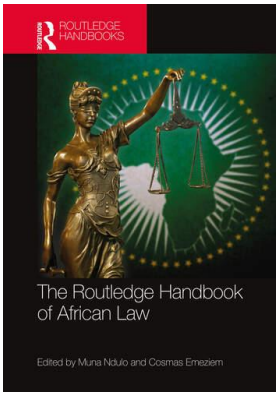

The Routledge Handbook of African Law

Muna Ndulo, Cosmas Emeziem

The effectiveness and predictability of social security lawConstitutional perspectives from the Republic of South Africa

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9781351142366-16
Letlhokwa George Mpedi
Published online on: 24 Nov 2021

13

THE EFFECTIVENESS AND PREDICTABILITY OF SOCIAL SECURITY LAW

Constitutional perspectives from the Republic of South Africa*

Letlhokwa George Mpedi

Introduction

The chapter reviews the effectiveness and predictability of social security legislation in the Republic of South Africa (hereinafter, South Africa). It does that from the standpoint of the Constitution of the Republic of South Africa, 1996 (hereinafter, the Constitution). In addition, it reflects, where appropriate, on historical legislative developments (particularly, with regard to the apartheid social security legislative framework), theoretical, and practical perspectives. "Apartheid" is an Afrikaans word that means separateness (Macaskill 2016; see, also, Roberts 1994, 54).

The general norm is that for legislation to be effective and predictable, it must be stable, capable of being changed, applied consistently and, most importantly, able to resolve disputes. Thus, the chapter, in its quest to realize its stated objective, reflects on the aforementioned principles under the following themes: knowledge of social security legislation by the public; impact of values, language and culture on social security legislation; consistent application of social security law; and adjudication, monitoring, and enforcement of social security legislation. Concluding observations follow this discussion.

Knowledge of social security legislation by the public

Consultation and public participation

The post-1994 South African government inherited a social security legislative framework, which evolved in a piecemeal fashion and without any meaningful consultation and public participation. Social participation was never the hallmark of social security legislation and policy development framework during the apartheid South Africa. The legislative drafting process was not inclusive (Department of Welfare 1977). For instance, the legislature that passed social security laws excluded the Black African majority. The various homelands were a notable exception. The stark reality of that period was that, "[l]aws affecting them [Black Africans] are

 DOI: 10.4324/9781351142366-16

passed without any previous consultation with them, and the first they know about these laws is that they have to obey them" (Buxton 1921, 165). The approaches adopted at the time focused on the elite stakeholders. This made the laws inappropriate for community-level engagement (see, for example, Department of Welfare 1977).

Another area of concern was, "[c]itizen and stakeholder participation in decision-making on social welfare policies, programmes and priorities was not exercised fully and effectively" (Department of Welfare 1977, Ch. 1, para. 16). The overall consequence of this situation is that it undermined public knowledge and the overall legitimacy of the social security system and its legislative framework.

To remedy the situation, the post-apartheid government resolved that it would create appropriate and effective mechanisms to promote the public participation in the decision-making process, with regard to the pertinent policies and programs. The present situation differs significantly from that which existed during the apartheid era for the reason that the foundation for social participation in the social security legislative process is set out in the Constitution (see Liebenberg 2015). Section 59 of the Constitution makes provision for public access to and involvement in National Assembly. It obliges the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committee. In addition, it requires it to conduct its business in an open manner. It must hold its sessions, and those of its committees, in public and must take reasonable measures to regulate public access, including access of the media, to the Assembly and its committee. Most importantly, it specifically prohibits the National Assembly from excluding the public or the media from a session of a committee, unless it is reasonable and justifiable to do so in an open and democratic society.

Furthermore, §72 of the Constitution regulates public access to and involvement in the National Council in a similar manner to that of the National Assembly, as outlined here. It is a common practice in South Africa for bills to be publicized with a request for comments from the public and any other interested stakeholders. Additionally, committees and commissions that are duly established to investigate and/or review any aspects of the social security system encourage social participation by soliciting submissions by the public. In addition, such committees and commissions hold the so-called stakeholder engagements or public hearings where the public can make verbal submissions. Failure to afford the public an opportunity to participate in the law-making process could result in the legislation in question being declared invalid. This principle was emphasized in the Constitutional Court judgment of *Doctors for Life International v. Speaker of the National Assembly* ([2006] ZACC 11). In *South African Veterinary Association v. Speaker of the National Assembly* ([2018] ZACC 49, paras. 26–28), the Constitutional Court found that Parliament failed to comply with its duty to facilitate public participation in the law-making process by inserting the word "veterinarian" without consulting the specific group affected by such an action.

At an institutional level, the National Economic Development and Labour Council (hereinafter, NADLEC) is one of the key institutions through which social participation is fostered in South Africa. NADLEC is a juristic person established in terms of the National Economic, Development and Labour Council Act 35 of 1994 (Republic of South Africa National Economic Development and Labour 1994). It comprises members who represent organized business, organized labor organizations and development interests, and the State (§3(1) of the National Economic, Development and Labour Council Act). Section 5(1) of the National Economic, Development and Labour Council Act mandates it to, *inter alia*, endeavor to promote the goals of economic growth, participation in economic decision-making and social equity, and consider all significant changes to social and economic policy prior to its implementation or introduction in Parliament.

Another important piece of legislation in respect to social participation is the Advisory Board on Social Development Act 3 of 2001. The primary aim of this act is: "To provide for a national advisory structure in the social development sector with the aim of building and consolidating partnership between government and civil society …" (Republic of South Africa 2001, Preamble). Although the Advisory Board on Social Development Act was assented to by the president over 15 years ago, it is regrettable that the Act has not yet been put into operation.

The consultative process, which accompanied the new Constitutional dispensation, has yielded some positive results. For instance, meaningful and effective participation in the social security policy and legislative-making process has increased significantly in South Africa (Department of Social Development 2016, 50). As a result, this consultative approach should yield social protection legislation and policy that is appropriate and embraced by the affected stakeholders (see Kumitz 2016, 217), unlike previously under the apartheid regime (Department of Social Development 2016, 50). However, this does not imply that all South Africans welcome the resultant policy or legislation. The point is that it is impossible to consult with the entire population of South Africa. Furthermore, not all of those consulted (will) agree with the final legislation and/or policy, which is not the intention of the principle of public participation and consultation.

Fragmented social security system

One of the key challenges that the post-apartheid government had to address concerned the fragmentation of the system. Fourteen departments for the different population groups and homelands in South Africa administered the social welfare system (Department of Welfare 1997). Accordingly, there was no unitary social security system. The relevant government departments existed and functioned in isolation from each other (Department of Welfare 1997). As can be expected, this led to fragmentation, duplication, inefficiency, and ineffectiveness in the administration of the system and, most importantly, in delivering the much-needed services to the public. The eventual establishment of the South African Social Security Agency (hereinafter, SASSA) has since addressed the problem, insofar as the administration of social assistance is concerned. Social insurance in South Africa is managed by various schemes falling under the administrative and policy oversight of various ministries that range from labor to transport. This situation highlights a sad reality in the administration of social security in South Africa. That is, SASSA is yet to be a South African social security administration "one-stop-shop" that it is intended to be. Section 3 of the South African Social Security Agency (9 of 2004) requires SASSA to "act, eventually, as the sole agent that will ensure the efficient and effective management, administration, and payment of social assistance; serve as an agent for the perspective administration and payment of social security; and render services relating to such payments" (Republic of South Africa 2004b). According to Mpedi (2008a, 18–22), the aforementioned objectives of SASSA call for an integrated administration of social security (namely, social assistance and social insurance) in South Africa. Such an administration promises greater efficiency, effectiveness and service delivery—particularly, to the vulnerable and marginalized members of the society in South Africa.

Duplication of and overlapping legislation

South Africa's social security system evolved from an apartheid social security legislative framework. Its purpose was to support racial segregation. These laws, which Bekink and Botha (2007, 43) aptly labeled "old order legislation" consist of:

> Acts of Parliament, legislation of the former so-called "independent homelands," legislation of the six former self-governing territories (Bantustans or homelands), provincial ordinances enacted by the provincial councils of the former four "white" provinces (1910–86), regulations of the four provinces (1986–94), by-laws enacted by the various local authorities, as well as other existing delegated (subordinate) legislation.
>
> *Bekink and Botha 2007, 44*

Thus, the legislative framework was characterized by duplication, overlaps, and proliferation of laws. This undermined the effectiveness and predictability of social security legislation. New social security laws enacted after the demise of the apartheid endeavored to address this problem. Some announced this goal in their preambles. For instance, the preamble of the Social Assistance Act 13 of 2004 states that "the effective provision of social assistance requires uniform norms and standards …" (Republic of South Africa 2004a). It declares further that the Social Assistance Act is enacted "in order to prevent the proliferation of laws, policies and approaches to the execution thereof from materially prejudicing the beneficiaries or recipients of social assistance …" (Republic of South Africa 2004a). This is helpful but to a limited degree. The point is that the South African social security legislation is uncodified. The Constitution, statutes, and regulations are, among others, the crux of social security law in that country. Thus, it invariably requires an educated mind to navigate through the social security legislative maze in South Africa. As shown next, those learned in law sometimes fail to make sense of (some sections of) the applicable social security law. It is often cumbersome to tell which provisions of the legislation (and its regulations) are in force and which are not.

Accessibility of legislation

The legislature enacted the bulk of social security laws after the end of apartheid. There is indeed a plethora of social security laws. In addition, most of these laws have gone through some amendments on several occasions. To complicate matters, secondary legislation such as regulations support these laws. This has culminated in a complex web of social security laws. As highlighted by the Court of Appeal decision in *Morina v. Secretary of State* ([2008] 1 All E.R. 718 (CA), para. [1], 721): "In the field of social security, primary and secondary legislation are notoriously labyrinthine. Sometimes the substantive entitlement to a statutory benefit is clothed in complexity and can be determined after an interpretive journey that few are equipped to travel."

The uncodified nature of social security laws in South Africa, lamented earlier, compounds the situation. As argued here, it is rather challenging, even for those trained in law, to establish what the current social security legal position is. The court grieved the status quo in *Cele v. South African Security Agency (SASSA) and 22 Related Cases* (2008 (7) BCLR 734 (D), para. 11) as follows:

> … [I]n the field of social assistance in South Africa the primary and secondary legislation is as labyrinthine as it apparently is in the United Kingdom and the entitlement of any applicant to relief flowing from a failure on the part of the Minister of Social Development or SASSA may well be complex. All this can only serve to emphasise the necessity for those lawyers who practise in this area of the law to be thoroughly familiar with the applicable legislation, both primary and secondary, and to ensure that it is properly placed before the Court in a coherent form when the need for litigation arises.

Could this then be regarded as a symptom of the South African social security legislation being unstable? Is it confusing the community that should use or apply it, and, therefore, is ineffective and unpredictable? At face value, this may seem to be the case. However, in reality, it is not. In this specific situation, it was largely the social assistance regulations that caused some confusion. It was unclear which one was in force and which one was not. As untenable as this may be, social security legislation in South Africa is generally stable. The point is that the frequency of amendments and rescinding of statutes over a period is occasional, and thus, reasonable. These changes point to the fact that the legislation is capable of being adapted to changing community values and any other pertinent developments (for example, advances in technology).

Therefore, to make social security laws accessible, it is imperative that the current maze of laws be systematized. This will eliminate the perennial problem generally associated with such a situation, namely, conflicting provisions between various social security laws. The post-apartheid social security legislative framework strives to be accessible to the public by subscribing to strategic guidelines that include "formulating legislation in language that is clear and easily understood" as well as "consolidating legislation on the same issue, as far as possible, into one Act or set of regulations" (Department of Welfare 1997, para. 28(a), (e)).

Legal language

Historically speaking, the South Africa legislature peppered laws, inclusive of those in the social security sphere, with legalese and Latin words. Such laws were legalistic and rarely imposed a legal duty on the social security institutions to educate ordinary members of society about their social security rights and duties. This undermined the general population's ability to comprehend the relevant laws. The question is whether the situation changed? The answer is somewhat ambivalent. The post-apartheid legislature exercises great care in ensuring that it complies with the principle of drafting in plain language. It is free from the constraints faced by its predecessor. As Hofman (1993, 99) pointed out: "Those responsible for drafting apartheid legislation may have felt their work would encounter a hostile judiciary. Modern drafters can free themselves from the restraints which belong in the past. They should try to express the law in language that ordinary people can understand." The use of plain language is crucial for ensuring that social security laws are accessible and effective. The core of the matter is that, "… obscure language can deprive ordinary people of their rights. When language is obscure ordinary people have to consult an expert to learn about their rights. If they are unable to do this, they have no rights. They are at the mercy of whoever claims to know what the language means" (Hofman 1993, 90).

It is indeed stating the obvious to mention that not all current and prospective social security beneficiaries can afford the services of a lawyer to help them fathom obscure legislative language. A complicated act of parliament places the illiterate and poor, particularly those living in rural areas, in an untenable situation (Vogt 2001, 202). Thus, social security laws that are ambiguous and drafted using complex language have a propensity to exclude those that they are meant to serve. For example, in *Santam Insurance Ltd v. Taylor* ([1984] ZASCA 139, para. 22–23), an appeals court judge remarked that, "[i]n my opinion the man in the street would be at least as perplexed by the language used by the legislature as is the man on the Bench who is writing this judgment."

Unnecessary Latin words in social security laws passed after 1994 are currently conspicuous by their absence. The structure of the laws is appreciably acceptable. Such a structure generally comprises: a preamble; definitions; aim and objectives; scope of application (that is, personal scope and territorial field of application); rights and duties; administrative and institutional framework;

monitoring, adjudication, enforcement framework as well as pertinent sanctions; and law(s) repealed. The conclusion that can be drawn is that efforts aimed at ensuring that the law is accessible and/or known are not restricted to the drafting process but also include the drafting style.

On the other hand, those who administer social security laws (for example, social security institutions) are still not statutorily obliged to disseminate information about the substance of the laws that they oversee. This shortcoming needs urgent attention, as it is an opportunity for social security institutions to share the substance of the statutes they administer in the various official languages. Second, this will resonate with the strategic guidelines that the social security legislation rendered accessible to the general public through strategies to communicate the content of legislation on an ongoing basis, and by ensuring that sources of information are effective, clear, understandable, and readily available (Department of Welfare 1997).

Impact of values, language, and culture on social security legislation

Human, religious, and cultural values

The apartheid government relied on human and Christian values to justify the extension of social security coverage to previously excluded groups of persons (Sagner 2000, 537). For example, the argument made was that:

> If the whole nation is to be held responsible for a decent living for every one of its members and if human values are always to rank higher than financial interests, no want shall he allowed owing to cause over which the individual or the community has any control, and in that case every individual must be protected as far as possible against physical retrogression and disease. The Re-United Nationalist Party is therefore of opinion that social welfare and national health must be of fundamental importance to the nation and the state.
>
> *Union of South Africa 1945, 80*

However, the social security legislation of that time, including the Constitutions, hardly made mention of human, religious, cultural, or similar values. The values are crucial, as they underpin the need and importance of providing and/or extending social security—particularly, to the vulnerable among us. The present social security legislative framework is required to embrace and display constitutional values (see, for example, Mpedi 2008b). Human dignity, non-racialism and non-sexism, supremacy of the Constitution, and the rule of law are the foundational values of the Constitution of the Republic of South Africa (Constitution, §1). The value of the "rule of law," as explained by De Waal, Currie, and Erasmus (2001, 14–15):

> … means more than the value-neutral principle of legality. It also has implications for the content of law and government conduct. In this regard it has both procedural and substantive components. The procedural component forbids arbitrary decision-making …
>
> The substantive component dictates that the government must respect the individual's basic rights. It is not clear what kinds of basic rights will qualify for protection under the rule of law.

See *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa*, 2000 (2) SA 674 (CC), para. 85, and *Chief Lesapo v. North West Agricultural Bank*,

2000 (1) SA 409 (CC). As shown later, some of the values are also entrenched as fundamental rights in the Bill of Rights. Such rights include human dignity and equality (Small and Grant 2000, 49–54). Human dignity, as a value and right, is essential in the sense that "… if a person is not put in a position where he or she not only could understand and apply the law but cannot protect and enforce their rights, then their right to human dignity could be violated" (Bekink and Botha 2007, 58).

Furthermore, there are related values that are not explicitly spelled out in the Constitution but are of great significance in the South African constitutional and social security legislative framework. *Ubuntu*, referred to in the postscript of Constitution of South Africa, Act 200 of 1993 (hereinafter the "interim Constitution"), is a case in point. The value of *ubuntu* has been explained, as follows, by Judge Mokgoro in *S v. Makwanyane and Another* (1995 (3) SA 391 (CC) at para. 308):[1]

> Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our "rainbow" heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly priced. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality. [Footnotes omitted.]

According to the Department of Welfare (1997, para. 24): "*Ubuntu* means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being" (for further reading, see Mokgoro [1998, 14–6]; Bennett [2011, 29–61]; Himonga, Taylor, and Pope 2013, 369–427]). The interim Constitution referred to *ubuntu* in the postscript, appositely named "National Unity and Reconciliation," as follows:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments, we, the people of South Africa, open a new chapter in the history of our country.
>
> Nkosi sikelel' iAfrika. God seen Suid-Afrika
>
> Morena boloka sechaba sa heso. May God bless our country.
>
> Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.

With respect to the value of human dignity, the Constitutional Court posited in *Dikoko v. Mokhatla*, 2006 (6) SA 235 (CC), at para. 68, that: "In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another." In addition, in *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217 (CC), at para. 37, it emphasized the connection between *ubuntu* and the Bill of Rights as follows:

> The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

Language

The apartheid social security legislative framework was inappropriate and ineffective in addressing the social security needs of all the people of South Africa (Department of Welfare 1997). It directly and, in some instances, indirectly excluded and marginalized a majority of the South Africa population. For instance, it did not reasonably accommodate the linguistic, cultural, racial, and religious diversity that characterizes the country. The key issue is that a parliament that was not representative of the South African population enacted laws, including social security laws. Furthermore, it gazetted laws in English and Afrikaans only. This is mainly because Afrikaans and English were the official languages of that period (see §108(1) of the Constitution of the Republic of South Africa, Act 32, of 1961 and §89 of the Republic of South Africa Constitution, Act 110, of 1983). Thus, social security laws were inaccessible to many South Africans, particularly the Black South African majority. The aforementioned challenges were the least of the apartheid era legislature's concerns, as the laws largely advanced racial segregation. As rightly argued by Bekink and Botha (2007, 41):

> South African legal language prior to 1994 was largely influenced by English and Roman-Dutch law. During the apartheid-era, plain language legal drafting was not

> high on the agenda of the former National Party government, and as a result, the general population's access to and understanding of the law was severely limited. Only two official languages (English and Afrikaans) were used to draft and publish legislation. Laws and legal documents were often very complicated and inaccessible.

Post-apartheid South Africa has 11 official languages, namely: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu (§6(1) of the Constitution). Even so, the various social security laws remain inaccessible to ordinary South Africans because they are yet to be published in all these languages. This should not be construed as implying that the publication of legislation in all the official languages will automatically result in the accessibility of same. The truth of the matter is that, irrespective of the language used, plain language is essential. Publishing laws in official languages will bring the laws within the grasp of those who lack the command of all or most of the official languages.

Law and culture

There is a connection between law and culture (see, for example, Cotterrell [2004, 1–14]). This interconnection has not always been respected in South Africa, particularly, in the field of social security legislation. Certain cultural practices were used as grounds to discriminate against those who believed in them. For instance, those who ascribed to polygamy often found themselves excluded and marginalized when it came to survivors' benefits. The law and social security institutions tended to rank civil marriages above all other unions. This predisposition seems to lean more toward the notion that law and culture are incompatible. Provided there is consistency with the Constitution, marriages concluded under any tradition or a system of religious, personal, or family law are recognized in South Africa (§15(3) of the Constitution). The law prohibits any unfair discrimination against individuals and their families in the social security-provisioning endeavors of the country (see §9 of the Constitution). The recognition of cultural practices, within the bounds of the law, is essential for the acceptability of social security legislation. The truth is that, "[l]aw rooted in culture has the strength to maintain its identity in the face of political efforts to instrumentalise it" (Cotterrell 2004, 7).

Consistent application of social security law

Interpretation of social security legislation

The consistent application of the social security legislation is important for ensuring the effectiveness of that law. Statutory interpretation plays an essential role in ensuring that (social security) law is applied in a consistent manner. The Constitution directs how a court, tribunal, or forum should interpret social security legislation in South Africa (§39 of the Constitution). First, it directs that a court, tribunal, or forum should promote the values that underlie an open and democratic society based on human dignity, equality, and freedom (§39(1)(a) of the Constitution). Second, it compels a court, tribunal, or forum to consider international law (§39(1)(b) of the Constitution). A court, tribunal, or forum has a constitutional duty, when interpreting legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (§233 of the Constitution). Hofman articulated the important role played by courts in insuring that legislation is predictable through the interpretation process as follows:

> Law not only protects rights in the present; it also aims at giving people advance notice of the existence of rights and duties in the future. This allows people to plan their lives in the way that best suits them. To keep the law predictable, courts are reluctant to change the interpretation that an earlier court has given to an expression in a statute. Courts try to freeze the meaning of statutory language so that people can rely on the original interpretation.
>
> *Hofman 1993, 92*

Customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament (§232 of the Constitution). Furthermore, there is discretion to consider foreign law (§39(1)(c) of the Constitution). The foreign law-conscious approach adopted by the Constitution is a form of an acknowledgment that the Bill of Rights is relatively young, particularly, when it comes to the area of socioeconomic rights. Thus, South Africa has much to learn from the (comparable) constitutional jurisprudence of other countries. In fact, the Constitutional Court has exercised its discretion on a number of occasions and referred to foreign laws and court decisions (for example, *S v. Makwanyane*, 1995 3 SA 391 (CC)). Nevertheless, it issued a warning against the use of foreign law and cases in interpreting the Constitution. The main reason behind such a warning is the "different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being" (*Park-Ross v Director, Office of Serious Economic Offences*, 1995 (2) SALR 148 (CC) at 160). In addition, the Constitution requires every court, tribunal, or forum to promote the spirit, purport, and objects of the Bill or Rights when interpreting any legislation (including social security legislation) and when developing the common law or customary law (§39(2) of the Constitution).

Stare decisis principles

South Africa is a common law jurisdiction. Thus, the courts of the country follows the *stare decisis* doctrine (see Hahlo and Kahn 1968, 214–215). This stems from a Latin maxim that basically means "to stand by the decision previously taken or doctrine of precedent" (*Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19 at para. 28). The principle of *stare decisis* is pertinent to the effectiveness and predictability of social security in South Africa in the sense that, "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*" (Hahlo and Kahn 1968, 215). The reason for the adherence with the *stare decisis* doctrine by South African courts and the connection between that principle and the Constitution has been summarized by the Constitutional Court as follows:

> Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal … The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.
>
> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another [2010] ZACC 19 at para. 28*

Adjudication, monitoring, and enforcement of social security rights and duties

The apartheid social security legislative framework made provision for the rights and duties of the social security (prospective) recipients. However, these rights and duties were not consistently applied between the races. This was in line with the discriminatory policies and practices of that time. Things are different now. The Constitution has a Bill of Rights (Chapter 2 of the Constitution) and social security is entrenched as a fundamental right in the Bill of Rights (§27(1)(c) of the Constitution). Social security in this context includes social assistance. In accordance with the Constitution, social security extends to all persons "… including, if they are unable to support themselves and their dependents, appropriate social assistance" (§27(1) of the Constitution). The Constitution imposes a duty on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right of access to social security (§27(2) of the Constitution). Alongside this right, there are other fundamental rights essential for ensuring that social security is accessible, effective, and, most importantly, predictable. These rights are the right to equality (§9 of the Constitution), human dignity (§10 of the Constitution), life (§11 of the Constitution), and privacy (§14 of the Constitution). In addition, there are basic rights that are fundamental to the administration of social security, which are essential for ensuring that social security and related rights are accessible in practice. These rights include the right of access to information (§32 of the Constitution), the right to just administrative action (§33 of the Constitution), and the right to enforce rights (§38 of the Constitution). The abovementioned rights are not absolute. They can be limited in accordance with the limitation clause contained in the Bill of Rights (§36 of the Constitution). In addition, they can be limited in accordance with the provisions contained elsewhere in the Bill of Rights (§7(3) of the Constitution). For instance, the right of access to social security is dependent upon the availability of resources (§27(2) of the Constitution). The state has an obligation to ensure that the right of access to social security is progressively realized.

The rights noted here apply to all law and binds the legislature, the executive, the judiciary, and all organs of state (§8(1) of the Constitution). Furthermore, they bind both the natural and juristic persons (§(8)(2) of the Constitution). These provisions align with the fact that the Constitution is the supreme law of South Africa (§§1(c) and 2 of the Constitution). Thus, law or conduct inconsistent with the Constitution is invalid (§2 of the Constitution). Most importantly, all obligations imposed by the Constitution must be fulfilled. This marked a radical departure from the apartheid approach where parliament was sovereign. The parliamentary sovereignty principle entailed that the parliament could enact any law(s) it deemed fit. Furthermore, the state has an obligation to respect, protect, promote, and fulfill the rights in the Bill of Rights (§7(2) of the Constitution).

The state gave effect to these rights by enacting a variety of social security and related laws. It is understood that the constitutional rights and duties that have been discussed here are essential for the monitoring, adjudication, and enforcement of the social security legislation. It would remain a pipe dream if those who need to enforce their social security rights were oblivious to the existence of same. As argued earlier, the effectiveness of social security laws is undermined by the fact that they fail to impose a duty on those entrusted with their administration to ensure that they are accessible to those who are supposed to benefit from them, particularly the excluded and marginalized urban and rural poor. Social security institutions are not obliged to enlighten the general population about their rights and obligations. It is

essential that the relevant legislative framework enjoin the social security institutions to render the following main services to the prospective beneficiaries: access to information; adequate consultation; meaningful advice; effective expert assistance; and legal representation. Moreover, the simplification of social security laws is more than necessary. This will involve the unification and streamlining of social security laws. In so doing, the relevant laws will be comprehensible for the affected persons.

The other problem, currently discernible in the South African social security legislative framework that undermines the accessibility and effectiveness of the pertinent laws is that the monitoring, enforcement, adjudication, sanctions, and remedies in the South African social security system are provided for in various social security pieces of legislation. This has resulted in a multitude of mechanisms, which could be invoked, and institutions that could be approached to settle social security disputes. The South Africa social security adjudication, monitoring, and enforcement system is not coherent. Furthermore, delays undermine the resolution of social security disputes (Nyenti 2013, 915–16).

Notwithstanding the proceeding pronouncements, there are several constitutional rights that are the basis of the system. First, the right of access to social security is enforceable in a court of law (§38 of the Constitution). Second, every person has the right of access to information held by social security institutions (§32 of the Constitution). In addition, every person has the right to administrative action that is lawful, reasonable, and procedurally fair. This includes the right to be given written reasons (§33(2) of the Constitution). The right to appeal is an integral part of the right to just administrative action. It is recognized by the Department of Welfare (1997): "In order to ensure the just administration of legislation, the right to appeal will be entrenched in all legislation, including the right to appeal against regulations. Information on this right will be accessible." Furthermore, every person has the right to have their disputes, inclusive of those of a social security nature, that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another impartial tribunal or forum (§34 of the Constitution). However, not all social security beneficiaries can afford the prohibitive costs associated with court proceedings.

Conclusion

As illustrated in this chapter, the effectiveness and predictability of social security legislation was not always at the top of the executive and related institutions' (for example, the legislative) agenda. They were preoccupied with the advancement of the interests of a small section of the South African society. Thus, attempts aimed at making laws effective and predictable were mainly focused on one designated group and not the entire population, as it should have been. The new constitutional dispensation serves as a dividing line between an "old South Africa," characterized by unfair discrimination, and a "new South Africa," which is founded of values such as human dignity, equality, non-racialism and non-sexism, and the rule of law. The difference between the past and present, insofar as the theme of this chapter is concerned, is substantial. However, this does (and should) not suggest that everything is impeccable. The truth is that, as shown in this contribution, there is still work that requires urgent attention. Ensuring that social security legislation is effective and predictable, in the ever-changing world, is truly an ongoing task. This is precisely what those entrusted with this solemn responsibility, of guaranteeing that (social security) laws are effective and predictable, should never forget. Otherwise, history will judge them harshly.

Notes

* This chapter is based on a paper presented by the author at the Workshop on Anthropology meets Pragmatist Philosophy, Max Planck Institute for European Legal History and Peace Research Institute, Frankfurt am Main, Germany, May 4–5, 2017.

1 See www.saflii.org/za/cases/ZACC/1995/3.pdf.

References

Bekink, Bernard, and Christo Botha. 2007. "Aspects of Legislative Drafting: Some South Africa Realities (or Plain Language Is Not Always Plain Sailing)." *Statute Law Review* 28 (1): 34–67.

Bennett, T. W. 2011. "Ubuntu: An African Equity." *PER/PELJ* 14 (4): 29–61.

Buxton, Earl. 1921. "South Africa and its Native Problem." *Journal of the Royal African Society* 20 (79): 161–73.

Constitution of the Republic of South Africa, 1996.

Cotterrell, Roger. 2004. "Law in Culture." *Ratio Juris* 17 (1): 1–14.

De Waal, Johan, Iain Currie, and Gerhard Erasmus. 2001. *The Bill of Rights Handbook*, 4th edn. Lansdowne: Juta.

Department of Social Development. 2016. "Comprehensive Report on the Review of the White Paper for Social Welfare, 1997." Pretoria, Republic of South Africa.

Department of Welfare. 1997. "White Paper for Social Welfare." Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare In South Africa. Pretoria, Republic of South Africa. Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa. www.kzndsd.gov.za/Documents/2015/August/documents/WhitePaperforSocialWelfare1997.pdf.

Hahlo, H. H. and Kahn, Ellison. 1968. *The South African Legal System and its Background*. Cape Town: Juta.

Himonga, C., M. Taylor, and A. Pope. 2013. "Reflections on Judicial Views of Ubuntu." *PER/PERLJ* 16 (5): 369–427.

Hofman, Julien. 1993. "Language Rights, Legal Rights and Plain Language." In *Language, Law and Equality: Proceedings of the Third International Conference of the International Academy of Language Law (ALL) in South Africa, April 1992*, edited by Karel P. Prinsloo, et al, 90–102. Pretoria: University of South Africa.

Kumitz, Daniel. 2016 "Nothing About Us Without Us: Self-Representation in Social Protection in Southern Africa." *Global Social Policy* 16 (2): 215–17.

Liebenberg, Sandra. 2015. "Social Rights and Transformation in South Africa: Three Frames." *South African Journal on Human Rights* 31 (3): 446–71.

Macaskill, Brian. 2016. "Apartheid." In *The Encyclopedia of Postcolonial Studies*, vol. 8, edited by Sangeeta Ray, Henry Schwarz, José Luis Villacañas Berlanga, Alberto Moreiras, and April Shemak, 1–6. Malden, MA: John Wiley & Sons.

Mokgoro, J. Y. 1998. "Ubuntu and the Law in South Africa." *PER/PELJ* 1 (1): 14–26.

Mpedi, L. G. 2008a. "Pertinent Social Security Issues in South Africa." Socio-Economic Rights Project, Community Law Centre, University of the Western Cape.

Mpedi, L. G. 2008b. "The Role of Religious Values in Extending Social Protection: A South Africa Perspective." *Acta Theologica* 28 (1): 105–25.

Nyenti, Mathias. 2013. "Access to Justice in the South African Social Security System: Towards a Conceptual Approach." *De Jure Law Journal* 46: 901–16.

Republic of South Africa. 1983. Constitution Act No. 110.

Republic of South Africa. 1994. National Economic, Development and Labour Council Act, No. 35. Government Gazette, Cape Town, December 2. Republic of South Africa. 1994. National Economic, Development and Labour Council Act, No. 35. Government Gazette, Cape Town, December 2. www.gov.za/sites/default/files/gcis_document/201409/act35of1994.pdf.

Republic of South Africa. 2001. Advisory Board on Social Development Act, No. 3. Government Gazette, Cape Town, May 23. www.gov.za/sites/default/files/gcis_document/201409/a3-010.pdf.

Republic of South Africa. 2004a. Social Assistance Act 13. Government Gazette, Cape Town, June 10. www.gov.za/sites/default/files/gcis_document/201409/a13-040.pdf.

Republic of South Africa. 2004b. South African Social Security Agency Act, No. 9. Government Gazette, Cape Town, June 2. www.gov.za/sites/default/files/gcis_document/201409/a9-040.pdf.

Roberts, Margaret. 1994. "The Ending of Apartheid: Shifting Inequalities in South Africa." *Geography* 79 (1): 53–64.

Sagner, Andreas. 2000. "Ageing and Social Policy in South Africa: Historical Perspectives with Particular Reference to the Eastern Cape." *Journal of Southern African Studies* 26 (3): 523–53.

Small, Joan, and Evadne Grant. 2000. "Equality and Non-Discrimination in the South African Constitution." *International Journal of Discrimination and the Law* 4 (1): 47–71.

Union of South Africa. 1945. *Debates of the House of Assembly (Second Session—Ninth Parliament (20th January to 12th June, 1945)*. Parliamentary Printers.

Vogt, Grete S. 2001. "Non-Discrimination on the Grounds of Race in South Africa: With Special Reference to the Promotion of Equality and Prevention of Unfair Discrimination Act." *Journal of African Law* 45 (2): 196–209.