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## Committee Report No 3

### ***Constitutional framework of Social Security in South Africa: regulation, protection, enforcement and adjudication***

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#### **A. The Protection of the Right to Access to Social Security**

##### **3.1 Introduction**

Fundamental reform of South Africa's social security system aims to redress past injustices, particularly our legacy of poverty and inequality. This approach is in accordance with the provisions of the Constitution of the Republic of South Africa 108 of 1996.<sup>1</sup> For the first time in South Africa's history, the Constitution compels the state to ensure the "progressive realisation" of social security. Section 27 of the Constitution clearly and unambiguously commits the state to develop a comprehensive social security system. It affirms the universal right to social security, including appropriate social assistance<sup>2</sup> for those unable to support themselves and their dependants, mandating the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>3</sup>

The Constitutional Court has acknowledged on several occasions that socio-economic rights are in fact justifiable.<sup>4</sup> The critical question is how these rights can be adjudicated. The Constitution imposed obligations on all spheres of the state to realise the right to social security, and the Constitutional Court has affirmed that many aspects of the socio-economic rights included in our Bill of Rights are justifiable.

The chapter is divided into three parts. The first part deals with the protection of the right to access to social security and covers the following issues:

- The status and impact of the Constitution
- Aims and values underpinning the Constitution
- A human rights-based approach
- Some constitutional decisions in the area of social security
- Guiding principles when redesigning the South African social security system: a constitutional perspective
- An enhanced role for the Human Rights Commission (HRC)
- What is meant by social security from a constitutional perspective
- The constitutional duty to respect, protect, promote and fulfil rights relating to social security
- Limiting social security rights
- Interpreting social security rights
- The role of the courts as enforcement mechanism

- Co-operative government and public service conduct
- Administrative justice and the need for a uniform social security adjudication system
- Non-citizens
- The impact of the equality provision
- The impact of the right to property
- The impact of the right to privacy.

The second part focuses on constitutional competencies (powers) and duties, and covers the following:

- Spheres of competencies and the relationship between the spheres
- National, provincial and local government competence
- The application of the Bill of Rights to the state and to social security laws
- Private institutions, NGOs, CBOs and public institutions and social security delivery

The final part deals with conclusions and recommendations.

### **3.2 Status and impact of the Constitution**

Section 2 of the Constitution<sup>5</sup> expresses the role the Constitution is meant to play with regard to social security regulation, policy-making and administrative practice. It states that the Constitution is the supreme law of the country; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Constitutional supremacy has therefore effectively replaced the notion of parliamentary sovereignty, in terms of which parliament could enact laws which discriminated against people and allowed for serious human rights abuses.<sup>6</sup>

The state is obliged to conform to the rights contained in its Bill of Rights, as they are said to bind the legislature, the executive, the judiciary and all organs of state,<sup>7</sup> as well as, to the extent foreseen by the Constitution,<sup>8</sup> natural and juristic persons. As documented in the discussion below,<sup>9</sup> the courts have not hesitated to enforce the supremacy of the Constitution in the area of social security in circumstances where its prerequisites have not been adhered.

The assumption can be made that South Africa is a social state.<sup>10</sup> The preamble to the Constitution states that the Constitution as the supreme law of the Republic aims to heal the divisions of the past and establish a society based on democratic values and to improve the quality of life of all citizens and free the potential of each person. The cornerstone of a social state is a comprehensive social security system.<sup>11</sup> The wording of the preamble of the Constitution implies that the state has the intention of creating a comprehensive social security system.

### 3.3 *Aims of and values underpinning the Constitution*

Due to the devastating effects of the apartheid regime on the quality of life of many people in South Africa, and their enjoyment of socio-economic rights, the overarching aims of the Constitution are to heal the injustices of the past, to ensure social justice, to improve the quality of life for all South African citizens (*inter alia* by alleviating poverty and suffering) and to free the potential of each citizen.<sup>12</sup>

In various sections<sup>13</sup> of the Constitution reference is made to fundamental values that underpin the objectives and aims of the Constitution. These values, especially in the South African context, play an important role as far as the interpretation of the fundamental rights is concerned. In fact, the Constitutional Court has often reiterated that the meaning of the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses, and that the Constitution endeavours to bring about reconciliation and reconstruction.<sup>14</sup>

Courts, tribunals and forums are further compelled by the Constitution, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>15</sup> “There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of Rights. The realisation of these rights is also critical to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”<sup>16</sup> The universal aim and basis for the existence of social security rights and other social rights pertaining to poverty is to protect a person’s right to human dignity.<sup>17</sup> Human dignity thus as a fundamental constitutional value<sup>18</sup> as well as a fundamental right<sup>19</sup> contained in the Bill of Rights plays a very important role with regard to social rights pertaining to the alleviation of poverty, and the equal treatment of those who are historically deprived.<sup>20</sup>

*Ubuntu* or group solidarity has been recognised by the Constitutional Court as a constitutional value. An outcome of solidarity is the prevention of social exclusion. By way of social security measures and other measures aimed at the alleviation of poverty a person can be placed in a position to still fulfil his/her role in society with dignity.<sup>21</sup> The International Labour Organisation (ILO)<sup>22</sup> describes the importance of solidarity as follows: “It is not possible to have social security, worthy of the name, without a consciousness of national solidarity and perhaps—tomorrow—international solidarity. The effort of developing social security<sup>23</sup> must therefore be accompanied by continuous effort to promote this crucial sense of shared responsibility.”

For a number of reasons, the consciousness of solidarity, which should support all efforts towards social security, has tended to get weaker as the role of social security has widened.<sup>24</sup> In the development of a social security concept a continuing effort must be made to promote this crucial sense of shared responsibility—in particular between the well-off members of society and those who live in conditions of deprivation.<sup>25</sup> The aims of social security and other measures targeted at the alleviation of poverty and social exclusion cannot be achieved if those who benefit from it do

not play an active role in its development. It is essential for them to participate voluntarily in this process of change and to accept responsibility for the agencies created for them.<sup>26</sup> Another important aspect to solidarity is the extent to which more advantaged sectors of the community are prepared to contribute to improving the living conditions of disadvantaged groups in order to promote a common social citizenship.

*Ubuntu*<sup>27</sup> and nation-building within the South African perspectives can contribute to a sense of shared responsibility. Mokgoro<sup>28</sup> describes *ubuntu* as a metaphor for group solidarity where the group is dependent on limited resources. Mokgoro<sup>29</sup> further states: “People are willing to pool community resources to help an individual in need. This is captured in some of the African aphorisms such as ‘a botho ba gago bo nne botho seshabeng’ which, literally translated, means, ‘let your welfare be the welfare of the nation’.” The Social Welfare White Paper<sup>30</sup> describes the importance of *ubuntu* as follows: “The principle for caring for each other’s well-being will be promoted, and a spirit of mutual support fostered. Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual’s humanity. Ubuntu means that people are people through other people.” *Ubuntu* as an aspect of solidarity would need to be considered within the changing socio-economic context and the impacts of economic globalisation. In this regard the critical role of the state in mobilising social resources towards overcoming poverty and extreme inequalities would be essential.

The conclusion can thus be reached that group solidarity is not a foreign principle within South African society. The respect for and promotion of the principle of *ubuntu* can in fact guarantee the success of a comprehensive social security system and other measures aimed at the alleviation of poverty and social exclusion in South Africa. This also emphasises the importance given to group protection in the fight against poverty and deprivation. Comparative analysis of the recent Constitutional Court judgement in *Grootboom* with previous judgements on the enforcement of social security rights clearly illustrates that courts will more readily come to the assistance of historically deprived and disadvantaged groups warranting judicial intervention.

### **3.4 A Human Rights-based approach**

The Constitution favours a human-rights friendly approach by giving special protection to certain fundamental rights. The Constitution contains a Bill of Rights that addresses both civil and political rights as well as socio-economic rights. No reference is made in the Bill of Rights to the traditional division<sup>31</sup> between first, second and third generation rights. Social rights have exactly the same status as other civil and political rights.<sup>32</sup> The notion of not differentiating between this apparent “categories” of rights places emphasis on the fact that these rights are interrelated, interdependent and indivisible.<sup>33</sup> The inter-relatedness of these rights, in particular in the South African context, has recently been emphasised by the Constitutional Court. The Constitutional Court has made it clear that realising a particular socio-economic right, such as the right to access to housing, would require that other elements which do at times form the basis of other socio-economic rights, such as access to land, must be in place as well.<sup>34</sup> Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life.

Some of these rights also operate in the sphere of social security, being a socio-economic right. These rights must be given effect in a particular fashion. To determine what the content of each of these rights is and under what circumstances and how the courts will enforce them, can best be discerned from the developing jurisprudence in this regard. It is clear that in the broad area of social protection certain trends are already emerging. It is, therefore, imperative to reflect on these trends and developments, as they undoubtedly influence the future direction of social security policy-making, regulation and practice.

The constitutional entrenchment of social security rights has significantly strengthened the mandate of the state to provide comprehensive social protection. The Constitution introduces (in the chapter dealing with the Bill of Rights) a constitutional imperative whereby the government is compelled to ensure the “progressive realisation” of the right to access to social security. The Constitution grants to everyone:

[t]he right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.<sup>35</sup>

and obliges the state to implement appropriate measures:

[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>36</sup>

This is a clear and unambiguous undertaking by the drafters of the Constitution to develop a comprehensive social security system, based on, amongst others, two important paradigms: right of access for everyone and financial viability. The Constitution places an obligation on the state to ensure universal access to social security through “reasonable” legislative and other measures. The state is allowed a certain degree of latitude in relation to three aspects: the progressive realisation of the right, the taking of *reasonable* measures and the availability of its resources. The availability of resources is thus a factor in determining whether the state has taken reasonable measures (see para. 46, Grootboom). Resource constraints could be a basis for the state justifying its rate of progress in achieving the full realisation of social security rights.

When this obligation imposed on the state in terms of section 27(2) is read in conjunction with section 2 (which contains the general requirement that the obligations imposed by the Constitution must be fulfilled), the assumption can be made that the fundamental right to access to social security is enforceable, because section 2 explicitly states that duties imposed by the Constitution must be performed. This is fortified by the constitutional provision (discussed in more detail below) that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>37</sup> In the 1997 White Paper for Social Welfare<sup>38</sup> this assumption is confirmed:

The general long-term objective is to have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes. This would be supported by a well-informed public, which is economically self-reliant, in a country which has active labour market

policies aiming at work for all, while accepting that all will not necessarily have formal employment. Where these broad goals cannot be met, social assistance should be a reliable and accessible provider of last resort. A comprehensive and integrated social security policy is needed to give effect to the constitutional right to social security.

This right to access to social security is reinforced by other fundamental rights, such as the right to have access to healthcare services,<sup>39</sup> to sufficient food and water,<sup>40</sup> to adequate housing,<sup>41</sup> and the right to education,<sup>42</sup> as well as the right of children to basic nutrition, shelter, basic healthcare services and social services.<sup>43</sup> Together these rights can be said to ensure, from a constitutional and human rights perspective, adequate social protection.<sup>44</sup> There are, of course, also other fundamental rights, which evidently play a significant role in the context of South African social security, such as the right to equality,<sup>45</sup> the right to privacy,<sup>46</sup> the right to property<sup>47</sup> and the right to just administrative action.<sup>48</sup> The state is obliged to respect, protect, promote and fulfil all of these fundamental rights.<sup>49</sup>

### **3.5 Some Constitutional decisions in the area of Social Security**

The *Grootboom* case has given guidance on the principles applicable to the interpretation of the socio-economic right of access to adequate housing in section 26.<sup>50</sup> Because of similar drafting, it is relevant to the right of access to social security in section 27.

How far may a court be prepared to go? In its first certification judgement the Constitutional Court remarked:

It is true that the inclusion of socio-economic rights may result in the courts making orders *which have direct implications for budgetary matters*. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, *or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits*. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.<sup>51</sup> (own emphasis)

In the most comprehensive judgement on social security-related rights to date, *Government of RSA v Grootboom and others*,<sup>52</sup> the Constitutional Court provided explicit guidance. In particular the Constitutional Court commented on the state's obligations under section 26, which gives everyone the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter. The case concerned the forcible removal of a large number of children and their families occupying land illegally, without making available to them alternative facilities. Due to the vast number of issues dealt with by the Constitutional Court and the range of principles developed in the process, it is worth

quoting directly from the summary (salient issues flowing from the judgement are discussed in different parts of the report):

In a unanimous decision ... it was noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting. Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. Human dignity, freedom and equality are denied to those without food, clothing or shelter. The right of access to adequate housing can thus not be seen in isolation. The state must also foster conditions that enable citizens to gain access to land on an equitable basis. But the Constitution recognises that this is an extremely difficult task in the prevailing conditions and does not oblige the state to go beyond its available resources or to realise these rights immediately. Nevertheless, the state must give effect to these rights and, in appropriate circumstances, the courts can and must enforce these obligations. The question is always whether the measures taken by the state to realise the rights afforded by section 26 are reasonable. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored. If the measures, though statistically successful, fail to make provision for responding to the needs of those most desperate, they may not pass the test of reasonableness....Although the overall housing programme implemented by the state since 1994 had resulted in a significant number of homes being built, it failed to provide for any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions. Their immediate need could be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability.

In another judgement it was made clear that a court must be slow to interfere with rational decisions taken in good faith by the political organs and (medical) authorities whose responsibility it is to deal with matters entrusted to these institutions.<sup>53</sup> However, the Constitutional Court also made it clear that there will be instances where the larger needs of society, as opposed to the specific needs of particular individuals, may have to be given priority.<sup>54</sup>

From other judgements in the broad area of social security, it is apparent that the Constitutional Court will not interfere easily with the underlying structure or financial balance of (publicly organised) social security schemes.<sup>55</sup>

### **3.6 Guiding Constitutional principles when redesigning the South African Social Security System**

Bearing in mind the provisions of the 1996 Constitution, relevant international law developments and obligations, and the decisions of the Constitutional Court thus far, the following could be said to constitute important elements of and guiding principles for redesigning the South African social security system. The list is not meant to be exhaustive, but only to highlight some of the most important elements on an inclusive basis:

3.6.1 The power of the courts to interfere and remedies at the disposal of the courts: courts have the power to enforce socio-economic rights and in particular the right to access to social security and other social security related rights. Wide-ranging remedies are at the disposal of the courts in this regard. This may result in courts making orders, which have direct implications for budgetary matters.<sup>56</sup>

3.6.2 A comprehensive and integrated approach required: the Constitutional Court has affirmed that all the rights contained in the Bill of Rights are interrelated and mutually supporting.<sup>57</sup> It is, therefore, not sufficient to attempt to adopt measures which give effect to the right to access to social security in isolation. In concrete terms this implies that when redesigning the social security system the state must ensure that: (a) all related constitutional values and rights, such as human dignity, freedom and equality, be given effect to; and (b) access is granted to resources which are necessary for the realisation of the right to access to social security and other related rights, with particular reference to food, clothing and shelter and, where appropriate, land. This could be effected by a package approach, in particular in the area of social assistance, whereby the provision of a baseline of services, transfers and resources to (in particular) those in need is ensured as a matter of priority.

The constitutional and developmental imperative for universal basic income support has to be considered within a comprehensive package of measures to address structural poverty. This would imply that the role of social assistance as a major programme in poverty alleviation is reinforced beyond a residual function to one that is developmental. “In the light of the extreme inequalities in South African society, a major social assistance programme of this nature is also a mechanism for income redistribution thus promoting greater social stability and reconciliation.”<sup>58</sup>

3.6.3 The need for a policy-based programme and legislative implementation: the Constitution requires the devising, formulation, funding and implementing, as well as the constant review, within the resources available, of a comprehensive and co-ordinated programme with well-targeted policies. These have to be reasonable both in their conception and their implementation, and must be implemented by the executive and through legislative intervention.<sup>59</sup> Provided that the measures adopted are reasonable, the Constitutional Court will generally speaking also uphold a social security programme, which institutionalises social security provision.

3.6.4 A range of reasonable measures at the disposal of government and the legislature: as long as the measures aimed at redesigning the social security system are reasonable in their conception and implementation, the courts will not consider whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent.<sup>60</sup> There is also some indication that the courts will not interfere with rational decisions (on budgets) taken in good faith.<sup>61</sup> A wide range of available options may, therefore, be considered and adopted by the state. The measures adopted may, subject to the constraints of the equality right, differentiate on the basis of past exclusion and disadvantage, and on the basis of socio-economic status. The reasonableness of the measures will be evaluated against criteria such as:

- The social, economic and historical context of the deficiencies in the system the measures aim to address.
- The institutional capacity to implement the programme adopted.
- Whether the programme is balanced, flexible and open to review, and makes appropriate provision for attention to the deficiencies in the system and to short-, medium- and long-term needs.
- Whether the programme is inclusive and does not exclude a significant segment of society.
- Whether the measures ensure that basic human needs are met and takes into account the degree and extent of the denial of the right they endeavour to realise.
- Whether the programme and measures ensure that a larger number of people and a wider range of people as time progresses benefit from them.

3.6.5 Allocating responsibilities and empowering implementing and delivery institutions: a reasonable programme must clearly allocate responsibilities and tasks and ensure appropriate financial and human resources.<sup>62</sup> This does not only apply to the various spheres of government (national, provincial and local), but also to non-governmental (NGO) organisations and other private providers. The responsibility in the areas of social security implementation and service delivery is shared not only by state institutions at the various levels, but also by other agents within our society, including individuals themselves. They must be enabled by legislative and other measures to provide housing. National government bears the overall responsibility for ensuring that the state complies with its constitutional obligations.<sup>63</sup>

3.6.6 Sufficient budgetary support required: while courts will be hesitant to interfere in budgetary provision in the area of social security, the Constitutional Court indicated in its certification judgement, as noted above,<sup>64</sup> that courts could grant orders which may have budgetary implications. In *Grootboom* the Constitutional Court stressed, within the context of the right to access to housing, that effective implementation requires at least adequate budgetary support by national government.<sup>65</sup> It emphasised that it is essential that a reasonable part of the national housing budget be devoted to granting relief to those in

desperate need, but that the precise allocation is for national government to decide in the first instance.<sup>66</sup> Guidelines drawn up in the wake of budget constraints have to be reasonable.<sup>67</sup>

3.6.7 The constitutional focus on vulnerable groups: provision has to be made for the most vulnerable and desperate in society.<sup>68</sup> The courts may or may not be hesitant to grant relief where individuals assert their constitutional rights. However, where communities are negatively affected, and the right infringed is fundamental to the well-being of (categories of) people (such as housing), the Constitutional Court appears to be more willing to intervene. This is in particular the case where the said communities have historically been marginalised and/or excluded or appear to be particularly vulnerable. A statistical advance may not be enough and the needs that are the most urgent must be addressed; it is not only the state that is responsible for the provision of (for example) houses, but it may be held responsible if no other provision has been made or exists.<sup>69</sup> How to establish priorities in view of limited resources remains, of course, one of the greatest challenges.

3.6.8 The inadvisability of retrogressive measures: in keeping with the principles set out above, as well the views adopted in respect of the provisions of the International Covenant on Economic, Social and Cultural Rights,<sup>70</sup> retrogressive measures (such as the phasing out or downscaling of a particular social security scheme or grant) are *prima facie* incompatible with the obligation to progressively realise the right to (access to) social security and social assistance. Any such reduction or downscaling will be subject to the courts' careful consideration. Of course, it remains possible to adopt replacement programmes, which provide, at the least, the same or similar standard of living.

### **3.7 The role and approach of the Human Rights Commission**

#### **3.7.1 Role of the HRC**

The Constitution grants an important role to the South African Human Rights Commission (HRC) in the area of fundamental rights advocacy, promotion, and monitoring.<sup>71</sup>

One of the most significant functions of the HRC is the evaluation of annual reports from organs of state, in order to determine to what extent these organs of state have taken measures to realise the socio-economic rights enshrined in the Constitution, in particular the rights relating to housing, healthcare, food, water, social security, education and the environment.<sup>72</sup>

In its oral submission to the Committee the HRC pointed out that it fulfils its constitutional mandate by undertaking research in order to produce protocols to organs of state;<sup>73</sup> by submitting reports to parliament and making them available to organs of state; by receiving individual complaints and involving itself in particular meritorious court actions (it intervened in the *Grootboom* case as *amicus curiae*); and by monitoring compliance with the order of a Constitutional Court, when requested to do so by the Constitutional Court (as has been the case in the *Grootboom* matter).

### 3.7.2 Approach of the HRC

In its first two annual Socio-Economic Rights Reports (1997-1998 and 1998-1999) the South African HRC commented on constitutional aspects of the right to access to social security, apart from commenting on other social security-related rights as well. It was fairly critical of the area of social assistance. It noted that the social assistance notion adopted for purposes of the Social Assistance Act<sup>74</sup> is too narrow from a constitutional perspective, as it restricts the term to income replacement grants system.

In both its oral and written submissions the HRC has dealt with particular problems in the South African social security system. It highlights the following from the perspective of the requirements of the South African Constitution:

- The need for a proper concept of social security for South Africa
- The exclusionary nature of the South African social security system, in particular as far as the unemployed, the self-employed and the atypically employed are concerned.
- The limited reach of the present system, as it benefits only a small proportion of the groups it is meant to target.
- Proper expenditure targeting in order to reach the poor, the vulnerable and people with special needs.
- Ill-defined and inappropriate criteria for the allocation of social assistance, resulting in poor targeting of support measures.
- Developing minimum standards for defining the realisation of the right to social assistance, with reference to issues such as whether the minimum levels of social grants are sufficient to ensure a minimum subsistence level.<sup>75</sup>
- Other limitations, such as the absence of effective mechanisms for preventing people from benefiting from different sources of assistance simultaneously.
- Insufficient regulation of private (employer-based) forms of social security.<sup>76</sup>
- The vast range of administrative problems.
- The need to review legislation and test its appropriateness in the light of the 1996 Constitution.
- Specific gaps in old-age provisioning, which leave old people without specially targeted services.
- The insufficient level of the Child Support Grant, the low take up of the grant, the violation of the rights of children by not providing adequately for children above the age of six, and the special needs of homeless and street children.
- The lack of universal coverage in healthcare and addressing the needs of the poor and people with HIV/AIDS.

- The exclusionary provisions of the Unemployment Insurance Act, and the need to increase employability, especially for school leavers.

### **3.7.3 An enhanced role for the HRC**

As there appears to be a need to give guidance to government departments and other stakeholders in regard to the implementation of socio-economic rights, a more intensive intervention by an appropriately mandated and equipped institution is required. It is, therefore, suggested that an enhanced monitoring, interrogative and enforcement role for the HRC is envisaged in order to give meaningful effect to the right to access to social security and other social security-related fundamental rights. International experience may be of assistance. The supervisory process of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that state representatives and the supervisory committee under the ICESCR enter into dialogue in order to address problem areas in the report. No similar provision or practice exists within the South African system. It is suggested that dialogue between the HRC and the relevant organs of state take place on a regular basis.

The Commission and representatives of different government departments together with other role players such as NGOs and community-based organisations (CBOs) must enter into dialogue in order to constructively identify deficiencies in the present system as well as work together to define and describe the content of social security rights.

The HRC must also monitor whether the different state organs had indeed followed the Commission's findings and recommendations. If not, and if the relevant organ of state cannot justify the fact why it did not follow these recommendations, the committee should be able to enforce the recommendations by way of a declaratory order.

## **3.8 *What is meant by Social Security from a Constitutional perspective?***

### **3.8.1 Overall framework**

In keeping with the discussion above,<sup>77</sup> it is recommended that in addition to the concept of "social assistance" contained in the applicable legislation a broader concept called social protection be used to incorporate benefits and services that have developmental objectives. Furthermore, it is incumbent on government to set minimum standards to define the right to access to social security and its realisation. This has to be done within the framework of the overall goals of the social security system envisaged by government.

Given the socio-political and economic history of South Africa, it is recommended that the goal of addressing poverty be adopted as key to social protection. Other goals to be incorporated relate to the constitutional values and principles, such as equality, non-sexism and non-racism. The definitional standards adopted have to be applied and implemented in programmatic fashion according to a suitable timeframe, setting out the goals to be achieved, mapping the different programmes and systems, determining the priority order, and indicating the targets.

Clearly evident from the wording of section 27(1)(c), is that the intention of access to social security in the comprehensive sense, and the specific issue of social assistance. The former would also incorporate the social insurance system (e.g. contribution-based systems such as Compensation for Occupational Injuries and Diseases Act (COIDA), the Road Accident Fund (RAF) and Unemployment Insurance Fund (UIF), as well as, occupational retirement schemes). The latter would refer to both monetary and non-monetary assistance measures, whether the aim thereof is income replacement or to afford other kinds of assistance government provision (e.g. programmes for the poor and the elderly).

Adopting a purposive approach towards the interpretation of fundamental rights, the underlying rationale and purpose of the right to access to social security and to social assistance is to provide to everyone an adequate standard of living. This is also in accordance with the International Covenant on Economic, Social and Cultural Rights. In this regard social assistance (which could take the form of minimum income support measures) becomes a constitutionally-mandated way of ensuring an adequate standard of living for “those unable to support themselves and their dependants”.

In developing and interpreting the concept of social security for constitutional purposes, it might be apposite to take note of developments internationally and in terms of enlightened social security thinking. In this regard the following:

- It is generally accepted in social security thinking and policy-making that social security is not merely curative (in the sense of providing compensation), but also preventative and remedial in nature.<sup>78</sup> The focus should be on the causes of social insecurity (in the form of, amongst others, social exclusion or marginalisation), rather than only the effects.
- This implies that measures aimed at preventing human damage (e.g. employment creation policies; health and safety regulation; preventative health care) and remedying or repairing damage (e.g. re-skilling/retraining; labour market and social integration) should be adopted as an integral part of the social security system, alongside compensatory measures. Comprehensive coverage and indemnification are considered as part of social security when: firstly, reasonable measures have been taken to prevent human damage; secondly, reasonable steps have been put in place to repair such damage; and, thirdly, reasonable compensation is provided if and to the extent that damage appears to be irreparable.<sup>79</sup>
- An overall aim, which directs and informs the social security concept and the areas covered by such a concept, has to serve as the point of departure. Within the context of such an overall aim a distinct social security system can be developed, without being restricted to a mere contingency or risk-category approach.
- As suggested earlier in this paragraph, it is recommended that addressing poverty should be adopted as one of the key goals of a comprehensive social security system. Other goals also have to be developed, and should factor in constitutional values and principles, such as equality, non-sexism and non-racism.
- Berghman suggests that such an overall aim or ideal should strive for a state of (complete) protection against human damage.<sup>80</sup> The concept “damage” should be interpreted broadly

to cover both loss of labour income and loss of health or well-being. Such a broadened concept of social security covers not merely the fiscal and occupational welfare of the individual concerned, but also the handicap, which the damaged person encounters in his/her contacts with his/her human and material environment—i.e. his/her social welfare.<sup>81</sup> A social security system which does not deal effectively with the social deprivation, exclusion or marginalisation of an affected individual or community is doomed to eventual failure, as it does not address social insecurity at its roots.

- Does the social security concept merely cover measures of a public nature? Modern social security thinking suggests that an operational division of social security is needed, instead of describing the existing patchwork of schemes and operations that may fit experiences of social protection. It is thus suggested that social, fiscal and occupational welfare measures, collectively and individually, whether public or private or of mixed public and private origin, be taken into account when developing coherent social security policies.
- A range of relevant state-provided social and fiscal measures with other collective, individual and/or private arrangements established to provide security would form a comprehensive social protection system.<sup>82</sup> These other arrangements would include non-traditional forms of protection, such as study grants, housing benefits, food and the provision of transport. It would also include informal arrangements, forms of family solidarity and private insurance aimed at guaranteeing social security. This is of particular importance to developing countries, where the traditional social security contingency approach is either unaffordable or often unable to address the essential issues and perceived needs associated with social insecurity at the core level.<sup>83</sup> The point to note here is that section 27(2) places the duty to ensure access to social security on the state. While this does not preclude the state relying on private mechanisms, it retains ultimate responsibility for ensuring that the package of measures adopted is sufficient. It also has the responsibility to adopt an adequate regulatory framework for the private sector, and to regulate it effectively.
- A view, which includes private arrangements within the broader framework of social security, would have to consider the constitutional limitations, which may exist in this regard. The application of the right to access to social security to the private sphere does not follow automatically as a matter of fact or law—this will only be possible if the qualifying conditions for private sphere application set out in section 8(2) and (3) of the Constitution are met (taking into account the nature of the right and of any corresponding duty that may be imposed). It is suggested that this (i.e. extension into the private sphere) will be possible if the said arrangements and the regulation thereof serve the purpose of fostering social security, and if the regulation of same is restricted to, for example, mandating the establishment of such a scheme and regulating its social security objectives and/or activities (but not the detailed content of such private arrangements), leaving a considerable scope for private action and initiative.<sup>84</sup>
- A wider view of the social security concept would require an integrated, comprehensive and co-ordinated approach to social security.<sup>85</sup> It makes no sense to view the different

parts, measures and objectives of the system in isolation, as a close interrelationship exists between these, and as modifications and developments in one area often have implications in other areas.

- An integrated approach would also enable one to identify disparities in the system as a whole (e.g. the structure of the present system clearly strengthens and perpetuates forms of inequality and patterns of social exclusion and deprivation).
- An integrated perspective would enable policy-makers to develop medium- and long-term strategies and policies in order to give effect to the constitutional obligation to take reasonable steps, within the state's available resources, to ensure the progressive realisation of the right to access to social security.<sup>86</sup> This would also necessitate administrative co-ordination of the system.
- Some measure of (social) solidarity and spreading of risk is required for the effective functioning of a social security system.<sup>87</sup>
- It is submitted that a well-structured and properly regulated measure of social solidarity across the system is imperative in the South African context, given the huge disparities in the system as it is presently structured. This might entail the imposition of compulsory membership of schemes, which fulfil social security aims, and for arranging for a graduated scale of benefits.<sup>88</sup> The principle of *ubuntu* is entrenched in our constitutional jurisprudence and serves as a South African variant of the principle of social solidarity.<sup>89</sup>
- Social and labour market integration should as a matter of principle and policy be regarded as an integral part and primary goal of social security. Berghman indicates that obligatory social security schemes are elaborated in such a way that insurability and entitlement to benefits are made conditional on the work effort—in this way, social security schemes confirm and socially reinforce the work effort.<sup>90</sup> Social assistance, therefore, operates as a bypass mechanism only in those cases where integration into the labour market is no longer possible or desirable.<sup>91</sup>
- It is recommended that the establishment of a comprehensive social security system with clear goals and objectives is set at national level. This will give clarity to and drive the reform of social security.<sup>92</sup> As suggested above, it is recommended that addressing structural poverty should be adopted as one of the key goals of a comprehensive social security system.
- Overall aims should be formulated. Several other issues of principle should for policy and clarity purposes be decided upon and made known—such as the model(s) which will be applied, the funding sources and financing procedures, the type and scope of benefits, underlying principles (e.g. links with the labour market), scope of coverage, etc.<sup>93</sup>
- Goals must be informed by the specific constitutional regulation of social security in a particular country. In the South African context this implies that regard must be had to the constitutional obligation to effect progressive realisation of the right to access to social security,<sup>94</sup> the importance of incorporating constitutional values such as human dignity when the social security system is reformed, the role occupied by other associated

fundamental rights (e.g. housing, health), and the impact of general constitutional principles and rights (e.g. equality, property, privacy).<sup>95</sup>

### 3.8.2 Specific considerations

It is significant that the right to access to social assistance is constitutionally qualified. Section 27(1)(c) stipulates that everyone has the right to access to “... *appropriate* social assistance, if they are *unable to support themselves and their dependants*”.<sup>96</sup> Although a universal or broad categorical approach is, strictly speaking, not demanded, such an approach would be regarded as (partly) fulfilling the constitutional duty to grant access to social assistance.<sup>97</sup>

It is necessary to interpret the constitutional concepts of “social security” and “social assistance” within the broader context of the Bill of Rights and, in particular, the other socio-economic rights which have a bearing on the right to access to social security. This flows from the fact that these rights are interrelated and mutually supporting,<sup>98</sup> as well as from the multi-dimensional nature of these concepts and the multi-actor responsibility foreseen by the Constitution. For example, while the right to access is granted to “everyone”, it is clear that the rights of children in this regard are exercised mainly via their parents and families.<sup>99</sup> In these cases where family support is available, the role of the state is restricted to provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by the Constitution.<sup>100</sup> In addition, according to the Constitutional Court in *Grootboom*, the state is required to fulfil its constitutional obligations to provide families with access to land, access to adequate housing, as well as access to healthcare, food, water and social security.<sup>101</sup> Moreover, the protection of children outside of the family environment, as it is conventionally understood, must be ensured.

Some of the other questions to be decided include the interpretation to be afforded to the notions of “dependant” and “unable”. It is suggested that a broad interpretation be appropriate, as a narrow view would still exclude millions of people in South Africa from an adequate standard of living. This would mean that “dependant” is not restricted to those dependants, in respect of whom there is a legal duty to provide maintenance, but that factual dependants are included as well. This would certainly be in keeping with the concrete South African care context as has already been recognised, to some extent, by the South African legislature.<sup>102</sup> Furthermore, being unable to support oneself and one’s dependants is not restricted to those who are physically or mentally unable to do so due to old age, illness or incapacity. The inability could also result from the unavailability of employment and the inability to pursue other income-generating activities. Such a broad interpretation is in accordance with South African realities relating to long-term and systemic unemployment, and widespread poverty.

### 3.8.3 Implications for implementation

For the right to access to social security (and the other social security-related rights) to fully mature and to be known and directly enforceable, the state should initiate legislation which must provide for the substantive rights capable of being claimed (what actually should be claimed); the procedure and mechanism for claiming such rights (how the rights should be claimed); and where (venue) the

rights should be claimed. On the question of how and where the right should be claimed, the Committee is also concerned with the institutions that will hear and determine disputes arising from claims for social security benefits provided for under the relevant legislation.

### **3.9 The Constitutional duty to respect, protect, promote and fulfil rights relating to Social Security**

As mentioned above, in certifying the 1996 Constitution the Constitutional Court acknowledged that socio-economic rights are in fact enforceable even if they give rise to budgetary considerations.<sup>103</sup> Section 7(1) of the Constitution states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Section 7(2) places a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

On a primary level the duty to respect requires negative state action and the courts will only expect the state not to unjustly interfere with a person's fundamental rights.<sup>104</sup> This is known as negative enforcement by the courts. In the area of social security this would, amongst others, entail that the state should allow individuals to insure themselves against particular contingencies.

The duties to protect, promote, and fulfil places a positive duty on the state and it is argued that this duty also requires positive action from the courts. On a secondary level all fundamental rights require the state to protect citizens from political, economic and social interference with their stated rights.<sup>105</sup> This obligation does not, as such, require that the state distribute money or resources to individuals, but requires setting up a framework wherein individuals can realise these rights without undue influence from the state. It requires in particular that the state protects especially vulnerable groups and encompasses protection against third (non-state) party violations of these rights. Practically this would, for example, mean that pensions, medical insurance and unemployment insurance legislation should be construed in such a manner that they sufficiently protect individuals against discrimination in acquiring benefits. In a number of cases<sup>106</sup> the right to just administrative action (section 33) has been used to *protect* people's social security (social assistance) rights.

At tertiary level section 7(2) requires that the state promote and fulfil everyone's rights.<sup>107</sup> The beneficiary has the right to require positive assistance, or a benefit or service from the state. "Promotion" means that the relevant legislative, executive and judicial frameworks for the realisation of, for example, the right to access to social security, have to be both in place and effective. "Fulfilment" in this context means to provide opportunities for individuals or associations to realise the rights and/or to provide for the fulfilment of the right by directly providing for the need, for example by making available resources for the acquisition thereof. For example, in the *Grootboom* case the Constitutional Court found that the state has a duty to provide emergency housing (i.e. shelter) to particularly needy and vulnerable groups of persons, should they not be able to provide in this for themselves.

O'Regan<sup>108</sup> also suggests a fourth level of obligation: a right may place an obligation on the state to act rationally and in good faith, and require that it justifies its failure to carry out its obligations. In other words, there must be a good reason for the state not to respect, protect, promote, and fulfil a right.<sup>109</sup>

### **3.10 Limiting Social Security Rights**

#### **3.10.1 Introduction**

Fundamental rights, including the constitutional rights relating to social security, are not absolute, but may be subject to limitations of a reasonable nature. Two forms of limitation have to be considered. Firstly, the limitation must comply with the requirements contained in the (general) limitation clause (sometimes referred to as external limitations),<sup>110</sup> bearing in mind relevant factors, some of which are explicitly mentioned in the Constitution.<sup>111</sup> Secondly, the limitation can also be justified on the basis of the specific qualifications contained in respect of a particular right (sometimes referred to as internal limitations or qualifiers). This means, in the event of the right to access to social security, that the state is required to take *reasonable measures*, bearing in mind *available resources*, to achieve the *progressive realisation* of the said right.<sup>112</sup> In *Soobramoney v Minister of Health (Kwazulu-Natal)*<sup>113</sup> Chaskalson P pronounced: “What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, *and that the corresponding rights themselves are limited by reason of lack of resources.*”<sup>114</sup>

#### **3.10.2 External limitations**

In *S v Zuma*<sup>115</sup> the Constitutional Court stated that constitutional analysis contains two phases.<sup>116</sup> In the first phase the applicant must show that there was an infringement on the duty to respect, protect, promote, and fulfil the rights in the Bill of Rights. In the second phase the respondent must show that the infringement was justifiable and that the right was legitimately restricted in accordance with the general limitation clause contained in section 36 of the Bill of Rights.

Section 7(3) refers to external limitations by stating that the rights in the Bill of Rights are subject to the limitations contained in or referred to in section 36 (the general limitation clause), or elsewhere in the Bill (the specific or internal limitations contained within the framework of specific fundamental rights). It is, therefore, important to establish the extent of limitations on the right to access to social security.

Section 36 of the Constitution, which reflects the influence of Canadian jurisprudence, subjects a limitation of a fundamental right to a threefold test, in terms of which the limitation must be:

- Contained in a law of general application
- Reasonable

- Justifiable in an open and democratic society based on human dignity, equality and freedom.

Generally speaking and in keeping with constitutional jurisprudence in countries with entrenched bills of rights, two questions should be asked in order to determine whether a limitation of a fundamental right passes constitutional muster. Firstly, has there been an actual or threatened infringement of the right in question? Secondly, is there sufficient justification for the infringement?<sup>117</sup>

In keeping with developments in other systems, both the Constitutional Court<sup>118</sup> and the Constitution itself,<sup>119</sup> it is accepted that the following criteria should be considered when the justification of the infringement is in issue, namely:<sup>120</sup>

1. Does the limitation serve a legitimate purpose of sufficient importance?
2. Is there a sufficient relationship between the limitation and the purpose, in other words, does the limitation not restrict the right in question more than is necessary?
3. Is there no other reasonable alternative through which the objective can be attained?

What does this mean for the limitation of social security rights? These basic principles imply that the courts' review legislative and other acts according to the principle of proportionality or alternative means (rationality) and/or according to the principle of reasonableness (balance).<sup>121</sup> In terms of the principle of proportionality the court sets aside an act which restricts a fundamental right (such as the right to access to social security) unnecessarily or gratuitously. An example would be where the classification or criteria adopted to indicate beneficiaries of a particular state project (such as a social relief programme) are not sufficiently determined, with the result that certain groups are, contrary to the intention of the programme, excluded. The recently decided *Grootboom* case<sup>122</sup> provides a telling example. In this case the Constitutional Court found that although the overall housing programme implemented by the state since 1994 had resulted in a significant number of homes being built, it failed to provide for any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions. In terms of the principle of reasonableness or balance an act is declared unconstitutional if there is a radical imbalance between the public interest served by the act and the limitation infringing the social and economic sphere of people's lives.

Any infringement on the duty to respect, protect, promote, and fulfil the right to access to social security by current and future legislation will have to be measured against the provisions of section 36(1) of the Constitution. Current social assistance legislation includes the Social Assistance Act 59 of 1992, Special Pensions Act 69 of 1996, Demobilisation Act 99 of 1996 and the Promotion of National Unity and Reconciliation Act 34 of 1995. Legislation regarding social insurance includes the Unemployment Insurance Act 30 of 1966 and Compensation of Occupational Injuries and Diseases Act 130 of 1993.

### 3.10.3 Internal limitations

The state's duty to respect, protect, promote, and fulfil the right to access to social security is further qualified by the phrasing of section 27(2). Section 27(2) states that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The inclusion of these qualifications is an acknowledgement that the right to access to social security cannot be fulfilled by the state immediately and completely.

The Constitutional Court in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others*<sup>123</sup> shed light on the meaning of these different provisions in sections 26(2) en 27(2) and the manner in which the courts are prepared to enforce socio-economic rights.<sup>124</sup>

#### 3.10.3.1 "Reasonable legislative and other measures"

In *Grootboom* the Constitutional Court laid down important principles concerning the requirement that the state must take reasonable legislative and other measures.

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."<sup>125</sup> The court also stressed that the policies and programmes must be reasonable both in their conception and their implementation.<sup>126</sup>

The Constitutional Court<sup>127</sup> further remarked:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.<sup>128</sup>

It would, therefore, appear that in view of the judgement in the *Grootboom* case that the Constitutional Court is prepared to go further than to (merely) investigate the rationality and *bona*

*fides* of the executive and the legislature. What essentially has to be determined is whether the socio-economic programme and the implementation thereof were reasonable.

From this it follows that regard must be had to the extent and impact of historical disadvantage. Furthermore, particularly vulnerable groups may not be neglected. Finally, basic human dignity must be seen to be accorded to everyone when a social security programme is constructed and implemented.

In its interpretation of similarly worded provision of the International Covenant on Economic, Social and Cultural Rights<sup>129</sup> the responsible United Nations Committee on Economic, Social and Cultural Rights (UNCESCR)<sup>130</sup> has been of the opinion that if the state is a developing country, or is experiencing economic difficulties, it must at least realise the so-called “minimum core obligations”.<sup>131</sup>

However, in *Grootboom* the Constitutional Court found the investigation into minimum core obligations to be inapplicable in the South African context.<sup>132</sup> It concluded that the real question in terms of the South African Constitution is whether the measures taken by the state to realise social rights are reasonable.

### 3.10.3.2 “Progressive realisation”

The wording of the phrase “progressive realisation” is similar to the phrase used in article 2(1) of the ICESCR. In *Grootboom* the Constitutional Court applied the interpretation of the UNCESCR on the meaning of this phrase. The UNCESCR<sup>133</sup> summarises the provision relating to the requirement of “progressive realisation” of socio-economic rights as follows:

On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for state parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards the goal...

The UNCESCR<sup>134</sup> further mentions that:

any deliberately retrogressive measures ‘ would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources..

The UNCESCR further stated that the ultimate objective of the covenant is the “full realisation”<sup>135</sup> of the rights.<sup>136</sup> The fact that the “full realisation” is subject to the condition of progressiveness, is merely a recognition of the fact that the full realisation of all socio-economic rights will generally not be able to be achieved in a short period of time.<sup>137</sup>

The Constitutional Court stated that “progressive realisation” shows that it was contemplated that the right could not be realised immediately, but the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal.<sup>138</sup> It continued:<sup>139</sup>

It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

### 3.10.3.3 “Within the available resources”

The Constitutional Court in *Grootboom*<sup>140</sup> referred to the judgement in the case of *Soobramoney v Minister of Health (KwaZulu-Natal)*,<sup>141</sup> where the meaning of the phrase “available resources” was interpreted as follows:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.<sup>142</sup>

In the *Grootboom* case<sup>143</sup> the Constitutional Court further stressed that there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

The conclusion can thus be reached that the availability of resources is but only one of the factors, which have to be considered when determining whether there was an infringement of a right. The following observation in the case of *Soobramoney-saak*<sup>144</sup> supports the conclusion that the Constitutional Court came to in the *Grootboom* case:

The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

Liebenberg, however, identifies a dynamic dimension to the “availability of resources” qualification, advancing the argument that “the state should make substantial resources available now for programmes that will facilitate sustainable economic and social development thereby increasing the availability of resources for the realisation of socio-economic rights.”<sup>145</sup> This argument recognises that income poverty stems from a specific social and economic context, rooted in South Africa’s history.

The Constitutional Court dictum is to the effect that those in desperate need should be provided with some form of immediate relief and should not have to wait for medium or long-term measures designed to ensure the progressive realisation of their rights. South Africa is suffering from an extreme crisis of immediate needs because of apartheid and therefore far-reaching measures are needed to provide relief to millions of people living below the poverty line. The provision of a minimum basket of transfers, services and facilities, which could include minimum income support measures such as a universal income grant, may be a way of dealing with this crisis of immediate needs while also making a valuable contribution to economic and social development in the country.<sup>146</sup>

#### **3.10.3.4 A note on the constitutional provision on the “right to access to”**

Sections 26(2) and 27(2) refers to the “right to access to” and not purely to the “right to”.<sup>147</sup> Although constitutional writers in the past viewed this as a limitation, in the *Grootboom* case<sup>148</sup> the Constitutional Court reached the conclusion that the “right to access to” can be interpreted broader than the “right to”; the Constitutional Court effectively stressed the interrelationship between the various fundamental rights as well as the importance of access to relevant services and material resources:

The right delineated in section 26(1) is a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society...<sup>149</sup>

When the judgement of the Constitutional Court is made applicable on social security rights the conclusion can be reached that “access to” means more than a pure “right to”.<sup>150</sup> It suggests that the state will also have to provide, by way of legislative and other measures, that everyone has access to social security protection.<sup>151</sup>

### **3.11 Interpreting Social Security Rights**

Social security-related fundamental rights also have to be interpreted. When interpreting the fundamental rights, every court, tribunal and forum is required to promote particular constitutional

values, and to consider international law (both binding and non-binding), while foreign law may be considered.<sup>152</sup> The power to enforce and adjudicate these rights vests in the courts (in particular the Constitutional Court),<sup>153</sup> while the HRC is given the mandate to monitor compliance with and support the development of fundamental rights.<sup>154</sup>

The way in which international law deals with the protection of the right to social security is particularly instructive in the South African context. Various international instruments contain provisions regarding the exercise of this right, such as the Universal Declaration of Human Rights of 1948,<sup>155</sup> ILO Convention 102 of 1952 concerning Social Security (Minimum Standards), the Convention on the Elimination of all Forms of Discrimination against Women of 1979,<sup>156</sup> the Convention on the Rights of the Child of 1989,<sup>157</sup> and the European Social Charter.<sup>158</sup> Even if the relevant provisions of most of these instruments are not legally binding on South Africa, they still have to be considered for purposes of interpreting the fundamental right to access to social security.<sup>159</sup>

Perhaps the most important instrument in this regard is the ICESCR of 1966, and for various reasons so. Firstly, it is significant that the wording of section 27(1)(c) and 27(2) of the Constitution is largely the same as the corresponding provisions of the ICESCR.<sup>160</sup> Secondly, South Africa already signed the convention in 1994, and ratification is apparently imminent. Legally speaking, the implication is that South Africa has incurred an international obligation to refrain from acts which would defeat the object and purpose of the treaty, and that it is supposed to review all domestic law and policy to ensure that it will be in compliance with the obligations imposed by the treaty at the moment of ratification.<sup>161</sup> Thirdly, since its inception in 1985 the UNCESCR has in the course of its supervisory and monitoring role (as mandated by the UN Economic and Social Council) issued several general comments, serving as an authoritative source of interpretation of the ICESCR.<sup>162</sup> (The International Commission of Jurists, together with certain other institutions, have also officially commented on the nature and scope of the obligations imposed on state parties to the Convention—in the form of the so-called Limburg Principles of 1987 and the so-called Maastricht Guidelines of 1997.)

Several of the general comments have either a direct or indirect impact on the interpretation of the right to social security contained. This is discussed in more detail in the chapter entitled “The Role and Influence of International Law on the Right to Access to Social Security”, prepared for the Committee.<sup>163</sup>

### **3.12 Role of the courts as enforcement mechanism**

Section 167(4)(e) states that only the Constitutional Court may decide that parliament or the President has failed to comply with a constitutional duty.<sup>164</sup> According to section 7(2) a constitutional obligation can be described as a duty, which is placed on the state to respect, protect, realise and promote the rights in the Constitution. This can be interpreted as meaning that the courts can enforce social security rights and order state organs to act positively.<sup>165</sup>

It is important to establish which court will play a role in the enforcement of the fundamental right to access to social security. Section 167(3) of the Constitution states that the Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters, and issues connected with decisions on constitutional matters and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. Section 167(7) describes a constitutional matter as any issue involving the interpretation, protection or enforcement of the Constitution.

It has been submitted<sup>166</sup> that our courts are empowered, whenever they decide on any issue involving the interpretation, protection and enforcement of a fundamental right contained in the Constitution, to make any order that is just and equitable<sup>167</sup> and may grant “appropriate relief.”<sup>168</sup> In *Fose v Minister of Safety and Security*<sup>169</sup> appropriate relief is described as follows:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...<sup>170</sup>

Specific constitutional remedies include orders of invalidity;<sup>171</sup> the development of the common law to give effect to the constitutional rights;<sup>172</sup> the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights;<sup>173</sup> and procedural remedies derived from some of the substantive rights.<sup>174</sup>

Where parliament or the provincial legislature failed to comply with a constitutional obligation that requires positive state action the Constitutional<sup>175</sup> or High Court<sup>176</sup> may grant appropriate relief. In such circumstances appropriate relief will be to make a declaratory order, where the relevant organ of state is ordered did not act in compliance with the provisions regarding the specific right.<sup>177</sup> Davis, Cheadle and Haysom<sup>178</sup> emphasise the importance of a declaratory order as follows:

However, it could rule that the legislature’s failure to act positively in the particular circumstances of the case was unreasonable and provide broad guidelines on what is required to fulfil the constitutional obligations. The effect of a declaration that parliament has not complied with its constitutional duties should not be underestimated. An order of this nature is in the public interest by promoting accountability, responsiveness and openness in decision-making affecting fundamental social and economic rights.<sup>179</sup>

Supervisory jurisdiction is a new way of addressing the problem of enforcing social security rights.<sup>180</sup> This entails that courts would give orders directing the legislative and executive branches of government to bring about reforms defined in terms of their objective and then to retain such supervisory jurisdiction as to the implementation of those reforms. This is to a large extent the

impact of the order given by the Constitutional Court in the *Grootboom* case. The Constitutional Court ordered (national and provincial) government to redraft its housing policy and programme in such a way as to make provision for those without any form of temporary housing. The HRC was given the task of monitoring compliance with the Constitutional Court's order.

Another important issue to address is what remedy will be available if the responsible legislature refuses to enact the social security legislation required of it by section 27(2). Section 27(2) states that the state *must* take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right in question. The question may be asked whether the Constitutional Court may compel the legislature to enact this legislation against its will. It has been suggested<sup>181</sup> that the Constitutional Court must simply declare that the legislature is compelled under the Constitution to enact this legislation. If the legislature refuses, the Constitutional Court may give a mandatory order against it. If the legislature still resists, the Constitutional Court may issue a mandatory order against its members personally. As a last resort, the Constitutional Court may issue a legislative order that prescribes the rules, which are deemed to have been enacted by the legislature required under the Constitution.

The conclusion can be reached that the protection and enforcement of the right to access to social security and social assistance will require the development of new remedies by the courts. Developing current and new remedies will require the courts to act proactively and in an inquisitorial fashion.

### **3.13 Administrative Justice: The need for a uniform Social Security Adjudication System**

#### **3.13.1 Administrative justice**

The way in which the law deals with social assistance issues in particular is a reflection of the inappropriate and inefficient administration and the flagrant disregard of basic legal tenets. The courts have not hesitated to intervene and assist beneficiaries where statutory entitlements to, for example, social assistance grants, as well as the principles of administrative law, had not been adhered. In several cases the courts have found that the unilateral suspension or withdrawal of grants is unlawful and invalid.<sup>182</sup> In one of the most recent cases the Eastern Cape High Court allowed a class action to be brought in this regard. Upon finding in favour of the applicants, it ordered the reinstatement of the (disability) grants, some of which go back as far as 1996.<sup>183</sup> On appeal this judgement has been upheld by the Supreme Court of Appeal.<sup>184</sup> The courts consistently held that an affected individual has a right to be heard before a grant is to be suspended or withdrawn; that notice of the intention to review the grant has to be given; and that reasons for the suspension or withdrawal have to be provided.<sup>185</sup>

The common-law framework of administrative law is supported by the constitutional right to just administrative action.<sup>186</sup> In *President of the Republic of South Africa v South African Rugby Football Union*<sup>187</sup> the Constitutional Court held that:

... the principal function of section 33 is to regulate conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.<sup>188</sup>

Furthermore, decisions taken by officials in relation to, for example, social security benefits, must be rational and may not be arbitrary. The Constitutional Court explained the principle as follows in *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Part Application of the President of the Republic of South Africa*:<sup>189</sup>

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The Promotion of Administrative Justice Act<sup>190</sup> gives expression to the constitutional requirement that national legislation be enacted to provide the details of the broad framework of administrative law rights enshrined in the Bill of Rights. The Act stipulates guidelines and benchmarks for administrative action<sup>191</sup> and decisions.<sup>192</sup> It requires a fair procedure in the event that administrative action materially and adversely affects the rights or legitimate expectations of any person.<sup>193</sup> What constitutes fair administrative procedure depends on the circumstances of each case,<sup>194</sup> but must, as a rule,<sup>195</sup> include the following:<sup>196</sup>

1. Adequate notice of the nature and purpose of the proposed action
2. A reasonable opportunity to make representations
3. A clear statement of the action
4. Adequate notice of any right of review or internal appeal, where applicable
5. Adequate notice of the right to request reasons.<sup>197</sup>

It has to be noted, however, that an aggrieved person is restricted to bringing a claim for judicial review if it is alleged that the administrative action (e.g. the withdrawal of a grant) is unlawful. Proceedings for the judicial review of an administrative action may be instituted in a court<sup>198</sup> or tribunal.<sup>199,200</sup> Furthermore, the review grounds contained in the Act are fairly limited.<sup>201</sup> Bringing a claim for judicial review would also imply that legal representatives would have to argue a case on behalf of a client. This may often be undesirable in the event of impoverished applicants who challenge a negative decision in the area of social security. The proceedings tend to be very formal, while the sheer costs of such an endeavour would make this option unattractive in most social security cases.

### **3.13.2 The need for a uniform Social Security Adjudication System**

The present system providing for complaints and appeals against negative decisions taken by social security providers (mostly public institutions and/or officials) is riddled with problems. There is little consistency as different bodies or officials are called upon to hear complaints and appeals in respect of different parts of the social security system. Undue delays are the order of the day; and the powers of the courts to deal with these matters are unsatisfactory. It is often maintained that normally the courts only have review and no appeal powers; the normal courts of the country are apparently not specialised enough to deal effectively with social security matters; access to the courts is limited, in particular as far as the indigent are concerned; cases are often dealt with on a pure technical and legalistic basis, with little regard to broader fairness considerations; and the court proceedings tend to be prohibitively expensive.

While one appreciates the important role that ombuds do and could play, this is only a partial solution, due to the fact that these institutions usually do not have final authority to deal with matters conclusively (at least from a legal point of view). By their very nature they are, as a rule, not adjudicative institutions. A plethora of ombud would also not serve the purpose of streamlining a system that is already plagued by a confusing number of dispute-settling institutions, often with overlapping jurisdictional powers.

What viable alternatives are available? Should one consider the creation of a separate and specialist court and/or tribunal, and if so, what should be the powers of such an institution, how should it be composed and how should it be funded?

One of the guiding principles in devising an adjudication system is the need to ensure that an institutional separation exists between administrative accountability, review and revision, and a wholly independent, substantive system of adjudication (which would approximate, for example, the role of quasi-judicious section 10 organisations created by the Constitution such as the Commissions on Human Rights and Gender Equality).

As explained in more detail elsewhere,<sup>202</sup> it is recommended that a uniform adjudication system be established to deal conclusively with all social security claims. It should involve an independent internal review or appeal institution, and a court (preferably a specialised court) which has the power to finally adjudicate all social security matters.

### **3.14 Co-operative Government and Public Service Conduct**

Several constitutional provisions relating to co-operative government and public service conduct have a bearing on social security service delivery. For example, chapter 3 of the Constitution on “Co-operative Government” requires of all spheres of government and all organs of state to secure the well-being of the people or the Republic.<sup>203</sup> In *Ngxuza & others v Secretary, Department of Welfare, Eastern Cape Provincial Government & another*<sup>204</sup> it was stressed that there could be no

compliance with the constitutional duty to provide effective, transparent, accountable and coherent government for the Republic as a whole,<sup>205</sup> where a social grant has been withdrawn unilaterally.

Chapter 10 of the Constitution sets out the basic values and principles governing public administration and the public service. Many of these principles are highly relevant to social security service delivery.<sup>206</sup>

### **3.15 Non-Citizens<sup>207</sup>**

The apparent lack of protection granted to non-citizens in the field of social security is one of the causes of social exclusion in South Africa. Their position leaves much to be desired. Apart from some exceptions for foreigners with permanent residence status, non-nationals are mostly excluded from South African social security. This applies for virtually all social assistance benefits,<sup>208</sup> as well as for certain branches of social insurance, such as the unemployment insurance scheme (since non-citizens are excluded from the operation of the UIF if they have to be repatriated at the termination of their services). The reality is that several millions of foreign workers and residents in South Africa are still without any form of social security protection. This is compounded by the ambivalent treatment allegedly meted out to certain categories of non-citizen workers.

On the one hand, temporary contract employees who have been long employed have been granted the opportunity to apply for permanent resident status and, in so doing, to qualify for social protection on the same basis as South African citizens. By 31 March 1997 more than 51 000 permanent resident permits had been granted to in particular mineworkers on this basis. The Department of Social Development more recently started implementing the (until recently little known) provision of the Social Assistance Act, which restricts eligibility for most of the grants to South African citizens.<sup>209</sup>

Legally, the exclusion of migrant workers raises serious questions of a constitutional nature. Section 27(1)(c) of the final Constitution grants the “right to access to social security” (inclusive of the right to access to social assistance) to “everyone”. The fundamental right to equality, enshrined in section 9 underpins this right. Jurisprudentially the right to equal treatment has already in the area of employment been interpreted to imply that there is no basis to distinguish between foreigners who have obtained permanent resident status and South African citizens: “Permanent residents should ... be viewed no differently from South African citizens when it comes to reducing unemployment.”<sup>210</sup> This may have legal consequences in the area of social protection as well, in particular as far as employment-related social security coverage (e.g. COIDA, UIF, pensions) is concerned—it is doubtful whether discrimination in social insurance coverage between citizens and non-citizens, in particular non-citizens with permanent residence status in South Africa, will withstand a constitutional challenge. With social assistance (excluding for example emergency medical care) the position is uncertain, but some limitation may perhaps be considered justifiable. However, core assistance that relates to the right to human dignity, may not be affected.

Also in other (more general) areas of fundamental rights protection the courts have struck down a purported distinction being drawn between citizens and non-citizens—as in the event of the applicability of the right to access to courts and the right to human dignity.<sup>211</sup> Furthermore, some of these exclusions are contrary to treaty obligations to which South Africa is bound—for example, the exclusion of foreign children from certain child grants.<sup>212</sup>

From a social security point of view this does not mean that all categories of non-citizen migrants would have to be treated alike. Even though the right to access to social security is extended to “every person”, nonetheless, upon further analytical scrutiny, it is apparent that one cannot categorically state that all constitutional provisions relating to “any/every person” apply equally and to the same extent to non-citizens *illegally* in the country as they do to lawful residents and citizens. The evolution of constitutional jurisprudence over time will set the precedent in this regard. However, the White Paper on International Migration<sup>213</sup> recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights<sup>214</sup> owing to the status of a person while in South Africa, including illegal immigrants.<sup>215</sup> One could, therefore, conclude that even illegal non-citizens are constitutionally entitled to core social assistance.

It is also necessary to draw a distinction between *refugees* and illegal immigrants. The new Refugee Act<sup>216</sup> places a general prohibition on the refusal of entry, expulsion, extradition or return of refugees to another country if the aforementioned acts will result in them being persecuted or their lives, physical safety and freedom being threatened.<sup>217</sup> It defines persons who qualify for “refugee” status as those persons who have fled their own country fearing persecution by reason of their race, religion, nationality, political opinion or their membership of a particular social group.<sup>218</sup> Certain other categories of persons,<sup>219</sup> including dependants of those who have been granted refugee status,<sup>220</sup> would also qualify for refugee status.

The significance is that in principle refugees enjoy full legal protection, which includes the fundamental rights set out in chapter 2 of the Constitution.<sup>221</sup> Concomitantly refugees qualify for the constitutionally entrenched right to access to social security and social assistance, as well as the other socio-economic rights in terms of section 27 of the Constitution. Note should also be taken of relevant international conventions dealing with the position of refugees. For example, the 1951 United Nations (UN) Convention Relating to the Status of Refugees specifically obliges state parties to grant refugees either the same treatment as nationals of that state or, as a minimum, “the most favourable treatment accorded to national of a foreign country in the same circumstances” in respect of a variety of different rights.<sup>222</sup> South Africa ratified this convention<sup>223</sup> and is, therefore, constitutionally bound to comply with its provisions.<sup>224</sup> These provisions have to be taken into account when the right to access to social security and social assistance, as well as the other social security-related fundamental rights are interpreted.<sup>225</sup>

Barring a limited number of exceptions, South Africa is not yet linked to the network of bilateral and multilateral conventions on the co-ordination of social security. This may operate to the disadvantage of both non-citizens in South Africa, and South Africans who take up temporary or permanent

employment or residence in other countries.<sup>226</sup> Vonk explains the position in terms of international law:<sup>227</sup>

The international community has a long standing tradition in protecting the social security of migrants through a network of instruments for the co-ordination of social security schemes. These instruments provide for the equal treatment of national and foreign subjects, for the exportability of certain types of benefits, and for the aggregation of insurance periods fulfilled under different national social insurance schemes. Furthermore, they establish a choice for the competent legislation which is applicable in transnational situations.<sup>228</sup>

Given the integration and migration thrust in South African Development Community (SADC), and the aims and purposes enshrined in the SADC Treaty and other SADC instruments,<sup>229</sup> it is recommended that South Africa enter into bi- and/or multi-lateral arrangements in terms of which the social security position of SADC citizens who migrate to South Africa, and South African citizens who migrate to other countries within the SADC region is regulated.

The Committee recommends, subject to regional obligations that South Africa may incur, that all the South African social security laws be reviewed so as to remove unconstitutional distinctions being drawn between citizens and non-citizens, in order to make South African laws compliant with its international law obligations. It is especially recommended that distinctions in the areas of employment-related (social insurance) and social assistance coverage be removed for non-citizens who are legally residing in the country. It is also incumbent on government to ensure that core social assistance be made available to illegal non-citizens. Given the international obligations South Africa has incurred, it is further recommended that the social security laws be amended so as to ensure that those with refugee status and non-citizen children are granted social security coverage on par with the protection enjoyed by South African citizens.

It should also be noted that “nationality” is being given special consideration for inclusion as a prohibited ground of discrimination in the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 (section 34).

### **3.16 The impact of the Equality Provision**

It is necessary to review the impact that the equality clause in the Constitution (section 9) has on, for example: (a) the effective denial of access to the system to millions of people in this country not covered, bearing in mind that these are often the most vulnerable categories of beneficiaries; (b) the distinction in retirement age for men (65) and women (60) for purposes of the state old-age grant; and (c) the almost blanket exclusion of non-citizens from almost the whole of the South African social security system.

In cases of alleged equality violations, a distinctive approach has developed. This has been set out in the case of *Harksen v Lane NO*:<sup>230</sup>

1. To determine whether section 9(1) is violated:

- (a) Does the law, policy or practice differentiate between people or categories of people?
  - (b) If yes, is there a rational connection to a legitimate government purpose?
  - (c) If there is no rational connection, section 9(1) has been violated.
2. In spite of a rational connection, there may still be discrimination in terms of section 9(3):
- (a) Does the differentiation amount to discrimination?
  - (b) If yes, does it constitute unfair discrimination? Discrimination on the listed ground(s) is presumed to be unfair; if it is not a listed ground, the complainant must show the unfairness. Unfairness is determined by the impact of the discrimination on a person or persons in similar situations. Two elements are important to establish unfairness: the “listed grounds” and the establishment of “impact”:
    - (i) Under the listed or unlisted grounds one would determine whether the complainant (or group of complainants) is part of a disadvantaged or vulnerable group; whether it can/has led to patterns of harm or disadvantage; whether that is due to the group or the person’s attributes and whether it impairs the person’s (or group’s) dignity or have a comparably serious effect.
    - (ii) Under the test for “impact” the person’s (or group’s) position in society; the nature of the discriminating provisions or power; the purpose for which the provision or power is used; the extent to which it affects the person’s (or group’s) rights; whether it violates the person’s dignity or have a comparably serious impact; all in view of the constitutional goals.<sup>231</sup>
  - (c) If the discrimination is thus established to be unfair, the law will only be unconstitutional if it cannot be justified in terms of section 36 (the general limitation clause).

Assessing the purpose of provisions is extremely important. This process is set out in *S v Lawrence*, *S v Negal* and *S v Solberg*.<sup>232</sup> The strong link between human dignity and equality is very much in line with the notion of social security. Current distinctions made in employment benefits between full-time and part-time workers concerning social security benefits will constitute indirect unfair discrimination.

Affirmative action may be a vehicle for addressing inequalities. This is regulated specifically in the employment sphere. In terms of section 1 of the Employment Equity Act 55 of 1998 employment policies or practices include employment benefits and terms, and according to section 15 affirmative action in terms of these is permitted.

As far as the denial of access to millions of people to the social security system in South Africa is concerned, it should be noted that the notions of “employee” and “contract of service” (or similar notions employed by the legislature) are often relied on in the laws in order to signify coverage.<sup>233</sup> The effect is that large categories of those who work atypically, in particular independent contractors, so-called dependent contractors, the self-employed, the informally employed, and the long-term unemployed, and consequently also the dependants of these categories of people, are

excluded from protection. The specific exclusion, in addition, of vast categories of persons confirms this conclusion. Given the strict categorical approach of South African social assistance, whereby protection in the form of social assistance is restricted to certain categories (in particular old age, disability and child care grants), and is made subject to an income and assets test,<sup>234</sup> the position thus is that these persons, as a rule, do effectively not enjoy social security protection. The same applies to those who are in formal employment, but who do not belong to occupational-based funds: insufficient coverage places them at particular risk—very often as a result of the lack of a legal obligation to participate in a particular scheme or programme aimed at insuring people against certain social risks occurring.

An enquiry into the distinction in the retirement age for men and women for purposes of the state old-age grant requires a balancing of several, potentially opposing, considerations. It is suggested that the generally disadvantaged position of women in the labour market, and their involvement in the care economy, especially in the bearing and rearing of children for a major part of their working lives, may constitutionally justify the said distinction. The Committee therefore recommends the retention of the age differential at this stage.

The position of non-citizens in the South African social security system has been discussed above.<sup>235</sup>

There are *prima facie* indications that several provisions of the South African social security laws may be found not to be compliant with the equality clause of the 1996 Constitution, and may not survive a constitutional challenge. There are also indications that the unequal, exclusionary and inequitable structure of the present social security system as a whole and of particular elements of the system, is not in conformity with the constitutional prohibition of unfair discrimination. Finally, it appears to be both constitutionally feasible and apposite to adopt social security measures, which are redistributive in nature and which give priority to the historically disadvantaged and particularly vulnerable individuals and groups. It is recommended that the social security system as a whole and the specific social security provisions be reviewed in order to detect these, and to suggest appropriate responses.

### **3.17 The impact of the right to property**

The Bill of Rights also protects the right to property<sup>236</sup> and this, it is suggested, could potentially have a significant impact on the protection of at least some social security rights. The implication would be that a claimant has a right not to be deprived of those social security rights which qualify as property, except in terms of a law of general application. Furthermore, section 25(1) explicitly prohibits the arbitrary deprivation of property in terms of any law.<sup>237</sup> It should also be noted that property has increasingly acquired a meaning, which emphasises the social utility thereof, in contrast with a pure and exclusive individual entitlement.

It is important to note that “property” has acquired a meaning, also in the South African Constitution, which goes beyond land or material or physical property. However, a right can only

constitute “property” in the constitutional sense of the word if it is a vested right.<sup>238</sup> For constitutional purposes “property” should be seen as those resources which are generally taken to constitute a person’s wealth and which are recognised and protected by law. It has been argued that in modern day life private wealth consists of personal rights, such as shares, private pension benefits, unit trusts, salaries, and public welfare entitlements.<sup>239</sup>

Social security benefits have been recognised in some countries as property rights.<sup>240</sup> Academics, both here<sup>241</sup> and abroad,<sup>242</sup> have supported such an approach, which also found favour with the court in the case of *Transkei Public Servants Association v Government of the RSA*.<sup>243</sup> It has also been argued that property rights against the state are to be handled differently than those derived from contracts.<sup>244</sup> This means that social assistance grants will not necessarily form part of property rights *before* they accrue to the specific individual.<sup>245</sup> Once they have accrued any arbitrary deprivation could be challenged as a potential infringement of the constitutional right to property. This could have serious implications for the practice of unilateral withdrawal of social assistance grants. The constitutional right to administrative justice (as amplified by common and statutory law) will prevent unfair interference with social assistance claims.<sup>246</sup> Furthermore, long-standing benefits awarded to people may become legal custom and thus create subjective rights. The effects of land legislation and interference with traditional property concepts illustrate this.

Benefits flowing from social insurance are often treated differently. In this case the protection of the property clause is available because the benefit flows from the payment of contributions.<sup>247</sup> This is the approach generally followed by the European Court of Human Rights<sup>248</sup> and the German Federal Constitutional Court.<sup>249</sup> For South Africa this would imply that the fact that compulsory contributions are paid to social insurance schemes, notably the UIF, the RAF, and the COIDA Compensation Fund, and, potentially, to occupational-based and private retirement or medical funds, does invoke the constitutional protection of the property clause and the prohibition on arbitrary deprivation.

### **3.18 The impact of the right to privacy**

The South African Constitution gives everyone a general right to privacy, and then lists specific incidents of this right—such as the right not to have property or possessions seized and the right not to have communications infringed.<sup>250</sup> The more comprehensive and coherent the administration of a social security system, the more scope there is for privacy violations.<sup>251</sup> Here the Constitutional Court’s opinion in *Bernstein v Bester NO*<sup>252</sup> may be relevant:

Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations as business and social interaction, the scope of personal space shrinks accordingly.

This may be true, especially where social security benefits are financed by public funds and abuse of the system is to be prevented. What is certain, however, is that information within such a system should be used for the system itself and not be made known to third parties. The Open Democracy Bill<sup>253</sup> will protect information held by government agencies, and even private institutions.<sup>254</sup> The

recently adopted Promotion of Access of Information Act 2 of 2000 seeks to give effect to section 32 of the Constitution, which provides that everyone has the right of access to any information held by (a) the state; or (b) another person, and that is required for the exercise of protection of any rights. It provides that any requester must be given access to any record, including personal information, which is in the possession of any person, public body or private organisation, provided certain conditions are met.<sup>255</sup> Sections 7(2) and 50(4) of the Employment Equity Act 55 of 1997 provide for confidentiality in relation to all medical tests on employees—this will relate to tests required for social security reasons as well. Sections 16 and 89(2) of the Labour Relations Act<sup>256</sup> also contain provisions as to access to information by a trade union or workplace forum. Private confidential information relating to an employee may only be disclosed with the concurrence of that employee.

If a comprehensive social security database is established, and/or where provision is made for access by social security institutions to data kept elsewhere by the state,<sup>257</sup> it is suggested that specific data-protection legislation be enacted, similar to those found in the European Union (EU)<sup>258</sup> and the United States (US).<sup>259</sup> The relevant EU directive emphasises the rights of the individual in this regard and stipulates that the individuals subject to systems processing personal data:

- Have the right to know that their information is in a specific database
- What information is contained in it
- For what purpose such data is used
- That the information is adequately protected
- That they have the right to correct information or have personal information removed from the database
- That the providers give notice of corrected information.

The US Privacy Act of 1974 focuses on the duties which rest on the state by requiring the state agency which asked for the social security number to state whether it is required or optional; what statutory authority it has for asking for the number; how the number will be used by them; and the consequences of failure to provide the number.