South African citizens.<sup>36</sup> The grant is payable to an unlimited number of one's biological children but it is limited to six non biological children living with the primary caregiver.<sup>37</sup>

In the CSG and Foster Care Grant (FCG) there are discrepancies in terms of monetary value of the grant and age of the beneficiaries. These discrepancies are currently being

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32 Chapter 2, Social Assistance Act.

33 Meintjes et al. [n.d.]; see also Goldblatt & Liebenberg (2004).

34 Section 1, Social Assistance Act.

35 Regulation 6(1)(b), Social Assistance Regulations, *Government Gazette* 31356.

36 Section 4(b), Social Assistance Act. See also *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

37 Regulation (1)(a); see also Footnote 36.

addressed.<sup>38</sup> Although the current position is that only children up to the age of 14 years can benefit from the CSG, there is a strong lobby for the extension of the grant to children up to the age of 18 years.<sup>39</sup> Monetary discrepancies between the two types of grants still remain.<sup>40</sup>

## **Foster Care and the Foster Care Grant**

In the Child Care Act a foster child is defined as any child who has been placed in the custody of any foster parent in terms of chapter three or six of the Act or in terms of section 290 of the Criminal Procedure Act.<sup>41</sup> A foster parent means any person, except parent or guardian, in whose custody a child has been placed.<sup>42</sup> Although fostering as a concept is not defined and not provided for in great detail in the Child Care Act, the Act does provide that a Children's Court has the jurisdiction to make orders for foster care<sup>43</sup> and adoption.<sup>44</sup> The Child Care Act also gives detailed information about institutions for children, including places of care, places of safety and children's homes.<sup>45</sup> Chapter 6 makes special provisions for custody matters regarding pupils and foster children, and transfer of such children from one custodian or institution to another.

In the Children's Amendment Act foster care results from a court-order. In terms of the Act if a child that is found to be in need of care and protection, that is, if the child has no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child, the court may order that such child be placed in foster care with a suitable foster parent.<sup>46</sup> Foster care is, therefore, one of the options for alternative care.<sup>47</sup> The Children's Amendment Act explains foster care as care for a child who has been placed in the care of a person who is not a parent or guardian of the child as a result of an order of a children's court; a transfer in terms of section 171; or discharge in terms of section 175.<sup>48</sup> Unlike the Child Care Act, the Children's Amendment Act<sup>49</sup> is more explicit on what foster care entails.

The provisions of section 175 and section 186 of the Children's Amendment Act may be interpreted to mean that the placement of a child in foster care is a temporary

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38 Until March 2003, the CSG was paid for children aged 0–7. This position has since changed and the CSG is now payable to children up to the age of 14 years. The FCG is payable up until the child turns 18. See also Van Rensburg (2005).

39 See ACESS (2003).

40 The CSG is R240 a month and the FCG is R680 a month. See SASSA (2009).

41 Section 1.

42 Section 1.

43 Section 15(1)(b).

44 Section 18(1)(a).

45 Chapter 5.

46 Section 156(1)(e)(i), Children's Act.

47 Section 167, Children's Amendment Act.

48 Section 180.

49 Chapter 12.

arrangement that can be terminated by the children's court when deemed to be in the best interests of the child.<sup>50</sup> Section 189 (2)(c)(i) however provides that before foster care can be terminated, one of the factors that the court must take into account are the prospects of achieving permanent care for the child by allowing such child to remain permanently in foster care with the foster parent. The court's decision on whether foster care should be terminated or not, rests primarily on what is in the best interests of the child. It is, however, important to emphasise that unlike the case of adoption, foster care is not meant to be a permanent placement of a child. Should the court deem it fit and in the child's best interests that the child remains with foster parents permanently, the normal procedure for adoption should follow.<sup>51</sup>

Once a child has been found to be in need of care in terms of section 14(4) of the Child Care Act and has been placed in the care of a foster parent, a foster parent becomes eligible to apply for a FCG in terms of the Social Assistance Act.<sup>52</sup>

To qualify for a FCG, the foster parent and the child must be resident in South Africa at the time of the application.<sup>53</sup> The FCG is payable until a foster child turns 18. In comparison to the CSG, the amount of money received under the FCG is much higher and the monetary benefit received under the FCG can last longer than that received under the CSG.

### **Adoption and Social Assistance**

Adoption is a process through which substitute family care is provided for a child whose natural parents are unable or unwilling to provide such care for the child.<sup>54</sup>

In the Children's Act<sup>55</sup> the purposes of adoption are:

- to protect and nurture children by providing a safe, healthy environment with positive support; and
- to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.

In the Child Care Act such purposes are interlinked with the factors that have to be satisfied before an application for adoption may be granted.<sup>56</sup> They are not as clearly stated as they are in the Children's Act.

Chapter four of the Child Care Act deals with adoptions. It lists people who are suitable to adopt<sup>57</sup> and the requirements that must be met before an application for adoption can be

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50 Meintjes et al. ([n.d.]:6).

51 Section 231(1)(e), Children's Act.

52 Regulation 7(a), Social Assistance Regulations, *Government Gazette* 31356.

53 Regulation 7(c), Social Assistance Regulations, *Government Gazette* 31356..

54 SALC (2002:2).

55 Section 229.

56 Section 18(4).

57 See section 17.

successful.<sup>58</sup> The first requirement that needs to be satisfied for adoption is noteworthy. It provides that the applicant must have adequate means to maintain and educate the child.<sup>59</sup> This provision has serious implications for prospective parents who do not have adequate financial resources but are capable of providing an intimate and stable environment for the child. Further, this requirement impacts negatively on prospective adoptive children whose financial needs could be supplemented through social grants that are provided by the government.

However, this position has been changed by the Children's Act. The Children's Act provides that a person may not be disqualified from adopting a child by virtue of his or her financial status.<sup>60</sup> The Act further provides that any person who adopts a child may apply for means-tested social assistance where applicable.<sup>61</sup>

### **Informal Kinship Care Grant and Court-ordered Kinship Care Grant**

*Kinship care* can be defined as a living arrangement in which children do not live with either of their parents are cared for by a relative or someone with whom they had a prior relationship.<sup>62</sup> As one will see in the discussion below, relying on extended family members for support in child rearing is a common phenomenon in African indigenous communities.<sup>63</sup> However, inadequate support, statutory and otherwise, of this alternative child care system has put children living in this structure at a disadvantage. At present, there is no formal support for kinship child care structures in our legal system. The South African Law Reform Commission in its report recommended the introduction of the court-ordered kinship care grant and the informal kinship care grant.<sup>64</sup> As a result, the Children's Act defined kinship care.

The Children's Bill<sup>65</sup> defined informal kinship care as an informal arrangement that is made outside court, in terms of which a relative, who is not the parent or guardian of a child, cares for the child. The informal kinship care grant would be payable to the relative of the child who cares for such child and it would be subject to a means test.<sup>66</sup> This grant will, however, not be payable if the child receive the CSG.

The court-ordered kinship care grant was also proposed. In terms of section 198(2) of the Children's Bill, a child is in court ordered kinship care if the child has, in terms of a

58 See section 18(4).

59 See section 18(4)(a).

60 Section 231(4).

61 Section 231(5). The adoption care grant has not been implemented yet. The SALRC recommended that the adoption care grant be equal to the foster care grant. See Meintjes et al. [n.d.]; see also Goldblatt & Liebenberg (2004).

62 Geen (2004).

63 (ibid.).

64 SALC (2002:334).

65 See SALRC Bill, 2003.

66 SALC (2002:230).



court order, been placed in the care of a relative who is not a parent or guardian of the child. The court ordered kinship care grant would be payable to the kinship caregiver of the child or, if the kinship caregiver is not the primary caregiver of the child, to the primary caregiver.

The rationale for the introduction of the court-ordered kinship care grant was to overcome problems that some primary caregivers, who are related to the child, face in trying to access the FCG. It is said that there is reluctance by some commissioners of child welfare to authorise foster care where a child lives with a relative. This is based on the assumption that the child concerned is not considered to be a child in need of care. In terms of the proposed court-ordered kinship care grant, relatives who are primary caregivers of children may qualify as recipients of this grant when the court formally orders the placement of children in their care. It is, however, important to note that the proposed provisions on kinship care and kinship grant were omitted in the final legislation.

## **Child care in indigenous African law**

In indigenous African communities there are alternative child care structures which are similar to adoption and foster care as provided for in legislation. Similar to adoption, is a process where one family agrees to give a child to another family, and the latter family receives the child as its own. The process of transferring the child from one family to the other is normally marked by reporting the matter to a traditional leader followed by a celebration.<sup>67</sup> The child may be transferred from one family to another for a number of reasons, including safeguarding the interests of the child, in the case where the biological parent(s) of such a child cannot maintain him or her and acquiring an heir by a person who does not have children of his or her own.<sup>68</sup> A system that is similar to foster care as provided in legislation, is when a child is temporarily sent by its family to live with a relative for various reasons which are not limited to the child being in need of care. A child may be sent to live with a relative in order to assist such a relative in the daily household activities.<sup>69</sup> It is, however, important to note that alternative child care structures in indigenous African communities are not always as easy to define because emphasis is on providing alternative care for the child rather than defining the system which provides such care. Some of the child care structures which are compromised because they are not defined in the legislation are mentioned below.

Generally, in indigenous African communities the responsibility of caring for children in need of care, particularly orphans, fell on other family members and various people in the community.<sup>70</sup> Members of the extended family and other members of the community play a prominent role in providing care for such children.<sup>71</sup> Notably, people who assumed

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67 Maithufi (2001).

68 (ibid.:392).

69 Bennett (1991).

70 Doctor (2004).

71 Chirwa (2002); see also Sloth-Nielsen (2003).

the responsibility of caring for such children assumed the various facets of the parental role,<sup>72</sup> as would a parent who has obtained an adoption order. The difference is that the indigenous African child care system does not always follow as a result of a court order as is the case is when a family obtains an adoption order or fosters a child in terms of the legislative provisions. Also, the time-frames in terms of which a child will remain in the alternative care structure, are not as readily determinable as the case is with legislative foster care.

There are different forms of extended families in indigenous African communities that are of particular significance in providing alternative care for children in need. A typical example of a family structure which provides alternative care for a child is that of aunts and uncles taking in a child in need of care. It is also common for grandparents to assume the responsibility of caring for children in need of care.<sup>73</sup> Another example of an extended family occurs when siblings, particularly brothers, choose to live together under the headship of a senior brother. This type of extended family usually arises when one of the brothers is a minor, or at least unmarried at the time of the death of his parents and is thus dependent upon his older brother.<sup>74</sup>

Communal structures, within which children in need of care can benefit, are borne from the principle of collective solidarity. Collective solidarity is a prominent characteristic of a typical indigenous African community. In an ideal situation, members of a community carry each other's burdens and they are a primary context in which the economic interests and psychological well-being of others are fostered.<sup>75</sup> It may be said that this quality of solidarity and communal way of living has its roots in the manner in which families were traditionally organised. People of the same '*isibongo*'<sup>76</sup> and later on even affiliates<sup>77</sup> of the people with the same *isibongo* lived in close-knit communities and regarded themselves as part of one another. Affiliation of this nature is found in the phenomenon of multiple fatherhood and motherhood. If for instance one calls a man his father, even if that man is not his biological father, the consequences of a father and a biological child will follow. One will rely on the man the way any other son would. One will have to call the man's children brother or sister and marriage between them will be prohibited.<sup>78</sup>

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72 Pakati (1992). Orphaned children are not the only example of children cared for by family and relatives, communities had systems in place to care for other children in need of care. See Moeno (1969).

73 Goldblatt et al. (2004:155); see also Maithufi (2001:392).

74 Hammond-Tooke (1974).

75 Ajayi (1982).

76 Literally translated, *isibongo* means "surname". It is, however, important to note that from the surname, secondary surnames, called *izithakazelo* in *isiZulu*, exist. Such secondary surnames are also significant in establishing relations because people with the same surname or secondary surname are related.

77 Ajayi (1982).

78 Afolayan (2004); see also Hammond-Tooke (1993).

Although black people, particularly those who live in urban areas, generally no longer live in the traditional family and communal organisations, this traditional way of living is still recognised in principle. Rural dwellers are generally traditional and still live in accordance with this type of organisation.

Yet, with the prevalence of unemployment and HIV/Aids, these support structures are strained and can no longer sustain the increasing volume of children in need of care.<sup>79</sup>

Our current legal framework makes classification of the alternative child care structures relevant for the purposes of accessing the correct social grant. At present, the different indigenous African child care structures are not recognised in social security legislation, as a result children in these alternative child care structures cannot enjoy appropriate benefits derived from such legislation. Of course, benefits such as the Child Support Grant may be accessible to children cared for under such structures, this position however does not explain the omission of the Foster Care Grant from the list of benefits for such children. The need to treat adoption effected by legislation and adoption under indigenous African law as parallels may become relevant for the purposes of accessing the adoption grant.<sup>80</sup>

## **Recommendations and conclusion**

South Africa has an obligation to enforce international conventions to which it is a signatory and to advance the provisions of the Bill of Rights. Legislative formulation which promotes such obligations is therefore essential. Social assistance benefits aimed at benefitting children play a huge role in alleviating poverty. They are, therefore, of great use to people who can access them. However there is a need to ensure that our child care legislation in South Africa is adaptable so as to address the socio-economic challenges that South African children face.<sup>81</sup>

The above discussion shows that the different types of alternative care systems are not properly positioned and therefore cannot afford optimal benefit to potential beneficiaries.

Some of the shortcomings of the South African child care system as it stands in the Child Care Act and as initiated in the Children's Amendment Act are the following:

The legal processes of fostering and adopting a child are complex and are not inherent to indigenous African communities. Indigenous African people continue to provide alternative child care through their own traditional systems. This view is supported by the findings of the research conducted by the South African Law Commission. It found that there is a probability that in the majority cases, children in substitute family care do

79 Sloth-Nielsen (2003:15).

80 The adoption grant is under consideration; see SALRC Bill, 2003.

81 See Dlomo (2004).

not go through the children's court enquiry, but are simply absorbed into the extended family system.<sup>82</sup> The challenge is, however, that this child care system is not sufficiently supported through legislative measures and as a result barely survives under the harsh economic conditions.

The process of absorbing children into the extended family system, as stated earlier, is not always defined in terms of legislation. In this process the focus is on affording care to children who are destitute. It is not always a concern to determine the legislative terms of taking these children into such care. As the indigenous African care system may not always fall within the parameters of the alternative child care systems recognised by legislation, children taken in under this system are deprived of benefiting from appropriate social grants. While the CSG is accessible to every primary caregiver of a child who is below the age of 15 and who is need of financial support, the FCG, which is higher in amount than the CSG, is only available for the benefit of children who have been placed in foster care in terms of a court order. The CSG is an obvious option for children living in indigenous African child care structures. Such children cannot enjoy the optimal benefits as they would if the FCG was accessible to them.<sup>83</sup> The proposed court-ordered kinship grant was meant to ensure that caregivers, who cannot benefit from the FCG, benefit from the court-ordered kinship care grant. Although this intervention is positive and welcome, the complex court processes that indigent caregivers in traditional communities cannot identify with create a barrier in accessing this type of a grant.

A suggested approach for efficient administration of social grants in the indigenous African care system is not to attempt to define the type of care system the child is in, particularly because even within the existing alternative child care systems that are regulated by legislation, monetary discrepancies which exist cannot be adequately justified.<sup>84</sup> An attempt, therefore, should be made to assess the needs of a child within the care structure and award a grant in accordance with those needs.<sup>85</sup>

Traditional leaders<sup>86</sup> may be mandated to play an active role in assisting potential beneficiaries access social assistance benefits. They can effectively assess the needs of children who are in indigenous African child care structures and make recommendations to appropriate authorities on how those needs can be met. They can play a positive role

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82 SALC (2002:73).

83 SASSA (2009).

84 Where a child is in foster care, continuation of payment of a FCG grant is possible where for instance a child has reached the age of 18 but is still at school. Such benefit for instance is not applicable where a child benefits from a CSG.

85 Goldblatt et al. (2004:153–154).

86 Section 19 of the Traditional Leadership and Governance Framework Act, 2003 (No. 41 of 2003) provides that a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned. Section 20(1) further provides that the national government or a provincial government, as the case may be, may, through legislative and other measures, provide a role for traditional councils or traditional leaders in respect of, amongst other things, welfare and economic development.

in inhibiting possible abuse of the system by monitoring and facilitating these processes. Traditional leaders are the closest authorities to people at the grassroots.<sup>87</sup> Therefore they are suitable people to carry out this task as they have a direct relationship with the communities which they lead.<sup>88</sup>

In one of his addresses the former premier of Mpumalanga said “through partnership with traditional leaders, access to grants and social security pension have improved in Mpumalanga”. The offices of traditional authorities are being used as service points with trained permanent staff available to assist grant applicants.<sup>89</sup> This shows that there is some recognition of the role played by traditional leaders in promoting accessibility to social grants. Clearly traditional leaders are already playing a significant role in processes of accessing social assistance benefits. They can continue to play a meaningful role aligned with the recommendations made in this discussion.

Counsellors may be mandated to play a similar role to traditional leaders to assist caregivers of children residing in semi-urban and urban areas.

The government’s efforts in curbing poverty in South Africa are commendable. It is however essential that the government takes a further step of ensuring that the various child care structures that exist in indigenous African communities are recognised and provided for in legislation. The recognition of the said structures will not only benefit children cared for within these structures, but will also endorse the status of indigenous African law that it enjoys as a recognised legal system.

## References

- ACCESS/Alliance for Children’s Entitlement to Social Security. 2003. *Submission on the Social Assistance Bill, 22 September 2003*. Available at [http://access.org.za/home/index.php?option=com\\_content&task=view&id=26&Itemid=34](http://access.org.za/home/index.php?option=com_content&task=view&id=26&Itemid=34); last accessed 6 November 2009.
- ACCESS/Alliance for Children’s Entitlement to Social Security. 2005. *Submission to the Department on the Regulations in terms of the Social Assistance Act 13 of 2004, 14 March 2005*. Available at <http://access.org.za/home/images/stories/3%20projects%20and%20campaigns/2%20promoting%20comprehensive%20social%20security/3%20all%20poor%20children/2%20submissions%20and%20commentary/Submission-DOSD-on-Social-Assistance-Act.pdf>; last accessed 6 November 2009.
- Ajayi, J. 1982. “Solidarity in African societies in crisis”. In International Institute for Labour Studies. *Towards solidarity in the management of African societies: Misgivings and certitudes*. Geneva: The institute, pp 8–9.
- 
- 87 Osaghae (1997:110).
- 88 Fortes (1940:44).
- 89 Address by Premier NJ Mahlangu at the opening of the Mpumalanga legislature, Riverside Government Complex, 13 February 2004. Available at <http://www.info.gov.za/speeches/2004>; last accessed 1 October 2009.

- Afolayan, F. 2004. *Culture and customs of South Africa*. Cape Town: Greenwood Press.
- Bennett, TW. 1991. *A sourcebook of African customary law in southern Africa*. Cape Town: Juta.
- Cassiem, S & J Streak. 2001. *Budgeting for child socio-economic rights: Government's obligations and the child's right to social security and education*. Cape Town: Institute for Democracy in Africa.
- Chirwa, W. 2002. "Social exclusion and inclusion: Challenges to orphan care in Malawi". *Nordic Journal of African Studies*, 11(1):100.
- De Koker, C, L de Waal & J Vorster. 2006. *A profile of social security beneficiaries in South Africa*. Stellenbosch: Department of Sociology and Social Anthropology, University of Stellenbosch.
- Dlomo, N. 2004. *Strategies for socio-economic empowerment of traditional leaders*. Master's thesis, Rand Afrikaans University. Available at <http://ujdigispace.uj.ac.za:8080/dspace/handle/10210/1239>; last accessed 6 November 2009.
- Doctor, H. 2004. "Parental survival, living arrangements and school enrolment of children in Malawi in the era of HIV/AIDS". *Journal of Social Development in Africa*, 19(1):32.
- Fortes, M (Ed.). 1940. *African political systems*. Oxford: Oxford University Press, p 44.
- Geen, R. 2004. "The evolution of kinship care policy and practice". *The Future of Children*, 14(1):132.
- Goldblatt B & S Liebenberg. 2004. "Giving money to children: The state's constitutional obligations to provide child support grants to child headed households. *South African Journal on Human Rights*, 20:152.
- Hammond-Tooke, WD (Ed.). 1974. *The Bantu-speaking peoples of Southern Africa*. Boston: Routledge & K Paul.
- Hammond-Tooke, WD. 1993. *The roots of black South Africa*. Johannesburg: Jonathan Ball Publishers.
- Liebenberg, F & A Tilley. 1998. "Poverty and inequality hearings, social security theme". Unpublished background paper for SANGOCO, the South African Human Rights Commission and the Commission for Gender Equality, 28 April.
- Maithufi, I. 1993. "Adoption according to customary law – *Kewana v Santam Insurance Co. Ltd* (4) SA (Tk) Followed". *De Jure*, 1(34):391.
- Manamela, T. 2004. "Children in poverty and child benefits in South Africa". *South African Public Law*, 19:161.
- Meintjes, H, Budlender, D, Giese S and Johnson L. [n.d.]. "Children in 'need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic". *Joint Working Paper of the Children's Institute and Centre for Actuarial Research*. Cape Town: University of Cape Town.
- Moeno, S. 1969. "The urban African family disorganisation with special reference to the problem of illegitimacy". Unpublished Master's thesis, University of South Africa.

- Osaghae, E. 1997. "The role and functions of traditional leaders and indigenous groups in Nigeria". In De Villiers, B (Ed.). *The rights of indigenous people: A quest for coexistence*. Pretoria: Human Sciences Research Council.
- Pakati, E. 1992. "Trends in adoption behaviour in the African family and the role of social work". Unpublished doctoral thesis.
- Republic of South Africa. 1996. *Report of the Lund Committee on Child and Family Support*. Available at <http://www.info.gov.za/otherdocs/1996/lund.htm>; last accessed 4 November 2009.
- SALC/South African Law Reform Commission. 2002. *Project 110: Review of the Child Care Act*. Pretoria: SALC.
- Sloth-Nielsen, J. 2003. "Too little? Too late? The implications of the *Grootboom* case for state responses to child-headed households". *Law, Democracy and Development*, 7(1):113–136.
- SASSA/South African Social Security Agency. 2009. *You and your grants 2009/10*. Available at [www.sassa.gov.za](http://www.sassa.gov.za); last accessed 5 November 2009.
- Van Bueren, G. 1999. "Alleviating poverty through the Constitutional Court". *South African Journal on Human Rights*, 15:52–74.
- Van Rensburg, LJ. 2005. "Xhosa and Mahlaule case – Opening the door for the inclusion of all children in the child support grant?". *South African Public Law*, 20:103–130.

