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# Co-ordination and integration of social security in the SADC region: developing the social dimension of economic co-operation and integration\*

## Summary

This article focuses on the need for developing a distinct social security paradigm in the SADC region in order to address poverty alleviation at a regional level and to address the challenge posed by the task of coordinating social security systems in the sub-continent. The paper departs from the premise that economic co-operation and integration is not an alone-standing aim, but has to be accompanied by development in the social sense. The contribution highlights the sheer extent of the inadequate social protection provisioning in the SADC region and the apparent failure of domestic social security measures to address poverty alleviation meaningfully and to bring about the social inclusion and participation of large numbers and significant categories of people who have effectively been left out. The article also examines different possibilities for the co-ordination of social security measures in SADC, bearing in mind experiences elsewhere in the world.

## Koördinerings en integrasie van sosiale sekerheid in die SAOG streek: ontwikkeling van die sosiale dimensie van ekonomiese koördinerings en integrasie

Die artikel fokus op die behoefte aan die daarstelling van 'n duidelike paradigma ten aansien van sosiale sekerheid in die SAOG streek ten einde die verligting van armoede op 'n streeksbasis aan te spreek asook die uitdaging om sosiale sekerheid stelsels op die sub-kontinent te koördineer. Die vertrekpunt van die artikel is dat ekonomiese samewerking en integrasie nie 'n geïsoleerde doelwit kan wees nie, maar gepaard moet gaan met sosiale ontwikkeling. Die bydrae beklemtoon die omvang van die onvoldoende sosiale beskermingsmaatreëls in die SAOG streek en die mislukking van plaaslike sosiale sekerheidsmaatreëls om verligting van armoede sinvol aan te spreek en om sosiale insluiting en deelname van 'n groot aantal en duidelike kategorieë van mense wat huidiglik uitgesluit word. Die artikel ondersoek ook die verskillende moontlikhede beskikbaar vir die koördinerings van sosiale sekerheidsmaatreëls in die SAOG, met in agneming van die ondervinding elders in die wêreld.

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## 1. Introduction

The paper focuses on the need for developing a distinct social security paradigm in the SADC (Southern African Development Community) region in order to address poverty alleviation at a regional level and, with this purpose in mind, the challenge posed by the task of co-ordinating social security systems in the sub-continent. The paper departs from the premise that economic co-operation and integration is not an alone-standing aim, but has to be accompanied by development in the social sense.

The contribution highlights, amongst others, the sheer extent of the inadequate social protection provisioning in the SADC region and the apparent failure of domestic social security measures to address poverty alleviation meaningfully and to bring about the social inclusion and participation of large numbers and significant categories of people who have effectively been left out, amongst whom the migrants of other SADC member countries. This is not only in the social and societal sense of the word, but also from the social protection system itself. This flows from the fact that most of the country social protection systems almost exclusively cater for the whole or part of the formally employed on a territorial basis, thereby marginalizing citizens from other SADC countries who migrate within the SADC region.

It would, therefore, so the paper argues, appear imperative to adopt measures in the region that could deal with these deficiencies not only holistically and comprehensively, but also incrementally. It would also appear that the mere transformation of the domestic systems to accommodate these crucial aspects of social security could only provide a partial solution. This is so because this would put impossible strain on the social security systems of, in particular, the small and impoverished countries of the region. In addition, the growing interdependence in the region and the more extensive migration of the region's workers and residents would ask for some kind of common response. Therefore it would then be necessary to adopt measures at regional level in order to deal effectively with the inadequacies in the systems with which countries cannot cope on their own.

The paper finally examines different possibilities for the co-ordination of social security measures in SADC, bearing in mind experiences elsewhere in the world (especially in Europe), considering the possibility of adopting an international minimum standards and human rights baseline approach for purposes of social security co-ordination in the region, the importance of factoring in African and Southern African values, the introduction of specific co-ordination mechanisms and structures in order to protect and regulate the position in social security (law) of residents of SADC countries when migrating within the region and finally, principles underlying the development of social security systems in the different SADC countries in a way which would support the co-ordination attempt.

## 2. The socio-economic background

The SADC region is one of the poorest regions in the world. The SADC countries share common problems. They share the experience of being confronted by, *inter alia*, high levels of unemployment and under-employment, poverty, and the HIV/AIDS pandemic. In addition, they are relatively interdependent and share a common legacy in many respects, such as through their economic interdependence with South Africa as the hub. The countries are, secondly, linked through the phenomenon of labour migration of which the primary trend entails migration from the other neighbouring countries to South Africa, but which also entails inter-country migration among other countries. The countries, thirdly, share a similar legacy in that they were initially colonised primarily because of the need to exploit primary commodities and that subsequently some of them (South Africa, Mozambique, Zimbabwe and Zambia) were colonised and settled in such a manner that the racial discrimination evolved to influence a number of social and political outcomes in the region.

## 3. Social protection in the SADC region

### 3.1 General characteristics

Social protection in the SADC region has, *inter alia*, the following distinctive characteristics:

- Un- and underdeveloped state of social security. Most of the SADC member states have undeveloped or underdeveloped social protection. Coverage of targeted populations tends to be narrow, leaving the most vulnerable across the region, in particular those in rural areas, without any form of social protection. The benefits paid by many schemes are inadequate to meet basic needs. In the case of non-contributory schemes, a heavy reliance on general tax revenues strains government financing, keeping benefits at low levels in most countries. Moreover, the social welfare/assistance schemes (or non-contributory schemes) are still in an embryonic stage, and the number of beneficiaries has been low as well as the benefits.<sup>1</sup>
- Lack of co-ordination in the region. There is a serious lack of co-ordination of social protection schemes in the region. Co-ordination of social security is presently almost totally absent in the region. The few

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1 Mauritius and, to some extent, South Africa are two notable exceptions. Mauritius has a generous family allowance system, and continues to offer free education, free health services and even subsidised food. In South Africa the popular but means-tested state-provided old age, disability and child support grants fulfil an extremely important function as poverty relief measures and reach sizable numbers of those who fall within the said categories.

examples that do exist do not function satisfactorily,<sup>2</sup> while attempts to enter into more comprehensive arrangements still have to bear fruit.<sup>3</sup>

- Administrative inertia and institutional inefficiency. Administrative inertia and institutional inefficiency in the area of social security delivery are, with some notable exceptions, apparently major obstacles. And yet it would appear that tailor-made solutions, for example, relying on non-governmental and community-based organisations<sup>4</sup> and traditional authorities,<sup>5</sup> to assist in this regard, have been relatively successful.
- Exclusion and marginalization. Migrant workers are (together with the informally employed) in most countries of the region, excluded and marginalized from social security coverage. It would appear that the lack of protection granted to migrant workers in the field of social security is one of the root causes of social exclusion in Southern Africa. Both the social security and social assistance systems in most SADC countries are, as a rule, territorial- and nationality-based. Mauritius is one of the few examples where the overall social security system is residence-based. In addition, the exclusion of non-citizens in social security terms serves as an impediment as far as the development of coherent social security mechanisms in the region is concerned. In short, the precarious position of non-citizens stresses the need for adopting comprehensive measures of social security co-ordination, on a bilateral and (preferably) multi-lateral basis.

## 3.2 An overview of social protection at SADC level: Regional instruments

### 3.2.1 The SADC Treaty and general developments

SADC objectives as set out in the founding Treaty aim at the promotion of economic and social development, the establishment of common ideals and institutions, among other objectives.<sup>6</sup> In August 1992, SADCC (as the organization was initially known) was transformed into SADC. The emphasis

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2 For example, in terms of a bilateral arrangement employment injury benefits in respect of returning Mozambican citizens who worked on South African Mines used to be paid out in Mozambique through government channels. This proved to be highly unsuccessful, with little of the benefits reaching the actual beneficiaries. See Fultz and Pieris 1997:11.

3 Some countries of the region (e.g. Zimbabwe and Lesotho) argue that since South Africa has relied extensively on and benefited so much from migrant mine workers from across the region, it indebted to extend social protection to mine workers who eventually return to their home countries, and who would otherwise be without cover. See. Fultz and Pieris 1997:11.

4 As often happens in South Africa.

5 In Swaziland, the public assistance system is accessible on recommendation of community leaders at grassroots level and the regional social worker who assesses the need.

6 See generally article 5.

of the organisation changed from “development coordination” to developmental, economic<sup>7</sup> and regional<sup>8</sup> integration”. The Treaty, as is the case with its antecedent Protocols,<sup>9</sup> is a legally binding document providing an all-encompassing framework, by which countries of the region shall co-ordinate, harmonise and rationalise their policies and strategies for sustainable development in all areas of human endeavour. The Treaty commits Member States to fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy and rule of law, equity, balance and mutual benefit.<sup>10</sup> According to article 5 of the Treaty, some of SADC’s objectives are to achieve development and economic growth, alleviate poverty, enhance the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. “Human resources development” and “social welfare” are specifically mentioned as areas on which SADC member states agreed to co-operate with a view to foster regional development and integration, and in respect of which the member states undertook, through appropriate institutions of SADC, to coordinate, rationalize and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects.<sup>11</sup> Therefore, in order to achieve these ideals, a programme of regional integration, collective self-reliance and interdependence of member states is envisaged.

### 3.2.2 The Charter of Fundamental Social Rights in SADC

A Charter of Fundamental Social Rights in SADC<sup>12</sup> that underpins the need for social protection, in particular of workers and vulnerable groups, has been agreed and is now open for ratification by SADC member states.<sup>13</sup> The Charter makes comprehensive provision for the establishment of harmonised programmes of social security throughout the region.

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7 The Preamble of the Treaty emphasises the importance of economic interdependence and integration, while SADC is defined as “the organisation for economic integration established by article 2 of the Treaty” (see article 1).

8 One of the objectives of the Community is to “achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration” — article 5(1)(a)). The Preamble also refers to the “need to mobilise our won and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration”.

9 The definition of “Protocol” in article 1 of the Treaty refers to a Protocol as an instrument of implementation of the Treaty, having the same legal force as the Treaty.

10 Article 4.

11 Article 21.

12 ELS.MSP/2000/4.2.5. The final version is dated 10 August 2001.

13 The Charter refers to the SADC Treaty and recalls the objectives contained in article 5 of the SADC Treaty.

As mentioned above, the SADC region is one of the poorest regions in the world. It is widely appreciated that issues such as the low economic growth rate, unemployment and underemployment, social exclusion and marginalisation, as well as the inadequacy of current labour and social protection standards and regulations must be addressed in the context of the regional integration agenda of SADC. In this regard the Charter recalls some of the significant objectives of the SADC Treaty, namely to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through SADC regional integration. This objective can only be reached through the creation and development of viable social protection measures and structures throughout the region.

The Charter contains provisions relating to the social protection of both workers and those who are not employed — and regulates the position of workers (in terms of social protection) more comprehensively than those who do not work. Article 10 is the lead article in this regard, and stipulates as follows:

SADC Member States shall create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.

The Charter requires equal treatment for men and women, and in particular equal opportunities to both men and women in, amongst others, the area of social protection.<sup>14</sup> Member states are also required to develop reasonable measures to enable men and women to reconcile their occupational and family obligations.<sup>15</sup> Protection of children and young people is emphasised,<sup>16</sup> while member states undertake to create an enabling environment in accordance with arrangements applying to each country to protect the elderly. This protection relates to both workers in respect of whom retirement provision exists, and every other person who has reached retirement age, but in respect of whom no entitlement to a pension exists and who does not have other means of subsistence. As far as the former are concerned, the Charter stipulates that every worker of the SADC region shall at the time of retirement be able to enjoy resources affording him or her a decent standard of living, including equity in post employment security schemes.<sup>17</sup> With regard to the latter, the Charter determines that such a person shall be entitled to adequate social assistance to cater specifically for basic needs including medical care.<sup>18</sup>

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14 Article 6(b).

15 Article 6(c).

16 Article 7.

17 Article 8(a).

18 Article 8(b).

Persons with disabilities are also given priority in the Charter. Member states are required to ensure that persons with disabilities, irrespective of the origin and nature of their disablement, are entitled to comprehensive additional concrete measures aimed at improving their social and professional integration.<sup>19</sup>

Minimum requirements and the harmonisation of these requirements are also foreseen, *inter alia* in the area of paid maternal leave and occupational health and safety protection.<sup>20</sup>

The onus to implement the SADC Charter lies with the national tripartite institutions and existing regional structures. All member states are required to submit regular progress reports to the annual tripartite sectoral meeting – the most representative organisation of employment and workers must be consulted in the preparation of the report.<sup>21</sup>

### 3.2.3 Some conclusions

As discussed above, the SADC region is one of the poorest regions in the world. It is widely appreciated that issues such as the low economic growth rate, unemployment and underemployment, social exclusion and marginalisation, as well as the inadequacy of current labour and social protection standards and regulations must be addressed in the context of the regional integration agenda of SADC. In this regard the Charter recalls some of the significant objectives of the SADC Treaty, namely to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through SADC regional integration. This objective can only be reached through the creation and development of viable social protection measures and structures throughout the region. A regional collaborative approach is therefore required. This approach should include all governmental as well as non-governmental sectors of society in order to address the issues of universal social protection for all in the region. It is, therefore, important to start this process by identifying current social protection measures in the SADC region, and evaluating the extent to which these successfully relate to and address issues of poverty and social exclusion, and enhance the standard and quality of life.

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19 Article 9.

20 Article 11(a).

21 Article 16(1). Article 16(2) stipulates that these institutions and structures must promote social legislation and equitable growth within the Region and prevent non-implementation of the Charter.

### 3.3 Recent developments in SADC member states

Most of the countries in the region have recently embarked on innovative processes of positively developing, strengthening and restructuring their social protection systems. Some of these processes and the results flowing from them can be summarised as follows:

- (a) Some countries, notably South Africa<sup>22</sup> and Namibia, have embarked on major reform initiatives, in an attempt to overhaul their social protection systems comprehensively in an attempt to deal effectively with exclusions and marginalisations in the system and with the need to address poverty holistically and in an integrated fashion from a social protection point of view;
- (b) In a substantial number of countries there has been a clear transition from national provident fund to public pension fund systems;<sup>23</sup>
- (c) Some countries in the region have introduced short-term benefits as a first step towards developing the social security system holistically;<sup>24</sup>
- (d) In many of the SADC countries there has unmistakably been a significant increase in the number of beneficiaries benefiting from the existing protection or from new forms of protection introduced, indicating that service delivery in some environments is increasingly being streamlined;<sup>25</sup>
- (e) A renewed appreciation of the role of informal forms of social security is evident, leaving policy-makers grappling with questions such as how to deal with and strengthen and/or regulate this phenomenon, and how to dovetail it with the formal system;<sup>26</sup>
- (f) SADC Member States are increasingly aware of the importance and urgency of co-ordinating the social security systems of the region, *inter alia* in view of increased migration and the requirements of enhanced integration in the region; and

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22 This has led to the establishment of a Ministerial Committee of Inquiry into a Comprehensive Social Security System in 2000; the Minister of Social Development has recently released the Committee's draft report entitled *Transforming the present — Protecting the future: Draft consolidated report* (March 2002).

23 The transition has already occurred in Tanzania and Zambia and (in principle) in Namibia, while some other countries are contemplating a similar transition/development.

24 This is in particular true of the highly successful system recently introduced in Namibia and implemented by the newly established Social Security Commission.

25 This appears to be the case in, amongst others, erstwhile war-torn Mozambique: see Garcia, *A Mozambique Country Profile* (prepared for a SADC Conference on Social Security, entitled "Towards the Development of Social Protection in the SADC Region"), held at Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (p 12 and further — Appendix).

26 Substantial research in this area, culminating in provisional policy proposals, has been undertaken in, amongst others, South Africa, Tanzania, Zimbabwe and Zambia. See generally Van Ginneken 1999 and Lund and Srinivas 2000.



(g) A growing interest in prioritising social protection policy-making, innovative social security approaches, structures and models, and in identifying “best practices” is clearly evident.

## 4. Improving social protection in the SADC

### 4.1 Improving social protection of SADC member states citizens as migrants in SADC

#### 4.1.1 General principles and considerations

The broad possibilities in terms of extending social protection to migrants are fairly well known and generally applied. These measures apparently distinguish between social insurance (security) and social assistance measures. Vonk succinctly sums up the position:<sup>27</sup>

The international community has a long standing tradition in protecting the social security of migrants through a network of instruments for the co-ordination of social security schemes. These instruments provide for the equal treatment of national and foreign subjects, for the exportability of certain types of benefits, and for the aggregation of insurance periods fulfilled under different national social insurance schemes. Furthermore, they establish a choice for the competent legislation which is applicable in transnational situations. However, it appears that these co-ordination instruments can do little to improve the position of migrants within minimum subsistence benefit schemes. Traditionally, they only cover social insurance schemes which are related to a number of internationally recognised social risks, such as sickness, unemployment, invalidity, and old age.

In the context of social security, the pertinent legislative provisions of European Community law<sup>28</sup> may be instructive and are to be found primarily in the following:<sup>29</sup>

- the Council Directive on equal treatment for men and women,<sup>30</sup> requiring member states to eliminate discrimination between men and women in matters of social security;<sup>31</sup>
- the Council Regulation on freedom of movement for workers,<sup>32</sup> prohibiting discrimination against workers in relation to social advantages on the ground of nationality; and

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27 Vonk 1991:483-484.

28 Hereinafter referred to as EU.

29 See Goosen *et al* 1999:563-571.

30 Council Directive 79/7 OJ L6, 10.1.79, 24.

31 *Ibid.*

32 Council Regulation 1612/68 OJ L257, 19.10.68, 2.

- the Council Regulation on social security for migrant persons,<sup>33</sup> promoting freedom of movement of employed and self-employed persons by eliminating the disadvantages which would be suffered by migrant workers from the application of national social security provisions alone.

EU member states citizens who migrate within the EU are, therefore, entitled to the protection afforded by these instruments. For example, article 7(2) of Regulation 1612/68 requires that migrant workers and their families enjoy the same social and tax advantages as nationals.<sup>34</sup>

The principles of choice of law, non-discrimination, aggregation, maintenance of acquired rights and exportability of benefits are, therefore, widely known<sup>35</sup> and applied, even elsewhere in the African context,<sup>36</sup> albeit sometimes on a qualified basis.<sup>37</sup> And yet, both on a bilateral and multilateral basis these arrangements are conspicuous by their almost total absence in the SADC context. This may be ascribed partly to the colonial heritage of these countries, partly to the lack of a history of regional and economic integration (at least before the 1990s), and partly to the sheer extent of poverty in the member countries, which tended to shift the focus in social matters to domestic needs and solutions.

On the one hand, strong incentives to develop measures of co-ordination as far as regional migration is concerned, may be less apparent in the SADC Treaty than in the EU counterpart instruments. For example, the non-discrimination rule contained in the Treaty does not cover discrimination based on nationality or citizenship.<sup>38</sup> Furthermore, the freedom of movement principle is couched in much weaker terms than the EU counterpart. Article

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33 Council Regulation 1408/71 OJ L149, 5.7.71, 2; OJ L28, 30.1.97, 1.

34 Council Regulation 1612/68 OJ L257, 19.10.68, p 2 art 7 (2). This provision applies to every social and tax advantage, whether or not linked to a contract of employment, generally granted to claimants as a result of their objective status as workers or due to the fact that they reside in national territory: Case 63/7 *Inzirillo v Caisse d'Allocations Familiales de l'Arrondissement de Lyon* 1976 ECR 2057, 1978 3 CMLR 596, ECJ. See also Case 187/73 *Callemeyn v Belgian State* 1974 ECR 553, ECJ; and Case 32/75 *Cristini v Société Nationale de Chemins de Fer Français* 1975 ECR 1085, 1976 1 CMLR 573, ECJ. 'Social advantages' include not only benefits granted by right but also benefits of a discretionary nature: Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* 1982 ECR 33, 1982 1 CMLR 744, ECJ; Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn* 1985 ECR 973, 1987 3 CMLR 638, ECJ; and Case 122/84 *Scrivner and Cole v Centre Public d'aide Sociale de Chastre* 1985 ECR 1027, 1987 3 CMLR 638, ECJ. See also Case C-310/91 *Schmidt v Belgium* 1993 ECR I-3011, 1995 2 CMLR 803, ECJ (the derived rights of members of a worker's family under EC Council Regulation 1408/71 OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, 1, are a social advantage to the worker and may not be taken away on the ground of nationality).

35 See also ILO 1989:151-159.

36 Cf Kaufmann 1988:399-417.

37 Kaufmann 1988:400 indicates that non-contributory benefits are often not made available to foreigners.

38 See article 6(2).

5(2)(d) of the Treaty does not regulate the matter conclusively, but requires of SADC to “develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States”. Moreover, the institutions of SADC are still not well developed or not yet operational.<sup>39</sup> Finally, the un- and underdeveloped state and diverse nature of the social security and protection systems of the Region can only complicate an already immensely difficult task of co-ordinating the systems.

And yet, on the other hand, as indicated elsewhere in this contribution, there is ample reason why it is imperative to adopt measures to co-ordinate the said systems. The growing extent of regional integration and migration and the realisation that collective and co-ordinated approaches are needed to foster integration and to deal effectively with the region’s massive problems, would require adopting innovative approaches. Extending protection to migrants within the Region who are citizens of member states is an indispensable part of this. Without making any attempt to exhaust the issues, it is suggested that both regional and unilateral approaches would be required.<sup>40</sup> As indicated above, the activities to be undertaken in the Region in the area of social protection also foresee the harmonisation of social security schemes in the Region, and the introduction of conditions and methods of cross-border payments of social security benefits.

#### 4.1.2 Regional responses

From a regional perspective, as far as social insurance is concerned, as a matter of policy and principle, it is certainly possible to introduce principles relating to choice of law, aggregation of insurance periods, maintenance of acquired rights and exportability of benefits, at least, but not necessarily restricted to, same or similar schemes. Inequality in benefit levels can be addressed by reliance on a principle operative in the EU context, namely that the beneficiary can claim the difference from the State which has the more generous arrangement, even though the base amount is paid by the State indicated by the choice of law provisions according to that State’s social security laws.<sup>41</sup>

Given the diversity of schemes in the region, as a starting point one would have to identify those areas where common elements are present. Employment injury schemes could be the ideal first candidate. These schemes are present in all the member states, sometimes as a public system, sometimes outsourced to private insurers, and sometimes treated as an individual employer liability.

It may also be possible, if not necessary in the long run, given the varied public/private nature of some of schemes in the region (for example retirement), to enter into some kind of asymmetrical reciprocity on a bi- or

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39 As is the case with the Tribunal.

40 See also Fultz and Pieris 1997:13-20.

41 *De Felice v INASTI* [1989] ECR 923.

multilateral basis, whereby different types of benefits are linked. For example, as Fultz and Pieris indicate,<sup>42</sup> it may be possible that countries that have contributory pension schemes of a public nature, may negotiate with South Africa on (other) benefits it provides.

However, one would think that the need for social protection and co-ordination in this area is of even greater importance than co-ordinating social security/insurance schemes. This flows from the extreme poverty in certain SADC countries, the vast number of those who are presently excluded from protection, the emphasis in the SADC Treaty on poverty alleviation and social welfare, and the focus in the Social Charter of Fundamental Rights on a decent standard of living for (ex) employees and adequate social assistance for (at least) those who retire. Here again, innovative thinking may be required. It would appear that it might be required to adopt certain country-specific minimum standards (using a measurable or fixed criterion such as (a percentage of) minimum wage as the appropriate benchmark), preferably on a multi-lateral basis, and extend this to citizens of other SADC member states (and their families/dependants) who migrate within the region. The EU soft law instruments referred to above may be particularly helpful in this regard. This would probably require a stronger anti-discrimination principle than the one contained in the SADC Treaty.

#### 4.1.3 Unilateral (country-specific) measures

Finally, much can be achieved by way of unilateral action, which may help towards creating a culture of accommodation within the region. The strong human rights-based approach in South Africa has already had a major impact on addressing the plight of particularly vulnerable groups in South African social security.<sup>43</sup> As indicated above, non-citizens constitute another marginalised group in the social security systems of the region. This is an area where governments and jurisprudence can do much to extend protection to migrants within the region. As a very minimum, discriminatory provisions in social security laws marginalising citizens of other SADC member states should be removed.

## 4.2 Development of a baseline approach

### 4.2.1 General considerations

An important question that needs to be addressed is the possibility of setting standards at the regional and country level with regard to the most basic social protection functions that a state has to fulfil. Is the setting of standards at all viable considering that SADC member states have different

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42 At 15.

43 Cf *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 BCLR 1169 (CC) (housing provision to be made to those without any form of temporary shelter).

levels of economic development? Should the yardstick for measuring compliance with its social protection duties be of an international, regional or national (even constitutional) nature?

It has to be noted again that in keeping with the general tenor of the SADC treaty, the Charter of Fundamental Social Rights foresees the development of minimum standards and the establishment of harmonised programmes of social security and labour law protection throughout the region.<sup>44</sup> This it does by stipulating the principles which should apply with regard to social security coverage and provision, and not by enumerating and detailing specific measures that the member states should take. That would, in any event, be nearly impossible to achieve, given the divergent nature and status of the systems in the region at present, as well as the un- and underdeveloped nature of many of the country systems. In the event of labour law protection the relevant ILO instruments are often referred to.

Some of the principles laid down by the Charter, which could serve as guidelines for developing and improving social protection systems and models in the region, are the following:

- (a) Every worker should have the right to adequate social protection, in the sense of adequate social security benefits.<sup>45</sup>
- (b) Those who are outside the labour market and who have not means of subsistence, must receive sufficient resources and social assistance.<sup>46</sup>
- (c) Men and women should enjoy equal treatment in the area of social protection.<sup>47</sup>
- (d) At retirement workers must be able to enjoy a decent standard of living, including equity in post employment security schemes.<sup>48</sup>
- (e) People who have reached retirement age but who are not entitled to a pension and who do not have other means of subsistence, are entitled to adequate social assistance to cater specifically for basic needs, including health care.<sup>49</sup>
- (f) Persons with disabilities should be entitled to additional concrete measures aimed at improving their social and professional integration.<sup>50</sup>

Of importance is also the identification of the actors in the process of developing these standards. Ideally, according to the Charter, this should be

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44 See, for example, the provisions of article 2(1), relating to the objectives of the Charter; article 3 with regard to the observance of basic rights referred to in the Charter; article 5 with regard to the adoption of ILO minimum standards; and articles 11(a) and 12 with regard to the areas of paid maternal leave and occupational health and safety protection respectively.

45 Article 10.

46 Article 10.

47 Article 6(b).

48 Article 8(a).

49 Article 8(b).

50 Article 9.

the responsibility of national tripartite institutions and existing regional structures.<sup>51</sup>

#### 4.2.2 Developing a common baseline for country compliance

One of the possibilities that can be envisaged, is the adoption of internationally accepted minimum standards for the region, preferably by way of a multilateral instrument. The ILO Convention on minimum standards in social security, Convention 102 of 1952, could wholly or partly serve as a baseline containing such standards in the area of social protection. However, given the divergence and un- as well as underdeveloped state of social security systems in most of the SADC countries, one should leave some room for adopting different (national) yardsticks, at least initially, to measure compliance with the said standards. Practically this would mean that a particular member state's socio-economic situation has to be considered when compliance is measured. This approach is not a foreign one — for example, the supervisory body under the European Social Charter adopts a similar approach when evaluating whether a country has complied with the provisions of the Charter.

Here again, innovative thinking may be required, as suggested above in relation to the social protection of citizens of SADC member states who migrate within the region. As mentioned, it would appear that it might be required to adopt certain country-specific minimum standards (using a measurable or fixed criterion such as (a percentage of) minimum wage as the appropriate benchmark), preferably on a multi-lateral basis, and extend this to citizens of other SADC member states (and their families/dependants) who migrate within the region. Similar EU (soft law) instruments may be particularly helpful in this regard. These measures attempt to foster some measure of synergy and co-ordination in the area of social assistance. As measures aimed at eradicating social exclusion and supporting social justice and the dignity of human beings, these measures suggest the adopting of a minimum level of protection for all residents,<sup>52</sup> the establishment of common criteria concerning sufficient resources and social assistance in social protection systems,<sup>53</sup> and the convergence of social policy objectives.<sup>54</sup> Country-specific indicators are suggested as a benchmark, which implies that harmonisation in the true sense of the word is not contemplated.

#### 4.2.3 Developing baselines for regional purposes

A baseline approach at regional level is also required. While outright harmonisation in the traditional sense of the word of the various country social protection schemes may not be a realistic option in the short- and medium term, measures aimed at co-ordinating the various systems must as a matter or priority be developed. This flows from the increased migration

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51 Article 16.

52 See the Community Social Charter of 1989.

53 Council Recommendation 92/441/EEC.

54 Council Recommendation 92/442/EEC.

in the region, and the poor state of social protection extended to SADC member state citizens who so migrate, both by the host country and the country of origin.

As suggested above in relation to migrating citizens of SADC member states, the introduction of principles relating to choice of law, aggregation of insurance periods, maintenance of acquired rights and exportability of benefits, at least, but not necessarily restricted to, same or similar schemes, should be seriously considered.<sup>55</sup> This is not necessarily foreign to the SADC context, as appears from the provisions of, for example, the draft Protocol on Freedom of Movement of Persons in the SADC (concluded in May 1998).<sup>56</sup> Two important general principles relating to residence and establishment in other member states are, amongst other, contained in the Protocol: the equal enjoyment in principle of freedoms and privileges enjoyed by citizens of the particular member state; and the maintenance of rights of residence or establishment acquired in another member state.<sup>57</sup>

As suggested above, given the diversity of schemes in the region, as a starting point one would have to identify those areas where common elements are present.<sup>58</sup> It may also be possible, if not necessary in the long run, given the varied public/private nature of some of schemes in the region (e.g. retirement), to enter into some kind of asymmetrical reciprocity on a bi- or multilateral basis, whereby different types of benefits are linked.<sup>59</sup>

#### 4.2.4 The importance of a human rights framework

An appropriate human rights framework may go a long way to strengthen and direct the extension of social protection in SADC member states. The origin of such an approach could be international in character: some of the countries have, for example, ratified the International Covenant of Economic, Social and Cultural Rights. This implies that the fundamental rights regime foreseen in the Covenant, in particular relating to social protection, is applicable to those countries.<sup>60</sup>

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55 Inequality in benefit levels can be addressed by reliance on a principle operative in the EU context, namely that the beneficiary can claim the difference from the State which has the more generous arrangement, even though the base amount is paid by the State indicated by the choice of law provisions according to that State's social security laws: *De Felice v INASTI* [1989] ECR 923.

56 Known as the Draft Protocol on the Facilitation of Movement of Persons in the Southern African Development Community (SADC), reproduced in <<http://www.queens.ca/samp/migdocs/protocol.htm>>.

57 Chapter IX; articles 22-23.

58 In particular employment injury schemes.

59 See par 3.1.2. above.

60 See also article 3(1) of the Charter, which stipulates that "This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments".

However, the origin of such an approach could also be national or constitutional in character.<sup>61</sup> South Africa may serve as an example of such a development.

#### 4.2.5 The South African Constitution: A human-rights based approach towards social protection

The South African Constitution unashamedly favours a human-rights friendly approach by giving special protection to certain fundamental rights. The Constitution contains a Bill of Rights that addresses both civil and political rights as well as socio-economic rights. No reference is made in the Bill of Rights to the traditional division<sup>62</sup> between first, second and third generation rights. Social rights have exactly the same status as other civil and political rights.<sup>63</sup> The notion of not differentiating between this apparent “categories” of rights places emphasis on the fact that these rights are interrelated, interdependent and indivisible.<sup>64</sup> The interrelatedness of these rights, in particular in the South African context, has recently been emphasised by the Constitutional Court. The Court has made it clear that realising a particular socio-economic right, such as the right to access to housing, would require that other elements which do at times form the basis of particular socio-economic rights, such as access to land, must be in place as well.<sup>65</sup> Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life.

Some of these rights operate in the labour relations sphere and grant comprehensive protection as far as the right to freedom of association, the

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61 It should be noted that the so-called international approach and the so-called national or constitutional approach are not necessarily mutually exclusive. Very often, as is the case in South African constitutional jurisprudence, the provisions of the international instruments are used as useful tools of interpretation (see section 39(b) of the Constitution 108 of 1996). Of course, the provisions of these international instruments must be applied if they have been ratified — see section 231-233 of the Constitution.

62 Traditionally, a distinction has been made between first (civil and political), second (socio-economic) and third generation rights. The United Nations perpetuated this distinction between first, second and third generation rights by introducing two separate Covenants. The first Covenant contains only first-generation rights and the second Covenant contain second- and third-generation rights. Underlying the decision to draft two separate Covenants was the assumption that second and third generation rights imply legal obligations and enforcement that differs substantially, from first generation rights. The same distinction is noticeable within the European regional system of human rights where a separate European Social Charter contains provisions for the realisation of economic, social and cultural rights.

63 Compare with India where socio-economic rights are contained in the Constitution as directive principles of state policy.

64 Vienna Declaration and Programme of Action 1993 UN Doc A/Conf.157/23 I par 5; Guideline 4 “The Maastricht Guidelines”.

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



right to organise, the right to collective bargaining, the right to strike, and the right to fair labour practices are concerned.<sup>66</sup> The notion of workers who qualify for protection has effectively been interpreted widely, so as to include a particular atypical category of workers, namely members of the defence force.<sup>67</sup>

Some of the rights also operate in the sphere of social security, being a species of socio-economic rights. These rights must be given effect to in a particular fashion. To determine what the content of each of these rights is and under what circumstances and how the courts will enforce same, can best be discerned from the developing jurisprudence in this regard. One would therefore have to infer these developments from a case-by-case approach, implying that it might perhaps be too early and premature to draw final conclusions. And yet, it is clear that in the broad area of social protection certain trends are already emerging. It is, therefore, imperative to reflect on these trends and developments, as they undoubtedly influence the future direction of social security policy-making, regulation and practice.

The constitutional entrenchment of social security rights has significantly enhanced the relevance of the social security debate in South Africa. 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 the right to access to social security. The Constitution grants to everyone:

[t]he right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance<sup>68</sup>

and obliges the state to implement appropriate measures:

[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>69</sup>

This is a clear and unambiguous undertaking by the drafters of the Constitution to develop a comprehensive social security system, based on, amongst others, two important paradigms: rights of access for everyone and financial viability.

When this obligation imposed on the State in terms of section 27(2) is read in conjunction with section 2 (which contains the general requirement that the obligations imposed by the Constitution must be fulfilled), the assumption can be made that the fundamental right to access to social security is enforceable, because section 2 explicitly states that duties imposed by the constitution must be performed. This is fortified by the constitutional provision (discussed in more detail below) that the State must respect,

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66 Section 23.

67 *SA National Defence Union v Minister of Defence & another* 1999 ILJ 2265 (CC).

68 Section 27(1)(c).

69 Section 27(2).

protect, promote and fulfil the rights in the Bill of Rights.<sup>70</sup> In the 1997 White Paper for Social Welfare<sup>71</sup> this assumption is confirmed:

The general long-term objective is to have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes. This would be supported by a well-informed public, which is economically self-reliant, in a country which has active labour market policies aiming at work for all, while accepting that all will not necessarily have formal employment. Where these broad goals cannot be met, social assistance should be a reliable and accessible provider of last resort. A comprehensive and integrated social security policy is needed to give effect to the Constitutional right to social security.

This right to access to social security is backed by a host of other social security relevant fundamental rights, such as the right to have access to health care services,<sup>72</sup> to sufficient food and water,<sup>73</sup> to adequate housing,<sup>74</sup> the right to education,<sup>75</sup> as well as the right of children to basic nutrition, shelter, basic health care services and social services.<sup>76</sup> Together these rights can be said to ensure, from a constitutional and human rights perspective, adequate social protection.<sup>77</sup> There are, of course, also other fundamental rights, which evidently play a significant role in the context of South African social security, such as the right to equality,<sup>78</sup> the right to privacy,<sup>79</sup> the right to property<sup>80</sup> and the right to just administrative action.<sup>81</sup> The State is obliged to respect, protect, promote and fulfil these fundamental rights,<sup>82</sup> which, in the case of most of these rights, imply that it must incrementally give effect to them.<sup>83</sup>

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70 Section 7(2).

71 Paragraph 45.

72 Section 27(1)(a)), and the right to equality (section 9).

73 Section 27(1)(b).

74 Section 26(1).

75 Section 29(1).

76 Section 28(1)(c).

77 Social security has to be distinguished from the wider concept of social protection. Social protection denotes a general system of basic social support which is no longer linked to the regular employment relationship, and which is founded on the conviction that society as a whole is responsible for its weaker members - in other words, a system of general welfare support and protection.

78 Section 9.

79 Section 14.

80 Section 25.

81 Section 33.

82 Section 7(2).

83 See sections 7(2) and 27(2) of the Constitution.

## 5. Informal social security<sup>84</sup>

### 5.1 Introduction

In the southern African context social security and -protection for the informal sector/workers and informal community- and family-based forms of social security and -protection are a well-known phenomenon. Informal community- and family-based forms of social security depend on a specific relationship or kinship, which places a societal or moral obligation on a person to provide social security support in certain circumstances. Contributions or social security support can consist of money but normally consists of a service that is rendered or support given. This would, for example, occur in cases where families are looking after the elderly and support them as a member of the family through their own means of subsistence.

These informal forms of social security may also benefit those in the formal sector, such as child care arrangements within a certain community which benefit all families in that community. Case studies have shown that collective action (in organisations and associations and in the form of informal unions, cooperatives or issue-based temporary relief movements) enhances the development of social security services and achieves great levels of inclusion.<sup>85</sup> And yet, good examples that last over time are not easy to find.

Informal sector social security refers to the collective “informal” social security measures by members of a certain sector. This normally refers to monetary contributions by all members of a particular sector or trade, for example street vendors paying a daily fee into a fund, which serves as a form of, amongst others, health insurance when members or their families become ill.

These forms of informal social security often co-exist alongside formal forms of social security. In fact, the impact of formal social security transfers should not be underestimated. In South Africa, this can be gathered from the *White Paper on Social Welfare*,<sup>86</sup> which finds that 80% of the elderly, in South Africa, received old age grants. The impact of this grant income on household income for people in poverty, is dramatic. For black South Africans, each pensioner’s income helped five other people in the household.<sup>87</sup> Often these grants constitute the main income source for poor families. Many families rely on income from grants along with informal social security measures to provide their livelihoods.

From a legal perspective and for social protection purposes in Africa, the general approach is to link coverage in terms of and entitlement to

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84 For a more detailed discussion, see Olivier, Klinck and Dekker 2001.

85 Lund and Srinivas 2000:115.

86 GN 1108 in GG 18166 of 8/8/1997.

87 White Paper on Social Welfare (Chapter 7) 49.

employment-based social insurance benefits generally to the existence of an employment relationship (unless somebody falls within a category which is explicitly excluded). In this legal sense of the word “formal” therefore equals the employment relationship as that term is understood at common law, and “informal” would cover persons who are not involved in an employment relationship. Employees in the formal sense are persons who work for a private or public employer and receive (or who are entitled to receive) remuneration in wages, salary, commission, tips, piece-rates or pay in kind.<sup>88</sup>

## 5.2 Reliance on informal social security<sup>89</sup>

There are several reasons why informal social security plays such an important role in the African, and in particular in the southern African context. It is clear that the formal system excludes and marginalises many of the poor who work informally or who have to rely on informal social security mechanisms. The reasons for this state of affairs relate to:

- (i) the formal employment basis and categorical approach of the present social security systems — excluding those who are not involved in formal employment and who do not fall within one of the categories eligible for social assistance;
- (ii) the urban bias of the present systems — marginalised and impoverished women in southern Africa are predominantly rural-based and therefore effectively excluded from existing formal social insurance measures;
- (iii) the restricted family concept underlying much of the formal system — most definitions of social security are based on the Western concept of the family, namely a family headed by a male bread-winner, with one wife and children.<sup>90</sup> This concept of a nucleus family does not reflect the family context in Africa, where the numbers of women-headed

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88 A non-legal (and much more imprecise) approach towards what is meant by the informal sector or informal economy is, however, also possible. The ILO recognises that this notion covers a large variety of groups (most of whom are self-employed) and defines this with reference to internationally accepted nomenclature. It states (see ILO 2000:194 (Box 10.2)): “In 1993 the Fifteenth International Conference of Labour Statisticians (ICLS) adopted an international statistical definition of the informal sector; it defined the informal sector in terms of characteristics of the enterprises (production units) in which the activities take place, rather than in terms of the characteristics of the persons involved or of their jobs. Accordingly, persons employed in the informal sector were defined as comprising all persons who, during a given reference period, are employed in at least one production unit of the informal sector, irrespective of their status in employment and whether it is their main or a secondary job. Production units of the informal sector were defined by the Fifteenth ICLS as a subset of unincorporated enterprises owned by household, that is, production units which are not constituted as separate legal entities independently of the household or household members that own them.”

89 See generally the instructive contribution by Kaseke (Kaseke 2001:242-250).

90 Fobre 1993.

households are increasing, the extended family still plays a substantial role and child-headed households are also becoming a reality, especially with the increasing number of adults that have HIV/AIDS;<sup>91</sup>

- (iv) the limited concept of work which, as a rule, does not encapsulate the productive and reproductive work in which women are involved, thereby marginalising women in poor and traditional communities. Lund and Srinivas<sup>92</sup> refer to these tasks as work in the care economy, and advocate that these activities should be recognized by the mainstream economy as forms of “work” that contribute to the economy. In this latter sense of the word their labour is “unpaid labour” which should be recognised for social security purposes, also in view of the fact that women’s personal income-earning capacity is constrained by this additional burden; and<sup>93</sup>

It should also be borne in mind that African people, especially in rural communities, have a strong sense of pride in their own traditions and functioning of their community and often resist changes which are imposed on them from outside and which do not evolve from communities themselves.<sup>94</sup> It is, therefore, imperative to have regard to the existing systems of solidarity and social protection and insurance in the informal context in order to prevent imposing a social security system that will be detrimental to and weaken those traditional support mechanisms. Transformation of the present social security framework should, therefore, also aim at incorporating, developing and transforming existing informal social security with the view to strengthening solidarity, and in so doing incorporating informal mechanisms of social security into the existing social security framework of the country.

### 5.3 Implications and policy considerations

What are the implications of these developments for more comprehensive social security coverage of informal sector/economy workers? This phenomenon is not foreign to southern Africa, but little conceptual thinking and strategising as to how it can be linked to meaningful social security coverage has been developed.

This is primarily a policy issue: it must be regarded as a policy priority that the social security system as a whole should cater in an appropriate manner for those who work informally and/or who have to rely solely on community- and family-based forms of informal social security. Due to the fact that more people are increasingly involved in this sector in southern

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91 Apart from being officially linked to the formal employment concept, the notion of “dependant” is also often restricted to the nucleus family concept. This requires a redefinition and realignment of the concept to accommodate particular realities of many African households, such as extended families, e.g. where grandparents look after grandchildren, and polygamy, e.g. where civil and customary wives have to contend for survivor’s benefits.

92 Lund and Srinivas 200:105.

93 Lund and Srinivas 2000:3-4, 24; Van Ginneken 1996:14.

94 Sikhosana 2001.

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.

However important and strong the role of the informal and community-based mechanisms, this can never be sufficient and all-encompassing. It is also necessary that the formal system accommodates these changes and developments and extends protection on an equitable basis. This can be done in a variety of ways. One or more separate (formal) system(s), covering different contingencies or issues, can be established, or branches of existing systems can be allocated to cover for the needs of this category of workers. Lund and Srinivas argue that there should be a conceptual integration of the informal economy in the mainstream of the economy, and that one should conceptualize a continuum representing the economy as a whole — with (un)paid but productive work at the one end. Reproductive work is then work, which undergirds this continuum. In this way should social security is then made to serve all who work, whether formally or informally.<sup>95</sup>

#### 5.4 Developing a social protection paradigm for those reliant on informal social security: Some reflections

In his enlightening contribution on informal social security in eastern and southern Africa, Kaseke draws the following conclusions with regard to the strengthening of non-formal social security schemes:<sup>96</sup>

The starting point in efforts to strengthen non-formal social security systems and schemes is recognition by governments that non-formal social security schemes are providing social protection to the majority of the people. Governments also need to accept that formal social security schemes as currently conceptualised and designed do not capture the poor who constitute the majority of the population. The following suggestions are pertinent:

- Providing training to members of mutual support schemes in order to improve the management of these schemes.
- Provision of financial assistance by governments and non-governmental organisations in order to improve their financial base and thereby enhance their capacity to provide better social protection.
- Widening the scope of non-formal social security systems in order to enhance social protection.
- Introducing linkages with formal social security systems so as to improve social protection. This would make it possible for non-formal social security schemes to incorporate the social insurance principle of risk-sharing.

In conclusion, it is important to note that social security will remain a dream for the poor unless efforts are taken to expand and strengthen

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95 Lund and Srinivas 2000:3-4, 11-13.

96 Kaseke 2001:242.

non-formal social security schemes. Confining government efforts to formal social security will only serve to exacerbate existing inequalities between the rich and the poor.

## 6. Group social security entitlements and responsibilities

### 6.1 The relevance of distinct African and southern African specific values<sup>97</sup>

The African Charter of 1981 (which came into force in 1986) contains many of the basic civil, political, social, economic and cultural rights, but although various other international instruments served as an inspiration, the Charter still retained a distinctive African character.<sup>98</sup> This is emphasised by the fourth paragraph in the Preamble to the African Charter:

Taking into consideration the virtues of their historical tradition and the values of African civilisation, which should inspire and characterise their reflection on the concept of human and people's rights...

A further departure from contemporary multilateral human rights instruments is the inclusion of collective rights, the protection of peoples' rights and the presence of duties as opposed to the classical position pertaining to the protection of individual rights.<sup>99</sup>

The African Charter recognises socio-economic rights in a unique way by referring to economic development within the context of group solidarity.<sup>100</sup> In *The Government of the Republic of South Africa and Others v Grootboom and Others*<sup>101</sup> the South African Constitutional Court emphasised the importance to be given to group protection in the fight against poverty and deprivation. In fact, upon analysing the recent judgement, and comparing that judgement with previous judgements of the Constitutional Court<sup>102</sup> on the justiciability of socio-economic rights, one is left with the clear impression that whenever the position of historically deprived and disadvantaged groups warrants judicial intervention, the courts will more readily come to assistance than in the case of an individual claiming assistance. This is in line with the so-called dignitarian approach where the court uses the value of human dignity to come to the rescue of particularly vulnerable groups.

The Charter does not guarantee the right to social security directly. Indirect reference is made to rights which can be regarded as specific contingencies of social security, such as articles 16, 18(1) and 18(4). Article

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97 This part has largely been taken from a contribution by Olivier M and Jansen van Rensburg 2001.

98 Okere 1984:141-159.

99 Kiwanaku 1988:80-101

100 Okere 1984:147.

101 2000 11 BCLR 1169 (CC).

102 Such as the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

16 states that every individual shall have the right to enjoy the best attainable state of physical and mental health and State Parties are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. Article 18(1) places a duty on the State Parties to protect the family as natural unit and basis of society and to protect the physical health and moral of the family. Article 18(4) recognises the right of the aged and disabled to special measures of protection in keeping with their physical and moral needs.

It is clear from the above that Africa as a continent has a unique way of addressing social rights and specifically social security rights. Great emphasis is placed on the duties that the family and the community have in the social protection of the most needy in the family and the community. This is apparent from the obligation that is placed on the individual to maintain his or her parents in case of need.<sup>103</sup> There is also an obligation on individuals to pay taxes in the interest of society.<sup>104</sup> Cobbah<sup>105</sup> describes the existence of the individual within the African community as follows: "I am because we are, and because we are therefore I am."<sup>106</sup> This implies that the duty to provide social protection is not the duty of the state alone but also a duty of the individual as a member of society. The duty to pay taxes in the interest of society further implies that the state has a duty to focus their budgets on social expenditure in order to ensure social inclusion.

## 6.2 Shared responsibility: The principle of ubuntu

The notion of shared responsibility is also of utmost importance in the African and, more specifically, the southern African context. In the South African context this is encapsulated in the principle of *ubuntu*, which has been elevated by the South African Constitutional Court to the status of a constitutional principle.<sup>107</sup> Mokgoro<sup>108</sup> describes *ubuntu* as a metaphor for group solidarity where the group is dependant on limited resources.

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103 Article 29(1).

104 Article 29(6). See also Benedek *Peoples' Rights and Individuals' Rights as Special Features of the African Charter* 86.

105 Cobbah 1987:320.

106 This is known as the principle of *ubuntu*. Justice Langa describes *ubuntu* in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 224 as follows: "The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

107 In *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

108 Mokgoro 1997:51: " a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with scarcity of resources "



Mokgoro<sup>109</sup> further states: "People are willing to pool community resources to help an individual in need. This is captured in some of the African aphorisms such as 'a botho ba gago bo nne botho seshabeng' which, literally translated, means, 'let your welfare be the welfare of the nation'." The Social Welfare White Paper<sup>110</sup> describes the importance of *ubuntu* as follows: "The principle for caring for each other's well-being will be promoted, and a spirit of mutual support fostered. Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual's humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being."

The conclusion can thus be reached that group solidarity is not a foreign principle within South African society. The respect for and promotion of the principle of *ubuntu* can in fact guarantee the success of a comprehensive social security system and other measures aimed at the alleviation of poverty and social exclusion in South and southern Africa. This in turn also emphasises the importance to be given to group protection in the fight against poverty and deprivation. This, as indicated above, has been stressed by the Southern African Constitutional Court in the case of *Grootboom*.<sup>111</sup>

### 6.3 State and non-state actors: The role of the family and the community

It is clear that in the (southern) African context, the provision of social security is not seen as merely the task of government. In fact, government in these countries often do not have the means, infrastructure and administrative capability to reach out to everyone in need. Practically, therefore, a large measure of provision comes from family and community networks, as well as non-governmental institutions, as indicated above.

In light of this reality the South African Constitutional Court has stated that the constitutional requirement of a reasonable programme entails that the programme must clearly allocate responsibilities and tasks and ensure appropriate financial and human resources.<sup>112</sup> This does not only apply to the various spheres of government (national, provincial and local), but also to non-governmental organisations and other private providers. The responsibility in the areas of social security implementation and service delivery is shared not only by state institutions at the various levels, but also by other agents within our society, including individuals themselves. They must be enabled by legislative and other measures to provide housing.

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109 Mokgoro 1997:52.

110 Of the Department of Social Development (previously the Department of Welfare): Chapter 2 par 24.

111 2000 BCLR 1169 (CC).

112 *Grootboom* paragraph 39.

National government bears the overall responsibility for ensuring that the State complies with its constitutional obligations.<sup>113</sup>

The position appears to be that as far as social protection for children is concerned, the primary responsibility to provide this protection lies with parents and families, who bear the duty to care in the first place. However, the state must provide the necessary framework which will enable that children be cared for in this way. Furthermore, where parental or family care is absent (for example where children are removed from their parents), the state would incur the obligation to provide the necessary protection.<sup>114</sup>

## 7. Conclusions

- (a) This contribution highlighted, amongst others, the sheer extent of the inadequate social protection provisioning in the SADC region and the apparent failure of domestic social security measures to address poverty alleviation meaningfully and to bring about the social inclusion and participation of large numbers and significant categories of people who have effectively been left out, amongst whom the migrants of other SADC member countries — not only in the social and societal sense of the word, but also from the social protection system itself. This flows from the fact that most of the country social protection systems effectively cater for the whole or part of the formally employed almost exclusively on a territorial basis, thereby marginalising citizens from other SADC countries who migrate within the SADC region.
- (b) And yet, in view of the extent of migration in the region, it is imperative that a distinct social protection/labour law paradigm in the SADC region be developed holistically and comprehensively in order to address poverty alleviation and social exclusion in the region.
- (c) Certain elements necessary for the development of a comprehensive social security paradigm for the SADC region are apparent. These elements represent to a large extent innovative and original solutions and mechanisms. This flows from the distinct nature of African society, the particular labour market context existing in the region, and the financial inability to and, to some extent, inappropriateness of transplanting Western concepts and models uncritically to the southern African context.
- (d) The innovative elements, from a southern African perspective, include the development of a common baseline for country compliance, which should allow some measure for adopting and applying different national yardsticks. These baseline standards should, therefore, apply across the board in the region, but could be implemented with reference to the particular socio-economic status of each of the member countries. The common baseline approach also includes developing baselines for regional purposes, much along the lines of the principles directing the

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113 *Grootboom* paragraph 66.

114 See the *Grootboom* judgement paragraphs 77-79.

co-ordination social security systems in the EU. These baseline standards may rely on either internationally accepted norms and/or generally applicable human rights norms. Such an approach further encapsulates the innovative possibility of introducing asymmetrical reciprocity on a bi- or multilateral basis.

- (e) The importance of a human rights-basis and -framework for the development of social protection is characteristic of the South African approach. Some of these remarkable jurisprudential developments are reminiscent of the approach adopted by other courts with constitutional and similar jurisdiction, such as the European Court of Human Rights. The progressive nature of the more recent judgements in South Africa may be relevant for developments elsewhere in the region.
- (f) Informal social security arrangements are crucial for the survival of millions of people, in particular the impoverished, in the SADC region. Extensive forms of informal community- and family-based forms of social security, as well as forms of social protection for the informal sector/economy co-exist with (the limited) formal forms of (in particular social assistance) support. The treatment of these informal forms of social protection within the broader framework of domestic social protection systems is still in its embryonic phase. One of the issues to be addressed in particular concerns the identification of measures to be employed in order to bring about the interlinking and dovetailing of the formal and informal sector.
- (g) Group social security entitlements and responsibilities to a large extent flow from distinct African values. Group solidarity, or “ubuntu” as it is often referred to in the South African context, is partly an expression thereof. The duties that the family and the community may incur in the area of social protection as a result of this approach appear to be extremely important for the sustainability of social protection in the region.
- (h) The eradication of poverty can only be achieved by the creation of new income sources, and the extension of current social protection and labour law measures in southern Africa. Micro- and macro-economic as well as social policies are the main determinants for sustainable urban and rural development in any country. It is submitted that these issues must be addressed in the context of the regional integration agenda of SADC as the countries of the region will not be able to improve the sustainability of poor people’s lives within its territory if some of the countries are lacking too far behind. This objective can only be reached through the creation and development of viable social protection and labour law measures and structures throughout the region.
- (i) From this it follows that the Southern African region can achieve its full potential only through close operation by Southern African countries in the exploitation of natural resources in a co-ordinated fashion, the pooling of technical expertise, the harmonisation of trade practices and the promotion of economies of scale. Addressing social needs and

problems by way of social protection and labour law measures within the region is of paramount importance to achieve the goals and aspirations of economic integration and co-operation. Stark differences in the quality of life are the driving force behind human migration. A regional approach on collectivity and equality is therefore in the region's interest. Effective measures should be put in place in order to ensure compliance of the treaty and the protocols.

- (j) It is imperative that a distinct social security paradigm in the SADC region be developed in order to address poverty alleviation at a regional level and, with this purpose in mind, the challenges posed by the task of co-ordinating social security systems in the sub-continent. It is suggested that the envisaged regional collaborative project on the development of social protection for the region will fulfill an important function in the fight against poverty by identifying regional social protection measures, evaluating their impact on South Africa, investigating possibilities for co-ordination measures, by improving access to information and, finally, contributing to higher education regarding the same.
- (k) Economic trends clearly indicate that issues of poverty and inequity are paramount concerns in the region. Unemployment, underemployment and poverty are manifestations of the employment and developmental problems of the region. These problems require comprehensive strategies, including social protection measures and the extension of labour law protection, alongside economic- and regional integration, addressing specific contingencies such as sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children. Other new or indirect contingencies such as poverty, lack of food and water, transport, energy and education also need to be addressed on the regional level.
- (l) The very 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 must also be adopted to co-ordinate current social security systems in the SADC countries. Co-ordination and integration of current social security systems should be effected not merely to support the aim of economic integration but as an imperative in its own right, given current and historical socio-economic deprivation in the region. Any proposed measures on social protection in SADC should take into account not only the economic realities of the countries involved, but also the large number of people who were disproportionately affected by non-democratic governments, either as victims of those governments or as fighters against those governments.
- (m) It is clear from examining both the policy documents and activities of SADC that a commitment to the development of enhanced social protection does exist. It is also clear, as preliminary research on policy and practical aspects of social security concluded by the ILO/SAMAT

has shown,<sup>115</sup> that many individual countries see the need for further development and enhancement of social protection as part of and beyond poverty alleviation strategies. Appropriate ways to factor in the divergent socio-political, historical and economic contexts of the different SADC countries into the development of a coordinated social security structure within the region, and mechanisms to achieve such co-ordination, have to be investigated thoroughly (also from a comparative perspective) and debated.

- (n) Any proposed measures on social protection in SADC should take into account not only the economic realities of the countries involved, but also the large number of people who were disproportionately affected by non-democratic governments, either as victims of those governments or as fighters against those governments.
- (o) In conclusion, these objectives can only be reached through the creation and development of viable social protection measures and structures throughout the region. A regional collaborative approach is therefore required. This approach should include all governmental as well as non-governmental sectors of society in order to address the issues of universal social protection for all in the region. It is, therefore, important to start this process by identifying current social protection measures in the SADC region, and evaluating the extent to which these successfully relate to and address issues of poverty and social exclusion, and enhance the standard and quality of life for all, including those who migrate from one member state to the other.

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115 See the various ILO/SAMAT contributions referred to elsewhere in this contribution.

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