

SOCIAL PROTECTION, POVERTY ALLEVIATION AND SOCIAL SECURITY IN THE SADC REGION: THE NEED FOR DEVELOPING A CO-ORDINATED SOCIAL SECURITY PARADIGM

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1. Introduction

The last decade of the 20th century witnessed enormous political, economic and social change in Southern Africa. The process of change was underpinned by attempts at democratic change, which continue in earnest. Although South Africa has been the most notable case in the search for democratic transformation, many other countries in the Southern African Development Community (SADC) have been similarly affected.

While there are some notable setbacks, such as continuous conflict and relative instability in certain countries within the region, it is clear that democratic governance is now widely accepted as the *sine qua non* for any meaningful political, economic and social progress. Sustainable and effective democratic governance assumes not only political participation, but also social inclusion, hence the imperative of social protection. Rampant social exclusion which exists widely in the region is a clear danger to the search for African Renaissance.

This paper focuses on the need to develop a distinct social protection paradigm as part of any meaningful search for development and regional integration in the SADC region. Effective social protection is necessary to alleviate the ever-increasing levels of poverty. To the extent that action needs to be taken at the regional level, it is crucial to co-ordinate social security systems in the region.*

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In this paper, we examine a number of crucial issues relating to social protection. We address the crucial role played by social security in alleviating poverty and effecting social inclusion. So much is evident from the sheer extent of the inadequate social security provision in the region and the apparent failure of domestic social security measures to address poverty alleviation meaningfully, and to bring about the social inclusion. Large numbers and significant categories of people have effectively been left out from social security systems. This flows from the fact that most countries' social security systems effectively cater for the whole or part of the formally employed almost exclusively, thereby marginalising the non-employed workforce, the self-employed, and the informally employed.

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

We also investigate the relevance of the SADC objectives as set out in the founding Treaty, which include the search for development and economic growth, alleviation of poverty, enhancement of the standard and quality of life, and giving support to the socially disadvantaged through regional integration (article 5). "Human resources development" and "social welfare" are specifically mentioned as areas on which SADC Member States have agreed to co-operate with a view to foster regional development and integration. Member States have also undertaken, through appropriate institutions of SADC, to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects (article 21). A programme of regional integration, collective self-reliance and interdependence of member states is envisaged in order to attain these ideals. The task of developing social policy has been entrusted to the Employment and Labour Sector. The sector has given a central place to the protection of vulnerable groups and the development of common approaches in its activities. This is clear from a number of measures adopted. As part of occupational health and safety strategies, a code on HIV/AIDS has also been adopted. A **Social Charter of Fundamental Rights** in the SADC that underpins the need for social protection, in particular of workers and other vulnerable groups is also on the agenda. The Social Charter makes comprehensive provision for the establishment of harmonised programmes of social security throughout the region. It is also notable that the Sector has established a technical Sub-Committee on Occupational Health and Safety, and Social Security. The Sub-Committee has identified the need to examine social security systems in the region and identify elements as basis for the development of common approaches in order to enhance social protection in the region. 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, 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 coordination, have to be investigated thoroughly (also from a comparative perspective) and debated. Such investigation naturally calls for reference to other comparative experiences.

Three broad areas of intervention aimed at supporting and achieving a co-ordinated regional social security response are investigated in the paper: **training programmes** (inclusive of academic training programmes), **research**, and **policy-making** (especially as far as **co-ordination** is concerned). The need for fundamental analysis and research is emphasised, and so is the importance of disseminating the research results obtained in order to support the process of social protection policy-making, regulation and co-ordination in the SADC region. We then discuss some of the obstacles faced when attempting to co-ordinate social security measures within SADC region. We finally examine different possibilities for the co-ordination of social security measures in SADC, bearing in mind experiences elsewhere in the world. We stress in particular the need to adopt an international minimum standards and human rights baseline approach for purposes of social security co-ordination in the region. We also emphasise the importance of taking into account African and SADC 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 principles underlying the development of social security systems in the different SADC countries in a way which would support the co-ordination attempt we particularly singled out.

2. THE CONTEXT

2.1 Poverty and deprivation

It has been suggested that the SADC region, with a total population of 200 million and combined GDP of about US\$190 billion, is one of the most promising developing regions in the world in terms of economic potential. However, the fact that 40 percent of the region's population still live in conditions of abject poverty translates to a need for an estimated sustained growth rate of around 6 percent per annum. In 1999, the total combined economic growth rate for SADC stood at 1.5 percent. The prevalence and sheer impact of the HIV/AIDS pandemic, and the alarming rate of infection, threaten to thwart attempts at addressing poverty and deprivation in the region, whilst leading to significant increases in such poverty and deprivation.

The SADC region is one of the poorest regions in the world, and its combined growth rate has been consistently low. The fourteen Member States of SADC are aware of the extent of high levels of **unemployment and under-employment**, as well as the **inadequacy of current labour and social protection standards and regulations**. That these issues must be addressed in the context of the regional integration agenda of SADC, is increasingly appreciated by political and other stakeholders in the region. The nature and extent of the role of the State lies at the centre of the need to balance the often-competing challenges of prosperity and social justice.

2.2 The socio-economic background

It is clear that the SADC countries are **relatively interdependent** and share a **common legacy** in many respects, such as through their economic interdependence. The countries are, secondly, linked through the phenomenon of **labour migration** of which the primary trend entails migration to South Africa from many of the countries in the region. It also entails inter-country migration among the other countries. Thirdly, the countries 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, economic and political outcomes in the region.

As remarked in a recent study,¹ the combination of an exclusionary enclave formal sector-led economic growth and the imperatives of racial discrimination have resulted in a number of **socio-economic outcomes** in the region. The first is that the majority of the population, consisting of Africans, has been simultaneously **marginalised and excluded** from participation in productive activities. Secondly, income-generating opportunities have been segregated to one degree or another such that the incidence of **under-employment, open unemployment and poverty** is unequal and highly skewed against the marginalised majority. Thirdly, the **HIV/AIDS epidemic** is having grave consequences in all social and economic spheres in all the countries. And, finally, the quest for both regional and global integration is resulting in **mixed consequences** which are exacerbating the condition of the poor, and the underemployed and the unemployed in urban and rural areas. It is within this context that the agenda for reform of social security systems will need to be situated.

According to Mhone in the above mentioned study, it is necessary to begin by noting that the countries of Southern Africa are confronted with the problem of both **growth and development**. The problems of economic growth primarily concern the need to increase gross domestic product, while that of development can be viewed as concerning the need to increase gross domestic product in such a manner that the per capita incomes of the poorest members of the society also increase over time. Thus, while the attainment of economic development necessarily implies the reduction in the depth and breadth of poverty, economic growth can occur without necessarily reducing poverty.

Essentially the countries of the sub-region have evolved what may be labelled as **enclave economies** in which growth has been predicated on a narrow economic base represented by the **formal sector**. This formal sector, while accounting for the greater proportion of gross domestic product and economic growth, only accounts for a **very small proportion** of employment. Thus the fundamental problem the countries are confronted with is that, for almost all of the countries except South Africa and Mauritius, the majority of the labour force still ekes out a living in the non-formal sectors of the economy comprising small holder agriculture, rural non-farm activities and urban informal activities.

Economic policies pursued immediately following the attainment of independence in many of the countries of the sub-region **failed to transform** this inherited legacy and merely reinforced it for a number of reasons, leaving a co-ordinated, inclusive response as the only viable option for transformation.

3. SADC COUNTRY FEATURES OF SOCIAL PROTECTION

3.1 General characteristics

A recent ILO/SAMAT study indicates the following as the **core context** in Southern Africa which informs the state and development of social security systems in the region: **economic features** comprising limited productivity, persistently high inflation rates, high and increasing informal sector employment, skewed income distributions; **demographic characteristics**, with reference to uneven population densities, low life expectancies, high birth rates, differing

¹ See Mhone, G., and Kalula, E., Draft Report of a Study on the Formulation of Policy Objectives, Priorities and Strategies for the SADC Employment and Labour Sector prepared for the SADC Employment and Labour Sector (ELS), February, 2001.

patterns of retirement; and **issues of governance**, relating to emerging democracies and weak subsystems for public administration.²

² Fultz, E and Pieris, B *Social security schemes in Southern Africa: An overview and proposals for future development* (ILO, Harare, 1999) 7-12.

An analysis of the relevant measures and the accompanying institutional framework in SADC member states clearly reveals the **un- and underdeveloped state of social protection in most of the states**, and the **lack of coordination** in the region.³ One of the common striking features is that most of the **social security schemes** across Southern Africa mainly focus to protect people who are **employed in the formal sector**. Often only certain categories of the formally employed benefit from social security schemes set up to deal with particular contingencies.⁴

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.⁵

It is also clear that the systems, as is the case with the underlying socio-economic, administrative and political profiles of the countries, are hugely **diverse in nature**.⁶ This, of course, makes it difficult to develop baseline standards for the region and to adopt measures to co-ordinate the various country social security systems. This is exacerbated by the fact that many of the **country systems have not been well researched**.

Co-ordination of social security is presently **almost totally absent** in the region. The few examples that do exist do not function satisfactorily,⁷ while attempts to enter into more comprehensive arrangements still have to bear fruit.⁸

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 organisations⁹ and traditional authorities,¹⁰ to assist in this regard, have been relatively successful.

³ For a more detailed discussion of the social security systems obtaining in the various SADC member states, see Olivier, M and Jansen van Rensburg, L "Regional integration and social protection: An analysis of country systems and regional instruments within the Southern African Development community (SADC)" (unpublished paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System, July 2001) par 3.3 ("Social protection measures in certain SADC member states").

⁴ For example, in Botswana and Malawi contributory retirement schemes established by legislation benefit public employees only.

⁵ 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.

⁶ This is evident from, amongst others, the way in which contributory retirement and health provision is structured. While in many of the countries public systems may be in place, in countries such as South Africa this function is fulfilled by strong private sector institutions.

⁷ 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, E and Pieris, B *The Social Protection of Migrant Workers in South Africa* (ILO/SAMAT, Harare, 1997) 11.

⁸ Some of the countries in the region (e.g. Zambia and Lesotho) argue that since South Africa has relied extensively on and benefited so much from migrant mine workers from across the region, it is indebted to extend social protection to mine workers who eventually return to their home countries, and who would otherwise be without cover. See Fultz, E and Pieris, B *The Social Protection of Migrant Workers in South Africa* (ILO/SAMAT, Harare, 1997) 11.

⁹ As often happens in South Africa.

¹⁰ 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.

Most of the countries in the region have embarked on **restructuring processes**. These have already yielded interesting results, as will be discussed below.¹¹

3.2 Labour law protection: a comparative overview

There are several features which, subject to a few notable exceptions, characterise labour law regulation and protection in the region:¹²

- Labour law in Southern Africa is primarily based on **labour legislation borrowed** from outside jurisdictions and bent in an attempt to suit domestic purposes, and much less on indigenous initiatives and case law developments;
- The underlying **bi- and tripartite corporatist structures** which could contribute much to labour market regulation and the tailor-made development of labour law are either non-existent or have largely failed, also as a result of insufficient capacity, despite outside interventions to help establish and strengthen such institutions;
- Labour law in the region tends to be **narrowly focused** on regulating labour relations in and extending protection to workers in the **formal sector**, resulting in its obvious inability to deal effectively with the dual phenomena of a shrinking formal sector and high and steadily increasing unemployment;
- Despite its undisputed importance, **ILO standard-setting** in the SADC region has met with only **limited success**, with many countries lagging far behind the minimum standards set in terms of ILO Conventions; and
- **Legislative, executive and judicial functions** often tend to be concentrated in the **labour departments** of the respective countries – this has been true, amongst others, at least until recently, of labour dispute resolution in most of the countries of the region.

3.3 Observations

This fairly dismal picture has led some to conclude that there has been an **almost complete failure** of labour law systems in the region, in particular as far as the extension of significant social protection to those who work outside the formal sector is concerned.

Despite some positive developments in the areas of social security and labour law protection in SADC Member States (as will be discussed below), the **un- and underdeveloped** state of and **limited capacity** to deal effectively with strengthening social protection and labour law regulation require **urgent intervention**. This, it is suggested, has to take place both at **country and regional** level. It also has to occur within an **integrated labour law-social protection framework**, in order to avoid piecemeal and discriminatory treatment of those – workers and non-workers – exposed to continued poverty, deprivation, abuse and social exclusion in the region.

¹¹ See par 4.1.

¹² See generally Feys, T "Labour Standards in Southern Africa in the context of globalisation: The need for a common approach" 1999 *ILJ* 1445; Kalula, E "In search of Southern African comparative labour law perspectives" 1993 *ILJ* 322; Woolfrey, D "Harmonisation of Southern Africa's labour laws in the context of regional integration" 1991 *ILJ* 703; Woolfrey, D "Harmonisation of Southern Africa's labour laws in the context of regional integration – an update" 1994 *ILJ* 944; Clarke, M, Feys, T and Kalula, E *Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation* (Development and Labour Monographs 2/99) (Institute for Development and Labour Law, University of Cape Town); Kooijmans *The role of International Labour Standards in Southern African Labour Courts* (Occasional Paper 1/2000) (Institute for Development and Labour Law, University of Cape Town); Kalula, E, Bosch and Clarke, M *Draft Report on Dispute Prevention and Conflict Resolution* (Paper presented at the Conference on Labour Relations in Southern Africa, Johannesburg, October 1999); Kalula, E and Mhone, G *Draft Report of a Study on the Formulation of Policy Objectives, Priorities and Strategies for the SADC Employment and Labour Sector* (Executive Summary) (2000).

4. SADC Regional and country responses

4.1 Developments in SADC Member States: a comparative overview

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 Africa¹³ 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;¹⁴
- (c) Some countries in the region have introduced **short-term benefits** as a first step towards developing the social security system holistically;¹⁵
- (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;¹⁶
- (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;¹⁷
- (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

¹³ This has led to the establishment of a Ministerial Committee of Inquiry into a Comprehensive Social Security System in 2000; the Committee is due to report to the South African government soon.

¹⁴ The transition has already occurred in Tanzania and Zambia and (in principle) in Namibia, while some other countries are contemplating a similar transition/development.

¹⁵ This is in particular true of the highly successful system recently introduced in Namibia and implemented by the newly established Social Security Commission.

¹⁶ 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).

¹⁷ Substantial research in this area, culminating in provisional policy proposals, has been undertaken in, amongst others, **South Africa** (see Olivier, M P, Klinck E and Dekker, A H *Informal (forms of) social security: Social security for those who work informally and informal (community- and family-based) solutions to social protection* (paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System) (July 2001); Dekker, A H "Social security for those who work informally, and informal (community- and family-based) solution to social protection" in Olivier, M *et al The Extension of Social Security Protection in South Africa: A Legal Enquiry* (Siberink, 2001) 247-268; Van der Waal, K and Malan, N *A developmental perspective on social security for the urban and rural poor and the informally employed in South Africa* (paper presented at a SANPAD seminar on 20 November 2000, Pretoria, South Africa); and Lund F *Reframing social security: the challenges presented by the growing size and importance of the informal economy* (submission to the Ministerial Committee of Inquiry into a Comprehensive Social Security System) (November 2000)); **Tanzania** (see Van Ginneken, W *Promoting productivity and social protection in the urban informal sector* (ILO, 1996) and Kaseke, E *Informal social security in Eastern and Southern Africa* (paper 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); **Zimbabwe** and **Zambia** (see the contribution by Kaseke). See generally Van Ginneken, W *Social security for the excluded majority – case studies of developing countries* (ILO, 1999) and Lund, F and Srinivas, S *Learning from experience: A gendered approach to social protection for workers in the informal economy* (ILO, 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.

It is in particular **Namibia** that has caught the attention of the region in this regard. Three elements characteristic of the reform process, which are of great significance to the region, need to be highlighted. Firstly, Namibia embarked upon a **comprehensive codification**¹⁸ of the social insurance part of its system, inclusive of retirement¹⁹ and - in principle – health provision.²⁰ Secondly, a **centralised institution** (the Social Security Commission) was set up to implement the reforms and to administer the new system, which included publicising the new system and introducing a user-friendly distinct social security number and social security card for identification and claim purposes. Thirdly, and partly in order to familiarise and sensitise the population as far as the need for and practical benefits of a (public) social insurance system are concerned, it has been implementing some of the **short-term schemes first**.

The various schemes have in common that they extend coverage to those who are **formally employed** for at least two days per week. **Marginalised groups** are also included – such as farm and domestic workers, as well as shebeen owners. The **self-employed** may pay voluntary contributions and by doing so enjoy coverage as well. It would, therefore, appear that the limited coverage of the (working) population available in terms of the mix of welfare and private provision was one of the primary reasons, which prompted the innovation and codification of the social insurance part of the system.

The **relative success** of the new system, its **widening support basis**, and the **extension of coverage** to many of those who were previously excluded and marginalized, provide interesting and important elements for analysis and comparison. The same applies to the deliberate decision to **gradually strengthen and widen** the new system. Much could be learnt, so it would seem, from the recent experiences of this relatively poor but developing African country. In short, the recent Namibian experience provides a telling example for many other countries in the region still grappling with initiating comprehensive reform processes.

However, as far as the general position in the different SADC Member States is concerned, it has to be stressed that much still needs to be done, in particular in the areas of analysing the role and function of **informal social security mechanisms**, and linking same to the formal system, as well as dealing effectively with **non-citizens**. They are in many of the systems excluded from the sphere of coverage (excluding those systems where permanent residence status and a number of years actual residence are sufficient).²¹

¹⁸ Several schemes of a public nature have consequently been established by law. Some of these still have to become operative. One of the already operative schemes is the Maternity, Sickness and Death Benefit Fund, which provides basic coverage, also as far as disability and survivors benefits are concerned. The other operative scheme, the Workers' Compensation Scheme, pays out benefits in the event of a work-related sickness. It also pays out disability benefits.

¹⁹ The introduction of the National Pension Fund is imminent and has been preceded by comprehensive negotiations with stake-holders. It provides for a basic pension, and was necessitated by the fact that occupational-based retirement funds only cover around 40% of formal sector workers. There is, presently, also a non means-tested old age grant paid out by the Ministry of Health and Social Services.

²⁰ Public health services are heavily subsidized but insufficient, while private medical aid schemes would only cover some of those who are employed. Health insurance is, however, lacking. This is the reason why a yet to be introduced national Medical Aid Benefit Fund has been provided for in the founding legislation.

²¹ As is the case with Mauritius.

4.2 Social protection at SADC level: A synopsis of regional instruments, measures and developments

4.2.1 The SADC Treaty and general developments; the task of the ELS

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.²² In August 1992, SADCC (as the organization was initially known) was transformed into SADC. **The emphasis of the organisation changed from "development coordination" to developmental, economic²³ and regional²⁴ integration".** The Treaty, as is the case with its antecedent Protocols,²⁵ 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.²⁶ 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.²⁷ Therefore, in order to achieve these ideals, a **programme of regional integration, collective self-reliance and interdependence** of member states is envisaged.

The task of developing social policy has largely been entrusted to the SADC Employment and Labour Sector (ELS). The sector has given a central place to the protection of vulnerable groups and the development of common approaches in its activities. It is also notable that the Sector has established a technical **Sub-Committee** on Occupational Health and Safety, and Social Security. The Sub-Committee has also identified the need to **examine social security systems** in the region and **identify elements** as a basis for the **development of common approaches** in order to enhance social protection in the region.

According to Mr Arnold Chitambo, the co-ordinator of the SADC ELS Co-ordinating Unit, Ministers and Social Partners have approved the following **activities** to be undertaken with regard to Social Security in the region:²⁸

²² See generally art 5.

²³ 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 art 1).

²⁴ 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" – art 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".

²⁵ The definition of "Protocol" in art 1 of the Treaty refers to a Protocol as an instrument of implementation of the Treaty, having the same legal force as the Treaty.

²⁶ Art 4.

²⁷ Art 21.

²⁸ See Chitambo, *A SADC Policy Dimensions of Social Protection* (paper submitted at 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 (par 3.3.5).

- identify common elements of Social Security Systems with a view to among other things formulating a reporting format for the SADC;
- develop a SADC Code of Practice on Social Security;
- identify Social Security institutions and develop a regional training programme;
- develop guidelines on conditions of SADC National and methods of cross-border payment on Social Security benefits; and
- develop guidelines on ratification of ILO Convention No. 102 on social security and other relevant conventions

A number of important measures have already been undertaken. As part of occupational health and safety strategies, a **Code on HIV/AIDS** has also been adopted. Furthermore, a **Draft Regional Code on Social Security in the SADC** has been developed and is in the process of being discussed and reflected upon. A **Draft Protocol on Freedom of Movement of Persons** in the SADC was concluded in May 1998.²⁹ It recognizes that the full popular participation in the process of building the Region into a Community is only possible where the citizens of the Community enjoy freedom of movement of persons, namely visa-free entry, residence and establishment in the territories of member states.³⁰ It suggests a **phased approach**, whereby these objectives are incrementally and progressively attained. Two important general principles relating to residence and establishment in other member states are also 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.³¹ Furthermore, as part of occupational health and safety strategies, a code on HIV/AIDS has also been drafted.

4.2.2 The Charter of Fundamental Social Rights in SADC

A **Charter of Fundamental Social Rights in SADC**³² that underpins the need for social protection, in particular of workers and vulnerable groups, has more or less been agreed on.⁽³⁴⁾ The Charter makes comprehensive provision for the establishment of harmonised programmes of social security throughout the region.

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:

²⁹ 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>

³⁰ Preamble; art 3.

³¹ Chapter IX; arts 22-23.

³² ELS.MSP/2000/4.2.5. The final version is dated 10 August 2001.

"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**.³³ Member states are also required to develop reasonable measures to enable men and women to reconcile their occupational and family obligations.³⁴ Protection of **children and young people** is emphasised,³⁵ 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.³⁶ 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.³⁷

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.³⁸

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.³⁹

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.⁴⁰ Lastly, the Charter also requires Member States to take appropriate **action to ratify and implement ILO instruments**, and to give priority to ratify the **core ILO Conventions**.⁴¹

4.2.3 *Some observations*

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

³³ The draft Charter refers to the SADC Treaty and recalls the objectives contained in art 5 of the SADC Treaty.

³⁴ Art 6(c).

³⁵ Art 7.

³⁶ Art 8(a).

³⁷ Art 8(b).

³⁸ Art 9.

³⁹ Art 11(a).

⁴⁰ Art 16(1). Art 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.

⁴¹ Art 5. The core Conventions are contained in the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

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.

4.3 Responses relating to labour law protection

The adoption of comprehensive legislation in South Africa on labour law protective measures⁴² has had **limited effect** on labour law developments elsewhere in the region. The same applies to the very **substantial jurisprudence** developing on the basis of the labour laws, the Constitution and even common law in South Africa. However, it is in particular in the area of **dispute resolution** that important developments are taking place in SADC. Following the example of the establishment of the South African Commission for Conciliation, Mediation and Arbitration,⁴³ several countries in the region have embarked on steps to move their dispute resolution systems outside the labour ministries. Furthermore, **regional collective bargaining** is clearly on the increase.

At SADC (regional) level the principle of *tripartism* (*workers, employers and government representatives working together*) is upheld, resulting in enhanced social dialogue. The specific objectives that the Sector intends to achieve include:⁴⁴

- (a) To promote the formulation and harmonization of social policies and programmes in SADC Member States which contribute to the generation of productive employment opportunities and increased income;
- (b) To promote labour policies and practices and measures in Member States which facilitate labour mobility, remove distortions in labour markets as well as enhance industrial harmony and increase productivity;
- (c) To provide a framework for regional co-operation in the area of employment and labour with the full participation and involvement of all the social partners;
- (d) To promote a framework of regional co-operation in the collection and dissemination of labour market information;
- (e) To promote the establishment and harmonization of social security schemes;
- (f) To harmonise regulations relating to safety and health standards at work places across the region;
- (g) To promote equity and protection of vulnerable groups; and
- (h) To promote the development of institutional capacities as well as vocational and technical skills in the region.

⁴² Such as the Labour Relations Act 66 of 1995; the Basic Conditions of Employment Act 75 of 1997; the Skills Development Act 97 of 1998; and the Employment Equity Act 55 of 1998.

⁴³ In terms of the Labour Relations Act 66 of 1995.

⁴⁴ See Chitambo, A *SADC Policy Dimensions of Social Protection* (paper submitted at 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 (par 3.3.5).

5. Approaches to Intervention

It is clear from examining both the policy documents and activities of SADC that a **commitment** to the development of enhanced social protection and labour law 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, that many individual countries see the need for further development and enhancement of social protection as part of and beyond poverty alleviation strategies. The following vacuums in existing research have been identified:

- (a) The **lack of systematic knowledge** about existing systems is clear and must be addressed.
- (b) Appropriate ways to factor the **divergent** socio-political, historical and economic contexts of the different SADC countries into the development of a co-ordinated social security structure within the region.
- (c) The **applied research capacity**, which is crucial to the informing of policy formulation, does not exist and has to be developed.

Pioneering research undertaken at country⁴⁵ and regional⁴⁶ levels has indicated the need and potential for targeted research in SADC to help in the development of practical policy. Based on consultations with officials of the SADC ELS Co-ordinating Unit and members of its Sub-Committee on Occupational Health and Safety and Social Security, a wide range of academic colleagues and institutions across the SADC region, as well as governmental policy-makers, social security institutions, other stakeholders, such as trade unions and employers' organisations, research institutions, and relevant international organisations initial steps have been taken to embark on a **comprehensive investigation** into the **regulation and extension of social protection** in the SADC region. This has already culminated in a highly instructive **SADC Conference on Social Security**, entitled "Towards the Development of Social Protection in the SADC Region", held at Helderfontein Conference Centre, Johannesburg, South Africa, from 17 to 19 October 2001. The Conference highlighted the need for proper foundational research, appropriate training, and comprehensive policy-making, *inter alia* in the area of social security co-ordination, as key elements of the further development of social protection in SADC.

Consequently, a three- to five year project which will address these very issues, is envisaged. It is conceived as a multidisciplinary project embracing economic, legal, political, social and cultural dimensions of social security and social policy, both at the country and regional levels.

A **multi-pronged approach** is suggested, focusing on **in-depth and applied research, research capacity building, focused academic and non-academic training programmes, and policy development and communication**. Relevant research and policy-making institutions, therefore, have to be targeted. They include **in-country research institutions and researchers** from the various SADC countries. They further include **policy-makers** at country and regional level. At country level the key institutions are the responsible ministries and operational social security agencies, responsible for social security implementation, and at regional level these would be the new SADC directorate responsible for social affairs and technical committees focusing on social

⁴⁵ Cf the research undertaken by Edwin Kaseke and his associates on social security provisioning in Tanzania, Zimbabwe and Zambia, referred to in n 18 above; see also the various social protection research projects spearheaded in South Africa, referred to in n 18 above, and contributions flowing therefrom, such as Olivier, M *et al The Extension of Social Security Protection in South Africa: A Legal Enquiry* (Siberink, 2001); Olivier M *et al Social security law: general principles* (Butterworths, Durban, 1999); Olivier M *et al Social insurance and social assistance: towards a coherent approach* (A report to the Department of Welfare, South Africa) (CICLA & FES, Johannesburg 1999); Olivier M *et al Social security law in South Africa: a comparative perspective* (CICLA, Johannesburg, 2000).

⁴⁶ See SADC/ELS Study, note 1 and also other sources referred to in note 13 above.

security and other relevant activities. **International experts and expert institutions** with experience and know-how, particularly in the field of social security (regional) co-ordination, are approached in order to secure their advice and support.

6. Core Elements of Developing Social Protection and Labour Law Protection in SADC.

6.1 Improving the social protection of SADC member states citizens as migrants in SADC: the need for co-ordinating SADC social protection systems

6.1.1 The precarious position of SADC Member States citizens when migrating in the Region

The level and frequency of regional migration has not been satisfactorily established due to the absence of reliable statistics as well as illegal migration. It can however be said that a significant amount of cross-border migration occurs daily within the SADC region.

However, 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 of the SADC countries are, as a rule, **territorial- and nationality-based**. Mauritius is one of the few examples where the overall social protection 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.

It would also appear, barring a limited number of exceptions, that SADC Member States **are not yet linked** to the **network of bilateral and multilateral conventions** on the co-ordination of social security. This may operate to the disadvantage of SADC citizens, both when they take up temporary or permanent employment or residence in other SADC countries and when they return home after working as migrants elsewhere in the region.

6.1.2 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:⁴⁷

"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."

⁴⁷ Vonk, G *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap* (1991) 483-484.

In the context of social security, the pertinent legislative provisions of European Community law⁴⁸ may be instructive and are to be found primarily in the following:⁴⁹

- the Council Directive on **equal treatment for men and women**,⁵⁰ requiring member states to eliminate discrimination between men and women in matters of social security;⁵¹
- the Council Regulation on **freedom of movement for workers**,⁵² prohibiting discrimination against workers in relation to social advantages on the ground of nationality; and
- the Council Regulation on **social security for migrant persons**,⁵³ 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.⁵⁴

The principles of **choice of law**, **non-discrimination**, **aggregation**, **maintenance of acquired rights** and **exportability of benefits** are, therefore, widely known⁵⁵ and applied, even elsewhere in the African context,⁵⁶ albeit sometimes on a qualified basis.⁵⁷ 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 1990's), 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.⁵⁸ Furthermore, the freedom of movement principle is couched in much weaker terms than the EU counterpart. Article 5(2)(d) of the Treaty does not regulate the matter conclusively, but requires of SADC to "develop policies aimed at the

⁴⁸ Hereinafter referred to as EU.

⁴⁹ See Goosen, C *et al* "International and Comparative Social Security Standards" in Olivier, M *et al* *Social Security Law: General Principles* (Butterworths, Durban, 1999) 563-571.

⁵⁰ Council Directive 79/7 OJ L6, 10.1.79, 24.

⁵¹ *Ibid.*

⁵² Council Regulation 1612/68 OJ L257, 19.10.68, 2.

⁵³ Council Regulation 1408/71 OJ L149, 5.7.71, 2; OJ L28, 30.1.97, 1.

⁵⁴ 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).

⁵⁵ See also ILO *Introduction to Social Security* (ILO, Geneva, 1989) 151-159.

⁵⁶ Cf Kaufmann, O "Social Security in the Context of French-African and intra-African labour migration" in Von Benda-Beckmann, F *et al* *Between Kinship and the State* (Foris, 1988) 399-417.

⁵⁷ Kaufmann 400 indicates that non-contributory benefits are often not made available to foreigners.

⁵⁸ See art 6(2).

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.⁵⁹ 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.⁶⁰ 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.⁶¹

6.1.3 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.⁶²

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 (e.g. retirement), to enter into some kind of **asymmetrical reciprocity** on a bi- or multilateral basis, whereby different types of benefits are linked. For example, as Fultz and Pieris indicate,⁶³ 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

⁵⁹ As is the case with the Tribunal.

⁶⁰ See also Fultz and Pieris *The Social Protection of Migrant Workers in South Africa* 13-20.

⁶¹ See par 4.2.1.

⁶² Barnard 307; *De Felice v INASTI* [1989] ECR 923.

⁶³ At 15.

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.

6.1.4 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.⁶⁴ 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.

6.2 Development of a baseline approach

6.2.1 General considerations

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.⁶⁵

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 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?

Of importance is also the identification of the actors in the process of developing these standards. Ideally, according to the Charter, this should be the responsibility of national tripartite institutions and existing regional structures.⁶⁶

6.2.2 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

⁶⁴ 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).

⁶⁵ See, for example, the provisions of art 2(1), relating to the objectives of the Charter; art 3 with regard to the observance of basic rights referred to in the Charter; art 5 with regard to the adoption of ILO minimum standards; and arts 11(a) and 12 with regard to the areas of **paid maternal leave** and occupational health and safety protection respectively.

⁶⁶ Art 16.

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.⁶⁷ 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,⁶⁸ the establishment of common criteria concerning sufficient resources and social assistance in social protection systems,⁶⁹ and the convergence of social policy objectives.⁷⁰ Country-specific indicators are suggested as a benchmark, which implies that harmonisation in the true sense of the word is not contemplated.

6.2.3 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 of priority be developed. This flows from the increased migration 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.⁷¹ 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).⁷² 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.⁷³

⁶⁷ Cf Barnard 326-327; Schulte 69-81.

⁶⁸ See the Community Social Charter of 1989.

⁶⁹ Council Recommendation 92/441/EEC.

⁷⁰ Council Recommendation 92/442/EEC.

⁷¹ 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: Barnard 307; *De Felice v INASTI* [1989] ECR 923.

⁷² 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>

⁷³ Chapter IX; arts 22-23.

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.⁷⁴ 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.⁷⁵

6.2.4 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.⁷⁶

However, the origin of such an approach could also be **national or constitutional** in character.⁷⁷ South Africa may serve as an example of such a development.

6.2.5 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 division⁷⁸ between first, second and third generation rights. **Social rights have exactly the same status as other civil and political rights.**⁷⁹ The notion of not differentiating between this apparent "categories" of rights places emphasis on the fact that **these rights are interrelated, interdependent and indivisible.**⁸⁰ 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

⁷⁴ In particular employment injury schemes.

⁷⁵ See par 6.1.3 above.

⁷⁶ See also art 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".

⁷⁷ 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 s 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.

⁷⁸ 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. Morphet 1992: 78; Liebenberg 1995: 360-361; De Vos 1997: 69; Scott 1999: 633.

⁷⁹ Compare with India where socio-economic rights are contained in the Constitution as directive principles of state policy.

⁸⁰ Vienna Declaration and Programme of Action 1993 UN Doc A/Conf.157/23 I par 5; Guideline 4 "The Maastricht Guidelines"; Castermans-Holleman 1995: 355; Kartashkin 1982: 112; Arambulo 1999: 16; Alston 1995: 94; Ramcharan 1979: 252; Ziskind 1982: 142; Steiner and Alston 1996: 256; Dankwa, Flinterman and Leckie 1998: 18; Donnelly 1989: 28; Pronk 1995: 2.

socio-economic rights, such as access to land, must be in place as well.⁸¹ Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life. Some of the rights **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"⁸²

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".⁸³

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, protect, promote and fulfil** the rights in the Bill of Rights.⁸⁴ In the 1997 White Paper for Social Welfare⁸⁵ 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."

⁸¹ *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

⁸² Section 27(1)(c).

⁸³ Section 27(2).

⁸⁴ Section 7(2).

⁸⁵ Par 45.

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,⁸⁶ to sufficient food and water,⁸⁷ to adequate housing,⁸⁸ the right to education,⁸⁹ as well as the right of children to basic nutrition, shelter, basic health care services and social services.⁹⁰ Together these rights can be said to ensure, from a constitutional and human rights perspective, **adequate social protection**.⁹¹ 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,⁹² the right to privacy,⁹³ the right to property⁹⁴ and the right to just administrative action.⁹⁵ The State is obliged to respect, protect, promote and fulfil these fundamental rights,⁹⁶ which, in the case of most of these rights, imply that it must incrementally give effect to them.⁹⁷

6.2.6 *The developing constitutional jurisprudence in South Africa in relation to social protection issues*

How far may a court be prepared to go? In its first certification judgement the Constitutional Court remarked:

"It is true that the inclusion of socio-economic rights may result in the courts making orders *which have direct implications for budgetary matters*. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, *or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits*. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers".⁹⁸ (own emphasis)

More recently, the Constitutional Court adopted a relatively cautious approach by invoking the dual test of **rationality** and **bona fides** as the yardstick in this regard. It opined: "... A court must be slow to interfere with rational decisions taken in good faith by the political organs and (medical) authorities whose responsibility it is to deal with such matters".⁹⁹ The case dealt with the refusal by a provincial hospital to make available kidney dialysis facilities to a chronically ill patient, on the basis that due to limited resources priority has to be given to patients who qualify for a kidney transplant. The Court made it clear that there will be instances where the **larger needs of society**, as opposed to the specific needs of particular individuals, may have to be given priority.¹⁰⁰

⁸⁶ Section 27(1)(a)), and the right to equality (section 9).

⁸⁷ Section 27(1)(b).

⁸⁸ Section 26(1).

⁸⁹ Section 29(1).

⁹⁰ Section 28(1)(c).

⁹¹ 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 (See Von Maydell 1997 "Fundamental Approaches and Concepts of Social Security" 1034).

⁹² Section 9.

⁹³ Section 14.

⁹⁴ Section 25.

⁹⁵ Section 33.

⁹⁶ Section 7(2).

⁹⁷ See sections 7(2) and 27(2) of the Constitution.

⁹⁸ *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) 800 D-F (par 77).

⁹⁹ *Soobramaney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) par 29.

¹⁰⁰ In par 31 of the judgement the Court remarks as follows: "The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society".

From other judgements in the broad area of social security, it is apparent that the Constitutional Court **will not interfere easily with the underlying structure or financial balance of (publicly organised) social security schemes.**¹⁰¹

In the most comprehensive judgement on social security-related rights to date, *Government of RSA v Grootboom and others*,¹⁰² the Constitutional Court commented on the state's obligations under section 26, which gives everyone the right of access to **adequate housing**, and section 28(1)(c), which affords **children the right to shelter**. The case concerned the forcible removal of a large number of children occupying land illegally, without making available to them alternative facilities. Due to the vast number of issues dealt with by the Court and the range of principles developed in the process, it is worth quoting directly from the summary:

"In a unanimous decision ... it was noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting.

6.3 Informal social security¹⁰³

6.3.1 Preliminary remarks

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.¹⁰⁴ And yet, good examples that last over time are not easy to find.

¹⁰¹ In *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1106 (CC) the Court upheld the **constitutional validity** of the statutory provision which substitutes the **liability of the Compensation Fund** for the common-law liability of the employer in the event of a workplace injury or illness suffered by the employee). This the Court did, bearing in mind the broader social purpose fulfilled by the Fund. In another decision dealing with the restriction of certain Road Accident Fund claims to the amount of R25 000 the Constitutional Court ruled that it would not likely give an order that would greatly **distort the financial affairs** of a social welfare scheme or social benefit programme (*Tsotetsi v Mutual and Federal Insurance Co Ltd* CCT16/95).

¹⁰² 2000 (11) BCLR 1169 (CC).

¹⁰³ For a more detailed discussion, see Olivier, M, Klinck, E and Dekker, A H "Informal (forms of) social security: Social security for those who work informally and informal (community- and family-based) solutions to social protection" (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security) (Jul;y2001).

¹⁰⁴ Lund & Srinivas *Learning from experience: A gendered approach to social protection for workers in the informal economy* (ILO, Geneva, 2000) 115.

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*,¹⁰⁵ 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.¹⁰⁶ 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 **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.¹⁰⁷

6.3.2 Reliance on informal social security¹⁰⁸

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:

¹⁰⁵ GN 1108 in GG 18166 of 8/8/1997.

¹⁰⁶ *White Paper on Social Welfare* (Chapter 7) 49.

¹⁰⁷ 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 *World Labour Report 2000 (Income security and social protection in a changing world)* (ILO, Geneva, 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."

¹⁰⁸ See generally the instructive contribution by Kaseke, E *Informal social security in Eastern and Southern Africa* (paper 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).

- (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.¹⁰⁹ This concept of a nucleus family **does not reflect the family context in Africa**, where the numbers of **women-headed 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;¹¹⁰
- (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 Srinivas¹¹¹ 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; and¹¹²

It is 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 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.

6.3.3 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 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.

¹⁰⁹ Fobre N *Women and social security in Latin-America, the Caribbean and sub-Saharan African (Equality for Women in Employment)*: Interdepartmental Project: Working Paper No. 5 (ILO Geneva) 1993.

¹¹⁰ 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.

¹¹¹ Lund & Srinivas 105.

¹¹² Lund F & Srinivas S 3-4, 24; Van Ginneken W Promoting productivity and social protection in the urban informal sector (ILO, Geneva, 1996) 14; Berghman "The resurgence of poverty" 16.

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**. 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.¹¹³

6.3.4 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:¹¹⁴

"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 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."

¹¹³ Lund & Srinivas 3-4, 11-13.

¹¹⁴ Kaseke, E *Informal social security in Eastern and Southern Africa* (paper 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 8).

6.4 Group social security entitlements and responsibilities

6.4.1 *The relevance of distinct African and Southern African specific values*¹¹⁵

The African Charter of 1981 (which came into force in 1986) contains many of the basic civil, political, social, economic and cultural rights,¹¹⁶ but although various other international instruments served as an inspiration, the Charter still retained a **distinctive African character**.¹¹⁷ 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.¹¹⁸ Robertson and Merrills¹¹⁹ remark:

"The States concerned wished to put forward a distinctive conception of human rights in which civil and political rights were seen to be counter-balanced by duties of social **solidarity**, just as they are complemented by economic and social rights and supplemented by peoples' rights."¹²⁰

The African Charter recognises socio-economic rights in a unique way by referring to **economic development** within the context of **group solidarity**.¹²¹ In *The Government of the Republic of South Africa and Others v Grootboom and Others*¹²² 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 Court¹²³ 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

¹¹⁵ This part has largely been taken from a contribution by Olivier, M and Jansen van Rensburg, L "Social security in the SADC region: The need for co-ordination" (paper presented at the First International Conference on Private International Law organised by the Institute for Private International Law in Southern Africa (RAU), held at the Rand Afrikaans University (RAU), Johannesburg, South Africa on 28-30 March 2001.

¹¹⁶ Welch 1992 *Human Rights Quarterly* 45; Mutua 1999 *Human Rights Quarterly* 343; Robertson and Merrills *Human Rights in the World* 207; Flinterman and Henderson *The African Charter on Human and Peoples' Rights* 316; Lindholt *Questioning the Universality of Human Rights* 213; Ankumah *The African Commission on Human and Peoples' Rights* 8; El-Obaid and Appiagyei-Atua 1996 *McGill Law Journal* 846; Dlamini *Human Rights in Africa* 86-87. No distinction is made in the Charter between the classical civil and political rights and socio-economic rights as is done in other international and regional instruments.

¹¹⁷ Okere BO "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" 1984 *Human Rights Quarterly* 141-159.

¹¹⁸ Kiwanaku RN "The Meaning of *People* in the African Charter on Human and Peoples' Rights" 1988 *American Journal of International Law Revue* 80 – 101; Welch 1992 *Human Rights Quarterly* 45; Mutua 1999 *Human Rights Quarterly* 343; Robertson and Merrills *Human Rights in the World* 207; Flinterman and Henderson *The African Charter on Human and Peoples' Rights* 316; Rembe *The System of Protection of Human Rights under the African Charter* 1; Lindholt *Questioning the Universality of Human Rights* 25; Ankumah *The African Commission on Human and Peoples' Rights* 8; El-Obaid and Appiagyei-Atua 1996 *McGill Law Journal* 836; Bennett *Human Rights and the African Cultural Tradition* 273; Mahmud 1993 *Human Rights Quarterly* 488; Benedek *Peoples' Rights and Individuals' Rights as Special Features of the African Charter* 59.

¹¹⁹ *Human Rights in the World* 216.

¹²⁰ Own emphasis.

¹²¹ Okere 1984 *Human Rights Quarterly* 147; Robertson and Merrills *Human Rights in the World* 210; Dlamini *Human Rights in Africa* 89.

¹²² 2000 11 BCLR 1169 (CC).

¹²³ Such as the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

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**.¹²⁴ 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 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**.¹²⁵ There is also an obligation on individuals to pay taxes in the interest of society.¹²⁶ Cobbah¹²⁷ describes the existence of the individual within the African community as follows: "I am because we are, and because we are therefore I am."¹²⁸ 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.

6.4.2 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.¹²⁹ Mokgoro¹³⁰ describes *ubuntu* as a metaphor for group solidarity where the group is dependant on limited resources. Mokgoro¹³¹ 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 Paper¹³² 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

¹²⁴ Lindholt *Questioning the Universality of Human Rights* 217.

¹²⁵ Article 29(1). See also Benedek *Peoples' Rights and Individuals' Rights as Special Features of the African Charter* 86. This is an indication of the subsidiary nature of social assistance as part of a social security system.

¹²⁶ Article 29(6). See also Benedek *Peoples' Rights and Individuals' Rights as Special Features of the African Charter* 86.

¹²⁷ Cobbah 1987 *Human Rights Quarterly* 320.

¹²⁸ 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."

¹²⁹ In *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

¹³⁰ Mokgoro 1997: 51: "a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with scarcity of resources"

¹³¹ Mokgoro 1997: 52.

¹³² Of the Department of Social Development (previously the Department of Welfares): Chapter 2 par 24.

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.

6.4.3 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**.¹³³ 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. **National government** bears the **overall responsibility** for ensuring that the State complies with its constitutional obligations.¹³⁴

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 (e.g. where children are removed from their parents), the state would incur the obligation to provide the necessary protection.¹³⁵

6.5 Prioritising the historically and socially disadvantaged

The priority to be given to the historically and socially disadvantaged is an important theme in the SADC treaty. According to article 5 of the Treaty, one of SADC's objectives is to support the socially disadvantaged through regional integration. This, of course, has to be read in close correlation with the other objectives contained in article 5: namely to achieve development and economic growth, alleviate poverty, enhance the quality of life of the peoples of Southern Africa.

¹³³ *Grootboom* par 39.

¹³⁴ *Grootboom* par 66.

¹³⁵ See the *Grootboom* judgement par 77-79.

It is increasingly clear that the South African Constitutional Court is prepared to endorse and enforce a constitutional focus on vulnerable groups, when it comes to socio-economic rights. It requires that provision has to be made for the most vulnerable and desperate in society.¹³⁶ The courts may or may not be hesitant to grant relief where individuals assert their constitutional rights. However, where **communities are negatively affected**, and the right infringed is fundamental to the well-being of (categories of) people (such as housing), the Constitutional Court appears to be more willing to intervene. This is in particular the case where the said communities have historically been marginalized and/or excluded or appear to be particularly vulnerable. A **statistical advance may not be enough** and the **needs that are the most urgent must be addressed**; it is not only the state that is responsible for the provision of (for example) houses, but it may be held responsible if no other provision has been made or exists.¹³⁷ How to do priority-setting in view of limited resources remains one of the greatest challenges ahead.

Moreover, **sufficient budgetary support is constitutionally required** for this purpose. While courts will be hesitant to interfere in budgetary provision in the area of social security, the Constitutional Court indicated in its certification judgement, as noted above,¹³⁸ that courts could grant orders which may have budgetary implications. In *Grootboom* the Constitutional Court stressed, within the context of the right to access to housing, that effective implementation requires at least **adequate budgetary support** by national government.¹³⁹ It emphasised that it is essential that a **reasonable part** of the national housing budget be devoted to granting relief to those in **desperate need**, but that the precise allocation is for national government to decide in the first instance.¹⁴⁰ **Guidelines** drawn up in the wake of **budget constraints** have to be **reasonable**.¹⁴¹

6.6 An integrated labour law-social protection approach

It is suggested that the dichotomy between labour law and social protection is wholly inappropriate to addressing the very real threat of continuing poverty, deprivation and social exclusion in the southern African region. This we say in view of the fact that labour law protection in the region extends to an **ever-shrinking formal sector**, while the masses of people, also those who work, do not benefit from these laws. The mind-shift required therefore means that in the SADC context, one has to move beyond labour market regulation. And yet, it would appear that in some SADC countries, even the protection offered by labour law to those who work formally is meagre and therefore insufficient.

The same, if not substantially worse, picture emerges from an analysis of social security protection in the region. This is often similarly restricted to the formal employment context.

In order to ensure **comprehensive protection**, covering the included and the excluded categories of people in the Region, it would appear necessary to **broaden the scope** of labour law into more **comprehensive social law approach**, covering both those in- and outside formal employment. **Minimum standards** at regional and individual country level should be introduced, both for those who work formally and for those who work informally or are unemployed – in other words, in both the areas of labour law and social security. This, it is suggested, is also the broad approach adopted by the Charter. These standards may differ according to whether people work formally or not.

¹³⁶ *Grootboom* (par 52 and 69) where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by section 26(2) in the Constitution.

¹³⁷ *Grootboom* par 35.

¹³⁸ See par 7.1.5 above.

¹³⁹ *Grootboom* par 68.

¹⁴⁰ *Grootboom* par 66.

¹⁴¹ *Soobramoney* par 25.

Social protection so understood as acquiring a wider meaning than in terms of the historical approach, should therefore not only address poverty alleviation, but move beyond these boundaries to ensure a proper standard of living for all the people of the region.

7. Concluding Observations

We set out to demonstrate the need for a distinct social protection paradigm in the SADC region both at the community level and in the policies of Member States. We have shown that current labour market regulation, to the extent that it provides for social protection at all, is restricted to the formal sector.

We have highlighted, among other things, the sheer inadequacy of social protection in the region. It is apparent that apart from lack of a distinct social protection paradigm, domestic social security measures such as there are apparently fail to address poverty meaningfully and foster social inclusion. Large numbers of people and significant categories have effectively been left out of the social protection systems in SADC countries.

Virtually all social protection systems in the region do not only cater for the whole or part of the formally employed, they operate almost exclusively on a territorial basis. This leads to the exclusion of migrant workers within the region.. Given the extent of migration within the region it is imperative that an inclusive and comprehensive social protection/labour law paradigm be developed.

We believe certain elements are necessary for the development of a comprehensive and holistic social protection paradigm. These flow from the nature of African society, in particular the context of the existing labour market in the region. An appropriate approach calls for an informed adaptation of western social security ideals not only to take account of acutely limited resources but also revitalised African communal interdependence.

Such elements are essentially innovative. These include the development of a **common baseline for country compliance**, which should allow scope for adapting different national yardsticks. While such **baseline standards** shall apply across the board in the region, they could be implemented with particular socio-economic conditions in each Member State. The common baseline approach is also possible for regional purposes, much along the lines of the principles directing co-ordination of social security systems in the European Union.

7.1 These baseline standards may rely on either internationally accepted norms and/or generally applicable human rights norms. Such an approach further emphasises innovation, and the possibility of introducing asymmetrical reciprocity on a bi- or multilateral basis.

7.2 The importance of a **human rights based framework** for the development of social protection is clearly apparent in the South African approach. Some remarkable developments in jurisprudence in South Africa 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 some recent judgements in South Africa may be relevant for developments elsewhere in the region.

- 7.3 **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. There is need to identify measures to be employed in order to bring about the **interlinking and dovetailing** of the formal and informal sector.
- 7.4 **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, partly expresses such values. 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.
- 7.5 The need to give priority to the **historically and socially disadvantaged** is undoubtedly partly stems from the colonial and racial (in particular the apartheid) heritage of many of the countries in the SADC region. And yet, the universality of this principle is apparent if we refer to the official interpretation of the relevant provisions of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN Committee on Economic, Social and Cultural Rights has made it clear that it is incumbent upon states bound by the ICESCR to satisfy, at the very least, a minimum essential level of, for example, the right to social security, bearing in mind factors and priorities such as whether a significant number of individuals are deprived from the right in question (i.e. the excluded and the marginalised) - even in times of severe resources constraints.¹⁴² In fact, the Committee has interpreted article 11(1) of the ICESCR as requiring state parties to give "due priority to those groups living in unfavourable conditions by giving them particular consideration". It has also held that "... policies and legislation should correspondingly not be designed to benefit already advantaged groups at the expense of others".¹⁴³
- 7.6 The **eradication of poverty** in Southern Africa can only be achieved by the creation of new income sources, and the extension of current social protection and labour law measures. 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 least developed countries of the region will not be able to improve the sustainability of poor people's lives if left to themselves. This objective can only be reached through the creation and development of viable social protection and labour law measures and structures throughout the region.
- 7.7 From this it follows that the SADC region can only achieve its full potential through **close co-operation** by Southern African countries in the exploitation of natural resources. Such co-operation calls for 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 market reform within the region is of paramount importance in order 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 seeking the promotion of equality is therefore in the region's interest. Effective measures should be put in place in order to ensure compliance of the SADC Treaty and the protocols.

¹⁴² Par 10, 12.

¹⁴³ General Comment No 4, par 11.

- 7.8 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 reform and regional integration. Such measures should address 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.
- 7.9 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.
- 7.10 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 conducted by the ILO/SAMAT has shown,¹⁴⁴ that many individual countries see the need for further development and enhancement of social protection as part of and beyond poverty alleviation strategies. The need for thorough investigation and debate of pertinent issues is obvious.
- 7.11 In conclusion, these objectives can only be achieved 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 need 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 deal with 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.

¹⁴⁴ See the various ILO/SAMAT contributions referred to elsewhere in this contribution.

SOCIAL PROTECTION, POVERTY ALLEVIATION AND SOCIAL SECURITY IN THE SADC REGION: THE NEED FOR DEVELOPING A CO-ORDINATED SOCIAL SECURITY PARADIGM

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CURRICULUM VITAE: M.P. OLIVIER

Marius Paul Olivier was born at Stellenbosch, South Africa on 9 October 1956. He obtained the BA (Law) degree (**cum laude**) and the LLB degree (**cum laude**) at the University of Pretoria. In 1986 the LLD degree was conferred on him by the University of South Africa.

His formal work experience has basically been of an academic nature. In 1982 he became a senior law lecturer in the Department of Mercantile Law at the Law Faculty of the University of South Africa. Since then he has been lecturing in the field of labour law and social security law, both for law and other students. In 1990 he accepted a chair in labour law at the Rand Afrikaans University and became professor of law. In 1991 he served as a guest professor at the Graduate Institute for Labour Research, National Chengchi University, Taipei, Taiwan. A similar position was held at the University of Antwerp, Belgium during February and March 1996. He has served as supervisor for a large number of masters and doctoral students in the areas of labour law and social security law.

In 1980 he was admitted as an advocate of the Supreme Court of South Africa. In 1987 he accepted an appointment as an **ad hoc** member of the Industrial Court and served in that capacity for a number of years. On occasion he sat as an assessor in Labour Appeal Court cases and also submitted various commentaries on draft labour legislation to Parliament, government institutions and other bodies. He has been and is involved in the drafting of reports on aspects of the South African labour law, social security and labour relations systems.

Various research publications have been written by him. These include several monographs, contributions to handbooks and a number of journal articles. He has delivered scientific papers at various national and international conferences and symposia. In the process he has specialised in the fields of labour law, social security, public international law and constitutional law. In this regard he has paid a number of academic research visits to universities in Europe, the USA, South America, Australia, New Zealand and the Far East. Since 1995 he has held a number of scholarships awarded by various research and other institutions, including the prestigious Ernest Oppenheimer Memorial Trust and the (German) Von Humboldt scholarships for purposes of advanced research at the International Labour Organisation in Geneva, Switzerland and in Germany.

He is co-director of the Centre for International and Comparative Labour and Social Security Law (CICLASS), an inter-disciplinary institution aimed at undertaking comparative and international labour law and social security research. Institutional links with various national and international research institutions have in the process been established. He was the project leader of a Human Sciences Research Council (now National Research Foundation)-approved and -supported project on establishing social security (law) as a separate academic discipline and on commenting on social security reform in South Africa. Presently he is the project leader of a comprehensive social security project focusing on the position of certain excluded and marginalised groups in South Africa, notably non-citizens and the rural and urban poor, as well as the informally employed amongst them. This project is supported and funded by SANPAD (South Africa Netherlands Research Programme on Alternatives in Development). He has also been a member of the Committee of Enquiry into Social Security, appointed on the basis of a decision by the South African Cabinet and charged with developing recommendations on the establishment of a comprehensive social security system for South Africa.

ABRIDGED CURRICULUM VITAE: EVANCE RABBAN KALULA

Date of Birth: 25 March 1952
Family Status: Married with children
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Current Positions: Professor of Labour Law and Social Security;
Director, Institute of Development and Labour Law;
Director, the School for Advanced Legal Studies, University of Cape Town;
Chair, South African Employment Conditions Commission.

Educational and Professional Background:

PhD, School of Law, University of Warwick, 1988;
M. Litt., Balliol College, University of Oxford, 1978;
LL.M., Kings College, University of London, 1976;
LL.B., *With Merit*, School of Law, University of Zambia, 1974.

Certified Courses:

International Law (The Hague Academy),
Human Rights (Institute of Human Rights, Strasbourg), Humanitarian Law (ICRC, San Remo).
Accredited Arbitrator and Mediator, Independent Mediation Service of South Africa (IMSSA), 1994-2000;
Panellist, Arbitration and Mediation Service of South Africa (AMSSA) 2001.

Scholarships, Fellowships and Awards.

Human Rights Research Fellowship, International Labour Office (ILO), Geneva, 1984-7;
University of Zambia Special Research Fellowship, (University of Warwick, 1980-82);
College Commendation ('Dean LL.M List'), King's College, University of London, 1976;
Rhodes' Scholar, Rhodesia and Zambia, Balliol College, Oxford, 1976-78;
UN Internship, New York, June-December, 1978;
Hindu Society Prize for Best Graduating Law Student, University of Zambia, 1974.

Employment History:

Associate Professor, Commercial Law Department, University of Cape Town, 1997-2000
Senior Lecturer, Commercial Law Department, University of Cape Town, 1994-97;
Senior Research Officer, Labour Law Unit, University of Cape Town, 1991-94;
Senior Lecturer, Faculty of Law, National University of Lesotho, 1990-92;
Lecturer, Faculty of Law, National University of Lesotho, 1988-90;
Coordinator, Africa Programme, Rights and Humanity, London, 1986-88;
Human Rights Fellow and External Collaborator, International Labour Office, Geneva, 1984-87;
Special Research Fellow, School of Law, University of Zambia at the University of Warwick, UK, 1980-82;
Lecturer, School of Law, University of Zambia, 1978-80;
Staff Development Fellow, School of Law, University of Zambia, 1974-77;
Trainee State Advocate, Attorney-General's Chambers, Lusaka, Zambia, 1974-75.

Extension Services

Served/s as consultant, expert and resource person to various international organisations, government agencies and trade unions, including, *inter alia*, the ILO, the UNHCR, the Commonwealth Secretariat, UNICEF, UNIMONT (Augsburg, Germany), Friedrich Ebert Foundation, International Transport Workers' Federation, BP Africa, Southern African Trade Union, Coordinating Council (SATUCC), SADC Employment and Labour Sector etc.

Delegate: Zambian Delegation, UN Human Rights Committee, 1973.

Technical Adviser: Zambian Government Delegation to the International Labour Conference, Geneva, 1985-86.

President: Oxford Africa Society, 1977.

Secretary-General: University of Zambia students' Union, 1972-73; Student Representative on University Council and Senate, 1972-73.

Member: *Ad hoc* Presidential Commission on National Development (Youth Committee), Republic of Zambia, 1973.

Professional and public interest activities

Member, Western Cape Advisory Board, IMSSA, 1998-2000

Member, BRIDGE Project, IMSSA, 1999-2000

Member, South African Employment Conditions Commission

Assessor, Labour Appeal Court, South Africa, 1997-98;

Member, Steering Committee (Western Cape), South African Society for Labour Law, 1996-98;

Member, Executive Committee, Industrial Relations Association of South Africa (IRASA), 1999-2001.

Board member, National Labour and Economic Development Institute (NALEDI);

Teaching and Research Supervision

Principal Lecturer and Programme Convenor of Labour Law and Social Security courses at LLB, Postgraduate Diploma, LLM levels, Faculty of Law, University of Cape Town; Supervisor of numerous LLB, Diploma, MA/M Phil and LLM dissertations, four PhDs (one completed); Part-time Lecturer (Public Sector Labour Relations), School of Government, University of the Western Cape;
Principal Researcher and Grant Holder, two National Research Foundation (NRF) projects.

Scholarly Activities

(a) Editorial and Refereeing Work

Member and Executive Editor, Editorial Board, *Acta Juridica*;
Labour Law Adviser, *You and Your Rights* (Reader's Digest, Cape Town, 1996 edition);
Member, Editorial Committee, *Law Democracy and Development Journal*;
Member, Editorial Committee, *South African Journal of Labour Relations*;
Member, Editorial Board, *International Journal of Discrimination and the Law*;
Referee, Human Sciences Research Council (HSRC);
Convenor (with Professor W. Bendix), "Study Group on Industrial Relations and Societal Transition", An Official Study Group of the *International Industrial Relations Association (IIRA)*;
Founding Editor-in-Chief, *Development and Labour Monographs* (incorporating Southern African Labour Monographs), an interdisciplinary research forum of development and labour issues in Southern Africa published by the Institute of Development and Labour Law, **over twenty titles** published in the series to date;
Member, Sustainable Livelihoods Advisory Panel, National Research Foundation (NRF).

(b) External University Examinerships and other Academic Assignments

University of Swaziland;
University of the North;
University of Venda;
University of the Western Cape;
University of Namibia;
University of Transkei;
University of the Witwatersrand;
University of Zimbabwe;
University of the North-West;
External Assessor, Appointment Panel for chair in Labour Law, Rand Afrikaans University, October 2000;
Member, Faculty of Law Review Panel, University of the Western Cape, 2000-1.

(c) Publications

Sole or joint author of various scholarly and policy papers, particularly on labour market regulation, Southern African labour relations law, and international and comparative labour law.

CURRICULUM VITAE: LINDA JANSEN VAN RENSBURG

Linda Jansen van Rensburg was born in South Africa on 22 September 1970. She obtained the B Comm degree in 1993, the LLB degree in 1995 and the LLM *Cum Laude* in 1997. She completed her **doctoral study** on 31 October 2000 and obtained the LLD degree in March 2001. The title of her thesis was "The adjudication of the fundamental right to access to social security". Her **formal work experience** has been of an academic nature. After completion of her LLB she filled the position of a research and administrative assistant at both the Department of Mercantile Law and Department of Legal Pluralism at the Law Faculty of the Potchefstroom University. In 1996 she was admitted as an advocate of the Supreme Court of South Africa. She became a lecturer at the Law Faculty of the Potchefstroom University in 1996 and was promoted to senior lecturer in 1998. In 2001 she has been promoted to an associate professor at the same university.

She obtained the following **scholarships** to do research abroad for her doctoral studies: University of Potchefstroom Bursary for Exceptional Researchers; National Research Foundation Bursary for Doctoral Studies Abroad; Flemish/South Africa Bursary. Her special fields of **interest** in lecturing and research are: Socio-Economic Rights; Social Security Law; Constitutional Law; Human Rights; International Law; Public Law and Poverty Law.

She already **published** several articles in peer-reviewed journals and made several contributions in chapters in books. She participated in several inter-university research projects both with universities in the Netherlands and Belgium. She is currently co-editor of a second edition of the book *Social Security: General Principles* (Butterworths Johannesburg 2002) where she is also involved in writing several of the chapters in the book. To broaden her scope of publications she contributed to chapter of an international book called "The Role and Influence of International Human Rights Instruments on South African Poverty Law" in Robson P en Williams L (red) *Moving towards International Poverty Law* (Hart Publications 2002). This will be published in 2002.

She has been involved in **several multidisciplinary projects** across national and international boundaries, where she fulfilled both the role of researcher and co-ordinator. She participated in the first inter-university project between HBU's (Historically Black Universities) and HWU's (Historically White Universities) entitled "The role of Traditional Authorities in South Africa". The members consisted of the Law Faculties of the University of the North, University of the North West, University of Zululand, University of Natal (Pietermaritzburg), University of Potchefstroom for CHE and the University of Leiden, Netherlands. Another project in which she participated was a Human Sciences Research Council (now National Research Foundation)-approved and -supported project on establishing social security (law) as a separate academic discipline and on commenting on social security reform in South Africa. She co-ordinated the "Protection and Enforcement" theme group. She was also responsible for the final editing of the research report. Presently she is a member of a comprehensive social security project focusing on the position of certain excluded and marginalised groups in South Africa, notably non-citizens and the rural and urban poor, as well as the informally employed amongst them. This project is supported and funded by SANPAD (South Africa Netherlands Research Programme on Alternatives in Development). She also established a new project on the utilisation of constitutional rights to alleviate poverty in South Africa.

She had also been involved in writing several outline papers on different contingencies of social security for the Committee of Enquiry into Social Security, appointed on the basis of a decision by the **South African Cabinet** and charged with developing recommendations on the establishment of a comprehensive social security system for South Africa. She also contributed to the **Shadow Non-Governmental Organisation** Report (Human Rights Centre, Pretoria) on the "Monitoring function of the Human Rights Commission with reference to the realisation of socio-economic rights" (July 2000). She is highly involved on **local governmental level** in advising the Potchefstroom Municipality on addressing poverty issues within the community and implementing anti-poverty measures aiming at the eradication and alleviation of poverty.