Towards a coherent approach to social protection, labour market policies and financing of social security: A new paradigm for South Africa?

Marius OLIVIER

Centre for International and Comparative Labour and Social Security Law
Faculty of Law, Rand Afrikaans University
South Africa
TOWARDS A COHERENT APPROACH TO SOCIAL PROTECTION, LABOUR MARKET POLICIES AND FINANCING OF SOCIAL SECURITY: A NEW PARADIGM FOR SOUTH AFRICA?

by Marius Olivier, Director: Centre for International and Comparative Labour and Social Security Law, Faculty of Law, Rand Afrikaans University, South Africa

This paper analyses three of the more important areas of the South African social security system where labour market and social protection/security integration and interaction is imperative: unemployment insurance, work-related and traffic-related injuries, and social assistance grants. A clear pattern emerges from this limited investigation, namely that preventative and integrative measures are either largely absent or insufficiently linked to the social security system. The emphasis is overwhelmingly on compensating victims and providing monetary support to certain categories of the indigent (unemployed). The rigid nature of the system, as well as its inability to build in flexibility measures in order to encourage (if not enforce) labour market participation, must be seen as counter-productive and, in the long run, costly. Certain measures are proposed to facilitate an overhaul the system, as far as these considerations are concerned.

1. INTRODUCTION

It is the aim of this paper to highlight aspects of a coherent approach towards labour market policy and social protection/security in South Africa. For this purpose a limited investigation is embarked upon, analysing three of the more important areas where labour market and social protection/security integration and interaction plays a predominant role. These areas relate to unemployment insurance, work-related and traffic-related injuries, and social assistance grants. The financing of social security is not reviewed in any detail or as an alone-standing issue. Where necessary, it will be commented upon within the framework of the social security-labour market debate.

It is suggested that a clear pattern emerges from this limited investigation, indicating a rather loose and insufficient relationship between labour market policies and social protection. It is, therefore, submitted that the South African social security system is in need of synchronising its

---

1 The paper is partly based on the research findings of a comprehensive and national (inter-university) social security research project in South Africa, approved and supported by the Human Sciences Research Council (now the National Research Foundation). Several publications flowed from this project, which to some extent form the basis of this contribution. They include: Olivier M et al Social security law: general principles (Butterworths, Durban, 1999); Olivier M et al Social insurance and social assistance: towards a coherent approach (A report to the Department of Welfare, South Africa) (CICLA & FES, Johannesburg 1999); Olivier M et al Social security law in South Africa: a comparative perspective (CICLA, Johannesburg, 2000).
social protection mechanisms in such a way that they will contribute to sound labour market
imperatives.

However, before entering into this discussion, it is necessary to have some impression of the
existing social security framework, of labour market and related data, and of what is to be
expected of an integrated labour market - social security approach.

2. THE EXISTING SOCIAL SECURITY FRAMEWORK: AN OVERVIEW

The social security system in South Africa is characterised by a strict distinction between social
assistance and social insurance. The other important characteristic is that some of the traditional
social security contingencies are due to historical reasons not regulated on a public insurance
fund basis, but covered in terms of essentially private mechanisms - in particular retirement and
health.\(^2\) In the area of social insurance the Unemployment Insurance Fund\(^3\) pays out benefits
to contributors and their dependants in the event of unemployment, illness, maternity and
adoption. Employers and employees contribute on an equal basis to the Fund with practically no
State contribution. Compensation for employment injuries and diseases is paid to employees
and their dependants out of the Compensation Fund, to which employers contribute on the basis
of industry-based risk assessments.\(^4\)

The state social assistance system rests on two pillars: the provision of various kinds of social
services and the payment of social grants. No universal coverage exists, as a needs-based and
categorical approach is followed. The main social grants,\(^5\) namely the child care grant, the
disability grant and the old age grant, are all means-tested. They are of a non-contributory
nature, as payments are made on the basis of an annual budgetary allocation. The categorical
nature of these grants is strengthened by a host of other conditions, amongst which is the
requirement that the beneficiary must be both resident in and a citizen of the Republic of South
Africa.

Health care for the bulk of the population is provided by the limited public measures in this
area: free primary health care, as well as free hospital care for women with young children and
the aged. For the rest, medical services are covered for a selected part of the population by

\(^2\) In these areas public provision is made to cover in particular those without sufficient means - such as by
means of the state old age social grant and public health services (in particular primary health care and
public hospitals). Conceptually this must in the South African context be seen as part of the social
assistance system.

\(^3\) Established in terms of the Unemployment Insurance Act 30 of 1966 - see further the discussion in par 5
below.

\(^4\) Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 - see
further the discussion in par 6 below.

\(^5\) Regulated and paid out in terms of the Social Assistance Act 59 of 1992.
private schemes which are increasingly subjected to regulation. In the absence of a national pensions scheme, private pension funds and more recently also provident funds have mushroomed. Around 74% of formal sector workers are covered. There are, however, several problems with the present regulation. One of the problems relates to a tendency to withdraw provident funds before they have matured. The implication is that workers who do this would have spent their savings when they reach retirement age, and would consequently end up drawing a State social grant. There is also no obligation to belong to a pension or provident fund. The implication is that those workers who do not so belong, including the informally and self-employed, later often become dependent on State social grants for the elderly. Furthermore, in practice retirement contributions are often not transferable when an employee changes employment. Finally, racial discrimination as regards membership of and employer contributions to a pension and/or provident fund still appears to be rife.

The relevance of the social security debate in South Africa has been significantly enhanced by the constitutional entrenchment of social security rights. For the first time in the history of South Africa as a unitary state the Constitution introduces (in the chapter dealing with the Bill of Rights) a constitutional imperative whereby the government is compelled to ensure the "progressive realisation" of social security. Section 27(1)(c) 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."

Section 27(2) provides that:

"[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

---

6 In terms of the Medical Schemes Act 131 of 1998 medical schemes may, as a rule, no longer refuse membership or differentiate between members of a scheme on the basis of age and medical history. Certain core medical services have to be covered by these schemes.
7 Regulated in terms of the Pension Funds Act 24 of 1956.
8 The assets of these funds account for a whopping 73% of GDP. There has been a massive growth rate in membership of these funds: over the past 35 years the growth rate has been 7% per annum (Van den Berg S "South African social security under apartheid and beyond" 1997 Development Southern Africa 481 485, 489).
9 Even in the event of provident funds the Act (the Pension Funds Act) permits a member of the Fund to withdraw savings for purposes of, amongst others, buying or extending homes.
10 The Department of Welfare therefore advocates compulsory retirement provision by all employees in formal employment, and the creation of a scheme for the self-employed: cf the White Paper for Social Welfare (Government Gazette 18166 of 8 August 1997) 54.
11 The White Paper (at 54) acknowledges that this is an area to be addressed through consultation with relevant stakeholders.
This is a clear and unambiguous undertaking by the drafters of the Constitution to develop a comprehensive social security system, based on two important paradigms: rights of access for everyone and financial viability.

It is, therefore, evident that the constitutional embodiment in the Bill of Rights of a right to access to social security has now unmistakably propelled this terrain into the forefront, not only of stakeholder debate but also of academic and legal discourse. Backed by a host of other equally relevant fundamental rights, as well as the obligation on the part of the State to incrementally give effect to this right, and the power which vests in the courts (in particular the Constitutional Court) to monitor compliance with and support the development of this right, this is set to effect a lasting change in the vast landscape of policy formulation, administrative organisation and service delivery, and academic and legal treatment. Interpreting and enforcing rights associated with social security, as is the case with other socio-economic rights, and giving effect to statutory entitlements which have accrued in this regard, certainly emphasise the importance of undertaking a proper legal analysis of the nature, content and ambit of the right to (access to) social security.

14 E.g. the right to health care services (s 27(1)(a)), and the right to equality (s 9).
15 See ss 7(2) and 27(2) of the Constitution.
16 In the first certification judgement the Constitutional Court remarked that these rights are justiciable and may lead to court orders which may have implications for budgetary matters: Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) 800 D-F (par 77).
17 S 184(3) of the Constitution: "Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."
18 For two recent examples, see Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) (i.r.o. the right to medical treatment) and Jooste v Score Supermarket Trading (Pty) Ltd 1998 BCLR 1106 (CC) (where the Court upheld the constitutional validity of the statutory provision which substitutes the liability of the Compensation Fund for the common-law liability of the employer in the event of a workplace injury or illness suffered by the employee).
19 In Bacela v MEC for Welfare (Eastern Cape Provincial Government) 1998 (1) All SA 525 (E) the decision of the MEC to suspend payment of arrear pensions, payable in terms of the Social Assistance Act 59 of 1992, due to budgetary constraints, was successfully challenged. This is in line with the general approach adopted by our courts when interpreting this Act (and the same would in principle apply to the other forms of social legislation). In R v Canan 1956 (3) SA 355 (E) at 357-358 Price J stated that social labour legislation: "... is designed to protect the interests of employees and to safeguard their rights, and its effect is to limit the common-law rights of the employers and to enlarge the common-law rights of employees. The history of social legislation discloses that for a considerable number of years there has been progressive encroachment on the rights of employers in the interests of workmen and all employees. So much has this been the purpose of social legislation that employees have been prevented from contracting to their detriment. They have been prohibited from consenting to accept conditions of employment which the legislature has considered are too onerous and burdensome from their point of view." More recently, this was echoed in the judgement of Jooste v Compensation Commissioner 1996 ILJ 497 (C) where Friedman JP and Van Zyl J ruled that a person who, because of accident or industrial disease, has ceased to be a worker, can still be a claimant. To rule otherwise would not be consistent with the policy of the Act, which is to assist workers as far as possible. However, the general condition still applies, namely that claims have to be lodged within a period of twelve months.
This is not to say that the constitutional imperative has been the only or perhaps even the primary driving force behind the current interest in social security. It is evident that the more sensitive approach to matters of socio-economic concern since the democratic elections of 1994, the wider international context of the social security paradigm and the commitments which South Africa may incur in this regard,\(^{20}\) as well as the need for a much more coherent approach in this area, are all playing a decisive role. More importantly, it is the very plight of those who are (still) excluded from the formal framework of social security, in particular the vast majority of the poor and needy who enjoy virtually no entitlement,\(^{21}\) which has caused concern and already brought about some reconsideration of the fundamental characteristics of the system.\(^{22}\)

In conclusion, the **lack of a coherent approach** in South African social security is clearly discernible and needs to be researched properly and rectified. In a sense the present system suggests an archaic and rigid distinction between social insurance and social assistance - it lets those who are or have been in formal employment benefit from a fairly well-developed social insurance coverage (in particular unemployment insurance and workers' compensation coverage), while social assistance, in particular the grant system, remains restricted in coverage, as it is mainly based on a categorical, means-tested approach which provides meagre protection against the occurrence of a limited number of social risks. There is, therefore, little social solidarity in the system, apart from state-mandated budgetary flows (through the tax system) to social assistance. This is exacerbated by the fact that those in formal employment are usually in a position to top up social insurance protection by occupational-based and/or private coverage against risks such as sickness, health, disability, and old age. Glaring disparities between the (relatively) rich and the poor are therefore prevalent, reinforcing and perpetuating not only the ever-present inequality, but also abject poverty in this country.

\(^{20}\) The provisions of the important International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations in 1966, are particularly relevant: Firstly, because of the similarity of formulation (the wording of s 27(1)(c) and 27(2) of the Constitution is largely modelled on that of the corresponding provisions of the ICESCR (a 9 and a 2(1) respectively)). Secondly, South Africa already signed the Convention in 1994, and ratification is apparently imminent. Thirdly, since its inception in 1985 the UN Committee on Economic, Social and Cultural Rights has in the course of its supervisory and monitoring role (as mandated by the UN Economic and Social Council) issued several General Comments, serving as an authoritative source of interpretation of the ICESCR (see generally Raoul Wallenberg Institute of Human Rights and Humanitarian Law *General Comments or Recommendations adopted by the United Nations Human Rights Treaty Bodies, vol II: Committee on Economic, Social and Cultural Rights* (1997)).

\(^{21}\) See in particular the 1998 government-commissioned *Poverty and Inequality Report* (PIR), which highlights, amongst others, the lack of a coherent strategy on the part of government to deal comprehensively and effectively with the plight of the poor.

\(^{22}\) For example, the recent introduction of the child support grant at the expense of the long-existing state maintenance grant, is a clear indication of a commitment on the part of government to let more and larger families in the impoverished section of the community benefit from state social assistance measures.
3. LABOUR MARKET AND RELATED DATA

By way of background, basic data on aspects of the labour market may be relevant. According to the 1995 October Household Survey of the Central Statistical Service (1996) the total labour force counts 14,4 million. The labour force (also referred to as the economically active population (EAP) includes all those who work and those who are available to work, even though they do not work - i.e. remunerated workers, the self-employed, those in the informal sector and the unemployed are all included. In South Africa the unemployment figure is comparatively speaking one of the highest: the unemployed count 4,2 million, in other words almost **29% of the total work force**; while 1,7 million (almost 12%) of all of those who work are involved in informal activities. The absorption rate of the South African economy is relatively low: over the ten year period 1980-1989 it was only 0,78% or about 60 000 workers, per annum. The implication is that only 15% of the 350 000 to 400 000 new entrants (per year) into the labour market over the same period were able to find employment. The situation has not since then improved, in particular as a result of the recession experienced for most part of the 1990's.

The expansion of informal activities has been considerable, where until now a lack of skills, low income levels and a survival strategy have characterised the sector concerned. It would, therefore, seem that labour market segmentation is inevitable.

While informal sector employment is evidently on the increase, the same cannot necessarily be said of other forms of non-standard employment. From the available evidence it is clear that the great majority of workers in South Africa are still permanent full-time employees, in particular as far as core activities are concerned. Although there has been an increase in the use of some forms of atypical employment, in particular in some industries (e.g. contract work in the mining and construction industries; temporary and part-time workers in the retailing sector), and although some expect an increase, the overall picture is that little change has occurred in

---

23 According to the recently released 1998 October Household Survey data the official unemployment figure is 25.4%.
25 According to a recently released statistics report by Statistics SA 40 300 formal sector jobs were lost over the period January to March 2000; for the year preceding March 2000 the formal sector has laid off 162 000 people or 3.3% of the workforce.
South Africa in this regard.\(^{29}\) However, it would appear that special protective measures need to be taken in order to safeguard atypical employees from abuse, in view of their very restricted coverage in terms of the South African labour and social security laws.\(^{30}\) Little if any accommodation is made for the voice of the atypical labour force to be heard at institutional level.\(^{31}\) A unified union approach towards non-standard employees is also lacking - existing unions would seldom represent the interests of these workers alongside those of their traditional membership.\(^{32}\)

In South Africa **occupational mobility** is limited and **skills training** seriously deficient.\(^{33}\) Illiteracy,\(^{34}\) innumeracy, low educational levels and insufficient skills training are some of the factors which contribute to limited job rotation and occupational mobility, even within the same firm. This of course impacts on the trainability of workers and improvements in productivity, and impedes the development of flexible work practices as regards job rotation and occupational mobility.\(^{35}\) In fact, the overall picture is that most workers in South Africa hold narrowly defined jobs. Horwitz and Franklin remark: "Structural barriers in access to skills and education have limited wider implementation of work flexibility, particularly task flexibility and multi-skilling. A low skills base is a consequence, with most workers holding narrowly defined jobs".\(^{36}\) The recently introduced Skills Development Act\(^ {37}\) may go some way to bring about changes to this

\(^{29}\) Bronsman P et al 37; Horwitz and Erskine 45; Horwitz and Franklin 21, 24, 29.

\(^{30}\) Horwitz and Franklin 35. The present legislation may provide for protection (e.g. in the event of unfair dismissal) to the extent that atypical labourers are covered by the statutory definition of "employee", but does not as such extend minimum conditions of service to atypical workers not covered by the definition of "employee". Furthermore, those outside the organised interest groups, notably workers not involved in regular wage labour, are left out of the distributional strategy provided for by the Labour Relations Act 66 of 1995 (Standing et al 178). As far as their exclusion from social security laws is concerned, see the discussion par 5, 6 and 7 below.

\(^{31}\) Standing et al 88.

\(^{32}\) In some instances existing unions have taken the task upon themselves to include categories of peripheral workers within bargaining arrangements with employers. However, these arrangements are limited in number and ambit, restricting extension merely to certain categories of peripheral workers and to certain topics only. As a result of this, and also as a result of the fact that those outside organised interest groups and outside regular wage labour are not institutionally represented at forums such as the National Economic, Development and Labour Council (NEDLAC) (see above), independent unions have recently been set up for and by non-wage and contract workers: Standing et al 96, 162, 178.

\(^{33}\) It has been suggested that South African employers do not do enough in terms of skills development. A recent study has revealed that 130 of South Africa’s most progressive employers spend only a relatively low 2.9% of the salary budget on skills development (quoted by Horwitz and Franklin 6). According to a recent ILO study institutional vocational training is low; private sector technical training is limited and tends to decline; and the number of apprenticeships has diminished (Standing et al 66).

\(^{34}\) 30% of people over 20 years of age are regarded as functionally illiterate, while 60% of the formal sector work force does not have a high school education: Horwitz and Franklin 6.

\(^{35}\) Horwitz and Franklin 14.

\(^{36}\) Horwitz and Franklin 34. However, a long-term process of occupational upgrading is discernible. For example, in the manufacturing industry there has been a steady shift from unskilled to semi-skilled to skilled jobs: Standing et al 79-80.

scenario. However, the statutory incentive\textsuperscript{38} to conduct training programmes will only have limited effect on employers. These programmes will certainly have an employee bias, with the result that those who are unemployed or who work but are not regarded as employees in the statutory sense of the word, will largely still not benefit from skills development programmes.

The rural and urban poor and the informally employed amongst them, as well as the structurally unemployed generally pose major challenges to social security protection. This follows from the fact that they are usually not part of the formal workforce of a country and are therefore as a rule excluded from social insurance mechanisms. In the absence of a universal system of social security coverage social assistance measures also do not suffice - mainly because of a categorical approach whereby services are limited and benefits restricted to specific categories of the poor and needy, aggravated by the often insufficient levels of coverage, and difficulties in complying with and administering means testing. For the poor and the informally employed amongst them, as well as for the structurally unemployed, social security coverage would often mean more than merely providing a safety net: it is their very means of short- and medium term survival in the face of a lack of capacity to be able to participate meaningfully and productively in society. In addition, institutional backing and representation is for most part absent or too weakly developed to have any meaningful impact on the betterment of their position social security wise. It would seem that world-wide deliberate attempts are needed to investigate social protection possibilities for these people excluded from the purview of the general system and that special measures may be required to ensure their coverage in terms of social security mechanisms.

The limited nature of protection in terms of the South African social security system has affected the poor, as well as the informally employed and structurally unemployed amongst them in particular. This stems from the fact that the social insurance system, notably unemployment insurance and compensation for work injuries and diseases, does not provide coverage to those outside formal employment. Social assistance measures seldom operate to the direct advantage of the poor and the informally employed amongst them. Due to the targeted nature of both social services and programmes, and of the various social grants (notably the old age grant, the disability grant and the recently introduced child care grant), many if not most of the persons falling within the categories mentioned remain part of the socially excluded population. While it is estimated that around 3 million South Africans are beneficiaries under the present grant system, these grants provide extremely low levels of income support (e.g. the present value of the old age grant is R540-00). This also flows from the fact that on average the said benefits have to cover for five additional household members in African communities, while the means tests created in order to access these grants have tended to promote a poverty trap syndrome.\textsuperscript{39} All of this is aggravated by the exceptionally high levels of unemployment and poverty in South Africa. Structural unemployment is said to hover around a figure of 25% to 30% of the

\textsuperscript{38} In terms of the Act employers have to pay over a certain percentage of the staff wage bill to certain institutions for training purposes. Eighty percent of same can be paid back to the employer, on condition that the employer runs approved training programmes.

\textsuperscript{39} Van den Berg 490; White Paper 48 (chapter 7, par 4-6). See also par 7 below.
economically active population of South Africa, making it extremely unlikely that large pockets of the rural and urban poor may be successful in entering the labour market in the near future. The extent of poverty is also illustrated by the fact, as indicated in the Poverty and Inequality Report, that around 45% of the informally employed receive an income which is below the MLL (Minimum Living Level). It is also estimated that 45% of the South African population, i.e. 18 million people, live in abject poverty - they are mostly African, females and children, and rural. The categories of the poor and informally employed mentioned (in particular the rural poor) fall within the lower end of the income inequality spectrum, contributing significantly to the Gini coefficient of 0,58, which (according to the PIR) is the second highest in the world. Informal employment activities amongst the poor are as a rule restricted to economic survival. These facts and figures are so much more forceful if account is taken thereof (as noted by the PIR) that government has not yet put forward an integrated strategy for the reduction of poverty and inequality. It is clear, therefore, that the present social security system in South Africa is for purposes of providing a true safety net for the rural and urban poor and the informally employed and structurally unemployed amongst them hugely deficient, operating within a paradigm where a consistent model for the alleviation of extreme poverty has yet to develop.

4. LABOUR MARKET AND SOCIAL SECURITY: AN INTEGRATED FRAMEWORK

The question can be posed what is to be expected of a social security system, in particular from the point of view of its relation to labour market policies. One should understand that social security, and in particular social insurance, should manifest itself as a "continuous process of social inclusion and, therefore, the very opposite of exclusion." Loss of income is but one, if not the most important, factor which causes social exclusion. If the possibility to find work does not materialise (unemployment), or if the employee has lost the ability to do work as a result of illness, injury, invalidity or old age, social exclusion of both the individual concerned and his/her family is a reality. The need, therefore, arises to restore (where possible) the individual to the

---

40 See the government-commissioned Poverty and Inequality in South Africa Report (PIR) (1998) 82; see, however, Standing et al 107-110.
42 PIR 45.
43 PIR 2, 23-24. According to the PIR the Gini coefficient for Black people has already reached an alarming 0,54. This seems to be confirmed by findings concerning wage differentials in South Africa. Standing notes that the drop in the inter-racial wage differential has been associated with another development, namely that the intra-racial differential amongst Black employees has worsened - due to the fact that an increasing number of Blacks have been appointed in senior positions, while the bulk of the African workforce remains locked in low-paid employment (partly as a result of limited schooling and training) (Standing et al 189-190).
44 PIR 79.
45 PIR 15.
46 Greiner D et al Autonomous and self-administered insurance against employment accidents and occupational diseases: an expanded and integrated model of social protection (Bureau of the Permanent Committee on insurance against employment accidents and occupational diseases, ISSA, Geneva, 1998) 1. Although the authors make this remark in the context of social insurance, it applies equally to other areas of social security.
position in which s/he was before or to another position (by assisting him/her to return to work) - also referred to as labour market integration. If this is not possible, whether temporarily or on a permanent basis, appropriate replacement of the individual's previous income should ensue, in order to avoid relying unnecessary on meagre public funds and falling back in abject poverty.\textsuperscript{47}

There are, therefore, several consequences which can be attached to social security in its relation to labour market policies. The first of these relates to the ability of social security to provide a meaningful substitute should a person have to leave the labour market temporarily or permanently. Social security as an income replacement or adjustment system therefore refers to a variety of policy instruments that are set up to compensate for the financial consequences of a number of social contingencies.\textsuperscript{48} However, most (social insurance) schemes provide inappropriate protection, as only the last earnings, and not future losses, are taken into account. The implication is that a major part of the damage has to be borne by the person affected.\textsuperscript{49} To this one could add that a monetary ceiling often applies, and that the beneficiary is usually entitled to only a percentage of the (maximum) amount(s) set by regulation. Generally speaking, in many systems social security has only partially succeeded in providing a guaranteed basic standard of living.\textsuperscript{50} As a rule these remarks are also largely true of the South African system (e.g. unemployment, employment injury and road accident cover), subject to some exceptions (some road accident fund payments).

The inability of most social security systems to provide comprehensive compensation is one of the factors which have increasingly, together with considerations of policy and principle, led to a radical rethinking of social security goals and policies. It is now generally accepted in social security thinking and policy-making that social security is not merely curative (in the sense of providing compensation), but also preventative and remedial in nature.\textsuperscript{51} The focus should be on the causes of social insecurity (in the form of, amongst others, social exclusion or marginalisation), rather than on (merely dealing with) the effects.

This implies that measures aimed at preventing human damage (e.g. employment creation policies; health and safety regulation; preventative health care) and remedying or repairing damage (e.g. reskilling/retraining; labour market and social integration) should be adopted as an integral part of the social security system, alongside compensatory measures. In fact, one could only speak of comprehensive coverage and true indemnification where, as part of social security, firstly, reasonable measures have been taken to prevent human damage and to keep human damage as minimal as possible; secondly, reasonable steps have been put in place to

\textsuperscript{47} See Greiner et al. 2.
\textsuperscript{48} Berghman J "Basic concepts of social security" in Social security in Europe (Bruylant/Maklu, Brussels/Antwerp, 1991) 9.
\textsuperscript{49} Berghman "Basic concepts" 21.
\textsuperscript{50} ILO Introduction into social security (ILO, Geneva, 1989) 20, 24.
\textsuperscript{51} Berghman "Basic concepts" 18, 20; Pieters D Introduction into the basic principles of social security (Kluwer, Deventer, 1993) 2-4.
repair such damage; and, thirdly, reasonable compensation is provided if and to the extent that damage appears to be irreparable.\textsuperscript{52}

**Social and labour market integration** should as a matter of principle and policy be regarded as an integral part and primary goal of social security. Berghman indicates that obligatory social security schemes are elaborated in such a way that insurability and entitlement to benefits are made conditional on the work effort - in this way, social security schemes confirm and socially reinforce the work effort.\textsuperscript{53}

Social security, therefore, operates as a \textbf{bypass mechanism} only in those cases where integration into the labour market is no longer possible or desirable.\textsuperscript{54}

It is important to note, for social security purposes, that prevention and rehabilitation together with compensation form a unity. In his discussion of the functions of accident insurance Fuchs maintains that these functions involve financial compensation, rehabilitation, and prevention. They form an organic whole consistent with the principle of global cover provided by accident insurance. If the risk materialises (in the sense that an accident occurs or an occupational disease is contracted) effective compensation has to be provided. However, compensation can never be an end in itself. It should, where possible, be only a temporary measure, while rehabilitation (in the sense of an attempt to get the victim back to work) should enjoy priority.\textsuperscript{55}

For purposes of the rest of the discussion, it should be remembered that the interaction between social security and the labour market operates at \textbf{different levels} with regard to the various categories of persons affected thereby:

(a) **Firstly**, there are those who have for various reasons traditionally been marginalised or excluded from the labour market, in particular from formal employment - one thinks here, amongst others, of the long-term unemployed and the informally employed. As a rule they also tend to be the poor and ultra poor members of society. As is evident from the discussion to follow, in the absence of real safety net provision in South Africa they do not as a rule enjoy the protection of social security mechanisms; nor do they have the necessary means to survive meaningfully and/or the skills to access the labour market successfully.

(b) **Secondly**, there are those who are active in the (formal sector of the) labour market, but who have traditionally been specifically excluded from the social security framework, in particular from social insurance mechanisms. In the South African context groups such as domestic workers spring to mind. While they are employed, the nature of their employment is often precarious, their formal skills basis restricted and their wages low. Their exclusion

\textsuperscript{52} See also Berghman "Basic concepts" 18.
\textsuperscript{54} Berghman "The resurgence of poverty" 10.
from the social security system places them at jeopardy, reinforcing not only their precarious labour market position, but also threatening their very survival and that of their dependants.

(c) Thirdly, there are those who have been active in the labour market but who, due to the occurrence of a particular risk, have been removed either permanently or temporarily from the labour market. One thinks here of those who are retrenched or who become disabled as a result of a work-related injury. In South Africa, if they have been active in the formal sector before the occurrence of the said risk, they would as a rule be covered by certain social insurance mechanisms (unemployment and employment injury cover). Depending on the reason for and duration of their removal they might eventually end up with the first category mentioned above (e.g. where they have been retrenched and have exhausted their unemployment benefits). Due to the limited level of the benefits paid out in terms of the existing social insurance schemes, they would in the absence of sufficient private provision be much worse off economically than was the case when they were still employed.

As will become apparent, as far as all these categories are concerned, little provision is made for their (re)integration into the labour market. Preventative measures also only exist to a limited extent. Comprehensive health and retirement coverage would, subject to some exception in the event of employment and traffic-related injury, as a rule also not be available to any of them.

5. UNEMPLOYMENT

In South Africa there is no universal or targeted social assistance based coverage against unemployment. The possible introduction of a minimum income support grant system - either on a universal or a means-tested basis - is being mooted in some circles. If introduced, the focus is not so much on dealing with unemployment than with poverty, bearing in mind that in a country such as South Africa structural unemployment is one of the major causes of poverty.

Unemployment insurance (UI) provides some protection to those in formal employment and their dependants. However, there are several reasons why the UI system must be seen as largely deficient, in particular when regard is had to its interrelationship with labour market issues. This is even more evident when one compares the existing regulation of unemployment coverage in the Unemployment Insurance Act (UIA)\(^56\) with the envisaged regulation contained in the Unemployment Insurance Bill (UIB).\(^57\) Amongst others, these deficiencies relate to:

(a) There is **little actual evidence** of innovative attempts to link entitlement to benefits to **(re)integration into the labour market**. The picture which emerges is that some but insufficient provision is made for labour market integration. There are also indications of other (envisaged) changes to the unemployment regime obtaining in South Africa which tend

---

56 Act 30 of 1966.
57 Published in Government Gazette 20952 of 2 March 2000 (vol 417) (General Notice 943 of 2000). The remarks to follow are partly based on Comments on the Unemployment Insurance Bill (UIB) and the Unemployment Insurance Contributions Bill (UICB) by Olivier M & Van Kerken E (March 2000).
to make unemployment insurance coverage even more rigid than it is and which do not support a labour market sensitive approach. For example, while it is required that a beneficiary must be capable of and available for work, and stipulated that a contributor is not entitled to unemployment benefits if s/he refuses without good reason to undergo training and vocational counselling under an approved scheme, the new Bill no longer provides for the possibility that somebody who has lost one work but retains another does not lose his/her entitlement to benefits in respect of the lost employment. This runs counter to the generally accepted notion that the retention or payment of benefits in circumstances of partial unemployment is meant to serve as an incentive to the (partially) unemployed to be employed or re-employed.

(b) No provision is made for the payment of unemployment benefits in the event of a temporary suspension of work. Unemployment benefits are only payable if the reason for the unemployment is the termination of the contributor's contract of employment. South Africa might do well to consider the provisions of ILO Convention 168 of 1991 in this regard. In terms of these benefits should be paid in circumstances of suspension or reduction of earnings due to a temporary suspension of work, without any break in the employment relationship, for reasons of an economic, technological, structural or similar issue. Furthermore, where there is such a suspension of work and a resultant suspension of earnings, benefits must be on the same level as benefits for full employment. The rationale is clear: namely to protect and maintain some measure of income replacement in the event of such a contingency occurring, and to ensure speedy reintegration in the labour market once the suspension comes to an end. It is submitted that this contingency is highly relevant to the South African scenario. The reason is that the suspension of the contract of employment, for example in the event of a protected strike, or as a result of the employer's operational requirements, legally has the result that the employer's obligation to pay remuneration and ancillary benefits is suspended as well.

---

58 See UIB cl 8(1)(b), confirming the similarly worded UIA provision.
59 UIB cl 8(2)(b). However, there appears to be an apparent contradiction with cl 10(2) of the UIB, which merely imposes a penalty of maximum thirteen weeks' benefits should a contributor refuse to accept available work, or to undergo training and vocational counselling.
60 Which is possible in terms s 35(11) of the present UIA.
61 As provided for by art 10.1 of ILO Convention 168 (The Employment Promotion and Protection against Unemployment Convention 168 of 1991) (see also Recommendation 176 of 1991 on the same topic). Art 10.3 of the Convention extends this protection to a part-time worker who actually seeks full-time employment. Payment of benefits to part-time workers are aimed at bringing the unemployed back into the world of work, because they do not lose their benefits merely due to the fact that they have found a job, or because they started their own business. In may countries, such as the United States, Canada, Australia, New Zealand and the more developed member states of the European Union, an unemployed person will retain some benefits while making his/her way back into the world of work.
62 UIB cl 8(1)(a).
63 Art 102.
64 See in particular FGWU v Minister of Safety and Security 1999 ILJ 1258 (LC).
(c) In terms of the envisaged dispensation unemployment benefits are claimable only where the reason for the unemployment is the termination of the contributor's contract of employment by the employer of that contributor. This would appear to be an incomplete attempt to bring South African legislation in this regard in line with international norms, in terms of which only persons who became involuntarily unemployed should be entitled to benefits. It remains incomplete as the formulation is much too narrow. There are other instances, apart from mere termination by the employer, where the employee also becomes unemployed involuntarily. The obvious examples that spring to mind are those where the contract is terminated by operation of law, and not by the making of any of the parties - such as where the employer becomes insolvent or is liquidated, or where the contract of employment terminates because the employer has passed away.

(d) It is unfortunate that the envisaged unemployment insurance regime does not pay serious attention to or treat the prevention of unemployment as part of the wider aim of unemployment insurance, for purposes of which any surplus in the Unemployment Insurance Fund could be used. The only indication in the Unemployment Insurance Bill that the Bill is not restricted to curing the effects of unemployment, is in clause 39 which empowers the Unemployment Insurance Board to advise the Minister on unemployment insurance policy, and making recommendations to the Minister on changes to legislation insofar as it impacts on unemployment policy. It is suggested that the advisory function is insufficient, and that urgent attention should be given to include in the purpose provision also the preventing/avoiding/combating of unemployment - illustrative of a move away from a passive labour market policy (i.e. paying of benefits to the unemployed) to active labour market policies (i.e. creating conditions conducive to getting the unemployed into work), and in keeping with an approach to unemployment insurance which is increasingly adopted world-wide.

(e) In disregarding the need to combat or prevent unemployment, the UIB takes a step backwards from the Unemployment Insurance Act which empowered the Minister to

66 UIB cl 8(1)(a).
67 See, for example, art 20(b) of ILO Convention 168, which stipulates that benefits may be refused, withdrawn, suspended or reduced to the extent prescribed when it has been determined by the competent authority that the person concerned has left the employment voluntarily without just cause, or when it has been determined by the competent authority that the person concerned had deliberately contributed to his or her own dismissal.
68 In terms of s 38 of the Insolvency Act 24 of 1936 the contract of employment terminates automatically in the event of insolvency - the same rule is made applicable where a company or closed corporation is wound up.
69 The purpose provision of the UIB (cl 2) contains no provision showing that the legislature has seriously considered, or plans to seriously consider, measures to prevent unemployment.
70 Since prevention of unemployment is not presently included as one of the purposes in clause 2, it is highly unlikely that any surplus in the Fund may be used towards giving effect to funding any programme, scheme or even research into preventative measures - given the provision in the UIB that the surplus may be utilised to give effect to the purposes of the Bill (cl 52(3)).
introduce schemes to combat or prevent unemployment.\textsuperscript{71} The position, therefore, is that no provision is made for linking unemployment prevention to the social security framework.

(f) While double-dipping of benefits appears to be a serious problem in terms of the present unemployment insurance dispensation, the envisaged legislation attempts to curb an unhealthy reliance on more than one source of (State- and non State-provided) benefits in the event that a contributor becomes unemployed.\textsuperscript{72} To the extent that this may be seen not only as a saving mechanism, but also as a measure to force beneficiaries back to the labour market, the attempt remains dubious both in terms of its rationale and its desired impact:

- The soundness of the rationale can be questioned as it is highly unlikely that mere meagre income could serve as a sufficient incentive to secure a position in an already saturated labour market.
- It is also clear that the legislature has not been able to fill all the holes in the murky waters of double-dipping of income-replacement state-provided benefits.\textsuperscript{73}
- Furthermore, it appears to be wrong in principle to exclude a contributor altogether from receiving any UIF benefits if he/she is in receipt of, for example, the meagre old-age or disability pension. It would be more appropriate to stipulate that the state-provided unemployment benefit is reduced to the extent that the contributor is entitled to other income-replacement state-provided benefits as well. This will ensure that taken together, the amounts obtained from the various sources will enable the beneficiary not to be worse off than another beneficiary who does not receive another State-provided or similar benefit.\textsuperscript{74}
- The regulation of double-dipping contained in the UIB loses sight of the fact that some of the other (non State-provided) benefits to which the beneficiary may be entitled may also serve the purpose of assisting the beneficiary to find an alternative position. In this way the double-dipping arrangement could actually work against the encouragement of active labour market policy development and the linking of same with the UIF part of the social security system. The prohibition on double-dipping if the beneficiary is in receipt of any retrenchment, gratuity, severance pay or similar payment\textsuperscript{75} provides a telling example. It does not take account of the nature of, for example, severance pay, and the reason why this is being paid to an employee who

\textsuperscript{71} The UIA also empowered the Minister of Labour to introduce training schemes. Although the matter is now being dealt with under the Skills Development Act 97 of 1998, the regulation in this regard in terms of the latter Act is of a non-compulsory nature and also does not link training schemes initiatives directly to the social security measures.

\textsuperscript{72} UIB cl 6.

\textsuperscript{73} The UIB excludes double-dipping between the Unemployment Insurance Fund (UIF) and the Compensation Fund (which pays out benefits as a result of an occupational injury or disease), as well as between the UIF and State pension or disability grants (cl 6(1)(b)91) and (ii)). However, it has failed to include other state-provided benefits as well - such as benefits from the Road Accidents Fund.

\textsuperscript{74} The same can be said concerning the similar exclusion from qualifying for UIF benefits in the event that benefits are received from any unemployment fund or scheme established by a sectoral collective bargaining institution (i.e. a bargaining or statutory council) - cl 6(b)(iv).

\textsuperscript{75} UIB cl 6(b)(iv).
has lost his/her employment due to external circumstances. From the judgements of our courts it is evident that several purposes are served by the payment of severance benefits, over and above the purpose of ameliorating the period of unemployment that lies ahead - it serves in particular also as a form of gratitude for years of faithful service, to compensate employees who lose their jobs through no fault of their own, and to assist the employee in finding an alternative position.76

- Finally, it has to be stated again that there is little chance that double-dipping can be avoided effectively in the absence of a proper database system, which is linked to other social security benefit schemes. It is suggested that the very limited provision in the UIB which envisages the creation of a database77 is for various reasons wholly insufficient - it does not, amongst others, envisage any link to other social security databases.

(g) One of the most pressing problems of both the present and the envisaged unemployment insurance dispensation relates to its exclusion of vast categories of persons. The result, amongst others, is that, once unemployed, they (and potentially also their dependants) would just be added to the vast number of people who have to fight for economic survival and against abject poverty with little hope to access the labour market - in the absence of income-replacement and other (active labour market incentive) measures which may assist or encourage their return to labour market participation. In this regard the following:

(h) Specific exclusions: One of the curious characteristics of social legislation in South Africa is that it would still often exclude specific categories of persons from the ambit of the definition of "employee" (or a similar term) contained in the relevant laws, even though these persons would otherwise perfectly fit the notion of being employees.

- The most telling example is perhaps domestic employees employed as such in a private household.78 The UIA further specifically excludes employees whose remuneration exceeds a certain monetary ceiling, migrant workers who have to be repatriated at the termination of their services, employees who are remunerated on a purely commission basis, casual employees working less than eight hours per week, seasonal workers, and civil servants.79 In the South African context many of these exclusions, apart from being archaic in nature, have a distinct racial and/or gender flavour: because of the country's history of employment-based racial and gender hierarchy, these groups are most likely to be African and/or women.80
The envisaged new legislation attempts to broaden the scope of coverage of statutory unemployment insurance by including certain categories of employees excluded under the UIA. There will no longer be an income ceiling, with the result that high-income earners will be covered. Migrant workers will also not be excluded. However, it would appear that certain other provisions of the UIB would effectively bar them from drawing benefits. In terms of these a contributor is not entitled to benefits under the UIB for any period that the contributor is outside the Republic.81 The implication is that a migrant worker will be able to claim benefits only while he/she is in SA. Not only is this contrary to the principles of insurance which underlie the UIB, but also may this provision cause jobless migrant workers to remain in the country for the sake of claiming benefits. It is suggested that alternative arrangements could be made in the event that migrant workers may be returning after their period of work and UIF contribution in South Africa.82 Public servants remain excluded,83 and so also domestic workers, although an investigation with a view to their possible inclusion is foreseen. However, it would appear that two previously included categories of employees will in future be excluded. They are learners84 and persons whose remuneration is based on output of work done.85 The exclusion of learners, it might well be that the disparate treatment meted out can be regarded as a form of indirect discrimination.

81 UIB cl 6 (1) a.
82 In keeping with international norms in this regard, retrenchment benefits for these workers could consist of a lump sum for settlement costs and subsidies for job creation in the migrant's home country (see Fultz E & Pieris B The social protection of migrant workers in South Africa (ILO, Harare, 1997) 10). Various ILO Conventions require co-ordination on the part of State parties in order to guarantee migrant workers complete and continuous protection on the basis of effective equality and reciprocity (cf e.g. the Maintenance of Social Security Rights Convention 157 of 1982 and supplementing Recommendation 167 of 1983).
83 Public servants are excluded from the unemployment insurance systems in some countries, and included in the systems of others. In South Africa, apparently, the rationale for exclusion in the UIB is, firstly, that public servants are regarded as having job security and therefore need no protection against unemployment. This is open to serious criticism. Public servants in South Africa no longer have job security (neither legally nor factually) to the extent that their exclusion from unemployment protection can be justified. The unemployment figures released by Statistics SA at the end of March 2000 indicate that the biggest job losses were in the public service and the mining sector. Secondly, the argument is often advanced that public servants are cared for financially by the State as employer and/or the pension fund for government employees in the event of a loss of job, as severance packages and pension pay-outs are allegedly quite advantageous. This, however, is open to challenge. It is submitted that these payments (i.e. severance packages and pension pay-outs) are certainly not more favourable than those given in the private sector.
84 It is submitted that learners belong to a particularly vulnerable group since the economy at present appears to be unable to absorb the young and newly qualified. Learners are therefore in need of protection against unemployment, and should have a right of access to social security in the form of unemployment benefits.
85 While the UIA of 1966 includes in the definition of "contributor" "... somebody whose earnings are calculated .... by work done" (see s 2(1)), such a person will now effectively be excluded if his or her remuneration is based on the quantity or output of work done, unless the amount is part of the employee's minimum compensation in terms of any law, collective agreement or contract or employment (see par (d) of the exclusions for purposes of the definition of "remuneration" contained in cl 1 of the Unemployment
of these particularly vulnerable groups jeopardises their meaningful participation in the labour market and effectively bucks the trend towards extending coverage.

♦ A dependant of a deceased employee can also qualify for a benefit in terms of UIA. However, even though the definition of "dependant" makes provision for women who were participants in an indigenous marriage to be beneficiaries as well, satisfactory recognition of these marriages, extended families and unconventional unions is lacking. It would appear that a spouse married to the deceased employee in terms of customary (indigenous) law would not qualify as a beneficiary if there was also a civil law marriage with another wife subsisting at the time of the employee's death.

♦ Several shortcomings exist with regard to the position of dependants under the envisaged new legislation (UIB). It is, firstly, unclear how extensively the notion of "spouse" should be interpreted. Secondly, the right of a child to claim is unsatisfactorily regulated as the child can only claim if the spouse has not done so.

(i) The predicament of the atypically employed: The pattern that can be discerned from both the present UIA and the envisaged legislation is evident: namely to restrict unemployment protection only to those who qualify as "employees". In this regard the unemployment insurance legislation appears to be much less progressive in terms of coverage than other recent labour legislation. Furthermore, case law in this country makes it clear that major categories, such as independent contractors, are excluded from the employee concept. From this it follows that the self-employed, the informally employed, dependant

---

Insurance Contributions Bill (UICB)). It is submitted that in modern day terms the quantity or output of work done is increasingly contractually made to constitute the sole basis for remuneration, while no minimum compensation is provided for. Despite the administrative difficulties which might accompany the collection of contributions under these circumstances, it is suggested that the exclusion of this previously included category may tend to weaken the Fund's ability to accommodate developing trends in work and employment, especially in South Africa, and may contribute to encourage "abuse" in this regard (e.g. where employers agree with employees to be paid purely on an output or quantity basis, in order not to be burdened with UIF responsibilities). This is a particularly serious issue as minimum compensation is relatively seldom prescribed by law, in particular in non-organised contexts.

86 UIA s 38.
87 UIA s 38(7)(a).
88 Cl 22.
89 As there is no definition of the notion.
90 E.g. s 1 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA) respectively, and s 213 of the Labour Relations Act (LRA) 66 of 1995, which defines the term in such a way as to include a person who assists an employer in the conducting or carrying on of a business. It can hardly be said that the definition contained in the present and envisaged unemployment insurance legislation, in contrast with the definition used in the other recent labour laws, goes further than what is at common law understood under the term "employee".
91 See, for example, s 1 of the BCEA and the EEA respectively; Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A); Niselow v Liberty Life Association of Africa Ltd 1998 ILJ 752 (SCA); Liberty Life Association of Africa Ltd v Niselow 1996 ILJ 673 (LAC); SABC v McKenzie 1999 ILJ 585 (LAC);
and independent contractors, and several other categories of the atypically employed, will still for all legal and practical purposes be excluded from UIF coverage.

(j) **The exclusions: conclusions and suggestions:** In essence then, the effect of relying on the "employee" notion in order to signify coverage, is that large categories of those who do non-standard work, in particular independent contractors, so-called dependent contractors, the self-employed, and the informally employed, as well as the long-term unemployed, are excluded from protection. The specific exclusions, in addition, of vast categories of persons confirm this conclusion. Given the strict categorical approach of South African social assistance, whereby no provision is made for an unemployment assistance scheme, the position thus is that these persons, as a rule, do effectively not enjoy unemployment protection. It is submitted that very few of them are in a position to make their own private provision in this regard. Extending coverage to them, either by allowing for voluntary contributions to the Fund, or by setting up a separate system, would be in keeping with recommendations made by the 1996 ILO country review and the SA Labour Market Commission, and with the findings of an important recent ILO study on the position of the atypically employed. In certain European countries separate social protection and/or unemployment insurance schemes have been developed for the self-employed. These schemes usually operate on the basis that the self-employed make voluntary contributions, which are sometimes (as is the case with Denmark) subsidised by the State. Although subsidising the self-employed may not be an option for South Africa, it is submitted that serious consideration be given to the introduction of a voluntary scheme for the self-employed.

---

MASA v Minister of Health 1997 ILJ 528 (LC); Oosthuizen v Minning & Engineering Supplies CC 1999 ILJ 910 (LC).

92 In terms of which protection in the form of social assistance is restricted to certain categories (in particular old age, disability and child care grants), and is made subject to an income and assets test: cf the pertinent provisions of the Social Assistance Act 59 of 1992, and the attendant regulations.

93 See generally Olivier M "Extending labour law and social security protection: the predicament of the atypically employed" 1998 ILJ 669-685 and Olivier M "Critical issues in South African social security: the need for creating a social security paradigm for the excluded and the marginalised" 1999 ILJ 2199-2212.


97 Wider coverage than the current position is also in accordance with the constitutional right of access to social security which is a right accorded to "everyone" (s 27(1)(c) of the Constitution). Of course, extended coverage must be effected according to measures which are reasonable (bearing in mind, one would think, the administrative capabilities of the Fund); the availability of financial resources appears to be a less important consideration, given the insurance nature of UIF coverage in this country (see s 27(2) of the Constitution). It is suggested that by allowing for voluntary contributions to the Fund, or the setting up of a separate system, the Constitutional provision will be complied with because everyone so excluded will have access.
To conclude: the envisaged unemployment legislation introduces a number of **innovative principles** in an attempt to streamline the public unemployment insurance system. There are many of these innovative approaches which must despite incomplete regulation be welcomed in principle - such as the (re-)introduction of some solidarity between higher and lower-income earners, and the avoidance of double-dipping, in particular as far as state-provided income-replacement benefits are concerned. And yet, there is much in the envisaged legislation that causes **serious concern** from a labour market policy perspective. One of these concerns relates to lack of properly addressing the **aims of prevention, avoiding and combating unemployment** as hallmarks of a modern and progressive unemployment insurance system, showing little sensitivity to active labour market policy approaches and the re-integration of the unemployed. Another relates to **unjustifiable coverage exclusions** from public regulation, notably public servants, learners, (still also) domestic servants, persons whose remuneration is based on output of work done, and the atypically employed.

Finally, there is one other matter of principle which should be raised. The wisdom of including illness, maternity, adoption and dependants' benefits alongside unemployment benefits is questioned. The **unnecessarily wide ambit of benefit categories** covered by the envisaged legislation (as is the case with the present UIA) may lead to (i) employees exhausting their benefits for reasons other than "pure" unemployment and not being able to claim when unemployment in the strict sense eventually strikes; (ii) a loss of proper focus as far as the Fund should be concerned, namely to provide for benefits in the event of more or less unavoidable unemployment, combating unemployment, and promoting integrative labour market policies aimed at preventing unemployment and creating incentives for integration and/or re-integration in the labour market. It is strongly **suggested** that the operation of the Fund be **restricted to "pure" unemployment issues**, and that one or more separate systems cater for most of the other contingencies (e.g. a separate family benefit system, dealing with, amongst others, maternity and adoption benefits).

### 6. EMPLOYMENT- AND TRAFFIC-RELATED INJURIES

In South Africa there is no general system providing for coverage against injuries. The Compensation for Occupational Injuries and Diseases Act (COIDA) regulates the payment of compensation in the event of an employment-related injury or sickness, while the Road Accident Fund (RAF) Act deals with the payment of compensation for loss or damage wrongfully caused by the driving of a motor vehicle. In terms of COIDA compensation is

---

98 Whereas the UIA of 1966 grants benefits at a fixed rate of 45% of previous earnings (s 34(2)(a)), the UIB provides for a **graduated scale of benefits** ranging from 29.5% to 58.6% of previous earnings: UIB Schedule 1. The scale seems to be undetermined. Cl 4 of the UIB provides that the benefits "may vary between 60% for low-income contributors to some other lower rate as will be determined by the thresholds as set out in terms of Schedule one".

99 Act 130 of 1993. See also the Occupational Diseases in Mines and Works Act 78 of 1977 which deals in particular with sickness in the mining work context.

100 Act 56 of 1996.

101 RAF Act s 3.
paid out on a no-fault basis\(^{102}\) to employees or their dependants in respect of injuries suffered in accidents that arose out of and in the course of employment, or where the employee had contracted an occupational disease. Compensation is paid out of the Compensation Fund, which is largely financed by employer contributions based on the remuneration paid to employees and the class of industry in which the employer operates.

Compensation for traffic accidents is paid out in respect of a third party's claim which arises from the negligent driving of a motor vehicle.\(^{103}\) It is paid out of the Road Accident Fund, which is financed by a compulsory fuel levy. The injury or death of the third party must be fault-based, in the sense that it must be due to the negligence or other wrongful act of the driver.\(^{104}\)

South Africa has a relatively poor safety record in the workplace and on roads. One would, therefore, expect that that part of the social security system which regulates injury-related coverage would be strong on preventative measures. As far as workplace injuries are concerned, one would, therefore, have to evaluate the appropriateness of such measures contained in COIDA and in the general legislation regulating safety in the workplace. COIDA contains several monetary incentives which have the combined effect of encouraging employers to maintain high safety standards. An individual employer's assessment rate may be varied by the Compensation Commissioner if the business is designed to prevent or avoid accidents. This the Commissioner may do if it is believed that the cost of accidents is likely to be less than that of similar businesses. In this way the adoption of an active approach to the prevention of accidents is rewarded. Similarly, the Commissioner may also penalise employers with poor safety records over a period of time. Furthermore, the Commissioner may give a rebate on assessments to any employer whose accident record is more favourable than that of employers in a similar business.\(^{105}\) However, it has been argued that the possibility of a rebate leads to the under-reporting of claims. Measures such as an at random investigation of the reporting histories of particular employers may be needed to ensure that the rebate system is not abused.

The general legislative framework for the regulation of safety in the workplace is primarily contained in the Occupational Health and Safety Act (OHSA)\(^{106}\) and the Health and Safety in Mines Act.\(^{107}\) The OHSA stipulates what the duties of employers in particular as well as of employees are and visits non-compliance with criminal sanctions.\(^{108}\) The two laws have in common that their main focus is to prevent accidents at work, and that maintenance of health

---

\(^{102}\) However, s 56 (read with s 37(1)) of COIDA provides for the payment of increased compensation in the event of negligence on the part of the employer or in the event of a patent defect in plant, material or equipment.

\(^{103}\) RAF Act s 17.


\(^{105}\) S 85(1).

\(^{106}\) Act 85 of 1993.

\(^{107}\) Act 29 of 1996.

\(^{108}\) S 38(1).
and safety standards is a joint responsibility of employers and employees. In accordance with some of the international standards in this regard,\textsuperscript{109} South African law requires that employee representatives be co-opted. For example, the OHSA provides for the appointment of health and safety representatives through a process of consultation in good faith,\textsuperscript{110} and the establishment of one or more health and safety committees for each workplace. These committees have to be actively involved in monitoring health and safety in the workplace.\textsuperscript{111}

While these general laws on prevention are fairly elaborate as far as their areas of coverage are concerned,\textsuperscript{112} their effectiveness as true preventative mechanisms is qualified by various considerations. Firstly, the sanctions are criminal in nature, leaving the employee with little remedy other than a limited claim to compensation against the Compensation Fund, as employees do no longer have the possibility of suing negligent employers.\textsuperscript{113} Secondly, these preventative measures are alone-standing, with little attempt to link them directly to the social security system and the dispensation foreseen in the accident compensation legislation (COIDA). Thirdly, some of the crucial definitions used in the legislation tend to be unnecessarily narrow, potentially limiting the sphere of responsibility which an employer may have. This is in particular true of the definitions of "health"\textsuperscript{114} and "safety".\textsuperscript{115} The introduction of internationally accepted nomenclature may assist in solving these problems.\textsuperscript{116}

Despite these forms of criticism, it would, therefore, appear that some provision is made in South Africa for preventing employment-related accidents and diseases. To the extent that the prevention is provided for and is enforced effectively, the need for reintegration and compensatory measures is reduced. However, it has also been indicated that some changes to the legal system regulating injury prevention may be necessary. As far as the prevention of

\begin{itemize}
\item \textsuperscript{109} See in particular ILO Conventions 155 of 1981 (Occupational Safety and Health and the Working Environment; 174 of 1996 (Prevention of Major Industrial Accidents) and 176 of 1996 (Occupational Safety and Health in Mines).
\item \textsuperscript{110} S 17: if the employer has more than 20 employees in its employment at any workplace. S 84 of the LRA makes provision for the involvement of workplace forums in this regard.
\item \textsuperscript{111} During its regular meetings with the committee the employer must consult with a view to initiating, developing, promoting, maintaining and reviewing measures to ensure health and safety at the workplace: s 19.
\item \textsuperscript{112} It is clear that the legislation attempts to cast the net of coverage as wide as possible - this flows from the wide categories of persons who qualify as "employer" for purposes of the Act, as well as from the wide ambit of the notions of "employee" and "user of machinery" in the OHSA (see s 1) - limited exclusions are provided for.
\item \textsuperscript{113} S 35 of COIDA takes away the common-law liability of employers, replacing it with the entitlement to claim from the Compensation Fund. The constitutionality of s 35 has recently been upheld by the Constitutional Court - cf Jooste v Score Supermarket Trading (Pty) Ltd 1998 BCLR 1106 (CC).
\item \textsuperscript{114} Not only does the definition of "health" in the two Acts differ, but the OHSA has a particularly narrow definition, in that "healthy" is meant to be "free from illness or injury attributable to occupational causes".\textsuperscript{114}
\item \textsuperscript{115} The OHSA defines "safe" as being "free from hazard".
\item \textsuperscript{116} The World Health Organisation defines "health" as "a state of complete physical, mental and social well-being, and not simply the absence of illness or disease". It is suggested that this definition is more in keeping with a broad social security approach, as it is clearly concerned with the total well-being of a person in a workplace.
\end{itemize}
traffic-related injuries is concerned, it is evident that neither the RAF Act nor any other legislation addresses this in any meaningful way. There are, therefore, also no significant linkages between traffic accident prevention, labour market policies and social security mechanisms in the event of traffic-related injuries.

It should be added, for the sake of completeness, that there are also other important laws which fulfil a limited preventative function with regard to health and safety, and work-related injuries and diseases. For example, the Basic Conditions of Employment Act (BCEA)\textsuperscript{117} contains protective provisions in relation to working hours\textsuperscript{118} and leave\textsuperscript{119} and stipulates that collective agreements may not reduce (the core of) this protection.\textsuperscript{120} Stringent conditions are imposed on employers requiring the performance of night work,\textsuperscript{121} in particular when the employee suffers from a health condition associated with the performance of night work.\textsuperscript{122} Pregnant and breast-feeding women enjoy special protection with regard to hazardous work\textsuperscript{123} and night work. Children between the ages of 15 and 18 are also protected in a special way.\textsuperscript{124} In addition, the Labour Relations Act (LRA)\textsuperscript{125} contains provisions aimed at safeguarding employees against unfair dismissal in the event of incapacity.\textsuperscript{126} Finally, the Employment Equity Act (EEA)\textsuperscript{127} protects disabled people against any form of workplace discrimination\textsuperscript{128} and provides for the introduction and implementation of affirmative action programmes designed to benefit the disabled as well.\textsuperscript{129} These programmes in particular, if successfully implemented, will go some way towards ensuring formal reintegration of the disabled into the labour market.

Neither COIDA nor the RAF Act is strong on reintegration measures. One would have thought that re-entry into working life should be the ultimate aim of an occupational injuries and diseases scheme. In many other systems rehabilitation programmes are usually obligatory, and a beneficiary who refuses to participate normally suffers a reduction or complete loss of benefit. However, in contrast with the position elsewhere, there is no provision in COIDA which

\textsuperscript{117} Act 75 of 1997.
\textsuperscript{118} Ch 2.
\textsuperscript{119} Ch 3.
\textsuperscript{120} S 49.
\textsuperscript{121} S 12. Employee consent is required, and the employee must be informed of any health and safety hazards that are associated with the work the employee is required to perform.
\textsuperscript{122} It is expected of the employer, when it is practicable to do so, to transfer the employee to suitable day work: s 17.
\textsuperscript{123} No employer may require or permit a pregnant employee or an employee who is breast-feeding, to perform work that is hazardous to her health or the health of the child: s 26.
\textsuperscript{124} They may not be employed in work that is inappropriate for a person of that age, and may not do work which places at risk the child's well-being, or physical or mental health: s 43.
\textsuperscript{125} Act 66 of 1995.
\textsuperscript{126} Schedule 8 of the Act. The dismissal must be both substantively and procedurally fair, which may imply that adapting or changing the employee's employment must be considered by the employer.
\textsuperscript{127} Act 55 of 1998.
\textsuperscript{128} S 6.
\textsuperscript{129} The Act stipulates that the disabled constitute one of the designated groups for purposes of affirmative action measures, which include provision for reasonable accommodation and the setting of numerical goals to rectify historical imbalances.
specifically attempts to enforce reintegration measures - such as compulsory rehabilitation or vocational training programmes.\textsuperscript{130} Also, when regard is had to the benefits payable to an injury or diseased employee, it is clear that the main aim is to \textit{compensate} an employee for loss of occupational faculties, and for medical expenses.\textsuperscript{131} This also flows from the fact that benefits are calculated on the basis of the previous income of the injured/diseased employee. Provision is further made for the payment of benefits to dependants and for funeral benefits.\textsuperscript{132} A special allowance may be paid towards defraying the costs of a disabled employee who requires constant help to perform essential actions of life.\textsuperscript{133} This should be seen as a measure to support the disabled employee in functioning physically, rather than in the first place as some attempt to ensure his/her integration in society. One should, however, add that the special measures aimed at protecting benefits\textsuperscript{134} may go some way towards the economic survival of the employee during the period that the employee may \textit{voluntarily} take measures to ensure his/her continued participation in the labour market. Finally, dismissal protection is also available to disabled employees, although no absolute guarantee is granted.\textsuperscript{135} This provides some basis for continued labour market participation.

The philosophy underlying the \textbf{RAF Act} is similarly not aimed at reintegrating the victim of a traffic accident socially or occupationally, but at compensating same on a delictual basis for loss or damage suffered. This is based on calculating the sum of money that is required to place the victim in the same position he/she would have been in had it not been for the accident.\textsuperscript{136} In order to make the system more affordable, government has proposed that a system of defined benefits be introduced, whereby a victim will not be compensated for his/her common-law damages, but will be paid a defined benefit.\textsuperscript{137} However, fault is still a requirement. Reintegration efforts would still not appear to be high on the agenda of the policy-makers.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{130} COIDA requires that the employer must pay the compensation due to the injured employee for the first three months of temporary total disablement (s 47(3)). This could perhaps be seen as a measure which will ensure to some extent the continuation of the employee's link with his/her employment. However, this remains essentially a temporary measure, which is not backed by other (re)integration measures.
\item \textsuperscript{131} The formula for calculating the compensation is contained in Schedule 4 of the Act (Schedule 3 in the event of occupational diseases). A distinction is made between temporary and permanent disability.
\item \textsuperscript{132} S 54.
\item \textsuperscript{133} S 28.
\item \textsuperscript{134} According to COIDA the benefits are not subject to tax, may not be set off against any debt, be ceded or pledged, do not form part of the employee's estate, etc: see ss 32, 24, 37 and 64(1).
\item \textsuperscript{135} S 187(1)(f) of the LRA prohibits dismissals where discrimination (such as the mere fact that the employee has become disabled) is the reason for the dismissal. However, Schedule 8 of the same Act regulates the dismissal of employees for reasons of incapacity, after attempts have been made to accommodate the employee in an alternative position (in particular where the disablement is a result of a work-related injury).
\item \textsuperscript{136} Myburgh P, Smit N & Van der Nest D "Employment injuries, diseases and motor vehicle accidents" in Olivier M \textit{et al} \textit{Social security law: General principles} (Butterworths, Durban, 1999) 360. Patrimonial and non-patrimonial loss can be compensated. This includes medical expenses.
\item \textsuperscript{137} White Paper on the Road Accident Fund: Government Notice 170 in Government Gazette 18658 of 4 February 1998.
\item \textsuperscript{138} Impending changes are now the subject of a judicial commission of enquiry.
\end{itemize}
Finally, mention should briefly be made of other aspects related to COIDA and the RAF system which impact on the labour market - social protection debate:

- As is the case with the unemployment insurance dispensation, large numbers of persons are excluded from the operation of COIDA. They include domestic servants, the unemployed and those involved in non-standard forms of work - such as the informally employed, the self-employed, and so-called dependant contractors. The remarks made above in relation to the exclusion of these categories form the unemployment insurance regime are equally applicable here. It is suggested that the possibility of voluntary registration in terms of COIDA should be considered, if compulsory coverage is not found to be feasible.

- As far as dependants are concerned, the exclusion of same sex partners could also be challenged.

- As is the case with unemployment insurance, civil marriage spouses enjoy preference over customary law wives, while no recognition is given to religious marriages. It is submitted that this is constitutionally not tenable, also in view of a finding made in the RAF Act context that the right of a widow to support if married in terms of Islamic law is worthy of public recognition and protection by the law.

- Although all employees are now, subject to the specific exclusions, eligible to participate in the payment of benefits, a maximum limit (per annum) is set by the minister in respect of the calculation of disablement benefits. Although this would severely restrict the right to the compensation claimable by injured employees who fall in the higher income brackets, it still does not do much to alleviate the position of the rank and file worker in South Africa in terms of actual benefits being paid out. Plans are apparently underway to increase the payment of 75% of the monthly earnings in the event of temporary total disablement in order to assist in particular the poor and needy workers.

- The White Paper for Social Welfare notes that the limited scope and poor application of the Act resulted in the systematic transfer of costs from industry to the State (e.g in terms of welfare services; old-age and disability grants). "The compensation system broke down completely in rural areas; rural families and communities bore the burden of diseases and disabilities incurred in the urban workplace which should have been compensated for by employers". The long-term effect both on the social assistance system and the labour market is evident.

- In South Africa provision is only made for an employment-related and a traffic-related social insurance system. Persons who are injured outside the employment sphere and the traffic context therefore enjoy no social insurance protection. Social

---

139 See par 5.
140 See the discussion in par 5 above.
141 Hafiza Ismail Amod (born Peer) & Commission for Gender Equality v Multilateral Motor Vehicle Accidents Fund (Case no 444/98 of 29 September 1999) (Constitutional Court).
143 P 49.
assistance, in the form of a disability grant, is only available to the indigent disabled. However, the amount of the grant is meagre.\textsuperscript{144} Labour market (re)integration is not a priority, as little general provision exists in this regard. Similarly, prevention in these cases does not seem to receive any particular attention from policy-makers.

- Finally, a lack of linkage with other social insurance\textsuperscript{145} and social assistance schemes\textsuperscript{146} leads to duplication of payments (double-dipping), thereby seriously eroding the financial soundness of the respective public insurance funds and the source from which social grants are paid. It does, of course, also serve as a disincentive to access or return to the labour market.

In conclusion it would appear that serious shortcomings exist in the South African system of employment- and traffic-related injuries with regard to prevention and integration. There is much to be learnt from the approach which has to a large extent found favour internationally, in terms of which the functions of financial compensation, rehabilitation, and prevention form an organic and integrated whole in the area of accident insurance.\textsuperscript{147} Although some provision is made for preventative measures, these are often inadequate. It is, however, especially in the area of reintegration measures that the system is extremely deficient. One would have to suggest that policy-makers should as a matter of priority consider the introduction of measures which would give effect to the principle of labour market integration. Rehabilitation, vocational training and, where appropriate, linking entitlement to benefits payment to participation in such programmes, should serve as minimal mechanisms to attain this goal. The structure of the Skills Development Act\textsuperscript{148} could be employed to make this possible, although some compulsion would have to be introduced, given the largely principled and voluntary nature of this legislation.

7. SOCIAL ASSISTANCE GRANTS

Both the Social Assistance Act\textsuperscript{149} and its concomitant regulations\textsuperscript{150} make provision for the payment of social assistance grant to people who are otherwise unable to care for themselves. These grants are usually subject to a \textit{means test} and are allocated on a strictly \textit{categorical} basis - children, old people and the disabled who do not have sufficient means are particularly meant to benefit from these grants. It is in particular the position of the indigent aged and disabled which concerns us here. Certain general qualifying conditions apply, namely that the recipient must: (a) be resident in South Africa; (b) be a South African citizen; (c) provide proof

\footnotesize
\textsuperscript{144} R540 per month.
\textsuperscript{145} Notably the UIF and the RAF systems. Statutory provisions prohibiting such practices only provide a partial solution; the question remains whether effective enforcement is administratively and otherwise possible, given the absence of a linked database system.
\textsuperscript{146} This is largely due to the absence of a database system which links the state social assistance system with the public insurance funds.
\textsuperscript{148} Act 97 of 1998.
\textsuperscript{150} Government Notice 417 in Government Gazette 18771 of 31 March 1998.
of his/her inability to support and maintain him-/herself (i.e. comply with the means test); (d) not be in receipt of another social grant in respect of him-/herself; and (e) not be maintained or cared for in a state institution. In the event of the old age grant, the applicant must be 65 years of age if a male, or 60 years if a female. A disabled person must be at least 18 years of age and must be unable, as a result of his or her disability, to obtain employment or must not have any other resources (on the basis of satisfying the means test) to support him-/herself sufficiently. The disabled person must also not refuse to undergo the necessary medical treatment. According to the definition of a disabled person such a person must have a physical or mental disability of longer than 6 months' duration, which makes him/her unfit to provide sufficiently for his/her own maintenance.

There are several issues from a labour market policy perspective which are of importance. Firstly, the means test. The maximum amount of R540 payable as an old age or disability grant is subject to compliance with a means test. Both assets and income are taken into account. While the cut-off point as far as assets are concerned is relatively high, the full amount of the grant is only payable if the beneficiary earns R1944 or less per year. If this amount is exceeded, the value of the grant is reduced on a sliding scale basis. It is submitted that the bottom of the scale (i.e. R1944 per year or R162 per month) is exceptionally low. Furthermore, it penalises old or disabled people who take up temporary work, as a low income from such work will already reduce the value of the grant. It also serves as a disincentive for work as people forfeit their State medical benefits if they earn small amounts of money.

Secondly, the disability grant would appear to be improperly targeted, as it might have been better to distinguish between long-term disability grants needed by permanently, severely disabled people in a poverty situation, and short-term disability grants which are available to persons who are receiving treatment and during that time are unable to work.

Thirdly, the emphasis on residency and, in particular, citizenship. Apart from constitutional considerations, there are also principled objections to be raised against a blanket exclusion of indigent foreigners. It would make much more labour market sense to grant some basic grant to those who are so excluded, and to simultaneously encourage active labour participation.

151 S 3 and Reg 2.
152 A so-called care dependency grant is available if the child is between one and 18 years of age.
153 S 1 of the Act.
154 R194 400 for a single person (30 times the maximum grant) and R388 800 for a married person (60 times the maximum grant): see Reg 12.
155 If the beneficiary is a single person, 50c is deducted for every Rand more than the grant; in the event of a married person the deduction is 25c for every Rand exceeding R1944 per year. The cut-off point for the minimum value of the grant, i.e. R100, is R12504 per annum (single person) and R23064 per annum (married person).
156 See the White Paper for Social Welfare ch 7; Truter L "People with disabilities" in Olivier M et al Social security law: general principles (Butterworths, Durban, 1999) 204.
157 This is recommended by the so-called CASE Report on disability (at 33), which has been published to recommend ways to attain the objectives set out in the White Paper on an Integrated National Disability Strategy (of November 1997): see Truter 206.
Fourthly, the definition of disability. It is essentially a medical model of disability that informs the definition. However, it does not cater for people who are socially disabled and therefore excluded. It is suggested that a broader definition be adopted which would cover the socially disabled as well. However, it has to be stressed that merely supporting them by means of a grant is insufficient. From a policy and principled perspective social and labour market integration has to be strengthened, even by active means, to ensure their meaningful participation in society and the labour market.

From this then follows the final issue, namely the absence of actual measures aimed at integrating recipients of these grants socially and in the labour market sense of the word. It is no small wonder that the perception exists that these grants are, for this reason, viewed by some as mere hand-outs. A sensitive programme which on a comprehensive scale and on a principled basis places emphasis on training and rehabilitation to integrate in particular the disabled has yet to be developed and implemented.

8. CONCLUDING REMARKS

From the discussion above, and by looking at three of the most crucial areas of social security regulation in South Africa, it is clear that the social security system is in many respects deficient as far as preventative and integrative measures are concerned. The emphasis is overwhelmingly on compensating victims and providing monetary support to certain categories of the indigent (unemployed). The rigid nature of the system, as well as its inability to build in flexibility measures in order to encourage (if not enforce) labour market participation, must be seen as counter-productive and, in the long run, costly. It is, therefore, evident that the system is, as far as these considerations are concerned, in need of fundamental overhaul. No quick-fix and/or single solution is available, as resources constraints, the sheer magnitude of the problem (in particular with regard to the large number of people affected), and the difficulty of transforming a system in these areas, would necessitate changes over a period of time. To this one could add that mere regulatory changes are insufficient; the very conditions for introducing innovative measures (such as up-and-running vocational training schemes and effective monitoring) must be created if they are not already present.

Suggested solutions would have to take into account the peculiar nature of the social security system and labour market profile. Considerations such as the nature, level and extent of exclusion and marginalisation, the low skills base of and narrow definition of jobs held by workers in and outside formal employment, and the ingrained inflexibility of the South African labour market, are some of the considerations which would have to be factored in when innovative alternatives are developed and implemented. And, of course, the solutions would to a large extent have to be specifically targeted at the particular groups affected differently by the present deficiencies in the system.

158 As advocated by both the White Paper on an Integrated National Disability Strategy (at 14) and the CASE Report (at vi, 16ff); see Truter 205-206.
Therefore, in order to develop some of the alternatives, it might be helpful to revert to the different levels at which the interaction in South Africa between social security and the labour market operates with regard to the various categories of persons affected thereby.\(^\text{159}\)

**Firstly**, those who have traditionally been **marginalised or excluded** from the labour market, in particular from formal employment. As mentioned above, they would in particular consist of the long-term unemployed and the informally employed, and would tend to be the poor and ultra poor members of society. In the absence of real safety net provision in South Africa they do not as a rule enjoy the protection of social security mechanisms; nor do they have the necessary means to survive meaningfully and/or the skills to access the labour market successfully.

Given the almost universal exclusion of these people, and the extreme inequality brought about as a result of same, it would appear appropriate to suggest the introduction of some kind of **basic grant** available to them on a basis other than the present narrow categorical approach. This would provide some assistance towards basic survival. However, one would have to bear in mind the limited resources that are available. Simultaneously, however, efficient labour market incentives and mechanisms aimed at meaningful participation need to be created.

Whether an envisaged basic grant has to be means tested would have to be decided after careful considerations of the options available. The **means test** as it is presently regulated and applied is insufficient and at times inappropriate - since it supports a poverty trap syndrome, is sometimes extremely difficult to comply with and to enforce, is often improperly targeted, and is inconsistently regulated and applied. A review thereof, which may imply the introduction of additional and/or alternative measures and criteria, has to be undertaken. It might be that a targeted grant (not necessarily on a means test basis) might seem to be apposite.\(^\text{160}\)

**Is labour market policy work** (also referred to as **public works programmes** in the South African context) a viable mechanism to ensure (re)integration into the labour market? In both the Reconstruction and Development Programme (RDP) and the subsequent Macro-Economic Strategy Programme (GEAR) adopted by the first democratic government of South Africa, the launching of special labour-intensive projects, financed by government, with a view to combat unemployment, is foreseen. In fact, in terms of the latter it is envisaged that roughly a quarter of the 800 000 new jobs to be created by the year 2000 could be accommodated in these kinds of programmes.\(^\text{161}\)

\(^{159}\) See par 4 above.

\(^{160}\) See in this regard the instructive contribution by Mackay R *Targeting in social security: the New Zealand experience* (Social Policy Agency, Department of Social Welfare, New Zealand) 1998.

\(^{161}\) Public works programmes are not unknown to South Africa. Apart from using such programmes to alleviate the “poor white” problem in the 1920’s, and to provide jobs for indigent African workers in the post-war period, similar broad-based programmes also operated between 1983 and 1992, amongst others the Special Employment Creation Programmes (SECP).
In 1994 the new government adopted a multi-pronged labour-intensive National Public Works Programme. As a result an RDP presidential lead project, the Community Based Public Works Programme (CBPWP), was set up in 1994. Standing explains: "An important feature of the CBPWP is that funds were to be channelled through the provincial authorities, with poorer provinces receiving the bulk of the funds. The allocation was to be based on a complex formula or index of relative need, based on provincial unemployment, poverty, schooling level, infrastructure and economic activity."

By early 1996 only 20% of the initial 250 million rands had been allocated to provincial governments and other institutions. It would appear that capacity constraints in delivering prompt and effective output posed a formidable obstacle in the poorer contexts where the programmes had to be implemented. Concerns have also been expressed that workers involved in public works programmes may be exploited and not benefit from minimum labour standards. For example, it is the intention that under the National Public Works Programme nobody should have a contract lasting for more than eleven months, and that participants in the programmes should not gain entitlement to unemployment benefits or to pensions. It would appear that despite trade union criticism no workable strategy to combat this is in place yet.

The comparative evaluation of similar programmes overseas (sometimes referred to as workfare programmes) appears to be inconclusive. It has been remarked that mandatory unpaid work experience does not contribute to consistent employment and that active job-search assistance appears to be the most important component of welfare-to-work programmes in terms of producing a modest increase in the incomes of participants and some movement off the welfare rolls. Higgins argues that "... workfare is not an effective way of reducing unemployment, even long-term unemployment. Problems of displacement, of shuffling people between workfare and low-paid work, and the manifest failure of unpaid work experience to improve employment options for participants in overseas programmes, all suggest that the community wage is effective as a genuine employment assistance mechanism. If the policy objectives are to assist job-seekers to find work that offers some hope of permanency with reasonable earnings, then the state's resources for employment assistance should be turned elsewhere, towards effective job-search assistance, training for actual jobs, and a genuine concern for the level and distribution of employment opportunities."

Although in my view these remarks do not rule out the sensitive but effective introduction of schemes that could provide employment opportunities to the excluded, the real and potential

---

162 This is aimed at (i) involving as much labour as is technically and economically feasible; (ii) producing good-quality, cost-effective and durable infrastructure; (iii) providing effective training; and (iv) strengthening the capacity of local communities to participate in development: see Standing G et al Restructuring the labour market: The South African challenge (An ILO Country Review) (ILO, Geneva, 1996) 470-472.

163 Standing et al 476-479.

164 Higgins J "From welfare to workfare" in Boston J et al Redesigning the welfare state in New Zealand: problems, policies, prospects (OUP, 1999) 270.

165 Higgins 275.
pitfalls of embarking on such a route, also against the background of the particular South African experience to date, have to be considered seriously. The emphasis should be on finding long-term solutions, not on creating work opportunities for a period of time. In this way prevention acquires its rightful place as part of the interaction between social security and labour market interaction, as opposed to integration strategies with only short-term effect. It is also important that the local nature of such work, and the fact that often the work can only be done on a part-time basis,166 would have to be accommodated particularly. And, of course, involving people in these opportunities implies that the necessary skills training be made available.

As far as the informal sector is concerned, it has to be noted that there is a growing interest internationally in ways and means of social security protection of this marginalised category of people. Existing traditional and informal (mostly community-based) forms and mechanisms of social security coverage on the basis of risk and/or need are increasingly being investigated. Supportive measures, e.g. by way of micro-lending and communal projects and savings, are both documented and developed and implemented on a pilot study basis by institutions such as the ILO.167 This phenomenon is not foreign to South Africa, but little conceptual thinking and strategising as to how it can be linked to meaningful social security coverage has been developed. Due to the fact that more people are increasingly involved in this sector in South Africa, who simultaneously remain outside the protective net of social security, it is clear that special mechanisms would have to be created in order to extend basic coverage to them. It is doubtful whether voluntary membership of existing social insurance funds, or the creation of a fully-featured separate social insurance system along traditional lines would for them be an appropriate solution in the South African context.

One would think that the particular racial, gender and geographical context of exclusion and marginalisation would require that employment creation, vocational training and job assistance

---

166 In order to avoid displacement.
167 See Van Ginneken W Promoting productivity and social protection in the urban informal sector; Social security for the informal sector: issues, options and tasks ahead (ILO, Geneva, 1996); Van Ginneken W (ed) Social security for the excluded majority (Case studies of developing countries) (ILO, Geneva, 1999); Lund F & Srinivas S Learning from experience: A gendered approach to social protection for workers in the informal economy (ILO, Geneva, 2000). In some of these cases social structures and customary practices seem to be playing a crucial role in the creation of innovative strategies and alternative forms of coverage and protection. Conceptually and legally speaking the debate is turning on issues such as whether the concepts of "partner", "dependant", "contributor" and "beneficiary" in social security terms are sufficiently wide to comprise members of extended family units amongst the poor who indirectly contribute to (or are dependant on) the income-earning capacity of the family, as well as whether it is feasible to extend the concept of insurance beyond that of "social" or "public" insurance in order to accommodate traditional forms of protection, assistance and coverage (see generally the (German) Federal Ministry for Economic Cooperation and Development Supporting social security systems in developing countries (1998) 5-7; Jütting (University of Bonn Center for Development Research) Strengthening social security systems in rural areas of developing countries (1999) 20-23, 25-35; Van der Waal & Jain "Managing credit for the rural poor" 1996 World Development 79-89).
programmes should be specifically targeted at Blacks, females, and those in rural areas. Creating **special targeted programmes** is indeed in line with developments internationally. ¹⁶⁸

**Secondly,** those who are active in the (formal sector of the) labour market, but who have traditionally been specifically **and/or definitionally excluded** from the social security framework, in particular from social insurance mechanisms. Domestic workers are specifically affected. As mentioned, the nature of their employment is often precarious, their formal skills basis restricted and their wages low. Their exclusion from the social security system places them at jeopardy, reinforcing not only their precarious labour market position, but also threatening their very survival and that of their dependants. Another category would be those in formal employment who do not belong to an occupational retirement scheme - in the absence both of a national scheme and a compulsion to belong to such a scheme. A third category would relate to those non-standard workers who do not fit the traditional "employee" concept employed in the various social security laws.

It is suggested, as a primary measure, that the **narrow definitional context** of, in particular, the social insurance (as well as the retirement) context be relinquished in favour of a broader (but tangible) concept. This will serve the purpose of making the system more accessible and penetrable, of extending coverage to many of those presently excluded, and of establishing the necessary link between participation in formal, non-formal and non-standard employment and social security. In this way it is ensured that social security, and in particular social insurance, follow trends in labour market developments and that social security does not remain the privilege of only those who are formally employed. Once again, adopting such an approach would be in line with developments internationally. ¹⁶⁹

There are, of course, **different modalities** that can be applied, should it be found that merely doing away with definitional exclusions does not render satisfactory results. It may be that introducing compulsory membership of existing schemes for some of the previously excluded would pose particular problems from the viewpoint of unequal contributions ¹⁷⁰ or administration. ¹⁷¹ Creating special categories in existing schemes, making membership voluntary,

---

¹⁶⁸ In Germany, for example, part-time work is used as a specific labour market policy tool and social security strategy in favour of certain specified categories, viz the elderly, the young, and parents of young children: cf Buschmann R & Torsten W "The role of labour law and the social partners in job creation policies" in Biagi M *From protection towards proaction: the role of labour law and industrial relations job creation policies* (Kluwer, The Hague, 2000).

¹⁶⁹ See Weiss M & Schmidt M "Job creation policies in Germany: the role of labour law, social security law, and industrial relations" in Biagi M *From protection towards proaction: the role of labour law and industrial relations job creation policies* (Kluwer, The Hague, 2000).

¹⁷⁰ For example, where there is no employer and consequently no employer contribution, as in the case of the self-employed.

¹⁷¹ This is often advanced as a reason why domestic workers should not be joined as members of funds aimed at covering those in other forms of formal employment.
or establishing separate schemes for the self-employed and other non-standard workers are some of the options that have internationally found favour.\textsuperscript{172}

These are not the only areas of definitional amendments required. Although strictly speaking not limited to this second category of persons, it would also appear necessary to revisit the narrow definition of disability\textsuperscript{173} as well as that of "dependants".

**Thirdly**, those who have been active in the labour market but who, due to the occurrence of a particular risk, have been removed either permanently or temporarily from the labour market. One thinks here of those who have reached retirement, who are retrenched, or who become disabled as a result of a work-related injury. As a rule they would be covered by social insurance measures (i.e. unemployment and employment injury cover). As was mentioned above,\textsuperscript{174} the danger is that they might eventually end up with the first category referred to here (e.g. where they have been retrenched and have exhausted their unemployment benefits). It was also remarked that they would, due to the limited level of the benefits paid out in terms of the existing social insurance schemes, in the absence of sufficient private provision be much worse off economically than was the case when they were still employed.

It has been indicated that little provision is made in the South African social security system for preventative and integrative measures as far as these categories are concerned.\textsuperscript{175} It is, therefore, submitted that tangible measures be introduced that would deal with and place a particular emphasis on the prevention of, for example, unemployment, as part of the social security framework.\textsuperscript{176} This would necessitate a redefinition of the aim(s) of the relevant legislation, and the empowerment of government to take particular steps, such as the setting up of particular schemes, to deal with the problem of unemployment from the perspective of an integrated labour market - social security approach. As far as employment-related injury is concerned, it has already been suggested that the available preventative measures be strengthened, while in the case of traffic-related injury such measures be introduced in such a way that they are linked to the social security framework.\textsuperscript{177}

However, it is abundantly clear that it is especially in the area of (re-)integration that much more needs to be done. On a principled level one would expect that the introduction and implementation of such measures where (almost) none is existing\textsuperscript{178} makes both labour market and social security sense. One would also expect that such measures would have to be carefully constructed. It is in particular advisable that the measures do not reflect an "all or nothing"

---

\textsuperscript{172} See the contribution by Weiss & Schmidt (n 169) as well as Schoukens PSJM Social Protection of the Self-Employed in the European Union (1994) 57.

\textsuperscript{173} Both in terms of COIDA and the RAF Act (see par 6 above) and the social assistance disability grant dispensation (see par 7 above).

\textsuperscript{174} Par 4.

\textsuperscript{175} Cf par 5 and par 6.

\textsuperscript{176} See the discussion in par 5.

\textsuperscript{177} See the discussion in par 6.

\textsuperscript{178} As is the case with employment and traffic injury.
approach, whereby in a rigid fashion full-blown unemployment or non-access to the labour market as a result of injury-related disablement only would let one qualify for benefits. A more sensitive approach would ensure that the payment of benefits is constructed in such a way as to actually and actively encourage labour market participation. From a practical perspective this would, amongst other examples, mean that benefits are not lost merely because of the fact that the beneficiary has been successful in obtaining limited access to the labour market (such as part-time work). As a matter of principle this would not only serve the cause of labour market policy development, but would infuse in the social security framework adherence to the work ethic imperative.

There is, therefore, certainly much that South Africa can learn from the world-wide emphasis in social security debate and policy development on a movement to active labour market measures in stead of merely paying out benefits.\(^\text{179}\)

In addition, the introduction of specific measures to facilitate and encourage labour market (re-)integration should not be neglected. Setting up vocational (re)training schemes, not only for those who have been temporarily removed from labour market participation, but also for those who are affected over a longer term, and linking same to active job seeking assistance and job creation, would go a far way to changing the face of social security as being primarily focused on income replacement. These schemes and measures should ideally be targeted, in the sense that they are made to benefit and support in particular those who are particularly vulnerable. Apart from those groups mentioned above who in the South African context should be regarded as historically disadvantaged,\(^\text{180}\) other vulnerable groups would include the disabled and the young. The National Skills Fund,\(^\text{181}\) to which virtually all employers contribute, could serve as a useful source to co-fund such targeted programmes.

Some scope for flexibility arrangements which do not erode employment protection in the narrow sense, could also be of assistance in the finding of long-term solutions. Job rotation, and linking those who face the loss of their jobs to other available positions, would require some innovative thinking and database or similar co-ordination. Furthermore, requiring employers to invest in (further) training of employees who are retrenched, much along the lines of the German Social Plan concept, would also provide a partial solution.\(^\text{182}\) And, of course, granting tax incentives or even integration allowances to employers who invest in employment creation, remains a powerful tool. However, it remains to be said that the financial viability of some of these measures in the South African context would require some real innovative thinking and policy development.

\(^{179}\) Cf the contributions by Weiss & Schmidt, Buschmann & Walter, as well as Lorber P "The United Kingdom employment policy: a success story?" in Biagi M From protection towards proaction: the role of labour law and industrial relations job creation policies (Kluwer, The Hague, 2000).

\(^{180}\) I.e. Blacks, women, and those in rural areas - see the discussion above.

\(^{181}\) Established in terms of the Skills Development Act 97 of 1998.

\(^{182}\) The Social Plan concept has been introduced in South Africa on a pure voluntary basis. It might be necessary to make compliance with, in particular, training initiatives and re-employment guarantees compulsory, should voluntary adherence not be forthcoming.
This brings one to the **role of government**. It is clear that the involvement of the social partners is crucial to the development and success of many of these measures, and that it is also necessary to involve stakeholders who represent in particular the excluded non-employee component (such as community based organisations). It is submitted, however, given the magnitude of the problems facing policy makers in this regard, the present state of matters from an integrated social security - labour market perspective, and the fundamental nature of many of these suggested changes, that government would have to play quite an active role - as initiator, catalyst, and co-ordinator. Entrusting to government the overall responsibility to co-ordinate some of these initiatives would appear to be necessary. Central co-ordination, despite its pitfalls, is a route which sometimes has to be taken.183

These cursory remarks must not be seen as an attempt to provide a complete picture of what needs to be done. It is also true that introducing measures in a piecemeal fashion, and not treating the issues raised holistically, would not provide long-term solutions. For example, extending social security coverage to the excluded and marginalised is as important as the need to develop active labour market measures. Both these, together with other measures, have to given effect to in a co-ordinated and integrated manner. By doing so, we could envisage reaching success in this area of streamlining a social security system which in many respects is in need of a fundamental overhaul.

MARIUS OLIVIER
JUNE 2000

---

183 For a recent European example in the area of vocational training, see Ball S "The role of European Community vocational training law and policy within the European Employment Strategy: simply a soft target?" in Biagi M *From protection towards proaction: the role of labour law and industrial relations job creation policies* (Kluwer, The Hague, 2000).