

## **C. Conclusions and recommendations**

### **I. General Considerations**

- 3.1 The importance of the constitutional provisions regarding social security is highlighted by the principle of constitutional supremacy: 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.
- 3.2 The Constitution also makes it clear that the state is obliged to conform, respect and give effect to the (fundamental) rights contained in the Bill of Rights, as they are said to bind the legislature, the executive, the judiciary and all organs of state. These rights also bind, to the extent foreseen by the Constitution, natural and juristic persons.
- 3.3 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.
- 3.4 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. The Constitutional Court has also recognised another important value that is of significant importance for social security: *ubuntu* or group/shared solidarity. In addition, 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.
- 3.5 The Constitution favours a human-rights 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. Social rights have exactly the same status as other civil and political rights.
- 3.6 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.
- 3.7 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.

- 3.8 This right to access to social security is backed by a host of other social security relevant fundamental rights, such as 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.
- 3.9 Other fundamental rights also play a significant role in the context of South African social security, such as the right to equality, the right to privacy, the right to property and the right to just administrative action.
- 3.10 The right to (access to) social security in South Africa is not yet cast in concrete terms. It is recommended that instead of a conventional social security system, South Africa adopts a comprehensive social protection system that incorporates social insurance, social assistance and development programmes.
- 3.11 Furthermore, 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 a suitable timeframe, setting out the goals to be achieved, mapping the different programmes and systems, determining the priority order, and indicating the time targets.
- 3.12 Given the socio-political and economic history of South Africa, it is suggested that addressing poverty should be adopted as one of the key goals of a comprehensive social security system, with explicit provision to deal with income poverty. Other goals also have to be developed, and should factor in constitutional values and principles, such as equality, non-sexism and non-racism.
- 3.13 Adopting a purposive approach towards the interpretation of fundamental rights, it is suggested that 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.
- 3.14 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. This entails, amongst others, the following:
- 3.14.1 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.

- 3.14.2 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, i.e. all instruments available to society for guaranteeing social security.
- 3.14.3 Adopting an integrated perspective towards social security 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.
- 3.14.4 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.

3.15 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, as well as from the multi-dimensional nature of these concepts and the multi-actor responsibility foreseen by the Constitution.

3.16 For example, 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 protection 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.

3.17 Important implications flow from the above conceptual framework. 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 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.

- 3.18 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.
- 3.19 Social security policies and programmes must be reasonable, factoring in the South African history of past discrimination and disadvantage, 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. The needs that are the most urgent must be addressed.<sup>314</sup> Particularly vulnerable communities and categories of people must both be given priority by government and their needs must be effectively addressed.
- 3.20 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 human 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 (such as NGOs and CBOs) 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. It is, therefore, insufficient to attempt to adopt measures that give effect to the right to access to social security in isolation. 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 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
  - 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—those who are vulnerable because they live in conditions of poverty and deprivation, as well as groups or categories of people who may because of other reasons

are particularly vulnerable, such as people with disabilities. 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 term “resources” does not only refer to monetary or financial resources or assistance from government. It should be seen within the framework of its widest possible meaning, all of which can contribute to the realisation of social security rights. Resources are, therefore, multi-levelled (household, family, community, government at various levels and international) and consist 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).

3.21 The Constitutional Court generally will uphold a social security programme which institutionalises social security provision.

3.22 The court may or may not be hesitant to grant relief where individuals assert their constitutional rights. However, where categories of people are made vulnerable in a way which impacts on their survival and livelihood, it 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. How to prioritise in view of limited resources remains one of the greatest challenges.

3.23 Given the distinct constitutional duties placed on the state and organs of state to fulfil, promote, protect and respect social security rights, and the constitutional rules of interpretation of these rights, all existing legislation, as well as common law and customary law must be scrutinised and brought in accordance with the right to access to social security, as well as other social security-related rights.

3.24 Social security rights may result in courts making orders which have direct implications for budgetary matters, as is evident from the *Grootboom* case.

3.25 The Constitution 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. 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.

3.26 This positive obligation does not, as such, require that the state merely 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.

- 3.27 In the allocation of subsidies in respect of which a member of the executive has a discretion, such member has to keep to the principles of fair administrative action. Where individual or institutional subsidies (of an ongoing nature) are to be terminated, those affected are to be afforded an opportunity to make representations prior to such a decision being taken. However, a court would not lightly substitute a decision by an administrative official with its own.
- 3.28 Similarly, the unilateral termination of pensions and other welfare grants by provinces can be successfully challenged on grounds of the principles of natural justice.
- 3.29 Administrative justice: the way in which the law deals with social assistance issues in particular is a reflection of the poor 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, have not been respected. In several cases the courts have found that the unilateral suspension or withdrawal of grants is unlawful and invalid. 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, the court ordered the reinstatement of the (disability) grants, some of which go back as far as 1996. This decision has been upheld by the Supreme Court of Appeal.
- 3.30 This approach is actively endorsed and supported by the Committee, and steps should be taken to enlighten and train social security administrators in order to sensitise them as far as the legal requirements and implications impacting on their decisions are concerned.
- 3.31 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.

- 3.32 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).
- 3.33 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.
- 3.34 A constitutional challenge could also be available to private institutions, such as NGOs and CBOs (partially) dependent on state subsidies in delivering social security. This will be the case where state subsidies are granted in order to fully realise the constitutional right to access to social security and the state is not or cannot itself sufficiently provide such a service.
- 3.35 The right to (access to) social security could, with certain qualifications, also be enforced against private institutions.
- 3.36 Regulatory legislation is essential to ensure that private institutions respect and facilitate the expansion of social security rights.
- 3.37 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.
- 3.38 Generally speaking, the interdependent and mutually supportive and complementary role of the different social security-related human rights is imperative for effecting social inclusion and honouring the dignity of people.
- 3.39 The constitutional right to equality in particular serves as an important yardstick against which the validity of distinctions in social security provision and service delivery must be measured, and binds both the state and non-state actors.
- 3.40 It might be constitutionally untenable to retain certain discriminatory provisions in social security legislation. There are, 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.
- 3.41 Access to the social security system in South Africa is denied millions of people. This follows from the fact 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. 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.

- 3.42 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, 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.
- 3.43 An enquiry into the distinction in the retirement age for men (65) and women (60) 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 (social reproduction) 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.
- 3.44 The almost blanket exclusion of non-citizens from the South Africa social security system, in particular the social grant system, may be subject to a constitutional challenge. A differentiated approach may in the event of some categories of non-citizens be appropriate.
- 3.45 In terms of international law obligations South Africa is bound to extend protection to persons with refugee status and to non-citizen children. Excluding lawful residents from areas of social security protection, in particular those who enjoy permanent resident status, may be found not to be justified in terms of the Constitution. It would also appear that even illegal non-citizens are constitutionally entitled to core social assistance.
- 3.46 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.
- 3.47 Given the integration and migration thrust in SADC, and the aims and purposes enshrined in the SADC Treaty and other SADC instruments, 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.

- 3.48 It is also recommended, 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.
- 3.49 International law deals with the protection of the right to social security in a way that is instructive in the South African constitutional context. Various international instruments contain provisions regarding the exercise of this right, such as the Universal Declaration of Human Rights of 1948, ILO Convention 102 of 1952 concerning Social Security (Minimum Standards), the Convention on the Elimination of all Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child of 1989, and the European Social Charter. 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.
- 3.50 An enhanced monitoring, interrogative and enforcement role for the South African HRC needs to be envisaged in order to give meaningful effect to the right to access to social security and other social security-related fundamental rights.
- 3.51 The supervisory process of the 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.
- 3.52 The Commission and representatives of different state departments together with other role players such as NGOs and 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.
- 3.53 It is necessary that 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 they did not follow these

recommendations the committee should be able to enforce the recommendations by way of a declaratory order.

- 3.54 Social security benefits may under certain circumstance be recognised as property rights. This means that social assistance grants will not necessarily form part of property rights *before* they accrue to the specific individual. Once social assistance grants have accrued to an eligible individual, 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. Of course, the constitutional right to administrative justice (as amplified by common and statutory law) will prevent unfair interference with social assistance claims.
- 3.55 In the event of benefits flowing from social insurance (e.g. COIDA, UIF, and RAF benefits), the protection of the property clause is available because the benefits flow from the payment of contributions.
- 3.56 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, it is suggested that specific data-protection legislation be enacted, similar to those found in the EU and the US, in order to comply with the constitutional right to privacy.

## **II. National, Provincial and Local Government competence**

- 3.57 Unless major constitutional changes are brought about, the position is that some social security matters fall within the functional areas of exclusive provincial legislative competence of the provinces (such as ambulance services, and provincial roads and traffics) (Schedule 5), while other social security matters fall within the functional areas of concurrent national and provincial legislative competence (such as health services, housing, public transport, and welfare services) (Schedule 4). It is also possible that provinces could make reference to social security matters in their provincial Constitutions as, for example, Western Cape did.
- 3.58 Given the potential for conflict in social security policy making and service delivery, it is, therefore, recommended that a permanent structure aimed at co-operation, be set up to deal with social security policy making and service delivery in the (constitutionally foreseen) spirit of co-operative governance. This structure could be reflected in the establishment of a Commission on Comprehensive Social Protection.
- 3.59 It is recommended that social security become a fully-funded mandate, within a costed norms approach, to ensure the delivery of social security in line with constitutional requirements. The constitutional principle of co-operative governance must also be given effect.

3.60 The role that local governments can play to promote social security should not be underestimated and provides the ideal opportunity for smaller-scale social security projects for sectors of the community previously not covered or improperly covered by social security provisions. This flows from their constitutional obligation to give priority to the basic needs of the community, and their (constitutional) role as promoters of social development and of a safe and healthy environment.

## REFERENCES

- A-G v The Queen & Boilermakers Society of Australia, ex p. Kirby* [1957] AC 288.
- Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 1 SA 162 (A).
- Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
- Compensation for Occupational Injuries and Diseases Act 130 of 1993.
- Constitution of the Republic of South Africa 108 of 1996.
- Davis D, Cheadle, H and Haysom, N. 1997. *Fundamental Rights in the Constitution—Commentary and Cases*. Kenwyn.
- De Villiers, B. 1996. Human Rights in Developing Countries: Some Crucial Issues. *TSAR*: 679-700.
- De Vos, P. 1997. Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution. *SAJHR*;67-101.
- De Waal, J, Currie, I and Erasmus, G. 1999. *The Bill of Rights Handbook* Kenwyn.
- De Wet, E. 1995. Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights? *SAJHR*:30-49.
- Du Plessis, LM. 1996. Evaluative Reflections on the Final Text of South Africa's Bill of Rights. *Stell LR*:283-305.
- Du Plessis, LM. 1997. Menseregte in die skadu's en skanse van die ivoortoring ('n akademiese waardering van enkele fasette van menseregtebeskerming in Suid-Afrika se finale Grondwet). *Stell LR*:181-191.
- Du Plessis, LM. 1996. The Bill Of Rights in the Working Draft of the New Constitution: An Evaluation of Aspects of a Constitutional Text *sui generis*. *Stell LR*: 1-24.
- Du Plessis, LM and Gouws, A. 1996. The Gender Implications of the Final Constitution with Particular Reference to the Bill of Rights. *SA Publikereg*: 472-489.
- Grootboom and Others v Oostenberg Municipality and Others* 2000 3 BCL 277 (C).
- International Covenant on Economic, Social and Cultural Rights, 1966 999 UN Treaty Ser 3.
- Lamarche, L. The Minimum Core Content of the Right to Social Security. Unpublished paper delivered at a workshop organised by the The Centre for Human Rights and the American Association for the Advancement of Science titled "Exploring the Minimum Core Content of Economic and Social Rights" Farm Inn Pretoria 28-29 August 2000.
- Liebenberg, S. 1999. National Implementation of Economic and Social Rights. Cape Town. (To be published in: Krause, C. ea *Economic, Social and Cultural Rights: A Textbook* (2000)).
- Majola, B. 1999. A Response to Craig Scott—A South African Perspective. 1:4 *ESR Review*: 6-7.
- O'Regan, K. 1999. Introducing socio-economic Rights. 1:4 *ESR Review*:2-3.
- PPWAWU v Pienaar NO & Others* 1993 4 SA 621 (A).
- R v Industrial Disputes Tribunal, ex parte The Half Moon Bay Hotel Ltd*, Suit No. M. 49 of 1978.
- R v The Industrial Disputes Tribunal, ex p. Portland Parish Council*, Suit No. M. 48 of 1978.
- Road Accident Fund Act Act 56 of 1996.
- S v Zuma* 1995 4 BCLR 401 (CC).
- Saskatchewan LRB v John East Iron Works Ltd* [1949] AC 134.
- Scott, C. 1999. Social Rights: Towards a Principled, Pragmatic Judicial Role. 1:4 *ESR Review*:4-6.
- Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC)
- Syarikat Kenderaan Melayu Bhd v Transport Workers Union* [1995] 2 MLJ 317 (CA).

- The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 BCLR 1169 (CC) (CCT case 11/00 of 4 October 2000).
- The Maastricht Guidelines on Violations of the International Covenant on Economic, Social and Cultural Rights reprinted in 1998. *Human Rights Quarterly*: 691-701.
- Toronto Corporation v York Corporation* [1938] AC 415.
- Trengove, W. 1999. Judicial Remedies for Violations of Socio-economic Rights. 1:4 *ESR Review*: 8-11.
- The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).
- Unemployment Insurance Act 30 of 1966.
- United Engineering Workers Union v Devanayagan* [1967] 2 All ER 367.
- Von Maydell, B. 1997. Fundamental Approaches and Concepts of Social Security. In: Blanpain R. *Law in Motion*. The Hague,. 1029-1058.
- Waterfront Workers Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.
- White Paper for Social Welfare General Notice 1108. In: *Government Gazette* 18166 of 1997-08-08.

## ENDNOTES

- <sup>1</sup> Hereafter referred to as the Constitution.
- <sup>2</sup> Section 27(1)(b).
- <sup>3</sup> Section 27(2).
- <sup>4</sup> *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 76-77; *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 20.
- <sup>5</sup> 108 of 1996, replacing the interim Constitution 200 of 1993.
- <sup>6</sup> See *Coetzee v Government of the Republic of South Africa and others; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC); 1995 (4) SA 639 (CC): “The difference between the past and the present is that individual freedom and security no longer fall to be protected solely through the vehicle of common law maxims and presumptions which neither the legislature nor the executive may abridge”.
- <sup>7</sup> Section 8(1).
- <sup>8</sup> In terms of section 8(2) a provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the rights.
- <sup>9</sup> See in particular par 3 below.
- <sup>10</sup> De Wet 1995 SAJHR 36; De Villiers 1996 TSAR 694.
- <sup>11</sup> De Wet 1995 SAJHR 36.
- <sup>12</sup> The Preamble of the Constitution of the Republic of South Africa 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.
- <sup>13</sup> Section 1 of the Constitution states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism. Section 7(1) further states that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- <sup>14</sup> See *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) par 7, 111: “The introduction of fundamental rights and constitutionalism in south Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted a bill of rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction...To treat it with the dispassionate attention one might give a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi constitution in Germany”. (at par 111)
- <sup>15</sup> Section 39(1)(a) of the Constitution.
- <sup>16</sup> *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 23.
- <sup>17</sup> Van Langendonck 1986: 2; Von Maydell 1998: 5, 7; Ben-Israel 1995: 146; *The Government of the Republic of South Africa and Others v Grootboom and Others* 11 BCLR 1169 (CC) par 23.
- <sup>18</sup> Sections 1 and section 7(1) of the Constitution.
- <sup>19</sup> Section 10 of the Constitution reads as follows: “Everyone has inherent dignity and the right to have their dignity respected and protected.”
- <sup>20</sup> The South African courts have consistently stated that there is close correlation between the right to equality and the protection of a person’s dignity: *Hoffmann v SA Airways* 2000 (21) ILJ 2357 (CC); *Walters v Transitional Local Council of Port Elizabeth & another* 2001 BCLR 98 (LC).
- <sup>21</sup> Compare Van Langendonck 1986: 1.
- <sup>22</sup> International Labour Organisation 1984: 115.
- <sup>23</sup> And other measures aimed at the alleviation of poverty and social exclusion.
- <sup>24</sup> International Labour Organisation 1984: 6-7.
- <sup>25</sup> Also see International Labour Organisation 1984: 115.
- <sup>26</sup> Berghman 1997: 8-9.
- <sup>27</sup> Justice Langa describes ubuntu in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 224 as follows: “The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s

status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”

- <sup>28</sup> Mokgoro 1997: 51: “ ...a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with scarcity of resources.”
- <sup>29</sup> Mokgoro 1997: 52.
- <sup>30</sup> Chapter 2 par 24.
- <sup>31</sup> Traditionally, a distinction has been made between first (civil and political), second (socio-economic) and third generation rights. The United Nations perpetuated this distinction between first, second and third generation rights by introducing two separate Covenants. The first Covenant contains only first-generation rights and the second Covenant contain second and third generation rights. Underlying the decision to draft two separate Covenants was the assumption that second and third generation rights imply legal obligations and enforcement that differs substantially, from first generation rights. The same distinction is noticeable within the European regional system of human rights where a separate European Social Charter contains provisions for the realisation of economic, social and cultural rights. Morphet 1992: 78; Liebenberg 1995: 360-361; De Vos 1997: 69; Scott 1999: 633.
- <sup>32</sup> Compare with India where socio-economic rights are contained in the Constitution as directive principles of state policy.
- <sup>33</sup> Vienna Declaration and Programme of Action 1993 UN Doc A/Conf.157/23 I par 5; Guideline 4 “The Maastricht Guidelines”; Castermans-Holleman 1995: 355; Kartashkin 1982: 112; Arambulo 1999: 16; Alston 1995: 94; Ramcharan 1979: 252; Ziskind 1982: 142; Steiner and Alston 1996: 256; Dankwa, Flinterman and Leckie 1998: 18; Donnelly 1989: 28; Pronk 1995: 2.
- <sup>34</sup> *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).
- <sup>35</sup> Section 27(1)(c).
- <sup>36</sup> Section 27(2).
- <sup>37</sup> Section 7(2).
- <sup>38</sup> Par 45.
- <sup>39</sup> Section 27(1)(a), and the right to equality (section 9).
- <sup>40</sup> Section 27(1)(b).
- <sup>41</sup> Section 26(1).
- <sup>42</sup> Section 29(1).
- <sup>43</sup> Section 28(1)(c).
- <sup>44</sup> Social security has to be distinguished from the wider concept of **social protection**. Social protection denotes a general system of basic social support which is no longer linked to the regular employment relationship, and which is founded on the conviction that society as a whole is responsible for its weaker members—in other words, a system of general welfare support and protection (See Von Maydell 1997 “Fundamental Approaches and Concepts of Social Security” 1034).
- <sup>45</sup> Section 9.
- <sup>46</sup> Section 14.
- <sup>47</sup> Section 25.
- <sup>48</sup> Section 33.
- <sup>49</sup> See sections 7(2) and 27(2) of the Constitution.
- <sup>50</sup> A summary of these principles are contained in the next paragraph (par 6).
- <sup>51</sup> *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).
- <sup>52</sup> 2000 (11) BCLR 1169 (CC).
- <sup>53</sup> *Soobramaney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) par 29. The case dealt with the refusal by a provincial hospital to make available kidney dialysis facilities to a chronically ill patient, on the basis that due to limited resources priority has to be given to patients who qualify for a kidney transplant.
- <sup>54</sup> Par 31.
- <sup>55</sup> In *Jooste v Score Supermarket Trading (Pty) Ltd* 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. In *Tsotetsi v Mutual and Federal Insurance Co Ltd* CCT16/95) the Constitutional Court ruled that it would not likely give an order that would greatly **distort the financial affairs** of a social welfare scheme or social benefit programme, such as the Road Accident Fund.

- <sup>56</sup> *In re the Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC) par 77.
- <sup>57</sup> *Grootboom* par 53.
- <sup>58</sup> Liebenberg 2001.
- <sup>59</sup> *Grootboom* par 42.
- <sup>60</sup> *Grootboom* par 41.
- <sup>61</sup> *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) par 29.
- <sup>62</sup> *Grootboom* par 39.
- <sup>63</sup> *Grootboom* par 66.
- <sup>64</sup> See par 13.1 above.
- <sup>65</sup> *Grootboom* par 68.
- <sup>66</sup> *Grootboom* par 66.
- <sup>67</sup> *Soobramoney* par 25.
- <sup>68</sup> *Grootboom* (par 52 and 69) where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by section 26(2) in the Constitution.
- <sup>69</sup> *Grootboom* par 35.
- <sup>70</sup> These views have been expressed by the UN Committee on Economic, Social and Cultural Rights.
- <sup>71</sup> See section 184(1).
- <sup>72</sup> Section 184(3).
- <sup>73</sup> According to the HRC in its oral submission it procures the views of civil society, in particular NGO's and CBO's, when drafting protocols.
- <sup>74</sup> 59 of 1992.
- <sup>75</sup> As well as the minimum distance to service points, and access to amenities.
- <sup>76</sup> If, for example, compulsory retirement funds were to be introduced, some people could ideally finance their own social security so as not to compete for limited resources at a later stage, at the expense of the poor.
- <sup>77</sup> See par 6.
- <sup>78</sup> Berghman J "The resurgence of poverty and the struggle against exclusion: A new challenge for social security?" 1997 *International Social Security Review* (vol 50) 18, 20; Pieters D *Introduction into the Basic Principles of Social Security* (1993) 2-4.
- <sup>79</sup> Berghman J "Basic Concepts of Social Security" in *Social Security in Europe* (1991) 18.
- <sup>80</sup> Berghman *Basic Concepts* 20.
- <sup>81</sup> Berghman *Basic Concepts* 17-18.
- <sup>82</sup> ILO *Introduction into Social Security* (1989) 19; Berghman *Basic Concepts* 18.
- <sup>83</sup> Olivier M *et al Social Security Law: General Principles* (1999) 17-18.
- <sup>84</sup> Olivier M *et al Social Insurance and Social Assistance: Towards a Coherent Approach* (1999) 252.
- <sup>85</sup> As is also advocated by the Welfare White Paper—chapter 7 par 45.
- <sup>86</sup> Section 27(2) of the Constitution.
- <sup>87</sup> See the discussion on *ubuntu* or shared responsibility as a constitutional value in par 3 above.
- <sup>88</sup> Pieters *Introduction* 5-6; Berghman *Resurgence of poverty* 11.
- <sup>89</sup> Welfare White Paper chapter 2 par 24; see also the discussion in par 3 above.
- <sup>90</sup> Berghman *Resurgence of poverty* 11.
- <sup>91</sup> Berghman *Resurgence of poverty* 10.
- <sup>92</sup> Von Maydell B "Fundamental Approaches and Concepts of Social Security" in Blanpain R *Law in Motion* (1997) 1038-1039
- <sup>93</sup> See Von Maydell *Fundamental Approaches* 1038-1057 for further details.
- <sup>94</sup> See sections 7(1) and 27(2) of the Constitution.



- <sup>95</sup> See par 16, 17 and 18 below.
- <sup>96</sup> Own emphasis.
- <sup>97</sup> *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 78.
- <sup>98</sup> See the *Grootboom* case par 53.
- <sup>99</sup> Constitutionally speaking it is generally parents and families who have the primary responsibility for caring for children: section 28(1)(b) and par 77-78 of the *Grootboom* judgement. This also applies to the obligation to provide shelter: according to the judgement (par 77) this obligation is imposed primarily on the parents or family and only alternatively on the State. The State only incurs the obligation to provide shelter to those children, for example, who are removed from their families.
- <sup>100</sup> “This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28.”—*Grootboom* par 78.
- <sup>101</sup> Par 78.
- <sup>102</sup> See the definition of “dependant” in section 1 of the Pension Funds Act 24 of 1956, which includes both legal and factual dependants.
- <sup>103</sup> *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 76-77. See also *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 20.
- <sup>104</sup> De Vos 1997 SAJHR 83; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights par II par 6; O’Regan 1999 1:4 ESR Review 2. However, **positive action** may be required where interference with a fundamental right has taken place: sufficient remedies should be provided by the State to deal with such interference.
- <sup>105</sup> De Vos 1997 SAJHR 83; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights par II par 6; O’Regan 1999 1:4 ESR Review 2.
- <sup>106</sup> For example *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (7) BCLR 728 (E) and *Rangani v Superintendent-general, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T).
- <sup>107</sup> De Vos 1997 SAJHR 86; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights par II pa 6; O’Regan 1999 1:4 ESR Review 2.
- <sup>108</sup> O’Regan 1999 1:4 ESR Review 2.
- <sup>109</sup> O’Regan 1999 1:4 ESR Review 2.
- <sup>110</sup> Section 36 adopts a three-fold test, in terms of which the limitation of a fundamental right must be: (a) in terms of a law of general application; (b) reasonable; and (c) justifiable in an open and democratic society based on human dignity, equality and freedom.
- <sup>111</sup> The relevant factors referred to in section 36 of the Constitution are: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.
- <sup>112</sup> Section 27(2).
- <sup>113</sup> 1998 (1) SA 765 (CC) par 11.
- <sup>114</sup> Own emphasis.
- <sup>115</sup> 1995 4 BCLR 401 (CC) 414.
- <sup>116</sup> Cf De Waal, Currie en Erasmus *The Bill of Rights Handbook* 142.
- <sup>117</sup> *R v Oakes* 26 DLR (4<sup>th</sup>) 200; *R v Bryant* 10 DLR (4<sup>th</sup>) 321; Cachalia A *et al Fundamental Rights in the New Constitution* (1994) 106-110).
- <sup>118</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) par 104.
- <sup>119</sup> See section 36(1)(a)-(e) and *Ferreira v Levin and others; Vryenhoek and others v Powell and others* 1996 (1) BCLR 1 (CC).
- <sup>120</sup> Beatty D “Constitutional Labour Rights: Pros and Cons” 1993 ILJ 1.
- <sup>121</sup> According to Beatty these principles essentially emanate from the equality principle.
- <sup>122</sup> *Government of RSA v Grootboom and others* 2000 (11) BCLR 1169 (CC).
- <sup>123</sup> *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC). Hereafter called the *Grootboom*-case.

- <sup>124</sup> This case raises the state’s obligations under section 26 of the Constitution, which gives everyone the right of access to adequate housing. The wording of section 26(2) is similar to that of section 27(2). Therefore the judgement of the court will also be applicable on section 27.
- <sup>125</sup> Par 41.
- <sup>126</sup> Par 42.
- <sup>127</sup> Par 44.
- <sup>128</sup> Own emphasis.
- <sup>129</sup> Article 2(1), which requires that State parties must realise the rights contained in the Covenant to the “maximum of their available resources”.
- <sup>130</sup> The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR).
- <sup>131</sup> “The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is **incumbent** upon every State Party.”: General Comment No 3 at 86 par 10. Compare also Craven *The International Covenant on Economic, Social and Cultural Rights* 141; Henckaerts 1996 *Mensenrechten* 23; Robertson 1994 *Human Rights Quarterly* 702; Guideline 9 “The Maastricht Guidelines”; Leckie 1998 *Human Rights Quarterly* 100; De Villiers *The Protection of Human Rights in Developing Countries* 306. The fact that the Committee refers to *minimum core obligations*, and not to minimum rights of subsistence, implies that there is an onus on a state to satisfy at least its minimum core obligations.
- <sup>132</sup> The Court noted that the General Comment of the UNCESCR does not specify precisely what the content of **minimum core obligations** is (par 30). The court further stressed that that minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law (par 31). The court argued that it is not possible to determine the minimum threshold for South African purposes due to the fact that the court does not have comparable information like the UNCESCR. It referred to the fact that the UNCESCR developed the concept of minimum core over many years of examining reports by reporting states (par 32). It further indicated that it is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right (par 33).
- <sup>133</sup> General Comment No 3 at 85 par 9; See also Häusermann *The Realisation and Implementation of Economic, Social and Cultural Rights* 52-53; Henckaerts 1996 *Mensenrechten* 22; Robertson 1994 *Human Rights Quarterly* 701.
- <sup>134</sup> General Comment No 3 at 85 par 9.
- <sup>135</sup> Sections 26(2) and 27(2) of the South African Constitution read that the state must “achieve the progressive realisation of each of these rights” and not the **full realisation** of these rights.
- <sup>136</sup> Craven *The International Covenant on Economic, Social and Cultural Rights* 128; Sybesma-Knol 1995 *Mensenrechten* 82.
- <sup>137</sup> Sybesma-Knol 1995 *Mensenrechten* 82; Alston and Quinn 1987 *Human Rights Quarterly* 166; Craven *The International Covenant on Economic, Social and Cultural Rights* 115; Andreassen, Smith and Stokke *Compliance with Economic and Social Human Rights* 257; Guideline 8 The Maastricht Guidelines; Gomez 1995 *Human Rights Quarterly* 163.
- <sup>138</sup> Par 45.
- <sup>139</sup> Par 45.
- <sup>140</sup> Par 46.
- <sup>141</sup> 1997 12 *BCLR* 1696 (CC) par 11.
- <sup>142</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 *BCLR* 1696 (CC) par 11—as quoted in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 *BCLR* 1169 (CC) par 46. Own emphasis.
- <sup>143</sup> Par 46.
- <sup>144</sup> Par 31.
- <sup>145</sup> Sandra Liebenberg, “The Right to Social Assistance: the Implications of *Grootboom* for Policy Reform in South Africa” (2001). *South African Journal of Human Rights*.
- <sup>146</sup> See also Liebenberg 2001.
- <sup>147</sup> Majola remarks that there is still uncertainty as to what is meant by “access to” and that the core content of this right must still be interpreted by the courts. Majola 1999 1:4 *ESR Review* 6. Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 345 further remarks that the distinction can be understood as an attempt to avoid an interpretation that this section creates an unqualified obligation on the state to guarantee free housing on demand to

- everyone. See also Du Plessis 1997 *Stell LR* 186; Du Plessis 1996 *Stell LR* 13-14; Du Plessis 1996 *Stell LR* 293; Du Plessis and Gouws 1996 *SA Public Law* 35.
- <sup>148</sup> Par 35.
- <sup>149</sup> Own emphasis.
- <sup>150</sup> This approach of the court places an even heavier burden on the resources of the state. It implies that the state will have to create effective policies to achieve the maximum output.
- <sup>151</sup> An example is to create the necessary infrastructure in rural areas for the elderly to enable them to collect their old-age pensions.
- <sup>152</sup> Section 39. See also the paper entitled “The Role and Influence of International Law on the Right to Access to Social Security”, prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Dr L Jansen van Rensburg (April 2001), in particular par 2.
- <sup>153</sup> As noted below, 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).
- <sup>154</sup> Section 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, healthcare, food, water, *social security*, education and the environment.”
- <sup>155</sup> Article 22.
- <sup>156</sup> Article 11(1)(e).
- <sup>157</sup> Article 26.
- <sup>158</sup> Article 12.
- <sup>159</sup> Section 39(1)(b) of the Constitution; *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) *BCLR* 665 (CC).
- <sup>160</sup> Article 9 and article 2(1) respectively.
- <sup>161</sup> See the Vienna Convention on the Law of Treaties of 1969, a 18, 26 and 27; Liebenberg “The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa” 1995 *SAJHR* 359 371-372.
- <sup>162</sup> 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).
- <sup>163</sup> By Prof MP Olivier and Dr L Jansen van Rensburg (April 2001)
- <sup>164</sup> See also Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 352.
- <sup>165</sup> As in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 *BCLR* 1169 (CC).
- <sup>166</sup> Trengove 1999 1:4 *ESR Review* 8.
- <sup>167</sup> Sections 172(b) and 167(7) of the Constitution.
- <sup>168</sup> Section 38.
- <sup>169</sup> 1997 3 SA 786 (CC) par 19.
- <sup>170</sup> Own emphasis. See *Grootboom and Others v Oostenberg Municipality and Others* 2000 3 *BCLR* 277 (C).
- <sup>171</sup> Section 172 (1)(a).
- <sup>172</sup> Sections 173 and 8 (3).
- <sup>173</sup> Section 173.
- <sup>174</sup> Sections 32 (10), 33 (2) and 34.
- <sup>175</sup> If it is non-compliance by parliament.
- <sup>176</sup> If it is non-compliance by the provincial legislature.
- <sup>177</sup> Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 352. See *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 *BCLR* 1169 (CC) par 96, 99.
- <sup>178</sup> Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 352.
- <sup>179</sup> Own emphasis.
- <sup>180</sup> Trengove 1999 1:4 *ESR Review* 8; Scott 1999 1:4 *ESR Review* 5. This remedy of supervisory jurisdiction is used in Canadian and Indian courts.
- <sup>181</sup> Trengove 1999 1:4 *ESR Review* 10-11.

- <sup>182</sup> 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. See also *Ngxuza & others v Secretary, Department of Welfare, Eastern Cape Provincial Government & another* 2000 BCLR 1322 (E); *Bushula & others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & another* 2000 BCLR 728 (E); *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T); and *Mpofu v MEC for the Department of Welfare and Population Development in Gauteng Provincial Government* unreported WLD case 2848/99 of 18 February 2000.
- <sup>183</sup> See also *Ngxuza & others v Secretary, Department of Welfare, Eastern Cape Provincial Government & another* 2000 BCLR 1322 (E).
- <sup>184</sup> The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Member of the Executive Council for Welfare, Eastern Cape Provincial Government (judgement delivered on 31 August 2001) (Case 493/2000).
- <sup>185</sup> See *Bushula & others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & another* 2000 BCLR 728 (E); *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T); *Mpofu v MEC for the Department of Welfare and Population Development in Gauteng Provincial Government* unreported WLD case 2848/99 of 18 February 2000.
- <sup>186</sup> Section 33 of the Constitution 108 of 1996.
- <sup>187</sup> 1999 BCLR 1059 (CC).
- <sup>188</sup> At 1117E-F.
- <sup>189</sup> 2000 BCLR 241 (CC).
- <sup>190</sup> Act 3 of 2000.
- <sup>191</sup> which is defined to include any decision taken, or any failure to take a decision, by an organ of state when exercising a constitutional power or a public power or performing a public function, or by a natural or juristic person when exercising a public power or performing a public function: s 1. Certain executive and other functions and decisions are specifically excluded from the purview of the definition.
- <sup>192</sup> The Act contains a wide definition of the concept: see section 1.
- <sup>193</sup> Section 3(1).
- <sup>194</sup> Section 3(2)(a).
- <sup>195</sup> If it is reasonable and justifiable in the circumstances, an administrator may depart from any of these requirements: section 4(a). Certain relevant factors to be taken into account to determine whether the departure is reasonable and justifiable, are indicated (section 4(b)).
- <sup>196</sup> Section 3(2)(b).
- <sup>197</sup> If **reasons** have not been given to any person whose rights have been materially and adversely affected by administrative action, the person may within a 90 day period (after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action) request that written reasons be furnished: section 5(1). The reasons must be furnished within a period of 90 days: section 5(2). Failure to furnish adequate reasons will be presumed to imply that the administrative action was taken without good reason: section 5(3).
- <sup>198</sup> Meaning the Constitutional Court, a High Court and a Magistrate's Court: section 1.
- <sup>199</sup> Meaning any independent and impartial tribunal established by national legislation for the purposes of exercising judicial review: section 1.
- <sup>200</sup> Section 6(1).
- <sup>201</sup> (a) where the administrator who took the action was not authorised to do so; or acted under an irregular delegation of power; or was biased or reasonably suspected of bias;
- (b) where a mandatory and material prescribed procedure or condition was not complied with;
- (c) where the action was procedurally unfair;
- (d) where the action was materially influenced by an error of law;
- (e) where the action taken was for a reason not authorised by the empowering provision; was for an ulterior purpose or motive; took into account irrelevant considerations or did not take into account relevant considerations; was because of the unwarranted dictates of another person or body; was taken in bad faith; or was taken arbitrarily or capriciously;
- (f) where the action concerned consists of a failure to take a decision;

- (g) where the action taken is so unreasonable that no reasonable person could have so exercised the power or performed the functions
- <sup>202</sup> “The legal framework of social security in South Africa” (paper prepared for the Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier, Mr R van Niekerk *et al*, Ms G Y Kuppen and Mr G Mpedi, July 2001)
- <sup>203</sup> Section 41(1)(b)).
- <sup>204</sup> 2000 *BCLR* 1322 (E).
- <sup>205</sup> Section 41(1)(c). Section 41(1)(d), which commands all organs of state to be loyal to the Constitution, has been relied upon by the Supreme Court of Appeal in *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* (judgement delivered on 31 August 2001) (Case 493/2000).
- <sup>206</sup> Section 195(1). In *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* (judgement delivered on 31 August 2001) (Case 493/2000) the Supreme Court of Appeal referred to section 195(1)(e) which requires that public administration be conducted on the basis that “people’s needs must be responded to”.
- <sup>207</sup> See also Freedman, W *et al* “Constitutional Issues” in Olivier, M *et al* *Social Security Law: General Principles* (Butterworths, 1999) 512-514.
- <sup>208</sup> In view of the fact that South African citizenship is in terms of section 3(c) of the *Social Assistance Act* of 1992 one of the eligibility criteria for accessing almost all social assistance benefits (such as old-age and disability benefits, but not the foster child grant, for which residency suffices); see also section 12(1)(b)(i) of the *Aged Persons Act* 81 of 1967 for a similar restriction.
- <sup>209</sup> Fultz & Pieris *The social protection of migrant workers in South Africa* (ILO, 1997) 9.
- <sup>210</sup> See *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) par 30-31; see also *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (BSC).
- <sup>211</sup> See *Baromoto v Minister of Home Affairs* 1998 *BCLR* 562 (W) and *Johnson v Minister of Home Affairs* 1997 (2) SA 432 (C).
- <sup>212</sup> See article 9 of the Convention on the Rights of the Child, signed and ratified by South Africa.
- <sup>213</sup> Of 31 March 1999.
- <sup>214</sup> Chapter 2 of the Constitution.
- <sup>215</sup> White Paper on International Migration par 2.2—2.4.
- <sup>216</sup> Act 130 of 1998.
- <sup>217</sup> Section 2(a) and (b) of the Act.
- <sup>218</sup> Section 3(a).
- <sup>219</sup> Namely people who flee their own country owing to external aggression, occupation, foreign dominion or events that seriously disturb public order: s 3(b).
- <sup>220</sup> Section 3(c).
- <sup>221</sup> Section 27(b) of the Act.
- <sup>222</sup> See articles 3, 16, 22, 23 and 24.
- <sup>223</sup> South Africa acceded on 12 January 1996. It also acceded to the UN Protocol Relating to the Status of Refugees of 1967 on 12 January 1996.
- <sup>224</sup> See sections 231-233 of the Constitution.
- <sup>225</sup> Section 39(1)(b) of the Constitution.
- <sup>226</sup> E.g. in terms of section 60 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.
- <sup>227</sup> Vonk G *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap* (1991) 483-484.
- <sup>228</sup> Vonk continues by drawing attention to the fact that in international co-ordination law a distinction is usually drawn between social assistance and social insurance measures: “However, it appears that these co-ordination instruments can do little to improve the position of migrants within minimum subsistence benefit schemes. Traditionally, they only cover social insurance schemes which are related to a number of internationally recognised social risks, such as sickness, unemployment, invalidity, and old age.”

- <sup>229</sup> Such as the Social Charter for Fundamental Rights and the SADC Protocols, discussed in the paper entitled “Regional integration and social protection: An analysis of country systems and regional instruments within the Southern African Development Community (SADC)”, prepared for the Committee by Prof MP Olivier and Dr L Jansen van Rensburg.
- <sup>230</sup> 1997 (6) *BCLR* 1489 (CC).
- <sup>231</sup> This constitutes a summary of the factors as per the cases of *Harksen v Lane NO* 1997 (6) *BCLR* 1489 (CC); *Prinsloo v Van der Linde* 1997 (6) *BCLR* 759 (CC); *Brink v Kitschoff NO* 1996 (6) *BCLR* 752 (CC); *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) *BCLR* 139 (CC) and others.
- <sup>232</sup> 1997 (10) *BCLR* 1348 (CC) at par 52, par 67-70.
- <sup>233</sup> For a fuller discussion of this issue, see the chapter on the legal framework of social security, appended in a separate volume of the Report.
- <sup>234</sup> Cf the pertinent provisions of the Social Assistance Act 59 of 1992, and the attendant regulations.
- <sup>235</sup> See par 15.
- <sup>236</sup> Section 25.
- <sup>237</sup> Section 25(1) provides that: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”
- <sup>238</sup> See generally De Waal, Iain and Erasmus *The Bill of Rights Handbook* (1999) 402 and the Black Sash submission to the Committee.
- <sup>239</sup> De Waal *et al* 404.
- <sup>240</sup> See Freedman, W *et al* “Constitutional Issues” in Olivier, M *et al Social Security Law: General Principles* (Butterworths, 1999) 520-522.
- <sup>241</sup> Devenish G A *Commentary on the South African Constitution* (1998) 71; De Waal *et al The Bill of Rights Handbook* 404-405; Freedman *et al* “Constitutional Issues” in Olivier, M *et al Social Security Law: General Principles* 520-522.
- <sup>242</sup> Reich A “The New Property” 1964 (73) *Yale Law Journal* 73.
- <sup>243</sup> 1995 (9) *BCLR* 1235 (Tk) 1246B-C. The Court expressed the view that “property” within the meaning of the constitutional clause (contained in the interim Constitution) possibly extends to social benefits such as state contracts, pension and medical benefits and employment rights; property under the Constitution, therefore, intends encompassing a broader field of incorporeal objects and rights such as state pensions than traditionally recognised categories under the common law: see also the Black Sash submission.
- <sup>244</sup> Van der Walt J *The Constitutional Property Clause* (1997) 57.
- <sup>245</sup> Of course, as pointed out by Freedman *et al* “Constitutional Issues” in Olivier, M *et al Social Security Law: General Principles* 522, if the argument is that social insurance deserves the protection of the constitutional property clause because of the elements of contribution, it could be argued that claimants of social assistance also make contributions through the taxes. This is also the position taken by the Black Sash in its submission to the Committee. A different basis for regarding welfare benefits as property has been developed in the USA. In *Goldberg v Kelly* 397 US 254 (1970) the Supreme Court held that welfare benefits did amount to property within the meaning of the due process clause in the American Constitution. See further Freedman *et al* “Constitutional Issues” in Olivier, M *et al Social Security Law: General Principles* 522
- <sup>246</sup> See also par 13.1 above.
- <sup>247</sup> See Freedman *et al* “Constitutional Issues” in Olivier, M *et al Social Security Law: General Principles* 521-522.
- <sup>248</sup> See the 1996 decision in *Gaygusuz v Austria*; Van den Bogaert S *Social Security, Non-discrimination and Property* (1997).
- <sup>249</sup> *BverfGe* 69, 272 (1985).
- <sup>250</sup> Section 14.
- <sup>251</sup> Cf. Freedman *et al* “Constitutional Issues” in Olivier, M *et al Social Security Law: General Principles* 515-517.
- <sup>252</sup> 1996 (4) *BCLR* 449 (CC) at 484D and 491G-H.
- <sup>253</sup> Bill 67-98 at <http://www.polity.org.za/gnuindex.html>.
- <sup>254</sup> Where it is current policy with insurance companies not to make known the results of an HIV-test (the policy application is merely turned down), it will be interesting to see the operation of the *Open Democracy Bill* provisions, which stipulate that a person should have access to information held by an organisation on him/her.
- <sup>255</sup> Section 11(1) and (2).
- <sup>256</sup> *The Labour Relations Act* 66 of 1995.

- <sup>257</sup> See now the proposed (amending) clause 57(3)(a) and (b) of the Unemployment Insurance Bill (B3-2001) which stipulates: “(a) In order to determine the payment of benefits in terms of this Act, the Commissioner may access any information on a database of the State which contains information regarding social security; (b) For purposes of paragraph (a) the Commissioner must co-operate with other State institutions to link their respective databases.”
- <sup>258</sup> EU Directive 95/46/EC.
- <sup>259</sup> US Privacy Act of 1974.
- <sup>260</sup> *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 CC; 1995 (10) BCLR 1289 CC.
- <sup>261</sup> This relates to social security and health in a number of ways, such as the well-known financial difficulties experienced by the ambulance services provincially, payment of ambulance services by private medical aid funds, free services for the needy, etc.
- <sup>262</sup> Insofar as this may relate to the Road Accident Fund.
- <sup>263</sup> This may be important in areas where forms of informal social security are prevalent, especially in rural areas in the Eastern Cape, KwaZulu Natal and Northern Province.
- <sup>264</sup> Insofar as it may relate to health (reproductive) matters.
- <sup>265</sup> Insofar as it may relate to the Road Accident Fund.
- <sup>266</sup> This falls squarely, currently at least as far as the administration thereof is concerned, within the domain of the provinces. This means that the administration of the various pieces of national legislation has been assigned to the provinces, or (previous) provincial legislation governing such services is still in place and has been taken over by the provincial governments.
- <sup>267</sup> See section 155(6)(a) and (7).
- <sup>268</sup> Which could include the question of fees and the possibility of child care grants made locally to ensure that these children are cared for during the day.
- <sup>269</sup> Which are often free and universal in its cover, but many municipalities are finding it difficult to continue providing these services or have limited the range of services provided.
- <sup>270</sup> In terms of item 14 of Schedule 6 to the 1996-Constitution. This may be an option where a decision is taken not to revamp the whole social security system, but rather to work with amendments to existing laws, some of which may come from a previous dispensation.
- <sup>271</sup> *Western Cape Provincial Government, Free State Provincial Government and Northern Province Provincial Government in re: DBV Behuising v North West Provincial Government and the Registrar of Deeds*, Case CCT 22/99, decision of 2 March 2000. This case concerned the interpretation of the Interim Constitution, but Devenish (A *Commentary on the South African Constitution* (1998) 172-173), for example, argues that there are not many fundamental differences (between the interim and the 1996 Constitution) in terms of how a conflict between national and provincial legislation is to be dealt with.
- <sup>272</sup> *DBV*-case par 17.
- <sup>273</sup> *Ex parte the President of the RSA in re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC); 2000 (1) SA 732 (CC) par 51.
- <sup>274</sup> *DBV*-case par 20.
- <sup>275</sup> *DBV*-case par 36ff.
- <sup>276</sup> *E.p. Speaker of the KwaZulu-Natal Provincial Legislature*-case 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) par 19.
- <sup>277</sup> *DBV* case par 40ff.
- <sup>278</sup> *DBV* case par 48ff.
- <sup>279</sup> Research (Murray and Simeon “From paper to practice: the National Council of Provinces after its first year” (1999) 14 *SA Public Law* 96-141 at 108) has indicated that the majority of NCOP members interviewed felt that section 75-legislation in fact does impact on provinces and that they should have been free to discuss it in their provincial legislatures.
- <sup>280</sup> And legislation in terms of a number of other sections (sections 65(2), 163, 182, 195(3) and (4), 196 and 197).
- <sup>281</sup> In the *Constitutionality of the Liquor Bill*-case 2000 (1) BCLR 1 CC; 2000 (1) SA 732 CC it was stated *obiter* that where a bill is erroneously, but in good faith, put through the stricter section 76-procedure, it would not necessarily lead to it being declared unconstitutional (par 26).
- <sup>282</sup> Murray and Simeon (1999) 132.
- <sup>283</sup> *DBV*-case par 65, 69.

- 284 E.g. health services, housing, public transport and welfare services.
- 285 E.g. ambulance services.
- 286 Section 156(4).
- 287 Sections 156(2) and 156(4).
- 288 Section 228.
- 289 Although this could be a **useful mechanism for provinces** to realise social security rights, it has been unutilised.
- 290 See for example *City Council of Pretoria v Walker* 1998 (3) *BCLR* 257 (CC); 1998 (2) SA 363 (CC); *Fedsure Life Assurance Greater Johannesburg Transitional Metropolitan Council* 1998 (12) *BCLR* 1458 (CC).
- 291 Sections 152(1)(c) and 153(a) (“a municipality *must* structure its administration and budgeting and planning processes to give priority to the basic needs of the community...”).
- 292 Section 152(1)(d).
- 293 *Liquor Bill*-case par 48. As mentioned above, these circumstances relate to **national security, economic unity, essential 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.
- 294 Sections 81 and 82 Western Cape Constitution, under the heading “Directives of Provincial Policy” states that “[T]he western Cape government must adopt and implement policies to actively promote and maintain the welfare of the people of the Western Cape...”. In the subsequent list is included: the exact wording of section 27(1) of the Constitution (i.e. the rights to social security), but also aspects such as the development of rural communities and the promotion of the welfare of rural workers and access to social services for the elderly. These principles are not legally enforceable, but guide the Western Cape government in making and applying laws. During the certification hearing of the Western Cape Constitution it was argued that the provinces create confusion by being peremptory (using the term “must”), while the relevant provisions are in fact non-enforceable. This was found to create no problem, as it guides the province and is similar to those found in the constitutions of India, Ireland and Namibia (*Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC) par 77ff).
- 295 In terms of section 239 of the Constitution, in addition to state departments in all spheres, state organs also include institutions functioning in terms of the national or a provincial Constitution and those exercising a public power or function in terms of any legislation. See also *Directory Advertising Cost Cutters v Minister of Post and Telecommunications* 1996 (3) SA 800 (T) (state is only shareholder and controls institution); *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfondse* 1997 (8) *BCLR* 1066 (T) (where the fact that the majority of a controlling body is appointed by the state or where the functions are prescribed by the state so that the state is effectively in control was considered to render the body bound by the Bill). Cf *Mistry v Interim National Medical and Dental Council of South Africa* 1997 (7) *BCLR* 933 (D) which illustrates the anomalies if the test is too strictly applied (i.e. state medical inspectors would be bound by the Bill, but those appointed by a statutory body, would not be).
- 296 *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 *BCLR* 1169 (CC) par 35. Own emphasis.
- 297 2000 (2) SA 1 (CC); 2000 (1) *BCLR* 39 (CC).
- 298 It is unlikely that the taxation powers of provinces will be such that social security schemes could be funded significantly in this regard. Furthermore, provinces currently lack the constitutional competence to comprehensively legislate on social security matters. See the discussion above.
- 299 Depending on the system (e.g. universal, means-tested) and branch of social security (e.g. health insurance/assistance, pensions), which are in fact delivered/implemented.
- 300 See par 13.1 above.
- 301 CCT 26/2000, decision of 29 November 2000 (<http://www.concourt.gov.za>).
- 302 What is interesting from the facts of the case, is that the school at stake serves a poor community (par 1), thus rendering the school heavily reliant on state subsidies. It may also be possible to argue that, in the absence of this school, government would not be able to realise the right to education for the children in involved to the same extent that the school, with the help of the subsidies, does.
- 303 The Court did not spell out what these constitutional requirements in relation to legislative acts may be. Cf. for example sections 44, 53 and 58 of the Constitution, which contain mostly procedural requirements.
- 304 The well-known *Traub*-case (1989 (4) SA 731 (A)) established the application of this phrase in South African law. It is said to come into existence where -  
 (a) a person enjoys an expectation of a privilege or benefit of which it would be unfair to deprive him/her without a fair hearing; or



(b) the previous conduct of an official has given rise to an expectation that a certain procedure will be followed before a decision is made.

<sup>305</sup> *President of the RSA and others v SARFU and others* 2000 (1) SA 1 (CC); 1999 (10) *BCLR* 1059 (CC).

<sup>306</sup> See the discussion in par 13.1 above.

<sup>307</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) *BCLR* 1458 (CC).

<sup>308</sup> Cf. section 39(1)(c) and sections 231-233 of the Constitution Act, 1996; O-Shea A “International Law and the Bill of Rights” in *The Bill of Rights Compendium*. See also the paper entitled “The role and influence of international law on the right to access to social security” prepared by Prof MP Olivier and Dr L Jansen van Rensburg for the Committee. South Africa has been criticised by the UN Committee on the Rights of the Child for its failure to ratify the Convention on Economic, Social and Cultural Rights and subsequent insufficient funding in this regard (*Concluding observations of the Committee on the Rights of the Child: South Africa* CRC/C/15/Add.122, 28 January 2000, para 11, 15, 24, 25, 29 and further).

<sup>309</sup> *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* of 28 September 1984, UN Doc E/CN.4/1984/4.

<sup>310</sup> [Http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html).

<sup>311</sup> Par 14.

<sup>312</sup> (1995) 5ff.

<sup>313</sup> *Fedsure*-case par 45.

<sup>314</sup> E.g. an increase in the number of people provided with houses.