

THE CONSTITUTIONAL RIGHT OF ACCESS TO SOCIAL SECURITY: PART II – PROPOSED SOLUTIONS

Avinash Govindjee
BA LLB LLM
Lecturer, University of Port Elizabeth

SUMMARY

This is the second of two articles dealing with the constitutional right to have access to social security in South Africa. Part I dealt with the general introduction to the topic and highlighted some concerns relating to the right to have access to social security in South Africa and the inclusion of this right in the Constitution. Part II contains a study of various proposed solutions to these problems with particular emphasis on attempts to assist those excluded from the formal framework of social security.

1 INTRODUCTION

The task facing the government in its attempt to solve some of the problems highlighted in Part I is considerable. The government wants to increase self-reliance and thereby lessen the dependence of individuals on the state.¹ This is to be achieved by assisting the poor and vulnerable to access the employment and training programmes provided by various government departments, non-governmental organizations involved in small business development, co-operative enterprises and the creation of other employment opportunities.² Many authors and politicians have stated that the problem of a lack of jobs requires reform in order for progress to be made. This much is widely accepted. Suggestions regarding the way in which the economy may be restructured, so that profitability and efficiency may be increased in order for the general level of demand for labour to rise, have not been as forthcoming. Individuals may contend with certain contingencies by taking out social insurance (which in some instances has been made compulsory by the state). With high unemployment rates, however, many individuals simply cannot provide insurance for themselves.³ To give effect to the right of

¹ *White Paper on Social Welfare* (1997) accessed at <http://www.gov.za/whitepaper/1997/soswel97.htm>.

² Barker "Financing Social Security" in Strydom (ed) *Essential Social Security Law* (2001) 194 213.

³ Barker 213; Olivier, Smit and Kalula *Social Security: A Legal Analysis* (2003) 200.

access to social security will only be possible if the unemployment problem is successfully addressed.

Social assistance measures seldom operate to the direct advantage of those who need them. Due to the narrowly defined nature of both social services and programmes, and of the various social grants, many of the poor, informally employed and structurally unemployed unfortunately remain part of the socially excluded population.⁴ Olivier states that to propose long term solutions to the exclusion and marginalisation of certain groups in the South African social security system would not only require a comparative analysis of some magnitude, but also a more or less complete restructuring and overhaul of the system as we know it today.⁵ In this regard, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Committee) recently recommended major changes to the system in its draft consolidated report.⁶

The difficulty of the government task depends partly on the pattern of production that was inherited and the extent to which it was distorted away from a market-forces-determined pattern; and partly on the extent to which the onset of the transition has been accompanied by a recession and a resulting fall in overall labour demand.⁷

One suggested way of hiding the labour surplus in Eastern European countries is to avoid forcing unprofitable state enterprises to lay off workers or to become bankrupt. The difference between Eastern European countries and South Africa, however, is that there is a dearth of state enterprises in this country, profitable or not, whereas countries formerly following a communist philosophy frequently encouraged labour-intensive state enterprises. Another method is to devise ways of adding to the demand for labour which the market, left to itself, would not provide. In other words, non-market ways of adding to the demand for labour are created. The traditional way of doing this is through public work schemes.⁸

In principle, such schemes create employment directly during the construction process. More employment is created indirectly through linkages to supplying industries. An added bonus is that workers spend their earnings, which stimulates the economy. Finally, when the assets have been built, these assets (such as schools, roads and health centres) help to raise

⁴ Olivier "Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and Marginalized" 1999 *ILJ* 2199 2206.

⁵ Olivier 1999 *ILJ* 2200.

⁶ *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa*. Draft Consolidated Report (2002).

⁷ Godfrey "The Struggle Against Unemployment: Medium-Term Policy Options for Transitional Economies" 1995 *International Labour Review* 3.

⁸ Godfrey 1995 *International Labour Review* 9.

productivity and income in the area. The advantage of such public work schemes is that, when applied successfully, they are self-liquidating – fading away automatically as the level of market demand for labour in the economy rises.⁹ It is the lack of imagination in creating such schemes in South Africa which is curious.

What should possibly be attempted is to identify projects which have previously been thought of as being too large to attempt. Practically, this could be done by inviting different interest groups to brainstorm a list of projects which will require a great deal of labour, and which will have the result of providing some long-lasting benefit to the country and its people. For example, any ecological interest group will lobby for greater eco-awareness and for less pollution within their area of interest. A large-scale clean-up operation could be organised in order to beautify a particular area of the country. This could have the result of increasing tourism to that area should the project be successfully completed. If the project is unsuccessful, then the benefit which has been obtained is restricted. On the other hand, if the idea has been well thought out and properly executed, the area could become a tourist destination, or it could be an area which the group of people involved in the project may consider settling in. A new type of community may have been created. Although the above may appear to be nothing more than wishful thinking, working from the premise that the current situation is completely inadequate and that drastic reform is needed, one feels that such a hypothesis is justified and should be explored by the experts in such fields. The ultimate goal, as far as relating this to access to social security is concerned, is the creation of employment in the short-term, the creation of a benefit for the country (in the form of beautification, cleanliness *etc*) and the possible creation of a new community, with a corresponding decrease in the need for social assistance to those people involved.

The Coega project in the Eastern Cape is, on paper, a great example of this idea. A village is being built for people who are working on the project, complete with sporting, shopping, restaurant and banking facilities. Upon completion of the project, the houses built for the workers will be handed over to the municipality and it is envisaged that a new community will have been formed. Although a number of jobs will ultimately be created, with economic spin-offs for service providers in a variety of sectors, the impact of the project on social security appears to be negligible. As workers will be mainly hired for a contract period, they will remain uninsured against loss of income other than in accordance with statutory minimums. No plan is in place for the long-term security of these workers and their families despite the port being the ideal candidate in the Eastern Cape for making a long-lasting social impact. Private savings are not being highlighted and it is possible that a few years after the project is completed, a large percentage of the workers involved will be back in the ranks of the unemployed and

⁹ *Ibid.*

dependent on the state for social assistance, rather than being economically secure.

The Committee found that, given apartheid and structural unemployment, the current range of poverty relief projects are unable to make any significant impact on mass based unemployment and levels of income poverty in the immediate term and are not cost efficient in terms of their outcomes.¹⁰ It was also ascertained that there is an inequitable geographic spread of Public Works projects.¹¹

According to Asghar Adelzadeh, a senior policy advisor at the United Nations Development Programme, two principal reasons for increased joblessness are, firstly, policies designed to achieve the restructuring of the economy through export promotion in an increasingly liberalised economy; and secondly, other “stabilisation” policies that have focused on lowering inflation and the deficit by administering contractionary measures in the economy. Neither of these two policy thrusts has placed an emphasis on job creation.¹² He writes that:

“The goal of substantially reducing the unemployment rate will remain elusive unless a strategy of openness, competitiveness and macroeconomic stability is pursued through policies that prioritise employment creation and poverty reduction. Contrary to the position taken in the 1998 Job Summit, the strategy of employment creation through projects and programmes is too limited in scope and potential to address the massive unemployment problem in the country. The outcome is very clear ... focus on adopting an employment-generating growth strategy that, first and foremost, utilises all macro- and microeconomic policy instruments to enhance growth and its employment intensity. Additional projects and programmes can then complement such a new thrust for employment creation.”¹³

2 POVERTY RELIEF AND SOCIAL SECURITY

The government has attempted to address the need for greater access to social security indirectly in the form of poverty relief. As will be illustrated, however, good ideas have not been coupled with a commitment to a long-lasting solution to the persistent problem of lack of access to social security.

The Department of Public Works has channeled funds for poverty relief through the Community Based Public Works Programme (CBPWP). According to Dupper, the key aims of the CBPWP are twofold:

- The first is to manage the implementation of job creation programmes targeted at the poorest rural areas. The programme concentrates on

¹⁰ *Transforming the Present – Protecting the Future* 56.

¹¹ *Transforming the Present – Protecting the Future* 57.

¹² Adelzadeh “On the Path to Nowhere” <http://www.labourguide.co.za/economy.htm> (Apr 2003).

¹³ *Ibid.*

creating productive assets such as community gardens, access roads, child care centres and sport complexes. The department has also implemented a training programme for youth and women on major capital works projects.

- Secondly, to support emerging black contractors by setting up help desks to offer support regarding work opportunities, training, information, finance and credit.¹⁴

The government also established the National Presidential Lead Project (NPLP) to pilot affordable mass housing delivery. The government thereby committed itself to ensure that a minimum of 50 000 and a maximum of 150 000 housing units will be built for low-income families through the NPLP. The government will, more importantly, encourage the use of labour intensive construction methods in the award of tenders in order to ensure that as many jobs as possible are created.¹⁵

No mention is made, however, of the access to social security that these people will enjoy. The types of work described above are traditionally not conducive to formal, fixed employment and it is highly unlikely that anything has been done to offer some income protection to those involved. The government's broader poverty relief strategy and the specific allocation for poverty relief are supplemented by a number of dedicated funds and agencies. These include the Umsobomvu Fund, the National Development Agency (NDA) and the National Lottery Distribution Fund and are expected to result in greater employment and poverty relief. The long-term effect of these agencies and funds on access to social security remains to be seen.

In March 2003, the Minister of Social Development, in his budget vote speech, announced that more than 2,6 million children under seven years had been registered for the Child Support Grant to date. The grant had also been increased to R160,00 per month and the Minister promised an increase in the age of eligibility for the grant for children up to their fourteenth birthday, to be implemented over three years which should result, at least, in the doubling of the number of beneficiaries. The Department of Social Development's budget increased to just under R2-billion last year, of which 57% is to be used for the extension of the Child Support Grant.

3 A NEW DEAL – WITH A NEW SACRIFICE

Many great civilizations have had to overcome hardship similar to that experienced by South Africans today. When Franklyn D Roosevelt took office in 1932, at least 12 million workers were unemployed. With their families, they added up to about 50 million persons, many of them on the

¹⁴ Dupper "The Lack of Opportunities for Disadvantaged Members of Society" in Strydom (ed) *Essential Social Security Law* (2001) 188 189.

¹⁵ Dupper 190.

verge of starvation, subsisting as best they could on a day-to-day basis. As in South Africa, the issue was not whether the government should act, but how; that is, whether to make handouts to the poverty stricken, which was the cheapest plan, or whether to provide work relief.¹⁶ It has been said that neither Beveridge nor Bismarck nor Roosevelt can provide a model for social security in developing countries.¹⁷ For Roosevelt's New Deal to be used as an example for South Africa, the spirit of self-sacrifice and commitment to the public good, which characterises volunteerism, will have to flourish.¹⁸

The first New Deal assistance to the unemployed was the Civilian Conservation Corps (CCC) for the youth of the country. At one point, the CCC had on its rolls 500 000 men between the ages of 18 and 25. Recruited from cities to camps built by the War Department, they worked on re-forestation, road and dam construction, control of mosquitoes and other pests, and similar tasks. Interestingly, almost 75% of the income earned was sent to the man's family.

Unless rural roads receive urgent funding for maintenance and development, the South African government's promise to improve the living standards of poorer people will remain unattainable.¹⁹ The Sabita-sponsored "*Taking the High Road*" project focused on the vital role played by roads in the delivery of second generation rights to South Africa's poorer communities. It has found that while access roads remain in their current poor condition, there is no hope of the standard of living of rural people improving as economic growth is unable to trickle down to these communities. By improving roads in a labour intensive manner, there is no reason why the positive impact of Roosevelt's road construction in the 1930's cannot be repeated. In fact, there is a great deal which South Africa can learn from Roosevelt's programme.

The first comprehensive New Deal relief measure was the Federal Emergency Relief Administration (FERA). At first, cash payments were distributed, but in time, almost half of those receiving relief were put to work on jobs that would not compete with private business. Pay began at 30 cents an hour.²⁰

The Public Works Administration had duties including planning bridges, dams, hospitals, municipal power plants, post offices and school buildings; slum clearance; and the rehabilitation of army posts and naval stations, and

¹⁶ Hofstadter, Miller, Aaron, Jordan and Litwack *The United States* (1979) 340.

¹⁷ Ahmad, Dreze, Hills and Sen *Social Security in Developing Countries* (1991) 103.

¹⁸ <http://www.polity.org.za/govdocs/speeches/2001/sp0606a.html>; (2001).

¹⁹ Ngubane "Parliamentary Report: South African Roads Policy Project" May 2001 *Asphalt News* 1.

²⁰ Hofstadter *et al* 340.

contracted for this construction privately. A distinction was later drawn between employable persons who needed relief and “unemployables” who could not have found work even in good times. This was implemented by the so-called “Works Progress Administration” (WPA). Public works such as the Orange River Scheme, the Tugela Vaal project and the Lesotho Highlands project are good examples of South African attempts since the 1960’s to provide solutions to major problems via water transfers from areas of surplus water to areas of water shortage. These projects are long-term in nature (the Lesotho Highlands project is expected to be completed in 2016) and are significant for employment creation and job security. This is an illustration of the state taking reasonable measures within available resources to achieve the progressive realisation of the right of access to social security. The true test of success will only be evident once the projects are completed and the community begins to enjoy the economic spin-offs. Ideally, the co-ordinators should have taken steps to ensure that the workers on the projects are secure (by virtue of their long-term work on the project) to the extent that they will not burden the state at all once their working days are completed.

The WPA also recognised the claims of the arts, whose practitioners, like other workers, were left stranded by the depression. By encouraging projects in the fine arts, music and the theatre, employment was given to painters, writers, actors, singers, instrumentalists, stage hands and many others. WPA’s cultural work was supplemented by a National Youth Administration (NYA), which helped meet the needs of young persons with intellectual interests. Through the NYA, young people aged 16 to 25 found part-time employment in high schools, colleges, and universities.²¹

The idea of using culture as a tool for social security in South Africa is potentially significant. South Africans are, generally speaking, a musical and artistic people, whose skills have long been admired world-wide. Although presently encouraged, culture has not been used thus far in South Africa’s new dispensation as a method of creating organised employment and social security. Realistically, the possibility of implementing such a notion successfully in South Africa, and particularly in the Eastern Cape, is poor. Even in the time of the New Deal, its relief programme drew more criticism than anything else. The cost was truly enormous for the times, and the tax burden had to be shouldered by the depressed private sector of the economy. No part of the relief programme, in turn, drew more criticism than its support of cultural activities. Many Americans had no sympathy with the thought that musicians, writers and artists had as much claim on the community as did workers in other fields.²²

Self-employed persons and entrepreneurs must be encouraged as they create employment. The informal economic sector, for example street

²¹ *Ibid.*

²² Hofstadter *et al* 341.

hawkers, flower-sellers, home industries and car guards also offers important alternative sources of income in our present economic conditions.²³ These people sometimes manage to escape the poverty trap as a result of their endeavours, but often without access to any form of social security. This problem can be solved by an education programme encouraging private savings, or perhaps by the creation of a state special savings programme for small business people, with small contributions made by the state to encourage the business. People receiving such a benefit should not be permitted to simultaneously claim any form of social grant. The informal sector must be seen as a praiseworthy example of community self-help efforts to surmount the problems of unemployment and poverty.²⁴ Not all problems will be solved in this way, as the informal sector has limitations as a result of the fact that the undertaking is often small, working conditions are difficult, income is unstable and often very meagre, and the potential for growth is low.²⁵

4 DEFENCE

The issue of the country's defence system is also an interesting one when seeking solutions to social security problems. The 2001 Budget in South Africa was criticised by the Congress of South African Trade Unions (COSATU) because spending on defence had risen faster than the budget as a whole, having increased by 14%. The effect of this upon poverty relief is notable, with the annual cost of the arms procurement programme around R5-billion a year at the time, compared to approximately R1,5-billion a year committed to poverty relief.²⁶

The government was to slash billions of rands off its planned R29-billion purchase of new equipment for the military after an extensive investigation ordered by President Thabo Mbeki.²⁷ A furore erupted over an anonymous report distributed in Parliament claiming that R6-billion would be wasted if the navy went ahead with its plan to buy new ships and submarines. The document, claiming to be a research paper for Parliament's portfolio and joint standing committees on defence, raised the important issue of whether such expenditure could be justified when viewed against the greater need for social spending, poverty relief and job creation.²⁸ The huge amount spent on defence is often considered unjustifiable as a result of the lack of any serious external threat to the country and the international environment in which we now live. Prior to 11 September 2001 (the date of the attack upon the World

²³ Vermeulen *Affordable Social Security: A Literature Study* (1986) 10.

²⁴ Tomaselli *The Indian Flower Sellers of Johannesburg* (1983) 10-14.

²⁵ Simon "Urban Poverty, Informal Sector Activity and Intersectoral linkages: Evidence from Windhoek, Namibia" 1984 *Development and Change* 551-569.

²⁶ <http://www.suntimes.co.za/business/budget/budget12.asp> (2001).

²⁷ http://www.polity.org.za/govdocs/white_papers/defence.html (2001).

²⁸ *Ibid.*

Trade Centre in New York), this may have been a viable solution due to the existence of the United Nations and considering America's tendency to assist a country like South Africa should it come under military threat. It goes without saying that this option now needs to be questioned.

Although the money spent on defence also includes job creation, there has not been an active drive to recruit unemployed people and train them for possible service in the armed services. To do this would result in the creation of more jobs and a strengthening of the military force of the country. Defence spending has typically involved expensive advancements in technology. The number of people required for an effective defence force appears to have been neglected and this is a possible solution to two problems. Even if the trainee is not of the required standard, perhaps some purpose would be served should these individuals return to their developing communities where they could serve as community "defenders" or guards. They would have to be paid for their services (by the community itself if possible) and the result would be a reduction in crime in the area.

Further on the topic of the defence force, one questions why these troops are not utilised more in areas where crime is prevalent.

The criticism against a greater use of the defence force will surely be that the amenities of life of citizens will be spoiled by having to walk outside their front door only to see uniformed defence force troops on every corner. Cairo is a city where this system is extremely noticeable, and yet this in no way detracts from the sights of the city. In fact, as a tourist, one feels safer in the knowledge that some potential help is a shout away should the need arise. The same argument must surely apply for some of the more dangerous suburbs of South Africa. Implementing this, even only temporarily, should have the effect of creating more "jobs" (in the sense that more unemployed people will join the defence force), in addition to hopefully reducing crime and therefore benefiting the economy. The implication of this on the constitutional right of access to social security is that those who have gained employment will be protected against loss of income by social insurance from their salary, while those still unemployed will benefit in the long run from the improvement of the economy. Should the economy take an upward turn, social assistance measures may be increased – both in their amount and in the extent of their application, thereby giving greater effect to the constitutional right of access to social security.

Crime is a social problem experienced in all sectors of South African society. Its impact is felt by individuals and families and by agencies and organizations whose task it is to deal with the problem. Although it is impossible to predict future trends with any degree of certainty, the predicted levels of unemployment have important implications for policy makers and

planners if future needs with regard to crime control and prevention are to be taken into account.²⁹

It is submitted that the state's obligation should be to provide just the basic form of employment together with some form of social security coupled to that job. People who are employed must try to use part of their wages to improve their skills so that, in the event of their losing these jobs, they will be able to use their Unemployment Insurance Fund (UIF) payments and find a new job while they are drawing unemployment benefits. While seeking a job, they should be able to join the masses in the state-created public works scheme to supplement their UIF. It is submitted that the state will discharge its Constitutional duty as long as it provides work – even if only at minimal pay and benefits – and security in the event of loss of work. It will then be left to the people themselves, the objects of social security, to convert these provisions and opportunities into a better life.

5 A SOCIAL WAGE

Most jobs being created are temporary, casual or part-time. The new millenium scenario is threatening a growing army of unemployed and “underemployed” people who subsist alongside a shrinking permanent workforce.³⁰ The consequences include rising inequality, job insecurity and crime. The ultimate result can only be a disintegrated society and a torn country. With this scenario in mind, it was agreed at the Presidential Jobs Summit that South Africa required a “comprehensive social security system”, aimed directly at the unemployed and those living in poverty.³¹

With changes in the labour market and higher unemployment, more people require some form of security in respect of their income. Many do not, however, qualify for this security under social assistance or social insurance systems, as mentioned above. To address this, a revised notion of a “social wage” is becoming popular.³² This idea originated with COSATU in 1997 and amounts to a base level or economic floor of income below which no South African should sink. The manner in which social wages are provided must transform economic organisation and social relations through, for example, giving people support for developing community co-operatives. As a result, individuals and communities will be empowered to support themselves even if they cannot find work in the capitalist economy. They will also begin to build an alternative to capitalist relations through the development of a socially-owned sector.³³ In this way, the provision of

²⁹ Snyman *Life Cycle Crisis and Social Security: Trends Until the Years 2000–2020* (1998) 70.

³⁰ Naidoo “Social Security for a Post-Millennium Society” 1999 *South African Labour Bulletin* 53.

³¹ *Ibid.*

³² *Ibid.*

³³ Naidoo 1999 *South African Labour Bulletin* 54.

social wages or comprehensive social security is about what is provided, who provides it, and how it is provided. The current “social wages” debate thus expands the mainstream definition of social security.³⁴

It is unlikely that the public sector could, by itself, provide all the necessary social wage benefits. A social wage is likely to be delivered by a combination of the public, non-profit and private sectors. The public and non-profit sectors should be given a greater role over time, while the private sector is brought into a tighter regulatory net in the interim.³⁵ There could also be a role for the unions in the delivery of such services.³⁶ Public action must not be confused with state action only. Public action includes not merely what is done *for* the public by the state, but also what is done by the public for itself. The political role of pressuring the government to act is a particularly important action that can be undertaken by the public. Public involvement and activism may have the role of drawing the attention of the government to problems that may otherwise be neglected and of forcing the hand of the government by making it politically impossible – or at least unwise – for it to ignore impending threats.³⁷

The importance of access to social security for South Africans is often under-emphasised. Social security shapes the relative strengths of the social forces. The classic debate is whether the “welfare state” stabilises capitalism or is an advance towards wider socialization. All around the world, modern social security systems were developed to support capitalist development. For example, public transport developed mainly as a way to reduce the private costs of transporting workers to their workplaces.³⁸ Furthermore, in many countries, government and business provided social security to skilled workers to help soften and win over a key component of the working class. It is, therefore, very important for unions to ensure that any demands for a social wage go beyond simply meeting the needs of their own membership.³⁹

The Committee states:

“The level at which a Basic Income Grant is set will be crucial. At the very least it should address destitution. By providing such a minimum level of income support people will be empowered to take the risks needed to break out of the poverty cycle. Rather than serving as a disincentive to engage in higher return activities, such a minimum (and irrevocable) grant could encourage risk taking and self-reliance. Such an income grant could thus become a springboard for development.”⁴⁰

³⁴ *Ibid.*

³⁵ Naidoo 1999 *South African Labour Bulletin* 58.

³⁶ *Ibid.*

³⁷ Ahmad *et al* 29.

³⁸ Naidoo 1999 *South African Labour Bulletin* 54.

³⁹ *Ibid.*

⁴⁰ *Transforming the Present – Protecting the Future* 61.

The Committee recommended the gradual development of a comprehensive and integrated income support that can underpin South Africa's comprehensive social protection system. A two-phase approach was suggested, with phased delivery balancing the need to allow time for the development of necessary institutional arrangements and ensuring that the state is able to meet important domestic and international commitments related to poverty reduction.⁴¹

Liebenberg criticizes the TAC case⁴² for its rejection of the notion of minimum core obligations which, according to her, will make it very difficult for litigation to be used as a strategy for immediate relief by those living in extreme poverty.⁴³

6 FINANCING SOCIAL SECURITY

Social assistance in South Africa is financed out of general tax revenues, mostly through the budgets of provincial departments of welfare. It constitutes the biggest element of the so-called "welfare expenditure" item of the budget, which in turn, together with health and education, forms part of the broader "social services" category in the budget. Welfare expenditure is now the fourth-largest functional area of government expenditure, forming about 11% of total expenditure and expected to increase by almost 8% per year over the next few years.⁴⁴

One suggested way to begin to expand public sector social wage provision is to withdraw the tax benefits that the "for-profit" sector receives for providing such benefits.⁴⁵ Much private provision has largely been to take advantage of these tax incentives, which are ultimately at the expense of other taxpayers. By withdrawing these tax incentives, tax revenue will be increased and this revenue can be channeled to support an expanded social wage programme. An even better alternative may be to *increase* tax benefits for proprietors of labour intensive schemes. What must be avoided is diverting these extra funds, when created, to a sector other than social security. Undoubtedly there are other rights, such as housing, health and education, which will have a *bona fide* claim to any additional funds. It is for this reason that a comprehensive social security system needs to be implemented and acknowledged as an important means towards obtaining the desired level of housing, health and education. The public, however, need to make an informed decision about prioritizing the social security

⁴¹ *Transforming the Present – Protecting the Future* 63, 64.

⁴² *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

⁴³ Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" 2002 (2) *Law Democracy and Development* 159 190.

⁴⁴ Barker 194-195.

⁴⁵ Naidoo 1999 *South African Labour Bulletin* 58.

system. In *Van Zyl v Jonathan Ball Publishers (Pty) Ltd*,⁴⁶ it was held that there is no hierarchy of rights as set out in the Constitution. When competing rights are asserted, therefore, the assertions and the clashes have to be viewed in context and against the circumstances of each case.⁴⁷ It must be understood that almost none of the other rights include a benefit which is guaranteed for the duration of a person's existence. An effective social security system can provide this by equipping an individual with work, income and security in the event of loss of work, including old age and disability. This income may then be used to provide for other individual and family needs.

It may also be possible to raise additional revenue for social security through indirect taxation – particularly on products which themselves have a social impact, such as the already highly taxed alcohol and tobacco.⁴⁸ The raising of additional local revenue for redistribution must, however, be balanced by publicly acceptable tax rates and the need for all residents to see some visible benefit from their taxes.⁴⁹ One point that needs emphasising is that if taxes are introduced or extended, the sphere of government levying the tax must confide in the taxpaying public. Citizens are the ultimate beneficiaries of any tax and the reasons for the tax, the rate and method of assessment and the ultimate use to which the revenue will be put must be clearly communicated to them.⁵⁰ Although the Finance Minister gave the people more than R8-billion in tax concessions in the recent budgets, it is arguable that the money would have been better spent as part of a focused anti-poverty or job-creation strategy.⁵¹

South Africa's problem has often been poor implementation (rather than a total lack) of finance and resources. With the natural resources at the country's disposal, it is astounding that the situation in the country has deteriorated to such an extent. A modern example of this is the "Lotto", or national lottery. Within a year of its commencement, this concept, which was expected to provide some poverty relief, had been plagued by problems and queries concerning the distribution of the income generated. Again, there appears to be a lack of a long-term plan or strategy and the government appears to have made the mistake of giving what they can to the needy – without equipping these people to fend for themselves in the long run. One does not advocate a preference of the right to social security over all other rights. What is necessary is to prioritise this right on account of its potential to create long-term solutions to some other major problems.

⁴⁶ 1999 4 SA 571 (WLD) 573.

⁴⁷ *Van Zyl v Jonathan Ball Publishers (Pty) Ltd supra* 591.

⁴⁸ Olivier 56.

⁴⁹ Fast and Franzsen "Financing Local Government in Rural Areas: Status, Key Issues and Potential Revenue Sources" 1998 *De Jure* 336 343.

⁵⁰ Fast and Franzsen 1998 *De Jure* 351.

⁵¹ Gumede "Poverty Relief Would Help Growth" www.bdfm.co.za (2001).

It is noteworthy that Section 214(2) of the Constitution states that the budget may be enacted only after considering, *inter alia*, the national interest. It is generally accepted, however, that a court will not consider the appropriateness of fiscal/economic policy choices, that the court does not have the capacity to make judgments on overall budgetary allocations and the division of revenue and that the court is unlikely to make a judgment in favour of a programme that has a significant budgetary impact.⁵²

According to section 152(1) of the Constitution, the objects of local government are:

- (a) to strive to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development within a safe and healthy environment; and
- (d) to encourage community involvement in the matters of the local sphere of government.

Furthermore, in terms of section 152(2) of the Constitution, municipalities are constitutionally obliged, within their financial and administrative capacity, to strive towards the achievement of these goals. Own revenue sources must be developed where possible, but a political decision must also be taken to redistribute income through other spheres of government, most notably via local government's "equitable share" of revenue collected at the national sphere (ss 214 and 227 of the Constitution).⁵³ Own revenue sources will not increase unless rural livelihoods improve, and in turn, rural livelihoods will not improve unless a co-ordinated development programme generates rural economic growth. Such development should be planned and implemented at municipal level, but funds and an overall strategy for rural development will have to come from the provincial or national spheres of government.⁵⁴ An important weakness to be attended to is that government departments and civil society do not yet co-ordinate social wage provision. If the provision of social wages is to be embedded in economic organisation and social relations, it requires a strong overall vision and implementation from all spheres of government and civil society.⁵⁵

⁵² Chetty "The Public Finance Implications of Recent Socio-Economic Rights Judgments" 2002 (2) *Law Democracy and Development* 231 237-239.

⁵³ Fast and Franzsen 1998 *De Jure* 344.

⁵⁴ *White Paper on Local Government* (1998) 17-36 accessed at <http://www.local.gov.za/DCD/policydocs/whitepaper/white2pg.html> as referred to in Fast and Franzsen 1998 *De Jure* 344.

⁵⁵ *Ibid.*

7 IMPROVING SERVICE DELIVERY: THE SOUTH AFRICAN SOCIAL SECURITY AGENCY BILL, 2003

The memorandum on the objects of the South African Social Security Agency Bill, 2003 states that one of the duties of the state is the delivery of social security service in order to improve the lives of the poorest of the poor. The memorandum acknowledges that “certain weaknesses in the administration and payments occur, resulting in some persons not timeously receiving assistance”. As a result, the memorandum explains, the government has decided to establish a “focused, specialized delivery mechanism” (namely the South African Social Security Agency) to achieve the goal of improving service delivery.

The broad list of functions of this Agency should result in more efficient and effective management, administration and payment of social security or other monetary benefits and the provision of services relating to these payments. Perhaps this could also be the start of a “Social Security Tribunal” of sorts, as proposed by Olivier and Jansen van Rensburg, for the protection and enforcement of the right to social security.⁵⁶

8 THE SOCIAL ASSISTANCE BILL, 2003

The memorandum on the objects of the Social Assistance Bill, 2003 indicates that this Bill is designed to consolidate legal requirements and provisions for social assistance in South Africa and to create uniform norms and standards. The principal objects of the Bill include provision for financing and administration of social assistance, administration and payment of social grants and to “ensure that minimum norms and standards are set for the delivery of social assistance”.

The proposed establishment of an Inspectorate for Social Security will hopefully also form part of a comprehensive solution to the problems at hand.

9 INTERNAL AND EXTERNAL SOLUTIONS

Government has shifted gear in economic management in a fresh bid to hoist the economic growth rate and so reduce unemployment and poverty.⁵⁷ Whether or not the best solution to the poverty problem lies internally or externally is debatable. Finance Minister Trevor Manuel refers to poverty as a global issue, arguing that the responsibility for its eradication in Africa

⁵⁶ Olivier and Jansen van Rensburg “Protection and Enforcement of the Right to Social Security” 2000 (1) *Law Democracy and Development* 87 96.

⁵⁷ Gumede *www.bdfm.co.za* (2001).

should rest with the entire world.⁵⁸ In an address to Parliament, he stated that the division of power within the Bretton Woods international financial institutions remained biased in favour of the industrialised nations – with a corresponding decline in developmental aid to Africa.⁵⁹

The situation is such that only four countries – South Africa, Egypt, Morocco and Tunisia – have access to funding from the global capital markets, with the remaining fifty-one nations relying on development finance from the World Bank and International Monetary Fund (IMF) and from regional development banks.⁶⁰ Consequently, South Africa is pushing for reforms within the two institutions for a better arrangement in favour of the developing nations. Forty-three African countries are currently represented on two constituencies of the IMF and the World Bank, where they have a meagre 4.38 percent of the shares. The G7 group of industrialised nations, on the other hand, commands a combined voting share of almost 50 percent, with the USA alone enjoying 17.5 percent.⁶¹ Mr Manuel has highlighted that the problem of this imbalance of power is exacerbated by the crushing debt burden faced by developing countries.⁶²

The Jubilee 2000 Campaign, which urged cancellation of debts incurred by the former apartheid regime, argued that the world owes Africa a duty to write off the debt to enable the governments to channel the freed funds to poverty alleviation programmes. President Mbeki, however, remains optimistic about the government's ability to eliminate poverty and to address the numerous needs of South Africans. Social Development Minister Zola Skweyiya, in accordance with this, believes that the only way to win the war against poverty, HIV/AIDS and other social ills, is through a strong partnership between government and civil society.

The outline of President Mbeki's Millenium Africa (Recovery) Plan (MAP) provides some interesting insights into current high level thinking on core development issues facing this country. Like the MAP, government here is blending macro-economic orthodoxy with an actively interventionist state focusing its resources on the twin goals of alleviating poverty and leveraging private sector investment for job-creating economic growth. It is a South African version of an economic third way that simultaneously embraces the market and globalisation while flexing state muscles to direct the impacts of both in the interests of the economy but protecting the poor and the marginalised from the negative effects of globalisation. To this end, ministries are having to factor job creation considerations and local

⁵⁸ <http://www.allafrica.com/stories/200008300348.html> (2001).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

economic development into their plans, and there is a much more co-ordinated, centrally-directed focus.⁶³

It is submitted that parts of both the Jubilee 2000 and Mbeki's MAP approaches have merit and that a composite, two-pronged plan should be adopted and maintained until the situation improves. What is envisioned is that pressure must be put onto the shoulders of the economic powerhouses of the world to actively ensure the reduction of African debt. This should not, however, absolve these countries from maintaining an active interest in the affairs of Africa and in assisting the continent in its economic growth. Equally important are the steps which can be taken within South Africa, (and, indeed, within Africa itself) simultaneously. Whether or not assistance is going to be received from western-dominated institutions such as the World Bank and IMF should not impact upon the mindset of the state. The state must continuously try to find solutions and funding for poverty relief and increased access to social security within the country, irrespective of the help received from beyond its borders. Mills highlights this by reference to "the power of partnership and governance, not aid".⁶⁴

The New Partnership for Africa's Development (NEPAD) has set its sights on creating a "rules-based" international system, in an attempt to effect a transfer of resources to Africa and to level the global playing fields between rich and poor states.⁶⁵ NEPAD seeks to address Africa's underdevelopment and marginalisation through ways which include promoting and protecting democracy and human rights in African countries and sub-regions, as well as developing clear standards of accountability, transparency and participatory governance at the national and sub-national level.⁶⁶

Poverty alleviation, a critical issue in the transformation process, is a major concern to the government. In this regard, Cabinet has directed that all poverty work should be co-ordinated by the Policy Co-ordination and Advisory Services unit (POCAS), formerly called the Co-ordination and Implementation Unit (CIU) in the Presidency. Thus, while it is true that the current political regime is making a concerted effort to alleviate poverty and reduce unemployment by means of the measures described above, no weight has been put on the need for security measures to guarantee a level of income should these measures cease.

It is clear we are not going to be able to deal with unemployment and poverty overnight. Government's unveiling recently of its long-overdue national skills development and human resource development strategies will

⁶³ <http://www.development-sa.co.za/> (2001).

⁶⁴ Mills *Poverty to Prosperity* (2002) 255.

⁶⁵ Mills 173.

⁶⁶ Baimu "Human Rights in NEPAD and its Implications for the African Human Rights System" 2002 (2) *African Human Rights Law Journal* 301 305.

at least begin to deal with the skills problem in the economy. The budgeted R8-billion over three years for infrastructure upliftment is also a positive development.

As mentioned above, one of the fundamental problems with social assistance in South Africa has been the fact that state pensions and the like are often used for the benefit of entire families, thereby negating their purpose of caring solely for the recipient. A direct link must also be made between the unemployment situation and this problem. In other words, by taking greater strides in the battle against unemployment, poverty will be reduced, social insurance should be increased and the *value* of social assistance will be increased because its application will increasingly be for the sole benefit of the recipient – and not his or her entire family. It is imperative, for this theory to succeed, that the workers who are the recipients of the jobs created use (or be forced to devote) part of their income for private savings or insurance measures.

10 CONCLUSION

The importance of enjoying first- and second-generation rights is expressed in the preamble to the principal international human rights instrument protecting socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR). The influence of the ICESCR on the drafters of the Constitution is evident in the use in the latter of concepts such as “progressive realisation” and the state’s duty to take “reasonable legislative and other measures within its available resources”, drawn from article 2 of the Covenant.⁶⁷ The basic obligation imposed by the Covenant on a member state is “to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the right by all appropriate means, including particularly the adoption of legislative measures”.⁶⁸ This provision may be described as imposing an obligation on the state to move as quickly and effectively as possible towards realising the listed objectives.⁶⁹

The correlation (and difference) between the Covenant and sections 26 and 27 of the Constitution was recognised by the Constitutional Court in *Grootboom v Oostenberg Municipality*.⁷⁰ Given that the socio-economic rights in the South African Constitution were modelled on those in the Covenant, the Committee on Economic, Social and Cultural Rights (which monitors the compliance of state parties with their obligations under the Covenant)

⁶⁷ De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4ed (2001) 436.

⁶⁸ A 2(1).

⁶⁹ De Waal *et al* 436.

⁷⁰ 2000 3 BCLR 277 (C).

provides a valuable source of guidance for South African courts by means of its interpretations of the Covenant and its comments on state reports.⁷¹

According to the Committee, a state's obligations under the Covenant do not end with the duty to refrain from interference with the enjoyment of the socio-economic rights. The rights have an additional, important, positive dimension in that they can be adequately realised only by taking positive steps directed towards fulfilling the rights.⁷² It is generally recognised that the positive component of socio-economic rights requires two forms of action from the state. The first, in accordance with Article 2(1) of the Covenant, requires that the state must "adopt ... legislative measures". This obligation entails the creation of a legal framework that will ensure that individuals are granted the legal status, rights and privileges that will enable them to obtain the necessary assistance from the state. The second requires the state to implement other measures and programmes designed to assist individuals to realise their rights.⁷³

It is more difficult to find comparable foreign case law that can assist in the interpretation of socio-economic rights due to the fact that South Africa is one of only a few jurisdictions to incorporate an extensive list of directly enforceable socio-economic rights into its Constitution. The problem with this is the fact that a common alternative is found in the form of "directive principles of state policy". This means that ammunition is added to an argument against active attempts to increase the application of social security rights. Most jurisdictions that recognise such rights in their constitutions (such as India, Brazil, Portugal and Ireland) do so in a manner whereby these principles are not directly justiciable but may affect the interpretation of other rights by being incorporated in a reading of these rights or may be important in the interpretation of legislation.⁷⁴ For example, according to Article 37 of the Indian Constitution, the list of Directive Principles "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

The positive dimension of international socio-economic rights is qualified by the use of the phrase employed in Article 2(1) – obliging a state to take steps "to the maximum of its available resources, with a view to achieving progressively the full realisation of the right". As described above, the terms "progressive realisation" and the "available resources" qualification are understood to grant the state a margin of discretion in selecting the means for achieving socio-economic rights. It is clear, however, that the qualification is

⁷¹ De Waal *et al* 437.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

not intended to entitle a state to a discretion regarding the implementation of these rights.

Building an effective and comprehensive social security system is a long-term process. It requires ensuring substantial resources through the budget to back up the clauses of the Constitution. But more than merely depending on money, a restructuring of the existing social *insurance* and other social security institutions is required. This is beginning to take place as a result of a greater awareness of the problem. Above all, what is required is a common understanding, mobilisation and action among the progressive social forces in society to see a transformation occur.⁷⁵

“With the distressing scenario of ‘barbarism’ fast becoming a reality in our society, there is little alternative but to effect drastic changes in society. The move to implement an effective and comprehensive social security system is one route to effect this change. And the opportunity needs to be grasped with both hands.”⁷⁶

There appears to be a lack of urgency amongst the people of the country regarding the formulation and implementation of a plan to reduce unemployment and poverty and to thereby increase access to social security. When faced with a problem of this magnitude, it would be expected that a solution be found and executed as soon as possible. Should this “solution” be unsuccessful, one would suppose that another answer would take its place in a constant and energetic response to the crisis. In South Africa, however, it would appear that the population (and it is the people, not the government, who appear not to have appreciated the problem) has accepted poverty and unemployment as part of their lives.

It has been the government which has, at least on a conceptual level, come up with feasible plans in an urgent endeavour to better the lives of their citizens. The fact that the implementation of these plans has sometimes left a lot to be desired is a distinct issue. The majority of citizens, usually the driving force behind reform, have appeared to be strangely apathetic in attending to problems which have such a tremendous impact upon their daily lives. The principle of solidarity appears to have been forsaken in favour of an individualistic approach to the challenges at hand. Instead of seeking a community-based solution to the problem of finding continued employment for the able-bodied, families seem to be isolating themselves from the concerns of others while hoping that their lot will somehow magically improve.

Just as every person in South Africa enjoys a host of fundamental rights (with very few corresponding obligations), so it is submitted that every person should have the right to work – with a corresponding duty (should they be able-bodied and of a working age) to do so should there be work

⁷⁵ Naidoo 1999 *South African Labour Bulletin* 58.

⁷⁶ *Ibid.*

available. A number of great nations and people built themselves on hard and unpleasant work. Is this not a sacrifice that a generation is prepared to make for their descendents? Should the answer be in the affirmative, then all that remains is for the state to ensure that there is some sort of work and social security available for those who are able and desirous of working in exchange for remuneration and/or other benefits. This is easier said than done, with almost every developing country being unable to provide sufficient work for its citizens.

The process of policy formation on social security can only bear fruit if accompanied by attention to anti-poverty measures. Schemes to insure people against illness, accident, disability, unemployment and for old age are dependent for their success on mass participation, and this can only be achieved if major proportions of the population are willing and able to become long-term contributors. The role of the state would then be to supervise and to support the schemes by filling inevitable gaps and by compensating for occasional deficiencies, rather than to take the main responsibility for upholding income maintenance systems.⁷⁷ This implies that as many people as possible must be elevated to a level at which they can contribute to productive employment on the one hand, and to those schemes that provide for the contingencies that they may encounter on the other. If the social insurance systems take care of the majority of the people, government programmes and money can be geared more easily to the deprived, less well-off, exposed or vulnerable groups.⁷⁸ The power of private savings, together with greater control over pension funds, also has a role to play in this strategy. In other words, while people are fortunate enough to be earning money, a system must be in place to ensure that part of this money is saved so that these people do not later need to become part of the various social assistance schemes.

Social security jurisprudence and legislation needs to be developed in South Africa as quickly as possible. Other than the Constitution which is acknowledged and treated as the supreme law, it must be acknowledged that a fragmented system of social security is currently in place. Reference is often made to the ILO and to international documents on the subject but, by being internationally based and drafted largely by the first world, these documents are not tailored to South Africa's specific situation.

Social security is often neglected in comparison to other socio-economic constitutional rights. When people are hungry or thirsty, they naturally shout and scream until they are fed. Once fed and satisfied, however, human tendency is such that they inevitably forget about the next time when food

⁷⁷ Snyman *Social Security in Six South American Countries – Report of a Study Tour* (1989) 48.

⁷⁸ *Ibid.*

and water will not be on the table. This is why access to social security is so important and why this right should be prioritised to a certain extent.

Access to social security does not have to be a large monetary grant per person in need. Rather, the state's goal should be to ensure that the basic rights which people enjoy in terms of the Constitution (in particular the other socio-economic rights) are guaranteed for the duration of their existence, however low these benefits may be. This basic assistance may then be used by the recipient as a launching pad for a better life.