

Revisiting the social security policy framework in South Africa

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1 INTRODUCTION

It may be true that the lives of most South Africans are increasingly affected by the various forms of social security. And yet, there are not many other academic disciplines, in particular legal disciplines, where so little of the general principles, let alone the intricate debates and details, is actually known. Irrespective of the considerations which may have contributed to this state of affairs over the years, the constitutional embodiment in the Bill of Rights of a right to access to social security (s 27(1)(c) of the Constitution Act 108 of 1996) has now propelled this terrain into the forefront not only of stakeholder debate but also of academic and legal discourse. Backed by a host of other equally relevant fundamental rights,¹ as well as the obligation on the part of the State to incrementally give effect to this right,² and the power which vests in the courts (in particular the Constitutional Court)³ and the Human Rights Commission⁴ to monitor compliance with and support the development of this right, this is set to effect a lasting change in the vast landscape of policy formulation, administrative organisation and service delivery, and academic and legal treatment. Interpreting and enforcing rights associated with social security, as is the case with other socio-economic rights,⁵ and giving effect to statutory entitlements which have accrued in this regard,⁶ certainly

1 Eg the right to health care services (s 27(1)(a)), and the right to equality (s 9)

2 See ss 7(2) and 27(2) of the Constitution.

3 In the first certification judgement the Constitutional Court remarked that these rights are justiciable and may lead to court orders which may have implications for budgetary matters: *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) 800 D-F (par 77).

4 S 184(3) of the Constitution: "Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

5 For two recent examples, see *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) (on the right to medical treatment) and *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1106 (CC) (where the Court upheld the constitutional validity of the statutory provision which substitutes the liability of the Compensation Fund for the common-law liability of the employer in the event of a workplace injury or illness suffered by the employee)

6 In *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* 1998 (1) All SA 525 (E) the decision of the MEC to suspend payment of arrear pensions, payable in terms of the Social Assistance Act 59 of 1992, due to budgetary constraints, was successfully challenged.

emphasise the importance of undertaking a proper legal analysis of the nature, content and ambit of the right to (access to) social security.

This is not to say that the constitutional imperative has been the only or perhaps even the primary driving force behind the current interest in social security. It is evident that the more sensitive approach to matters of socio-economic concern since the democratic elections of 1994, the wider international context of the social security paradigm and the commitments which South Africa may incur in this regard,⁷ as well as the need for a much more coherent approach in this area, are all playing a decisive role. More importantly, it is the very plight of those who are (still) excluded from the formal framework of social security, in particular the vast majority of the poor and needy who enjoy virtually no entitlement,⁸ which has caused concern and already brought about some reconsideration of the fundamental characteristics of the system.

2 CONCEPT OF SOCIAL SECURITY

It would appear that there is no universally applicable definition of social security. Sometimes the term is understood with reference to the different risks or branches of social security covered by Convention 102 of 1952 (Social Security (Minimum Standards)) of the International Labour Organisation.⁹ Others criticise this approach, and attempt to provide their own definition of what social security is meant to cover.¹¹ And yet, the treatment of social security in different systems and countries reveals that

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- 7 The provisions of the important International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations in 1966, are particularly relevant: Firstly, because of the similarity of formulation (the wording of s 27(1)(c) and 27(2) of the Constitution is largely modelled on that of the corresponding provisions of the ICESCR (a 9 and a 2(1) respectively)). Secondly, South Africa already signed the Convention in 1994, and ratification is apparently imminent. Thirdly, since its inception in 1985 the UN Committee on Economic, Social and Cultural Rights 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 (see generally Raoul Wallenberg Institute of Human Rights and Humanitarian Law *General Comments or Recommendations adopted by the United Nations Human Rights Treaty Bodies, vol II: Committee on Economic, Social and Cultural Rights* (1997)).
 - 8 See in particular the 1998 government-commissioned *Poverty and Inequality Report* (PIR), which highlights, amongst others, the lack of a coherent strategy on the part of government to deal comprehensively and effectively with the plight of the poor.
 - 9 For example, the recent introduction of the child support grant at the expense of the long-existing state maintenance grant is a clear indication of a commitment on the part of government to let more and larger families in the impoverished section of the community benefit from state social assistance measures.
 - 10 The ILO Convention No 102 of 1952 lists the nine classic risks, namely sickness, maternity, employment injury, unemployment, invalidity, old age, death, the provision of medical care, and the provision of subsidies for families with children. It compels ratifying countries to establish a minimum of three branches, with at least one from unemployment, old age, invalidity, employment injury or survivors and minimum standards of coverage and benefits.
 - 11 For example, Pieters defines social security as "... the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (ie income from paid labour) or particular costs" (Pieters 1993:2).

neither the traditional nor the definitional position appears to cater sufficiently for particular approaches a country or system might want, or have, to follow. For instance, in South Africa part of the current debate revolves around the question of whether or not housing, transport, education and other forms of income and support provision should be included in the social security framework. Government appears to be of the view that for South African purposes social security includes not only public measures but also covers private measures, inclusive of private savings.

In fact, social security is not a fixed concept, but reflects both similarities and variety (Berghman 1991:9; Olivier *et al* 1999:9–13). While it can be said to comprise of social contingencies or core elements (eg relating to health, unemployment, old-age, employment injuries), it is nevertheless flexible enough to reflect a country-specific content, and is subject to constant change and development over time. Structural and cultural factors, amongst others, determine the specific content of social security in a country at any given time (Berghman 1991:10–11).

It is generally also true that existing schemes are hardly ever fundamentally overhauled at once but, rather, incrementally changed over a period of time (Berghman 1991:12). It is suggested that such gradual introduction and implementation is also foreseen by section 27(2) of the Constitution of the Republic of South Africa 108 of 1996, which requires “progressive realisation” of the right to access to social security.

It would appear that the time has come to undertake a fundamental review and, to the extent necessary, an overhaul of social security in South Africa. Various government and other initiatives are presently under way, aiming at the development of a comprehensive approach to social security.¹⁵ Several reasons, which would all require a further in-depth investigation into the issues concerned, would appear to make this necessary. One of these relates to the essentially Western-oriented concept of social security. It is clear that this approach is unable to comprehend, give sufficient recognition to and support informal forms of social security obtaining in marginalised communities, consisting mainly of the rural and urban poor as well as the structurally unemployed and the informally employed amongst them. They are for the most part excluded from the formal social security framework as they are not in formal employment and do often not qualify for social assistance, unless they fit the requirements for one of the narrow categories of social grants (old-age, child support, disability).

It would appear that there is much to be learnt from other experiences where existing traditional and informal (mostly community-based) forms and mechanisms of social security coverage on the basis of risk and/or

12 See the *White Paper for Social Welfare* 1997:48.

13 Recently, in fact some months ago, a Committee of Enquiry into Social Security has been established by the Minister of Welfare and Population Development, on the basis of a Cabinet decision. This committee is charged with developing recommendations on the establishment of a comprehensive social security system.

need are being practiced and increasingly being investigated.¹⁴ Accommodating these forms and measures in, or alongside, the formal system, and adapting or extending the formal system in order to cover these excluded categories of people in an appropriate manner, might go some way to extending protection to them. For such groups social security coverage would often mean more than merely providing a safety net: it is their very means of short- and medium term survival where individuals lack the capacity to participate meaningfully and productively in society.

Furthermore, the position of other categories and groups excluded from or marginalised by the formal system should also be investigated: such as those who are specifically excluded from the statutory definitions used to indicate the range of beneficiaries concerned. Examples of such categories include the self-employed, the informally employed and certain other atypically employed persons, and non-citizens. Legally speaking the exclusion of (some of) these categories may raise serious questions of a constitutional nature, as the final Constitution grants the "right to access to social security" (inclusive of the right to access to social assistance) to "everyone". This right is underpinned by the fundamental right to equality. Jurisprudentially the right to equal treatment has already in other areas been interpreted to imply equality of treatment.¹⁵

Finally, the lack of a coherent approach in South African social security is clearly discernible and needs to be researched properly and rectified. In a sense the present system suggests an archaic and rigid distinction between social insurance and social assistance. For instance it lets those who are or have been in formal employment benefit from a fairly well-developed social insurance coverage (in particular unemployment insurance and (workers') compensation coverage), while social assistance, in particular the grant system, remains restricted in coverage as it is mainly based on a categorial, means-tested approach which provides meagre protection against the occurrence of a limited number of social risks. There is, therefore, little social solidarity in the system apart from state-mandated budgetary flows (through the tax system) to social assistance. This is exacerbated by the fact that those in formal employment are usually in a position to top up social insurance protection by occupational-based and/or private coverage against risks such as sickness, health,

14 See generally the (German) Federal Ministry for Economic Co-operation and Development 1998:5-7; Jütting 1999:20-23, 25-35; Van der Waal & Jain 1996:79-89; and the seminal work by Von Benda-Beckmann *et al Between Kinship and the State* (1988).

15 This applies in particular to non-citizens: "Permanent residents should . . . be viewed no differently from South African citizens when it comes to reducing unemployment" (see *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) par 50-51; see also *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC)). 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 (see *Baromoto v Minister of Home Affairs* 1998 BCLR 562 (W) and *Johnson v Minister of Home Affairs* 1997 2 SA 432 (C)).

disability, and old age. Glaring disparities between the (relatively) rich and the poor are therefore prevalent, reinforcing and perpetuating not only the ever-present inequality, but also abject poverty in this country.

As is apparent from the preceding contributions, other gaps also exist (bearing in mind both public and private modalities of coverage), as a result of the way in which the various contingencies are regulated – such as insufficient levels of coverage under the Road Accident Fund (RAF) Scheme due to the fault-based nature of the system, the exclusion of high-income earners from the public unemployment insurance scheme and the poor income-replacement potential of the state social grants. Some overlaps in the system do also occur – such as the duplication in service provision by the unemployment insurance scheme, the Compensation Commissioner, and the RAF in the event of survivors' benefits, and the simultaneous accessibility to free primary health care, medical insurance coverage, and coverage in terms of both public and private health schemes.

3 REVISITING THE POLICY FRAMEWORK

As a result of present disparities, deficiencies and inconsistencies in the regulation of social insurance and social assistance, it is recommended that several changes be effected which are necessary to create a coherent system of social security regulation and service delivery. These changes would entail both an innovative and integrated approach towards social security, statutory and definitional amendments, and administrative reforms, including the possible creation of unified instruments and institutions instead of the fragmented and piecemeal mechanisms presently available. The need for greater coherence between the various parts of the social security system as well as between the different programmes, services, funds and benefits appears to be a matter of urgency.

It is suggested that a redefining of social security and of the basis for the awarding of and entitlement to benefits is required. This would imply extending protection against human disadvantage or damage rather than merely relying on the traditional risk categories; moving away from the pure employee and categorial approach in order to qualify for social insurance and social assistance benefits respectively; strengthening solidarity across the system; and accepting that appropriate informal as well as private measures and systems are relevant to social security in the South African context. Statutory changes to definitions that circumscribe the categories of dependants also appear to be necessary.

Of course, the Constitution as well as international instruments play an important and supportive role in the debate surrounding the extension of coverage. This flows from the fact that every person is entitled to the exercise of the judicially and constitutionally enforceable right to access to social security, backed by other fundamental rights, and qualified by the resources available to the State. International standards, including those which are and will become applicable to South Africa, reinforce the need to provide on a priority basis and progressively for encompassing social security coverage.

Social assistance as presently regulated suffers from many deficiencies. These have to be addressed by both the legislature and the administration. The means test as regulated and applied is insufficient and at times inappropriate – since it supports a poverty trap syndrome, is sometimes extremely difficult to comply with and to enforce, is often improperly targeted, and is inconsistently regulated and applied. A review thereof, which may imply the introduction of additional and/or alternative measures and criteria, has to be undertaken. Introducing a (qualified) basic income support grant may prove to be one of the measures needed to deal with some of the problems in this regard and to ensure some basis for universal coverage.

State social assistance is also unnecessarily burdened as little coherence exists with the social insurance system. Beneficiaries may succeed in obtaining more than one benefit or grant, and the restricted personal, monetary and time period coverage of certain social insurance schemes may cause an undue reliance on the social assistance system. The same result flows from the fact that employee-based schemes are sometimes insufficiently regulated with little or no compulsion. It would, therefore, seem necessary to introduce compulsory membership of retirement funds, compulsory preservation and transferability of retirement contributions, and the tightening of provident and pension fund withdrawals.

A combination of these and other measures may result in more funding becoming available to cater for a broader spectrum of the population presently being excluded or marginalised. It may also be necessary to consider the introduction of particular public schemes on a national basis, such as health and/or pensions, in order to ensure effective and comprehensive coverage.

There are also other reasons why the specific social grants should be subject to review. Discrimination in the allocation of these grants within particular categories (eg the poor, aged and (very) young), the unsatisfactory definition of disability, nationality exclusions, the lack of proper stakeholder and citizen participation, and the insufficient and inconsistent level of some of these benefits need to be addressed.

Social insurance is also in need of overhaul. Vast coverage restrictions, depleted funds and administrative shortcomings are some of the major problems. The possibility of abuse by partakers and beneficiaries is an omnipresent reality, while legalistic approaches and technical criteria tend to make some of the schemes unnecessarily complex for the layperson. A more simplified and cost-restrictive approach is advocated, in particular as far as the Road Accident Fund system is concerned.

It would appear necessary to reconsider the statutory regulation of certain contingencies. For example, maternity coverage is in need of more comprehensive statutory protection (eg with regard to paid maternity leave; the non-exhaustion of unemployment insurance credits). It may also be necessary to create limited additional protection against risks which are presently not regulated sufficiently – such as the creation of a wage guarantee fund system to support employees and their dependants in the event of an employer's insolvency. Extended coverage has to be integrated against the background of the totality of the social security system.

Administrative deficiencies abound. These include poor service delivery, insufficient administrative capacity and fragmented policy implementation at national or provincial level, a lack of proper funding and budgeting, unacceptable levels of fraud, the claiming of grants for the same contingency from different parts of the social security system, little inter-departmental co-ordination, insufficient record-keeping and collection of contributions, the absence of an integrated data system and accountability problems. Appropriate and comprehensive steps are needed to address each one of the deficiencies.

It may be apposite to consider the establishment of a separate independent judicial (as opposed to an administrative) enforcement system. All claims arising from the social insurance and social assistance system (eg workers' compensation, unemployment insurance, motor vehicle accidents, and social grants) could fall within the jurisdiction of a body which is granted or already enjoys the status of the High Court (whether it be a specially established Social Security Court or the existing Labour Court). This may help to let social security develop as a separate but integrated system independent from other systems, make the settlement of disputes cheap, accessible and speedy, bring professionalism and expertise to bear in settling and adjudicating such disputes, and make (social) justice accessible to and a practical reality for those who rely for their very existence on benefits forthcoming from social security.

Finally, a clear pattern emerges as far as the interaction and integration between labour market and social protection or security is concerned: preventative and integrative measures are either largely absent or insufficiently linked to the social security system. The emphasis is overwhelmingly on compensating victims and providing monetary support to certain categories of the indigent (unemployed). The rigid nature of the system, as well as its inability to build in flexibility measures in order to encourage (if not enforce) labour market participation, must be seen as counter-productive and, in the long run, costly. Certain measures would have to be introduced to facilitate an overhaul of the system as far as these considerations are concerned.

4 CONCLUSION

The preceding articles focus on various parts of the existing social security system, identifying and addressing the most pressing problems which arise due to a lack of an integrated system and suggesting changes or rectification or restructuring to streamline the system as it is, in order to arrive at a more coherent approach. They do not necessarily address in any detail a more fundamental overhaul of the system, the integration of the labour market, social security and occupational or private retirement dispensations, and financing options pertaining to the sourcing of social security. Nevertheless, it is hoped that these contributions will facilitate an in-depth and informed discussion of the South African social security system as a whole, on the basis of which policy options for the restructuring of the system can be further debated.

Sources

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