

The co-ordination of social security rights in Southern Africa: Comparisons with (and possible lessons to be learnt from) the European experience

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1 INTRODUCTION

Sub-Saharan Africa is regarded as one of the poorest regions in the world¹ and the number of very poor people has been increasing steadily since 1993.² Social security measures are widely regarded as one of the more important poverty alleviation tools, therefore any endeavours to improve the quality of lives of the peoples of the region should take social security structures into account.

Although the main focus of regional integration in the South African Development Community (SADC) region has until recently been economic in nature, the need to address social protection issues has become part of the regional integration agenda. Unfortunately, actual co-ordination of social security measures in the region is currently lacking.

South Africa is embarking on a process to completely restructure its social security system. One of the initial steps in this process has been the research done by the Committee of Enquiry into a Comprehensive System of Social Security for South Africa. This Committee's report³ published in 2002 indicates the direction social security developments will take. It is significant that the Committee regards the "growing interdependence in the [SADC] region, and the more extensive migration of the region's workers and residents" as an indication that a regional response to social security is urgently required.

South Africa is the main host country for migrant workers in the Southern African region⁴. This is mainly due to the perception of a better quality of life to be attained by working (and staying) in South Africa.⁵ The South

- 1 SADC ELS Annual Progress Report 2001-2002 estimates that 40% of the total regional population live in abject poverty.
- 2 World Development Report (2003) 2.
- 3 "Transforming the Present - Protecting the Future" March 2002.
- 4 Eg the estimated 145 000 Mozambican migrant miners and farm workers - SA Dept of Labour Media Statement, 9 March 2003.
- 5 SAMP "Challenging Xenophobia: Myths & Realities about Cross-Border Migration in Southern Africa" Migration Policy Series No 7 (1998) 13.

African government already spends considerable amounts on social security for South Africans.⁶ The blanket inclusion of migrant workers under South African social protection would lead to an increase in the level of government spending, creating the perception that South African taxpayers are expected to subsidise benefits for migrants.⁷

The decreased protection offered to cross-border migrant workers internationally is partly the result of social security systems being country-specific by nature. States conventionally jealously guard their powers to make their own social security decisions. This global phenomenon is based on two principles, namely:

- The principle of territoriality, which confines the scope of application of social security legislation to the boundaries of the country that enacted it. This principle can therefore lead to the loss of social insurance benefits by workers migrating from the one country to the next.
- The nationality principle, which gives preference to the citizens of a particular country and consequently may lead to less favourable benefits to non-nationals or even outright exclusion of foreigners from social security benefits.⁸ An example of this is the distinction South African legislation makes between citizens and non-citizens when it comes to the allocation of certain benefits.⁹

The abovementioned obstacles to the enjoyment of social security rights by migrants globally, apply to the Southern African region as well. All measures to co-ordinate social security benefits will of necessity entail concessions on the abovementioned principles of territoriality and nationality.

Gillion¹⁰ states in the context of the deficiencies of social security systems in developing countries: "It is easier to perceive what is lacking than it is to analyse the causes of the problem, and it is even more difficult to judge what is the best response." In seeking the "best response" to deal with the social security challenges in the SADC region, particularly the formidable task of co-ordinated treatment of migrant workers, a comparison with the European treatment of social security rights could offer some solutions.

The member states of the European Union have developed high levels of social protection with established social security systems. There is no European "Welfare State" model and each member state has its own unique social security legislation, administrative structures and enforcement

6 According to the SAHRC Report on Socio-Economic Rights for the period April 2000 to March 2002, 4 374 817 people were receiving social security and 1 709 103 children were receiving social assistance.

7 Fultz E and Pieris B "The Social Protection of Migrant Workers in South Africa" www.ilo.org/public/english/region/afpro/pretoria/papers/1997/polpap3/intro.htm 2. In a study by the SA Migration Project 60% of the South African respondents believed that non-South African migrants put a strain on South African resources - SAMP "Immigration, Xenophobia and Human Rights in South Africa" Migration Policy Series No. 22 (2001).

8 ILO *Social security for migrant workers* (1996) 5-6.

9 See below at 2.6 for a discussion on whether this distinction can be regarded as unconstitutional in terms of ss 9 and 27 of the SA Constitution 108 of 1996.

10 "Health care and pensions in developing countries: The basis for strategy" 1993 *International Labour Review* 161.

measures. The countries in the region do, however, face certain common challenges, such as ageing populations, the costs involved in continuing to provide high levels of benefits, the pressures of globalisation on social spending, the changing nature of work and new family structures. These challenges require a "modernisation" of social security in Europe.¹¹ What makes Europe a good subject for a comparative study, is the fact that regardless of the diversity of the national social security systems, measures have been put in place to co-ordinate existing structures to ease the difficulties faced by cross-border workers. A clear policy trend toward the convergence of social security provision across Europe is also noticeable.¹² This trend is partly driven by concerns that differences in social security measures impair free movement of workers and deepen regional imbalances.¹³

The purpose of this study is to determine whether the measures to co-ordinate social security applied in Europe can be utilised in the Southern African situation. For this purpose the social protection available in the Southern African region will be sketched in brief, together with the challenges faced by migrant workers in the region. The comparative success story of European social security will be briefly explained, with emphasis on the measures to co-ordinate the diverse national social security measures. This will be followed by an analysis of the possible lessons to be learnt from the European experience and the levels to which it can be translated to the unique situation in the SADC region. In the search for a regional response to social protection in Southern Africa, policy makers will have to consider international standards¹⁴. The pertinent international human rights standards will be outlined briefly. Selected international labour and social security standards will also be considered, particularly those that set minimum social security standards or deal particularly with the treatment of non-citizen migrant workers.

2 SOCIAL SECURITY IN SOUTH AND SOUTHERN AFRICA

2.1 Challenges hampering social security provision in the region

Social security provision (both social insurance and social assistance¹⁵) in the region has historically been underdeveloped. At the same time, the

11 European Commission "A Concerted Strategy for Modernising Social Protection" 3.

12 See below at par 4 for more on European co-ordination of social security provision and protection against the consequences of the principles of territoriality and nationality.

13 Von Steenberge and Jorens "New Challenges for European Social Security" (2001) 13.

14 This is also in line with s 39 of the SA Constitution, which instructs all courts, tribunals and forums to consider international law when interpreting the Bill of Rights.

15 Social insurance and social assistance are the 2 main recognised branches of social security. Social insurance is funded by contributions from employers and employees and is intended to cover risks related to loss of earnings. Social assistance, on the other hand, is financed from the general revenue of the country with statutory scales of benefits adjusted according to a person's means. The goal of social assistance is to serve as a guard against deprivation and is paid out only to those that are perceived to be in need of assistance - Pieters (1993) 6.

social protection needs that have developed in the region are much broader in scope than conventional "social security" measures.¹⁶ The additional risks people in the region face include calamities such as droughts, floods, famine and civil unrest, and sudden and large expenditures such as hospitalisation or wedding costs.¹⁷ HIV/AIDS has also led to a decline in the productivity of the working age population and increased the numbers of AIDS orphans to be cared for by the governments of the region.¹⁸

The social security systems in the countries of the region are diverse in nature as a result of the array of socio-economic and political situations. One common characteristic of the countries in the SADC region is the large share of their population living in rural and geographically isolated areas. This impedes social security administration and service delivery by governments.¹⁹ Social security beneficiaries also find it difficult to access their benefits, in many cases due to a lack of transport.²⁰

The focus of existing social security schemes in the region is on formally employed workers. A large proportion of the working age population in the region is working in the informal economy²¹ and they are therefore excluded from formal social security.²²

2.2 South African social security

The current South African social security system can be described as fragmented, with responsibility for the different schemes spread among various government departments. This state of events led to the appointment of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa, tasked with creating a more coherent system.

South Africa offers only limited social assistance benefits, namely social grants for the aged, people with disabilities and war veterans, and grants for families raising children. These grants are as a rule means-tested. No provision is currently made for people falling outside the above-mentioned categories.²³

Nevertheless, the South African social security system is still regarded as better off than those of many neighbouring countries,²⁴ particularly because most recognised social insurance risks are catered for to some degree²⁵. According to Liffmann²⁶ "many regard the system astonishingly

16 See Dekker "Social Security for those who Work Informally, and Informal (Community- and Family-Based) Solutions to Social Protection" (2001) 257.

17 Van Ginneken "Social security for the informal sector" (1996) 7.

18 Fultz & Pieris (1999) 13.

19 Taylor Committee Report No 14, 559.

20 Fultz & Pieris (1999) 25.

21 SADC ELS Sectoral Annual Report for 2000-2001 par 3.10.

22 See below at 2.3.

23 For more on the challenges facing social security in South Africa, see Taylor "Social Protection Challenges in Southern Africa" (2001) 60-61.

24 See Taylor "Social Protection Challenges" (2001) 60.

25 Provision is made for risks such as unemployment, sickness, maternity, adoption, occupational injuries and diseases. Instead of national provident or pension schemes, occupational retirement funds provide retirement benefits.

26 (2001) 71.

commendable, specially in light of the current status of South Africa as a developing third world country in a constant state of flux". The promise of better social security benefits in South Africa has been linked to the "influx" of migrant workers seeking a better existence for themselves and their families. Hence, a regional approach on social security is in South Africa's interest.

2.3 Social security coverage limited to "formal" sector

The present conceptual foundations of social security are inappropriate, given Africa's socio-economic conditions, especially those in rural communities, in that social security is defined narrowly and the social risks insured against are primarily based on the social, economic and ecological conditions of Western Europe. Consequently, the Western model of social security is unlikely to have a meaningful impact on solving the social problems facing Africa.²⁷

Approximately one third of the population of the world (more than 2 billion) are estimated to be without any formal social security cover, whether social insurance or social assistance. In Africa, the situation is even worse, as it is estimated that 90% of the population are deprived of social security protection.²⁸

Social security coverage in South Africa, as in the rest of the region, is focused predominantly on labour-centred social insurance and therefore extends mainly to the "formally" employed. In reality, a significant portion of the population falls outside the formal work force and are either "atypically" employed²⁹ or unemployed. This leads to the exclusion of unemployed, self-employed and informally employed persons from social insurance coverage,³⁰ leaving them to rely on social assistance³¹.

The reason for the inability of conventional Western models of social security to cater for the needs of workers in the informal sector and the unemployed lies in the fact that both social insurance and social assistance were designed based on the belief that all employees will sooner or later become active in the formal sector.³² This is unfortunately not the situation in developing countries.

27 Dekker (2001) 255

28 Van Ginneken "Social security for the informal sector: Issues, options and tasks ahead" ILO Working Paper (1996) 3.

29 Such as casual, seasonal, temporary, or part-time employees, fixed term contractors, home workers or those active in the informal sector. It has been argued that these forms of work are fast becoming the norm, and should therefore not be regarded as "atypical" Lund & Srivinas *Learning from Experience: A gendered approach to social protection for workers in the informal economy* ILO (2000). In Southern Africa only about a fifth of the working population can be regarded as "formally" employed – Fultz and Pieris (1999) 7.

30 Consolidated Report 151; HRC Report (2003) 219.

31 The impact of social assistance grants on poverty reduction in South Africa is significant. Social grants for the elderly and people with disabilities have a dramatic impact on the income of their households. This is particularly the case in rural areas where the reach of social insurance type benefits is very limited – White Paper for Social Welfare (1997) ch 7 on "Social Security"

32 Where they would be covered by social insurance, leaving social assistance to only cater for those who cannot work.

Social insurance is by nature contributions-based. The limited contributory capacity of the informally employed therefore renders them particularly vulnerable.

While "formal" social security measures are most closely linked to formal employment, it would be incorrect to conclude that "informal social security" only encompasses the extension of social security measures to workers in the "informal" economy. A distinction is therefore made between "informal sector social security", which covers those working in the informal economy, and "informal forms of social security", which are the services rendered and support given by communities and families to those in need.³³ These two types of "informal social security" co-exist as alternatives to "formal" social security measures.³⁴

2.4 Migrant workers³⁵

Migration to South Africa is on the increase due to the perceived³⁵ differences in the quality of life between neighbouring countries and South Africa, as well as the greater availability of employment opportunities in South Africa.

It is assumed that Africans from other countries are either pulled to South Africa by the country's superior social, economic and political climate, or pushed from their home countries by poverty, chaos and a lack of opportunity.³⁷

Sending countries rely on migration to South Africa, as this lessens their unemployment burden and they rely on the remittances from South African social insurance.³⁸ The South African government has for a long time turned a blind eye to the influx of unskilled migrant workers, because they constitute cheap labour.³⁹ It has to be recognised that the quality of life of migrant workers is influenced by the social protection measures available to them, for example, whether they are protected against retrenchments or whether or not the dependants of a deceased worker would be entitled to death benefits.⁴⁰ Currently, the lack of co-ordination of social security afforded to migrant workers results in their exclusion from social protection.

33 See Dekker (2001) 247–268.

34 For more on informal on informal social security measures, see Dekker (2001); Van Ginneken (1996) 8; Fultz and Pieris (1998) 37–39; Kasente *Gender and social security reform in Africa* (1997) 5–6.

35 ILO Migration for Employment Convention (Revised) 97 of 1949 defines "migrant for employment" as meaning "a person who migrates from one country to another with a view to being employed otherwise than on his own account". The same definition is used in the Migrant Workers (Supplementary Provisions) Convention 143 of 1975. Illegal migrants and refugees fall outside the scope of this paper.

36 See SAMP "Challenging Xenophobia: Myths & Realities about Cross-Border Migration in Southern Africa" (1998) which aims to challenge some of the popular perceptions regarding cross-border migration in Southern Africa.

37 SAMP (1998) 17.

38 SAMP "Challenging Xenophobia" (1998) 33. In some instances, the agreements between the migrants' home countries and the South African government make provision for the remittance of part of their SA earnings to their home countries for support of their families – Fultz & Pieris *The social protection of migrant workers in SA* 1997.

39 White Paper on International Migration (1999) par 4.4; Fultz & Pieris 1997.

40 Fultz & Pieris 1997.

2.5 Discrimination against migrant workers and other non-citizens

No distinction is currently made between SADC migrants and migrants from further afield when it comes to South African legislation and policy on social security. South African legislation does, however, distinguish between SA citizens and non-citizens, particularly in the case of social assistance. As will be shown below, equality of treatment is one of the main principles of co-ordination of social security. The extent to which non-citizens are at a disadvantage compared to South African nationals is an issue that will have to be addressed before a regional co-ordination process can be embarked upon.

Section 27 of the South African Constitution affords "everyone" the right of access to social security, including access to social assistance if they are unable to support themselves and their dependants.⁴¹ No distinction is therefore made in the Constitution between citizens and non-citizens with regard to the right to access to social security. In contrast, section 3 of the Social Assistance Act⁴² limits social grants to South African citizens who are resident in the country. This section in effect excludes all non-citizens from the social grants for the aged, disabled or war veterans.⁴³ This might well be an example of a retrogressive action by the state, as the Department of Social Development only started implementing this provision in 1996.⁴⁴

As for the grants paid to families raising children, the child support grant is paid to the primary care giver of a child only when he or she and the child are South African citizens and are resident in the country.⁴⁵ Parents (except foster parents) who apply for care-dependency grants for disabled children have to prove that they and the children concerned are citizens and resident in South Africa.⁴⁶ The only exception to the citizenship requirement for social assistance benefits is the foster child grant, where residency and not citizenship is required.⁴⁷

Certain social insurance schemes, such as those governed by the Unemployment Insurance Act⁴⁸ also expressly exclude certain categories of migrant workers.⁴⁹ The Act excludes most informal workers, as only "employees" qualify as contributors under its scheme. As most migrant workers are also informal workers, this scheme will in any case not cater for them.

41 Social assistance in South Africa is means-tested.

42 Act 59 of 1992.

43 The definition of "citizen" includes non-citizens who prior to 1 March 1996 were receiving grants.

44 Malan & Jansen van Rensburg (2001) 111.

45 S 4 Social Assistance Act as amended.

46 S 4B.

47 S 4A.

48 63 of 2001.

49 S 3(1)(d) excludes persons who enter South Africa to work, if they are required to leave the country when the contract is terminated.

It therefore seems that, notwithstanding the constitutional promise of access to social security for "everyone", non-citizens find themselves in an insecure position. The Constitutional Court has on occasion had the opportunity to reflect on the position of non-citizens in South Africa. In *Larbi-Odam and Others v MEC for Education (North West Province) and Another*⁵⁰ the court held that even though citizenship was not one of the specified grounds of discrimination in terms of section 8(2) of the Interim Constitution, differentiation on the grounds of citizenship amounted to discrimination, as foreign citizens, as a result of their status as a minority, have a lack of political muscle.⁵¹ They also found that excluding permanent residents from employment opportunities constituted unfair discrimination which cannot be justified under the general limitation clause in the Bill of Rights.⁵²

Legislation such as the Social Assistance Act, which denies non-South-Africans benefits solely based on citizenship, is therefore open to attack on the basis of the equality clause of the Constitution. The Constitutional Court has in fact recently been approached by a group of indigent Mozambican citizens, living in the Limpopo province, for an order confirming the constitutional invalidity of the provisions of the Social Assistance Act which deny non-citizens social assistance.⁵³ The outcome of this case will determine the fate of many non-citizens who have been denied social assistance benefits.

The exclusion of non-citizens in general, and migrant workers in particular, from social assistance could also be regarded as contrary to international human rights standards. Key international human rights standards, such as the International Covenant on Economic, Social and Cultural Rights, provide protection against discrimination based on nationality and social origin on the one hand, but on the other hand provide developing countries with some discretion regarding the extent to which social security coverage is afforded to non-nationals.⁵⁴

As was stated above, section 27(1) guarantees *everyone* the right of access to social security. Legislative measures that deprive a particular group, in this case non-citizen migrant workers of the opportunity to apply for social assistance may be regarded as a breach of the state's duties in terms of section 27.⁵⁵ In terms of the *Grootboom* case⁵⁶ the state

50 CCT 2/97; 1997 (12) BCLR 1655 (CC).

51 At 1665, par 19. The question of discrimination against "aliens" also arose in *Baloro and others v University of Bophuthatswana and others* 1995 (8) BCLR 1018 (B) where the applicants claimed that a moratorium placed on the promotion of non-citizen University employees amounted to unfair discrimination in terms of s 8(2) of the Interim Constitution. Non-citizens were held to be included under the words "no person" in s 8(2). Therefore the distinction between citizens and non-citizens when it came to promotions was held to be a violation of s 8(2).

52 S 33(1) Interim Constitution; s 36 Final Constitution.

53 *Mahlaule and others v Minister of Social Development* CCT 12/03.

54 Art 2.3. For more on the ICESCR and its impact on the right to social security, see below at par 6.2

55 See Liffmann (2001) 41.

56 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

is required to respond to the needs of those who are most desperate and vulnerable. It is submitted that groups like non-citizens, migrant workers and their dependants are particularly vulnerable, as they do not have ready access to informal social support and are often discriminated against. Although it is recognised that the state's primary duty would be toward South African citizens, it is obliged to ensure that non-citizens (particularly SADC migrants) enjoy access to basic subsistence rights. State measures that exclude a significant segment of society such as migrants cannot be regarded as reasonable.

Section 38 of the Constitution empowers the courts to grant appropriate relief for the infringement of the rights protected by the Bill of Rights. The courts are constitutionally bound to ensure that the rights in the Bill of Rights are protected and fulfilled. Non-citizen migrant workers who comply with the other requirements for benefits can therefore apply for a court order compelling the state to provide them and their dependents with access to social assistance benefits.⁵⁷

The cause of non-citizen migrant workers requesting access to South African social assistance is unfortunately not furthered by reports that there are currently many migrants that cross the country's borders on a monthly basis to collect social assistance grants that they are not entitled to.⁵⁸

2.6 Formally employed workers

The principle of territoriality, which means that the scope of application of social security legislation is limited to the territory of the country that enacted it, also applies to South African social insurance.⁵⁹ Exceptions to the principle of nationality (excluding non-nationals from benefits or offering them lesser benefits) can be found in social insurance, for example, compensation for workplace injuries or diseases is available to all employees, notwithstanding their nationality. Other social insurance schemes, such as unemployment insurance, however, exclude certain migrant workers from the definition of "contributors" and therefore from receiving benefits.⁶⁰

As is the case with most cross-border workers internationally, migrant workers in the SADC region face losing even the few social insurance benefits they were able to obtain, due to the territorial nature of most social insurance schemes in the region. They therefore experience problems with the maintenance of their acquired rights, due to the lack of practical arrangements for the exportability of benefits.⁶¹

57 As was done in the *Mahlaule* case referred to above.

58 HRC Report 2003 223.

59 The Compensation for Occupational Injuries and Diseases Act 130 of 1993 sets out the rules regarding its territorial application in s 23.

60 S 3(1)(d) Unemployment Insurance Act 63 of 2001 excludes persons who enter South Africa to work, if they are required to leave the country when the contract is terminated.

61 Fultz & Pieris 1997 give the example of South African compensation for occupational injuries benefits never reaching the intended beneficiaries in Mozambique, mainly owing to the lack of the required administrative backup.

The governments of Lesotho and South Africa have concluded a bilateral agreement on the transfer of funds for Basotho beneficiaries of South African benefits.⁶² Similar agreements have been reached with some other neighbouring countries,⁶³ some even dating back as far as 1964.⁶⁴ It is therefore time for these agreements to be updated.

In the case of South African unemployment insurance, the payment of benefits is conditional on having been a "contributor",⁶⁵ and the duration of payment of benefits is determined by the period of service as a contributor.⁶⁶ South Africa does not have a national pension scheme for the aged, but the level of retirement benefits will usually be dependent either on the number of years of membership of a particular fund or on the contributions paid by and on behalf of the member and the investment returns thereon. All of the above examples have a system of accumulation of credits in common, which leads to difficulties for migrant workers when they are required to shift from a system where they have "credit" to one where they have none. A migrant worker who has been employed in various countries in the region would not have been able to build up enough credits to receive an adequate benefit.⁶⁷ In other regions, the maintenance of rights in course of acquisition has usually been attained through reciprocity agreements between states (restricted to schemes in place in both contracting states), which allow the adding up of periods of insurance.⁶⁸ South Africa has not yet concluded agreements to ensure the maintenance of rights in course of acquisition.⁶⁹

3 SHORTAGE OF REGIONAL SOCIAL SECURITY MEASURES:

Measures (both bilateral and multilateral) to encourage free movement of workers in the region, and in particular to co-ordinate social security systems so that migrants are not disadvantaged for exercising their right to free movement, are "conspicuous by their almost total absence in the

62 Republic of South Africa. Treaty Series No. 1/1973 www.queensu.ca/sarmp/Treaties/Lesotho.htm.

63 With the governments of Malawi (Treaty Series 10/1967), Botswana (Treaty Series 3/1973) and Swaziland (Treaty Series 3/1986).

64 With the government of Portugal regulating the employment of Mozambican workers on certain mines in South Africa - Treaty Series No. 11/1964. The Ministers of Labour of South Africa and Mozambique signed an agreement on 17 January 2003 aimed at the protection and security of migrant workers in the 2 countries. Currently 1 100 Mozambicans receive compensation for workplace injuries from the SA Compensation for Occupational Injuries and Diseases scheme - Dept of Labour Media Statement, 17 January 2003.

65 Defined in s 1.

66 S 13(3). No qualifying period of employment to receive South African compensation for occupational injuries and diseases is required.

67 Fultz & Pieris (1997) give the example of Mozambican migrant workers who have worked in SA for an extended period. On their return to Mozambique, they may be ineligible for benefits as they have not been paying contributions to the national retirement scheme in Mozambique.

68 ILO *Social Security for Migrant Workers* (1996) 16-20.

69 Liffmann (2001) 65.

SADC context”⁷⁰ The following is intended as a brief summary of the few existing regional structures and instruments relating to freedom of movement and the co-ordination of social security.

3.1 The African Charter on Human and Peoples’ Rights⁷¹

The African Charter contains various provisions on socio-economic rights, but makes no explicit reference to social security rights. It does contain rights that are indirectly linked to social security, such as the right of every individual to work under equitable and satisfactory conditions⁷² and the right to enjoy the best attainable state of health.⁷³

The Constitutive Act of the African Union (AU) of 2000 states as one of the objectives of the newly formed AU “to promote co-operation in all fields of human activity to raise the living standards of African peoples”.⁷⁴ The Executive Council of the AU is directed to co-ordinate and take decisions regarding social security, including the formulation of mother and child care policies as well as policies relating to people with disabilities.⁷⁵

3.2 The SADC Treaty

The amended Treaty establishing SADC⁷⁶ lists the objectives of SADC in article 5. It is significant that the first objective on the list is regional integration in order to “support sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged”.⁷⁷ Regional attempts at creating social stability are therefore at the core of the SADC objectives. Member states undertake to co-ordinate and harmonise their policies and programmes in a variety of areas, including social welfare.⁷⁸

3.3 Charter of Fundamental Social Rights

The Charter of Fundamental Social Rights, adopted in 2001, refers to the objectives of SADC as set out in article 5 of the SADC Treaty. The objectives of the Charter set out in article 2 include promoting labour policies, practices and measures which facilitate labour mobility, and promoting

70 Taylor Committee Report No 14, 564.

71 (Banjul Charter) OAU Doc. CAB/LEG/67/3/Rev.5 (1981). All the SADC countries have ratified the Charter. For more on ways of enforcing the Charter, and the potential role of the African Court on Human and Peoples’ Rights, see De Vos at “A new beginning” LDD 2004(1) 1–24.

72 Art 15.

73 Art 16.

74 Art 3(k).

75 Art 13(1)(k).

76 For more on the SADC objectives and structures, see Olivier *et al.* (2002) 657–660.

77 Art 5(1)(a).

78 Art 21.

the establishment and harmonisation of social security schemes. Governments are tasked with creating an enabling environment in order to realise the objectives of the Charter.⁷⁹ National tripartite institutions are responsible for the implementation of the Charter through the promotion of social legislation.⁸⁰

The Charter makes specific provision for adequate social protection for all workers in the region.⁸¹ Measures should be put in place so that all workers, regardless of status and the type of employment, can enjoy adequate social security benefits. Migrant workers and workers in the informal sector are therefore included in the scope of protection afforded by the Charter. The Charter also makes provision for social assistance for people who are unable to enter or re-enter the labour market and have no means of subsistence.

3.4 Attempts at regulating the freedom of movement of workers in the SADC

Two Protocols to the SADC Treaty regarding the freedom of movement of workers in the SADC region were drafted, but never really got off the ground as a result of negative reactions to the wording of the Draft Protocols and political resistance.

The first attempt was the Draft Protocol on the Free Movement of Persons in the SADC.⁸² One of the aims of this Protocol was to promote the freedom of movement of workers within the region. Consequently, article 23 of the Protocol opens the door for member states to provide for the transferability of benefits and rights acquired by virtue of employment.

The Protocol was revised by the Draft Protocol on the Facilitation of Movement of Persons in the SADC.⁸³ This was done mainly as a result of the negative reaction to the first protocol. The principle aim was watered down from wording such as "free movement" to the development of policies aimed at the "progressive elimination of obstacles to the movement of persons generally into and within the territories of Member States".⁸⁴

3.5 Attempts at harmonisation and co-ordination of social security

Developing baseline standards (or model social security schemes) for Southern African social security systems is easier said than done as a result of the diverse social security structures found. Different socio-economic, administrative, political structures and legislative frameworks also hamper efforts to develop baseline standards for the region.⁸⁵

79 Art 2(2).

80 Art 16.

81 Art 10.

82 Of 15 March 1996 www.queensu.ca/samp/migdocs/Documents/1996/draftprotocol.htm.

83 Of 8 May 1998 www.queensu.ca/samp/migdocs/Documents/1998/protocol.htm.

84 Art 3. The preamble reflects the recognition by SADC member states that regional integration would only be possible when SADC citizens enjoy freedom of movement.

85 "Transforming the Present" (2002) 152; Communiqué of the SADC Labour Relations Conference, 1999.

The SADC Employment and Labour Sector⁸⁶ started a process of converging the social security systems in the region. One of the objectives of this process is the development of guidelines on the treatment of SADC nationals and methods of co-ordination of cross-border payment of social security benefits.⁸⁷

Another option for convergence of social security systems is the conclusion of treaties (bilateral or multilateral) co-ordinating social security measures with that of other countries in the region. This process differs from harmonisation in that it recognises the differences in the national systems, but attempts to minimise the effects of any discrepancies, for example to enable the transferability of social security benefits over national borders (maintenance of rights in the period of acquisition). Co-ordination is a matter for both international law and domestic law, with national legislation detailing how the treaties and agreements are to be applied to domestic circumstances.

In short, there seems to be a shortage of regional enforcement measures when it comes to social security rights. The only legally binding regional instrument, the African Charter, does not make specific provision for social security. SADC attempts at regional measures, such as the protocols on movement of persons in the region, have not been able to get off the ground. According to the Taylor Committee,⁸⁸ co-ordination of social security measures "is presently almost totally absent in the region", a situation that will have to be addressed to protect migrants in the region.

4 EUROPEAN SOCIAL SECURITY

In Europe, the evolution of social security has by and large been a success story. The various national social security schemes guarantee a certain level of security against social risks such as loss of income and the additional costs related to medical expenses and raising children to all citizens.⁸⁹ Social security has therefore succeeded in "guaranteeing an income to millions of people, brought about social peace and eliminated the worst effects of poverty".⁹⁰ But providing such extensive coverage is complicated and very expensive, specifically when coupled with the demographic problem of the ageing European population.

The greater degree of inter-dependence between European states brought about by the common market has led to a situation where "social protection becomes more and more a matter of common concern among

86 Before the restructuring of SADC

87 SADC ELS Sectoral Annual Report 2000 2001 par 3.8.

88 Taylor Committee Report No 14, 566.

89 Social security rights are contained in both the European Social Charter and the Charter of Fundamental Rights of the European Union.

90 Von Steenberge and Jorens (2001) 10. In 1997, spending on social protection accounted for 28,5% of Community GDP, of which 63% was spent on pensions and health care. In the absence of these social transfer payments, the number of households living in relative poverty would have risen from 17% to 40% - Communication on "A Concerted Strategy for Modernising Social Protection" (1999) 5.

Member States. Reforms in the social protection systems of one Member State are of interest to, and can potentially impact on, others".⁹¹

4.2.1 *Co-ordinating instruments*

There is no single "European" social security system, but rather a variety of national systems. This is as a result of the principle of subsidiarity,⁹² under which the European Union only has competence to act in the field of social security when given the authority by the member states. This situation could lead to difficulties for cross-border workers, as each of the social security schemes is restricted geographically.

Certain principles have guided the development of legally binding co-ordinating instruments in Europe:

- Maintaining national social security legislation: the goal therefore is co-ordination, not harmonisation
- A movement away from the principle of territoriality to "European citizenship"
- Collaboration between national social security institutions
- Equal treatment of citizens of other member states.

Article 51 of the EU Treaty confers the power on the EU Council to "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers". The most important of these measures are Council Regulations 1408/71 and 574/72, the main provisions of which will be outlined below.

4.2.2 *Regulations 1408/71 and 574/72*

Council Regulation 1408/71 is the principal co-ordinating instrument regarding social security arrangements for people moving within the European Union. It was introduced to facilitate the right of free movement of persons in Europe. The Regulation has been updated regularly, based on the interpretations of the European Court of Justice, the addition of new member states and changes to national social security legislation.

Regulation 1408 covers social insurance benefits of employed, self-employed person and their families, or refugees/stateless persons residing in the territory of a member state.⁹³ In order to simplify Regulation 1408, a process to adopt a modernised version of the co-ordination measures has been set in motion. One of the major changes to the regulation will entail extending coverage to all persons who are subject to the social security legislation of one or more member states, their families and their survivors.⁹⁴ The network of protection will therefore be extended to all

91 "A Concerted Strategy" (1995) 8.

92 Which means that decision-making should be done at the closest level to the citizen and that the EU should not take on tasks which are better suited to national or local administrations.

93 Amendments to the regulation have extended coverage to students and civil servants.

94 Proposal for a Regulation COM(1998) 779 final O.J. C 38 of 12/2/1999, art 1.

European citizens and not just workers. The question of whether the extension of the scope of the amended regulation should include third-country nationals is still under discussion.⁹⁵

The matters currently covered by the regulation are based on the classical branches of social security: sickness and maternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; unemployment benefits; and family benefits.⁹⁶ The regulation does not apply to social assistance.

Regulation 1408 lays down the rules for the **determination of the applicable legislation** in order to ensure that each migrant is subject to the social security legislation of only one member state. A distinction is made between the general rules, and special rules and exceptions.

As a rule, a person employed in the territory of one member state is subject to the legislation of that state.⁹⁷ The worker/self-employed person's social security benefits are therefore determined by the legislation of that state. The rights of retired persons are subject to the laws of the state in which they reside.

The principle of **equality of treatment** means that a person covered by the Regulation and who resides in the territory of one member state, is entitled to the same social security benefits as the citizens of that state.⁹⁸ No member state may therefore reserve benefits for its citizens only.

Article 12 contains measures to **prevent the overlapping of benefits**. While the primary objective of the Regulation is to protect migrants exercising their right to freedom of movement, it also prevents them from obtaining special advantages. Membership of social insurance schemes in more than one country does not confer the right to several benefits of the same kind.

Regulation 1408 contains measures to ensure the **exportability of social security benefits**. It therefore ensures that a person does not lose benefits (or suffer from the reduction or suspension of benefits) paid by a social security institution in one member state if the person resides in another state.⁹⁹ Benefits are therefore payable throughout the EU. These measures therefore constitute a break from the principle of territoriality.

Most social insurance legislation sets conditions such as the completion of periods of insurance, employment or residence for the acquisition or retention of benefits. The social security institutions of a member state that sets such conditions should take account of periods of insurance, employment or residence completed under another member state's legislation in deciding whether the person satisfies the requirements for the legislation it administers. The regulation therefore makes provision for the **aggregation of periods** of insurance or employment.

95 Council of the European Union "Parameters for the modernization of Regulation 1408/71" 2001.

96 Art 4(1).

97 Art 13(2)(a).

98 Art 3.

99 Art 10.

The abovementioned are just the general principles for co-ordination set out in Regulation 1408. Special provisions are made for each of the different categories of benefits, which means that the regulation offers a high standard of protection, but has become extremely complicated.

Regulation 574/72 determines the details on the practical application of Regulation 1408.

5 CAN THE EUROPEAN MODEL BE TRANSLATED TO THE SADC REGION?

The European system serves as a good example of a historical evolution from divergent national schemes towards social security schemes with common principles and characteristics. Co-ordination of social security benefits and requirements in the SADC region will have to start from scratch. The series of agreements and treaties that ruled co-ordination of social security in Europe prior to Regulation 1408/71 are valuable as an illustration that co-ordination does not occur overnight, but as the result of a process.

In Europe, national social security systems are already developed. In many countries social security institutions have been operating with their own particular structures for decades. This has made it difficult to harmonise the different social security systems and explains why co-ordination has always been the preferred option. In comparison, most of the countries of the SADC region are currently restructuring their social security systems and in many cases developing new programmes.¹⁰⁰ Since most social security programmes are being overhauled, the possibility of basing the designs of the new programmes on an acceptable common baseline should be explored.¹⁰¹

Different social needs from those prevalent in Europe have arisen in the SADC region.¹⁰² This has led to a movement toward social protection in the broad sense for the region. The social protection approach requires greater coherence between social assistance and social insurance and a thorough examination of the survival systems of poor households and the role that traditional support structures play in their lives.¹⁰³

The European social security co-ordination system, in striving to be as inclusive and efficient as possible, is inevitably complex. A complicated co-ordination system such as that provided for in terms of Regulation 1408/71 is not likely to succeed in the SADC region. The existing administrative structures are just not geared for such a task. Should policy makers decide to borrow from the European model, they will have to ensure that the rules are simplified and that they will be understandable to the administrators as well as the potential beneficiaries.

100 Fultz & Pieris ch 5 at 41–54.

101 SADC ELS Sectoral Annual Report 2001–2002, 3 and 6.

102 See above at par 2 for more on the social needs particular to the Southern African region and in particular par 2.3 for the consequences of the large informal sector.

103 Taylor (2001) 53.

In Europe the emphasis has conventionally been on the design of social security programmes. In the SADC region, political and economic factors other than planning and programme design play a major role in social security reforms,¹⁶⁴ such as:

- Democratic governance, with the emphasis on who makes the decisions on benefit allocation and on what basis.
- The balance that is struck between measures aimed at reducing social exclusion (such as ensuring equitable distribution of services and goods), and those intended to improve economic efficiency and institutional capacity.
- The reduction of social fragmentation: concepts such as social solidarity and pooling of risks take on different meanings "in the context of intergenerational poverty, long-term unemployment and jobless growth, and limited possibilities of cross-subsidization across the public-private sectors, giving shrinking revenue bases and ineffective tax regimes".¹⁶⁵ The extreme disparity between the standard of living of the wealthy and the poor in the region has also contributed to the breakdown of social solidarity.
- The effectiveness of the public administration and administration costs.¹⁶⁶

Social security reforms in the SADC region should therefore be based on the correct mix of policy options suited to the region that would promote "the most effective range of benefits to the broadest number of people".¹⁶⁷ The focus should therefore be less on design and more on delivery.¹⁶⁸

6 THE IMPACT OF INTERNATIONAL INSTRUMENTS AND ORGANISATIONS

Section 39(1) of the South African Constitution instructs all courts, tribunals or forums to consider international law and foreign law when interpreting the Bill of Rights.¹⁶⁹ When interpreting any other legislation, courts "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".¹⁷⁰

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.¹⁷¹

104 Fultz & Pieris (1999) 41.

105 Taylor (2001) 54.

106 Fultz & Pieris (1999) 33.

107 Taylor (2001) 54.

108 Fultz & Pieris (1999) 47.

109 Even non-binding international law (*S v Makwanyane* 1995 (6) BCLR 665 (CC) 686 par 35), including "soft law" relevant to social security such as the General Comments of the CESCR and the Limburg Principles Jansen van Rensburg (2001) 118.

110 S 233 1996 Constitution.

111 *Grootboom* 2000 (11) BCLR 1169 (CC) 1185 par 26.

Social security and related rights are recognised in numerous international human rights instruments. The following is a brief outline of the protection afforded to the right to social security in selected international standards (that either contain express provisions on social security, or are social security standards in their entirety).

6.1 Universal Declaration of Human Rights (UDHR)

Article 22 of the UDHR provides for the right to social security. It states that everyone, as a member of society, has the right to social security and is entitled to realization through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

In addition, article 25 guarantees everyone a standard of living adequate for the health and well-being of themselves and of their families, including food, clothing, housing and medical care and necessary social services, and the right to protection in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control.

Discrimination on the basis of national or social origin is regarded as a violation of human rights.¹¹²

The adoption of current international human rights standards such as the UDHR can unfortunately not be regarded as an instant solution to the problem of social exclusion, as shortcomings in social security systems continue despite many of the developing countries being signatories to human rights instruments such as the Universal Declaration for Human Rights.¹¹³

6.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹⁴

The right to social security, including social insurance, is found in article 9 of the ICESCR. In conjunction with article 9, article 11.1 provides for

the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Art 2.1 of the ICESCR provides that state parties undertake "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources,

¹¹² Art 2.

¹¹³ Iyer (1993) 188.

¹¹⁴ U.N. Doc. A/6316 (1966). South Africa is a signatory to the ICESCR and Parliament is in the process of ratifying it. This is evidence of South Africa's intention of becoming legally bound by the ICESCR.

with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".¹¹⁵

Article 2.2 prohibits any discrimination by the state parties with regard to the rights guaranteed in the Covenant, particularly on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹⁶ This has been interpreted as requiring state parties to provide judicial review and other recourse procedures should discrimination regarding these socio-economic rights occur.¹¹⁷ In recognition of the difficulties that developing countries might have in guaranteeing the socio-economic rights in the Covenant, article 2.3 provides developing countries with some elbow room regarding the extent to which social security coverage should be afforded to non-nationals.

The supervisory role of the UN Committee on Economic, Social and Cultural Rights (UNCESCR) entails monitoring compliance by state parties with their obligations in terms of the ICESCR. To assess the degree to which state parties comply with their duties under the ICESCR, reports that outline the legislative and other measures taken to ensure the fulfillment of the rights in the Covenant have to be submitted to the Committee.¹¹⁸

As part of their duty to clarify the content of the rights contained in the ICESCR, the Committee has produced General Comments¹¹⁹ that, together with the Limburg Principles and the Maastricht Guidelines of 1997, have become authoritative guidelines on the scope and content of socio-economic rights.

6.3 Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) is a widely ratified international treaty creating a set of fundamental rights for all children.¹²⁰

South Africa ratified the Convention on the Rights of the Child in June 1995. The state is therefore obliged to prioritise the needs of children throughout the government's programmes, services and development strategies.

Article 26 of the CRC provides for the right of every child to benefit from social security:

115 Due to the similarity in wording of many of the provisions, the ICESCR is helpful as a guide to the interpretation of the positive obligations created by the socio-economic rights in the 1996 Constitution of South Africa, particularly for the internal limitations found in s 27(2).

116 Emphasis added.

117 Principle 35, Limburg Principles.

118 Art 16.

119 Eg General Comment 1 (1989) dealing with the objectives with the reporting obligations in terms of the Covenant.

120 S 28 of the SA Constitution guarantees children rights similar to those in the Convention.

States parties shall recognize for every child the right to benefit from social security, including social insurance and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

The right of every child to an adequate standard of living is established by article 27 of the CRC. The primary responsibility for creating conditions of living necessary for the child's development lies with the parent, but the state has to take appropriate measures to assist parents or other persons responsible for the child to fulfil these responsibilities.¹²¹ The state is required to provide material assistance and support programmes in case of need. In particular, the state is obliged to take all appropriate measures to secure the recovery of maintenance for the child.¹²²

6.4 Social security standards of the International Labour Organization (ILO)

The ILO Declaration of Philadelphia was adopted to state the aims and purposes of the ILO. It affirms the right of all human beings, irrespective of race, creed or sex, to pursue material well-being in conditions of freedom and dignity, or economic security and equal opportunity. The ILO has thus, since its creation in 1919 as an organisation dealing mainly with international labour standards, also developed a number of social security standards.

The most general of the ILO standards dealing with social security is the **Social Security (Minimum Standards) Convention 102 of 1952**. The aim of this Convention was to set a basic level of social security that should be progressively attained all over the world.¹²³ It recognises the various degrees of economic development in the world, and therefore attempts to set standards in line with any country's ability to reach those standards, rather than setting some theoretical benchmark which some countries will never be able to reach. Consequently, it allows developing countries with insufficiently developed economies and medical facilities the option of temporary exceptions when applying for ratification.¹²⁴ Notwithstanding the flexible approach taken in the Minimum Standards Convention, ratification levels are surprisingly low.¹²⁵

Other conventions setting out more precise provisions regarding migrant workers are summarised below:¹²⁶

121 Art 27(2) and (3).

122 Art 27(4).

123 It provides for minimum standards in 9 branches of social security: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors' benefits. The Minimum Standards Convention has been supplemented with more specific Conventions, eg Maternity Protection Convention (Revised) 103 of 1952, Invalidity, Old-Age and Survivors' Benefit Convention 128 of 1967. These Conventions set higher standards than the Minimum Standards Convention for the benefits contained in them.

124 ILO *Introduction to Social Security* (1984) 12.

125 Ben-Israel (1994) 13. None of the countries in Southern Africa have ratified this Convention.

126 In chronological order and not necessarily order of importance.

The Migration for Employment Convention (Revised) 97 of 1949¹²⁷ regulates the conditions under which the migration of persons for employment is to take place. The Convention provides for equality of treatment of nationals and immigrants in respect of social security, with the only exceptions being arrangements for the maintenance of acquired rights and rights in course of acquisition, and special arrangements concerning publicly funded benefits.¹²⁸

In terms of the ILO Discrimination (Employment and Occupation) Convention 111 of 1958, member states undertake to actively pursue a national policy to promote equality of opportunity and treatment in respect of employment. The aim of this policy is to eliminate discrimination¹²⁹ in respect of employment (article 2). Member states are, however, allowed to adapt the measures to promote the policy to their national conditions and practice.

All of the countries in the SADC region have ratified this Convention and are therefore obliged to adopt a policy for eliminating discrimination on the basis of national extraction, and consequently to improve the protection afforded to non-citizen migrant workers.

The Equality of Treatment (Social Security) Convention 118 of 1962 provides for equality of treatment under a ratifying country's social security legislation¹³⁰ to workers of other ratifying countries,¹³¹ with specific reference to schemes for the maintenance of acquired rights and rights in course of acquisition.¹³²

The Migrant Workers (Supplementary Provisions) Convention 143 of 1975 requires ratifying states to respect the basic human rights of all migrants for employment.¹³³ Member states agree to create national policies designed to promote and guarantee, "by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, **of social security**, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory".¹³⁴ Member states may conclude multilateral or bilateral agreements to resolve problems arising from the application of the Convention.¹³⁵

127 Ratified by Malawi, Mauritius and Zambia.

128 Art 6(1)(b).

129 Art 1 defines discrimination as including "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". Discrimination against non-citizen migrant workers would therefore fall under the ambit of C 111.

130 Excluding social assistance – art 10.

131 Art 3.

132 Art 7.

133 Art 1.

134 Art 10. Emphasis added.

135 Art 14.

The Maintenance of Social Security Rights Convention 157 of 1982 provides the principles for the maintenance of rights in course of acquisition and of acquired rights in respect of the branches of social security covered by the Minimum Standards Convention 102 of 1952.¹³⁶ This Convention caters specifically for those migrants (and their family members and survivors) who are subject to the legislation of one or more member state, and establishes an international system for the maintenance of rights. The principle of reciprocity lies at the heart of this Convention and it therefore extends protection only to nationals of states that themselves agree to afford protection to migrants from other countries.

ILO Conventions on social security play a significant role as minimum standards for the SADC region. Participants at the SADC Labour Relations Conference in 1999 urged SADC member states who had not yet ratified core ILO Conventions to do so. The importance of effective implementation of and compliance to minimum standards was also underscored. The Charter of Fundamental Social Rights in SADC also encourages member states to ratify and implement the relevant ILO standards.¹³⁷ This has unfortunately not occurred yet, as the Discrimination (Employment and Occupation) Convention 111 is the only Convention related to migrant workers or social security that has been ratified by all countries in the region. Even though the extension of benefits to non-citizens is encouraged by the ILO Conventions mentioned above, non-citizen migrants are still excluded by national social security legislation.

The dearth of local jurisprudence on social security rights makes it inevitable that international and comparative standards will be used to offer guidance on the interpretation of national legislation,¹³⁸ as well as the design (and interpretation) of regional standards. Unfortunately international law seems to play a larger role when it comes to social insurance measures¹³⁹ than with social assistance.

7 CONCLUSION

Much of the improvement of the situation of migrant workers in SADC will depend on the policy responses of the governments in the region. It is therefore essential that policy makers understand the plight of migrant workers. Governments should also be willing and capable of protecting and promoting social security rights.

Currently, the chief obstacle to the realisation of social security rights (in general) in the SADC region is the lack of resources to meet even the minimum international standards. As most of the countries in the region are classified as third world developing countries, it is unlikely that a

136 Excluding social or medical assistance schemes and special schemes for civil servants.

137 Art 5(b).

138 Malan and Jansen van Rensburg (2001) 78; Jansen van Rensburg (2001) 118.

139 Eg the social security system for salaried workers in Mozambique, a system based on the minimum standards set out in the ILO Convention 102 – SADC ELS Sectoral Report 2000-2001.

sudden influx of resources for social security will occur. It is therefore incumbent on the governments in the region to re-evaluate their national spending priorities to make funds available for social protection systems and to make the provision of a minimum standard of living for all a regional priority.

For a variety of reasons, unilateral action by governments in the region, and the South African government in particular, is not the ideal solution to expand the protection afforded to migrant workers. The unwillingness to take unilateral measures to expand protection to migrants "in the absence of parallel action by other governments" is related to the expenses involved and the reluctance to create the impression that benefits to migrants are not balanced with advantages to South African citizens. Hence measures such as bilateral agreements based on reciprocity are far more likely to gain the necessary public support, as they would spell out the potential advantages for South Africans.

One of the objectives of the SADC is free movement across borders within the region. Barriers to migrant workers' enjoyment of social security rights, particularly the citizenship restrictions found in national social security legislation, are in conflict with the principle of free movement and should therefore be relaxed to some degree. The only question is whether this can be best achieved through creating a common social security standard for the region, or through reciprocal agreements.

A possible strategy for the convergence of Southern African social security measures is the development of **baseline standards** for the region, possibly in the form of a model social security system. The Taylor Committee¹⁴⁰ states:

The aim of economic integration as is evident in most of the protocols and the resultant movement of labour from one SADC country to another, requires that provisions be adopted to co-ordinate current social security systems in the SADC countries. Although the Charter of Fundamental Social Rights contains more direct provisions in this regard, specific standards still need to be developed to assist the member states to fulfil their duties as expected at a regional level.

International standards can be employed as a basis for such regional standards and the jurisprudence regarding the interpretation of the international standards will be particularly useful as guidelines for interpreting the regional standards. That said, it must be emphasised that standards set for other regions, and the minimum thresholds contained therein, will have to be adapted to developing countries and their limited finances. And even such adapted standards will have to make provision for a variation in the definition and application of the right to social security as contained in such standards, depending on the state of the economies in different countries in the region.¹⁴¹ The end result might be a thoroughly diluted minimum standard set for the region that would hardly constitute a real advance on the position of migrant workers.

140 Consolidated Report (2002) 153.

141 Lillmann (2001) 51.

As was indicated above, there currently is minimal co-ordination of social security in the region. To achieve the objectives of regional integration as stated in the SADC Treaty, a co-ordinated approach to social security is required. Agreement (even if initially voluntary and bilateral) should be reached on common objectives that will form the basis of co-ordination. The relevant ILO Conventions and Recommendations can provide the framework in terms of which social security agreements can be concluded.¹⁴²

Mention was made previously of the unique social needs in the region and the importance of social protection measures in addition to purely financial grants and benefits. Informal/community-based social security measures have been shaped by the people of the region themselves and these innovative forms of social protection should be actively encouraged. This would also ease the burden of the respective governments to provide formal social security benefits. As a result of the community-specific nature of these benefits, they are not required to form part of the co-ordination process, but could serve as additional protection to those migrants excluded from formal social security.

The possible lessons that can be learnt from European social integration and the measures to co-ordinate social security were set out above. The European co-ordination structures and their underlying principles serve as a useful point of reference for future developments in the SADC region. Then again, much has to happen on the economic and social development front in the SADC region before any plans of translating the European system to this region can be tabled. A co-ordination system based on the principle of equal treatment (reciprocity) is at this stage not possible on account of the dissimilar stages of development of social security structures in the region.

A workable approach to co-ordination of social security in the region is to focus legal and institutional reforms on one branch of social security at a time, for example, ensuring that all countries in the region have some form of compensation for occupational injuries and diseases. The focus of such co-ordination efforts should initially be on the exportability of benefits and determination of applicable law. The provisions of Regulation 1408/71 can be useful as guidelines for these co-ordination measures. Once satisfactory progress is made on the co-ordination of one branch of social security, the co-ordination efforts can be extended to cover the remaining branches.

Harmonisation of social security provisions is a complicated process, particularly in Southern Africa with its diversity of social security systems. On the other hand, many countries in the region are in any case overhauling the content of their social security systems. Countries redesigning their social security systems could base their social protection reforms on agreed-upon fundamental values and principles, which could form the first step in the process of harmonisation of social security in the region.

142 And in particular the principles for integration established by the ILO Conventions, namely determination of applicable legislation, maintenance of acquired rights (exportability) and maintenance of rights in the course of acquisition.

Finally, South Africa will remain the major host country of migrant workers in the region for the foreseeable future. Barring regional social protection measures, some unilateral improvements to the treatment of migrant workers in South Africa are required. Legislative barriers to the enjoyment of social security rights by everyone, including migrant workers, should therefore be restricted in order to comply with the constitutional imperative under section 27 and international standards. The state should be required to take steps to enable non-citizens to access social security.¹⁴³ These legislative measures will have to be supplemented with administrative actions to implement the extension of social protection to migrant workers.

Bibliography

- Barbone I. and Sanchez Bl. "Pensions and social security in Sub-Saharan Africa" Paper presented at the XIII International Social Security Association African Regional Conference, Ghana 1999
- Ben-Israel R "Social Security in the Year 2000: Potentialities and Problems" ISL.ISS XIVth World Congress, Seoul, 1994
- Committee of Enquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present - Protecting the Future* (Consolidated Report) March 2002
- Council of the European Union "Proposal for a Regulation of the European Parliament and of the Council on the coordination of social security systems - Parameters for the modernization of Regulation (E.E.C) No 1408/71" 15045/01
- Dekker A "Social Security for those who Work Informally, and Informal (Community- and Family-Based) Solutions to Social Protection" in Olivier *et al The extension of social security protection in South Africa* 2001 SiberInk
- Department of Labour "Communique of the SADC Labour Relations Conference" 13-15 October 1999, Johannesburg
- European Commission "A Concerted Strategy for Modernising Social Protection" COM (99) 347
- European Parliament "Fundamental Social Rights in Europe" *Social Affairs Series* SOCI 14 EN-02/2000 www.europarl.eu.int/workingpapers/soci.104/part2_en.htm
- Eurostat "The social situation in the European Union 2002" www.europa.eu.int/comm/eurostat
- Fultz E and Pieris B "Social security schemes in Southern Africa" ILO/SAMAT Discussion Paper No. 11 (1999)
- Fultz E and Pieris B "The Social Protection of Migrant Workers in South Africa" ILO/SAMAT Policy paper No 3 (1997) Zimbabwe

¹⁴³ HRC Report (2003) 228, 230 and 231.

- Gillion C "Health care and pensions in developing countries: The basis for strategy" 1993 *International Labour Review* (132) 161
- Iyer SN "Pension reform in developing countries" 1993 *International Labour Review* (132) 187
- ILO Discrimination (Employment and Occupation) Convention 111 of 1958
- ILO *Social security for migrant workers* 1996 Geneva
- Liffmann R "Social Security as a Constitutional Imperative" in Olivier *et al The extension of social security protection in South Africa* 2001 SiberInk
- Malan S and Jansen van Rensburg L "Social Security as a Human Right and the Exclusion of Marginalized Groups: An International Perspective" in Olivier *et al The extension of social security protection in South Africa* 2001 SiberInk
- Olivier M *et al* (eds) *Social security law – general principles* 1999 Butterworths
- Olivier M "Some trends and critical issues in South African Social Security" Paper presented at regional workshop in Cape Town March 1998
- Pieters D *Introduction into the Basic Principles of Social Security* (1994)
- South African Human Rights Commission *Fourth Annual Economic and Social Rights Report* (2003)
- South African Migration Project "Challenging Xenophobia: Myths & Realities about Cross-Border Migration in Southern Africa" Migration Policy Series No 7 (1998)
- South African Migration Project "Draft Protocol on the Free Movement of Persons in the Southern African Development Community" 15 March 1996
- South African Migration Project "Immigration, Xenophobia and Human Rights in South Africa" Migration Policy Series No. 22 (2001)
- Taylor V "Social Protection Challenges in Southern Africa" *Cooperation South* (2) 2001 49–65
- Van Ginneken W "Social security for the informal sector: Issues, options and tasks ahead" 1996 ILO Working paper
- World Development Report 2003
- Von Steenberge J and Jorens Y "New challenges for European Social Security" in Olivier *et al The extension of social security protection in South Africa* 2001 SiberInk