

AN EVALUATION OF THE CONSOLIDATED NATIONAL SOCIAL SECURITY BILL FOR LESOTHO: PART I

Kananelo E Mosito

Dip (Law) BA (Law) LLB PGDLL (Con & Arb) (NUL) LLM (Edin) PhD (UCT)

Dean of the Faculty of Law, National University of Lesotho

Email: kananeloemosito@gmail.com

ABSTRACT

This article is about social security, which, in turn, is a subset of social policy. 'Social policy' is a term that is applied to many areas of policy, usually within a governmental or political setting (such as social services). This article critically evaluates the proposed Consolidated National Social Security Bill for Lesotho. It examines the general background to the proposed national social security scheme; the legislative framework for the proposed scheme; the governance and institutional framework of the scheme as well as the establishment of insurance funds and the financing sources of various funds. The evaluation is undertaken through the lens of social security perspectives and policy considerations.

Keywords: Lesotho, National Social Security Bill, social policy, social security, insurance fund

INTRODUCTION

Proposals to accelerate the establishment of social security systems in low-income countries (such as Lesotho) have gathered momentum since the early years of the

UNISA  university
of south africa

Journal of Law, Society and Development
Multi-, Inter- and Transdisciplinary
Volume 3 | Issue 1 | 2016
pp. 45–66

ISSN 2313-8289
© Journal of Law, Society and Development and Unisa Press

millennium (Hagemejer 2009: 90). Therefore the provision of basic social security is an investment in a country's development, giving in return not only reduced poverty but also increased demand and expanded domestic markets; a healthier, better-educated, empowered and more productive workforce; peace, stability and social cohesion; fewer conflicts, and politically more stable societies (Hagemejer 2009: 90).

In 2000, the government of Lesotho took a policy decision to introduce a comprehensive national social security scheme for the country. The decision was to be implemented through the introduction of a consolidated Social Security Bill. The advantages of such an instrument are:

- the achievement of a coherent view of social security;
- a simplified and streamlined administration;
- an all-encompassing and broad-based outcome for the scheme;
- the avoidance of the danger of inconsistencies, huge discrepancies and unnecessary overlaps, and
- rendering the task of the courts in interpreting the legislation easier.¹

Given the social policy importance of the Bill, however, it is important to examine it critically.

The objective of this article therefore is to critically evaluate the structural² aspects of the Bill with a view to determining the extent to which it succeeds in making provision for a comprehensive national social security scheme for the country.³ This is achieved in six main ways. First, a brief general background to the Bill is outlined. Second, the content of the legislative framework for the scheme is discussed. Third, the article evaluates the legislative framework for the scheme. Fourth, the governance and institutional framework of the scheme is assessed. Fifth, the establishment of insurance funds and their financing is discussed. Finally, the article, by way of conclusion, highlights some salient points arising from the above discussions.

1 M Olivier Social protection in SADC: Developing an integrated and inclusive framework – A rights-based perspective' in MP Olivier & ER Kalula (eds) *Social Protection in SADC: Developing an Integrated and Inclusive Framework*, Johannesburg CICALASS and Cape Town Institute of Development and Labour Law, University of Cape Town (2004), 21 at 32.

2 This part addresses the structural aspects, whereas the next part will concentrate on the social policy aspects of the Bill. Dividing this contribution in this manner was a result of space and word limitations.

3 The Bill is entitled The Consolidated National Social Security Act [sic] 2000. This Bill has, however, not yet been presented to Parliament for consideration.

GENERAL BACKGROUND TO THE PROPOSED NATIONAL SOCIAL SECURITY SCHEME

In the mid-1990s, a five-year development plan to establish the scheme was formulated.⁴ The government enlisted the assistance of the Arab Bank for Economic Development in Africa (BADEA) and the Arab Labour Organisation (ALO) to provide financial assistance and expertise for the project. The project had three main aims: first, to prepare an actuarial study for the introduction of a comprehensive National Social Security System. Second, it was to help with the drafting of an adequate, new and modern National Social Security Act compatible with the international standards on social security.⁵ Lastly, it was to devise mechanisms for the use of information technology (computerisation) for the social security operations. Consequently, a report which summarised the project's activities and outputs as well as the extent of progress was prepared.⁶ It also made recommendations for the future. The report did, inter alia, produce a draft Bill.⁷ The government approached the International Labour Organisation (ILO) to make some inputs into the Bill.

There were, however, a number of shortcomings in terms of the above-mentioned BADEA exercise. First, the BADEA experts conducted no broad-based country-wide research activities on the pragmatic feasibility and sustainability of the proposed national security scheme.⁸ This meant that no attempt was made to secure broad and representative contributions to the views underpinning the contemplated scheme. Second, the project had a limited scope as it did not seek to determine peculiar national social risks that might inform the conceptual framework of the scheme. Third, thorough research was not conducted into the existing socio-economic situation and social security system of the country that would have informed the kind of comprehensive legal framework contemplated in the terms of reference. This was the case notwithstanding the fact that the terms of reference required the drafting of an adequate new modern National Social Security Act compatible with international standards.

The principal problem with the Bill is that it does not cover the settings in the rural areas: it seems to be concerned largely with the urban populations employed in urban settings. The Bill also does not provide for a consideration of the contribution of member-based organisations (MBOs) which – alongside the state, the market and private households – provide social security for their members. Included here are

4 In its *Sixth National Development Plan 1996/97–1998/99*, the country envisaged the introduction of a comprehensive National Social Security Scheme that would be suitable for Lesotho.

5 The reference here was to the principles set out in ILO Convention 102 of 1952.

6 See Final Report presented to the government of Lesotho on the Introduction of National Social Security Scheme, June 2000, 1–2.

7 The draft Bill is entitled The Consolidated National Social Security Act [sic] 2000.

8 In the case of South Africa, the government commissioned a group of experts to undertake serious research.

civic organisations in the form of the various sorts of self-help groups which have been organised to improve social security at the community level (Jütting 2009: 5).

LEGISLATIVE FRAMEWORK FOR THE PROPOSED SCHEME

Before discussing the essence of the Bill, it is appropriate to begin by considering its framework. In this connection it is fitting first to examine the purpose and design of the Bill, as well as the comprehensiveness and the main features of the proposed scheme.

Purpose of the Bill

The long title of the Bill declares that the purpose of the Bill is to introduce a comprehensive National Social Security System compatible with the international standards suitable for Lesotho in order to cover the entire employed labour force in the government, parastatal organisations and the formal private sector, as well as to provide income-protection benefits in respect of the contingencies of old-age, invalidity, death, employment injury and occupational diseases, and maternity. It is intended to be compulsory for all nationals who are employees and older than 15 years of age. The phrase ‘national employees’ is not defined in the Bill, but it gives the impression that the Bill is intended to benefit Lesotho nationals only, a phenomenon that would appear to be inconsistent with the principle of equality of treatment.

The said employees must be in an employment contract⁹ for the benefit of an employer. While the term ‘employment contract’ is not defined in the draft Bill, it is arguable that it bears the same meaning as the term ‘contract of employment’ in section 3 of the Labour Code Order 1992. In the latter legislation, the term ‘contract of employment’ means a contract, whether oral or in writing, express or implied, by which an employee enters the service of an employer. Consistency in definitions would help to achieve a harmonious co-application of the two pieces of legislation. The employer may be the government, a corporate body or an enterprise in the formal private sector.¹⁰ It is important to determine the scope and object of the Bill by referring to its long title (see below).¹¹

Design of the Bill

The Bill contains a wide variety of provisions. It begins with some preliminaries: the short title and commencement of the Act, the interpretation of terms, the scope of

9 See s 3 of the Labour Code Order 24 of 1992.

10 Clause 3 of the Bill.

11 Section 12(1) of the Interpretation Act 19 of 1977.

application of the law and exemptions from the application of the law.¹² It goes on to establish the general organisation and governance of the social security scheme.¹³ It establishes three insurance funds and their financing techniques:

- insurance against old age, non-occupational disability and death as well as its financing; eligibility for an old-age pension; eligibility pensions in case of non-occupational disability and death;
- eligibility for lump-sum compensation, and
- the computation of benefits for old age, non-occupational disability and death.¹⁴

The Bill addresses insurance against employment injuries and its financing, medical care, cash benefit, compensation and pensions as well as assessment of the degree of incapacity.¹⁵ It focuses on maternity insurance and its financing as well as on medical services.¹⁶ It deals with the rights of beneficiaries entitled to a pension, compensation in case of death, as well as some social grants.¹⁷ Furthermore, it provides for transitional provisions, compensation for employment injuries and occupational diseases sustained prior to the application of the Act; the addition of a hypothetical contribution period as well as the reconciliation of private schemes.¹⁸ It also lays out some general provisions and penalties and includes provisions for regulations, repeals and amendments.¹⁹ Lastly, it provides for schedules detailing the amounts due regarding a back service period²⁰ – lump-sum payments as well as monthly instalments in case the insured opts for the payment in instalments of the amounts due by him or her.

Comprehensive national social security

It is apparent from the long title of the Bill that the scope and object of the Bill are to introduce a comprehensive national social security scheme for Lesotho. The term ‘comprehensive national social security’ has, nevertheless, not been defined in the Bill. However, in social policy studies, social security is a subset of social protection. Social protection includes social security schemes (whether private or non-statutory schemes) with a similar objective, such as mutual benefit societies (micro-insurance) and occupational pension schemes, provided that the contributions to these schemes

12 See clauses 1–4.

13 See clauses 5–16.

14 See clauses 17–36.

15 See clauses 37–56.

16 See clauses 57–60.

17 See clauses 61–68.

18 See clauses 69–73.

19 See clauses 74–119.

20 This means the service period during which an employee worked and which is to be bought when a new scheme starts operating.

are not wholly determined by market forces (Van Ginneken 2007: 41). As the Taylor Committee aptly put it:

‘[c]omprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State’ (Taylor Committee of Inquiry 2002: 41).

Social security, as one possible form of social protection, refers to contributory schemes of social protection in terms of which benefits for a variety of possible contingencies are earned through the payment of contributions (Scheinin 1995: 159). The coverage of the Bill goes beyond benefits for a variety of possible contingencies being earned through the payment of contributions, as it even caters for non-contributory benefits such as marriage and funeral grants.²¹

What is doubtful is whether the term ‘national comprehensive social security’ as used in the Bill is synonymous with ‘comprehensive social protection’. The content of the Bill falls far short of that of a comprehensive social protection mechanism, because it fails to incorporate developmental strategies and programmes designed to ensure a minimum acceptable living standard for all citizens. This is so notwithstanding that providing income security to the vulnerable category of the working-age persons who are either unable to find employment or are underemployed should also form part of a comprehensive social security floor (Hagemeyer 2009: 95). In addition, the Bill does not embrace traditional measures of social insurance, social assistance and social services; neither does it focus on causality through an integrated policy approach, including many of the developmental initiatives undertaken by the state. Social protection requires a more comprehensive approach, which is concerned with many more risks and which proposes many more instruments dealing with diverse risks than traditionally considered by social protection (Holzmann, Sherburne-Benz & Tesliuc 2003: 1). Therefore, for a social security scheme to be comprehensive, it must go beyond the traditional perception that social security is aimed merely at income protection, as such an approach is too restrictive (Olivier 2003: 43). It follows, then, that social security should focus on such issues as employment creation policies, health and safety regulation as well as preventative healthcare.

A comprehensive social security scheme must be judged, *inter alia*, by two standards which focus on promotional measures that aim to improve endowments, exchange entitlements, real incomes and social consumption, namely (1) preventative measures that seek more directly to avert deprivation in specific ways and (2) protective (or ‘safety net’) measures that are more specific in their objective of guaranteeing relief from deprivation (Guhan 1994: 38). In addition, a comprehensive

21 See clauses 67 and 68.

social security concept should recognise the protection of individuals as well as of the society. In so doing, a social security system relieves society and the state of the burden of looking after individuals. A comprehensive social security scheme should therefore ultimately aim at the redistribution of resources from the rich to the poor.

A social security scheme depends largely on social solidarity and the principle of shared responsibility (ILO 1984: 115; see also Olivier & Van Rensburg 2001: 26). In addition, it should be able to address the causes of social insecurity, namely: social exclusion and marginalisation, as well as its effects (Olivier 2003: 32). The scheme should embrace all measures and instruments as well as institutions devised to meet the ultimate goal of social security in society. Comprehensive social security goes beyond social insurance and social assistance measures. It has to take cognisance of the values inherent in constitutional and socio-economic imperatives which are incorporated into a society's legislative instruments providing for a comprehensive social security scheme. It is therefore submitted that, bearing the foregoing aspects in mind, as well as having regard to the content of the Bill, it is not adequately comprehensive.

Main features of the scheme

It is envisaged that the scheme will have six main features: (1) It will apply to establishments with five employees and more,²² although it is not clear from either the Bill or the reports why five employees was decided upon; (2) it is intended to cover employees in the public service, parastatals and the formal private sector;²³ (3) contributions to the scheme will be mandatory for both employers and employees²⁴ who are covered under the scheme; (4) apart from the fact that small, formal private-sector employers (those with fewer than five employees) will be excluded from the scheme, it seems that most self-employed professionals will also be excluded and, therefore, not contribute to the scheme; and (5) all economically employed persons aged 15 years and above will become eligible for membership. While there are no set legal minimum thresholds in an employment contract in the law of Lesotho, a person under the age of 15 years may not be employed.²⁵ It is arguable that, by implication, the Bill renders a minor capable of contracting for employment, a phenomenon that runs counter to the common law. Finally, (6) the Bill provides that both employers and employees will contribute to the social security fund.

22 See clause 3(1).

23 See the long title of the Bill above.

24 See clauses 19–23.

25 Sections 3 and 124 of the Labour Code Order 24 of 1992.

GOVERNANCE AND INSTITUTIONAL FRAMEWORK OF THE SCHEME

The Bill establishes an organisation to be called the ‘General Organisation for Social Security’ (GOSS). The Bill further provides that the organisation is to be a body corporate, with legal personality.²⁶ When an Act establishes a body as a corporation, the effect is to clothe such body with three main characteristics:²⁷ first, the body is vested with the power to sue and be sued, to contract, and to be contracted with under its corporate name; it has a common seal and may alter or change it at its pleasure, and have perpetual succession; moreover, it has the power to acquire and hold personal property or movables for the purposes of which the corporation is constituted, to alienate the same at pleasure, and to do and suffer all such other acts and things as bodies corporate may lawfully do and suffer.

Second, it vests in a majority of the members of the corporation the power to bind the others by their acts. Third, it exempts the individual members of the corporation from personal liability for their debts, obligations or acts as do not contravene the provisions of the Act incorporating them.

A glance at the provisions of the Bill gives the impression that the intention of the framers of the Bill was to create GOSS as an autonomous institution.²⁸ However, as will be evident below, its governance structure points to the heavy presence of government representation in the management of the scheme. It has legal personality. The personality, governance and institutional framework of the scheme are interdependent on each other.

The Bill makes provision for the governance and institutional framework of the scheme. Prior to considering its governance and institutional framework, it is appropriate to consider briefly the concepts of governance, leadership and management as they will apply to the scheme.

Leadership and management of the scheme

The term ‘governance’ refers to the relationship of the leader with those that he or she leads. The relationship is viewed in terms of practical commitment and technical competence, fairness, efficiency and effectiveness of the institutions, service delivery, accountability and transparency (Rwegoshora 2005: 40). It therefore denotes the activity of controlling an organisation, or the way in which an organisation is controlled.²⁹ The sustainability and viability of a social security scheme depend on

26 See clause 5.

27 Section 44 of the Interpretation Act 19 of 1977.

28 See clause 5.

29 See the *Oxford Advanced Learner’s Dictionary* (International Student’s Edition, 7 ed).

good governance as one of its important pillars (Olivier & Kaseke 2005: 45). On the one hand, good governance must be:

‘[p]articipatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision making. It is also responsive to the present and future needs of society.’³⁰

On the other hand, bad governance is responsible for:

- a lack of transparency and disclosure;
- weak internal corporate governance structures;
- directed investments under political pressure and poor returns;
- high administrative and operational costs;
- cross-subsidisation between pension and non-pension programmes;
- payment of dividends and taxes to the government by virtue of corporate status;
- a general perception among the participants that there is no independent audit, and
- inadequate management information systems.

All these factors raise the possibility of under-reporting or the misallocation of contributions.³¹

The concepts of governance and leadership are closely related. Another concept akin to leadership is management. Walters writes, ‘[m]ost people realise that the art of leadership is a learned craft. Management, on the other hand, is a science’ (Walters 1999: 10). While leadership focuses on vision, strategic development and initiative, management deals with the implementation of the vision (Werner 2004: 332). The question is whether, regarding the terms of the Bill, a distinction is clearly drawn between leadership and management.

An organisation has a number of characteristics, namely, its size, the technology that governs the way work is performed, as well as its personality (Hall & Goodale 1986: 5). The National Social Security Scheme established by the Bill has a number of such organisational characteristics. As an organisation, it should therefore be considered as a planned co-ordination of the activities of a number of people in order to

30 United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), ‘What is good governance?’ Available at <http://www.unescap.org/sites/default/files/good-governance.pdf> (accessed 20 November 2015).

31 See the Asian Development Bank, Report and Recommendation of the President to the Board of Directors on a Proposed Cluster, First Loan and Technical Assistance Grant to the Republic of Indonesia for the Financial Government and Social Security Reform Progress, RRP: INO 33399, November 2002.

achieve some common, explicit purpose or goal through the division of labour and function and through a hierarchy of authority and responsibility (Schein 1980: 15).

Moreover, statutory bodies responsible for the administration of social security schemes usually enjoy the following shared traits: boards of directors, regular policy control by a government ministry, and legal personality (Sylva 1989: 43–44; see also Olivier, Smit, Kalula & Mhone 2004: 57). The governance of the scheme established under the Bill is placed in the hands of statutory bodies. Lesotho will do well to avoid a badly governed social security scheme so as to avoid a lack of confidence in the scheme. This is because a lack of confidence in the governance of the scheme is likely to result in low returns and inadequate benefits due to the high rate of non-compliance by contributors (ILO 2002: 2). The question that next arises for discussion relates to the extent to which the provisions of the Bill on the institutional governance of the scheme match the standards outlined above.

Board of management

The organisation³² is to be managed by a board of management that will be composed of ten members. The Minister³³ will be the chairman of the Board. The Director will be the vice-chairman.³⁴ Four members – one each from the Ministry of Employment and Labour, the Ministry of Finance, the Ministry of Public Service and the Ministry of Health and Social Welfare – will represent government on the Board.³⁵ There will also be two members representing employers who are subject to the Bill and nominated by employers' organisations,³⁶ as well as two members representing the insured employees nominated by the organisations of trade unions.³⁷

The question is in which way the above composition of the Board is likely to affect the efficiency and effectiveness of the scheme. An answer to this query should be based on the axiom that the success of an organisation is founded on two cornerstones: efficiency and effectiveness. Similarly, efficiency and effectiveness are vital for a social security scheme. While it may be conceded that it is an inevitable duty of the state to assume general responsibility for due provision of benefits and for the proper administration of the institution, a board which is dominated by government officials whose expert qualifications are not even clear is a recipe for inefficiency, political nepotism and corruption. On this point, Quisser states:

32 'Organisation' means the general organisation for the social security established under clause 5 of the Bill.

33 The term 'Minister' refers to the Minister responsible for the administration of the contemplated Act.

34 Clause 6(b).

35 Clause 6(c).

36 Clause 6(d).

37 Clause 6(e).

'most Latin American countries have chosen the Chilean approach, whereby a separate agency was set up which is exclusively responsible for pension supervision. In order to be able to attract and retain qualified staff who might otherwise be hired away by pension funds or insurance companies ...' (1998: 40).

The author further points out that countries have adopted different models according to the stage of development of the private pension sector and the institutional arrangements for pension provision as well as the historical and cultural circumstances in the individual country.³⁸ It is true that social security is both a policy and an institution and that, as a public policy, it can hardly be privatised (Tamuri 1999: 25). On the other hand, handing over certain tasks into non-public hands has always been a possibility. It is therefore submitted that there is nothing either historical or cultural in Lesotho that can militate against following the Chilean approach on this aspect. The new worldwide trend is that the volume and the political relevance (social, financial) of private involvement are increasing. The scheme requires a differently constituted board for it to be administered properly and efficiently. Otherwise, the present composition of the board portends the failure of the organisation.

Furthermore, in line with the technical comment by the ILO that the employers' organisations and the organisations of trade unions that nominate members should be specified in this section, there should be a qualification that, after consultation with representative trade unions and employers' representative organisations, the Minister shall nominate a number of persons having experience or knowledge of labour relations from an employees' and from a management's point of view to constitute two panels to be known as the Labour Panel and the Management Panel respectively.

While it is a commendable practice to have appointments of personnel for an organisation presented to a board for approval or qualification and subsequent recruitment, it is not apparent why the government would have to be responsible for setting remuneration packages for such personnel upon the recommendations of the board. Furthermore, the Bill empowers the Minister, by notice in the *Government Gazette*, to appoint a secretary to the Board, who is not to be a member of the Board and yet is to perform all the administrative functions of the Board.³⁹

Tenure of office of members of the Board

The Bill provides for the cessation of tenure of the Board members:⁴⁰ a member of the Board other than an *ex officio* member shall cease to be a member in four circumstances. First, membership ceases when a member loses the capacity in which he or she was appointed as a Board member, as an employer or an employee. As already indicated, there is a heavy presence of government representation in the Board, but

38 Quiesser (1998) 40.

39 Clause 6(4).

40 Clause 10.

there is no provision in the Bill that prevents the membership of the Minister from terminating in circumstances where, as a result of his or her pressing state commitments, he or she may not be able to attend Board meetings. This represents a weakness, as Ministers are known to be busy people.

Second, the Bill provides that membership ceases if a member absents himself from attending the Board meeting three consecutive times without any reason acceptable to the Board. The provision is inelegantly drafted. The phrase ‘without any reason acceptable by the Board’ was probably intended to mean without a valid excuse. It has the effect of making the Board the exclusive subjective repository of the power to assess whether a valid reason exists or not. As it stands, this provision does not require the validity of a reason to be objectively ascertained. In practice, this has the effect of rendering the justiciability of the acceptability of a reason beyond objective determination by a court of law. In other words, it opens a floodgate to the possible abuse of power by the Board.

Third, the Bill further provides for the cessation of membership of the Board if a member is convicted of an offence of forgery, theft, breach of trust, fraud or any other offence or attempt at such offence connected with honour or morals. This is a sound provision, regard being had to the fact that the functions of the Board include looking after substantial funds of the scheme.

Fourth, the Bill provides that an employer shall cease to be a member if he or she is declared insolvent. Why it should pick upon an employer to the exclusion of all other members is hard to understand, but the wording renders this provision unsatisfactory. It would be better if the insolvency aspect applied to all members of the Board as they occupy the office as individual persons, even though some serve in their official capacities. Whether a person is a member *ex officio* or not, therefore, the fact that he or she is a human being does not render him or her immune from corruption. Nothing therefore turns on singling out an employer from all other members of the Board.

Functions of the Board

The norm in statutes establishing bodies corporate is to provide for both the powers and the functions of the supreme governing body of the corporation. However, the present Bill provides for the functions only and not the powers of the Board. The term ‘function’ is capable of various interpretations. It can indicate a particular conduct or the task of some organ or other (Wiechers 1985: 87). On the other hand, ‘power’ refers to the specific authority conferred on a government organ in a particular case and regarding a specific matter. The Bill does not clothe the Board with the power to be the supreme governing body of the scheme. By conferring a combination of powers and duties upon the administration, the law is able to facilitate and direct the administrative process (Baxter 1984: 77).

An examination of the functions of the Board created by the Bill reveals that it is essentially an advisory body. The present Bill confers upon it the function to supervise the implementation of the impending Act, regulations and orders in force, and to take all measures which it deems necessary to achieve its objectives and to improve the management of the organisation's business.⁴¹ However, it does not confer the power to make such regulations and orders upon the Board: that power is vested in the Minister responsible for the administration of the Act.

Decisions approved by the Board are to be referred to the Minister for affirmation within eight days. If not affirmed within eight days from the date of such referral, the Board's decisions thereupon are to become operative.⁴² The Board cannot even formulate administrative rules. In this regard, its function is limited to the mere approving of such administrative rules, which are to be presented to the Minister for ratification by him or her. The Board can also recommend the scope of the initial and subsequently implemented Act.⁴³ As the Board is usually also involved in advising on the drafting of administrative rules⁴⁴ and proposing legislation relating to social security, it is necessary to add a provision conferring on the Board the power to draft the necessary administrative rules to be presented to the Minister for ratification and to propose the legislation related to social security.

Another aspect of the present arrangement in the Bill is that the recommendation is made to the Minister who is him- or herself chairperson of the Board. This implies that the Minister may, when sitting as a body to whom a recommendation is made, decide contrary to what he or she may have decided while sitting as a member of the Board. This anomalous situation may lead to the undermining of the relationship of the political leaders with the rest of the Board members in terms of practical commitment.

The Board does, of course, have other functions. It is empowered to approve the draft budget of the organisation, which should specify the various items of expenditure and the amounts allocated to each. It also has to approve the final balance sheet and the general accounts of income and expenditure. It also approves the annual general report on the activities of the organisation. Furthermore, it lays down the internal, financial, administrative and technical regulations of the organisation, which ensure that the organisation discharges its functions in fulfilment of its objects. The Board also sets out the general rules relating to investing the funds accruing to the organisation. It proposes amendments to the Social Security Act and may perform such other functions as may be entrusted to it by law or assigned to it by the Minister. The Board may also appoint an auditor to audit the accounts of the organisation and

41 Clause 11(a).

42 Clause 12(1).

43 Clause 12(1).

44 Clause 11(b).

specify his or her remuneration. It may also appoint an actuary to investigate the financial situation of the organisation and specify his or her remuneration.

Affirmation of the Board decisions

The Bill provides that the decisions approved by the Board are to be referred to the Minister for affirmation. The effect of this provision is again to treat the Minister as different from the Board that he or she heads as chairman. It cannot be sufficiently emphasised that this provision has the effect of undermining not only the corporate autonomy of the GOSS, but also of rendering the Minister the first among equals: effectively, this creates a situation in which the Minister is made an executive chairman who can even overrule the Board. This is another example of the Bill merely paying lip service to the autonomy of the GOSS. There is no apparent reason why the decisions of an autonomous body's board should be made subject to the approval of a Minister of the government other than to have a scheme that is run by politicians. This is totally unacceptable. This situation is rendered worse by the fact that the Minister may return to the Board decisions with which he or she disagrees.⁴⁵ To make things even worse, the Bill provides that where the Minister does not agree with a decision of the Board, and such decision is returned to the Board for reconsideration, the Board shall not maintain its original decision unless such decision is voted for by at least seven of the ten members of the Board.⁴⁶

Committees

The Board is empowered to appoint a committee or committees from its members for a special purpose or purposes determined by the decision for its formation and it may invite participation by professional specialist experts.⁴⁷ The thinking behind this provision is clearly to enable the committees to be able to grapple with difficult issues should they arise. The Board may also appoint specialist experts to participate in the meetings of the Board, but such experts will have no right to vote.⁴⁸ All committees of the Board must report to the meetings of the Board on the activities and decisions undertaken by such committees and the Board may ratify or modify such decisions as it deems fit.⁴⁹ The provisions of the Bill in this regard make no provision for the principle of tripartism in the composition of such committees. It is submitted that there is a need to provide for such representation on committees in the Act itself.

45 Clause 9(2).

46 Clause 9(3).

47 Clause 8(1)(a).

48 Clause 8(1)(b).

49 Clause 8(1)(c).

Expenses and allowances of the Board

The Bill further empowers the Minister of Finance to determine sums of money to be paid out of the National Social Security Fund (NSSF), on the recommendation of the Board and in consultation with the Minister responsible for Finance, in respect of costs, expenses and other disbursements relating to the functions of the Board as well as regarding the sitting allowance payable to members of the Board or any of its committee members.⁵⁰ This is a further indication that the Minister will in effect be running the show in this scheme. There is no apparent reason why the Minister should be granted so much power: the Minister is not even enjoined to respect the recommendations of the Board. Furthermore, it is not clear what would happen were the Board and the Minister responsible for Finance to disagree on the sums involved. The better approach would be to give the Board greater powers than being merely advisory to the Minister.

Purpose of the organisation's funds

The Bill further provides that the funds of the organisation should be used solely for the purpose of providing benefits to nationals of Lesotho who qualify for these benefits, and to meet the administrative expenses of the organisation.⁵¹ Critics may argue that this provision is not adequately protective of all workers. In the first place, there is no apparent reason why the funds of the organisation should be used only for the purposes of providing benefits to Lesotho nationals. The question that arises is whether non-nationals of Lesotho who are expatriate workers should be entitled to benefit under the scheme or not. Furthermore, should it be considered the spirit of this provision that expatriate workers in Lesotho will not contribute to this scheme? There is no reason in logic and policy why expatriate workers should not benefit under the scheme equally with Lesotho nationals.

The funds of the organisation shall be used solely to meet the administrative expenses of the organisation. Critics may argue that the use of the word 'administrative' is unsatisfactory, as it does not connote such things as investment of the funds. The funds should also be used to pay for investment expenses. There are indeed other purposes which may not be administrative, but which would necessitate the use of the funds of the organisation to meet expenditure on them. In its present form, this provision is too restrictive.

50 Clause 9.

51 Clause 13.

ESTABLISHMENT OF INSURANCE FUNDS AND THEIR FINANCING

The existence of a fund or funds is the very hub of any social security scheme. In other countries, more than one fund is established to look after one category of assets of the scheme. The funds are usually concerned with the review of the financial position of the organisation, the assessment of an insured's contribution, the computation of the insured's monthly wage, the relationship of the scheme to taxes and fees, provision for alternative contributions in case of secondment of an employee to another employer, contributions and date of entering employment, dates of payment of contributions and additional amounts as well as mechanisms for the deduction of the insured's contribution. In the next section, the above features of funds established by the Bill are critically considered.

Funds of the organisation

The Bill makes provision for the accrual and disbursement of the funds of the organisation⁵² by providing, in the first instance, for the establishment of an independent NSSF.⁵³ The NSSF must operate separate accounts, to be maintained and administered under each of the three branches of insurance established under the Bill,⁵⁴ namely:

- insurance against old age, disability, and death;
- insurance against employment injuries, and
- maternity insurance.⁵⁵

The NSSF is to be independent of the government budget.⁵⁶ Unlike the case of Namibia, where there is a specific provision that moneys will be appropriated by Parliament for purposes of the various funds,⁵⁷ there is no such provision in the case of Lesotho, save where money is provided for taking care of a deficit in the fund.⁵⁸ The monies that will be allocated by the government for the purposes of settling a deficit will ultimately have to be budgeted for by the government. Therefore a provision that the fund will be independent of government's budget is questionable: in terms of this provision, it will be impossible to have a fund whose budgeting is independent of the government budget. Also unlike the case of Namibia, where the

52 Clause 17.

53 Clause 17.

54 They are established under clause 3(2).

55 Clause 17(1).

56 Clause 17(1).

57 Sections 28(3)(b), 32(3)(b), 34(3)(b), 37(3)(b) of the Namibian Social Security Act 1994.

58 Clause 17(2)(d) of the Bill.

various funds have juristic personality,⁵⁹ the NSSF does not have a juristic personality. This means that it has no corporate character.

Review of the financial position of the organisation

The Bill provides for the review of the financial position of the organisation at least once every three years from the date of commencement of the Act by an actuary to be appointed by the Board.⁶⁰ Critics may argue that the period of three years is too long as financial matters are by nature very sensitive and a delay in attending to them may spell doom to the organisation. Furthermore, it is not clear why the framers of the Bill decided on the period of three years and no other. It would ordinarily be expected that the review period should be at least annual. This would be consistent with the legal fiscal policy of the GOSS, which spells out that the financial year of the organisation starts on 1 April and terminates on 31 March of the following year.⁶¹

This is all the more unusual as the review must include an estimate of the existing commitments of the scheme.⁶² Furthermore, in case a deficit appears in the funds of the organisation and the various reserves are insufficient to settle such deficit, the government is obliged to settle such deficit.⁶³ Where the valuation of the scheme reveals the existence of a surplus, this surplus must be transferred to a special account and not be disposed of except with the approval of the Board.⁶⁴ Moreover, the surplus must be used for two purposes. First for setting up a general reserve and any other special reserves for the various purposes,⁶⁵ such as providing for any additional social risks not yet provided for in the Bill. Second, it must be used for settling, in full or in part, the deficit payments made by the government.⁶⁶

Assessment of insured's contribution

In terms of the Bill, the contribution of the insured is to be assessed on the basis of the monthly wage received by the insured.⁶⁷ The determination of contributions due in respect of each month of a year, whether they be those of employers or those deducted monthly from wages of the insured, may be made upon the basis of the wage received in the month of April of each year.⁶⁸ In the case of employees who

59 Sections 28(2), 32(2), 34(2), 37(2) of the Namibian Social Security Act 1994.

60 Clause 18(1) of the Bill.

61 Clause 16.

62 Clause 18(2).

63 Clause 18(2).

64 Clause 18(4).

65 Clause 18(4)(a).

66 Clause 18(4)(b).

67 Clause 19(1).

68 Clause 19(2).

enter employment after the month of April, the contribution is to be computed on the basis of the wage in the month of such entry to employment and until the end of the month of March of the following year; thereafter, contributions will be treated on the basis of the wage received in the month of April in each year.⁶⁹

Computation of the monthly wage

The Bill provides that, for the purpose of computing the monthly wage of daily-rated workers, the daily rate should be multiplied by 30 and the resultant monthly rate should be used for the purpose of calculating the insurance contribution.⁷⁰ The criticism to be levelled at this provision is that it is not clear why the number 30 has been chosen. Assuming that it has been chosen because it represents the number of days in a month, then the criticism is that not all months comprise 30 days. On the one hand, if the rationale was to set a general standard for computing contributions, it could still have adequately served the purpose to base computations on the number of days of each month. If, on the other hand, the idea was to ensure that computations were based on the actual number of days worked by a worker, it fails to take into account the fact that no worker in Lesotho is legally permitted to work for a period of 30 continuous days.

The reason for this is that, as a general rule, every employee is allowed a weekly rest period of at least 20 continuous hours which, whenever practicable, includes Sunday as the day of rest.⁷¹ However, if the circumstances of a particular employment contract so dictate, an employer may, after consultation with an employee or his or her representative, at not fewer than three days' notice, grant a different period of at least 24 continuous hours in that week as the period of weekly rest for the employee concerned.

The Bill further provides that the contribution of the monthly wage of a worker who is paid by piece work or production or by the hour must be computed on the basis of the monthly average wage for the actual period worked during the previous three months. However, for new workers, the average wage of a similar worker must be taken as the basis for computation.⁷²

Exemption from taxes and fees

The contributions required under the Bill are to be computed on the basis of the wage before deducting taxes and fees due, or which may be due, or debts or instalments and such like.⁷³ The soundness of this provision lies in the fact that gross income is

69 Clause 19(3).

70 Clause 20(1).

71 Section 117(1) of the Labour Code Order 24 of 1992.

72 Clause 20(2).

73 Clause 21.

a reliable and predictable base for computation. As opposed to gross income, net income changes from time to time depending on the needs of an insured. Contributions based on net income would also not be constant in terms of the amount tendered; neither would their basis of computation.

Contribution in case of secondment of employee to another employer

The Bill provides for the continuous payment of contributions by the substantive employer of the insured while the insured is on secondment. It provides that the first establishment is to continue to carry the full obligations of social security to the organisation, including the insured's share.⁷⁴ The philosophy behind this provision is to ensure that no gap is created in the payment of contributions on behalf of the insured, which could prejudice the worker.

The Bill introduces an implied term in contracts of employment that, in the case of a secondment contract, an undertaking is made between the two establishments for the one to reimburse the other for a seconded employee's social security contributions. The Bill does not, however, tell us what will happen should there be no agreement between the establishments on the matter of reimbursements. This represents a deficiency in the Bill. It would be better to introduce penalties for failure to agree on reimbursements if the intention is to protect the employee's contributions.

Contributions and date of entering employment

There is a further provision that insurance contributions must be paid for the month in which an employee enters employment; the contribution will be levied on the basis of a full month if the total number of days worked during that month is 15 days or more; similarly, if⁷⁵ a contribution is levied in respect of the month of termination of service, it will be based on a full month's wages if the total number of days worked during that month is at least 15. No contributions are payable for the month of commencing employment or in which employment is terminated if the number of days worked is fewer than 15.

Critics would argue that there is no apparent reason for not providing for contributions to be paid where an employee entered employment and spent fewer than 15 days in employment. A further criticism is that this amounts to the exploitation of employees as it is bound to affect their contributions and therefore their benefits in the future as a result of not including the 14 days (or fewer) that an employee would have worked for. In any event, there is no apparent reason why the framers of the Bill decided to settle on 15 days as the threshold for computing contributions.

74 Clause 22.

75 Clause 23.

CONCLUSION

This discussion of the National Social Security Bill has revealed that, as it stands, Lesotho's Bill will not provide a comprehensive social security scheme. It is also apparent that the Bill promotes social exclusion by leaving some categories of employees and other persons out of its scope of coverage, largely because it is preoccupied with protecting those employed in the formal sector. Despite the introduction of the Bill, the provision of social protection in the country has not been harmonised. The Bill should be able to address the implemented social security programmes and social insurance schemes, and specific policy measures such as transfers and subsidies; but there are also market-based systems that need to be included in its ambit in which firms offer social insurance based on actuarial calculations, member-based organisations, some of them called non-profit organisations, co-operatives, mutuals and self-help groups, which voluntarily provide services to their members. The Bill should also provide for the private household level at which family members provide social security mainly on the basis of social norms and values.⁷⁶ In order to promote integration and inclusiveness, the scheme has to be revised so as to increase the number of people and contingencies covered.

There is still a lot of work to be done to improve the clarity of the Bill, such as clarifying some concepts. A further aspect relates to the introduction of social assistance provisions so as to co-ordinate the on-going programmes already in place in Lesotho. Lastly, as has been shown, the social security financing mechanisms introduced by the Bill will need to be revisited so as to accommodate sounder principles of social security financing. The Bill does not appear to have taken on board some of the principles advocated by the ILO and World Bank models. It is hoped that these principles will help to improve the contemplated social security scheme for the country.

REFERENCES

- Asian Development Bank. 2002. *Report and Recommendation of the President to the Board of Directors on a Proposed Cluster, First Loan and Technical Assistance Grant to the Republic of Indonesia for the Financial Government and Social Security Reform Progress*, RRP: INO 33399, November.
- Baxter, L. 1984. *Administrative Law*. Cape Town: Juta & Co.
- Guhan, S. 1994. Social security options for developing countries. *International Labour Review* 133(1): 35.
- Hagemejer, K. 2009. Can low-income countries afford basic social security? Available at <<https://www.oecd.org/dac/povertyreduction/43280726.pdf>>.

76 See, generally, Jütting (2009) 4–7.

- Hall, DT & Goodale, JG. 1986. *Human Resources Management: Strategy, Design and Implementation*. New York: Scott Foresman, Pearson Education Inc.
- Holzmann, R, Sherburne-Benz, L & Tesliuc, E. 2006. Social risk management: The World Bank's approach to social protection in a globalising world. Social Protection Department, The World Bank, Washington, DC, May 2003. Available at <<http://siteresources.worldbank.org/SOCIALPROTECTION/Publications/20220038SRMWBAApproachtoSP>> (accessed 21 February 2016).
- International Labour Office (ILO). 1984. *Into the Twenty-First Century: The Development of Social Security*. Geneva: ILO.
- International Labour Office (ILO). 2001. *Social Security: A New Consensus*. Geneva: ILO.
- International Labour Office (ILO). 2004. *Technical Comments on the Consolidated National Social Security Act of the Kingdom of Lesotho*. Geneva: ILO.
- Jütting, J. 2009. Social security systems in low income countries: Concepts, constraints and the need for cooperation. *International Social Security Review* 53(4): 3–24.
- Olivier, M & Van Rensburg, LJ. 2001. Perspectives on the concept of social security. In M Olivier, E Kalula, J van Steenberge, Y Jores & W van Eekhoutte (eds) *The Extension of Social Security Protection in South Africa – A Legal Inquiry Extension of Social Security Protection in South Africa: A Legal Inquiry* Cape Town: Siber Ink.
- Olivier, M. 2004. Social protection in SADC: Developing an integrated and inclusive framework – A rights-based perspective. In MP Olivier & ER Kalula (eds) *Social Protection in SADC: Developing an Integrated and Inclusive Framework*. Cape Town: Centre for International and Comparative Labour and Social Security Law (CICLASS) and Institute of Development and Labour Law.
- Olivier, MP. 2003. The concept of social security. In MP Olivier, N Smit & ER Kalula (eds) *Social Security Analysis*. Durban: LexisNexis Butterworths.
- Olivier, MP & Kaseke, E. 2005. *Report to the Tanzanian Labour Law Reform Task Force*.
- Quiesser, M. 1998. Regulation and supervision of pension funds: Principles and practices. *International Social Security Review* 51(2): 39.
- Rwegoshora, HMM, 2005. Employment-based Social Security Systems in Tanzania, *Labour Law Reform* (Phase II), February.
- Schein, EH. 1980. *Organisational Psychology*. New York: Prentice-Hall, Pearson Education Inc.
- Sylva, AG. 1989. Managerial problems in the administration of social security scheme. In Workshop in Organisation and Methods for Chief Executives of Social Security Institutions in English-speaking Africa, Swaziland, 7–10 November. Geneva: ISSA.
- Scheinin, M. 1995. The right to social security. In A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: Textbook*. Dordrecht: Martinus Nijhoff.
- Tamuri, G. 1999. Motivation, purpose and processes in pension reform. *International Social Security Review* 52(3): 25.
- Taylor, V. 2002. Committee of inquiry into a comprehensive system of social security for South Africa: Transforming the present – protecting the future. *Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa*.
- Van Ginneken, W. 2007. Extending social security coverage: Concepts, global trends and policy issues. *International Social Security Review* 60(2/3): 39.

- Walters, H. 1999. Leadership and teamwork in a hostile environment: A true inspirational challenge. *Management Today* 15(7).
- Wehmeier, S, McIntosh, C & Turnbull, J (eds). *Oxford Advanced Learner's Dictionary* (International Student's Edition, 7 ed). Oxford: Oxford University Press.
- Wiechers, M. 1985. *Administrative Law*. Durban: Butterworths.