THE CONSTITUTIONAL RIGHT OF ACCESS TO SOCIAL SECURITY

by

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In memory of Arvind Harry (Bapu)
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# TABLE OF CONTENTS

## 1. GENERAL INTRODUCTION

1.1 Aim of dissertation 1
1.2 Socio-economic rights in the constitution 2
1.3 Definitions of social security 6
1.4 Social assistance 9
1.5 Social insurance 11
1.6 Pension and provident funds 13

## 2. INTERNAL LIMITATIONS TO THE RIGHT OF ACCESS TO SOCIAL SECURITY

2.1 Judgments of the Constitutional Court 14
2.2 ‘Reasonable legislative and other measures’ 18
2.3 ‘Progressive realisation’ 19
2.4 ‘Within available resources’ 20
2.5 Ubuntu 22

## 3. IDENTIFYING THE PROBLEMS

3.1 Unemployment and poverty 24
3.2 Foreigners and the right of access to social security 28
3.3 A constitutional perspective on budgetary constraints 32
3.4 Legal remedies 35
4. **SOLUTIONS**

4.1 State enterprises 37
4.2 Poverty relief and social security 40
4.3 NEDLAC’S solutions 41
4.4 ILO solutions 42
4.5 A new deal – with a new sacrifice 43
4.6 Defence 47
4.7 A social wage 50
4.8 Increasing finance for social security 52
4.9 Internal and external solutions 55

5. **CONCLUSION**

5.1 International perspective 60
5.2 A final word 65

LIST OF SOURCES 70

LIST OF CASES 73
The inclusion of the right of access to social security in the Constitution did not meet
with wholehearted approval in South Africa. This right, however, is of vital importance
for the future upliftment of the country. The present social security system is based upon
a clear distinction between social assistance and social insurance. There is a gap in
current social security provisions in that the unemployed middle aged individual is not
covered. Unemployment itself is one of the greatest challenges obscuring the
implementation of a comprehensive social security system. The Constitutional right is to
have ‘access’ to social security and the amount of resources at the state’s disposal is
directly related to increasing this right, although it is true that a number of available
resources are misspent. The state must take reasonable legislative and other measures,
within its available resources, to achieve the progressive realisation of the right of access
to social security. The principles of solidarity and ubuntu must be cultivated so that
national social development becomes a concern for all citizens. There are numerous
problems facing South Africans in attaining the goal of access to social security – even if
national social development does become a priority. Budgetary constraints, poverty,
unemployment, HIV/AIDS and foreigners are examples of these. By making social
security a priority for everyone, existing ideas (almost all of which have merit) may be
converted into long-term solutions for poverty and unemployment. Currently, numerous
opportunities to salvage the situation are being overlooked as a result of the lack of a
comprehensive and structured plan to better the access to social security. The
constitutional right of access to social security is enforceable, although the jurisprudence
in this field remains underdeveloped. Conditions are currently favourable, within the
country and beyond its borders, for an imaginative and concerted attempt to be made to
find potential solutions. It is possible for resources to be increased and for tax benefits to
be incorporated for businesses which have the capacity to contribute. The issue of
defence spending is controversial, but could hold the key to lowering unemployment.
Should jobs be created, it is likely that they will initially be of a temporary nature.
Consequently, provisions are needed to ensure some guarantee of income in the lacuna
between when a job is lost and another found. Ultimately, one thing is certain: the
constitutional right of access to social security will only be complete once the people who are recipients of this right make sacrifices and create corresponding duties for themselves to ensure that the next generation of inhabitants of this country are not facing similar problems. The state’s goal should be to ensure that the basic rights which all people enjoy in terms of the Constitution (in particular the other socio-economic rights) are guaranteed for the duration of their existence, even if the level of benefits received by such people is low.
1. GENERAL INTRODUCTION

1.1 Aim of dissertation

“Africa tell me Africa
Is this you this back that is bent
This back that breaks under the weight of humiliation
This back trembling with red scars
And saying yes to the whip under the midday sun
But a grave voice answers me
Impetuous son, that tree young and strong
That tree there
In splendid loneliness amidst white faded flowers
That is Africa your Africa
That grows again patiently and obstinately
And its fruits gradually acquire
The bitter taste of liberty”

A great deal has been written about South Africa’s transition to democracy and about the fundamental rights entrenched in the Constitution of the Republic of South Africa,² (‘the Constitution’). Socio-legal research has become increasingly popular as the number of vulnerable people in the country has increased, with authors seeking to highlight aspects of the law which may be used to cause an improvement.

With respect to the constitutional right of access to social security, however, there appears to be a strange dearth of South African literature on the subject. Whereas other socio-economic rights are seemingly well covered in all aspects, the right of access to

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2 Act 108 of 1996.
social security has often been overlooked – not even featuring in many textbooks dealing with ‘fundamental rights’. Where it does feature, no more than a page is written, and the opinions of the authors are normally the same: social security, unenforceable, not enough resources, government must just do what it can, things will improve when the economy gets better and so on.

As a result, one has endeavoured to establish the validity of these remarks. Are the problems insurmountable? Or are there potential solutions waiting to be explored and developed? A practical approach has been adopted in an attempt to find some viable solutions, with the premise being (after reading a great deal of pessimistic literature regarding the situation in South Africa) that anything that will result in a positive difference is worthy of an attempt.

Furthermore, one has attempted to comply with the guidelines of length prescribed, as a result of which an exposition of most things which may be found in any of the ‘general principles’ text books on the subject has been omitted from the final draft. What has necessarily been included is sufficient background on the current social security system for the reader to apply his or her mind to some of the ideas expressed in order to decide on their merit when applied to the current position. The writer’s real passion lies in a hands-on practical approach to solving problems, not merely highlighting what these problems are. As a result, a large portion of this work is devoted to exploring ideas which may be developed and implemented in order to urgently address the issue.

1.2 **Socio-economic rights in the constitution**

“Social and economic rights concern the stomach of Africa and other impoverished areas: some form of acknowledgment that the state has a constitutional duty to take care of the social and economic plight of people is necessary; ordinary citizens will not relate to a bill of rights that recognises
only Lockean rights.”³

The creation of a so-called welfare state as a necessary dimension of a true constitutional state is called for in terms of the ideal of a ‘soziale rechstaat’.⁴ Such state recognises not only the first generation of human rights but also gives due recognition to the second and third generations of human rights. The inter-dependence of these rights was recognised by the Constitutional Court in Government of the Republic of South Africa v Grootboom⁵ as follows:

“The Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”

The recognition of second generation or socio-economic rights ensures that every person has rights such as the right to eat, the right to work, the right to shelter, the right to health and the right to education and social security. Third generation human rights ensure that every person also has, inter alia, the right to a healthy environment.⁶

Problems arise with the judicial enforcement of these rights in that it is difficult for the courts to interfere in the allocation of state resources in order to realise the goals of all socio-economic rights. It is a fallacy, however, to state that first generation human rights

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⁵ 2000 11 BCLR 1169 (CC) para 23.
⁶ Ibid.
do not also, on occasion, place positive obligations upon the state. Basson cites the right to vote, which cost almost a billion Rand to realise in the first fully democratic election. All three generations of human rights are equally fundamental in ensuring the dignity of every person. The interim Bill of Rights gave only scant attention to socio-economic rights – leaving it to Parliament to realise these ideals. The result of this was that the judiciary’s duty to apply and test Parliament’s conduct in respect of these rights was severely curtailed.

The preamble to the Constitution, however, commits the state to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights…” and “to improve the quality of life of all citizens and free the potential of each person…. Sections 26, 27, 28 and 29 of the Constitution further provides, amongst other things, for the following socio-economic rights, namely the right to housing, health care, food, water and social security, the right to education and children’s rights.

One of the principal objections to the certification of South Africa’s Constitution was the inclusion of these rights – the objectors claiming that this was inconsistent with the separation of powers required by the Constitution because the judiciary would have to encroach upon the terrain of the legislature and executive. In particular, it was argued that this would result in the courts dictating to the government how the budget should be allocated.

A more compelling argument against the constitutional right of access to social security stems from section 7 of the Constitution, which states:

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7 Ibid.

‘The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

This section serves as a reminder of the importance of the concept of ‘democracy’ in the Constitution and that fundamental rights must be interpreted within a framework of democracy. The essence of democracy is the right to vote and the separation of powers amongst the legislature, executive and judiciary. The very reason that Judges are appointed rather than elected also comes from the fact that they are appointed by the people’s representatives – namely the government as elected by the voting public.

According to Motala, the judiciary is not the appropriate body for resolving conflicts on socio-economic policies. It is trite that it is the task of Judges to apply the law as it exists and is created by the people (through their representatives, the government). It is not their task to amend the law where they see fit or to rewrite the law and it is essential for supporters of democracy that this remains the function of the state. It is therefore somewhat anomalous, though absolutely necessary for social justice as will be seen from the cases referred to below, that it is left to Judges to compel the state to make payments in cases where the state claims that it is unable to do so.

“In a country with a history like South Africa’s, it would be more than a little ironic if the price of guaranteeing more social justice in the work place was a less democratic system of government in the country as a whole.”

Ultimately, the definition which is accepted by the Constitutional Court for the concept of democracy could hold the key to greater acknowledgment of the enforceability of the constitutional right of access to social security. If the traditional definition, with its emphasis on ‘negative rights’ (rights which must not be infringed) such as the right to vote, is accepted, then positive rights (which the state must give effect to) such as the

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9 S 7(1) of the Constitution.
11 Jansen van Rensburg 1999 Tydskrif vir Regswetenskap 52.
right of access to social security will suffer. On the other hand, an acceptance by the courts of a definition of social democracy will primarily be concerned with leveling the playing fields amongst all classes of persons and eradicating poverty in order to achieve social justice. Such an interpretation of the (currently undefined) concept of democracy will result in less ‘traditional democracy’ in that the courts will be increasingly asked to trespass on ground formerly reserved for the elected government. The upside, however, will be that the right of access to social security will be enforceable to a greater degree.

The budgetary constraints which arise when the enforcement of socio-economic rights is in question, together with the fact that these rights are not universally accepted fundamental rights, meant that the inclusion of the right of access to social security in South Africa’s Constitution did not meet with universal approval. Furthermore, the justiciability of these rights was also considered doubtful. Despite this, it was held that many civil and political rights entrenched in the Bill of Rights gave rise to similar budgetary constraints – without compromising their justiciability. The inclusion of socio-economic rights was accordingly not in breach of the constitutional principles.\textsuperscript{13} As will be illustrated, the inclusion of the right of access to social security, in particular social assistance, will become increasingly important for the upliftment of South Africa.

### 1.3 Definitions of social security

Although a number of differing definitions have been used to describe the concept of social security, this has been unrelated to shortcomings in the current system in South Africa as no particular definition or ideology has been rigorously followed. Generally, it can be said that the social security system in South Africa has four elements:\textsuperscript{14}

- **Private savings** (whereby people voluntarily save for unexpected contingencies such as disability, retirement and chronic diseases);

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\textsuperscript{13} In re Certification of the Constitution of the Republic of South Africa supra.

Social insurance (for example, joint contributions made by employers and employees to pension or provident funds, or social insurance covering other unexpected events);

Social assistance in the form of social grants (non-contributory and income-tested benefits provided by the State to groups such as people with disabilities, elderly people and unsupported parents and children who are unable to provide for their own minimum needs);

Social relief (short-term measures, also non-contributory and means tested, to tide people over a particular individual or community crisis).

The present system of social security in South Africa is based upon a clear distinction between social insurance and social assistance, which may be considered to be branches of South Africa’s social security system. The former is meant, by means of unemployment insurance and workers’ compensation coverage, to take care of those people who are (or have been) formally employed and is financed by contributions made by employers and employees. The latter is based on a means-tested approach to protection from a limited number of social risks and is, therefore, itself restricted in coverage. The general revenue of the country finances this system.

It has been said that,

‘Nothing in the history of social policy has transformed the life of the common man more radically than the assurance that, in the event of loss of income through accident, poor health, unemployment, death of the breadwinner or any other misfortune, he will not be forced into destitution.’

The Constitution does not define social security or social assistance. Section 39 of the Bill of Rights, however, regulates the interpretation of the Bill by providing specifically that a court, tribunal or forum tasked with interpreting the Bill of Rights, must also consider international law. These institutions would, therefore, take note of the

15 Olivier et al Social Security Law 5.
16 Wilfred Jenks Former Director-General of the ILO as referred to in Olivier et al Social Security Law 9.
International Labour Office ("ILO") conventions dealing with social security (in particular Convention 102 of 1952), and the ILO’s definition of these concepts.

ILO Convention 102 is the landmark source in international social security legislation.\(^\text{17}\) The ILO’s aim is to provide total and uniform cover and to extend the protection afforded by social security to the whole community.\(^\text{18}\) It covers the nine main benefits that an individual would be entitled to in the event of the applicable risk occurring, namely medical / health, sickness, unemployment, old-age, employment injury, family, maternity, invalidity and survivors’ benefits. The techniques used to address these ‘risks’ are social assistance and social insurance.

The *White Paper on Social Welfare* ("the White Paper") defines social security within the framework of a wide variety of public and private measures which are intended to provide both cash and in-kind benefits, or both should the situation demand this. The domain of social security remains poverty prevention, poverty alleviation, social compensation and income distribution.\(^\text{19}\) Although the White Paper’s definition of social security is broader than the ILO’s definition, it does not explicitly cover strands of social security such as social compensation and social upliftment which are found in South Africa’s social security system. The strand of ‘social compensation’ is to be found in the government’s provisions regarding the payment of compensation to those persons who sacrificed their jobs and education in the process of overturning the previous government and establishing South Africa’s first democratic government.\(^\text{20}\) The strand of ‘social upliftment’ is to be found in the government’s various initiatives to improve the lives of the millions of South Africans who live with little hope of ever improving the quality of their lives.\(^\text{21}\) According to Strydom *et al*, this relatively narrow definition of social security could be legally defended in terms of the Constitution’s treatment of social security as something apart from those human rights that promote the well-being and

\(^{17}\) Olivier *et al* *Social Security Law* 8.
\(^{18}\) Olivier *et al* *Social Security Law* 9.
\(^{19}\) GN 1108 in GG 18166 of 1997-08-08, ch 7.
\(^{21}\) Strydom *Essential Social Security Law* 24-25.
upliftment of people living in extreme poverty, such as the right to adequate housing, health care, sufficient food and water.\textsuperscript{22} On the contrary, however, it is submitted that that ultimate goal of greater access to social security is to uplift the lives of those living in poverty, and rather than being separated from the other socio-economic rights, social security must be viewed as an integral part of a comprehensive approach to social upliftment.

1.4 Social assistance

Social assistance was the first form of social security to develop, in the form of the so-called ‘poor laws’. Also known as social welfare, this concept is difficult to conceptualise within an international framework, as different nations tend to define social assistance according to their particular circumstances. Countries also differ on the contingencies in respect of which social assistance must be provided. In this country, the welfare system provides social assistance to the elderly, to parents and foster parents who are unable to provide sufficiently for their children and to disabled persons. It does not, however, afford social assistance to persons on the ground of unemployment. A person who has lost his or her job and who has exhausted the benefits obtainable from the new Unemployment Insurance Act will therefore be unable to claim government assistance on the sole ground of unemployment.\textsuperscript{23}

Social assistance is considered to be the exclusive responsibility of the state in South Africa, with the Department of Social Development (previously known as the Department of Welfare), being responsible for the payment of pensions and grants, and the Department of Health being in control of medical care services.

The \textit{Social Assistance Act} of 1992 provides for three types of non-contributory and means tested financial benefits to indigent individuals, namely social grants, child-care grants and financial awards for the temporary relief of distress. A means test entails that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} Strydom \textit{Essential Social Security Law} 24.
\item \textsuperscript{23} Strydom \textit{Essential Social Security Law} 8
\end{itemize}
\end{footnotesize}
the institution responsible for the administration of the funds evaluates the income and the assets of the person applying for assistance in order to decide whether the person’s means are below a stipulated minimum. Should that be proved to be the case, the person would qualify for assistance. Means-tested social assistance thus constitutes the final safety net against severe deprivation and is aimed at maintaining a basic subsistence level for disadvantaged groups (namely the aged, disabled and youth) who are unable to do so themselves. The gaping hole in the system is for the unemployed middle aged individual. The fact that there is no provision for this group has tremendous implications not only for South Africa’s social security situation, but also, it is submitted, for the high crime levels as well, although this is beyond the scope of the topic at hand.24

A developed country such as the United Kingdom does not, contrary to popular belief, provide such assistance as a matter of fact to an unemployed person. The individual must first exhaust unemployment insurance benefits while actively seeking employment. If no other job has been secured at this stage, only then will the state provide social assistance in the form of an income based ‘job-seeker’s allowance’.25 The utopian thinker would immediately consider this to be a logical solution and an excellent idea for South Africa. The reality of the situation, however, is that this is untenable due to the number of people unemployed.

The term ‘unemployment’ bears the connotation that an individual is unable to find a suitable job or is unwilling to work in a particular sector and is seeking something better. This must be distinguished from the current position, namely that there is no work available for people who are willing and able to carry out any form of reasonable work in exchange for basic remuneration and benefits. South Africa’s current social assistance structure must also be distinguished from a national social assistance, which is unrestricted and premised on the idea that the state should provide a minimum standard of living for all.

1.5 Social insurance

The essential features of insurance was well explained in the English case of *Prudential Insurance Co v Inland Revenue Commissioners*. In terms of this definition, a premium must be paid prior to the occurrence of the event against which insurance has been taken out. This premium is usually paid by way of monthly installments and would result, on the happening of a specified occurrence, in the receipt of compensation in the form of cash payments. By definition, there must be uncertainty about the occurrence of the event, either as to whether the event will actually happen, or, if it is bound to happen such as the death of a person, uncertainty as to when it will happen.

Unlike other forms of insurance, social insurance is usually compulsory and regulated by the state through legislation. Another unique feature is that social insurance is not available to all members of society, but is restricted to employees and their dependants in certain circumstances. Unlike social assistance schemes which are financed through taxes, social insurance funds are financed mainly through contributions by employers and/or employees. The payments usually constitute a percentage of an employee’s earnings and the state would only assist in the financing of these funds through supplementary contributions in certain instances. In return for these payments the employee, or his or her dependant, is entitled to benefits upon the mere occurrence of the contingency against which the employee is insured, no means test being applicable.

South Africa has regulated social insurance only by means of the new Unemployment Insurance Act, the Compensation for Occupational Injuries and Diseases Act and the Road Accident Fund. The Unemployment Insurance Fund (UIF) is funded by a payroll levy of 1% on employers, as well as a levy of 1% on the employee’s income. The state contributes a maximum of R7 million per year to the fund. Employees who are retrenched can draw UIF benefits subject to their contribution to the fund.

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26 1904 2 KB 658.
29 Ibid.
The revenue of the Compensation Fund consists mainly of annual assessments paid by registered employers on the basis of a percentage or fixed rate of the annual earnings of their employees. The assessment rate at which an employer is assessed depends on the nature of the employer’s business operations. The assessment rates are fixed on the principle that each industry should carry the costs of its own accidents and are reviewed annually.

The Road Accident Fund may also be considered a social insurance fund. It is financed by a levy on petrol (14 cents per litre) and diesel (10,3 cents per litre) which raises about R1,4 billion a year. The levy is a fixed amount and varies as a percentage of the petrol price depending on the price. It is used to finance the third party insurance scheme for all motorists.  

The prevalent social security regime has, however, been unable to support informal forms of social security required by the structurally unemployed and informally employed poor people. They are generally excluded from the formal social security framework, as they are not in formal employment and often do not qualify for social assistance measures, unless they meet the requirements set for the narrow categories of social grants, namely old age, child support and disability. For these people, social security coverage is much more than a mere safety net: it is the manner by which they are able to survive the problems of not being able to earn an income and being unable to participate productively in modern-day society.

In an ideal society, social security would provide comprehensive coverage against all contingencies and occurrences that endanger income-earning ability and the ability of people to support them and their dependants. The limited nature of protection in terms of the South African social security system has been attributed to the fact that the social insurance system does not provide coverage to those who do not have formal

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32 Ibid.
employment. More problematically, social assistance measures seldom operate to the
direct advantage of the poor and the informally employed in that most such people are
excluded from the present social grant system. Even people who do receive grants have a
legitimate gripe considering the low levels of monthly income they are expected to
survive upon. This is exacerbated by the number of family members who claim a share
of the grant received and by the exceptionally high levels of unemployment and poverty
in South Africa. What is required is an integrated social security system that is fully
financed and is of such a nature as to cover the entire population for principal
contingencies. The present social security system is, for purposes of providing a true
safety net for the poor, the informally employed and structurally unemployed, hugely
deficient. A thorough and consistent plan for the alleviation and ultimate eradication of
poverty has yet to be developed.

1.6 Pension and provident funds

In the absence of a national pension scheme, private pension funds, more recently, also
provident funds, have mushroomed, especially over the past 35 years. There are more
than 16000 of these funds in existence, covering around 74% of formal sector workers.
And yet, because of the high percentage of unemployment, only 40% of the economically
active population are covered. The assets of these funds, regulated in terms of the
provisions of the Pensions Fund Act 24 of 1956, account for approximately 73% of GDP.
There has been a huge increase in membership of these funds – over the past 35 years, the
growth rate has been 7% per annum. However, viewed from a broader social security
perspective, there are several serious problems with the present retirement dispensation.
As a rule, there is no statutory obligation to the effect that contributions / benefits have to
be transferred or preserved should an employee change jobs or terminate his / her

33 Olivier et al Social Security Law 32.
35 Olivier et al Social Security Law 33.
37 Ibid.
services. The result of this is often that ex-employees so affected may become reliant on the state social grants for the elderly, which are extremely limited.\textsuperscript{38}

The same result flows from the absence of an obligation to belong to a pension or provident fund. Consequently, those workers who do not so belong, including the informally and self-employed, later often become dependent on state social assistance. This is acknowledged in the White Paper, and what is advocated is compulsory retirement provision by all employees in formal employment, and the creation of a scheme for the self-employed.\textsuperscript{39} Similarly, it has become common practice to withdraw provident funds before they have matured. Even with pension funds, section 19 of the Act permits a member of the fund to withdraw savings for the purposes of, \textit{inter alia}, buying or extending a home. Once again, the consequence is that workers who do this spend their savings when they reach retirement age, and are forced to resort to drawing a state social grant.

\section{INTERNAL LIMITATIONS TO THE RIGHT OF ACCESS TO SOCIAL SECURITY}

\subsection{Judgments of the Constitutional Court}

Assuming that it is accepted that South Africa is a welfare state, it must be accepted that there is an obligation on the state to provide for its citizens. An effective system of social security is the cornerstone of this.\textsuperscript{40} One of the primary goals of the Constitution is to remedy the injustices of the past. It can be deduced from the wording of section 27 of the Constitution that the restructuring of the social security system is one way in which the historical injustices may be corrected.\textsuperscript{41} The future importance of the right of access to

\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Jansen van Rensburg 1999 \textit{Tydskrif vir Regeerwetenskap} 53.
\textsuperscript{41} Ibid.
social security is dependent to a large extent upon the emphasis that is placed upon the different constitutional rights.

It is significant that no judgment of the Constitutional Court deals, in a concrete form, with the nature of social security rights within the context of section 27(1) of the Constitution. The protected right, however, is the right to have access – meaning that the state may not deny anyone access to social security benefits. The availability of the benefits will be dependent on the availability of resources at the disposal of the state. The constitutional obligation of the state in terms of this section is merely to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Three judgments have directly addressed the nature of socio-economic rights in the Constitution. In Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996, the Court held that the legal enforcement of socio-economic rights has the same implications as first generation rights, being at least to the same extent justiciable and at the very minimum capable of negative protection from “improper invasion”. Negative protection is the usual form of judicial protection given to civil and political rights and, applied to socio-economic rights, the term means that a court can prevent the state from acting in ways that infringe socio-economic rights directly. The rights to housing, health care, sufficient food and water, social security and basic education may therefore not be subjected to what have been termed by the United Nations Committee on Economic, Social and Cultural Rights as “deliberately retrogressive measures”. The state, as a minimum, must not only itself refrain from interfering in the enjoyment of socio-economic rights but also has a duty to prevent interference by private individuals.

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42 Olivier et al Social Security Law 518.
43 S 27(2) of the Constitution.
44 1996 10 BLLR 1253 (CC) para 78.
45 Ibid.
The Court also questioned the rigidity of the distinction drawn between socio-economic rights, and civil and political rights on the basis that the former entail judicial imposition of positive duties while the latter do not.\textsuperscript{48} Courts enforcing civil and political rights may on occasion impose positive duties on the state, as illustrated by the case of \textit{August v Electoral Commission},\textsuperscript{49} dealing with the extensive positive obligations of the right to vote.

This approach to the nature of socio-economic rights in the Constitution is, it is submitted, in line with international law, which the Constitution in section 39(1) enjoins the courts to consider.\textsuperscript{50} The importance of having socio-economic rights in the Constitution was emphasised by Nelson Mandela, who said:

\begin{quote}
‘The key, therefore, to the protection of any minority is to put core civil and political rights, as well as some cultural and economic rights beyond the reach of temporary majorities, and to guarantee them as fundamental individual rights. Thirdly, we must address the issue of poverty, want, deprivation and inequality in accordance with international standards which recognise the indivisibility of human rights. A simple vote, without food, shelter and health care is to use first generation rights as a smoke-screen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched.

We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.’\textsuperscript{51}
\end{quote}

\begin{footnotes}
\item[48] De Waal et al \textit{The Bill of Rights Handbook} 434.
\item[49] 1999 3 SA 1 (CC).
\item[50] Olivier et al \textit{Social Security Law} 519.
\end{footnotes}
The second relevant case is that of Soobramoney v Minister of Health, Kwazulu Natal. The well-known facts may be summarised as follows:

The applicant was an unemployed diabetic who was at an irreversible stage of chronic renal failure at the time of his application to the Constitutional Court. His life could only be prolonged by means of regular renal dialysis. Because of the limited facilities that are available for kidney dialysis, the hospital was unable to provide Soobramoney with the treatment requested. The appellant’s urgent High Court application [based on sections 27(3) and (11) of the Constitution] was dismissed. On appeal to the Constitutional Court, it was held that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them in the field of renal dialysis, the court held that it was impossible to commit to an unqualified obligation in respect of section 27(3). The available kidney dialysis machines would be used on people who had a hope of recovering from their illness – and could not be used merely to prolong life.

What is important for the field of social security law is that the court laid down a rational and objective criteria test. It held that “a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters…” On a more positive note, the court held that notwithstanding the difficulties in enforcing the socio-economic rights, the state has a constitutional duty to comply with the obligations imposed on it by section 27.
Government of South Africa v Grootboom\textsuperscript{56} is the Constitutional Courts most significant decision on socio-economic rights as expressed in the Constitution. Although it dealt specifically with the right to adequate housing (section 26 of the Constitution), it is relevant in that the court considered the extent of the positive duties placed on the state by section 26(2). The importance of this is that section 26(2) uses the same formulation as that employed in the constitutional section dealing with the right of access to social security (section 27), namely that the state is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right. The interpretation of this wording will now be considered:

\subsection*{2.2 ‘Reasonable legislative and other measures’}

According to the Constitutional Court in Grootboom, the key to the justiciability of socio-economic rights in the Constitution is the standard of reasonableness. Though a considerable margin of discretion must be given to the state in deciding how it is to go about fulfilling socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by a court on a case by case method.\textsuperscript{57} It has, furthermore, been held that a court can require the state to give an account of its progress in implementing those measures.\textsuperscript{58}

It is submitted that this wording, when applied to the right of access to social security, should be interpreted as a statutory minimum, with more drastic steps now being required from the state in order to remedy the current unsatisfactory situation. In other words, while a court will be unable to fault the state provided it acted reasonably, the wording of this provision does not adequately convey the urgency of the problem. It is no longer adequate for the state to merely take reasonable measures; in addition to this is required

\textsuperscript{56} 2000 11 BCLR 1169 (CC).
\textsuperscript{57} Government of South Africa v Grootboom supra para 41.
\textsuperscript{58} Government of South Africa v Grootboom supra para 42.
an illustration of serious and committed endeavour to give effect to the constitutional right of access to social security.

In terms of *Grootboom*, reasonableness requires the design, adoption and implementation of measures to realise socio-economic rights that do not exclude those most in need of the protection of those rights. Reasonable measures were not in place at the time of the initial application for constitutional relief in *Grootboom*, and the state was therefore held to be in violation of its obligations under s 26(2).\(^{59}\)

### 2.3 ‘Progressive realisation’

The meaning of this qualification was interpreted as follow by the Constitutional Court in *Soobramoney*:

‘The obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.’\(^{60}\)

One is unable to deny the reality of the current situation in South Africa, and this provision accordingly does nothing more than state the obvious – namely that the positive dimension of these socio-economic rights can only be achieved over a period of time. What the wording does not do, once again, is highlight the urgency which is required by the legislature and judiciary to ensure that ‘progressive realisation’ happens sooner rather than later. As the situation currently stands, there is no guarantee that progressive realisation will happen at all. It is insufficient to claim, as do De Waal *et al*, that this

\(^{59}\) De Waal *et al* *The Bill of Rights Handbook* 441.

\(^{60}\) *Soobramoney v Minister of Health Kwazulu-Natal* *supra* para 11
does not alter the obligation on the state to take those steps that are within its power immediately and other steps as soon as possible. This, it is submitted, is merely stating the bare minimum as a standard. This minimum should occur in any event. That it does not is an indictment upon the state, but also attributable to a negative approach to the wording of the obligation. More will be achieved by striving (and failing) to attain the unattainable than by attaining a minimum standard. The fact that even the minimum is not being achieved adds further weight to the argument. Should an urgent attitude be adopted [illustrated perhaps by an amendment to the wording of section 27(2)], it is possible that this will trigger a chain reaction of national and then international effort to ensure that the position improves. An appreciation of the severity of the present situation results in an understanding that the country is in a no-lose situation – with anything worthy of an attempt in the hope of a positive change.

2.4 ‘Within available resources’

Yet another internal limitation to the right of access to social security is that it is only available to the extent that the state resources permit. In the absence of available state resources, the failure of the state to address socio-economic rights is therefore not a violation of the right. Even if resources become available, however, a further problem arises in the determination of where these resources will be channeled. While it is difficult to promote social security above requirements such as food, water, health and housing, it is submitted that the right to social security is at least as important as these other rights. What often occurs in practice, unfortunately, is that resources are channeled to first generation rights or to whatever other cause is deemed to be the most deserving when the resources become available. Because social security and other socio-economic rights are continuous problem areas, they tend to be downgraded in the country’s priority list and often miss out on discretionary or unexpected funding.

It is, therefore, only on a theoretical level that a state will find it difficult to justify its failure to devote resources to the fulfillment of the right to social security. All that the state has to do is to account to its subjects with respect to the distribution and
implementation of the budgetary allowance for social security every year. Even this has often proved to be a step too far – again, it is submitted, because the goalpost has been set too low. What is not prescribed or challenged (after the initial uproar which meets every budget speech) is the amount of money demarcated for social security or an indication that this right is a South African priority.

The ‘available resources’ qualification is also employed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), where it is understood to grant the state a margin of discretion in selecting the means for achieving socio-economic rights. Authorities on the subject do not hesitate to note that this qualification “cannot mean that the state is simply left to its own devices in choosing whether and how to implement the rights”.  

Nevertheless, the fact that this must be implied into provisions of the ICESCR and the Constitution indicates another problem.

As the law currently stands, it is generally accepted that resource scarcity does not relieve the state of its duty to fulfil its core minimum obligations, which must be met unless the state can show that its resources are “demonstratably inadequate” to allow it to fulfil its duties. Even when resources are scarce, the obligation remains on the state to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.

The Constitutional Court, however, rejected the invitation to set a core minimum obligation guideline for the right to housing in *Grootboom*, finding instead that the issue in terms of the Constitution was whether the standard of reasonableness had been complied with. The Court did hold that there may be cases where it could be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. Clearly this cannot be done without sufficient information being placed before a court to enable it to determine the minimum core obligation in any given context. By avoiding the issue of establishing a

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63 *Government of South Africa v Grootboom supra* para 33.
minimum core obligation, the Court refrained from holding that certain positive
obligations in terms of the socio-economic rights might be immediately complied with
and are immediately enforceable.\textsuperscript{64} Remembering that \textit{Grootboom} dealt with rights
under sections 26 and 28, it is possible to distinguish this aspect of the case from the
context of the right of access to social security.

\subsection*{2.5 Ubuntu}

As mentioned above, the Preamble to the Constitution states that this Constitution is
adopted as the supreme law of the Republic so as to, \textit{inter alia}, improve the quality of life
of all citizens and free the potential of each person. The notion of improving the quality
of life for all citizens should not, it is submitted, be viewed solely from the perspective of
a governmental responsibility to all. This interpretation results in the true idea behind
this provision in the Preamble being lost. It must be remembered that the Bill of Rights
applies to all law, and binds the legislature, the executive, the judiciary and all organs of
state.\textsuperscript{65} More importantly, a provision of the Bill of Rights binds a natural or a juristic
person if, and to the extent that, it is applicable, taking into account the nature of the right
and the nature of any duty imposed by the right.\textsuperscript{66} It is always assumed that the
constitutional right of access to social security is not horizontally applicable, that is,
enforceable by one citizen against another. The reason for this interpretation rests on the
wording of section 27(2) of the Constitution. If the state only has to take measures within
its available resources then, so it is argued, surely the duty imposed by a horizontal
application of the right would be too burdensome to impose on private individuals.\textsuperscript{67}
Such an interpretation completely ignores the principle of solidarity and \textit{ubuntu} – namely
that the promotion of national social development is a collective effort and responsibility.
Whether or not the argument is theoretical due to the financial problems facing people in
the country is irrelevant. What is important is that the co-operation of civil society must
at least be promoted and encouraged so that the urgency of the situation is appreciated.

\textsuperscript{64} De Waal et al \textit{The Bill of Rights Handbook} 444.
\textsuperscript{65} S 8(1) of the Constitution.
\textsuperscript{66} S 8(2) of the Constitution.
\textsuperscript{67} De Waal et al \textit{The Bill of Rights Handbook} 55.
Some discernible improvement may then be made. The ILO has recognised the importance of this and has stated that the effort of developing social security must be accompanied by a continuing effort to promote a sense of shared responsibility.\textsuperscript{68} A consciousness of national solidarity is therefore crucial to the attainment of a successful and comprehensive social security system.\textsuperscript{69}

Article A of the Treaty on European Union also recognises the principle of solidarity. According to the ILO, solidarity appears to be at the heart of the whole social protection concept:

\begin{quote}
“That social security should extend protection to the whole community is a truism. That its protection should be uniform for each section of the community is simple social justice. And that the whole community should stand together, non-national residents equally with national residents, to provide this protection is an expression of the solidarity which underlies the whole concept.”
\end{quote}

It must be emphasised that in terms of s 184(3) of the Constitution, the Human Rights Commission requires relevant organs of state to provide the Commission with information on measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

This is indicative of the seriousness with which the government is expected to view its Constitutional obligations to these second generation rights. It is clear that the above section is meant to address the abject poverty and the filthy settlements in which the mass of people live. For the section to be effective, however, is going to require the South African Human Rights Commission and the judiciary to play significant and

\textsuperscript{68} ILO Into the Twenty-First Century: The Development of Social Security (1986) 115.
\textsuperscript{69} Olivier et al Social Security Law 50.
interventionist roles.\textsuperscript{70} Despite success in other fields, the Commission has not lived up to expectations in the area of socio-economic rights. It is expected that the Commission will take a leading role in ensuring that the government and the private sector confront poverty and other social ills more effectively in the future. As stated in its Third Annual Report, the challenge to address social and economic rights violations is compounded by the reality that, years into the new constitutional order, many people remain ignorant of their rights. Confusion over government’s obligations and the mechanisms through which people can access pensions and other government support is also widespread.\textsuperscript{71}

3.

IDENTIFYING THE PROBLEMS

3.1 Unemployment and poverty

‘As you all know,’ said Hecate, the mistress of the witches in Shakespeare’s \textit{Macbeth}, ‘security is the mortals’ chiefest enemy.’ While his exaggerated sense of security did not help Macbeth, the ‘chiefest enemy’ that the majority of humanity faces is the almost total absence of security in their fragile and precarious existence. The lives of billions of people are nasty, brutish short and full of uncertain horrors. An epidemic can wipe out a community, a famine can decimate a nation, unemployment can plunge masses into extreme deprivation, and insecurity in general plagues a large part of humankind with savage persistence.\textsuperscript{72}

Poverty in South Africa is severe; the UN Development Programme estimates it at 45%, meaning that yet another generation of children will grow up in absolute poverty. How are they going to get through school in a poverty-stricken environment, with low nutrition and parents unable to pay for basic health needs? What about the social costs involved -

\textsuperscript{70} Nhai 1999 \textit{De Rebus} 42.


\textsuperscript{72} Ahmad, Dreze, Hills & Sen (eds) \textit{Social Security in Developing Countries} (1991) 3.
school dropouts and more jobless youths unprepared for the job market? Clearly the cycle of poverty and despair, which frequently ends up in crime, needs to be broken.\textsuperscript{73}

Both unemployment and poverty in South Africa are structural, with our apartheid past having done nothing to assist the country’s plight. Local labour, which is largely unskilled, faces a decline in job opportunities as the economy becomes more service- and knowledge-based. Grinding poverty means there is no spending power to speak of - consumption is depressed. Thus, unemployment and poverty are structural blockages to growth.\textsuperscript{74}

From informal discussions with some people affected by a lack of access to social security, one is immediately struck by the lack of a work ethic amongst those who are unemployed and the lack of willingness to sacrifice for their own future. Generally speaking, there is also no culture of savings, coupled with a large proportion of income being wasted on alcohol, cigarettes and drugs. A number of youths also believe that they are entitled to a good life – with hard work and planning for the future not part of their plan.

Intended to be a limited poverty relief program for the aged, the pensions system in South Africa has turned into a social welfare program relied on by young and old alike.\textsuperscript{75} Since many of South Africa's elderly are either unemployed or worked in the informal sector, much of the burden of caring for the aged will likely continue to fall on the government – a government which already spends more than half of the welfare budget on old-age grants.\textsuperscript{76}

The Department of Social Development is working to correct the way the country distributes its 1.9 million pensions. During the apartheid era, pensions were largely unavailable to so called “non-whites”, and the expansion of the pension system to rural
areas and townships, where telephone and regular mail service are often unavailable, has posed tremendous difficulties.\textsuperscript{77} Compounding the problem of poverty in the rural areas is the high cost of providing services. This is due to a more sparsely distributed population, greater distances and the lack of infrastructure, particularly in former homeland areas.\textsuperscript{78} It was estimated in 1998 that the cost to provide full service delivery of social security would cost R25 895,00 per rural household per annum – as compared to R20 840,00 per urban household.\textsuperscript{79} This is a significant difference in cost, especially as travel costs can be a huge cost factor in rural areas and were not taken into account in the above calculation.\textsuperscript{80}

The national pension rate has been set at approximately halfway below the official South African poverty line for a single person. The real value of the pensions, which are available to women over 60 and men over 65, has fallen in recent years, because the amount paid is not linked to inflation or automatically increased every year.\textsuperscript{81} The fact that pensions increased to R570,00 per month as a result of the 2001 Budget is unlikely to dent South Africa’s forty three percent poverty rate, the amount not having increased with inflation for a number of years.

In many parts of the country, the distribution system for distributing monthly payments remains a nightmare of long lines, missing payments, and inefficient, even abusive service. Pensioners often wait all day for their payments, with no shelter, seating, or restrooms - and at least two have died in the last year while waiting for their money.\textsuperscript{82} One problem with the pension system, according to government officials, is the lack of a national set of standards governing their distribution.\textsuperscript{83} Department officials have conceded that an inadequate mechanism exists to ensure that poverty funds reach their intended beneficiaries.\textsuperscript{84} In other words, not only is there a problem with an insufficient

\textsuperscript{77} Ibid.
\textsuperscript{78} Fast & Franzsen “Financing Local Government in Rural Areas: Status, Key Issues and Potential Revenue Sources” 1998.\textsuperscript{De_Jure} 336 341.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} http://www.csmonitor.com/durable/2001/04/25/fp7x1-csm.shtml
\textsuperscript{83} Ibid.
\textsuperscript{84} http://www.suntimes.co.za/1999/08/22/news/news01.html.
number of people enjoying access to social security, those receiving these benefits often only do so after enduring severe hardship.

It is unclear what percentage has been disbursed from the 17 million US dollars earmarked for poverty eradication, and anti-HIV/AIDS programmes, for fiscal 2000/1. According to Social Development minister Zola Skweyiya, there is both a direct and indirect relationship between poverty and HIV/AIDS. It is estimated that 4.2 million South Africans are infected with HIV, the virus that causes the dreaded disease AIDS. This figure is expected to rise steeply to around 6.1 million by 2005, when about one million children, under the age of fifteen, are also expected to lose their mothers to the disease.

South Africa’s Budget for 2001 has been criticised for having an inherent shortcoming: by not providing minimum social security for the poor, its market-orientated reforms is facing a wall of dissatisfaction. There has, however, been a move toward developmental social welfare, which may be interpreted as a repugnance for grants – a perception that these are ‘handouts’ which are neither beneficial for the state nor the recipients. On the contrary, the Lund Committee Report supported monetary grants as having important economic and developmental benefits which include economic cost-efficiency.

Much research is required into which policy should be adopted. South Africa is not an economically rich country. The economic, social and administrative conditions prevailing here are those of a developing rather than an advanced society, although vast differences in wealth exist. Problems are exacerbated by the fact that in our society,
Unlike developed countries, a nuclear family is fairly rare among the poorer sectors of the population. 90  

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.” 91  

There are more non-working persons per South African worker than in most other countries with whom South Africa can be compared. For every working man or women in South Africa, there are 3.2 people who are not working. In the high-income countries, on the other hand, there is only one dependent person per working person. The dramatically higher number of non-working persons per worker means that, taking into account all the other claims on the output of each worker, South Africa will not be able to afford social assistance programmes similar to those in high-income countries. 92 The high incidence of HIV/AIDS will also increase costs, reduce contributions and impact on service delivery. Finally, the relatively low productivity of the country is not conducive to a high allocation to social security.  

3.2 Foreigners and the right of access to social security  

The self-employed, the informally employed and non-citizens are some groups who may challenge being specifically excluded from the statutory definitions used to indicate the range of beneficiaries of South Africa’s social security model. Such a challenge would arise from a constitutional perspective – the Constitution granting the right to equality, as well as the right of access to social security to everyone. Whether the entitlement to social and economic benefits should extend to non-citizens is contentious.  

90 Clark 2000 SALJ 354.  
91 Chaskalson P in Soobramoney v Minister of Health, KwaZulu-Natal supra.  
International human-rights documents conferring such rights upon aliens are not widely ratified, and many states are reluctant to include aliens in social assistance schemes. Many countries are not in a position to provide adequately for the socio-economic needs of their citizens, let alone those of foreigners in their territory. Furthermore, aliens are often blamed for contributing to socio-economic hardship by taking away jobs and public benefits believed to be rightly due to citizens.

In the light of the fact that several rights in the Constitution are conferred upon citizens alone, and whereas the constitutional right of access to social security is conferred without any distinction between citizens and non-citizens, one can only conclude that the framers of the Constitution intended that aliens should also enjoy access to this right.

Despite this, it would seem from the Department of Home Affairs Green Paper that the Department does not wish to extend any social welfare benefits (apart from emergency medical treatment and temporary schooling) to anyone other than citizens and permanent residents. No authorities or reasons are cited for this stance, and it is doubtful whether this policy is in accordance with the Constitution. The Social Assistance Act also provides social security benefits only to citizens, excluding even permanent residents from its application, in apparent conflict with section 27(1) of the Constitution.

It is difficult to see how aliens can by definition be excluded from the scope of the right to social security embodied in the Bill of Rights. The fact that it is the right of ‘access’ to social security does not amount to an indication that the rights are restricted in their application to certain people, namely citizens. The majority in Soobramoney accentuated the commitment expressed in the preamble of the Constitution to “improve

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93 Pautse “Foreigners and Socio-Economic Rights: Legal Entitlements or Wishful Thinking?” 2000 THRHR 51 55.
94 Ibid.
95 Pautse 2000 THRHR 56.
96 Pautse 2000 THRHR 58.
99 Pautse 2000 THRHR 58.
the quality of life of all citizens…”101 This may be an indication that citizens will be favoured above non-citizens in the progressive implementation of socio-economic rights, despite the fact that those rights in principle belong to everyone. It must be remembered, however, that a limitation on any right in the Bill of Rights must comply with the criteria set out in section 36 of the Constitution. It is difficult to imagine how a blatantly unreasonable and unjustifiable limitation on the rights of aliens will pass constitutional muster.102

As alluded to above, even if the right of access to social security is interpreted in such a way that aliens are precluded from claiming benefits, there is another constitutional provision which could assist aliens, namely the right to equality which is entrenched in section 9 of the Constitution. This right also belongs to ‘everyone’, irrespective of citizenship. Section 9(1) of the Constitution states:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

Subsections (3) and (4) of section 9 further provide that neither the state nor any individual may discriminate against any person on one or more of the grounds listed in section 9(3). Citizenship (or alienage) is not mentioned in this list of prohibited grounds of discrimination. As this list is not exhaustive, this does not mean that it will be constitutionally sound to discriminate against a person of the basis of alienage.103

The Bophuthatswana Supreme Court decided in Baloro v University of Bophuthatswana104 that a moratorium imposed on the promotion of non-South African academic staff at a university violated the right to equality in section 8 of the 1993 Constitution, in that it grossly discriminated against foreigners on the basis of their social

101 Par 9 of the Preamble of the Constitution of South Africa.
102 Pautse 2000 THRIR 59.
103 Ibid.
104 1995 4 SA 197 (B) 198.
origin. The court emphasised that international standards require that lawfully admitted aliens should be afforded treatment which accords with ordinary standards of civilization.

In *Larbi-Odam v Member of the Executive Council for Education* a regulation which prevented non-citizens from being permanently appointed as teachers was challenged under section 8(2) of the 1993 Constitution. The High Court initially found that, although the regulation amounted to unfair discrimination and bias against aliens, such discrimination was justifiable under the limitation clause and therefore not unconstitutional. Applying the limitation clause, the court found that the oversupply of teachers in South Africa and the consequential forced retrenchment of a large number of teachers justified the preferential treatment of citizens by the respondent.

The Constitutional Court unanimously reversed this decision and held that aliens who are permanently resident should not be treated differently from citizens when it comes to reducing unemployment. Mokgoro J stressed the vulnerability of aliens as a group and found that differentiation on the ground of citizenship, albeit a non-listed ground, seriously impairs the dignity of foreigners and amounts to unfair discrimination. Although finding that securing employment for South African citizens may in certain circumstances constitute a legitimate government interest, it was held that to exclude permanent residents from employment opportunities in the circumstances of the case merely because of their nationality did not amount to a reasonable and justifiable limitation on their right to equality.

The *Larbi-Odam* decision finally confirms that aliens are entitled to demand equal protection and benefit of the law as a marginalised, vulnerable minority group. It

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105 Pautse 2000 THRHR 60.
106 1996 12 BCLR 1612 (B) 1630.
107 1996 12 BCLR 1612 (B) 1631.
108 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) para 31.
109 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* supra para 26-31.
110 Pautse 2000 THRHR 61.
indicates that the Constitutional Court is willing to subject differentiation on the basis of alienage to constitutional scrutiny.

Millions of South African citizens suffer great socio-economic hardship, which creates uneasiness when one suggests that foreigners should also be entitled to some of the human rights guaranteed by the Constitution.\textsuperscript{111} On the other hand, it is inherent in the nature of human rights that people are entitled to them solely on account of their humanity. Aliens are humans who have ties to the community in which they live, also experiencing suffering and having needs. Ultimately, one should not, in focusing on the social security of South African citizens, lose sight of the rights of the country’s population of foreigners.\textsuperscript{112}

As Chaskalson P stated in \textit{S v Makwanyane}\textsuperscript{113}:

\begin{quote}
“The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.”
\end{quote}

### 3.3 A constitutional perspective on budgetary constraints

It is likely that budgetary constraints will always be a major obstacle to a permanent solution to the social security problem in South Africa. In a utopian society, endless amounts of capital would be available to improve and increase the provision of social assistance to citizens. The reality of the situation, however, is that there will always be a need for more funding in order to improve the amount of assistance which a state is able

\begin{flushleft}
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} 1995 3 SA 391 (CC) para 88.
\end{flushleft}
to provide for those who require it. Paradoxically, it is probable that money alone will not solve the country’s problems. What is required in addition to providing sufficient assistance is the effective spending and distribution of this assistance to those who require it. Society must avoid merely accepting their financial lot while bemoaning the fact that it is practically impossible to find a “quick-fix” to a problem of this nature. The very least which can be accomplished must be accountability in respect of the current efforts together with an ongoing attempt to increase social assistance funding whilst simultaneously striving to reduce unemployment.

In Bacela v MEC for Welfare (Eastern Cape Provincial Government)\textsuperscript{114} the respondent, who was responsible for the administration of the Social Assistance Act,\textsuperscript{115} issued a circular to regional directors in the department, in which she set out her decision to suspend the payment of arrear pensions due to budgetary constraints. The appellant, a pensioner, challenged the decision of the respondent as being unconstitutional, as well as unlawful and invalid. After examining the powers of the respondent under the Act and regulations, the court concluded that the respondent was not authorised to suspend the payment of pensions. As such, the decision of the respondent was declared unlawful and of no force and effect, and the respondent was ordered to pay the arrear pensions. Regrettably, the court did not consider the constitutionality of the respondent’s decision, although the outcome was important as a useful guide for the implementation of socio-economic rights. It also served to dispel an incorrect notion held by some lawyers that socio-economic rights cannot be enforced in a court of law.\textsuperscript{116}

In the case of Tsatsawane Shivambu and Three Others v The Member of the Executive Council for Health and Welfare\textsuperscript{117}, the appellant lodged an application for an order

\textsuperscript{114} 1998 1 All SA 525 (E) 527.
\textsuperscript{115} Act 59 of 1992.
\textsuperscript{116} Nthai 1999 De Rebus 42
\textsuperscript{117} TPD 1998 Case No 16784/98
stating that it was unlawful for the respondent to refuse to receive, process and consider applications for social grants payable to aged persons merely because the date of birth reflected in the persons’ identity documents indicated that they had not yet attained the prescribed age. As this case was settled out of court, another important opportunity to decide on the implementation of socio-economic rights was missed.\textsuperscript{118}

In the Eastern Cape Division of the High Court, some individual applicants brought motion proceedings against the Eastern Cape provincial government seeking the reinstatement of the disability grants they had been receiving under the \textit{Social Assistance Act} - which the provincial government had terminated without notice to them. Many other Eastern Cape disability grantees were in a similar predicament.\textsuperscript{119} The applicants had sought to institute representative, class action and public interest proceedings in terms of section 38(b), (c) and (d) of the Constitution. After being granted leave to proceed, the applicants obtained an order to litigate as representatives of anyone in the Eastern Cape Province whose disability grants were cancelled or suspended by or on behalf of the Eastern Cape government between specific dates.\textsuperscript{120}

More importantly, the order required the Eastern Cape government to provide the Legal Resources Centre with the details of the members of this class of people as kept on computer or physical file in governmental records. The order even required the applicants to disseminate through the media in the Eastern Cape and, with the assistance of the provincial government, by notices at pension pay points information about the class action.\textsuperscript{121}

The Eastern Cape government appealed to the Supreme Court of Appeal challenging both the grant of leave to institute the class action and the disclosure order. The Court, in a

\textsuperscript{118} \textit{Ibid}

\textsuperscript{119} Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Nguza and Others 2001 10 BCLR 1039 (SCA) 1040.

\textsuperscript{120} Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Nguza and Others supra 1040.

\textsuperscript{121} Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Nguza and Others supra 1040.
unanimous judgment, dismissed the appeal. Cameron JA noted that the province had chosen to verify and update its pensioner records in a manner which was undifferentiatingly harsh. This had been demonstrated by *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another.* In *Ngxuza,* the grantees whose grants had been terminated were victims of official excess, bureaucratic misdirection and unlawful administrative methods. The class the applicants represented was drawn from the very poorest in society. They also had the least chance of vindicating their rights through the legal process. Their individual claims were small and they were scattered throughout the Eastern Cape Province. Despite the fact that the situation cried out for leave to bring a class action, the government had opposed this request. Cameron JA observed that its response spoke of “a contempt for people and process that did not befit an organ of government under our constitutional dispensation…”

It was further held that while it was not the function of the courts to criticise the government’s decisions in the area of social policy, by invoking legal processes to impede the rightful claims of its citizens, the government defied the Constitution and misused the mechanisms of the law.

A number of similar cases of litigation have become prevalent in the High Courts, in particular in the Eastern Cape, which has resulted in a great deal of money being wasted in legal fees.

### 3.4 Legal remedies

Despite the strong statements of the Constitutional Court in the *Grootboom* case about the justiciability of socio-economic rights, authors have been unable to envisage effective

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122 2000 7 BCLR 728 (E).
123 Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others supra 1040.
124 Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others supra 1040.
125 Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others supra 1041.
judicial remedies for their enforcement.\textsuperscript{126} In so far as the negative aspect of the right is infringed, the appropriate remedy would in most cases be a declaration of invalidity of the infringing measure. In respect of a failure to fulfil a positive measure, more innovative measures will have to be developed to vindicate the Constitution.\textsuperscript{127} So far, the structural interdict (which directs a violator to take steps to rectify a violation of rights under court supervision) and declaratory relief have been granted by South African courts as discussed above. Advocate Wim Trengrove argues that awards of preventive damages may be more appropriate in certain circumstances than individualized awards of compensatory damages. An award of preventive damages against the state may be made in favour of an independent state institution or non-governmental organization with the necessary skill and programmes aimed at preventing future violations of the socio-economic rights in question.\textsuperscript{128}

A litigant in a case alleging that the state has neglected to fulfil its positive duties will be confronted with the difficult decision concerning the appropriate sphere of government to cite as defendant. This decision will depend on the facts of the particular case. In certain cases, the failure to comply with a positive duty can be clearly attributed to a particular sphere of government. An example of this would be where it is clear that a provincial government has failed, despite an adequate budgetary allocation by national government, to give effect to its executive obligations to advance access to social security within its jurisdiction.\textsuperscript{129} In these circumstances the particular provincial government will be the sole defendant. However, if an order is sought calling upon the national government to intervene in terms of section 100 of the Constitution when it is alleged that “a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution”, the national government will have to be joined as a defendant.

\textsuperscript{127} Ibid.
\textsuperscript{128} W Trengrove Judicial Remedies for Violations of Socio-Economic Rights (1998) Unpublished paper delivered at a seminar entitled Giving Effect to Socio-Economic Rights: The Role of the Judiciary and Other Institutions co-hosted by the Community Law Centre (UWC) and Legal Resources Centre (Constitutional Litigation Unit), 1998-10-06 as cited in Chaskalson, Kentridge, Marcus & Spitz Constitutional Law of South Africa Revision Service 3 (1998) 41-52.
\textsuperscript{129} Chaskalson et al Constitutional Law of South Africa 41-44.
4.

SOLUTIONS

4.1 State enterprises

The task facing the government in its attempt to solve some of the problems highlighted above is considerable. Many authors and politicians have stated that the lack of jobs problem 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. Olivier states that to propose long term solutions to the exclusion and marginalization of certain groups in South African social security 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.\textsuperscript{130}

To give effect to the right of access to social security will only be possible if the unemployment problem is successfully addressed.

As mentioned above, the limited nature of protection in terms of the South African social security system has affected the poor, as well as the informally employed and ‘structurally unemployed’ amongst them in particular. One of the reasons for this is that the social insurance system (especially unemployment insurance and compensation for work injuries) does not provide coverage to those outside formal employment. Furthermore, social assistance measures seldom operate to the direct advantage of the poor and the informally employed. 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.\textsuperscript{131}

\textsuperscript{130} Olivier 1999 \textit{ILJ} 2200.
\textsuperscript{131} Olivier 1999 \textit{ILJ} 2206.
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.\textsuperscript{132}

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.\textsuperscript{133}

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 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.\textsuperscript{134} 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

\textsuperscript{133} Godfrey 1995 \textit{International Labour Review} 9.
\textsuperscript{134} \textit{Ibid.}
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 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 intended to be built for people who are going to be 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 chance to create a long-lasting social impact. Private savings is not being highlighted and it is likely 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 dependent on the state for social assistance, rather than being economically secure.
4.2 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 initial allocation of the government to address poverty amounted to R800 million, and reached R1.2 billion in 2001. The biggest allocation went to the Department of Water Affairs and Forestry. The Working for Water Programme was initiated in 1995, and uses labour intensive methods to remove vegetation that reduces water availability.

R249 million was allocated to the Department of Public Works for poverty relief projects. The funds were channelled through the Community Based Public Works Programme (CBPWP). The key activities 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 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.\(^\text{135}\)

The government also established the National Presidential Lead Project (NPLP) to pilot affordable mass housing delivery. The government hereby 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

\(^{135}\) Strydom et al Essential Social Security Law 189.
the use of labour intensive construction methods in the award of tenders in order to ensure that as many jobs as possible are created.\textsuperscript{136}

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.

4.3 **NEDLAC’S solutions**

The labour constituency submitted the following social security components to the post-Job Summit task team at Nedlac:

- Ensure that social assistance provides a safety net to all citizens: currently there is no support for 90\% of working age people who are unemployed. Labour proposes that a basic income grant be paid to all citizens, as set out in the Jobs Summit.\textsuperscript{137} Where the finance for this will come from is not stipulated;
- Restructure existing social insurance institutions;
- All working people should be covered by work-related social insurance. Historically, the groups that are the most high-risk and need social insurance the most (such as domestic workers) have been excluded from social insurance. This is because government saw these groups as being ‘too risky’ and their segment of the labour

\textsuperscript{136} Strydom et al Essential Social Security Law 190.

market was unregulated.\textsuperscript{138} Even in terms of the Unemployment Insurance Bill,\textsuperscript{139} domestic workers and their employers are excluded from the application of the Act. It is provided that there shall be an investigation undertaken by an appropriate body, appointed by the Minister of Labour, to investigate methods by which domestic workers may be included under coverage of this Act. This investigation ‘may’ be concluded within eighteen months from the date of promulgation of the Act;\textsuperscript{140}

- High and low income earners should contribute to the same fund. This will balance out risk profiles and encourage redistribution and solidarity among all working people. It will be more affordable to include more vulnerable workers in a fund when the fund also has higher earners contributing.\textsuperscript{141}

- Public sector service delivery must provide essential goods and services to all, especially the poorest. Providing social services (such as cheaper public transport) is not merely a cost – it also lowers the cost of living and improves living conditions. A better public service helps maintain “social infrastructure” (such as community services and values) which is an extremely neglected concept.\textsuperscript{142}

- Importantly, employment-related benefits such as transport, retirement funds, private health care and housing amount to about 30\% of labour costs. This cost to employers must be reduced should all these benefits be included in an overall social wage package. In this way, the publicly provided safety net will be better resourced and more sustainable by reducing duplication.\textsuperscript{143}

\section*{4.4 ILO solutions}

Many solutions suggested (such as “public measures should complement and not replace traditional support systems”)\textsuperscript{144} are not practical enough and provide no assistance as to the application of the idea. Improved social protection will only be achieved by a

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combination of initiatives within an overall strategy. The ingredients for such a strategy should include the following according to the ILO:

- Recognition by government and the social partners of the State’s obligation to ensure, either directly or indirectly, a minimum standard of living for all;
- A comprehensive analysis of social protection needs and the extent to which these are being met or could be met by existing provisions;
- The reform of social security schemes to provide them with greater autonomy and administrative efficiency and to enable them to provide better benefits, more efficiently, to more people;
- The encouragement of individual, employer-based and private sector initiatives to complement statutory provisions;
- The extension of relevant benefit packages on social insurance principles to other sections of the labour force who have the capacity and stability to contribute;
- The provision by government of a tax-financed safety net to provide for basic needs such as primary health care, food, security, primary education and access to safe water - and possibly a guaranteed minimum income to defined vulnerable groups without other support.\(^{145}\)

4.5 A new deal – with a new sacrifice

Many great civilizations have had to overcome hardship greater than 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 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.\(^{146}\) It has been said that neither Beveridge nor Bismarck nor Roosevelt can provide a model for social security in

\(^{145}\) Ibid.

\(^{146}\) Hofstadter, Miller, Aaron, Jordan & Litwack *The United States* (1979) 340.
developing countries.\textsuperscript{147} For the 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.\textsuperscript{148}

The first New Deal assistance to the unemployed was the Civilian Conservation Corps (CCC) for the youth of the country. At one point, 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.\textsuperscript{149} The Sabita-sponsored ‘Taking the High Road’ project will shortly enter its second phase – focussed 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 can not be repeated. In fact, there is a great deal which South Africa can learn from FDR.

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.\textsuperscript{150}

\textsuperscript{147}Ahmad, Dreze, Hills & Sen (eds) Social Security in Developing Countries 103.
\textsuperscript{150}Hofstadter et al The United States 340.
The Public Works Administration had duties including planning bridges, dams, hospitals, municipal power plants, post offices, school buildings, slum clearance, the rehabilitation of army posts and naval stations and 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 project are long-lasting (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 begin to enjoy economic spin-offs. Ideally, the co-ordinators will 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 theater, 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 NYA, young people aged 16 to 25 found part-time employment in high schools, colleges, and universities.151

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

151Ibid.
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 in particularly in the Eastern Cape, is poor. Even in the time of the New Deal, its relief program 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 program, 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.152

Self-employed persons and entrepreneurs must be encouraged as they create employment. The informal economic sector, for example street hawkers, flower sellers, home industries and car guards also offer important alternative sources of income in our present economic conditions.153 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 program encouraging private savings, or perhaps by the creation of a state special savings program 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.154 Possible ways of encouraging the informal sector could be a further deregulation of zoning so that places of employment and accommodation need not be separate and a relaxing of certain requirements for obtaining a trading license.155 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

152 Hofstadter et al The United States 341.
often small, working conditions are difficult, income is unstable and often very meagre
and the potential for growth is low.\footnote{Simon “Urban Poverty, Informal Sector Activity and Intersectoral linkages: Evidence from Windhoek, Namibia” 1984 Development and Change 551 569.}

4.6 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
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 for the next
three years, compared to approximately R1,5-billion a year committed to poverty

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
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 committee 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.\footnote{http://www.polity.org.za/govdocs/white_papers/defence.html (2001).} 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 Trade Centre in New York), this may have been a
viable solution as a result of the United Nations and considering America’s tendency to

\footnote{156 Simon “Urban Poverty, Informal Sector Activity and Intersectoral linkages: Evidence from Windhoek, Namibia” 1984 Development and Change 551 569.}
\footnote{157 http://www.suntimes.co.za/business/budget/budget12.asp (2001).}
\footnote{158 http://www.polity.org.za/govdocs/white_papers/defence.html (2001).}
\footnote{159 http://www.polity.org.za/govdocs/white_papers/defence.html (2001).}
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 army. 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. As put by Kriegler J (as he then was),

“It would be irresponsible to ignore the harsh reality of the society in which the Constitution is to operate. Crime is a serious national concern…”

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

160 S v Schietekat 1999 7 BCLR 771 (CC).
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 with 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.\footnote{Strydom \textit{(ed) Life Cycle Arises and Social Security: Trends Until the Years 2000 – 2020} (1998) 70.}

It is submitted that the state’s obligation should just be to provide 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 UIF payments and find a new job in the six months that they have. 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.
4.7 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. 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.

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. 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 can not 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. In this way, the provision of 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.

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-

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163 Ibid.
164 Ibid.
166 Ibid.
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.\footnote{Naidoo 1999, South African Labour Bulletin 58.} There could also be a role for the unions in the delivery of such services.\footnote{Ibid.}

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 hands of the government by making it politically impossible – at least unwise – for it to ignore impending threats.\footnote{Ahmat, Dreze, Hills & Sen Social Security in Developing Countries (1991) 29.}

The promotion of a wider floor of recipients will require a transfer of resources from the privately supplied benefits to the publicly supplied benefits. This effort to ‘de-privatise’ social security requires improvements in the quality of public sector service.\footnote{Naidoo 1999, South African Labour Bulletin 58.}

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.\footnote{Naidoo 1999, South African Labour Bulletin 54.} 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 its own membership.\footnote{Ibid.}
As government prioritises poverty relief, so attention is turning to the outcome of the official committee investigating the feasibility of a national social welfare system for South Africa. The committee has recently received a strong motivation for a R100,00 a month basic income grant (BIG) for all adult South Africans, to be funded by increased taxation at higher income levels.\(^{173}\)

### 4.8 Increasing finance for 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.\(^{174}\)

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.\(^{175}\) 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 program. 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 to obtaining the desired level of housing, health and education. The public, however, need to make an informed


\(^{175}\) Naidoo 1999 *South African Labour Bulletin* 58.
decision about prioritizing the social security system. In *Van Zyl v Jonathan Ball Publishers (Pty) Ltd*[^166]^{176}, it was held that there is no hierarchy or 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.[^166]^{177} 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, old age or 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.[^166]^{178} 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.[^166]^{179} 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.[^166]^{180} Although the Finance Minister gave the people more than R8 billion with tax concessions in the latest budget, it is arguable that the money would have been better spent as part of a focused anti-poverty or job-creation strategy.[^166]^{181}

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

[^166]: 1999 4 SA 571 (WLD) 573.
[^177]: Olivier et al *Social Security Law* 56.
[^179]: Fast & Franzsen 1998 *De Jure* 351.
[^180]: W M Gumede “Poverty relief would help growth”, www.bdfm.co.za

53
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, has 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.

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 (sections 214 and 227 of the Constitution).182 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.183

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South Africa spends about 10% of gross domestic product on health. This relatively high level of expenditure is due to two-thirds of health spending going towards the well-resourced, private health sector. Private health services the minority in the population that can afford to pay high, and rising medical costs. This contributes towards high medical inflation and the drain of good doctors from public hospitals. The result is that under-resourced government services are left to deal with the vast majority of the population who cannot afford private services. An important weakness to be attended to is that government departments and civil society do not 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.

Despite the Constitutional Court’s ruling in *Soobramoney*, the state has to prove that it is acting in good faith and rationally in the circumstances. This judgment highlights the need to expand the current narrow concept of ‘affordability’. It also places a greater burden on the state to provide evidence. The judgment emphasises the need for progressive social forces to increase their pressure on the national budget and other redistributive instruments that determine affordability.

### 4.9 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. 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

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185 Ibid.
186 Ibid.
for its eradication in Africa should rest with the entire world.\(^{188}\) In an address to parliament early in the year, 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.\(^{189}\)

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.\(^{190}\) Consequently, South Africa is currently 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.\(^{191}\) Minister Manuel has highlighted that the problem of this imbalance of power lay in developing countries also facing a crushing debt burden, with Africa's debt estimated at some 319 billion dollars as at the end of 1998. To service its own debt, South Africa pays some 2.57 billion dollars every year.\(^{192}\)

The Jubilee 2000 Campaign, which is urging cancellation of debts incurred by the former apartheid regime, argues 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 the civil society. The South African parliament will soon begin


\(^{189}\) Ibid.

\(^{190}\) Ibid.

\(^{191}\) Ibid.

\(^{192}\) Ibid.
consideration of a much-anticipated report by a government commission that is studying possible long-term poverty solutions. Ideas that have been aired include a food-stamp-type program, grants to elders caring for orphaned children, and strengthening laws that regulate the obligations of private businesses to their former employees.

In June, the government was expected to issue a set of uniform standards for pension pay points. The standards would draw partly on a new high-tech distribution system run by ABSA, one of the nation's largest banks, in Gauteng Province. Using a sophisticated computer system that scans pensioners' identification cards, checks their thumb prints against a centralized database, and then electronically distributes the correct payment from a locked safe, ABSA has reduced the amount of time it takes to process a pension payment from several minutes to about 15 seconds. A small army of volunteers answers questions and helps with crowd control. Payment times are also now staggered, so that those arriving to pick up child and disability grants are not competing with elders.\(^{193}\) This advancement should improve the distribution of social grants, although the advancement must spread to the rest of the country.

Although South Africa is a member of the international development partnerships strategy, in addition to meeting international obligations there have been national initiatives to develop indicators that take into consideration the country’s specific needs with regard to the monitoring of transformation of hitherto apartheid South Africa. The goals of transformation are embodied in the Government’s Reconstruction and Development Programme (RDP), and the Growth, Employment and Redistribution (GEAR) strategy.

The RDP is an integrated, coherent socio-economic policy framework and its programme of action is structured around its principal policy thrusts, which brings together clusters of Ministries and Departments. Five major policy programmes have been linked. These are designed to meet the overall goal of the RDP - a better life for all – namely: meeting

basic needs, developing the country’s human resources, building the economy, democratizing the state and society and implementing the RDP.

On the other hand, GEAR is the government’s macro-economic framework for rebuilding and restructuring the economy; it complements the RDP. The twin objectives of the GEAR are transformation of the economy to meet the needs of the new democracy, and gearing it for the competitive world economy. The strategy in place to achieve the objectives includes infrastructure development (including housing, health care and education facilities, municipal and rural infrastructure, and recreational facilities); measures to promote competitiveness and employment; restructuring of state assets; fiscal and financial discipline and the reprioritising of spending.

The outline of President Mbeki’s Millenium Africa Project (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 with 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 associated with the RDP are having to factor in job creation considerations and local economic development into their plans, and there is a much more co-ordinated, centrally-directed focus.  

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 is 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.

Poverty alleviation, a critical issue in the transformation process, is a major concern to the government. In this regard, the Cabinet has now instructed that all poverty work 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 the unemployment and poverty overnight. Government's unveiling recently of its long-overdue national skills development and human resource development strategies will 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 to private savings or insurance measures.

5. 

CONCLUSION

5.1 International perspective

Harvard economist Dani Rodrik argues that a proper social security net is a necessary ingredient for any successful market economy. Social security legitimises a market economy because it renders it compatible with social stability and social cohesion. Rodrik points to widespread dissatisfaction among the populace of Latin America, after their countries in the Eighties pursued market-orientated reforms without paying much attention to providing social insurance and safety nets.

In the USA, it was the trauma of the Great Depression that paved the way for social security, unemployment compensation, public works, deposit insurance and legislation favouring trade unions. Despite a backlash against the welfare state since the Eighties, neither the US nor Europe has significantly scaled back these programmes.

Social insurance need not always take the form of transfer programmes paid out of the Treasury. The East Asian model, represented by the Japanese, is one where social insurance is provided through a combination of enterprise practices, such as lifetime employment and enterprise-provided social benefits. In addition, Japan has sheltered and regulated sectors, and an incremental approach to liberalization. Certain aspects of Japanese society that seem inefficient to outsiders, such as preference for small-scale retailers or extensive regulation of product markets, can be viewed as substitutes for the transfer programmes that would otherwise have to be provided by a welfare state.
A variant on this approach is applied by China. Special enterprises are set up to absorb people who have been laid off. These are complex institutions, some functioning as employment exchanges and training agencies, some organizing productive enterprises, and some doing both. It is their productive-enterprise function that is of most interest. Thus, a state enterprise with surplus workers, instead of declaring them redundant, might use its labour service company to set them up in business, for example, running a shop, which could also absorb the unemployed children of enterprise employees. The sponsoring enterprise provides its labour service company with start-up capital, operating funds and technical and managerial staff. The labour service company in turn may contribute capital and operating funds to enterprises that it sets up (which share in the preferential tax treatment that it enjoys), either as a loan or in return for a share of the profits. Employees of the new enterprises have access to the mother enterprise’s social facilities, such as housing and social security.

At the same time, welfare provision in Europe and the US engenders economic and social costs (mounting fiscal outlays, an entitlement culture, long-term unemployment) that have become increasingly apparent. Partly because of that, developing countries have not paid sufficient attention to creating institutions of social insurance. The upshot has been economic insecurity and a backlash against the reforms.

Other constitutions protect selected economic and social rights. An example is the German Basic Law which includes guarantees of special state protection to marriage and the family and education. These basic rights in conjunction with the German Constitution’s explicit commitment to the social state principle (articles 20 and 28) have resulted in significant interventions by the German Constitutional Court in socio-economic spheres.

197 Gumede 2001 www.bdfm.co.za.
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). This is the most important instrument relating to socio-economic rights and, as of January 2001, had been ratified by approximately 130 states.

South Africa signed the Covenant in 1994, but has not yet ratified it. States are obliged to accept at least three branches of the forms of social security identified by the Social Security Convention of 1952 (mentioned above) in order to ratify the Convention. 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. 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.” 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.

The correlation (and difference) between the Covenant and sections 26 and 27 of the Constitution was recognised by the Constitutional Court in Grootboom. 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) provides a valuable

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200 Article 2(1).
202 2000 3 BCLR 277 (C).
source of guidance for South African courts by means of its interpretations of the Covenant and its comments on state reports.\textsuperscript{203}

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.\textsuperscript{204} 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 in realising their rights.\textsuperscript{205}

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.\textsuperscript{206} For example, according to Article 37 of the Indian Constitution, the list of Directive Principles “shall not be enforceable by any court, by the principles therein laid down are

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\textsuperscript{203} De Waal et al \textit{The Bill of Rights Handbook} 437. \\
\textsuperscript{204} Ibid. \\
\textsuperscript{205} Ibid. \\
\textsuperscript{206} Ibid. 
\end{flushright}
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 not intended to entitle a state a discretion regarding the implementation of
these rights. De Waal et al cite the following principles as having emerged from
international custom:

- The fact that the full realisation of socio-economic rights can only be achieved
  progressively does not alter the obligation on the state to take those steps that are
  within its power immediately and other steps as soon as possible. The burden is on
  the state to show that it is making progress toward the full realisation of the rights.
  This, it will be noted, is in accordance with the approach of the Constitutional Court
  in Soobramoney. In other words, while the state has a margin of discretion in
determining which measures it will implement and how it will utilise its resources, it
must show that it is exercising its discretion rationally and in good faith.

- While the requirement that a state take ‘appropriate’ steps towards the realisation of
  the rights confers a considerable margin of discretion on states, there is nevertheless
  an obligation to justify the appropriateness of the measures adopted. The
determination whether a state has taken all appropriate measures remains one for the
courts to make.

- Scarcity of resources will not absolve states of certain minimum obligations and
  violations of socio-economic rights will occur when the state fails to satisfy

207 Soobramoney v Minister of Health (KwaZulu-Natal) supra.
obligations to ensure the minimum essential levels of each of the rights, or fails to prioritise its use of its resources so as to meet its core minimum obligations. In terms of the Maastricht Guidelines, these core minimum obligations will apply unless the state can show that its resources are ‘demonstratably inadequate’ to allow it to fulfil its duties. Even then, the obligation remains on the state to ‘strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances’. 210

A state claiming that it is unable to carry out its obligations because of resource scarcity bears the onus of proving that this is the case. As a result, the inability of a state to comply with its obligations must be distinguished from its unwillingness to do so. Furthermore, the fact that obligations are to be realised progressively does not mean that the state may postpone its obligations to some distant or unspecified time in the future. 211

5.2 A final word

Social security in the modern era is essentially conceived of as a related concept to the high ideals of human dignity and social justice. Almost all independent countries have enacted social security measures as per their means and capacity. However, the structure of social security laws and the extent of participation in it by the governments vary from country to country, depending upon the nature of economy and the resourcefulness of its government. 212 The Department of Social Development reported in its submission to the South African Human Rights Commission that it is able to reach approximately three million people, when it is estimated that about 49% (approximately twenty million) of the people in South Africa can be regarded as poor. 213 According to the Commission, this is closely related to the lack of co-ordination in the various components of the social security system. Responsibilities for the delivery of the social security system are

211 Ibid.
dispersed across a number of agencies of the state without effective co-ordinating mechanisms for social insurance on one hand, and social assistance on the other. For example, the Department of Social Development administers a significant form of what has been defined as social assistance, which are mostly grants. The Department of Labour administers unemployment and occupational-types of social security, which comes mainly in the form of social insurance. The Department of Health is responsible for health insurance and the Department of Transport is responsible for the Road Accident Fund. Social services for children is shared between the Departments of Social Development, Justice and Constitutional Development.

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.²¹⁴

“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.”²¹⁵

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

²¹⁵ Ibid.

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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, and not the government, who appear not to have appreciated the problem) has accepted poverty and unemployment as part of their lives – even though it probably affects at least one of their immediate relatives.

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 on the part of government is a distinct issue. The majority of citizens, however, 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 improve magically.

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 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 that 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. The relationship between HIV/Aids and poverty relief also needs to be investigated. 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.\footnote{Snyman Social Security in Six South American Countries – Report of a Study Tour (1989) 48.} 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 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.\footnote{Ibid.} The power of private savings, together with greater control over pension funds, also have 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 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.
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