

# Developing an Efficient and Effective Social Security Adjudication Framework in South Africa: The Role and Impact of International Standards

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## Abstract

*South Africa is currently developing an overarching policy framework for efficient and effective resolution of social security disputes as part of reforms towards the establishment of a comprehensive social security system. In the development of the policy, international and regional guidelines and standards on access to justice were instrumental as they are benchmarks on the scope and content of the right of access to courts for social security claimants and the State's obligations in this regard. This article outlines some international guidelines and standards relevant to the realisation of access to justice for social security claimants; and their role in recent reform initiatives that have been undertaken to promote access to justice in the South African social security system.*

## Introduction

The Bill of Rights of the South African Constitution guarantees everyone the right to have access to social security, including appropriate social assistance for persons who are unable to support themselves and their dependants.<sup>1</sup> It further requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right

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<sup>1</sup> Section 27(1)(c), *Constitution of South Africa* (1996).

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to access to social security.<sup>2</sup> Since a dispute resolution (adjudication) framework is an integral part of any comprehensive social security system, it is included in the constitutional obligation of the State to take reasonable legislative and other measures.

The establishment of an efficient and effective social security adjudication system is an intersection of the rights of access to social security and to justice. In relation to the right of access to justice, the Constitution states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>3</sup> In addition, other rights that have a bearing on the realisation of the rights of access to social security and to justice are protected in the Constitution. These rights, which include the rights to equality,<sup>4</sup> human dignity<sup>5</sup> and just administrative action<sup>6</sup> must thus be considered in establishing a social security adjudication system. This is because there is a close correlation between all the rights in the Bill of Rights, as they are interrelated, interdependent and mutually supporting. They must all be read together in the setting of the Constitution as a whole and their interconnectedness must be taken into account in interpreting rights; and in determining whether the State has met its obligations in terms of any one of them.<sup>7</sup>

As a result of several gaps and challenges in the South African social security adjudication system, the country is currently developing an overarching policy framework for efficient and effective resolution of social security disputes as part of reforms towards the establishment of a comprehensive social security system. International standards are pivotal in determining the nature and scope of constitutional rights and have thus played an important role in the development of the social security adjudication policy. This is because international standards act as benchmarks for the evaluation of domestic systems; and the international (and comparative) law-friendly approach adopted by the Constitution.

This article outlines some international guidelines and standards relevant to the realisation of access to justice for social security claimants; and their role in recent reform initiatives that have been undertaken to promote access to justice in the South African social security system. The article first examines the gaps

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<sup>2</sup> Section 27(2).

<sup>3</sup> Section 34.

<sup>4</sup> Section 9.

<sup>5</sup> Section 10.

<sup>6</sup> Section 33.

<sup>7</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000].

and challenges in the current system. Thereafter, the constitutional framework for access to justice for social security claimants is discussed, followed by the role of international standards in promoting access to justice. Finally, the article highlights the application of international standards in the adjudication policy and in comparative legal jurisdictions.

## Current South African Social Security Adjudication System

There is currently no uniform social security adjudication institution as each statute provides for its own dispute resolution institution(s) and processes.<sup>8</sup> This has resulted from the piecemeal fashion in which schemes were established and protection against individual risks regulated in South Africa. In addition to the fragmented and uncoordinated nature of the social security dispute resolution system,<sup>9</sup> there are other gaps and challenges. These are: the inaccessibility of some social security institutions; inappropriateness of some of the appeal institutions; lack of a systematic approach in establishing appeal institutions; limited scope of jurisdiction and powers of adjudication institutions; inconsistencies in review and/or appeal provisions in various laws; unavailability of alternative dispute resolution procedures; and the absence of institutional independence of adjudication institutions or forums.

### *Inaccessibility of Social security institutions*

The accessibility of the various adjudication institutions/forums is not always appropriately ensured. Some forums are geographically spread across the Republic, while legislation also empowers some of the adjudications forums to be convened at any determined place.<sup>10</sup> However, others are centrally located.<sup>11</sup>

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<sup>8</sup> See the *Social Assistance Act* (Act No.13 of 2004); *Compensation for Occupational Injuries and Diseases Act* (Act No.130 of 1993); *Occupational Diseases in Mines and Works Act* (Act No.78 of 1973); *Unemployment Insurance Act* (Act No.63 of 2001), *Road Accident Fund Act* (Act No.56 of 1996); *Pension Funds Act* (Act No.24 of 1956) and *Medical Schemes Act* (Act No.131 of 1998).

<sup>9</sup> A wide array of laws provide for dispute resolution institutions or forums and procedures. Appeal mechanisms are also fragmented across the social security system, sometimes involving specially constituted appeal bodies (such as an Appeal Tribunal appointed by the Registrar of the Health Professions Council of South Africa) and at times the High Court.

<sup>10</sup> In the case of the Road Accident Fund Appeal Tribunal, where the Tribunal determines that a hearing for the purpose of considering legal arguments is necessary, the Tribunal is convened at any place determined by the appointed presiding advocate or attorney, Sub-Reg. 3(10)(e) *Regulations to the Road Accident Fund Act* (No. 31249 of 21 July 2008).

<sup>11</sup> The Certification Committee and the Medical Reviewing Authority in terms of the *Occupational Diseases in Mines and Works Act* (together with the Medical Bureau for Occupational Diseases are located

The accessibility of the various adjudication forums is also facilitated through the application of multiple lodgement options<sup>12</sup> and reasonable timeframes.<sup>13</sup> The relevant documentation for the lodging of applications and consideration of disputes are in English<sup>14</sup> and the hearings (where applicable) are also conducted in English. However, interpreters are provided where necessary. In addition, the Road Accident Fund Appeals Tribunal provides for the travel and accommodation needs of persons required to attend a hearing. The parties to a dispute are also notified of the dispute resolution outcome.

However, the speedy resolution of disputes is not guaranteed, as timeframes for finalisation are not stated in many statutes.<sup>15</sup> In addition, no power is granted to the adjudication forums to reconsider their original decision.<sup>16</sup> Furthermore, avenues for alternative (speedier, more flexible) dispute resolution are not available for most disputes.<sup>17</sup>

The adjudication forums adopt a variety of dispute resolution procedures. Where necessary, some of the adjudication forums can convene a hearing, in which case personal attendance of the parties and other interested persons is possible. However, some forums resolve disputes only by means of documentary evidence.<sup>18</sup>

External dispute resolution avenues are only through litigation in the High Court (at times the Labour Court).<sup>19</sup> Due to its inherent review powers, all the

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in Johannesburg; while the National Appeals Committee of the Unemployment Insurance Fund Board is located in Pretoria.

<sup>12</sup> Applications can be lodged by hand, telefax or registered mail.

<sup>13</sup> Dispute resolution timeframes are mostly 90 days after (notification of) the decision and 180 days in the case of the Compensation for *Occupational Injuries and Diseases Act*.

<sup>14</sup> See, for example, the “Objection Against a Decision Form” Section 29, *Occupational Diseases in Mines and Works Act* and the objection form of the *Road Accident Fund Act*.

<sup>15</sup> It is only the Independent Tribunal for Social Assistance Appeals which is required to finalise an appeal within 90 days from the date on which the appeal was received.

<sup>16</sup> Except as provided in terms of the *Compensation for Occupational Injuries and Diseases Act* that a presiding officer may correct the error or defect.

<sup>17</sup> It is only in terms of *Compensation for Occupational Injuries and Diseases Act* that parties to a hearing are required to hold a pre-hearing conference.

<sup>18</sup> See for example the review of a Certification Committee disease certification decision by the Medical Reviewing Authority for Occupational Diseases in terms of the *Occupational Diseases in Mines and Works Act*; the consideration of the decision of the Regional Appeals Committees by the National Appeals Committee of the Unemployment Insurance Fund Board; the consideration of the (reconsidered) decisions of the South African Social Security Agency by the Independent Tribunal for Social Assistance Appeals; and the resolution of appeals by the Road Accident Fund Appeals Tribunal.

<sup>19</sup> Such as in section 66, *Unemployment Insurance Act* which provides for objections to compliance orders to be referred to the Labour Court; and for a compliance order to be referred to the Labour Court to be made an order of the court.

decisions of public social security institutions are reviewable (on the basis of judicial review) by the High Court (except where expressly provided otherwise). Specific issues to be dealt with by High Court on the basis of appeal are also outlined in some laws.<sup>20</sup> In addition, some laws provide for the resolution of disputes by the High Court in the first instance.<sup>21</sup> It is doubtful whether the High Court is the appropriate venue for the resolution of such disputes due to its inaccessibility.

### *Inappropriateness of current appeal institutions*

Some social security statutes provide for reviews by, and appeals to the ordinary courts (especially the High Court). However, the ordinary courts are not always the appropriate forums to deal with social security appeals. The powers of these courts to deal with the matters are unsatisfactory; as the courts mostly have review powers with little appeal powers. They are also apparently not specialised enough to deal effectively with social security matters. Appeals to such courts may also pose difficulties for aggrieved persons, due to *inter alia*, limited access to the courts especially for indigent persons (also due to costs in the absence of legal aid); undue delays that characterise court proceedings; the technical and legalistic basis with which cases are dealt (with little regard to broader fairness considerations). This leads to the contention that:

“the current South African social security system has a large backlog in terms of the pool of beneficiaries. Yet, the adjudication system is not sufficiently specialised and localised, from the perspective of access to the system. Instead, the beneficiaries cannot financially afford the system of legal representation in the normal court context. Those who could afford to pay the costs still face a punitive snail paced legal bureaucratic process. Tedious as it is, the system leaves out the bulk of marginalised social security beneficiaries when they lodge a complaint.”<sup>22</sup>

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<sup>20</sup> In terms of Section 92, *Compensation for Occupational Injuries and Diseases Act*, the Compensation Commissioner can also state a case on a question of law to the High Court; the *Occupational Diseases in Mines and Works Act* also empowers the Compensation Commissioner for Occupational Diseases to also state a case on question of law to the High Court on appeal.

<sup>21</sup> For example, the *Road Accident Fund Act* requires a person with a claim against the fund to bring a claim in any High Court within whose area of jurisdiction the occurrence which caused the injury or death took place.

<sup>22</sup> Kanyane H, ‘Exploring and developing a culture of good governance’ in Olivier M and Kuhnle S (eds), *Norms and institutional design: Social security in Norway and South Africa*, African Sun Media, Stellenbosch, 2008, 104.

### *Lack of a systematic approach in establishing appeal institutions*

There is also a lack of a systematic approach to the regulation of appeals in the South African social security system. While some laws specifically provide for the establishment and functioning of appeal institutions and mechanisms; other laws leave such issues to the discretion of the relevant Minister.<sup>23</sup> It is inappropriate to establish an appeal tribunal purely on the basis of ministerial or registrar direction/regulation, also due to the gravity and importance of the issues at stake, such as the establishment of the institution; the appointment of its members; its main objective(s); its jurisdiction, functions and powers; procedures for the disposal of complaints; giving parties an opportunity to comment and to be represented; time limits; record-keeping; making a determination and enforceability of determinations; review possibility; accountability; remuneration; and limitation on liability etc.<sup>24</sup>

### *Limited scope of jurisdiction and powers of adjudication institutions*

The scope of jurisdiction and powers of the social security adjudication institutions/forums is limited. They can only exercise the powers and functions as circumscribed in legislation. The scope of jurisdiction and powers of the High Court as the appeal institution is also sometimes limited, particularly in relation to the types of cases or issues that it can decide. The High Court is mostly empowered to review decisions taken by the institutions concerned.

The possible remedies that can be provided by the social security institutions are also limited due to the circumscription of such remedies in the various statutes. This emanates from the circumscribed powers afforded to the social security institutions. Some of the social security statutes stipulate that the decisions of the adjudication forums are binding on the administrative institutions; and the Compensation Court is considered to have the status of a magistrate court (with

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<sup>23</sup> An example of such a situation is the *Social Assistance Act* which empowers the Minister of Social Development to either consider an appeal against a decision of the South African Social Security Agency him/herself; or appoint an independent tribunal to consider such an appeal. Where a tribunal is so appointed, all appeals against decisions of the agency must from then on be considered by that tribunal. In addition, in the case of the Road Accident Fund, upon receipt of the notification from a party to the dispute or 60 days after receiving submissions, medical reports and opinions relevant to the dispute period, the registrar will refer the dispute for consideration by an appeal tribunal paid for by the Road Accident Fund - Regulation 3(8)(a), *Road Accident Fund Act Regulations*.

<sup>24</sup> See Olivier M, Fourie E and Nyenti M, 'Commentary on the regulations to the Social Assistance Act (Act No. 13 of 2004) A Report to the Department of Social Development', 2005, 6.

its decisions enforced as such). However, most of the adjudication forums are not afforded the power and mechanisms to enforce their rulings.

In addition, effectiveness of some of the institutions is restricted due to the provision of multiple dispute resolution avenues in some statutes. An example is in the Pension Funds Act where a party could lodge a complaint within the jurisdiction of the Adjudicator in a civil court (High Court). This is problematic as it encourages “forum shopping”<sup>25</sup> and undermines the objective of the establishment of the Office of the Adjudicator – to dispose of complaints in a procedurally fair, economical and expeditious manner.

### *Inconsistencies in review and/or appeal provisions in various laws*

Most social security statutes fail to make an appropriate distinction between (internal) reviews and (external) appeal procedures. Social security adjudication standards require that the administrative organs/institutions that undertake the determination of applicants’ rights to social security benefits should also undertake internal review procedures (first level adjudication procedures). This implies that where an applicant for social security benefits is aggrieved by a decision of the administering institution, he/she should be able to request a revision of the initial decision. After the exhaustion of the internal review (first level) processes, applicants should have access to an external appeal mechanism or institution (second level procedures). There is a lack of consistency in the provisions relating to reviews and appeals in the various laws. Some laws make provision for appeals to appeal bodies established in terms of the relevant laws,<sup>26</sup> while other laws provide for appeals to other adjudication bodies such as the Health Professions Council of South Africa and the High Court.

### *Unavailability of alternative dispute resolution procedures*

Social security disputes are resolved mainly by resort to litigation (adversarial adjudication). Few social security statutes provide for other external dispute resolution avenues other than litigation in the normal court system.<sup>27</sup> The

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<sup>25</sup> Forum shopping refers to the practice where a party selects a dispute resolution avenue with the best possible prospects.

<sup>26</sup> See the *Unemployment Insurance Act* and the *Occupational Diseases in Mines and Works Act*.

<sup>27</sup> The only exception can be found in the *Compensation for Occupational Injuries and Diseases Act* which provides for the organisation of pre-trial conferences; the *Pension Funds Act* which provides for alternative dispute resolution mechanisms, including conciliation and/or arbitration and the *Labour Relations Act* which empowers the Labour Court to stay proceedings and refer a dispute to arbitra-

absence of alternative dispute resolution avenues in South African social security statutes implies that persons not satisfied with the internal adjudication processes can only have their right of access to social security enforced by means of (adversarial) litigation in the ordinary courts of law. However, the various problems plaguing the current court structure indicate that the courts are not the most appropriate forum for the resolution of social security disputes. Litigation therefore has an adverse impact on the right to social security of beneficiaries/applicants, as it restricts access to adjudication. Therefore, alternative mechanisms for the resolution of disputes should be considered in the South African social security system. This is to ensure proper redress for social security litigants and promote their right of access to social security.

### *Lack of institutional independence of adjudication institutions/forums*

A review of the current South African social security dispute resolution institutions/forums reveals that most of the adjudication forums or institutions can effectively be regarded as internal organs of the social security institutions and therefore not independent of these institutions (the only exceptions are the Office of the Pension Funds Adjudicator and (in some respects) the Appeal Board of the Council for Medical Schemes. In the first place, the Ministers or Directors-General of the relevant Departments in charge of the relevant social security institution are in most instances responsible for the appointment of members of the adjudication forums (the only exception is the Road Accident Fund Appeal Tribunal which is established by the Registrar of the Health Professions Council of South Africa).<sup>28</sup> The relevant Ministers or Directors-General also determine the length and (other) conditions of employment of members, including remuneration. Ministers or Directors-General can further discipline the members and terminate their appointment.

In addition, most of the social security adjudication institutions/forums also do not have independent funding through direct appropriations from parlia-

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tion; or with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator.

<sup>28</sup> See for example Section 2(1)(b) (read with the definition of presiding officer in section 1) *Compensation for Occupational Injuries and Diseases Act*; Section 40(2)(b), *Occupational Diseases in Mines and Works Act*; Section 47, *Unemployment Insurance Act* and regulation 4 of the regulations relating to the lodging and consideration of applications for reconsideration of social assistance application by the agency and social assistance appeals by the independent tribunal, GN R746 in GG 34618, 19 September 2011.

ment (the Office of the Pension Funds Adjudicator and the Council for Medical Schemes being the exception). They are mostly funded by the relevant departments as part of the departments' annual budget allocations.<sup>29</sup> The financial dependence of the adjudication forums is also indicated by the fact that they are not independent accountable institutions in terms of the Public Finance Management Act.<sup>30</sup> Management governance, oversight and supervision are also undertaken by the departmental or institutional heads; and the adjudication forums are also required to report to departmental or institutional heads (in the case of the Road Accident Fund Appeal Tribunal, to the Registrar of the Health Professions Council of South Africa). Human resource and administrative support is provided either by the social security administration institutions or (in the case of the Road Accident Fund Appeal Tribunal, the HPCSA).

The gaps and challenges in the current social security dispute resolution system adversely affect claimants' constitutional rights of access to justice and to social security.

## Constitutional Framework

### *Status and aims of the Constitution*

The Constitution's status as the supreme law of the republic influences its interpretation as constitutional supremacy is one of its foundational values.<sup>31</sup> This means law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>32</sup> The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of State.<sup>33</sup> The Bill of Rights also 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>34</sup> The Constitution requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law.<sup>35</sup> The Constitution places

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<sup>29</sup> See Regulation 6 of the Regulations; *Compensation for Occupational Injuries and Diseases Act* (2008); Section 41(1), *Occupational Diseases in Mines and Works Act* (South Africa); Section 51, *Unemployment Insurance Act* and Regulation 3(8)(a), *Regulations to the Road Accident Fund Act* (2008).

<sup>30</sup> *Public Finance Management Act* (Act No.1 of 1999).

<sup>31</sup> Section 1(c).

<sup>32</sup> Section 2.

<sup>33</sup> Section 8(1).

<sup>34</sup> Section 8(2).

<sup>35</sup> Section 39(2).

obligations on the realisation of these rights. Section 2 states that duties imposed by the Constitution must be performed, while section 7(2) enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This implies that the state and other (non-state) entities are obliged to give effect to each of the rights in the Constitution.

The preamble outlines the kind of society that was hoped to be achieved through the enactment of a Constitution as the supreme law. The aims reflect the spirit and purpose of the Constitution, and must be taken into consideration when rights and obligations are interpreted, and when the rights are limited. It has been declared that:

“the Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.”<sup>36</sup>

Some of the purports of the Constitution are to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens.<sup>37</sup> Therefore, the Constitution was adopted and a bill of fundamental rights was entrenched not only to avoid a repetition of and to redress South Africa’s past injustices, but in order to establish a new society based on mutual respect, equality and freedoms.<sup>38</sup> The Constitution aims to heal the divisions of the past and to improve the quality of life of all citizens as well as seeks to eradicate social and economic disadvantages (such as inequality, poverty and lack of access to basic human rights). This has been confirmed by the Constitutional Court, when it stated that:

“we live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring... This commitment is also reflected in various provisions of the bill of rights and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.”<sup>39</sup>

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<sup>36</sup> *S v Mlungu*.

<sup>37</sup> Preamble.

<sup>38</sup> Olivier MP and others ‘Constitutional issues’ in Olivier MP, Smit N and Kalula ER (eds) *Social security: A legal analysis*, LexisNexis, Durban, 2003, 52.

<sup>39</sup> *Soobramoney v Minister of Health (KwaZulu Natal)*.

### 3.2 Values underlying the Constitution

The Bill of Rights is informed by the values that underpin the objectives of the Constitution. In addition to being a fundamental right, equality is a foundational value that informs constitutional interpretation. Equality has formal, substantive and restitutionary dimensions.<sup>40</sup> Human dignity is also a fundamental right and a foundational value that informs constitutional interpretation at a range of levels.<sup>41</sup> The Constitution states that some of South Africa's foundational values are human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>42</sup> Section 39(1)(a) enjoins every court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the rights in the Bill of Rights. In addition, the limitation clause adopts a value-based approach as section 36(1) requires that a right in the Bill of Rights must only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Constitutional values lie at the heart of the Bill of Rights,<sup>43</sup> and are important in the interpretation and enforcement of the rights entrenched therein. The impact of constitutional values in interpreting the constitution and understanding its fundamental purpose was highlighted by the Constitutional Court when it remarked that:

“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 the 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 .... It is a momentous document, intensely value-laden. 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

<sup>40</sup> See Currie I and De Waal J, *The bill of rights handbook*, Juta, Cape Town, (2005); Devenish GE, *A commentary on the South African bill of rights*, Butterworths, Durban, 1999; van Wyk D, Dugard J, de Villiers B and Davis D (eds), *Rights and constitutionalism*, Juta, Cape Town, 1994; Cheadle MH, Davis DM and Haysom NRL. *South African constitutional law: The bill of rights*, Butterworths, Durban, 2002; *Brink v Kitzboff* (NO 1996 6 BCLR 752 (CC)); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)..

<sup>41</sup> *Danwood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs*; *President of the Republic of South Africa v Hugo*; Chaskalson, 2000.

<sup>42</sup> Section 1(a).

<sup>43</sup> *Khosa and Others v The Minister of Social Development and Others*; *Mablaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC), 85.

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.<sup>244</sup>

Therefore, the right of access to justice for social security claimants, as is the case with all other rights must be interpreted in the light of underlying constitutional values, as well as the interests that it is meant to protect. These constitutional values are instrumental to the establishment of a social security adjudication framework, the framework must seek to promote these values. The adjudicative framework put in place must seek to ensure that users of the system are able to realise their rights to have access to court equally, freely and with dignity.

### *Right of access to social security*

Section 27(1)(c) of the Constitution states that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The constitutional right of access to social security therefore vests in “everyone”. The constitutional reference to everyone implies that all in need must have access to the social welfare scheme that the State has put in place. If some who are in need are excluded, this implies that not everyone has access to the scheme. The Constitutional Court has stated that the word ‘everyone’ is a term of general import and unrestricted meaning, which means what it conveys. Once the State puts in place a social welfare system, everyone has a right to have access to that system.<sup>45</sup>

Access to social security and its supporting rights is necessary as a result of its impact on the realisation of the founding values of the Constitution and enjoyment of the other rights in the Bill of Rights. Courts have stated that socio-economic rights must be understood in the context of the founding values of our Constitution. The right of access to social security, like all other socio-economic rights in the Constitution, is closely related to the founding values of human dignity, equality and freedom. Access to socio-economic rights is crucial to the enjoyment of the other rights mentioned in the Bill of Rights, in particular the enjoyment of human dignity, equality and freedom.<sup>46</sup> The protection of the right of access to social security also seeks to promote equality, as section 27 entitles

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<sup>44</sup> *S v Mlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para. 111.

<sup>45</sup> *Kbosa*, 111.

<sup>46</sup> *Kbosa*, 104.

everyone to have access to socio-economic rights.<sup>47</sup> It is also protected to ensure a person's dignity, as the protection of a person's dignity is the core aim and basis for social security and other socio-economic rights.<sup>48</sup> This was confirmed by the Constitutional Court, when it remarked that 'there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.'<sup>49</sup>

The right of access to social security is entrenched due to the impact apartheid had on the quality of life of many South Africans, and their enjoyment of socio-economic rights. In an attempt to redress past injustices (including poverty and inequality), social security seeks to realise some of the aims of the Constitution, such as 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.

For persons who are unable to support themselves and their dependants, the right is further entrenched because the South African society values human beings and wants to ensure that people are afforded their basic needs.<sup>50</sup> In the *Grootboom* case, it was remarked that a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society based on human dignity, equality and freedom. The State has an obligation to ensure that its residents have their basic needs met and as such have access to food, clean water and shelter. Social security is a vital component of the social system that is available for those who cannot meet these basic needs for themselves or their families.<sup>51</sup> It enables people to avoid destitution and affords that their basic needs are met upon stoppage or disruption of their income or their earning potential never developing. It also ensures complete protection against human damage, an adequate standard of living and protection against destitution. It serves to protect human beings from the life-threatening and degrading conditions of poverty and material insecurity. Social security and other socio-economic rights serve the additional purpose of facilitating the integration of persons into society so as to further their sense of participation.

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<sup>47</sup> *Khosa*, 42.

<sup>48</sup> Van Rensburg I.J and Lamarche L, 'The right to social security and assistance' in Brand D and Heyns C (eds), *Socio-economic rights in South Africa*, PULP, Pretoria, 2005, 235.

<sup>49</sup> *Grootboom*, 23.

<sup>50</sup> *Khosa*, 52.

<sup>51</sup> *Khosa*, 114.

It also prevents the arbitrary discrimination of access to or participation in society and the eradication of stumbling blocks that impede access to benefits.<sup>52</sup>

The absence of an efficient adjudication system through which aggrieved social security beneficiaries can enforce and realise their rights entails that they would be denied access to social security. To borrow from comments by the Constitutional Court, the denial of the right of access to social security would be total (no access) and the consequences of the denial would be grave (social exclusion, poverty, lack of basic services, denial of equality and human dignity). They would be relegated to the margins of society and would be deprived of what may be essential to enable them to enjoy other rights granted under the Constitution.

### *Right of access to justice*

The concept of access to justice has evolved over the years from a narrow definition that refers to access to legal services and other state services (access to the courts or tribunals that adjudicate or mediate) to a broader definition that includes social justice, economic justice and environmental justice.<sup>53</sup> The evolution of the definition of the concept of access to justice indicates that earlier approaches to the concept failed to take into account the impact of social and economic conditions on the ability of claimants to use dispute resolution institutions and processes. The concept of access to justice must go beyond the functioning of institutions that resolve disputes and legal processes and should be defined within the context of the social and economic conditions of prospective users of the justice system. Conditions such as poverty, illiteracy, geographical location etc. have an inevitable impact on the ability to utilise the legal system. Defined as such, any measures adopted to enhance access to justice will include measures aimed at empowering users in using the established systems.<sup>54</sup> Therefore, the modern concept must be defined in a manner that also considers the number of ways in which access is denied either through spatial, temporal, linguistic, social

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<sup>52</sup> Liffman R, 'Social Security as a constitutional imperative: An analysis and comparative perspective with emphasis on the effect of globalisation on marginalisation' in Olivier MP, Kalula E, van Steenberge J, Jorens Y & van Eeckhoutte W (eds) *The extension of social security protection in South Africa*, SiberInk, Claremont, 2001, 41.

<sup>53</sup> Open Society Foundation for South Africa, *Access to justice round-table discussion* Parktonian Hotel, Johannesburg, 22 July 2003, 5.

<sup>54</sup> Nyenti M, 'Access to justice in the South African social security system: Towards a conceptual approach' 46 *De Jure* 4 (2013), 901-916 at 905.

or symbolic barriers.<sup>55</sup> The concept is also about breaking down the barriers that prevent the poor and indigent from accessing justice.

Access to justice, as expressed in section 34 of the Constitution has three components. In the first instance, is the right to bring a dispute to court: accessibility to the adjudication institutions must be ensured. This means everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress, taking into account the socio-economic conditions of claimants and other barriers on their ability to utilise the adjudication system must be considered within the concept of access to justice.<sup>56</sup> Secondly, access to justice entails that effective dispute resolution institutions and mechanisms must be in place: establishment of a court or another independent and impartial tribunal or forum.<sup>57</sup> Finally, in order to ensure access to court, section 34 guarantees the right to procedural fairness: disputes resolved in a fair and public hearing.<sup>58</sup>

## Role of International Standards in Access to Justice

The right to lodge a complaint and the right of appeal in social security matters ensure compliance with and the effective implementation of the rights

<sup>55</sup> Baxi P, 'Access to justice and rule-of- [good] law: The cunning of judicial reform in India' Working Paper commissioned by the Institute of Human Development, New Delhi on behalf of the UN Commission on the Legal Empowerment of the Poor, May 2007, 4.

<sup>56</sup> Currie and De Waal, *The bill of rights handbook*; Department of Justice and Constitutional Development, 'HIV/AIDS, Human Rights and Access to Justice' (Draft Discussion Paper) Pretoria, May 2009, 11-12; Vawda YA, 'Access to justice: From legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor' 2005 *Obiter* 234-247; Foundation for Human Rights, *Civil society priorities in the access of justice and promotion of constitutional rights programme of the Department of Justice and Constitutional Development*, March 2009; Anderson MR, *Access to justice and legal process: making legal institutions responsive to poor people in LDCs*, Institute of Development Studies, Sussex (February 2003) 19-20; Nyenti M, *Dispute resolution in the South African social security system: the need for more appropriate approaches*, *Obiter*, (2012), 33(1) 27-46; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

<sup>57</sup> See *Carephone (Pty) Ltd v Marcus and Others* 1999 (3) SA 304 (LAC); 1998 (10) BCLR (1326 (LAC) 33; Currie and de Waal, *The bill of rights handbook* 723 and Bosch C, Molahleli E and Everett W, *The conciliation and arbitration handbook: A comprehensive guide to labour dispute resolution proceedings*, LexisNexis, Durban, 2004, 7.

<sup>58</sup> See *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) ,11-14; Currie and de Waal *The bill of rights handbook*, 723; *Mbebe and Others v Chairman, White Commission and Others* 2000 (7) BCLR 754 (Tk), 776; *Bongozwa v Minister of Correctional Services and Others* 2002 (6) SA 330 (TkH), 22-25; and Brickhill J and Friedman A, 'Access to courts' in Woolman S, Roux T and Bishop M, *Constitutional law of South Africa*, 2ed, Original Service 07-06, Cape Town, Juta, 59-98.

of insured persons and of due process.<sup>59</sup> As a result, the right of access to justice or of fair trial is protected in various international, supra-national and regional instruments, either on its own or as part of the right to social security. Some of these instruments include the African Charter of Human and Peoples' Rights,<sup>60</sup> International Covenant on Economic, Social and Cultural Rights,<sup>61</sup> International Covenant on Civil and Political Rights,<sup>62</sup> ILO Social Security (Minimum Standards) Convention 102 of 1952,<sup>63</sup> ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988,<sup>64</sup> European Convention on Human Rights,<sup>65</sup> and Code on Social Security in the SADC.<sup>66</sup>

The provisions of international instruments relating to the adjudication of social security are in the form of standards, and act as benchmarks for the evaluation of domestic adjudication frameworks. They have been vital in the development of an overarching policy framework for efficient and effective resolution of social security disputes in South Africa. This is because the Constitution favours an international law - and comparative law - friendly approach in determining the scope and content of the rights in the Bill of Rights. It requires that when interpreting fundamental rights, international law must be considered<sup>67</sup> while foreign law may be considered.<sup>68</sup> In addition, section 233 requires that when interpreting any legislation, any reasonable interpretation of the legislation that is consistent with international law (including customary international law) must be preferred over any alternative interpretation that is inconsistent with international law.<sup>69</sup>

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<sup>59</sup> International Labour Organisation, *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalisation), Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35, Constitution of South Africa, Report III (Part 1B)) International Labour Conference, 100th Session, 2011, Geneva, 2011, 403.

<sup>60</sup> Article 7(1).

<sup>61</sup> Article 9 - South Africa signed the International Covenant on Economic, Social and Cultural Rights and Cabinet approved its ratification in 2012. In addition, there are similarities between the provisions of the International Covenant on Economic, Social and Cultural Rights and those in the Constitution of South Africa, which make the Covenant an important interpretation tool.

<sup>62</sup> Articles 2 and 14.

<sup>63</sup> Article 70.

<sup>64</sup> Article 27(1).

<sup>65</sup> Article 6.

<sup>66</sup> Article 21.1(b).

<sup>67</sup> Section 39(1) (b) of the Constitution.

<sup>68</sup> Section 39(1) (c) of the Constitution.

<sup>69</sup> See Section 232 of the Constitution on customary international law.

International standards are also relevant for the interpretation and development of constitutional rights as the objectives of and principles and values guiding the Constitution are reflective of those in international instruments. These instruments also seek to establish the society envisaged by the Constitution and guided by the same principles and values.<sup>70</sup> As pointed out by the Office of the United Nations High Commissioner for Human Rights, international human rights underpinned by universally recognised moral values and reinforced by legal obligations provide a compelling normative framework for the formulation of national and international policies.<sup>71</sup>

Furthermore, South Africa is a member of various international organisations and/or a party to international instruments that contain provisions relating to social security and access to justice.<sup>72</sup> South Africa is therefore bound by the obligations arising from these instruments and to implement their provisions. As mentioned in the *Grootboom* case:

“The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”<sup>73</sup>

Even where South Africa is not bound by the obligations arising from an international instrument, similarities in the formulation of the rights of access to social security and to courts in the South African Constitution and the provisions of some international instruments would require the consideration of such instruments in the interpretation of the constitutional rights.<sup>74</sup> The jurisprudence

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<sup>70</sup> Such as equality (formal, substantive and restitutionary) in Article 2 of the African Charter on Human and Peoples’ Rights (ACHPR), Article 3 of the African Charter on the Rights and Welfare of the Child (ACRWC), Article 6 of the Charter of Fundamental Social Rights in the South African Development Community (SADC-SR), Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 2(1) and 3 of the International Covenant on Civil and Political Rights (ICCPR), Article 14 of the European Convention on Human Rights (ECHR) and Article 1 of the Universal Declaration of Human Rights (UDHR); and human dignity ACHPR in Article 5, ICESCR Preamble, Committee on Economic, Social and Cultural Rights, General Comment 19 and ICCPR Preamble of ICCPR.

<sup>71</sup> Office of the United Nations High Commissioner for Human Rights, *Human rights and poverty reduction: A conceptual framework* United Nations, New York and Geneva, 2004.

<sup>72</sup> South Africa is a member of the United Nations, International Labour Organisation, African Union and the Southern Africa Development Community. It is a party to the international instruments such as the ICCPR, Convention on the Rights of the Child, ACHPR, and ACRWC.

<sup>73</sup> *Grootboom*, 26.

<sup>74</sup> Such as Article 2(1) of ICESCR - each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures; and Article 6(1) of the European Convention on Human Rights - in the determination of his civil rights and obligations ... everyone is entitled to a fair and

of the institutions charged with the monitoring and enforcement of these instruments which provide guidelines on the nature and content of the rights in these instruments is thus helpful in interpreting the right in the Constitution.<sup>75</sup> As the Constitutional Court has held:

“... public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]”.<sup>76</sup>

In *Coetzee v Government of the Republic of South Africa*,<sup>77</sup> the Constitutional Court stated that section 39 (section 35 of the Constitution of South Africa, 1993) requires due attention to be given to international experience with a view to finding principles and to look for rationales.

Access to justice or fair trial provisions of international instruments have thus been vital in the development of an overarching policy framework for efficient and effective resolution of social security disputes in South Africa.<sup>78</sup> The Policy calls for the introduction of special and earmarked adjudication institutions and procedures, in order to deal effectively with social security disputes. A reformed social security dispute resolution system which adopts an integrated approach to realisation of rights is proposed. The proposals take into account the need to (*inter alia*) create a uniform dispute resolution system; establish sequential and complementary (internal) reviews and (external) appeals procedures; guarantee the institutional separation of administrative accountability, review and revision; dedicate a court or a specialist tribunal as an appeal mechanism; guarantee the independence and impartiality of dispute resolution institutions; promote

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public hearing within a reasonable time by an independent and impartial tribunal established by law.

<sup>75</sup> Examples are the General Comments of the Committee on Economic, Social and Cultural Rights, the Committee on Civil and Political Rights, Guidelines of the African Commission on Human and Peoples' Rights and judgments of the European Court of Human Rights.

<sup>76</sup> *S v Makwanyane*, 35 and *Grootboom*, 26.

<sup>77</sup> Case CCT 19/94.

<sup>78</sup> See Olivier M, Govindjee A and Nyenti M, *Developing a policy framework for the South African social security adjudication system: Policy*, (Policy prepared for the Department of Social Development, South Africa), 2011.

the accessibility of social security dispute resolution institutions; resolve disputes in procedurally-fair manner; appoint suitably-qualified persons as adjudicators; grant dispute resolution institutions wide powers and extensive scope of jurisdiction; and prevent multiple dispute resolution institutions and avenues.<sup>79</sup>

### *Resolution of disputes by a court of a general jurisdiction or a special tribunal*

The Constitution requires that disputes which can be resolved by the application of law may be decided before a court or, where appropriate, a tribunal or forum.<sup>80</sup> International instruments also afford Member States the leeway to decide on whether a dispute (including a social security dispute) is to be resolved in a court or a tribunal. As an example, the right of appeal against decisions of a social security administration in terms of ILO Convention 102 can be guaranteed either to a court of a general jurisdiction or to a special tribunal.<sup>81</sup>

### *Sequential and complementary reviews and appeals procedures*

In developing an efficient and effective social security dispute resolution system, there is a need to ensure an institutional separation between administrative accountability, review and revision (on the one hand) and a wholly-independent, substantive system of appeals (on the other).<sup>82</sup> The ILO has remarked that the provisions of Paragraph 70 of Convention 102 of 1952 (right

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<sup>79</sup> See Nyenti M, Olivier M and Govindjee A, 'Reforming the South African social security adjudication system: The role and impact of international and regional standards' in Olivier M, Dupper O and Govindjee A (eds) *The role of standards in labour and social security law: International, regional and national perspectives* Juta, Cape Town, 2013; Olivier, Govindjee and Nyenti, *Developing a policy framework for the South African social security adjudication system: Policy*; Olivier M, Govindjee A & Nyenti M, *Developing a Policy Framework for the South African Social Security Adjudication System: First (Research) Report* (Report prepared for the Department of Social Development, South Africa) 2011; Nyenti M *Developing an appropriate adjudicative and institutional framework for efficient social security provisioning in South Africa*, Unpublished University of South Africa, LL.D thesis, 2012; and Committee of Inquiry into a Comprehensive Social Security System for South Africa, *Transforming the present – protecting the future* (Draft Consolidated Report), Pretoria, 2002.

<sup>80</sup> Section 34, *Constitution of South Africa*.

<sup>81</sup> International Labour Organisation, *Social security and the rule of law*, 406.

<sup>82</sup> Olivier MP, van Rensburg LJ and Mpedi LG, 'Adjudication and enforcement of social security; reviews and appeals' in Olivier MP, Smit N, Kalula ER and Mhone GCZ (eds), *Introduction to social security* LexisNexis Durban, 2004, 526. See also Committee of Inquiry into a Comprehensive Social Security System for South Africa, *Transforming the present – protecting the future*, 124 where it is recommended that a uniform adjudication system be established to deal conclusively with all social security claims. Such a system should, in the first place, comprise an independent internal review or appeal institution. In the second place, according to the Committee, the system should comprise a court (which could be a specialised court) that has the power to finally adjudicate upon all social security matters.

of appeal of every claimant in case of refusal of the benefit or complaint as to its quality or quantity) reflect the sequential and complementary character of the rights to complain and to appeal. It stated that social security disputes are settled in two stages: a first complaint phase, generally before the higher level administrative body within the social security institutions, and a second stage of appeal against the decision of the administrative body, generally before an administrative, judicial, labour or social security court or tribunal.<sup>83</sup> Article 27(1) of Convention 168 of 1988 also grants claimants the right, in the first instance, to present a complaint to the body administering the benefit scheme and, in the second instance, to appeal its decision to an independent body. It also distinguishes between the bodies with which claims are to be lodged: while complaints should be addressed to the body administering the benefit scheme, appeals should be lodged with an independent body, such as a court or tribunal. It thus 'reaffirms the complementary nature of the right of complaint and of appeal and systematizes their exercise as two successive stages in the treatment of claims'.<sup>84</sup>

### *Establishment of independent and impartial institutions*

A major requirement in the various international instruments for the establishment of an adjudication framework is for these to be independent and impartial. The ILO has observed that this fundamental right is intended to guarantee that courts and judges are impartial and have judicial independence to decide disputes according to the facts and the law, including freedom from improper internal and external influence.<sup>85</sup>

The African Commission on Human and Peoples' Rights has laid down guidelines on the requirements for a fair hearing in all legal proceedings, including the independence and impartiality of adjudication institutions in civil matters.<sup>86</sup> It requires that the independence of judicial bodies and judicial officers be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities. In order for independence to be achieved, there should not be any inappropriate or unwarranted interference with the judicial process, nor should decisions by judicial bodies be subject to

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<sup>83</sup> ILO, *Social security and the rule of law*, 434.

<sup>84</sup> ILO, *Social security and the rule of law*, 407.

<sup>85</sup> ILO, *Social security and the rule of law*, 433.

<sup>86</sup> African Commission on Human and Peoples' Rights, *Principles and guidelines on the right to fair trial and legal assistance in Africa*, 1999, Section A.

revision except through judicial review in accordance with the law. All judicial bodies should be independent from the executive branch. The process for appointments to judicial bodies should be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary. The sole criteria for appointment to judicial office should be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability. No persons should be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions. Judges or members of judicial bodies must have security of tenure until a mandatory retirement age or the expiry of their term of office. The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.<sup>87</sup>

The Commission requires an adjudication institution to be impartial, with its decision based only on objective evidence, arguments and facts presented before it. Judicial officers should decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason. The impartiality of a judicial body could be determined on the basis of whether the position of the judicial officer allows him or her to play a crucial role in the proceedings; if the judicial officer had expressed an opinion which would influence the decision-making; and if the judicial official would have to rule on an action taken in a prior capacity. The Commission believes that the impartiality of a judicial body would be undermined when a judicial official sits as a member of an appeal tribunal in a case which he or she decided or participated in on a lower judicial body. In any of these circumstances, a judicial official would be under an obligation to step down. A judicial official may also not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.<sup>88</sup>

The independence and impartiality of social security adjudication institutions is also mandated by ILO Conventions. In relation to the right in Article 70 of Convention 102, the ILO has noted that:

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<sup>87</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section A, Article 4.

<sup>88</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section A, Article 5.

“In accordance with Convention No. 102, the right of appeal should be guaranteed against decisions of a social security administration either to a court of a general jurisdiction or to a special tribunal. The concept of appeal further implies the settlement of the dispute by an authority that is *independent of the administration that reviewed the initial complaint*. *Merely guaranteeing the right to seek review of the decision by the same administrative authority would not therefore be sufficient to constitute an appeal procedure* under Convention No. 102. In addition, in the absence of special appeal procedures against the decisions of an administrative authority responsible to the government which rules in the first and last resort, the ... safeguards provided for in the Convention could nonetheless be ensured by the application of the general rules governing the right of appeal to the ordinary courts in so far as these rules permit the review or annulment of any administrative ruling in the cases covered by Article 70”.<sup>89</sup>

Under the European Convention on Human Rights, an independent tribunal is one that is independent of the parties, and of the executive. Issues that are considered in determining the independence of an adjudication institution include the manner of appointment of its members, their terms of office, the existence of guarantees against outside pressures and the question as to whether there is the appearance of independence or not.<sup>90</sup>

### *Appointment of suitably-qualified adjudicators*

For the right to a fair trial in international law to be realised, appeal bodies should be composed of referees who are experts in social insurance law, assisted by assessors, representative of the group to which the claimant belongs and, where employed persons are concerned, also by representatives of employers.<sup>91</sup> Adjudicators should also have comprehensive legal knowledge and expertise.<sup>92</sup>

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<sup>89</sup> ILO, *Social security and the rule of law*, 406.

<sup>90</sup> Interights, *Right to a fair trial under the European Convention on Human Rights (Article 6)* (Manual for Lawyers), 2009, 28; In *Belilos v Switzerland* (ECHR (1988) Series A, No. 132) the Court held that there was a lack of the requisite appearance of independence in a tribunal where a civil service member was in a subordinate position to an officer who was a party to the proceedings. In *Langborger v Sweden* ((1990) 12 EHRR 416 89/9), the Court also found a lack of independence where two lay assessors on a tribunal dealing with a claim for revision of a lease had been appointed by associations which had an interest in the continuation of the existing terms of the lease. However, in *Campbell and Fell v United Kingdom* ((1984) 7 EHRR 165), the Court found that there was no breach of the requirement of independence where members of a prison disciplinary body were appointed by the Minister responsible for prisons, but were not subject to any instructions from the Minister in their adjudicatory role. In addition, in *Stojakovic v Austria* (ECHR Case No. 30003/02 of 9 November 2006), a tribunal consisting of a judge and two civil servants, one representative of the employer and one of the employee, both with a fixed term, was also found to be in compliance with the requirement of independence in Article 6 of the Convention.

<sup>91</sup> ILO, Recommendation 67 of 1944, Annex, 27(8).

<sup>92</sup> ILO, *Social security and the rule of law*, 433.

*Provision of reasonable time limits for reviews (complaints) and appeals*

Where a statute imposes a time limit and/or notice period requirement, an aggrieved person is barred from bringing the case to court after the expiry of the time limit. Time limits and notice periods are considered necessary in a dispute resolution system as they bring certainty and stability to social and legal affairs and maintain the quality of adjudication.<sup>93</sup> Time limits and notice requirements on the right of access to court have been described as ‘conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law’;<sup>94</sup> ‘a very drastic provision’ and ‘a very serious infringement of the rights of individuals’.<sup>95</sup> The requirement has the effect of ‘hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts’.<sup>96</sup> In *Brümmer v Minister for Social Development and Others*, the Constitutional Court held that:

“... time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The enquiry turns wholly on estimations of degree<sup>6</sup>. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive.”<sup>97</sup>

According to the European Court of Human Rights, the right of access to a court prohibits legal and factual impediments to judicial action, such as procedural rules.<sup>98</sup> The Court believes that the interests of the proper administration of justice will justify the imposition of reasonable time-limits and procedural

<sup>93</sup> *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC), 8.

<sup>94</sup> *Benning v Union Government (Minister of Finance)* 1914 AD 180, 185.

<sup>95</sup> *Gibbons v Cape Divisional Council* 1928 CPD 198, 200.

<sup>96</sup> *Aves Air (Pty) Ltd v Borough of Vryheid* 1973(1) SA 617(A), 621F-G and *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A),764E.

<sup>97</sup> See *Brümmer*, (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC), 51.

<sup>98</sup> See the cases of *Geoffre de la Pradelle v France* (16 December 1992) and *Zvolsky and Zvolska v the Czech Republic* (12 November 2002); as quoted in Akandji-Kombe J-F, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Human rights handbooks, No. 7, Council of Europe 2007, 62.

conditions for the bringing of claims.<sup>99</sup> The ILO suggests that although its standards do not prescribe the length of the period which should be available to the claimant to lodge a complaint, the Committee of Experts considers that such period should be of a reasonable duration.<sup>100</sup>

Where time limits are applicable, they must therefore afford social security litigants an opportunity to bring a case, taking into account their ability to bring the case to court. As the Constitutional court remarked, the socio-economic conditions in South Africa (the backdrop of poverty and illiteracy in our society) are important in considering the reasonableness and justifiability of time bar and notice periods.<sup>101</sup> This is because in a society where the workings of the legal system remain largely unfamiliar to many citizens, due care must be taken that rights are adequately protected as far as possible.<sup>102</sup>

### *Expeditious (rapid) and simple proceedings*

Delay in the adjudication of disputes impairs social security litigants' rights of access to courts. South African courts have held that 'inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs.'<sup>103</sup>

International standards require the expeditious resolution of disputes.<sup>104</sup> This aims to protect the parties against excessive delays in legal proceedings and to highlight the impact of delay on the effectiveness and credibility of justice.<sup>105</sup> In the opinion of the ILO, the general principles set out in international social security instruments, which call for recourse procedures to be rapid, militate in favour of the harmonisation of the applicable procedural law throughout dispute settlement procedures in social security matters.<sup>106</sup> It adds that in certain cases, due to the sometimes inadequate guarantees relating to the impartiality and independence of the administrative bodies that examine complaints in the first resort, emphasis should be placed on observance of certain fundamental princi-

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<sup>99</sup> See for example *MPP Golub v Ukraine* (December 2005).

<sup>100</sup> ILO, *Social security and the rule of law*, 418.

<sup>101</sup> *S v Makwanyane and Another; Mhloni v Minister of Defence*.

<sup>102</sup> *Road Accident Fund and Another v Mdeyide*, 70.

<sup>103</sup> *Mhloni v Minister of Defence* 1997 (1) SA 124 (CC), 11.

<sup>104</sup> Such as Article 27(1), Convention 168 of 1988.

<sup>105</sup> Interights, *Right to a fair trial under the ECHR* 52.

<sup>106</sup> ILO, *Social security and the rule of law*, 436.

ples during the complaint procedures, which should therefore be reinforced such as the right to obtain a rapid and reasoned decision. This is because one of the most important principles of regular proceedings, namely the prompt rendition of justice, is also crucial in social security matters, since claimants often have to rely on benefits to survive. It thus underscores the need to establish a procedure for the rapid solution of cases where the urgency is manifest.

Simple and rapid procedures are also crucial to ensure the accessibility and effectiveness of the rights of access to court. Therefore, the language and terminology to be used should be readily understood by an individual of similar background, education and related circumstances (in this case social security claimants who may either be illiterate or do not understand English).<sup>107</sup> The procedures for review (complaint) and appeal of social security decisions must also be simple and rapid.

The need for simple procedures further entails that the law and regulations relating to social security be drafted in such a way that beneficiaries and contributors can easily understand their rights and duties. Simplicity should thus be a primary consideration in devising procedures to be followed by beneficiaries and contributors.<sup>108</sup> The European Convention on Human Rights requires hearings to be conducted within a reasonable time. The reasonableness of the duration of a hearing depends on the particular circumstances of each case. In assessing reasonableness, the European Convention of Human Rights takes into account the complexity of the cases, the conduct of the plaintiff and the conduct of the State.<sup>109</sup>

### *Procedural guarantees to ensure a fair hearing*

The resolution of disputes must be undertaken in a fair and public manner. Fairness includes equality of arms between the parties to proceedings, whether the proceedings are administrative, civil, criminal or military in nature.<sup>110</sup> The principle of equality between the parties is also extremely important in social security disputes, as claimants usually come up against a government or administrative body. The ILO is thus of the opinion that the right to a fair trial requires

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<sup>107</sup> ILO, *Social security and the rule of law*, 428-431.

<sup>108</sup> ILO, *Income Security Recommendation 67 of 1944 Annex*, 27(3) and (4).

<sup>109</sup> Autheman V, *Global best practices: Judicial integrity standards and consensus principles*, IFES Rule of Law White Paper Series (April 2004), 10.

<sup>110</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section A, Article 2(a).

procedural equality between the parties in the dispute.<sup>111</sup> Dispute settlement bodies should therefore ensure that individual claimants have reasonable opportunities to assert or defend their rights. Equality of arms between the parties to proceedings further involves equal access to evidence. This means each party should also have access to the relevant evidence, including documents, expert opinions, etc. The burden of proof should also not lie exclusively with the complainant.<sup>112</sup> Parties should have adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence.<sup>113</sup> Parties should also be entitled to the assistance of an interpreter if they cannot understand or speak the language used in or by the judicial body.<sup>114</sup>

Social security claimants should also not be deprived of the right to a fair trial due to costs. As a result, where appeal procedures are not free of charge, the cost of appeal should be kept at the absolute minimum so as to allow for the effective exercise of the right of access to court, including by persons of small means.<sup>115</sup>

### *Guarantee of representation and legal assistance*

The right to a fair trial in section 34 of the South African Constitution guarantees a right to representation. The African Charter affords litigants with an entitlement to consult and be represented by a legal representative or another qualified person chosen by the party at all stages of the proceedings.<sup>116</sup> This position is also supported by ILO Conventions, such as the Invalidity, Old-Age and Survivors' Benefits Convention which provides that procedures should be prescribed to permit the claimant to be represented or assisted, where appropriate, by a qualified person of his choice or by a delegate of an organisation representative of persons protected.<sup>117</sup> Convention 168 also provides that the appeal procedure should enable claimants to be represented or assisted by a qualified person of the claimant's choice or by a delegate of a representative workers' organisation or by a delegate of an organisation representative of protected persons.<sup>118</sup>

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<sup>111</sup> ILO, *Social security and the rule of law*, 436.

<sup>112</sup> ILO, *Social security and the rule of law*, 436.

<sup>113</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section A, Article 2(e).

<sup>114</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section A, Article 2(g).

<sup>115</sup> ILO, *Social security and the rule of law*, 436.

<sup>116</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section A, Article 2(f).

<sup>117</sup> Article 34, 2.

<sup>118</sup> Article 27, 2.

However, a right to free legal assistance is not expressly provided, which brings to question the entrenchment of such a right. This is contrary to section 35 (which deals with criminal matters) where such a right is expressly protected.<sup>119</sup> However, differences in the formulation of the right to a fair trial between section 34 of the Constitution and section 22 of the Interim Constitution of 1993; and the similarity between section 34 and the right to fair trial in some international instruments support the conclusion that a right to legal aid and legal assistance is intrinsic to the right to a fair hearing in section 34.<sup>120</sup>

The African Charter does not specifically regulate the issue of whether state-funded legal aid is an essential component of the right to a fair hearing. However, the African Commission on Human and Peoples' Rights has interpreted the right to a fair hearing as incorporating the right to legal aid. The Commission has held that a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the party to a civil case if he or she does not have sufficient means to pay for it.<sup>121</sup> The interest of justice is determined in civil cases by considering the complexity of the case and the ability of the party to adequately represent himself or herself; the rights that are affected; the likely impact of the outcome of the case on the wider community.

ILO also advocates for the provision of free legal aid and legal assistance in social security disputes as it believes the law should guarantee that claimants who cannot afford legal assistance must be entitled to be represented by a public defender or counsel for the defense appointed by the competent authority. It states that:

“The right to receive legal aid is an essential means of helping beneficiaries in their efforts to identify and understand their legal rights and obligations. It is often the case that the provisions of the relevant national legislation are not formulated in simple and readily understandable terms. Such aid is also rendered necessary by the unequal positions of the parties involved, as state institutions and bodies are in a more favourable position. Beneficiaries often feel helpless when faced with complicated provisions, and without proper assistance they may be unable to resolve the issues that arise. Assistance in social security matters enables people to understand their legal obligations and assert their legal rights more effectively.”<sup>122</sup>

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<sup>119</sup> Section 35(3)(g), *Constitution of South Africa*.

<sup>120</sup> See Budlender G, 'Access to court', 121. *South African Law Journal* (2004) 339-358 at 342.

<sup>121</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section H.

<sup>122</sup> ILO, *Social security and the rule of law*, 425.

Section 34 is similar to Article 6(1) of the European Convention of Human Rights, which guarantees a right to legal aid and legal assistance. The European Court of Human Rights has concluded that the right to a fair and public hearing in Article 6(1) of the European Convention of Human Rights includes the right to legal aid and legal assistance in certain circumstances. In *Airey v. Ireland*, the court held that:

“Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”<sup>123</sup>

In the case of *P, C and S v United Kingdom*, the Court held that there is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.<sup>124</sup>

In *Steel and Morris v. the United Kingdom*, the Court held that the lack of civil legal aid was a violation of Article 6.<sup>125</sup> The case concerned a libel suit by the fast food chain McDonalds against the two applicants claiming compensation for damage caused by a leaflet allegedly written by the applicants, which severely criticised the practices and food of McDonalds. The applicants were refused legal aid and so represented themselves throughout the trial and appeal, with only some help from volunteer lawyers in a trial that lasted for 313 court days (the longest in English legal history). The European Court of Human Rights noted that the case was factually and legally complex; and that in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel. It stated that the very length of the proceedings was, to a certain extent, a testament to the applicants’ lack of skill and experience. The Court also stressed that it was McDonalds that had instituted the proceedings, not the applicants.<sup>126</sup>

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<sup>123</sup> *Airey v Ireland* (1979) 2 EHRR 305, 26.

<sup>124</sup> *P, C and S v United Kingdom* (2002) 35 EHRR 31, 91.

<sup>125</sup> *Steel and Morris v. the United Kingdom*, 15 February 2005.

<sup>126</sup> Mole N and Harby C, *The right to a fair trial: A guide to the implementation of Article 6 of the European*

It therefore confirms a conclusion that a right to legal aid and legal assistance is foreseen in the right to a fair public hearing in section 34. South African courts have also adopted this approach, as seen in *Nkuzi Development Association v Government of the Republic of South Africa* and *Cele v the South African Social Security Agency and 22 related cases*.<sup>127</sup> In the *Nkuzi* case, the Land Claims Court held that labour tenants and occupiers have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result, and they cannot reasonably afford the cost thereof from their own resources. In *Cele*, Wallis AJ questioned how people who are so impoverished that they qualify for social assistance grants can afford to pay legal fees.

### *Provision of effective (enforceable) remedies*

The right to fair trial entails the provision of effective or enforceable remedies in case of disputes. The African Charter compels states to provide effective remedy. The African Commission on Human and Peoples' Rights requires that everyone shall have a right to an effective remedy by competent national tribunals for acts violating rights granted in the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.<sup>128</sup> Member States are compelled to ensure that any remedy granted is enforced by competent authorities; and that any state body against which a judicial order or other remedy has been granted complies fully with such an order or remedy.

In terms of ILO standards, the right to a fair trial further guarantees that any decision has to be legally enforceable.<sup>129</sup> The Committee on Economic, Social and Cultural Rights has also called for the availability of appropriate means of redress and accountability for violations of economic, social and cultural rights within national legal systems.<sup>130</sup> State parties are obliged to ensure that legal remedies, whether of a judicial or administrative nature, are available to aggrieved individuals or groups. The remedies must be "accessible, affordable, timely and effective".

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*Convention on Human Rights*, (Human Rights Handbook No. 3) Council of Europe, 2006, 41.

<sup>127</sup> *Nkuzi Development Association v Government of the Republic of South Africa* (2002 (2) SA 733 (LCC) 737B-D) and *Cele v the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D)), 2.

<sup>128</sup> ACmHPR, *Principles and guidelines on the right to fair trial*, Section C.

<sup>129</sup> ILO, *Social security and the rule of law*, 433.

<sup>130</sup> Committee on Economic, Social and Cultural Rights, *General comment No. 9: The domestic application of the Covenant* (19th Session, 1998), UN Doc E/C.12/1998/24, 9

## Impact of International Standards in Comparative Jurisdictions

Pronouncements in comparative jurisdictions on the role of the objectives of and principles and values guiding international standards on the interpretation and development of rights are illustrative of this view. An example is the opinion of Canadian courts on the role of international standards in the interpretation of the Charter of Rights and Freedoms (Part 1 of the Canada Constitution Act). The Canadian Supreme Court believes that international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under section 1 of the Charter.<sup>131</sup> Section 1 provides that the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The Canadian Department of Justice, on its part, says the Charter looks to international human rights law as a reflection of its principles as a free and democratic society.<sup>132</sup>

The Canadian Supreme Court has also noted that the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself,<sup>133</sup> that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review;<sup>134</sup> and that Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter.<sup>135</sup> This concurs with Sullivan who held that:

“[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.<sup>136</sup>

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<sup>131</sup> *R v Keegstra* [1990] 3 SCR 697.

<sup>132</sup> Department of Justice, *Polygyny and Canada's obligations under international human rights law* (Family, Children and Youth Section Research Report)(September 2006), 80.

<sup>133</sup> *R v Keegstra*.

<sup>134</sup> *Baker v Canada (Minster of Citizenship and Immigration)* [1999] 2 SCR 817.

<sup>135</sup> *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27; [2007] 2 SCR 391.

<sup>136</sup> Sullivan R, *Driedger on the construction of statutes*, Butterworths, Toronto, 1994, 330. See also *R v Hape* [2007] 2 SCR 292, 2007 SCC 26.

## Conclusions

Rights enshrined in international instruments are also guaranteed as fundamental rights in the South African Constitution. This is because the Constitution seeks to establish the kind of society envisaged in the international instruments and which is guided by the same values and principles: an open and democratic society based on social justice, fundamental human rights and founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism.

As a result, it adopts an international and comparative law-friendly approach, as seen through its interpretation and limitation clauses. These, together with its preference for a reasonable interpretation that is consistent with international law over alternative or inconsistent interpretations, means that international standards have been influential in determining the nature and scope of the rights in the Bill of Rights.

The Policy for an overarching framework for efficient and effective resolution of social security disputes in South Africa indicates the role and impact of international guidelines and standards in the establishment of a system. The Policy proposes that in the absence of a new, uniform, social security administrative institution, properly-functioning internal review or revision frameworks within the various social security administrative institutions are recommended as part of the most appropriate dispute resolution system. In addition, a uniform, independent and impartial administrative Tribunal that is accessible, is afforded a wide scope of jurisdiction and powers, resolves disputes in a procedurally-fair manner and is staffed by adjudicators with the necessary expertise and specialisation is proposed as the external appeal institution to hear appeals emanating from the (reviewed or reconsidered) decisions. The Tribunal will thus serve as the new highest level of non-judicial appeal in social security matters. This means that all appeals against administrative conduct in terms of any social security statute will proceed to the Tribunal before the High Court is approached. The Policy thus adopts international standards to establish a system that realises the right of access to justice for social security claimants: one that is “accessible, affordable, timely and effective”.