It Takes Three to Tango: The Right to Equality, Social Security and Constitutional Law in South Africa

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A. Summary

In this article the meaning of social security in general, and in the South African context specifically, will be discussed (see Section C *post*). As a country under the principle of constitutional supremacy, the operation of the South African Bill of Rights and its (possible) impact on social security will be analyzed in Section D *post*. Section E *post* deals with the right to equality and the interpretation thereof in South Africa. It will be illustrated how this interpretation can assist the realization of social security rights for as many South Africans[1] as possible. Lastly, legislation and international measures addressing the issue of social security and equality in general will be set out in Section E *post*. These are relevant in view of the constitutional provisions in relation to international law. It will be argued throughout that the entrenchment of social security as a human right, coupled with the general constitutional provisions on application and limitation and the right to equality specifically should be utilized to a larger extent in bringing about material change in South Africa.

B. Introduction

The South African Constitution Act No 108 of 1996 (the Constitution)[2] guarantees

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[19] The issue of citizenship and the limitation of certain social security rights to citizens will not be dealt with comprehensively in this article. For more on this issue, see Olivier et al., *Social Security Law – General Principles* (Durban, 1999) at pp. 512–514.

[20] South African legislation (from 1994) is available at <www.polity.org.za/gnuindex.html>

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'everyone ... the right to have access to social security'[3] in its Bill of Human Rights. Social security law has never been a separate field of law, neither has it been taught as a separate subject at any of the South African law schools before the adoption of this Section in the Constitution.[4] The new clause in the Constitution provided the impetus for recent endeavours to find the content and scope of the right to have access to social security, as well as the possibility of its realization.

South Africa is a country with deep divisions along racial lines as to access to social security. In addressing this issue the equality clause, and the interpretation awarded to it by the South African Constitutional Court, will be instrumental in achieving social justice and improving the quality of life[5] of its citizens. The various government departments involved in social security rights have only recently started to address this issue and have to be guided by the Constitution and its interpretation through case law and comparative research.

The equality principle combined with the horizontal application of the Bill of Rights will also broaden the scope of the right to access to social security. This means that access to social security rights can be claimed from private institutions providing social security, such as insurance companies and private employment-related funds.

C. The Meaning of Social Security

I. South African Constitutional Provisions on Social Security

The question of definition and scope is crucial. Any litigation based on Sections 26,[6]

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[21] Section 27(1)(c).

[22] Aspects of social insurance were addressed to a very small extent as part of labour law and aspects relating to social assistance (welfare) in the law of persons. Only after the commendable efforts of Professor Marius Olivier of the Rand Afrikaans University and numerous overseas sponsors, a national research team undertook research on the subject. The outcome was the first textbook on South African social security law (Olivier et al., *Supra* note 1. The author of this article was fortunate to be part of this team and I am greatly indebted to all the institutions involved for knowledge gained on this subject.

[23] The Preamble to the Constitution states:

> *We the people of South Africa, recognise the injustices of our past ... .We therefore ... adopt this Constitution as the supreme law of the Republic so as to – ... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights; ... Improve the quality of life of all the citizens and free the potential of each person.*

[24] Section 26:

> *(1) Everyone has the right to have access to adequate housing.*
> *(2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right.*

27[7] and 28[8] of the Constitution will involve an investigation as to whether the claimant is in fact the bearer of the right, and, whether the alleged violator is in fact bound by this specific provision of the Bill of Rights. It therefore has definite constitutional and financial implications.[9]

The concept of 'social security' was introduced into the South African legal system through the inclusion of a right to access to social security in Section 27(1)(c) of the Constitution. Whereas social security is generally accepted to include both social insurance and social assistance,[10] Section 27(1)(c) includes the right to social assistance in a separate phrase for persons and their dependants 'if they are unable to support themselves'.

Some of the aspects gathered under a broader definition of social security are entrenched in other Sections of the Constitution. Section 27(a) grants everyone access to health care services and reproductive health care, which would include access to medical aid and state-sponsored health care. Section 26 lists the right to access to housing.[11] What is important is that the right to social security of children[12] is worded differently from the right enjoyed by 'everyone' else. Every child has the right to shelter, basic healthcare services and social services. It is not just 'access to' the right that is guaranteed, but the right to social security (benefits) itself. For children there is also no provision that the state should institute 'reasonable and progressive measures', as with Sections 26 and 27. This implies that children's social security rights are to be

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[25] Section 27:

> *(1) Everyone has the right to have access to*
> *(a) health care services, including reproductive health care*
> *(b) ...*
> *(c) social security, including if they are unable to support themselves and their dependants, appropriate social assistance.*
> *(2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of these rights.*

[26] Section 28:

> *(1) Every child has the right –*
> *(c) to basic nutrition, shelter, basic health care services and social services.*

[27] See the case of *Soobramony v. Minister or Health, Kwa-Zulu Natal* [1997] 12 Butterworths Constitutional Law Reports 1696, CC. All South African Constitutional Court decisions are available at <www.law.wits.ac.za/archive.html>.

[28] D. Pieters, *Introduction into the Basic Principles of Social Security* (Deventer, 1993) at p. 5; International Labour Organization (ILO), *Introduction to Social Security* (Geneva, 1989) at p. 3.

[29] As housing is not ordinarily regarded as a social security right, it is submitted that in the South African context it has to be. This would also ensure not only access to state-subsidized housing, but also access to employment-related housing schemes. Property is also the key to access to financing, and provides security for families. This will also assist in alleviating the plight of street children in South Africa.

[30] Section 28(1)(c) of the Constitution.

prioritized and are to be realized as a matter or urgency.[13] This may have implications for the measure of success in litigation on these issues.

II. Defining Social Security

A more recent definition of social security is:

> *a state of complete protection against the loss of sources.*[14]

In the South African context, a more appropriate definition may include reference to the protection of those who already lack sufficient sources for subsistence. It is submitted that poverty, relief, preventative measures and social compensation are to be brought within the scope of a broader concept of 'social protection'.[15] Including, for example, social compensation or poverty relief under the constitutional concept of social security will open the possibility of a range of constitutional Section 27 claims against institutions. These may include institutions such as the Truth and Reconciliation Commission[16] and even, in view of the possible horizontal application of the right, private institutions or organizations.

The traditional division of social security[17] into social assistance and social insurance[18] is still operative. Many definitions include an enumeration of social risks,[19] others are defined in terms of the involvement of the state,[20] employers and/

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[31] Despite this, the realization of children's social security rights is limited by policy and legislation, based on limited state resources. For example, only children up until the age of six qualify for state-sponsored health care, and childcare grants have been limited up until the age of seven. The objective is to provide of more even spread of benefits to all South African children, but it may not be enough to dispose of the Section 28 constitutional duty.

[32] Sinfeld quoted by J. Berghman, 'Basic Concepts of Social Security' at p. 20 (paper distributed at Social Security Training, University of Leuven, 1997).

[33] The South African *White Paper on Social Welfare* ('the Welfare White Paper') General Notice 1108 in Government Gazette 18166 1997–08–08 (also available at <www.polity.org.za/govdocs/white_papers/>) does the exact opposite. Social protection is defined as social insurance and social assistance (glossary at end of chapter 7), and social security as a wide variety of private and public measures (para 1). It does, however, also state that it uses the terms interchangeably.

[34] The Commission provides for possible and in fact limited compensation for victims of human rights abuses in the past. See Chapter 5 of the Promotion of National Unity and Reconciliation Act No 34 of 1995.

[35] D. Pieters, *supra* note 10, at p. 5; International Labour Organization, *supra* note 10, at p. 3.

[36] For the components of social insurance and social assistance respectively, see International Labour Organization, *supra* note 10, at pp. 4, 5.

[37] Such as The Social Security (Minimum Standards) Convention, 1952 (No. 102) of the ILO (hereafter ILO Convention 102). The *Welfare White Paper* (glossary, chapter 7) lists under social protection 'policies that ensure adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age' and social assistance as dealing with old age, disability, child and family care and poverty relief.

[38] F. Barker and M. Holzhausen, *South African Labour Glossary* (Cape Town, 1996) at p. 138, for example defines social security as 'a system of assistance guaranteed by the state ...'.

or the private sector, in terms of the aims and/or benefits or financing of the scheme. There has always been correspondence between the risks and schemes, then often called 'branches' of social security.[21] The International Labour Organization (ILO) Convention No. 102 lists the classic risks, compelling ratifying countries to establish a minimum of three branches of social security, with unemployment, old age, invalidity, employment injury or benefits for survivors and minimum standards of coverage and benefits. The South African Welfare White Paper lists old age, disability, child and family care and poverty relief under social assistance and unemployment, ill health, maternity, child-rearing, widowhood, disability and old age under social protection.[22] The 'omission' of medical care and employment injury is attributed to the fact that the Departments of Health and Labour[23] are basically responsible for these.

The responsibility for social security is spread over various departments and thus creates a need for a coherent and co-ordinated approach to what is a single human right. If South Africa is to adhere to a broader scope of social security, it may be necessary to extend the concept of 'risk' to include 'disadvantage' or 'damage', as the principle of equality is intertwined with (historical) disadvantage suffered in this country.

III. Contributions, Benefits and Beneficiaries

The principle upon which benefits are made accessible to persons or groups are need (e.g. the most needy or for everybody) and/or the occurrence or even possibility[24] of risks. Where there is little or insufficient social insurance (e.g. in unemployment[25] or maternity benefits), social assistance is legitimately expected to fill the gap. This places a heavy burden on public revenue, the main source of social assistance funding.

Policy makers decide on who will be beneficiaries of social assistance, but have to bear in mind the possibility of constitutional challenges where there is no universal

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[39] D. Pieters, *supra* note 10, at p. 2; International Labour Organization, *supra* note 10, at p. 102.

[40] *Welfare White Paper*, Glossary, *supra* note 15.

[41] The Department of Labour's *Social Plan* General Notice 1590 in Government Gazette 20305 of 1999–07–23 affirms the concepts of social security and solidarity. Three sets of measures are set out, amongst others 'measures to assist the affected individuals and communities to find alternative ... employment or sustainable livelihoods'. The *Employment Strategy Framework* (para 2.3.4.) aims towards improved and more cost-efficient systems of social security and better and more accessible social services in the medium- to long-term (<http://www.polity.org.za/govdocs/misc/jobs/jobsframework.html>) amidst retrenchments and a difficult job market.

[42] As is the case when a preventative approach is taken.

[43] There is considerable disagreement as to how many South Africans are unemployed. Estimates vary from 12 per cent to 40 per cent of the adult population. According to some definitions, those who are not actively seeking employment are not regarded as 'unemployed'. For social security purposes such a definition would be fallacious, as a person may be in need of social protection irrespective of the definition as to their unemployment status.

coverage or where benefits are limited. Social insurance covers only those insured. It is however possible to compel[26] the establishment of or contribution to funds, as well as regulate membership and private social security measures. Case law may impact on the scope of benefits in social security systems, such as the recent Constitutional Court judgment on soldiers being 'workers' for the purposes of the right to form and join a trade union.[27]

Benefits can be means-related, can 'top-up' real or potential incomes or can be of a fixed amount ('flat rate'), irrespective of income or means. The Welfare White Paper states that social assistance are non-contributory and income-tested, and for parents and children who cannot provide for their own *minimum* needs.[28] It is submitted that not all forms of social assistance are in fact (or at least properly) income-tested, with uncertainty as to what is meant by this test. There is also an important link that has to be borne in mind between social security benefit levels and minimum wages.

Social insurance has deviated from private insurance schemes on the third and fourth assumptions: the voluntary contract has been replaced by an insurance obligation with constitutional roots; and benefits are linked to categorized contributions (no individual premiums), maximum benefit levels and an inter-generational aspect.[29]

IV. Financing and Administration

Two main sources of financing are found: wholly or partly by contributions (by or on behalf of the insured); and/or through public funds (e.g. taxation on goods and services and (income) tax).[30] Social assistance is (partly) publicly-funded, but the

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[44] See the Zimbabwean case of *Nyambirai v. National Social Security Authority and Another* (1995) 9 BCLR 1221 ZS where the compulsory contributions to the National Social Security Fund for pension purposes were challenged on constitutional grounds.

[45] *South African Defence Force Union v. Minister of Defence*, Case CCT 27/1998, Constitutional Court decision of 26 May 1998 (<www.law.wits.ac.za/archive.html>).

[46] Para 2(c). This is a safety-net approach. According to Section 27(1)(c) of the Constitution those 'who are unable to support themselves' have the right to access to social assistance. It is submitted that the constitutional scope is wider than the protection of minimum needs, but a more restrictive interpretation may be justifiable in view of Section 27(2) that provides for progressive realization.

[47] There is a growing trend in medical schemes linked to employment, that benefits and contributions are 'individual' and unused contributions can go into 'savings accounts', therefore, there is no or only limited vertical or cross generational funding within such schemes. This is symptomatic of a decrease in solidarity.

[48] In the Zimbabwean case of *Nyambirai v. National Social Security Authority and Another* (1995) 9 BCLR 1221 ZS at 1227, the following test was employed to determine whether contributions qualify as 'tax':

> It is compulsory and not optional; it is imposed or executed by the competent authority; it must be enforceable by law; it is imposed for the public benefit and for public purposes and it must not be for a service for specific individuals but for a service to the public as a whole, a service in the public interest.

more limited the financial resources, the lesser the coverage and/or benefits. Sometimes public funds are used to universally cover specific needs without having a means test. These are called 'demogrants' and cover for example everyone to whom a risk has occurred, such as child-rearing or disability. In the South African context some aspects of public health care, for example, still offer universal coverage, although individuals may be able to afford (some) contribution.

With social insurance, individuals, employers and/or the government contribute and benefits are allocated automatically, but linked to the amount of contributions. This may perpetuate existing inequalities: those with good salaries (i.e. those with jobs!) will make better contributions and receive better benefits.[31] This may be what is meant by the Welfare White Paper's 'income distribution' domain of social security.[32]

Comprehensive and co-ordinated systems are needed to administrate any effective and efficient social security system. The National Social Grants Register, as proposed by the Department of Welfare, is a step in the right direction. Links with other schemes and programmes, and even the South African Revenue Service, are however necessary. In some countries there is a central social security databank in which even information from visits to private doctors and pharmacies can be recorded. Other questions raised in a developing country include weighing the costs of the administration and application of a means test against universal coverage for all, or certain groups; as well as the usefulness of decentralization.

V. Solidarity and Social Exclusion

Pieters[33] defines social security as the body of arrangements shaping the *solidarity* with people facing (the threat of) lack of earnings.[34] Solidarity has however universally weakened, prompting a more vigorous approach in promoting a sense of shared responsibility.[35] Tax payers, employers and individual contributors are often

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[49] See S.J. Terblanche, 'A Comparison of the Social Security Systems of Sweden, Germany and the United States: Possible Lessons for South Africa' 4–5, 32–33 (paper delivered at the Social Transformation Processes. Conditions Using the Example of Social Security Systems Seminar, Johannesburg 1998).

[50] *Supra* note 15, para 1.

[51] See the International Labour Organization, *supra* note 10, at p. 2.

[52] Emphasis added.

[53] ILO, *Into the Twenty-First Century: The Development of Social Security* (Geneva, 1986) at p. 115. One sees a similar trend in South Africa, where medical aid funds (those linked to the employment relationship as well), for example, have been 'individualized' and members are not willing to carry the burden of those who are more in need of social protection. People do not believe that once they get old or fall ill, that they will be able to benefit from the same solidarity. Some fear that funds may be exhausted by the time they want to claim.

negative about social security implications.[36] *Ubuntu*[37] and nation-building[38] may be said to be (South) African equivalent concepts to the principle of solidarity.

It is argued that in developing countries social security is necessary, not as a result of some feeling of solidarity, but rather due to deprivation and the vulnerable status of many of their people.[39] As a result, historical reasons exist different from those that prompted the European social security initiatives.

Socio-cultural repercussions also occur in 'good' social security systems. Social taxes and social security contributions may serve as a disincentive to work, look for work or create employment.[40] Thus also the link with for example minimum wages. A spin-off of solidarity is the prevention of social exclusion, i.e. meaningful participation in society. Social security should actually enhance people's ability to participate in society and to be self-sufficient.[41] The effects of social exclusion are self-evident. Criminality, homelessness and poverty in turn lead to a decline of general physical and psychological welfare.

VI. A Modified Concept of Social Security[42]

It has been suggested that an operational division of social security is needed, instead of the existing patchwork of schemes and operations, that may fit experiences of social protection. It is thus suggested that social, fiscal and occupational welfare have to be collectively and individually 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 utilize limited resources.

A second recent move involves a shift from curative[43] to preventative social

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[54] Another example is the low maternity benefits, for which not employers, but government takes the primary responsibility in terms of the Unemployment Insurance Fund. Even from the ranks of the Labour Appeal Court there is a perception that pregnant women in higher positions 'burden' a country (Labour Appeal Court Case CA06/99, *Woolworths (Pty) Ltd v. Whitehead* (2000) 9 LAC 6.12.2. (<www.irnet.co.za>) paras 145–149).

[55] The African principles of humanity, respect and dignity.

[56] S.J. Terblanche, *supra* note 31, at p. 31.

[57] J.P. Drezé and A.K. Sen, *Social Security in Developing Countries* (Oxford, 1991) at p. 43.

[58] A suggestion of this may be found where reports show that approximately five people are sustained by a single pensioner's income (*Welfare White Paper* para 7). This now forms an integral part of the latest social security strategies in many developed countries.

[59] Thus many unemployment grants in many countries are linked to training programmes and/or proof of attempts to find or create employment. This is already happening in the case of health care for the disabled (*Welfare White Paper* para 50). See also B Cantillon B, 'Poverty in Advanced Economies: Trends and Policy Issues' at pp. 24, 25 (paper delivered at Social Security Group Training, Antwerp 1997).

[60] Berghman, *supra* note 14, at pp. 17–22.

[61] An emphasis on 'income protection' may be interpreted as curative, as are most social assistance projects and schemes.

security. Thus a three-tiered approach to social security is taken,[44] i.e. prevention, reparation and compensation. Social security schemes that prioritize income substitution systems and attempt to 'build' social security systems are doomed to fail. A focus on 'developmental social security' is to be welcomed. The inclusion of preventative measures in the concept of social security is also propagated by the ILO.[45]

Another deviation from the classic idea of social security is the division of human damage into loss of labour income and loss of health or well being. The first refers to the difference between income that would have been earned, had the risk not realized,[46] and the current income, and the second refers to the disadvantage a damaged person encounters in his/her environment.

D. The Operation of the Bill of Rights in South African Law

I. Supremacy of the Constitution

According to its Section 2, the Constitution Act of 1996 is the supreme law of South Africa, and anything in conflict with it, is invalid. Section 1(c) the Constitution mentions the rule of law as one of the founding values of the South African State. In the context of social security law this means that all legislation, practices and conduct in relation to social security are subject to the Constitution and can be scrutinized by a relevant court for their conformity with constitutional principles. Therefore all involved in the realization[47] of the right to access to social security have to be familiar with the basic operation of the Constitution and especially the Bill of Rights, contained in Chapter 2 of the Constitution.

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[62] This approach is seen for example in the Department of Welfare's 1998 Programme on Children and Youth at Risk. Another commendable project that is preventative from a social security perspective, is the Flagship Developmental Programme for Unemployed Women with Children under 5 Years (Department of Welfare, 30 July 1996 (< www.polity.org,za/gnuindex.html >)).

[63] ILO, *Into the Twenty-first Century: the Development of Social Security* (Geneva, 1984) at §219.

[64] This is the fundamental difference between current compensatory calculations and the approach advocated here. Damage = hypothetical earnings – (minus) residual earnings. It is clear that this method will assist in alleviating risk of future poverty. It should be noted that ILO Convention No. 102 stipulates calculations of benefits 'by reference to the previous earnings of the beneficiary or covered person' (International Labour Organization, *supra* note 10, at p. 179).

[65] Section 27(2) provides for the realization of the right in a progressive manner. The primary duty is placed on the state to take reasonable legislative and other measures within the limits of its available resources.

II. Interpretation of the Constitution and the Law in Conformity With the Constitution

According to Section 39(2) of the Constitution, all legislation, and the development of the common and customary law, has to promote the spirit, purport and objects of the Bill of Rights. Therefore, the Bill of Rights does not deny the existence of common or customary law rules, as long as they are consistent with the Bill.[48]

When interpreting the Bill of Rights (i.e. interpreting the right to social security and the right to equality in this case), the court, tribunal or forum *must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It also *must* consider international law and *may* consider foreign law.[49] Nearly all human rights cases show the application of this Section in practice.[50] It must however be noted, that the exact application of international law is set out by Sections 223–233 which requires detailed knowledge of the status of specific instruments in South Africa.

III. Horizontal Application of the Bill of Rights

The Bill of Rights applies to the legislatures, the executives, 'all state organs'[51] and all laws (Section 8(1)). As the definition of state organs is quite broad, the obligation to fulfill constitutional rights to social security will be similarly encompassing. But it also has horizontal application, some of which has now been manifested in subsequent legislation.[52]

According to Section 8(2), the Bill of Rights binds natural and legal persons, if three pre-requisites are fulfilled:

1. the extent, to which the right is applicable;
2. the nature of the right; and
3. the nature of any duty imposed by the right.

This means that the context in which adherence to the right is claimed has to be taken into account.[53] The nature of the right and the nature of the corresponding

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66 Section 39(3).
67 Ibid., emphases added.
68 Most cases include detailed comparative studies and long lists of case law, legislation and international law principles consulted in the process of reaching a decision.
69 Defined in terms of Section 239 as state departments or administration nationally, provincially and locally; this includes all institutions functioning the Constitution or a provincial constitution, which are exercising a public power or function in terms of any legislation. See also *Directory Cost Cutters v Minister of Post and Telecommunications* 1996(3) SA 800 T where Telkom, a private company, was found to be an organ of state.
70 Discussed in Section E VII *infra*.
71 J. De Waal et al., *The Bill of Rights Handbook* (Cape Town, 1998) at p. 32 mentions the example of a security guard that is as much bound by provisions binding a police officer, when exercising powers of arrest or investigation.

duty mean that a child would be able to claim the right to access to housing from it parents, but no third party would be able to claim this from a stranger. The duty placed on individuals would just be too heavy. Thus the allocation and administration of housing subsidies/allowances by private employers may also be covered by the Bill of Rights. The same would go for, for example, the provision of health care benefits for HIV+ persons by private insurance companies and hospitals.

When planning to incorporate private organizations/instititutions[54] and even individuals[55] into social security strategies, *these* are the relevant criteria. Where social security is broadly defined and private savings and informal welfare sector[56] assistance is included, this may not create any subjective rights towards an institution, but rather prompt action on the part of the institution to realize social security rights and the achievement of equality. The Supreme Court of Appeal has ruled on social security matters in the past, thereby interfering with 'private' funds. In *TEK Corporation Provident Fund and Ten others v. Lorenz*[57] employees were prohibited from taking so-called 'contribution holidays', thereby using surplus funds to reduce, diminish or avoid their obligations to make contributions to the fund.

IV. The Limitation of Human Rights

The proper application of the limitation clause will be crucial in relation to human rights. When the subjective right to access to social security in the form of, for example, old age benefits, is not granted to a particular person or group, such a person or group's right has been limited. This limitation can be an internal limitation, i.e. the right is subject to progressive realization within the state's available resources. Where it is found that there has not been any progressive realization, or where realization has been limited to certain categories of persons, such a failure may still be justifiable in terms of the Section 36 limitation clause.

The limitation of human rights is a two-phase process. In the first phase, the scope of the right is determined and the person claiming the right has to prove that he or she falls within the protective ambit of that right. In the second phase, the institution/person limiting the right has to show that the limitation conforms to the requirement set by Section 36.

1. Internal Limitation

Programmes, policies or measures taken by the state to realize social security rights

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[72] Including insurance companies, industries, pharmaceutical companies, banks, etc.

[73] This will, for example, be the case with private savings or a father's maintenance obligation towards a child.

[74] Defined by the *Welfare White Paper*, *supra* note 15, at Glossary.

[75] Supreme Court of Appeal decision of 3 September 1999 (<www.uovs.ac.za/law/appeals/Index.htm>).

may be constitutionally challenged for, for example, only providing cover to certain sectors of society, for compelling contributions, etc. In these cases there may be a number of 'defences' available to the state in terms of the obligation to only progressively realize these rights. The second question is the appropriate nature and extent of interference in policy and budgetary decisions by the courts.

In the case of the right to access to social security, the internal limitation will be difficult to prove for any individual, as s/he may not have access to information relevant to the state's available resources. The Constitutional Court in *Soobramoney*[58] decided that it would not interfere with decisions taken in good faith by political organs and medical authorities. However, this suggests by implication that if it is possible to show *mala fides*, the courts will have to interfere with budgetary decisions. Referring to English case law,[59] both the court *a quo* and the Constitutional Court underlined the undesirability of courts making orders as to *how* scarce medical resources are to be applied. It also referred to the danger of making an order that resources be used for a particular patient, whilst others to whom those resources might have been more advantageous, are denied access to them.[60]

In the Zimbabwean case of *Nyambirai v. National Social Security Authority and Another*[61] it was decided that the courts will not interfere with the government's assessment as to whether a particular programme promotes public interest, unless it is manifestly without reasonable foundation.

2. Limitation by a Law of General Application

Under the rule of law this requirement means that the law sets limits to the exercise of power (legality principle). Legislation limiting human rights should therefore not permit arbitrary[62] powers, should not be vague[63] or too widely-formulated.

3. Reasonable

The reasonability test is three-tiered:[64]

1. is there a reason for the limitation?

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[76] In the case of *Soobramony v. Minister or Health, Kwa-Zulu Natal* [1997] 12 Butterworths Constitutional Law Reports 1696, CC at para 23 the Constitutional Court upheld the Court *a quo*'s finding that the respondent had conclusively proved that there were no funds available.

[77] *R v. Cambridge Health Authority, ex parte B* [1995] All ER 129, CA.

[78] *Soobramoney, supra* note 58, at para 30.

[79] [1995] 9 Butterworths Constitutional Law Reports 1221, ZS.

[80] *S. v Makwanyane* [1995] 6 Butterworths Constitutional Law Reports at p. 156.

[81] *Reizer Pharmaceuticals (Pty) Ltd v. Registrar of Medicines* (1998) 4 SA 660, T.

[82] I.M. Rautenbach, *Algemene Beginsels van die SA Handves van Regte* (*General Principles of the South African Bill of Rights*) (Durban, 1994) at pp. 107–109.

2. is there a rational connection between the limitation and an objective or purpose?[65] and
3. is the means and effect proportional in relation to the objective or purpose?

The reason for the limitation refers to the so-called threshold-value of the right,[66] i.e. the importance of the right in a democracy in a certain context. It is often equated with foreign (US) jurisprudential standards such as 'pressing an substantial' or 'clear and present danger'. It is submitted that in the South African context, the right to access to social security is extremely important if the objectives set by the Constitution are to be achieved.

The rationality requirement has been illustrated in the case of *Brink v. Kitschoff NO*.[67] In this case a policy, ceded to a wife, went back into the estate of her deceased husband under the terms of the Insurance Act of 1943. No similar provision existed in relation to husbands. The defence, that it serves the important aim to protect creditors, was not accepted, since the same effect could have been obtained by a gender-neutral provision. There was no rational connection between the limitation of women's rights and the alleged aim.

Most aspects of the proportionality test are now contained in Section 36(1)(a)–(e), including the effect/impact of the limitation and the purpose thereof, as well as the question, namely whether less restrictive means could have been used to achieve the objective.

V. Justifiable in a Democratic Society Based on Freedom, Equality and Human Dignity

This part of the limitation clause serves to prevent the abuse of terms such as 'public security' or 'public health' or 'public morals'. It may entail investigations into other democracies' realization and limitation of rights.[68] The emphasis that has been placed on human dignity and *ubuntu*[69] is evident in most human rights case law of the Constitutional Court and also has to been interpreted against South Africa's history. The Preamble and Section 1 list a number of important values, such as the *achievement* of equality.

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[83] To determine the purpose of a legislative measure limiting a human right, one has to look at the context, including the language and background of the provision (*S v. Lawrence, S v. Negal and S v. Solberg* [1997] 10 Butterworths Constitutional Law Reports 1348, CC, at para 52).

[84] Cachalia et al., *Fundamental Rights in the New Constitution* (Cape Town, 1994) at p. 111.

[85] [1996] 6 Butterworths Constitutional Law Reports 752, CC.

[86] As was done in the minority judgment in *Harksen v. Lane NO* [1997] 6 Butterworths Constitutional Law Reports 1489, CC.

[87] See *supra* note 37.

VI. The Factors Listed in Section 36(1)(a)–(e)[70]

These factors are a direct codification of the Constitutional Court's application of the limitation clause test in the *Makwanyane* decision.[71] The 'nature of the right' refers to the relative importance of the right in a certain context. The 'importance of the purpose of the limitation' means that any limitation must serve constitutional values. The 'nature and extent of the limitation' refers to the costs and benefits of the limitation. The importance of the limitation in a democracy is thus relevant. The 'relation between the limitation and the purpose' refer to the principle of rationality. Assessing the purpose of the provisions is therefore extremely important. This process is set out in *S v. Lawrence, S v. Negal and S v. Solberg*.[72] It also does not mean that the purpose must be effectively achieved, only that there is a rational basis for the legislative measure.[73] In the *Nyambiria* case,[74] for example, the Zimbabwean Supreme Court found that the national social security scheme was designed to achieve the purpose of improving the quality of life and providing income security at old age and retirement. The aim was to ease the burden on the government in providing state pensions by making it compulsory for employers to contribute to the national fund. Whether there could have been a 'less restrictive means to achieve the purpose' is the last part of the inquiry.

One can foresee that in limiting the right to access to social security, the purpose, the cost and benefit analysis, the possibility of less restrictive measures and the spirit of an African democracy will be important.

E. The Right to Equality

I. Contents

Section 9(1) contains the principles of equality before the law and equal protection and benefit of the law. This does not only involve equality in the application of other human rights (such as property and access to social security), but also as far as the rules of social security law are concerned. This is further endorsed by the addition of equal *protection* and *benefits*, both being core elements of social security law. Section

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[88] For a critical commentary see S. Woolman, 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' in (1997) *South African Journal on Human Rights*, at pp. 102–134.

[89] *S v. Makwanyane* [1995] 6 Butterworths Constitutional Law Reports 1, CC.

[90] [1997] 10 Butterworths Constitutional Law Reports 1348, CC at para 52.

[91] *S v Lawrence, S v. Negal and S v. Solberg* [1997] 10 Butterworths Constitutional Law Reports 1348, CC, at paras 52, 68.

[92] *Nyambirai v. National Social Security Authority and Another* [1995] 9 Butterworths Constitutional Law Reports 1221, ZS.

9(2) contains the affirmative action principle, formulated positively as 'equality includes ...'. The Preamble and Section 1 of the Constitution also re-enforce the importance of the *achievement* of equality in South Africa.[75] Sections 9(3) and 9(4) prohibit unfair discrimination by the state and by private individuals or institutions respectively. Section 9(5) deals with the burden of proof, i.e. that discrimination on one or more of the grounds listed is presumed to be unfair, until the fairness thereof is established. This also means that if litigation concerns a non-listed ground, such as citizenship or nationality, the complainant would have to prove the unfairness thereof.[76]The Constitutional Court has firmly established a link between equality/discrimination and impairment of human dignity[77] or impairment with a comparably serious effect[78] before a Section 9 violation can be found.

Only two Constitutional Court cases have dealt with equality and social security-related matters: namely *Jooste v. Score Supermarket*[79] and *Brink v. Kitshoff NO*.[80] In *Jooste*, the court found that the differentiation between the limited claims of employees under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and non-employees' common law claims does not amount to a violation of the right to equality. There is a rational connection between the purpose of the Act, i.e. to provide compensation to employees due to disability without having the common law burden of proving negligence on the part of the employer before accessing any compensation (i.e. the right to social security in case of disability). *Brink* concerned provisions of the Insurance Act 27 of 1943 under the terms of which a life policy ceded to a wife by her husband within two years prior to his death was deemed part of the husband's estate. This was found to constitute unfair discrimination since no similar provision existed for married men. As both cases were dealt with in terms of the South African Interim Constitution[81] which included no right to access to social security, the concept did not feature in either case.

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[93] Emphases added.
[94] *Harksen v. Lane NO* [1997] 6 Butterworths Constitutional Law Reports 1489, CC, at para 1515D.
[95] *Prinsloo v. Van der Linde* (1997) (6) 759 CC 447H. This approach has been discussed and criticized by a number of authors, see for example E. De Wet, 'Interpretation of equality clause in Bill of Rights' in (1998) 8 *Amicus Curiae*, at pp. 28–31; C. Albertyn and B. Goldblatt, 'Facing the Challenge of Transformation: Difficulties in Developing an Indigenous Jurisprudence of Equality' in (1998) *SAJHR,* at pp. 248–276; A. Fagan, 'Dignity and Unfair Discrimination: a Value Misplaced and a Right Misunderstood' in (1998) *SAJHR*, at pp. 220–247 and G.J. Swart, 'An Outcomes-Based Approach to the Interpretation of the Right to Equality' in (1998) *South African Public Law*, at pp. 217–233.
[96] *Harksen v. Lane* [1997] 6 Butterworths Constitutional Law Reports 1489, CC, 1511.
[97] [1999] 2 Butterworths Constitutional Law Reports 139, CC.
[98] [1996] 6 Butterworths Constitutional Law Reports 752, CC.
[99] Act 200 of 1993.

II. Substantive Equality

Substantive equality is a concept applied in South African law.[82] It can be contrasted with formal equality, where everyone is treated the same, irrespective of the context or situation in reality. Substantive equality dictates that more should be done to achieve equality for certain groups, as will be the case with accommodating the disabled or giving rural people access to social security. The concept of substantive equality thus allows for asymmetrical treatment. Such treatment will not constitute unfair discrimination and allows for societal changes to be accommodated, without prompting new legislation or exemptions with every shift in employment patterns of family responsibilities.

The fact that social security inequality may deal with *de facto* inequalities[83] to a great extent necessitates a substantive approach to equality. Because they are linked to employment and income respectively, social security and private social insurance in reality deny equal access to social security to the unemployed in the first, and to the poor in the second instance. Other examples of substantive equality include a lesser number of years to qualify for a full pension for women who had career breaks for child bearing and rearing purposes, or the fact that being absent from work for this reason may not detrimentally effect the calculation of social security benefits.[84] In effecting substantive equality, rural areas and the agricultural sector will have to be specifically addressed by the state to guarantee them equal access to social security.[85]

By adopting a substantive approach to equality, South Africa is in line with international approaches. At the ILO *Tripartite Meeting of Experts on Social Security and Social Protection: Equality of Treatment between Men and Women*[86] it was recognized that formal equality has been established, but that the situation of most women still is not the same as that of men. Past discrimination may still have unfair results in the present day situation, such as no maternity leave resulting in women having had to take ordinary leave, which is consequently not paid out on retirement.

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[100] *President of the RSA v. Hugo* [1997] 6 Butterworths Constitutional Law Reports 708, CC, at paras 727–728, 755–756, and *Harksen v. Lane* [1997] 6 Butterworths Constitutional Law Reports 1489, CC, at paras 1510–1511. The court never explicitly refer to 'substantive equality', but the fact that it uses 'factors' and 'context' relevant to the impact of discrimination and outcome-based results in the circumstances at hand, indicate this approach.

[101] See A. Brocas, *Women and Social Security. Progress Towards Equality of Treatment* (Geneva, 1990) at pp. 11, 15 for how this was recognized internationally the last two decades. In South Africa people enjoy *de iure* equality through the Constitution and legislative reform, but mostly not *de facto* equality.

[102] See also M.E. Klinck, *Substantive Equality and Pregnancy (Un)Defined: Some Repercussions*. Danish Centre for Human Rights Research Partnership Programme 1/1998 (Copenhagen, 1998).

[103] See, for example, the situation in the EU and discussion in the International Labour Organization, *supra* note 10, at pp. 15–17.

[104] *ILO Report* (Geneva, 21–25 November 1994) 1–2.

There is a technical distinction between discrimination in employment and discrimination in social security benefits. Pay discrimination against women may result in lower social security benefits, whilst exclusion of part-time workers from social security schemes is an indirect discrimination in social security alone. Assumptions, such as that people's earnings rise towards the end of their working lives, may not be true for women or the increasing number of people not occupying long-term positions, and may therefore constitute a breach of the equality principle.

There have been constitutional challenges to local government attempts to eradicate historical disadvantages in the provision of services to communities by, for example, cross-subsidization by charging higher rates and taxes in certain areas. According to *Fedsure Life Association Ltd v. Greater Johannesburg Metropolitan Council*[87] the duty to provide for the well being of the communities they were servicing justified the imposition of a levy on a municipal substructure not only to balance the budget of the entire municipal structure, but also to subsidize another substructure's deficit. In *City Council of Pretoria v Walker*[88] the Court found indirect discrimination based on race, from mostly white people living in the same area as Mr Walker receiving metered water at their houses. It however found that it was not unfair to cross-subsidize areas where there are, for example, unmetered water taps on the street.

III. Discrimination

1. The Listed and Unlisted Grounds

The listed grounds that will feature most prominently in relation to social security and equality include sex/gender, marital status, pregnancy, age and sexual orientation. Nationality is an unlisted ground on which discrimination may be alleged[89] bearing in mind that the onus to proof unfairness then rests on the applicant. In terms of the Employment Equity Act 55 of 1998 (EEA) the list is extended to those with HIV status and or family responsibility. By stating 'no person' instead of 'no employer' may discriminate, the prohibition is extended to other parties who may share in some way in the employment relationship, as is the case with social security benefits. But employers have to exclude discrimination in all employment practices, i.e. the prohibition applies to job applicants and migrant workers as well.[90]

The High Court has already found as discriminatory the exclusion of same-sex life partners from medical aid fund benefits[91] and the question arises whether heterosexual

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[105] [1998] 12 Butterworths Constitutional Law Reports 1458, CC.
[106] [1998] 3 Butterworths Constitutional Law Reports 257, CC.
[107] *Larbi-Odam v. MEC for Education (North West Province)* [1997] 12 Butterworths Constitutional Law Reports 1655, CC.
[108] Section 6. See also discussion on affirmative action below.
[109] *Langemaat v. Minister of Safety and Security* [1998] 2 All SA 259, T.

life partners who are not married, will have a similar claim. It is submitted that in the light of the serious impact requirement, this may not be the case.

Another non-enumerated ground that is sometimes linked to disability, is HIV status. In terms of the Employment Equity Act (EEA) it is prohibited to test the HIV status of an employee, unless is it justifiable in, amongst others, the light of social policy or the fair distribution of employee benefits.[92] It is however clear that a positive result may not absolutely exclude such persons from employment benefits, as such an exclusion would amount to a suspension of access to employment-related social security rights and not a limitation thereof.

Since the adoption of the Recognition of Customary Marriages Act 120 of 1998, the principle of equality dictates that a man married in terms of the polygamous indigenous system would have to be permitted to have all his wives registered as dependants for medical aid schemes, survivor's benefits, etc. Although relevant legislation has, and will be amended to accommodate the extensive interpretation of the word 'spouse' and 'dependent', all schemes will have to change their rules to accommodate this shift. Recognition was also given to a *de facto* monogamous union (not formally recognized by South African law). Here a woman wanted to claim compensation (the social risk of loss of income had materialized) after her husband, to whom she was married in terms of the Muslim faith, died in a motor vehicle accident.[93] Such a marriage was therefore recognized for social security purposes through the application of constitutional principles to the *boni mores* of society.

2. Unfair Discrimination

If based on a listed ground, the fairness of a distinction would have to be proved by the distinguishing party. Unfairness is defined as discrimination against disfavoured groups that can lead to patterns of disadvantage and harm.[94] Indicative of unfair discrimination is stereotyping and prejudice on biological or social characteristics.[95] The Constitutional Court has however narrowed this down by adding that the group had to be discriminated against in the past and that the group has to be a vulnerable one.[96] A further criterion concerns the effect or impact[97] of the discriminatory measure on the individual concerned or other individuals in a similar position. To establish this, one would look at the specific group, the nature of the power in terms

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[110] Sections 7 and 50(4).
[111] *Amod v. Multilateral Motor Vehicle Accidents Fund* Supreme Court of Appeal decision of 29 September 1999 (<www.uovs.ac.za/law/appeals/Index.htm>).
[112] *Brink v. Kitshoff NO* [1996] 6 Butterworths Constitutional Law Reports 752, CC, at paras 769B–C.
[113] This was the minority view of O'Regan J in *Harksen v. Lane NO* [1997] 6 Butterworths Constitutional Law Reports 1489, CC, at para 1523–I.
[114] Ibid. at paras 1515E–F.
[115] Ibid. at paras 1510–1511.

of which the discrimination was effected (it must serve a worthy and important societal goal) and the nature of the interests affected.[98]

3. Direct and Indirect Discrimination

Indirect discrimination occurs where a measure seems to be neutral, but has a disproportional negative effect on a certain group. Indirect discrimination cases are often seen in the field of part-time employment, working hours/flexibility, seniority and age. Ample examples can be found in US, Canadian and European jurisprudence.[99] It ties up with the idea of substantive equality insofar as, for example, a neutral provision on minimum uninterrupted service is set for employment benefits, if this period may be difficult to meet for women taking career breaks for child rearing or bearing. In both instances *de facto* impact and effect are important.

So far there is no South African constitutional case law on indirect discrimination, but a number of cases have been settled within the labour relations system. In *Leonard Dingler Employee Representative Council and others v. Leonard Dingler (Pty) Ltd*[100] the English case of *R v. Secretary of State Employment*[101] has been followed. In *Kadiaka v. Amalgamated Beverage Industries*[102] the inquiry was set out as follows:

1. was the requirement applied equally (for example between men and women)?
2. was the requirement such that a considerably smaller group of, e.g. women, could comply?
3. was the requirement justifiable irrespective of e.g. sex, race or any other non-discriminatory ground?
4. did the requirement lead to the detriment of the persons who could not comply?

4. The Section 9 Recipe

The test to be applied to Section 9 violations has been set out by the Constitutional Court in the case of *Harksen v. Lane NO*.[103] To determine whether Section 9(1) is violated, the following has to be established:

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[116] Ibid. at paras 1510-D, 1510-G, 1524-H from the Canadian case of *Egan v. Canada* (1995) 29 CRR (2d) 79 that had been used in all the previous equality cases in the context of human dignity and equality.

[117] See for example the cases of *Griggs v. Duke Power Co* 401 US 242; *R v. Secretary of State Employment, ex parte EOC and another* [1994] 1 All ER 910; *Bilka Kaufhaus GmbH v. Weber* [1986] ECR 1607; *Handels OG Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsforening* [1989] IRLR 532; etc.

[118] [1997] 2 LC 6.12.1. at <http://www.irnet.co.za>.

[119] *R v. Secretary of State Employment, ex parte EOC and another* [1994] 1 All ER 910.

[120] [1999] 8 LC 6.12.1. (<www.irnet.co.za>).

[121] [1997] 6 Butterworths Constitutional Law Reports 1489, CC, at paras 1511–1512.

1. does the law[104] differentiate between people or categories of people?
2. if yes, is there a rational connection[105] to a legitimate government purpose?[106]
3. if there is no rational connection, Section 9(1) has been violated.

In spite of a rational connection, there may still be discrimination in terms of Section 9(3):

1. does the differentiation amount to discrimination?
2. if yes, does it constitute unfair discrimination?

Discrimination on the listed ground(s) is presumed to be unfair; if it is not a listed ground, the complainant must show the unfairness. Unfairness is determined by the impact of the discrimination on a person or persons in similar situations. Two elements are important to establish unfairness: the 'listed grounds' and the establishment of 'impact':

1. under the listed or unlisted grounds one would determine whether the complainant is part of a disadvantaged or vulnerable group; whether it can/has lead to patterns of harm or disadvantage; whether that is due to the group or person's attributes and whether it impairs the person's dignity or has a comparably serious effect.
2. under the test for 'impact' the person's position in society has to be taken into account as well as the nature of the discriminating provisions or powers; the purpose for which the provisions or powers are used, the extent to which it affects the person's rights, whether it violates the person's dignity or has a comparably serious impact; all this has to be analyzed in view of the constitutional goals.[107]

If the discrimination is thus established to be unfair, the law policy or practice will, however, only be unconstitutional if it cannot be justified in terms of Section 36.

The strong link between human dignity and equality is very much in line with the purpose of social security rights.

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[122] Or policy, practice or other measure limiting a human right.

[123] 'Rational connection' means that the measure is not irrational, arbitrary or manifests naked preference *(Harksen v. Lane NO* [1997] 6 Butterworths Constitutional Law Reports 1489, CC, paras 1507G–H, 1513C; affirmed in *Jooste v. Score Supermarket Trading (Pty) Ltd* [1999] 2 Butterworths Constitutional Law Reports 139, CC, at paras 147C–E).

[124] It is not clear what type of governmental purpose will be regarded as 'legitimate' or what criteria will be used to determine this, except that it would have to accord with the constitutional spirit and the rule of law.

[125] This constitutes a summary of the factors as per the cases of *Harksen v. Lane NO* [1997] 6 Butterworths Constitutional Law Reports 1489, CC; *Prinsloo v. Van der Linde* [1997] 6 Butterworths Constitutional Law Reports 759, CC; *Brink v. Kitshoff NO* [1996] 6 Butterworths Constitutional Law Reports 752, CC; *Jooste v. Score Supermarket Trading (Pty) Ltd* [1999] 2 Butterworths Constitutional Law Reports 139, CC and others.

IV. Relation to the Limitation Clause of Section 36

It appears that most of the Section 36 limitation tests (such as the importance of the purpose of the limitation, the nature and extent of the limitation, etc.) would have already being scrutinized in order to establish the unfairness[108] or fairness[109] of a discriminatory measure. Since the two-stage analysis does form part of South African constitutional law, it will, at least theoretically, form part of a Section 9 inquiry. The 'appropriateness' and 'effectiveness' of the measure will be tested under Section 36,[110] although the Court did consider these two factors in the Section 9(1) inquiry in *Harksen*.[111] Recent legislation effecting the right to equality fuses the tests for unfairness and the limitation clause inquiry.[112]

V. Affirmative Action

To effectively tackle the underlying disadvantages that people may suffer, positive action is needed, because symmetrical treatment will only perpetuate such disadvantages. In Ireland, for example, special pensions and allowances were paid to deserted wives, unmarried mothers and prisoners' wives in the 1960s. Since the situation changed and more women are working, the need for such positive treatment having diminished, benefits are now extended to men in similar situations as well.[113] South Africa, however, is not in such a position.[114] Older married women might not have participated in the labour market to the same extend as men, which may warrant asymmetrical treatment. A counter argument to this regard goes along the lines that, although not having formally participated in the labour market, these women have worked and thus contributed to society, for which the solidarity principle may dictate the allocation of the same benefits.

Three requirements are set down by Section 9(2) for affirmative action. The beneficiaries should have been disadvantaged or members of a disadvantaged group and also there should be a rational connection ('measures designed to . . .') between

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[126] If based on a ground not listed by the complainant.
[127] If based on a listed ground by the party that has allegedly discriminated.
[128] *Jooste v. Score Supermarket Trading (Pty) Ltd* [1999] 2 Butterworths Constitutional Law Reports 139, CC, at para 147D.
[129] *Harksen v. Lane NO* [1997] 6 Butterworths Constitutional Law Reports 1489, CC, at paras 1513C–D.
[130] Section 14, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This Act is discussed briefly in Section E VII *infra*.
[131] 'American and European Perspectives on Social Security' *EISS Yearbook 1991* (Leuven, 1992) at pp. 246, 247.
[132] 50.2 per cent of black women in South Africa were unemployed in 1995 (*Convention on the Rights of the Child. Initial Country Report* (Cape Town, 1997) at p. 10) and at least 35 per cent of all households are women-headed of which 67 per cent are poor (*Department of Welfare Flagship Program* (1996) (<www.polity.org.za/govdocs/ programmes/welu-nemp.html>)).

the specific advancement measure and the objective, i.e. the protection or promotion of the disadvantaged, which then constitute the third requirement.

In terms of Section 1 of the EEA, 'employment policy or practices' include 'remuneration ... and employment benefits and terms'. 'Employment law' includes the Unemployment Insurance Act 30 of 1966 and a number of other acts dealing with social security risks. Read together with Section 15 of the EEA, it means that affirmative action in social security benefits will be permitted, as long as it does not create an absolute barrier to non-designated groups. Employers must also gather information on its employment policies and practices in relation to all designated groups in all the occupational categories and levels.[115] This will have to include a breakdown of social security benefits.

In this context it is important that disadvantages or asymmetrical positions must be proven and cannot be merely assumed.

VII. Other Legislative and International Measures Addressing Social Security and Equality

In terms of Section 39(1)(b) of the Constitution, international law has to be considered when interpreting human rights. The Constitution also contains legislative duties, such as those found in Section 9(4) concerning the prohibition of unfair discrimination in the private sector and sphere in order to spell out in greater detail the extent of the specific constitutional rights.

1. EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

The EEA has the main objective of eradicating unfair discrimination and promoting equal opportunities in the workplace. Section 5 obligates employers to take steps to promote equal opportunities and eliminate unfair discrimination in 'any employment policy or practice'. 'Employment policy or practices' include remuneration, employment benefits and terms and conditions of employment.[116] They therefore include pension and provident funds, medical aid and all other employment-related social security benefits. Therefore, employers should ensure that these benefits are awarded to all employees, are not directly or indirectly discriminatory and give effect to achieving equality.

The PEPUDA applies where the EEA does not, and has an all-encompassing scope, binding private individuals, institutions, etc. In the application of the Act, the existence of systemic discrimination and inequality is to be considered.[117] This Section may be extremely helpful in realizing social security rights for disadvantaged

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[133] Section 19.
[134] Section 1.
[135] Section 4(2)(a).

people. Section 8(g) specifically mentions the limitation of access to social services or benefits, such as social security, by *any person*, as a form of unfair discrimination.

The PEPUDA also includes a directive principle of HIV/Aids and socio-economic status. Socio-economic status is defined as inclusive of a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or low-level educational qualifications.[118] The Minister of Justice and the Equality Review Committee should give special consideration to these groups. It is submitted that an investigation of the social security status of these groups will also need to be addressed.

The Schedule to the PEPUDA contains an illustrative list of unfair practices in certain sectors that need to be addressed.[119] This may have far reaching implications for the right to access to social security of certain groups, as it lists access to health care facilities, specifically for the elderly; unfair discrimination in insurance, including the exclusion of services on the basis of HIV/Aids status; unfair discrimination and exclusion in retirement funds; etc. Insurance companies and other private institutions mentioned are now forced to take up their responsibility to realize social security rights to the greatest extent possible, as was the aim with the decision in favour of a horizontal operation of the South African Bill of Rights.

2. *The ILO*

The first ILO Social Security Convention was the Minimum Standards Convention No. 102 of 1952. Convention No. 118 of 1962 deals with equality between nationals and non-nationals regarding social security and the Older Workers Recommendation No. 162 concerns equality of opportunity, provision for and access to retirement, etc. The ILO aims at total and uniform coverage of social security benefits. Convention No. 102 recognizes that non-universal benefits (that may constitute unequal treatment) may be awarded when establishing a social security scheme. A minimum of 50 per cent of the persons at risk is placed by the Convention on Member States, and exceptions are possible for developing countries. Putting a maximum on higher paid employees' benefits is permitted by the ILO.[120]

Convention No. 118 determines that non-national residents should have the same rights as nationals. Excluded are instances where benefits are mainly from public funds or where benefits are payable under a social insurance scheme and non-nationals' rights may be subject to a reciprocal agreement between the states. Migrant workers, who are also a South African issue, need to be dealt with in terms of five basic principles. These are equality of treatment with residents of the same age, sex, civil status and social security qualification; legal certainty regarding applicable legislation; the maintenance of acquired rights or rights in course of

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[136] Section 1(xxvi).
[137] Section 29.
[138] International Labour Organization, *supra* note 10, at pp. 11–12, 23–24, etc.

acquisition; and the payment of benefits abroad. These five principles may be extended to non-contributory benefits, giving effect to the idea of social justice.[121]

Most countries have not ratified the Maternity Protection Convention No. 103 of 1952[122] under the terms of which no employer would be individually liable for paid maternity leave for employees. The rationale for the Convention was the fear that making employers liable would be a disincentive for the employment of women. Discrimination against women due to their (potential) child bearing function has however continued even in the absence of any obligation on employers regarding paid maternity leave. Aspects such as maternal mortality and contributions towards or costs of ante and post natal medical care also have to be considered in the substantive equality context.

South Africa has ratified Convention No. 111 on equality in matters of employment and occupation, which is interpreted to be broad enough to include social security.[123] Recommendation No. 111 expressly mentions the social security measures to be provided with employment. These international instruments may assist South African employers in fulfilling their duties under the EEA.

3. *Other International Treaties*

By ratifying international treaties, South Africa undertakes to incorporate the provisions in its domestic legal system. Case law and other materials relating to the treaty then become sources of law, assisting in the application of the equality principle in South Africa.[124] The Universal Declaration of Human Rights, now widely regarded as international common law, provides in Article 25 for the 'right to security in the event of unemployment, sickness, disability, widowhood, old age ... or other circumstances beyond his control'.

South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC) in 1998 and is subject to the authority of the Human Rights Committee (HRC). A number of cases have been handled by the HRC on social security and equality, in terms of Article 26 of the ICCPR. The right to social security in Article 9 of the ICESC is not limited by an 'access to' qualifier, but the Covenant's implementation is limited by means of the fact that the rights are to be progressively implemented and states have to report on their progress. In the absence of a complaint mechanism, there is no case law on the implementation of the Covenant. The Economic and Social Council, to whom state parties must report, may however

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[139] International Labour Organization, *supra* note 10, at pp. 152–3; 159 and ILO Conventions Nos. 118 of 1962, 157 of 1982 and 167 of 1983.

[140] Discussed in the *Tripartite Meeting of Experts on Social Security and Social Protection: Equality between Men and Women. ILO Report* pp. 3–4.

[141] A. Brocas, *supra* note 83, at p. 8.

[142] Section 39(1)(b) and sections 231–233 Constitution Act 108 of 1996.

bring issues to the attention of other United Nations (UN) organs.[125] Article 2(3) states that developing countries may decide on the extent to which they will award social and economic rights to non-nationals, bearing in mind their national economies. South Africa has not signed or ratified this Treaty.

South Africa has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995. Article 11, dealing with employment, demands with the eradication of discrimination in social security and any loss of seniority or benefits due to pregnancy or marriage. Article 13 awards the right to equality to family benefits and insurance, thus recognizing the link between financial and social security. Article 14 gives rural women the right to benefit directly from social security benefits, an area in which South Africa still needs to do more than is currently being done. Affirmative action is permitted by Article 4 to accelerate *de facto* equality between men and women.[126] The recommendations made by the CEDAW are useful tools in interpreting and applying the rights awarded by the Convention.

South Africa has ratified the Convention on the Elimination of All Forms of Racial Discrimination CERD in 1998. Article 2(1)(c) and (d) prohibit the perpetuation of racial discrimination in policies and legislation and Article 5(e) refers to equality in the rights to unemployment benefits, housing and social security.

F. Conclusion

From the above it is clear that ample legislative mechanisms are in existence recognizing, and even specifically dictating, what needs to be done in order to realize human rights in social security. The South African courts have also made significant progress in interpreting the relevant rights, in order to advance the constitutional aim of achieving equality and eradicating historical (racial) disadvantage. However, it is up to the Government, against the legislative and judicial background, to realize the social security rights for South Africans, to monitor the proper implementation of these rights and to regulate the details of social security law in South Africa.

Only if, and when, there have been considerable changes in the reality experienced by many South Africans will it be possible to state that the constitutional guarantees have been effective and useful.

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[143] Articles 19 and 22 of the ICESC.

[144] United Nations Centre for Human Rights, 'Discrimination Against Women: The Convention and the Committee' *Human Rights Fact Sheet* No 22 (Geneva, 1995) at pp. 11–12.