

Chapter 4

Constitutional Framework for Social Security in South Africa



4.1 Introduction

Fundamental reform of South Africa's social security system that aims to redress past injustice is in accordance with the provisions of the Constitution of the Republic of South Africa 108 of 1996 (hereafter referred to as the constitution). 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 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.

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 justiciable.

4.2 Status and impact of the Constitution

Section 2 of the Constitution 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.

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,¹³ as well as, to the extent foreseen by the Constitution,¹⁴ natural and juristic persons. In recent times, 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.

4.3 General principles

The overarching aims of the Constitution are closely related to social security goals: healing the injustices of the past, ensuring social justice, improving the quality of life for all South African citizens (*inter alia* by alleviating poverty and suffering), and freeing the potential of each citizen. The meaning of the constitutional fundamental rights has to be determined and understood against the background of past human rights abuses.

Certain constitutional values are key to the interpretation of fundamental rights pertaining to social security: human dignity, equality and freedom, as well as the advancement of race and gender equality.

4.4 A human rights approach

The Constitution favours a human rights approach by not differentiating between social, civil and political rights. By not differentiating between this apparent "categories" of rights,

emphasis is placed on the fact that these rights are interrelated, interdependent and indivisible. 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 particular socio-economic rights, such as access to land, must be in place as well. Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life.

In the Constitution the human rights-based approach towards social security (fundamental) rights is strengthened by provisions which: (a) state that the duties imposed by the Constitution must be performed, and (b) require of the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

The right to access to social security is backed by a host of other social security relevant fundamental rights. These include the right to have access to healthcare services, to sufficient food and water, to adequate housing, the right to education, as well as the right of children to basic nutrition, shelter, basic healthcare services and social services. Together these rights can be said to ensure, from a constitutional and human rights perspective, adequate social protection.

4.5 The meaning of social security from a constitutional perspective

The right to (access to) social security in South Africa, however, is not yet cast in concrete terms. It is incumbent on Government to set minimum standards for defining the right to access to social security and its realisation. This, it is suggested, has to be done within the framework of the overall goals of the social security system envisaged by Government. The definitional standards so adopted then have to be applied and implemented in programmatic fashion according to an appropriate time-frame, setting out the goals to be achieved, mapping the different programmes and systems, determining the priority order, and indicating the time targets.

In keeping with modern social security thinking and policy-making, social security is no longer seen as merely curative (in the sense

of providing compensation), but also as preventative and remedial in nature. The focus should be on the causes of social insecurity (in the form of, amongst others, social exclusion or marginalisation), rather than on (merely dealing with) the effects.

Further, the social security concept does not merely cover measures of a public nature. Social, fiscal and occupational welfare measures, collectively and individually, whether public or private or of mixed public and private origin, must be taken into account when developing coherent social security policies. In a country such as South Africa such an approach may not only be advisable, but also necessary, in order to fully utilise limited resources. This implies that a functional definition of social security be adopted, which includes all instruments, schemes or institutions representing functional alternatives for the publicly recognised schemes – that is, all instruments available to society for guaranteeing social security.

While the right to access to social security is granted to “everyone”, it is clear that the rights of children in this regard are exercised mainly via their parents and families. 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 protected contemplated by the Constitution. In addition, according to the Constitutional Court in the *Grootboom* case, 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.

Important implications flow from the above perspective. 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 to 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 also needs to be specified. On the question of how and where the right should be claimed, the state also has to concern itself with the institutions that will hear and determine disputes arising from claims for social security benefits provided for under the relevant legislation.

The Constitution places a duty on the state to respect, protect, promote, and fulfil the rights in the Bill of Rights.¹⁵ 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. On a secondary level, 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.

This positive 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 of the state to protect 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.

4.6 Limiting, interpreting and enforcing social security rights

The constitutional rights relating to social security are subject to two forms of limitations. First, the limitation must comply with the requirements contained in the (general) limitation clause of the Constitution (sometimes referred to as external limitations). 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).

As far as the general limitation clause is concerned, section 36 of the Constitution 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.

An example of a non-justifiable limitation would occur 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 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 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 benefit from them as time progresses.

When interpreting social security-related 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. The power to enforce and adjudicate these rights vests in the courts (in particular the Constitutional Court), while the Human Rights Commission is given the mandate to monitor compliance with and support the development of fundamental rights.

Where parliament or the provincial legislature failed to comply with a constitutional

obligation that requires positive state action the Constitutional or High Court may grant appropriate relief.

4.7 Concluding remarks

Committee analysis indicates that there are unequal, exclusionary and inequitable structure of the present social security system as a whole, and of particular elements of the system, which are therefore not in conformity with the constitutional prohibition of unfair discrimination.

In view of the need to urgently address this challenge, the Committee recommends that social security policies and programmes must be reasonable both in their conception and their implementation. Showing that the measures are capable of achieving a statistical advance in the realisation of the right to access to social security may not be sufficient to meet the test of reasonableness. Rather, the needs that are the most urgent must be clearly addressed. Particularly vulnerable communities must be given priority by Government and their needs must be effectively addressed.

From the *Grootboom* and other constitutional case law it appears that:

- A reasonable programme must clearly allocate responsibilities and tasks and ensure appropriate financial and other resources
- It is not only the state that is responsible for the provision of social security, but that the responsibility and/or involvement of family structures, other (non-state) providers and private provision has to be factored in, acknowledged, supported/protected, and, where necessary, regulated
- As a rule (but subject to the reasonableness criterion), the court will not consider whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent
- The socio-economic/social security right at stake must be coherently and comprehensively addressed
- Guidelines drawn up in the wake of budget constraints have to be reasonable

- A minimum floor of benefits or provision has to be made for the most vulnerable in society.

The Committee recommends that given South Africa's commitment to relevant international obligations, social security laws be amended to comply with these.