

B. Constitutional competencies (powers) and duties: The constitutionally foreseen role of national, provincial and local spheres of government (legislative and executive) and of private providers in relation to social security

3.1 Spheres of competencies and the relationship between the spheres

As reasonable legislative (and other) measures have to be taken in order to realise the right to access to social security in terms of section 27 of the Constitution, the Committee therefore engaged with who has to exercise this legislative power and in respect of which issues. Since South Africa has a constitutional system with federal traits and as certain powers may also be assigned to the provinces, issues such as budgetary constraints and the definition of social security complicate the matter further.

3.2 National, Provincial and Local Government competence

National parliament can legislate on anything, except those areas contained in Schedule 5, but subject to the provisions of section 44(2) of the Constitution. Parliament may also delegate subordinate powers to legislate to the executive who, however, may not amend or repeal legislation.²⁶⁰ Schedule 5 contains the functional areas of exclusive provincial legislative competence and Schedule 4 the functional areas of concurrent national and provincial legislative competence. However, section 44(2) gives national parliament the power, under certain circumstances, to pass legislation on a Schedule 5 matter. These circumstances relate to national security, economic unity, national standards, minimum standards for the rendering of services and to prevent one province from taking action prejudicial to another province or the country as a whole. Sections 146 to 150 of the Constitution govern conflicts between national and provincial legislation (i.e. pertaining to both Schedule 4 and 5 matters).

Two issues are crucial in relation to the determination of a subject-matter that could be legislated upon: whether the matter falls within a certain area of competence and, secondly, what definition of social security is used to determine whether concurrent areas actually include social security aspects. At first glance there are numerous issues that may relate to social security. In Schedule 5 (areas of exclusive provincial competence) the following are found:

- Ambulance services²⁶¹
- Provincial roads and traffic.²⁶²

In Schedule 4 (areas of concurrent competence) one finds:

- Education at all levels
- Health services
- Housing
- Indigenous law, customary law and traditional leadership²⁶³
- Population development²⁶⁴

- Provincial public works programmes
- Public transport and road traffic regulation²⁶⁵
- Welfare services.²⁶⁶

Areas on which the provinces and national parliament may legislate in terms of Schedule 4 so as to regulate the executive authority of municipalities in terms of social security include:²⁶⁷

- Child care facilities²⁶⁸
- Electricity and gas reticulation
- Municipal health services²⁶⁹
- Municipal public transport
- Municipal public works
- Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems.

This gives a rather fragmented picture of possible social security provision. It could also be argued that, in view of, for example, the exclusion of many people from social security, this fragmentation may have positive characteristics. It could ensure that municipalities and communities could on a smaller scale provide basic (and better) social security schemes. It could also mean that richer provinces could become more self-sufficient in the delivery of social security services, thus freeing national government to provide better assistance to poorer provinces.

Provinces may challenge the constitutionality of national social security legislation, especially where they may be of the opinion that they should or could have dealt with it more effectively, or where it places burdens on them or affects their powers and competencies. At issue will be whether a specific matter falls within a functional area or not and whether national parliament has the power to legislate on it, or whether a provincial legislature has, for example, the power to amend (or even repeal) legislation assigned to it. To determine whether an issue falls within a functional area of competence of a province (when, for example, the President exercises powers to assign old laws to provinces),²⁷⁰ the Constitutional Court has stated the following:²⁷¹

- The functional areas of competence are not to be interpreted restrictively, but rather purposively,²⁷² informed by a functional vision of what was appropriate to each sphere.²⁷³
- The legislation must not deal with matters referred to in section 126(3) of the Interim Constitution (of which more refined versions are found in section 146 of the 1996-Constitution, dealing with a conflict between the national and provincial legislation).²⁷⁴
- One has to look at the substance of the legislation, its essence, i.e. its true purpose and effect.²⁷⁵ It is also possible that although legislation purports to deal with a matter within a certain functional area, its true purpose and effect falls outside of the listed areas.²⁷⁶ This purpose is to be gleaned from an inquiry into the legislative scheme, which will include the

historical context²⁷⁷ of the legislation and the substance²⁷⁸ to be established from the preamble and the provisions of the legislation.

The functional areas of competence may become an issue where (proposed) legislation regulates social security and only partly deals with issues within the competence of provinces. Disability is one such example. Healthcare and welfare are provincial concurrent competency areas, but other social security issues affecting people with disabilities may be national.

National parliament consists of the National Assembly and the National Council of Provinces (NCOP), where provincial delegates have a direct input in certain national legislative processes. Legislation is divided into section 75 legislation (ordinary bills not affecting provinces) and section 76 legislation (ordinary bills affecting provinces). Input by the NCOP is limited in terms of the process in section 75 cases and each delegate votes separately.²⁷⁹ This in effect means that proposed social security legislation that does not have a bearing on an area mentioned in schedule 4²⁸⁰ will more easily pass possible resistance from the provinces.²⁸¹ Other mechanisms would have to be devised so as to facilitate discussion with and contribution by the provincial spheres as any social security system is sure to impact significantly on the provinces.

Another problem which has been identified and which has a definite bearing on social security, is the lack of input from provincial executives that implement social security matters, in discussions that go to the NCOP.²⁸² Section 42(4) provides an additional opportunity for the NCOP to have an impact on social security policies as it constitutionally serves as a national forum for public consideration of issues affecting the provinces.

Both executive powers and national legislation that existed when the 1996 Constitution took effect, can be assigned to the provinces. Where no major overhaul of the existing social security provisions/schemes is considered, the assignment of existing legislation, administered nationally, in terms of item 14 of Schedule 6 to the Constitution is an option to effect better delivery or a devolution of power. Such legislation, however, has to be within the functional areas of Schedule 4 or 5. When assigned, the province may repeal²⁸³ or amend or even substitute such assigned legislation. In terms of section 99 a cabinet minister may assign “any power or function that is performed in terms of an Act of parliament to a member of a provincial executive”. A similar power of assignment of executive powers exists for the provinces towards municipalities. National government and provinces however *must* assign to municipalities a matter listed in Schedules 4A²⁸⁴ and 5A²⁸⁵ which “necessarily relates to local government”, if that matter would most effectively be administered locally and the municipality can effectively administer it.²⁸⁶ Municipalities may make by-laws on the issues that they have the right to administer.²⁸⁷

Where a social security scheme is financed through taxes, the relevant authority should possess the necessary powers to tax, unless national taxes are allocated to provinces where the scheme has been decentralised. The taxation powers²⁸⁸ of provinces are subject to national legislation, but excludes income tax, VAT, general sales tax and rates on property or customs duties. Flat-rate surcharges may, however, be placed on the tax bases of any tax.²⁸⁹ It is also a method of redistribution that has

effectively been used by municipalities.²⁹⁰ The role of municipalities in delivering social security can be extended, especially in view of their constitutionally assigned role as promoters of social development²⁹¹ and providers of a safe and healthy environment.²⁹²

From the above one can conclude that:

- Provinces could on their own initiative adopt legislation on social security matters insofar as Schedules 4 and 5 permit. Conflicts with existing or new national legislation falling within Schedule 4 (concurrent national and provincial legislative competence) will be dealt with in terms of sections 146-150. Conflicts falling within schedule 5 (exclusive provincial competence) are to be dealt with in terms of section 147(2). In terms of national legislation that falls within the circumstances referred to in section 44(2) will prevail.²⁹³
- National legislation that deals with social security matters can be challenged by provinces for infringing on a Schedule 5 matter. However, the legislation could in turn be justified by section 44(2).
- Provinces could make reference to social security matters in their provincial constitutions, as, for example, Western Cape did.²⁹⁴
- Social security legislation can be assigned to the provinces, bearing in mind the constitutional principles of co-operative governance and public finances that have to make delivery possible.
- The role that local governments can play in order to effect social security should not be under-estimated and provides the ideal opportunity for smaller-scale social security projects for sectors previously not covered by social security provisions.

After careful consideration of the above the Committee recommends that social security become a fully-funded mandate, within a “costed norms” approach, to ensure delivery in terms of constitutional obligations. The constitutional principle of co-operative governance with regard to delivery will also have to be given effect.

3.3 The application of the Bill of Rights to the State and to Social Security Laws

In terms of section 7(2) of the Constitution “the state must respect, protect, promote and fulfil” the right to access to social security.

“The state” is said to include all state organs, as well as institutions fulfilling a public function and those “private” institutions in which the state is the only shareholder.²⁹⁵ “Private” agencies delivering (for example) social pensions will also be bound by the Bill of Rights. It is arguable that private institutions, in particular NGOs and CBOs which fulfil several social security functions, would be regarded as state organs and thus claim from national government sufficient support as they are undertaking social security delivery on behalf of the state. They should, at the very least, be enabled to render social security services. In the *Grootboom* case the Constitutional Court made the point in the following terms:

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.²⁹⁶

There are a number of section 7 duties on the state in respect of the realisation of the right to access to social security in accordance with section 27, apart from the duty to take legislative and other measures to progressively realise the right to access to social security.

In terms of section 8(1) the Bill of Rights applies to “all law” and binds the legislature, the executive and the judiciary. When legislating, or when holding the executive accountable or making decisions, it has to bear in mind the Bill of Rights, and in this regard, the section on social security. However, it may be argued that the national legislature has the duty to create the necessary framework for the other spheres, or that it has to assign legislation so as to enable other spheres to realise and respect social security rights. The same goes for the executive in the various spheres of government.

Section 39(2) states that when interpreting “any legislation” (for example any existing social security law) or when developing the common or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Coupled with the fact that the Bill of Rights applies to “all law”, this gives considerable impetus to attempts to broaden the scope of social security and to regulate the whole field in such a manner so as to ensure the realisation of the right. Therefore, the Labour Relations Act of 1995, the Insurance Act of 1943, the law in relation to contracts, family law (e.g. maintenance), and customary law all have to be interpreted in the light of the constitutional right to access to social security. In the case of the *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*²⁹⁷ the Constitutional Court interpreted the word “spouse” in the Aliens Control Act to include “same-sex life partner” in order to give effect to the constitutional prohibition on discrimination on sexual orientation.

- There are thus distinct duties placed on the state and bodies classified as organs of state in relation to the realisation of social security rights.
- All existing legislation and the development of common and customary law has to be interpreted in a way which is sensitive to the right to access to social security, as well as related human rights.

3.4 Private Institutions, NGOs, CBOs and Public Institutions and Social Security delivery

3.4.1 Constitutional principles in relation to the allocation of (public) funds to public and private bodies (NGOs, CBOs and other institutions, whether acting as expressly mandated or implicit agents of delivery or not for government)

The allocation of funds for social security delivery/implementation is an area of potential conflict. A social security system may be decided upon in which tax payers' monies—or contributions—from a large sector of society are utilised. In such a system monies collected centrally/nationally²⁹⁸ would have to be allocated to decentralised agents (provinces, municipalities or other, perhaps private, agencies), which would deliver the social security services or benefits.²⁹⁹ This is often linked to a constitutional right to deliver the services or benefits.

A second problem may arise when a new and more comprehensive social security system is developed that may affect existing bearers of rights or existing legitimate expectations. This would prompt policy-makers, the legislature and the executive to keep carefully to the principles outlined in the Constitution, relevant legislation such as the Administrative Justice Act and the case law discussed above.³⁰⁰

The Constitutional Court has already set a few guidelines with regard to the disputed allocation of money for education and municipal matters, as well as more general principles in relation to judicial interference with budgetary decisions. In the case of *Permanent Secretary of the Department of Education, Eastern Cape v Ed-U-College (P.E.) Section 21 Inc.*³⁰¹ the reduced subsidies of so-called independent schools were at issue.³⁰² As far as those subsidies originated from the lump sum budget allocated to the Department of Education in the Eastern Cape, the Constitutional Court found such allocation to be legislative in nature and therefore subject to the relevant constitutional framework in that regard (but not subject to the principles of administrative justice).³⁰³ Where the formula to determine the specific allocation of subsidies to private schools by the Member of the Executive Council (MEC) was concerned, this was found to constitute administrative action, thus making such decisions subject to the provisions of section 33 of the Constitution (and, therefore, subject to the dictates of procedural fairness, reasonableness and lawfulness).

The Constitutional Court mentioned the variety of options available to the MEC, such as an across the board subsidy per learner, a means test for parents of learners, a means test for schools, etc. This discretion rests with the MEC by virtue of the provisions of the Schools Act of 1996. It was argued that such discretion is political in nature and therefore not subject to section 33, which determines that such action has to be procedurally fair, reasonable and lawful. The nature of the power exercised by the MEC will determine what exactly is required in terms of these three requirements. The right to be afforded a hearing arises in cases where a legitimate expectation³⁰⁴ to the (unchanged) subsidy is present. In this case insufficient facts before the court to prevented it coming to a conclusion.

This decision is of great significance for private institutions, NGOs and CBOs which are (partially) dependant on state subsidies for purposes of delivering social security. Where state subsidies exist as part of the (full) realisation of the constitutional right to access to social security and the state is not providing or cannot itself sufficiently provide such a service, the claim may weigh even heavier.

To distinguish whether a power is political or administrative in nature, reference could be made to the *SARFU* case.³⁰⁵ Implementation of legislation is ordinarily administrative action. In determining this question the source of the power, its subject matter, whether it involves the exercise of a public duty, its relation to policy matters which are not administrative and/or its relation to the implementation of legislation, are of importance. In the *Ed-U-College* case O'Regan J stated that a policy in the narrow sense where the member of the executive is implementing legislation, often constitutes an administrative act.

It should be added that the termination of pensions and other welfare grants by provinces have been successfully challenged in a number of cases on grounds of the principles of administrative justice.³⁰⁶

As far as budget allocations and distributions are concerned, the *Fedsure* case³⁰⁷ is of importance, especially as re-distribution and cross-subsidisation were contextual factors influencing the complaints against the act. The budget resolutions, as with by-laws and the imposition of taxes, were found to be legislative in nature and therefore not subject to the provisions of administrative justice.

In addition, international guidelines in existence in relation to the realisation of socio-economic rights (and therefore by implication rights to social security) should serve as persuasive authority in this regard.³⁰⁸ Included in this body of guidelines/principles are the 1984 Limburg Principles³⁰⁹ and the 1997 Maastricht Guidelines,³¹⁰ which provide guidance in the interpretation of socio-economic rights in the ICESCR. It is submitted that these soft law interpretations remain useful in guiding the decisions to be made on the implementation of socio-economic rights, as the Maastricht Guidelines for example list violations of socio-economic rights.³¹¹ This list includes:

- Reduction or diversion of specific public expenditure that leads to the non-enjoyment of rights
- Failure to put into effect policies to implement rights
- Failure to maximise available resources
- Failure to promptly remove obstacles to fulfilment.

“Resources” which must be employed in order to give effect to, amongst others, the right to access to social security (and to appropriate social assistance) does not only mean money or financial assistance from government. Himes³¹² defines resources as multi-levelled (household, family, community, government at various levels and international) and consisting of various types, i.e. human (knowledge, skills, time, leadership), economic (i.e. financing, funding, public revenue,

development co-operation) and organisational (i.e. family or community structures, municipal and provincial social services, judicial organs, national co-ordinated planning and legislative and judicial initiatives).

Therefore:

- In the allocation of subsidies for which a member of the executive has a discretion, such member has to keep to the principles of fair administrative action. Where subsidies are to be terminated, those affected are to be afforded a hearing prior to such decision being taken. However, a court would not lightly substitute a decision by an administrative official for its own.
- In relation to budget allocations or appropriations made out of public funds³¹³ the function is legislative in nature and has to conform to principles in relation to legislative functions, and not to those of administrative justice.
- The Maastricht Guidelines provide useful examples of what could be referred to as violations to socio-economic rights and could guide legislative, administrative and political decisions in relation to social security.
- “Resources” should be given the widest possible meaning, all of which can contribute to the realisation of social security rights.

3.4.2 Horizontal application of the Bill of Rights

To what extent may the state regulate, expand or limit the provision of social security measures by private providers and individuals? Could it, for example, regulate private healthcare provision even more—for example, by requiring medical and retirement schemes to expand categories of membership?

Section 8(2) and (3) of the Constitution states that the Bill of Rights binds natural and juristic persons, i.e. private (non-state) institutions to the following extent:

- To the extent that the right is applicable
- Bearing in mind the nature of the right
- The nature of any duty imposed by the right.

Although section 27(2) states that the state must take reasonable legislative and other measures, section 27(1)(c) states unequivocally that “everyone has the right to have access to social security”. This potentially binds private deliverers of social security, such as insurance companies, employers, medical aid schemes, and pension schemes, by section 27. It could indeed be argued that in order to cast comprehensive social security protection in South Africa in sufficiently concrete terms, the incorporation of these private institutions is imperative.

The interpretation of the three criteria listed above will be instrumental in determining the extent of such application. A number of other human rights, such as the right to equality and property rights,

will also apply to the private provision of social security. Laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and the Medical Schemes Act of 1998 have already made inroads in the private sphere's provision of social security for, for example, HIV positive people. These laws protect vulnerable groups such as women and people with disabilities, also in relation to social security. In *Government of the Republic of South Africa v Grootboom*, the Constitutional Court affirmed that the right of everyone to have access to adequate housing placed, at the very least, a negative obligation on private entities "to desist from preventing or impairing the right of access to adequate housing" (par 34). A similar duty therefore rests on private institutions that have the capacity to prevent or impair the right of access to social security.

Therefore the following should be borne in mind:

- The right to (access to) social security could, with certain qualifications, also be enforced against private institutions.
- Regulatory legislation is essential to ensure that private institutions respect and facilitate the expansion of social security rights.
- Related human rights, such as equality and non-discrimination, administrative justice and children's rights all remain useful tools in effecting change in social security in the private sector.