

CONSTITUTIONAL PERSPECTIVES ON UNEMPLOYMENT SECURITY AND A RIGHT TO WORK IN SOUTH AFRICA

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1 Introduction

South Africa's unemployment rate is one of the highest in the world, and significantly higher than those of other middle income economies.¹ When using the narrow International Labour Organisation ("ILO") definition² (which is the official definition in South Africa), South Africa's unemployment rate currently stands at 25%.³ If the broad definition of unemployment is used (which includes discouraged work seekers), the unemployment rate swells to 36.6%.⁴ While urban unemployment rates are already very high, particularly striking and unusual are the higher rural unemployment rates (particularly in the so-called former "homelands") which are far higher than anywhere in the developing world.⁵ Also noteworthy is that these unemployment rates differ greatly by race, age and gender.⁶ In 2011 Africans had much higher (official or narrow) unemployment rates (28.9%), compared to Coloureds (23.6%), Indians (10.8%) and Whites (5.6%).⁷ Age is also a major determinant of unemployment. Unemployment disproportionately impacts on the youth,

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¹ H Bhorat "Unemployment in South Africa: Descriptors and Determinants" (2007) *Developmental Policy Research Unit, University of Cape Town* 2 <http://www.commerce.uct.ac.za/Research_Units/DPRU/OtherPDFs/Unemployment_in_South_Africa4.pdf> (accessed 05-08-2011)

² Art 20 of the ILO Social Security (Minimum Standards) Convention 102 (1952) ("ILO Convention 102") states:

"The contingency covered shall include suspension of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work"

³ Statistics South Africa "Quarterly Labour Force Survey, Quarter 3, 2011" (2011) *StatsOnline* xii <<http://www.statssa.gov.za/Publications/P0211/P02113rdQuarter2011.pdf>> (accessed 01-11-2011)

⁴ Statistics South Africa "Quarterly Labour Force Survey, Quarter 4, 2010" (2011) *StatsOnline* 12 <<http://www.statssa.gov.za/publications/P0211/P02114thQuarter2010.pdf>> (accessed 01-11-2011)

⁵ S Klasen & ID Woolard "Surviving Unemployment without State Support: Unemployment and Household Formation in South Africa" (2008) 18 *J African Economies* 1 2

⁶ On women and unemployment in general, see C Cooper "Women and the Right to Work" in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights* (2011) 247 248

⁷ Statistics South Africa "Quarterly Labour Force Survey, Quarter 3, 2011" (2011) *StatsOnline* xii <<http://www.statssa.gov.za/Publications/P0211/P02113rdQuarter2011.pdf>> (accessed 01-11-2011)

affecting about 35% of those below the age of 25.⁸ Of particular concern is the unemployment rate of African youth, which stood at 53.4% at the end of 2009.⁹ There is also a noticeable gender differential with females suffering from higher unemployment rates among each age and race group.¹⁰

Protection against unemployment takes various forms in South Africa. In the first place, partial and temporary income support is provided in the form of social insurance *via* the Unemployment Insurance Fund (“UIF”). However, a proper unemployment policy framework requires more than just partial and temporary income replacement. In this respect, South Africa has made some modest attempts to develop what the ILO¹¹ refers to as both “employment-enhancing measures” (primarily in the form of public works) as well as “employment services” (which includes the most recent Employment Services Bill¹² aimed at providing assistance to the unemployed in searching for new employment). Nevertheless, the most glaring gap in the assistance provided to the unemployed in South Africa is the exclusion of the structurally- or the long-term unemployed from any income replacement measures. For example, there is no social assistance grant that particularly targets persons who have either exhausted their limited unemployment insurance benefits, or those who have never been formally employed and therefore never contributed to the social insurance system.¹³ Structurally unemployed youths and adults receive limited or no support from the existing social assistance framework.¹⁴

In this paper, we argue that the constitutional right to have access to social security, as read with other existing rights, is an inadequate “umbrella right” for purposes of covering the most recent policy developments which attempt to address poverty by way of a combination of social security and unemployment protection strategies. It is also suggested that the disparity between current policy developments and the existing statutory scheme of laws requires address, given that current policy-making in this area operates in the absence of a proper legal framework and that a real possibility exists for a constitutional challenge in this regard.

In developing our argument, we introduce the concept of “unemployment security” – one that is not common in the literature. The primary purpose for

⁸ Department of Social Development *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security* (Discussion Paper) (2008) 7

⁹ See SAPA “Youth Unemployment is a ‘Ticking Time Bomb’: Mdladlana” (27-08-2010) *The Times* <<http://www.timeslive.co.za/local/article625827ece/Youth-unemployment-is-a-ticking-time-bomb--Mdladlana>> (accessed 23-03-2011)

¹⁰ Statistics South Africa “Quarterly Labour Force Survey, Quarter 3, 2011” (2011) *StatsOnline* 2-5 <<http://www.statssa.gov.za/Publications/P0211/P02113rdQuarter2011.pdf>> (accessed 01-11-2011)

¹¹ See ILO *World Social Security Report 2010-2011: Providing Coverage in Times of Crisis and Beyond* (2010) 57

¹² Employment Services Bill (draft) in GN 1112 in GG 33873 of 17-10-2010

¹³ Although social grants cover those under the age of 18 and those over the age of 60 who are unable to support themselves, as well as all disabled persons, adults between the age of 19 and 59 who are not disabled are effectively not entitled to any social assistance – even when they are unable to support themselves

¹⁴ Department of Social Development *Creating Our Future* 8 Also see Government of the RSA *Decent Work Country Programme 2010-2014* (2010) *International Labour Organization* 9 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/genericdocument/wcms_145432.pdf> (accessed 24-03-2011)

using the term is to acknowledge the state prioritisation on matters relating to unemployment, while simultaneously linking the discussion to the well-known theme of social security. Used in this fashion, the term is defined to include both unemployment insurance and unemployment assistance. It is also intended to include both preventative and re-integrative components of unemployment protection – a concept which may be viewed as being one component of the broad notion of social protection. Unemployment protection would, for example, include state strategies to prevent employment loss as well as attempts to integrate people into employment, such as public works programmes. Unemployment security is accordingly defined to be practically synonymous with what is understood to be the unemployment protection-specific aspects of social protection, including social security strategies focusing on the problem of unemployment (unemployment insurance and unemployment assistance), as well as prevention and integration strategies directed at minimising unemployment. Skills development and training activities are clearly linked to such strategies and could be combined with any of the suggested sub-components of unemployment security.¹⁵ The proposed definition also brings to the fore the possibility of a “right to work”, which must be coupled with the developing notion of “decent work”.¹⁶

The term may be diagrammatically represented as follows:



¹⁵ This aspect is dealt with in greater detail in A Govindjee, M Olivier & O Dupper “Activation in the Context of the Unemployment Insurance System in South Africa” (2011) 22 *Stell LR* 205-205-227.

¹⁶ In this paper, the term “work” is used in the same way that the ILO has defined the concept, as an individual responsibility and a social activity, frequently involving collaboration in a team and occupying a central and defining place in people’s lives, determining the stability and well-being of families and communities and being a key to social integration. The concept of “work” does not only refer to a paid job, self-employment and running a business, but any form of economic activity that increases the ability of an individual and their family not just to survive but to develop. As a result, it includes unpaid tasks related, for example, to helping in the home, the range of activities in the informal economy and the care economy: ILO *Changing Patterns in the World of Work: Report of the Director-General* (2006) v-vi as referred to in ILO *Skills Development through Community Based Rehabilitation (CBR): A Good Practice Guide* (2008) 7. Also see ILO Report of the Director-General: *Reducing the Decent Work Deficit- A Global Challenge* (2001) 5. The term “decent work” is considered, below.

This article is structured in two main parts. The first part provides a brief overview of each of the components represented in the diagram above. In part 2, we discuss the two related terms of social security and social protection, and then turn to a brief discussion of the current unemployment insurance- and unemployment assistance systems in South Africa (parts 3 and 4). In parts 5 and 6 respectively, we examine the two sub-components of unemployment protection, namely unemployment prevention initiatives (including the training layoff scheme) and employment creation interventions (such as the expanded public works programme and the wage subsidy for incentivising the employment of the youth). This is followed by a brief explanation of the concept of “decent work” in part 7. In the second part of the paper we turn to the crux of the paper, namely a consideration of some constitutional perspectives related to unemployment security matters. The absence of direct statutory or constitutional provisions regarding the notion of unemployment security or a right to work is highlighted. Three potential options for constitutional and/or legislative reform are considered, including an actual amendment to the Constitution of the Republic of South Africa, 1996 (“the Constitution”) itself. It is argued that such redress is in accordance with the notion of transformative constitutionalism and could serve as a principled basis for the introduction of legislative and (further) policy developments aimed at achieving poverty alleviation.

2 Comprehensive social security

Although there is no universally acceptable definition of “social security”, the concept has traditionally been split into social assistance (non-contributory) and social insurance (contributory) components.¹⁷ These components are expected to combine so as to provide income protection and access to services upon the occurrence of certain defined events.¹⁸ As indicated above, ILO Convention 102 describes social security as guaranteeing a stable income through medical care, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, and invalid benefits.¹⁹ Social security has been trumpeted as representing one of the conditions for sustainable social and economic development, operating as an economic, social and political stabilizer, providing mechanisms to alleviate and prevent poverty, reducing income disparity to acceptable levels,

¹⁷ Social insurance denotes contributory- and risk-based schemes giving rise to fixed benefit payments aimed at income maintenance. Social assistance refers to tax-based benefit payments on a universal or targeted basis, aimed at minimum income-support (E Strydom “Introduction to Social Security Law” in EML Strydom (ed) *Essential Social Security Law* (2006) 1 6).

¹⁸ Department of Social Development *Creating Our Future* 4.

¹⁹ ILO Convention 102.

and enhancing human capital and productivity.²⁰ The development of comprehensive social security systems in countries where only rudimentary systems exist has been identified as being a key task to prepare global society for future economic downturns, as well as to achieve other objectives such as the Millennium Development Goals, sustainable economic development and fair globalization.²¹

Social security must also be distinguished from the broader concept of “social protection”.²² This term has been used to describe a general system of basic social support which “is no longer linked to the regular employment relationship, and which is founded on the conviction that society as a whole is responsible for its weaker members”.²³ The United Nations Social Protection Floor Initiative, for example, is based on the principle of progressive universalism and seeks to ensure a base level of benefits (or the so-called “social protection floor”) for everyone.²⁴ In South Africa, it has been argued that the term also encapsulates elements and rights related and ancillary to social security itself.²⁵ As the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the so-called “Taylor Committee”) noted:

“Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy-approach including many of the developmental initiatives undertaken by the State.”²⁶

The South African social security system itself (that is, even ignoring broader social protection initiatives) is remarkably comprehensive by a middle-income developing country standard. While the system is largely

²⁰ See B Caracciolo “Social Protection: An Instrument for Poverty Reduction and Social Cohesion” in S Stocker (ed) *European Social Watch Report 2010* (2010) <http://www.socialwatch.eu/wcm/instrument_for_poverty_reduction_and_social_cohesion.html> (accessed 01-11-2011) The recent global economic crisis has, for some commentators, highlighted that investment in social security systems is an economic need (Caracciolo “Social Security” in *European Social Watch Report 2010*) The ILO found that the employment effect of automatic stabilisers, including social transfers, were as important as some of the stimulus packages introduced by countries as a response to the crisis Governments with social protection systems in place were found to be in a better position to cope, as the impact on households was softened ILO *Protecting People, Promoting Jobs: A Survey of Employment and Social Protection Policy Responses to the Global Economic Crisis* Report to the G20 Leaders’ Summit, Pittsburgh, 24-09-2009 – 25-09-2009 (2009) 15 <www.ilo.org/public/libdoc/jobcrisis/download/protecting_people_promoting_jobs.pdf> (accessed 22-10-2010)

²¹ Caracciolo “Social Security” in *European Social Watch Report 2010*

²² MP Olivier “The Concept of Social Security” in MP Olivier, E Kalula & N Smit (eds) *Social Security: A Legal Analysis* (2003) 23

²³ 26

²⁴ Caracciolo “Social Security” in *European Social Watch Report 2010* On the relationship between this initiative and the International Social Security Agency (ISSA) strategy to extend social security coverage, see ISSA *Social Policy Highlight 18* (2011) 3

²⁵ Olivier “The Concept of Social Security” in *Social Security: A Legal Analysis* 26

²⁶ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa: Transforming the Present – Protecting the Future* (2002) 120 <<http://www.sarprn.org/CountryPovertyPapers/SouthAfrica/taylor/report4.php>> (accessed 01-11-2011)

formal employment-oriented (in particular as far as social insurance schemes and retirement provision are concerned), excludes many from participation, and adopts a categorical and means-tested approach as far as social assistance is concerned, numerous studies indicate that the system of social grants have contributed significantly to reducing overall poverty and (income)²⁷ inequality. As a recent report noted:

“Not only do the grants have a significant impact on poverty [at the lower poverty line] but they also make a significant impact on inequality... [T]he Gini coefficient on ‘pre-grant’ income is 0.03 higher than when calculated on either reported income or simulated income.”²⁸

The positive attributes of social transfers have been confirmed by evidence which suggests that social transfers are an effective tool to prevent and fight poverty.²⁹ The evidence suggests, in particular, that social security transfers increase domestic demand and encourage growth by expanding domestic markets. While the assimilation of more people into the labour market is at the heart of South Africa’s poverty reduction strategy, there remains a need for programmes that provide income support to the unemployed and people that are unable to work. Social assistance cash grants provide income support to people whose livelihoods are most at risk.³⁰ The number of grant recipients has increased significantly during the past fifteen years, partly because social welfare was previously targeted mainly at white recipients.³¹ Grants are generally well targeted and mostly reach the poorest of the poor.³² For example, 62% of social grants go to the poorest 40% of households and 82% to the poorest 60%.³³ Almost fourteen million South Africans (nearly a quarter of the population) benefit from one grant or another (see table below).³⁴

The post-apartheid government has been very active in reforming and expanding the system of social grants. A key aspect of the post-apartheid fiscal expenditure patterns has therefore been a widening and deepening of South Africa’s social security system.³⁵ While spending on most big-item budget items such as education and health has remained fairly constant in real terms, consolidated expenditure on social assistance has increased from R30.1 billion (3.2% of GDP) in 2000/01 to R101.4 billion (4.4% of GDP) in

²⁷ See part 4 below for a discussion of the difference between income and non-income inequality

²⁸ M Leibbrandt, I Woolard, A Finn & J Argent *OECD Social, Employment and Migration Working Papers No 101: Trends in South African Income Distribution and Poverty since the Fall of Apartheid* (2010) 66

²⁹ For confirmation of these findings see H Bhorat, C van der Westhuizen & T Jacobs *Income and Non-Income Inequality in Post-Apartheid South Africa: What are the Drivers and Possible Policy Interventions?* Development Policy Research Unit (DPRU) Working Paper 09/138 (2009) 44-56

³⁰ Caracciolo “Social Security” in *European Social Watch Report 2010*.

³¹ On the positive impact of social grants on work-seeking behaviour and employment, see Department of Social Development *Creating Our Future* 11; M Samson “Social Cash Transfers and Employment: A note on Empirical Linkages in Developing Countries” in *OECD Promoting Pro-Poor Growth: Employment* (2009) 179-186

³² K Pauw & L Mncube *Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints* DPRU Working Paper 07/127 (2007) 2 <http://www.commerce.uct.ac.za/research_units/dpru/workingpapers/pdf_files/wp_07-127.pdf> (accessed 06-10-2011)

³³ Bhorat et al *Income and Non-Income Inequality in Post-Apartheid SA* 44

³⁴ The Presidency *Towards a Fifteen Year Review* (2008) 19 <<http://www.info.gov.za/view/DownloadFileAction?id=89475>> (accessed 06-10-2011)

³⁵ National Treasury *Budget Review 2010* (2010) 103

³⁶ Bhorat et al *Income and Non-Income Inequality in Post-Apartheid SA* 44

2008/09.³⁶ In 2010, just over 2.5 million people received the old age grant, almost 9.5 million children benefited from the child support grant, and 1.3 million people were in receipt of the disability grant.³⁷ As Seekings notes:

“In no other country in the South does social assistance cover such a wide range of circumstances, reach so many of its citizens or cost so much in relation to GDP.”³⁸

SOCIAL GRANTS BENEFICIARY NUMBERS BY TYPE: 2005/06 – 2009/10³⁹						
Type of grant	2005/06	2006/07	2007/08	2008/09	2009/10	% growth (average annual)
Old age	2 144 117	2 195 018	2 218 993	2 343 995	2 534 082	4.3%
War veterans	2 832	2 340	1 963	1 599	1 248	-18.5%
Disability	1 319 536	1 422 808	1 413 263	1 371 712	1 310 761	-0.2%
Foster care	312 614	400 503	443 191	476 394	569 215	16.2%
Care dependency	94 263	98 631	101 836	107 065	119 307	6.1%
Child support	7 044 901	7 863 841	8 195 524	8 765 354	9 424 281	7.5%
Total	10 918 263	11 983 141	12 374 770	13 066 118	13 958 894	6.3%

However, as a poverty reduction strategy, this method is nearing the boundaries of its effective use, given fiscal constraints.⁴⁰ Various proposals to extend social assistance coverage in South Africa have failed to find favour within government circles, especially within the National Treasury.⁴¹ Acknowledgement of the reality of resource constraint has resulted in increasing policy-focus being placed upon contributory social security arrangements, since these arrangements seek to draw from a reasonable proportion of individual or family income and do not place a direct strain on the availability of state resources.⁴²

³⁶ Leibbrandt et al *Expanding the Social Security Net in SA* 52

³⁷ See National Treasury *Budget Review 2010* 105

³⁸ J Seekings “Employment Guarantee or Minimum Income? Workfare and Welfare in Developing Countries” (2006) 2 *International Journal of Environment, Workplace and Employment* 44

³⁹ National Treasury *Budget Review 2010* 105

⁴⁰ S van der Berg, R Burger, R Burger, M Louw & D Yu *Trends in Poverty and Inequality Since the Political Transition* DPRU Working Paper 06/104 (2006) 28 <http://www.tips.org.za/files/forum/2006/papers/VanderbergTrends_in_Poverty.pdf> (accessed 06-10-2011) This is one of the general characteristics of non-contributory social security arrangements, namely that their effect is limited by a scarcity of resources (Department of Social Development *Creating Our Future* 4) In countries such as Costa Rica, the evidence has shown that even universal social security systems can only help reduce inequality and poverty if production regimes provide the required funding, the formal jobs and the demand for skills (JM Franzoni & D Sanchez-Ancochea “The Productive Bottlenecks of Progressive Social Policies: Lessons from Costa Rica and Beyond” (2011) Feb *Crop Poverty Brief* 1 2)

⁴¹ For example, the Department of Social Development considered the introduction of a *conditional social assistance grant* for the long-term unemployed. The proposed value of the grant would have been low, and would have been conditional upon participation in labour activation programmes such as skills development programmes and special employment projects (see O Dupper “Actualités Juridiques Internationales: Afrique du Sud” (2009) *Bulletin de Droit Comparé du Travail et de la Sécurité Sociale* 335 337. The Taylor Committee suggested a similar intervention, arguing that a flat-rate social assistance grant (the so-called “Basic Income Grant”) could be introduced, coupled with active labour policies (see Committee of Inquiry into a Comprehensive System of Social Security for SA *Transforming the Present – Protecting the Future* 71)

⁴² Department of Social Development *Creating Our Future* 4. The proposed national retirement and national health insurance systems are examples of this mindset

The realisation of the financial limitations of a society reliant upon social grants has left a glaring gap in South Africa's social security system: the exclusion of the structurally- or the long-term unemployed from social security coverage. There is no social assistance grant that particularly targets persons who have either exhausted their limited unemployment insurance benefits, or those who have never been formally employed and thus never contributed to the social insurance system.⁴³ Structurally unemployed youths and adults receive limited or no support from the existing social assistance framework.⁴⁴ In addition, as will be illustrated, the existing unemployment insurance framework is woefully insufficient for purposes of dealing with this group of people.

3 Unemployment Insurance in South Africa⁴⁵

The Unemployment Insurance Act 63 of 2001 ("UIA")⁴⁶ and Unemployment Insurance Contributions Act 4 of 2002 ("UICA")⁴⁷ are applicable to all employers and employees except for those specifically excluded. Unless specifically excluded, participation in the unemployment insurance scheme is compulsory.⁴⁸

The UIF recently announced that it had recommended certain legislative changes to the Minister of Labour. Three of those changes relate to the inclusion of some excluded categories, while the other two relate to the benefit replacement rate⁴⁹ and the benefit period⁵⁰ respectively. As far as the inclusion of currently excluded categories are concerned, the Fund recommended that public servants, legal migrants and those in learnerships

⁴³ Although social grants cover those under the age of 18 and those over the age of 60 who are unable to support themselves, as well as all disabled persons, adults between the age of 19 and 59 who are not disabled are effectively not entitled to any social assistance – even when they are unable to support themselves

⁴⁴ Department of Social Development *Creating Our Future* 8 Also see Government of the RSA *Decent Work Country Programme* 9 The main source of income for this group of people is indirect, meaning that they rely on the labour incomes of other household members, or through a process known as "benefit dilution", rely on social grants received by other household members (in particular the old-age pension and the child support grant) It has been pointed out that reliance on such private safety nets can generate disincentive effects that can prolong unemployment, including low labour-market mobility and the reduction of job-search activities (Klasen & Woolard (2008) *J African Economies* 17)

⁴⁵ The following paragraphs are in the main based on O Dupper, MP Olivier & A Govindjee "Extending Coverage of the Unemployment Insurance-System in South Africa" (2010) 21 *Stell LR* 438 438-462

⁴⁶ The Act provides for unemployment, sickness, adoption, maternity and survivor benefits in respect of workers and their dependants

⁴⁷ This Act establishes the Unemployment Insurance Fund ("UIF") Employers and employees contribute equally to the UIF

⁴⁸ ET van Kerken & MP Olivier "Unemployment Insurance" in MP Olivier, E Kalula & N Smit (eds) *Social Security: A Legal Analysis* (2003) 415 435

⁴⁹ The current graduated rate of 38-60% of previous income, although a rare example of the important principle of solidarity in the South African social security system, is nevertheless not in compliance with ILO Convention 102, which prescribes a minimum income replacement rate of 45% The recommendation by the UIF, reportedly accepted by the Minister of Labour, that the minimum income replacement rate be increased from 38% of final monthly salary to 45% would align South African with international precedent L Ensor "Strong Finances may widen UIF Beneficiary Net" *Business Day* (13-09-2010)

⁵⁰ The Minister of Labour has apparently also accepted the recommendation from the UIF that the benefit period be extended from the current maximum benefit period of 238 days (about eight months) to 365 days (twelve months) (Ensor *Business Day* (13-09-2010))

be included under its umbrella.⁵¹ It has been reported that the Minister has agreed to the inclusion of public servants, which would cost the state about R3 billion annually.⁵²

While the UIA has extended its scope of coverage over time, much more could be done to reduce exclusion and marginalisation in the unemployment insurance system. The reality is that the UIF currently only covers about 10% of South Africa's unemployed.⁵³ This is due to three main reasons. In the first place, the current maximum benefit period under the UIA is 238 days.⁵⁴ Studies indicate that almost half (44%) of the unemployed with previous work experience have been unemployed for more than a year, which means that they would have exhausted their benefits had they were ever eligible for them.⁵⁵ Second, slightly more than half (55%) of those unemployed report that they have never worked and have therefore not contributed to the UIF.⁵⁶ Finally, the UIF continues to exclude certain categories of workers from coverage, most notably the atypically employed, particularly independent contractors, so-called "dependent contractors", and those who are self-employed or informally employed; public servants in the national and provincial spheres of government; learners; and certain categories of migrant workers.⁵⁷ Therefore, while the UIF clearly has an important role to play in providing replacement income to the short-term unemployed with work experience, the vast majority of the unemployed fall outside of this system. This *lacuna* has resulted in attention being thrust upon the need for some form of non-contributory unemployment assistance in South Africa.

4 Unemployment assistance in South Africa?

Social assistance to low-income households is the primary way in which government tries to eliminate income poverty. The *Creating Our Future* government discussion paper launched by the Department of Social Development highlights the gaps in the social assistance framework in South Africa with respect to structurally unemployed "youth" (which it defines as people aged 19 to 25 years of age) and structurally unemployed "adults" (aged

⁵¹ Ensor *Business Day* (13-09-2010)

⁵² Ensor *Business Day* (13-09-2010) The exclusion of public servants has always been based on the assumption that the risk of unemployment for public servants is either low or non-existent. This assumption may be challenged, both legally and factually. The job security afforded to South African public servants is not as adequate as it is assumed to be. The risk of unemployment for private sector workers is often not greater than that of public servants in South Africa. In addition, it is doubtful whether the exclusion of public servants from the UIF is constitutionally tenable: see, for example, Olivier & Van Kerken "Unemployment Insurance" in *Social Security: A Legal Analysis* 438-440

⁵³ M Leibbrandt, I Woolard, H McEwen & C Koop *Employment and Inequality Outcomes in South Africa* Southern Africa Labour and Development Research Unit & School of Economics, University of Cape Town (2010) 36 <<http://www.oecd.org/dataoecd/17/14/45282868.pdf>> (accessed 23-03-2010)

⁵⁴ S 13(3) of the UIA provides that unemployment insurance benefits accrue at a rate of one day's benefit for every completed six days of employment as a contributor subject to a maximum accrual of 238 days benefit

⁵⁵ Leibbrandt et al *Employment and Inequality Outcomes in South Africa* 36

⁵⁶ 36

⁵⁷ Dupper et al (2010) *Stell LR* 448-459

26 to 59).⁵⁸ The document acknowledges the short-term, inadequate benefits currently provided by the UIF and proposes a “continuation benefit” (at a value of 50% of a minimum wage still to be determined) for a maximum three year period for people who exhaust their unemployment insurance entitlements without having been able to find suitable employment.⁵⁹ Importantly, it is proposed that recipients of the continuation benefit would need to participate in labour activation programmes where these have been implemented, possibly including skills development programmes, special employment projects with or without a skills development component and participation in surveys to evaluate the causes of continued unemployment.

A conditional social assistance grant, at a value equivalent to one fifth of the proposed continuation benefit, is proposed for unemployed “adults” who have never been in formal employment and, consequently, have never qualified for unemployment insurance.⁶⁰ These proposals appear to be based, in part, on the proven positive correlation between receipt of a social grant and a person’s attempts to find employment.⁶¹ As such, the Department of Social Development suggests that reforming the social assistance system in this matter would prevent households with unemployed breadwinners from falling into extreme poverty, while simultaneously assisting their re-entry into formal employment (both because of the conditionalities attached to the proposed benefits, and because of the apparent relationship between receipt of social assistance and the search for employment).

The *Creating Our Future* document also promotes the idea of a conditional social assistance grant to unemployed youth, at a value of 30% of the unemployment insurance continuation benefit. Conditions for such a grant would include assessments by a labour and skills adviser, successful participation in skills-acquisition programmes, participation in employment structured to enhance skills development, and participation in surveys to evaluate the continuation of unemployment.⁶² Failure to participate meaningfully in the programme, or to achieve set skills acquisition goals, would be met with punishment in the form of a reduced grant payment for set periods.

It has been argued that the low value of such continuation benefits or grants will act as a deterrent against the problem of grant dependency and that implementing such proposals between now and 2015 would eradicate poverty experienced by over one third of the population of the country.⁶³ It must be noted, however, that the feasibility of introducing such a costly form of social

⁵⁸ Department of Social Development *Creating Our Future* 21. The document specifically indicates that the proposals contained therein do not represent government’s final position on any matter.

⁵⁹ Department of Social Development *Creating Our Future* 19-20. The proposals make two suggestions in this regard: either a conditional continuation benefit of up to three years to be funded from the existing UIF surplus; or, alternatively, an unlimited, reduced-value conditional continuation benefit to be funded out of general revenue.

⁶⁰ Department of Social Development *Creating Our Future* 18.

⁶¹ Department of Social Development *Creating Our Future* 12; Samson “Social Cash Transfers and Employment” in *Promoting Pro-Poor Growth* 179, 180-185.

⁶² Department of Social Development *Creating Our Future* 20.

⁶³ 17-18.

assistance at this stage of South Africa's development is questionable and does not appear to have found significant support at National Treasury level. There is also no available information to indicate that the UIF plans to implement such proposals (using the current surplus of the Fund, for example) in the foreseeable future.

5 Unemployment Prevention Strategies

Despite numerous amendments, the current UIA still reflects its origins as an Act designed to deal with cyclical unemployment in the 1940s.⁶⁴ In essence, the UIA retains the Fund as one designed to cater for the limited requirements of a historically privileged workforce not seriously threatened by unemployment.⁶⁵ Although it is questionable whether a fund based upon employer and employee contributions should be expected (or, indeed, was ever intended) to address large-scale problems related to unemployment, the UIA has rightly been criticised for its failure to appropriately contribute to preventing and combating unemployment as well as for its inability to reintegrate those who have become unemployed in the labour market.⁶⁶ The coupling of reintegration measures with compensation (as compared to compensation in isolation) would enhance the prospect of lasting change for the presently unemployed. However, there is little innovative attempt in the UIA to link entitlement to unemployment benefits with reintegration into the labour market. For example, in contrast with the previous legislation,⁶⁷ benefits are no longer available in the event of partial unemployment⁶⁸ and temporary suspension of work. Although it is required⁶⁹ of an applicant for benefits to register as a work-seeker with a labour centre,⁷⁰ and despite the fact that the refusal, without just reason on the part of an employee, to undergo training and vocational counselling for employment under any approved scheme is visited with disqualification to unemployment benefits,⁷¹ there is no further evidence of support for labour market integration in the UIA. These limitations are compounded by institutional challenges, human rights difficulties, and general problems of implementation. The cumulative effect of these factors complicates the ability of the UIF to act as a catalyst for employment activation. Most significantly, the UIA contains little in terms of

⁶⁴ P Benjamin *Labour Market Regulation: International and South African Perspectives* (2005) 39

⁶⁵ Committee of Inquiry into a Comprehensive System of Social Security for SA *Transforming the Present – Protecting the Future* ch v

⁶⁶ See, for example, Olivier & Van Kerken "Unemployment Insurance" in *Social Security: A Legal Analysis* 458

⁶⁷ Unemployment Insurance Act 30 of 1966

⁶⁸ For example, unlike the previous Act and except for the position of domestic workers, the UIA does not contain a provision that a contributor employed by two employers simultaneously, who lost one employment and continues in the other, does not lose his or her entitlement in respect of the lost employment simply because he or she retained the other employment (s 35(11) of the Unemployment Insurance Act 30 of 1966)

⁶⁹ S 16(1)(c) of the UIA

⁷⁰ Established under the Skills Development Act 97 of 1998

⁷¹ S 16(2)(b) of the UIA

a statutory framework for comprehensive unemployment policy-making, in particular in the area of preventing and combating unemployment.⁷²

However, despite the fact that South Africa does not have a single, national employment policy, a number of initiatives have been undertaken to prevent unemployment and generate employment opportunities, the latter primarily by means of public works programmes. Both of these broad policy directions will now receive brief attention.

While the idea of bringing people who have become unemployed back to work through active measures (so-called “labour activation measures”) is far from new (at least in developed economies), their application in developing middle-income or low-income countries may be problematic for a number of reasons, including institutional and capacity constraints, as well as the lack of job opportunities into which the unemployed may be “activated”.⁷³ Nevertheless, there is significant support within government for making participation in active labour market policies a precondition for the receipt or the continuation of benefits – whether social insurance or social assistance benefits.⁷⁴

For example, the recent Employment Services Bill contains a number of ambitious and varied goals all aimed at promoting active labour market policies. These include reducing unemployment, improving access to the labour market for all work-seekers, providing opportunities for work experience, improving the employment prospects of people with disabilities, assisting the unemployed, facilitating access by workers to training, improving workplace productivity, and promoting job security.⁷⁵ These objectives are to be achieved by providing “comprehensive and integrated public employment services”, co-ordinating the activities of public sector agencies engaged in the provision of employment services, encouraging partnerships between the public and private sectors of the economy to provide employment services, providing a regulatory framework for the operation of private employment agencies, and promoting a constructive relationship between these agencies and the public employment service.⁷⁶ The draft provisions relating to private employment agencies reflects an evident attempt to align South Africa’s international obligations in terms of the ILO Unemployment Convention⁷⁷ to endeavours to co-ordinate at a national scale the operations of public and private employment agencies where they exist.

⁷² Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 418

⁷³ For a more detailed discussion, see Govindjee et al (2011) *Stell LR* 205-227

⁷⁴ See Department of Social Development *Creating Our Future* 19:

“Conditional social transfers can link grant recipients to a range of related government programmes and initiatives which form part of the common developmental package. These can include: 1 Participation in primary and secondary education; 2 Skills development targeted at the youth; 3 Skills development targeted at the long-term unemployed; 4 Preventive healthcare programmes; 5 Job placement programmes; and 6 Special employment programmes”

For a more detailed discussion, see Govindjee et al (2011) *Stell LR* 205-227

⁷⁵ Cl 2(1) of the Employment Services Bill

⁷⁶ Cl 2(2)

⁷⁷ ILO Unemployment Convention 2 (1919) (“ILO Unemployment Convention”) Ratification took place on 20-02-1924

There are also a variety of measures in place that are aimed at preventing people from becoming unemployed in the first place, including strong protection against dismissal. One of the most innovative policies has been the so-called “training-layoff scheme”, introduced during the aftermath of the 2008 international economic crisis. The scheme aims at avoiding the retrenchment of workers whose employers would ordinarily have retrenched them and instead allows workers to temporarily suspend their normal work to take part in training programmes. During the period of training, the worker agrees to forego his or her normal wage in return for a training allowance. The training allowance is set at 50% of the worker’s salary subject of an overall cap of the UIF threshold. The amount is guaranteed for a three month period with the possibility of an additional three month extension. A National Jobs Fund was established in 2009 with an initial allocation of R2.4 billion to help finance the Training Layoff Scheme.⁷⁸

6 Policies aimed specifically at creating work

In recent years, various macro-economic policies of the government have been developed to foster job-rich growth and to address persistent high levels of unemployment, poverty and unequal growth. For example, the Accelerated Shared Growth Initiative for South Africa (“AsgiSA”) seeks to create an environment of, and opportunities for, an inclusive economy through the promotion of more labour absorbing economic activities. In addition, the government’s Industrial Policy Framework and the second Industrial Policy Action Plan (“IPAP2”) are aimed at facilitating economic diversification beyond the current reliance on traditional commodities and non-tradable services towards a more labour absorbing industrialisation path.⁷⁹

The evaluation of these long-term employment generating strategic policies falls beyond the scope of this paper. However, it is clear that there is an urgent need for interventions that alleviate the current unemployment situation. According to the ILO, these interventions should include income support to the unemployed and underemployed (working poor) in the form of cash transfers, as well as certain forms of basic employment guarantees in the form of public works or similar programmes.⁸⁰ While the possibility of cash transfers will receive separate and more detailed analysis later in this paper, two programmes aimed at ensuring basic employment guarantees merit attention here. These are the labour-intensive public works programme (also known as the “Expanded Public Works Programme” or “EPWP”) as well as an employment-guarantee programme along the lines of India’s much

⁷⁸ See, in general, L Ramutloa “A Guide to the Training Layoff Scheme” (2009) *Department: Labour* 1 1-11 <<http://www.labour.gov.za/documents/useful-documents/skills-development/guide-to-training-lay-off-scheme>> (accessed 08-09-2011)

⁷⁹ See *RSA Decent Work Country Programme* 12 The Programme was launched by the Government of the Republic of South Africa, the International Labour Organization, Representative Employers’ and Workers’ Organisations and the Community Constituency on 29-09-2010

⁸⁰ The ILO considers both income support and employment guarantees to be among the foundations of the social protection floor ILO *World Social Security Report 2010/2011* 63

touted National Rural Employment Guarantee Scheme (“NREGS”) (called the “Community Work Programme” or “CWP”).

The EPWP was launched in 2004 and aims to create productive employment opportunities by increasing the labour intensity of all government programmes. The design of the EPWP seems to have been informed by proposals set out in the World Bank’s 2001 *World Development Report*.⁸¹ However, it has been pointed out that the World Bank proposals were meant to address problems of cyclical unemployment, not problems of structural and chronic unemployment as is the case in South Africa.⁸²

In terms of the programme, all government bodies and state corporations are required to endeavour to increase the use of unskilled labour. Through the use of public expenditure, temporary, (generally) unskilled employment is created for the jobless. This temporary employment is coupled with on the job skills development and training. The intention is that this will provide the participants leaving the programme with a better chance of finding regular employment.⁸³ The size of the EPWP has grown considerably since its inception, and the intention is to increase the scale of the project to provide the full-time equivalent of more than 400 000 jobs a year over the medium term.⁸⁴ While the ability of the EPWP to have a positive impact on the unemployment figures have been questioned,⁸⁵ there is general agreement that the EPWP has the potential to make a significant contribution to poverty alleviation through the provision of short-term income support.⁸⁶

The CWP was initiated in 2007 by the Second Economy Strategy Project – an initiative of the Presidency. The design phase of the CWP was initially implemented without direct control of government, namely with donor funding and strategic oversight from a Steering Committee comprising representatives of the Presidency and the Department for Social Development, and later also from National Treasury, the Department of Cooperative Governance and the Department of Public Works.⁸⁷ The CWP offers two days of work per week,

⁸¹ World Bank *World Development Report* (2000/2001) See also Seekings *Employment Guarantee or Minimum Income?* 15

⁸² Seekings *Employment Guarantee or Minimum Income?* 15

⁸³ Leibbrandt et al *Employment and Inequality Outcomes in South Africa* 36

⁸⁴ 37

⁸⁵ For example, Seekings points to the fact that most of the job opportunities are typically of short duration, and the training component suffers from general delivery problems typical of all government training programmes (Seekings *Employment Guarantee or Minimum Income?* 15) In addition, while the EPWP provided 1.4 million “work opportunities” between 2004/05 and 2008/09, it has been pointed out that the number of full-time person years of work created is about one quarter of the number of “work opportunities” reported as a result of the short-term nature of these opportunities See Leibbrandt et al *Employment and Inequality Outcomes in South Africa* 36

⁸⁶ Leibbrandt et al *Employment and Inequality Outcomes in South Africa* 37 According to the latest available figures, the EPWP created 643 116 work opportunities in the 2010-2011 financial year (Government Communication and Information System “EPWP a Catalyst for Decent Work Opportunities” (23-06-2011) *BuaNews* <<http://www.buanews.gov.za/news/11/11062311351001>> (accessed 06-10-2011)) For a more detailed evaluation of the benefits and drawbacks of the EPWP, see Cooper “Women and the Right to Work” in *Women’s Social and Economic Rights* 257-262

⁸⁷ K Philip *Employment Guarantees: Innovation at the Interface between Social and Economic Policy* (2010) 7 paper prepared for the conference *The Global Economic Crisis and South Africa: Lessons in Long-Run Economic Growth and Development*, Johannesburg, October 2010 <http://www.commerce.uct.ac.za/research_units/dpru/DPRU-Conference_2010/Conference_Papers/Philip%20Employment%20Guarantees%20DPRU%20TIPS.pdf> (accessed 25-03-2011)

and provides 100 days of work per person spread throughout the year. The programme targets unemployed and underemployed people and is area-based, meaning that it is implemented in a defined local area or site. A site operating at full capacity offers work opportunities to 1 000 people.⁸⁸ While the CWP is still small in comparison to the Indian NREGS that it is meant to replicate, it has nevertheless grown in less than two years from 1 500 participants in April 2009 to almost 83 000 participants by March 2011, which demonstrates its potential to grow to significant scale, and to mobilise the local partnerships and capacities required to do so.⁸⁹ In addition, with a labour-intensity of 65% at site level, it is highly cost effective. The aim is to establish a presence for CWP in every municipality by 2014, which could provide as many as 237 000 work opportunities.⁹⁰

7 Decent work creation

Given the fiscal constraints which hamper the possibility of expanding social assistance coverage in South Africa, coupled with other concerns pertaining to the creation of a welfare-dependent society, it has been argued that the state should place renewed emphasis on the implementation of complementary policy measures such as the strengthening of labour market policies and improving the education system. This would make it easier for labour market entrants to secure employment which in turn “would make it easier to wean the South African society off the social security system that we so desperately depend on”.⁹¹ On a political level too, the government has recognised that addressing all the challenges facing the country, including growing the economy and reducing the high rates of poverty, inequality and unemployment, as well as improving the livelihoods of all South Africans, requires a “developmental state” with the capacity to actively intervene to achieve these goals.⁹²

The creation of decent work opportunities serves the dual objective of acting as a complementary policy measure to the well-established social security system, as well as being a driving force behind the attempt to actually create a true developmental state in South Africa.⁹³ The concept of “decent work” is based on the understanding that work is

“not only a source of income but more importantly a source of dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment. The goal is not just the creation of jobs, but the creation of jobs of acceptable quality.”⁹⁴

⁸⁸ K Motlanthe *Address by Deputy President Motlanthe* (22-03-2011) a public address in the National Council of Provinces, 22-03-2011 <<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=17184&tid=30466>> (accessed 06-10-2011)

⁸⁹ Philip *Employment Guarantees* 8

⁹⁰ Motlanthe *Address by Deputy President Motlanthe*

⁹¹ Bhorat et al *Income and Non-Income Inequality in Post-Apartheid SA* 56

⁹² O Edigheji “Constructing a Democratic Developmental State in South Africa: Potentials and Challenges” in O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010) 1 1

⁹³ On the decent work deficit, see ILO *Reducing the Decent Work Deficit* 7-12

⁹⁴ RSA *Decent Work Country Programme* 5; ILO *Skills-Development through CBR* 7 For further information in this regard, see ILO *Decent Work Agenda* <<http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm>> (accessed 06-10-2011)

The decent work ideal has been encapsulated in the objectives of promoting fundamental principles and rights at work, promoting employment and income opportunities, expanding and improving social protection coverage and promoting social dialogue and tripartism. Decent work offers a way of combining employment, rights, social protection and social dialogue in developmental strategies.⁹⁵ The South Africa Decent Work Country Programme represents the culmination of a consultative process between the ILO, the South African government, business and labour (through the mechanism of the National Economic Development and Labour Council) in order to internalise and operationalise key international principles which facilitate decent work enhancement in this country.⁹⁶ The priorities and strategic focus of the South Africa Decent Work Country Programme intersect with the ILO strategic objectives and key outcome areas as outlined in the ILO Strategic Policy Framework (2010-2015)⁹⁷ and the ILO Programme and Budget for the 2010-2011 Biennium.⁹⁸

In 2005, the United Nations Millenium Development Goals Summit agreed on the inclusion of a specific target for decent work, namely to “achieve full and productive employment and decent work for all”.⁹⁹ One of the key elements of the development agenda of the government in South Africa is to eradicate poverty and unemployment through the promotion of decent work and employment.¹⁰⁰

Despite the South African economy enjoying relatively strong economic growth during the first decade of the twenty first century, the economy has seemingly been unable to create sufficient employment opportunities.¹⁰¹ In order to attempt to address this anomaly, the past few years has seen a

⁹⁵ ILO *Reducing the Decent Work Deficit* 11

⁹⁶ RSA *Decent Work Country Programme* 4

⁹⁷ ILO *Strategic Policy Framework 2010-2015* (Three Hundred and Fourth Sess of the Governing Body, March 2009) 5-25

⁹⁸ ILO *Programme and Budget for the Biennium 2010-2011* (2009) The priorities of the Decent Work Country Programme also respond to other global and regional commitments to which South Africa is a part, notably: the ILO *Decent Work Agenda for Africa: 2007-2015* (Eleventh African Regional Meeting, Addis Ababa, April 2007) <<http://www.ilo.org/public/English/standards/relm/rgmeet/11afrm/dg-tthematic.pdf>> (accessed 06-10-2011); African Union *Ouagadougou Declaration and Plan of Action on Employment and Poverty Alleviation* (African Union Extraordinary Summit on Unemployment and Poverty Alleviation in Africa, Ouagadougou, Burkina Faso, 08-09-2004-09-09-2004) <<http://www.africa-union.org/EMPLOYMENT/declaration%20on%20employment%20and%20poverty%20alleviation.pdf>> (accessed 06-10-2011), and the SADC Regional Indicative Strategic Development Plan (2008) <<http://www.sadc.int/index/browse/page/104>> (accessed 06-10-2011)

⁹⁹ Para 47 of UN GA 2005 *World Summit Outcome* Res 60/1 UN GAOR (2005) UN Doc A/60/L 1 This commitment was with direct reference to the first Millenium Development Goal of eradicating extreme poverty and hunger Reconfirmed in para 70 of UN GA *Keeping the Promise: United to Achieve the Millenium Development Goals* Res 65/1 UN GAOR (2010) UN Doc A/60/PV 9 <http://www.un.org/en/mdg/summit2010/pdf/outcome_documentN1051260.pdf> (accessed 19-10-2010)

The ILO *Declaration on Social Justice for a Fair Globalisation* included a framework for the implementation of the four pillars of decent work at international, regional and national levels (ILO *ILO Declaration on Social Justice for a Fair Globalisation* (2008) 5-7 <www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf> (accessed 22-10-2010))

¹⁰⁰ RSA *Decent Work Country Programme* 5

¹⁰¹ Government of the Republic of South Africa *The New Growth Path: The Framework* (2010) 3 The ILO's implementation of its “decent work for all” programme has been criticised for its overwhelming focus on “decency”, as opposed to a focus on “work for all” (see Cooper “Women and the Right to Work” in *Women's Social and Economic Rights* 251)

heightened policy focus on the creation of decent work through a new growth path in South Africa.¹⁰² It is now clear that the creation of decent work is practically at the centre of current economic and social policy ambition.¹⁰³ The number and quality of jobs created is presently entrenched as the first indicator of success of the so-called “New Growth Path”, which seeks to direct limited state resources and capacity at activities that maximise the creation of decent work opportunities.¹⁰⁴ This advancement in the number of quality job opportunities is a key component of the present conceptualisation of South Africa as a developmental state.¹⁰⁵

In support of this, the 2011 Budget Speech reflected an expansion of social protection initiatives as well as a strong enhancement of employment creation strategies.¹⁰⁶ In particular, a R9 billion jobs fund was set aside over the next three years to co-finance innovative public- and private-sector employment projects, with R73 billion earmarked over the same period for continued support of the expanded public works programme.¹⁰⁷ Manufacturing investment opportunities with a focus on job-creation potential received tax breaks of R20 billion and a targeted commitment to youth employment was backed by a R5 billion wage subsidy allocation.¹⁰⁸

The recent proposed amendments to South Africa’s existing labour legislation, as well as the proposed introduction of new employment-centred law and the reconsideration of broad-based black economic empowerment provisions is a consequence of this renewed focus, across all spheres of government, on job creation.¹⁰⁹

Such developments raise a number of difficult issues. For example, there is arguably a trade-off required in order to balance attempts to create work for everyone who seeks it against the concept of “decent work” provision.¹¹⁰ The capacity of the UIF to adequately address the malaise of the structurally or long-term unemployed is a serious concern, as is the sustainability of increased social grants provision, despite their positive attributes. The efficacy of unemployment prevention strategies and policies aimed specifically at creating work raise further questions. The next part of this contribution attempts to

¹⁰² See, for example, RSA *New Growth Path 1*; JG Zuma *State of the Nation Address by His Excellency JG Zuma, President of the Republic of South Africa*, 03-06-2009 1 a public address at the Joint Sitting of Parliament at Parliament, Cape Town

¹⁰³ RSA *New Growth Path 1*; P Ghordan *2011 Budget Speech* (2011) 41

¹⁰⁴ RSA *New Growth Path 6* At an international level, for example, the United Nations Chief Executive Board launched the “Global Jobs Pact” in 2009, aimed at focusing decision-makers’ attention on employment measures and decent work as the foundation for long-term economic recovery. The key component of the Global Jobs Pact is employment promotion coupled with social protection (see United Nations Department of Economic and Social Affairs *The Global Social Crisis: Report on the World Social Situation 2011* (2011) UN Doc ST/ESA/334 7-9)

¹⁰⁵ RSA *New Growth Path 28*

¹⁰⁶ Ghordan *2011 Budget Speech 3*

¹⁰⁷ 16-17

¹⁰⁸ 17 In total, an amount of R146 9 billion was reserved for social protection-related matters

¹⁰⁹ E Patel *Comments in the State of the Nation Address Debate, National Assembly, by Minister of Economic Development Ebrahim Patel* (15-02-2011) a public address to the National Assembly in Parliament, Cape Town, 15-02-2011 <<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=16545&tid=28906>> (accessed 08-09-2011)

¹¹⁰ Cooper “Women and the Right to Work” in *Women’s Social and Economic Rights* 256-257

contextualise these matters against the backdrop of the Constitution, in order to lay the foundation for the concluding arguments advanced.

8 The absence of a constitutional or legislative provision regarding unemployment security or a right to work

The Constitution was adopted so as to establish a society based on democratic values, social justice and fundamental human rights.¹¹¹ The Preamble specifically refers to the rationale of improving the quality of life of all citizens and the liberation of the potential of each person. In addition to important constitutional values such as human dignity, the achievement of equality, non-racialism and non-sexism, the founding provisions of the Constitution include the advancement of human rights and freedoms as a constitutional value.¹¹² The Constitution is characterised by a broad-ranging Bill of Rights, which includes socio-economic and environmental rights. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.¹¹³

It is somewhat surprising, given the large-scale problem of unemployment and the state prioritisation of employment creation activities, that the Constitution does not contain a provision pertaining to “non-social security” aspects of unemployment security (as defined above).¹¹⁴ There is also no designated right to work contained in the Bill of Rights.¹¹⁵

The right of access to social security and appropriate social assistance contained in section 27 of the Constitution may not, strictly speaking, be read in such a manner so as to automatically incorporate all components of the broader notion of social protection.¹¹⁶ The term “social security” is normally understood in a relatively narrow sense. The social insurance and social assistance components of social security are, similarly, limited by the manner in which they are generally conceptualised and understood in practice. Employment creation initiatives would, for example, be excluded from the ambit of section 27. Employment protection interventions such as the training layoff scheme would also not be covered. The limited social insurance benefits available in cases of unemployment would be included, as would any

¹¹¹ Preamble to the Constitution

¹¹² S 1

¹¹³ S 7(2)

¹¹⁴ For an example of intensive investment by the Department of Labour (involving R35 billion from the UIF and R27 billion from the Compensation Fund), via the Public Investment Corporation, in the creation and sustainability of jobs, see Government Communication and Information System “Labour Dept Ploughs Billions into Job Creation” (08-07-2011) *BuaNews* <<http://www.buanews.gov.za/news/11/11070809351001>> (accessed 06-10-2011)

¹¹⁵ A Govindjee “Assisting the Unemployed in the Absence of a Legal Framework: The Next Frontier for the Eastern Cape Bench?” (2011) 25 *Speculum Juris* 86 105. Also see Cooper “Women and the Right to Work” in *Women’s Social and Economic Rights* 246

¹¹⁶ On the need for social security systems to move towards integrated forms of social protection, see ILO “Social Security and the Rule of Law” in *General Survey concerning Social Security Instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization* Report III (Part 1B) (2011) 11 22. The idea that social security should serve as a means, among others, for promoting employment and must be co-ordinated with other means of employment and social policies serving the goal of employment protection (but is not synonymous with unemployment security) is also clear from a consideration of the ILO Employment Promotion and Protection against Unemployment Convention 168 (1988)

“continuation benefit” or other form of unemployment assistance introduced in future for groups of unemployed people.¹¹⁷

Similarly, the constitutional provisions pertaining to freedom of choice and practice of trade, occupation and profession, and the right to fair labour practices have neither been interpreted in a manner to suggest that unemployment protection activities are encompassed, nor in order to claim that there exists a constitutional right to work.

There is also no legislation which deals directly with employment creation initiatives.¹¹⁸ Furthermore, there are very few cases¹¹⁹ which have considered the right to work in a South African context, or the legalities of work in terms of public works programmes. Leaving aside the possibility of a constitutional amendment giving effect to a right to work, the speediest method of gaining more formal recognition for its attempts to create jobs would be for government to introduce legislation regulating its own employment creation activities. Section 39(3) of the Constitution states that the Bill of Rights does not deny the existence of a right or freedom that is recognised or conferred by common law, customary law or legislation, to the extent that it is consistent with the Bill. This would arguably serve as constitutional support for such law.

Passing legislation that formally regulates the state’s efforts to create employment (in particular through its public works programmes) and prevents unemployment would arguably have contributed to greater accountability on the part of those involved in such initiatives. Furthermore, the passing of legislation would involve the judiciary by making it notionally easier for unreasonable state conduct pertaining to employment creation initiatives to be challenged in court on a basis similar to the manner in which unreasonable policies pertaining to other socio-economic rights have been exposed and reformulated.¹²⁰ Policy-making in the area of job creation exists and operates largely in the absence of direct constitutional, legislative and case law guidance.¹²¹

There would appear to be little reason in principle for refraining from constitutionalising, or at the very least passing legislation relating to, unemployment security, including a progressively realisable right to work,

¹¹⁷ S 27(1)(c) of the Constitution states that “[e]veryone has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance” Furthermore, s 27(2) provides that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to social security”

¹¹⁸ On the absence of a formally legislated right to work, in general, see Cooper “Women and the Right to Work” in *Women’s Social and Economic Rights* 245 It is arguable that various pieces of legislation and proposed legislation, such as the Skills Development Act and the Employment Services Bill, strive to encourage employment creation indirectly

¹¹⁹ See *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 JOL 16852 (W) para 64; *Swartbooi v ACV Civils* CCMA 01-04-2004 case no ECPE 3157/03 <<http://www.caselaw.co.za/search.php?court=0&stype=caselaw&query=ACV+Civils&sfunc=0>> (accessed 12-06-2007); *Lewis v GATA/Coast Care CCMA* 29-04-2003 case no WE9080/02 <<http://www.caselaw.co.za/search.php?court=0&stype=caselaw&query=gata&sfunc=0>> (accessed 12-06-2007)

¹²⁰ See Cooper “Women and the Right to Work” in *Women’s Social and Economic Rights* 272

¹²¹ Govindjee *Assisting the Unemployed in the Absence of a Legal Framework* 3

in South Africa.¹²² One concern could be that a constitutional focus on unemployment security and work would permit individuals to utilise their freedom to contract in order to choose work at a standard below legislated basic conditions of employment or somehow otherwise undermine legislation prescribing such basic working conditions.¹²³ To the extent that it is necessary to do so, careful constitutional and legislative crafting should easily be able to circumvent this concern.¹²⁴ Another perceived concern may be that the advancements made with respect to realisation of the right to have access to social security will be lost by virtue of a constitutional focus on work. This argument may be rebutted by considering established principles of interpretation of socio-economic rights. For example, it is by now well-known that the removal of existing access to rights, or the adoption of a retrogressive measure regarding a particular right, would not easily be justified.¹²⁵

The right to work is, in addition, established in international and regional instruments such as the Universal Declaration of Human Rights (1948),¹²⁶ the International Covenant on Economic, Social and Cultural Rights (1966),¹²⁷ the European Social Charter (1961) and Revised Social Charter (1996),¹²⁸

¹²² Regarding the fear that a right to work in the Constitution would promote untoward interference by the judiciary in the realm of the executive and legislature, or could result in rigidities in the labour market, see Cooper "Women and the Right to Work" in *Women's Social and Economic Rights* 274-275

¹²³ See S Liebenberg *Toward a Right to Work in SA?* (2006) unpublished paper presented at the *AIDC Conference on the Right to Work*, 12-06-2006 (copy on file with the authors)

¹²⁴ S 36 of the Constitution, which provides that all rights may be limited by a law of general application to the extent that this is reasonable and justifiable in an open and democratic society, should, in any event, serve to "limit" a right to work in such a way that only the idea of "decent work" would be promoted. It is also important to note that there appears to be no justification for suggesting that international law sanctions a reduction in labour standards protection as a mechanism for advancing the right to work (Liebenberg *Toward a Right to Work* 3)

¹²⁵ See, generally, *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 1)* 2002 5 SA 703 (CC). See also Liebenberg *Toward a Right to Work* 3-4. However, it might be true that the introduction of a new right relating to the fight against unemployment will be read together with s 27 in such a manner so as to more easily justify the limitation of the s 27 right or the failure to progressively continue to realise that right.

¹²⁶ Art 23(1) of the Universal Declaration of Human Rights (1948) UN Doc A/810 provides that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection from unemployment"

¹²⁷ Art 6 of the International Covenant on Economic, Social and Cultural Rights (1966) UN Doc 14531 provides that

- "(1) The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right
- (2) The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual "

¹²⁸ See Council of Europe, European Social Charter (1961) art 1 and Council of Europe, Revised Social Charter (1996) art 1 which states:

"With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:

- (1) To accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible with a view to the attainment of full employment;
- (2) To protect effectively the right of the worker to earn his living in an occupation freely entered upon;
- (3) To establish and maintain free employment services for all workers;

the Additional Protocol to the American Convention on Human and Peoples' Rights in the Area of Economic, Social and Cultural Rights (1988),¹²⁹ the African Charter on Human and Peoples' Rights (1981),¹³⁰ as well as in various ILO standards. There is also foreign precedent for the constitutional inclusion of some form of this right, as is evident from consideration of the law in Spain, Finland and France.¹³¹

In sum, there should be little disagreement about the merits of including a right to work, in one form or another, in the Constitution. Recognising a right to work would have the positive consequence of placing the values associated with work on an equal footing with other human rights contained in the Constitution, thereby elevating this aspect of life above other social interests.¹³² Interestingly, there also appears to be a positive empirical relationship between government effort and the actual constitutionalisation of economic rights which a policy-maker strives to achieve.¹³³ There exists at least some evidence to demonstrate that constitutionalisation is associated with increased government effort and higher economic rights fulfilment.¹³⁴ Put differently, countries that display high effort in fulfilling the human needs associated with economic rights also on average have the strongest economic rights provisions in their constitutions.¹³⁵

At least two further options may be considered in order to achieve this end. Firstly, there would appear to be some opportunity for the courts to utilise the existing constitutional text and framework of constitutional values in order to identify "unenumerated" rights in appropriate and limited circumstances.¹³⁶ The judges of the Constitutional Court in *Ferreira v Levin NO*¹³⁷ all seemed

(4) To provide or promote appropriate vocational guidance, training and rehabilitation"

¹²⁹ See art 6 of the Additional Protocol to the American Convention on Human and Peoples' Rights in the Area of Economic, Social and Cultural Rights (1988), which states:

"The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work"

¹³⁰ See art 15 of the African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/3 rev 5, 21 I L M 58, which states:

"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work"

¹³¹ Cooper "Women and the Right to Work" in *Women's Social and Economic Rights* 272-273

¹³² G Mundlak "The Right to Work: Linking Human Rights and Employment Policy" (2007) 146 *International Labour Review* 189 208; I Ahmed "Decent Work and Human Development" (2003) 142 *International Labour Review* 263 265 On the philosophical underpinnings of the right to work, in particular the relationship between this right and the attainment of social justice, see Cooper "Women and the Right to Work" in *Women's Social and Economic Rights* 249

¹³³ L Minkler "Economic Rights and the Policymaker's Decision Problem" (2007) 5 *Economic Rights Working Paper Series* Human Rights Institute, University of Connecticut 1 3

¹³⁴ 3 This is apparently because the constitutionalisation of economic rights results in the reduction of a policymaker's likelihood of making a "decision error"

¹³⁵ 26 It must be noted that there are a number of caveats to the conclusions reached by Minkler

¹³⁶ R Kruger & A Govindjee "The Recognition of Unenumerated Rights in South Africa" forthcoming in (2011) 20 *SAPL* On the recent, negative, view of the South African government of interventions of this sort, see the Keynote Address by President JG Zuma (3rd Access to Justice Conference, Pretoria, 8 July 2011) 5 <http://www.justice.gov.za/access-to-justice/conference-2011/20110708_ajc_zuma-speech.pdf> (accessed 06-10-2011) It is interesting to note that British courts of appeal have on occasion in the past recognised a person's right to work based on an interpretation of English common law and with emphasis on the relationship between work and livelihood: see, for example, the judgments of Lord Denning in *Nagle v Feilden* [1966] 1 All ER 689; *Edwards v Society of Graphical and Allied Trades* [1970] 3 All ER 689

¹³⁷ *Ferreira v Levin NO* 1996 1 SA 984 (CC)

to agree, for example, that the Constitution of the Republic of South Africa Act 200 of 1993 (“the Interim Constitution”) protected both enumerated and unenumerated freedom rights.¹³⁸ There is nothing to suggest that the position has changed when it comes to the final Constitution.

Secondly, it is also open for judges (perhaps reluctant to take the seemingly drastic step of recognising an unenumerated right) to utilise an expanded interpretation of existing, enumerated constitutional rights in order to address a challenge relating to a right not expressly included in the Bill of Rights.¹³⁹ The right of everyone to have their dignity respected and protected¹⁴⁰ is probably most conducive to such an exercise.¹⁴¹ In *Minister of Home Affairs v Watchenuka*¹⁴² the Supreme Court of Appeal accepted that

“[t]he freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity ... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound by with being accepted as socially useful.”

There is also a small body of jurisprudence that argues that the right to life in the South African Constitution may have to be construed in such a way that it includes socio-economic entitlements not contained in the Constitution or, at least, enhances those socio-economic rights guaranteed by the Constitution. As Pieterse argues:¹⁴³

“To be deprived of clothing, sanitation, *employment* or means to secure a livelihood can seriously encroach upon the quality of human life and may even threaten survival. The constitutional right to life must at least ensure access to these basic survival requirements if it is to have any significance for a large percentage of the population.”¹⁴⁴

In *S v Makwanyane*¹⁴⁵ it was suggested that the right to life, coupled with the right to dignity, may impose a positive duty on the state to create conditions which enable people to enjoy these rights as something more than a guarantee of mere physical existence.¹⁴⁶ In *City of Johannesburg*,¹⁴⁷ the court linked the absence of adequate housing for the respondents, as well as their potential

¹³⁸ Paras 184, 212

¹³⁹ Kruger & Govindjee (2011) *SAPL*

¹⁴⁰ S 10 of the Constitution

¹⁴¹ For example, the Constitutional Court’s purposive interpretation of the right to dignity in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 36-38 enabled it to give recognition to the importance of family life

¹⁴² *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 27 See also *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 59; *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 SCR 313 (SCC); *Malik and Mahmud v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20 para 37; *Johnson v Unisys Ltd* [2001] UKHL 13 [2001] IRLR 279 (HL) para 35

¹⁴³ M Pieterse “A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa” (1999) 15 *SAJHR* 373 384

¹⁴⁴ Pieterse (1999) *SAJHR* 384 (emphasis added) See also, in general, *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 JOL 16852 (W)

¹⁴⁵ 1995 3 SA 391 (CC)

¹⁴⁶ Para 25 Also note the minority judgment of Arbour J in *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 holding that a minimum level of welfare is so closely connected to issues relating to a person’s basic health and security, and possibly even survival, that such a right to minimum welfare must encompass these issues

¹⁴⁷ 2006 JOL 16852 (W)

eviction, to the effect that this deprivation would have on their employment prospects, their livelihood, their dignity and their life:

“An individual has as much right to work as the individual has to live, to be free and to own property. To work means to eat and consequently to live. This constitutes an encompassing view of humanity.”¹⁴⁸

International law and foreign law in the form of section 21 of the Constitution of India 1949 provides support for reading the right to work into either the right to dignity or the right to life, although at least one court in southern Africa has already rejected this notion expressly.¹⁴⁹

9 The right to unemployment security and transformative constitutionalism

The impetus behind arguing for constitutional or statutory recognition of unemployment security and the right to work is enhanced by the inherent limitations of the South African social assistance system. A vast number of unemployed people are completely uncovered by the UIF, for reasons discussed above, and are not entitled, in terms of the provisions of the Social Assistance Act 13 of 2004, to any form of social assistance. There is a potential constitutional challenge to the current situation, details of which are summarised below.

The Constitution provides that everyone who is unable to support themselves and their dependants has the right to have access to social assistance, the state having the duty to take progressive steps, within its available resources, to achieve progressive realisation of the right. The definition of “social assistance” contained in the Social Assistance Act is currently restricted to social grants, including the social relief of distress grant.¹⁵⁰ This suggests that all other “state assistance” geared towards the unemployed in South Africa barring the provision of unemployment insurance (which would count as part of the “social insurance” component of social security), cannot, by definition, amount to “social assistance” or “social security”. Public works programmes which appear to be enjoying some success in terms of creating work opportunities would, for example, not be considered to be “social assistance”.¹⁵¹ Unemployment prevention initiatives, such as the training layoff scheme, would similarly be excluded by definition. However, should the proposals mooted for the youth and adult unemployed in the *Creating Our Future* document¹⁵² be implemented, the position might be different. The

¹⁴⁸ Para 64

¹⁴⁹ *Baitsokoli v Maseru City Council* 2005 3 All SA 79 (LesCA) paras 17, 20, 23-24. See A Govindjee “Lessons for South African Social Assistance Law from India: Part 2 – Is There More to the Right to Life in South Africa?” (2006) 27 *Obiter* 33; *Olga Tellis v Bombay Municipal Corporation* [1987] LRC (Const) 351 368

¹⁵⁰ The main social grants provided for are the Child Support Grant, the Older Persons Grant and the Disability Grant

¹⁵¹ Social assistance, as presently defined in South Africa, exists as a safety-net in the event of unemployment. To argue that there is a greater attempt to create employment or provide additional work opportunities cannot, therefore, absolve the state from its current duty in terms of s 27

¹⁵² Department of Social Development *Creating Our Future*

difficulty with the current situation is that the obligation on the state to take progressive measures to provide social security, including social assistance, to unemployed adults who are unable to support themselves and their dependants, is largely being ignored.¹⁵³ The consequence of this is that the state may be challenged for failing to take steps, within its available resources, to respect, protect, promote and fulfil a right contained in the Bill of Rights, despite clearly prioritising employment creation at a policy level. The difficulty with implementing the Department of Social Development's proposals to deal with this *lacuna* relates primarily to concern regarding the financial viability of the suggested options.

Put differently, it is feasible that a group of unemployed youths, having attempted to unsuccessfully obtain sustained work *via* a public works programme and being unable to support themselves and their dependants (currently not being entitled to any UIF "continuation benefit" or social grant), could approach the court in order to challenge the constitutionality of the state social assistance system. Such a challenge could be based, for example, on the obligation of the state to take reasonable measures, within its available resources, to achieve the progressive realisation of the right to social assistance for "everyone" – not just for children, older persons and disabled persons. A defence to the effect that the state is taking progressive *policy* steps to create employment for the affected group would seemingly be ineffective, given the present wording of section 27 of the Constitution.

It may well be the case that such a matter has only not come before the courts to date due to the state's ability to progressively increase the scope of the Child Support Grant over the past few years, as well as the recent age equalisation of the Older Persons Grant. Should the state fail to expand the scope of social assistance further (for example, by refusing to pay social assistance progressively to able-bodied person between the ages of 19 and 59 years of age due to inadequate resources), the situation may be different.

Inserting a limited right to unemployment security, including work, into the Constitution will allow the state the possibility of justifiably limiting an unemployed person's right to social assistance on the basis that the state is striving, within its available resources, to progressively take reasonable legislative and other measures in order to create employment opportunities for that person. Such a right could be crafted, and limited, as follows:

"Everyone has the right to have access to unemployment security, including the right to work. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

It may be argued that it should be left to the judiciary to chart the course of transformation and to secure a greater level of social justice for the people of South Africa.¹⁵⁴ For the unemployed person currently ineligible for any form of social security, this could involve the recognition of an unenumerated right or an expanded reading of an existing constitutional right, as discussed above.

¹⁵³ The mooted extension of coverage of the UIF system may provide a temporary reprieve in this regard

¹⁵⁴ See D Mosenke "Transformative Adjudication" (2002) 18 *SAJHR* 314 318-319; F Michelman "A Constitutional Conversation with Professor Frank Michelman" (1995) 11 *SAJHR* 477 479

There would appear, however, to be an even better argument in favour of *direct constitutional transformation* in order to address the current anomaly of policy focus on unemployment in the absence of a coherent legal framework.

In fact, the Constitution does not provide a specific method to achieve its transformative goals and the envisaged transformation could be achieved in various ways. While a process of transparent judicial decision-making may play a great role in transforming society, the courts should not be the sole bearers of the duty to transform society.¹⁵⁵

As Mosenke has noted, the Constitution promised a new beginning and represented a collective quest for renewal, committing itself to improving the quality of life of all citizens, and to freeing the potential of each person.¹⁵⁶ Mosenke sees embedded in the “inner recesses of our transformative project” the meticulous observance of fundamental human rights as well as “the quest to ameliorate material deprivation and, so to speak, to bring the goal of a better life for all within reach”.¹⁵⁷ Albertyn and Goldblatt have suggested as follows:

“We understand transformation to require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.”¹⁵⁸

This clearly cannot be a challenge to be met only by the judiciary and, in fact, there is some opposition to the idea of *transformative adjudication* because of its perceived invitation to judges to accomplish political objectives.¹⁵⁹ The state is intimately involved in the protection of socio-economic rights and the advancement of the goal of a transformed, socially just society. In fact, it is generally acknowledged that the state carries the primary duty to protect socio-economic rights by regulating such rights through legislation and administrative conduct.¹⁶⁰ It is suggested that there may not always be a justifiable basis for limiting this primary duty to matters short of constitutional amendment.

The Constitution (incorporating the Bill of Rights) was drafted only a few years ago and its provisions are, in comparison to those of older constitutions, comprehensive. But this comprehensiveness does not imply that the provisions of the Constitution expressly cater for every eventuality.¹⁶¹ Constitutions and Bills of Rights are necessarily products of their time and context. In order for these documents to continue to address important societal issues, it has been

¹⁵⁵ See, in general, S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010)

¹⁵⁶ D Mosenke “Transformative Adjudication in SA – Taking Stock” in G Glover & PC Osode (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 21 23

¹⁵⁷ 24

¹⁵⁸ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 *SAJHR* 248 248-249

¹⁵⁹ Mosenke (2002) *SAJHR* 315

¹⁶⁰ Mosenke “Transformative Adjudication” in *Law and Transformative Justice* 31

¹⁶¹ Kruger & Govindjee (2011) *SAPL*

argued that constitutions need to reserve room for their own development through the addition of new rights and through new interpretations being given to “old” rights.¹⁶² According to De Villiers, there are various reasons which explain why this is necessary.¹⁶³ Firstly, societal circumstances change and the interpretation given to bills of rights must keep track of the needs and requirements of society. Secondly, the legal obligation of the state to take certain active steps to realise and respect fundamental individual rights is facilitated by a “living Constitution” which evolves so as to keep pace with changes in society. Thirdly, human rights philosophy acknowledges that fundamental rights have to adapt as more insight into human nature and the organisation of government is gained.¹⁶⁴

The wording of section 74 of the Constitution implies that the drafters understood the need for careful amendment to any part of the constitutional text.¹⁶⁵ Section 74 specifically provides the criteria and requirements for constitutional amendment.¹⁶⁶ It is arguable that constitutional amendment is sometimes desirable in order to accommodate the developing needs and requirements of a society. It is submitted that the constitutional goal to “heal the divisions of the past and guide us to a better future”, which according to Langa is the core idea of transformative constitutionalism, can also be achieved through refinement of the Constitution.¹⁶⁷

That the Constitution has already been amended several times supports this submission, although some of the amendments have related merely to technical matters. The Constitution prescribes the attainment of strict majorities prior to amendment of sections 1 and 74 (75% of the National Assembly and the supporting vote of at least six provinces) as well as for the amendment of chapter 2, including the Bill of Rights (two thirds of the members of the National Assembly and the supporting vote of at least six provinces).¹⁶⁸ Given that employment-related matters have become a primary policy focus, introducing a new constitutional right giving recognition to this reality may be the best method of ensuring that current unemployment security initiatives are continued and improved in a sustainable fashion.

10 Concluding remarks

The problems still experienced by the majority of people living in South Africa are well known and undeniable. These problems include gross inequality and abject poverty, coupled with an unacceptably high rate of unemployment and issues regarding basic service delivery. A complex and interrelated range of factors have contributed to creating this harsh reality

¹⁶² B de Villiers *The Protection of Social and Economic Rights: International Perspectives* Occasional Paper 9 Centre for Human Rights, University of Pretoria (1996) 3

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¹⁶⁴ 4

¹⁶⁵ On the unlikely existence of the basic structure doctrine existing in South Africa, see A Govindjee & R Kruger “A Question of Interpretation: A Comparative Study of ‘Unenumerated’ Rights Recognition in India and South Africa” forthcoming in (2011) *Journal of the ILS Law College*

¹⁶⁶ Govindjee & Kruger (2011) *Journal of the ILS Law College*

¹⁶⁷ P Langa “Transformative Constitutionalism” (2006) 17 *Stell LR* 351 352

¹⁶⁸ Subs 74(1) and 74(2) of the Constitution

and the country remains on the back foot regarding the constitutional promise of a society underpinned by the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.

There is general consensus that the constitutional promise of upliftment will remain unfulfilled as long as the living conditions which currently torment millions of residents in the country prevail.¹⁶⁹ It has repeatedly been mentioned that a life which is perpetually stuck in circumstances of squalor is an affront to human dignity.¹⁷⁰ On an international level, agencies such as the ILO and the World Health Organisation have also realised that unemployment and poverty are global crises, and have increasingly focused on the creation of a basic “social floor”, comprising both social transfers and the provision of essential services, as a possible solution.

This approach resonates with the emerging South African experience. South Africa has, during the course of the last two decades or so, endeavoured to utilise its available resources in a manner which progressively establishes a comprehensive system of social security. This system is, to some extent, targeted towards those inhabitants who are the most vulnerable, and, importantly, is underpinned by a constitutional right which grants everyone the right to have access to social security, including appropriate social assistance for those people unable to support themselves and their dependants. As Justice Mokgoro noted in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*:¹⁷¹

“The right of access to social security, including social assistance for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.”¹⁷²

The Constitutional Court has yet to engage substantively with the scope and content of the right to social security and assistance entrenched in section 27(1)(c).¹⁷³ While the positive attributes of social transfers have been confirmed by evidence which suggests that social transfers are an effective tool to prevent and fight poverty, it has been argued that as a poverty reduction strategy, this method is nearing the limits of its effectiveness, given fiscal constraints. This realisation of the financial limitations of a society reliant upon social grants has left a glaring gap in South Africa’s social security system: the exclusion of the structurally- or the long-term unemployed from social security coverage.

¹⁶⁹ See *Soobramoney v Minister of Health, KZN* 1998 1 SA 765 (CC) paras 8-9; M Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” (2004) 20 *SAJHR* 383 385

¹⁷⁰ See, for example, K Kallmann “Towards a BIG Paradigm Shift: A Rights Based Approach to Poverty Alleviation” (undated) *Economic Policy Research Institute* 1 <<http://www.epri.org.za/KarenKallmannFullPaper.pdf>> (accessed 20-06-2010) See also *Soobramoney v Minister of Health, KZN* 1998 1 SA 765 (CC) para 8

¹⁷¹ 2004 6 SA 505 (CC)

¹⁷² Para 52

¹⁷³ S Liebenberg “The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Rights of the Poor” in EH Riedel (ed) *Social Security as a Human Right* (2006) 69 74

This contribution addresses this particular gap from a constitutional perspective. Noting the terminological distinction between “social security” and the broader notion of “social protection”, the idea of “unemployment security” has been conceptualised in order for inadequacies in the current system to be better identified and addressed. For example, the UIF has proven to be an insufficient tool to address the plight of people who find themselves in a situation of long-term, structural unemployment. Proposals regarding the introduction of some form of unemployment continuation grant or unemployment assistance scheme may stall due to the large costs associated with the idea. It is also clear that not all of the components of unemployment security are directly covered by the section 27 constitutional right to have access to social security (or any other constitutional right), despite government having unambiguously promoted unemployment protection interventions (such as unemployment prevention and employment creation schemes) in terms of recent policy pronouncements. There is also no legislation in place which regulates matters such as employment creation or protection interventions, or the notion of decent work, directly. This results in policy innovations on such matters failing to be grounded in a proper legal framework. This, in turn, contributes to a range of resulting difficulties due to the disparity between current policy developments and the statutory scheme of laws. There is also the real potential for a successful constitutional challenge (on the part of a group of unemployed people in South Africa) against the current situation.

It is argued that there are a number of potential advantages to legislating such matters, not least because this will result in unemployment security interventions enjoying the same legal status (and level of accountability) as other existing attempts to progressively realise matters of a socio-economic nature. This will, for example, also limit the potential of government (or a new government) being able to back-track from the progress made to date in this regard. Going even further, it is suggested that there are few grounds for failing to constitutionalise a new right relating specifically and directly to unemployment security and work. The Committee for Economic Social and Cultural Rights has emphasised both the social and economic dimensions of the right to work. Work is viewed as a “good” activity in itself – and not merely as something which might just as well be substituted for by income support in the form of a social grant.¹⁷⁴ In fact, it is precisely because of the inability of the social security system to provide for any form of “unemployment assistance” that the claim for a right to have access to work deserves heightened consideration. Such a right could be read into the Constitution as an example of a self-standing unenumerated right, alternatively some form of the right could be read into the Constitution *via* an expanded interpretation of, for example, the rights to dignity, life, fair labour practices, equality, or access to social security. It is suggested that directly constitutionalising such a right would be the ultimate expression of the notion of transformative constitutionalism and should result in a principled basis for the introduction of legislative and policy

¹⁷⁴ Mundlak (2007) *ILR* 364

developments aimed at achieving poverty alleviation through minimising unemployment insecurity.

SUMMARY

The endemic problem of unemployment poses a serious challenge to the realisation of South Africa's constitutional goals and values. One of the most glaring gaps in the assistance provided to the unemployed in South Africa is the exclusion of the long-term unemployed from any income-replacement measures. While the state's focus, when it comes to people of working age, is on job creation (rather than extending the range of social grant recipients), policy interventions to reduce unemployment tend to operate largely in the absence of a proper legal framework. For example, there is no designated right to work in the Bill of Rights. No legislation deals specifically with employment creation initiatives and few court cases have considered this issue. Without a right to work, there is a real possibility of a successful constitutional challenge to the current situation. Although this article acknowledges indirect ways to give constitutional recognition to such a right, a more direct approach is favoured in the form of the insertion in the Constitution of a limited, qualified right to unemployment security, including the right of access to employment opportunities and work. This would allow the state to limit an unemployed person's right to social assistance – the root of a potential constitutional challenge – on the basis that the state is striving, within its available resources, to progressively take reasonable legislative and other measures to create employment opportunities. In the absence of such an explicit right, the state may find it very difficult to use its attempts to create more jobs as a justification for its failure to pay social grants to the entire uncovered adult population. Significantly, constitutionalising such a right would embody transformative constitutionalism. It is argued that the Constitution should be the starting point in the quest for meaningful social change. A new constitutional right would result in a principled basis for the introduction of legislative and policy measures aimed at defusing the time bomb of long-term unemployment and endemic poverty.