

Informality, Employment Contracts, and Social Insurance Coverage: Rights-Based Perspectives in a Developing World Context

Marius OLIVIER*

This contribution critically reflects on rights-based perspectives in relation to the extension of social security, in particular social insurance coverage to those who work informally, with a focus on the developing world. It is argued that the traditional social security concept is insufficient in this regard, mainly as a result of its particular focus on formal employment-based social insurance, its emphasis on state-regulated and formal forms of social security, and a narrowly focused risk/benefit approach, which does not reflect the true needs and situation of those who work informally. Domestic (social security) legal systems, as is the case with international standards embedded in most of the International Labour Organization (ILO) instruments, have a primary focus on those in the formal economy, who work within the framework of an identifiable employment relationship. In addition, there appears to be little scope to apply employment contracts outside the framework of the traditional employment relationship to support coverage extension of social insurance arrangements. Alternative approaches to and opportunities for coverage extension are suggested. These include: adopting innovative conceptual approaches to extend coverage beyond those who work in terms of a contract of employment; using contractual tracking approaches and deeming measures; and deliberately widening the base of social insurance coverage through targeted accommodation of informal workers. Finally, it is argued that there is need for a strengthened rights-based framework, supported and informed by suitable international standards, regional norms, and constitutional prescriptions, to ensure that social security, in particular social insurance coverage, is extended to informal workers.

Keywords: Social security for informal workers, informal economy and social security, informal sector and social security, extension of social security, social security international standards.

1. INTRODUCTION

This contribution¹ critically reflects on rights-based perspectives in relation to the extension of social security, in particular social

* Extraordinary Professor, Faculty of Law, Northwest University, South Africa; Adjunct Professor, Faculty of Law, University of Western Australia.

¹ Based on a report on this theme completed by the author for the International Social Security Association (ISSA) ('Informality, Employment Contracts and Extension of Social Insurance Coverage', <www.issa.int/content/download/91354/1830644/file/2-paper9-Olivier.pdf>, <www.iislp.net/images/stories/Reports/ISSA_Informal_Sector_Coverage_Extension_Project_REVISIED_INTEGRATED_VERSION_FINAL_REPORT_Aug_2009.pdf>, 2009; this report was presented at a European Report on Development (ERD) Regional Conference on Promoting Resilience through Social Protection in Sub-Saharan Africa, organized by the Robert Schuman Centre for Advanced Studies, European University Institute, Dakar, Senegal, 28–30 Jun. 2010. 'The extension of social protection to non-formal sector workers, with specific reference to social insurance coverage: The quest for an alternative paradigm'). A synopsis of some of the ideas expressed in this contribution formed the basis of a contribution entitled 'Extending Social Protection to Non-formal Sector Workers: The International Quest for an Alternative', financially supported by the European Commission,

insurance² coverage, to those who work informally, with a focus on the developing world. It briefly deals with the contextual framework, discusses the limitations of current conceptual as well as domestic social security systems and regulatory frameworks, including the international standards frameworks in extending coverage, and suggests alternative approaches to and opportunities for coverage extension. These include: using contractual tracking approaches and deeming measures; extending coverage beyond the sphere of the formal employment relationship; and widening the base of social insurance coverage. Finally, it highlights the importance of a rights-based and human rights-friendly framework.

2. CONTEXTUAL FRAMEWORK

Worldwide, there is a growth in non-traditional, and in particular informal employment, and a decline in standard forms of work. It is estimated that only 5–10% of the active population in sub-Saharan Africa and South Asia are covered by statutory social security schemes, and in general, only 20% of workers enjoy adequate social security coverage worldwide.³ This is especially the case for those working in the informal sector. These forms of work are usually associated with increasing job insecurity and precarious conditions of work.⁴

In sub-Saharan Africa generally, informal employment constitutes 72% of all non-agricultural employment.⁵ In Africa as a whole, the relationship between informal work in low-productivity environments and low-paid positions is evident: According to a recent International Labour Organization (ILO) report, the persistence and depth of poverty in Africa is strongly related to both the structure of employment and low productivity.⁶ The figures for some other parts of the world correspond with those for Africa quoted above. In India, a total of 423 million workers are engaged in the unorganized⁷ sector, amounting to 92% of the total workforce.⁸ In Asia, the size of the informal economy ranges from 45% to 85% in different parts of the continent. The figure for Latin America is 55%.⁹

and published in the European Report on Development (ERD) 2010 ('Social Protection for Inclusive Development: A New Perspective in EU Co-operation with Africa (2010)', <http://erd.eui.eu/media/2010/Social_Protection_for_Inclusive_Development.pdf>, 5 Oct. 2011, 76–77).

² This contribution therefore does not discuss the impact of social assistance and social protection floor interventions on those who work informally.

³ E. Reynaud, 'The Extension of Social Security Coverage: The Approach of the International Labour Office', Social Security Policy and Development Branch – ESS Paper No. 3 (Geneva: International Labour Office, 2002), 1.

⁴ M. Quinlan, 'The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge (Paper)' (Australian Council of Trade Unions, 25 Sep. 2003), 2–3, <www.actu.asn.au/public/ohs/reactivatecampaign/1064473735_24238.html>, 5 Oct. 2011.

⁵ ILO, *Contribution to the Joint AU/ILO Workshop on the Informal Economy in Africa* (Dakar, 2008), 3–4.

⁶ *Ibid.*, 3.

⁷ According to the National Commission for Enterprises in the Unorganized Sector (NCEUS) in India, unorganized workers consist of those working in the unorganized enterprises or households, excluding regular workers with social security benefits, and the workers in the formal sector without any employment/social security benefits provided by the employers. Quoted from K. Sankaran, 'Legislating for the Informal Economy: The Challenges for Labour Law', paper presented at the Fifth African Regional Congress of the International Industrial Relations Association (IIRA) (Cape Town, South Africa, 28–30 Mar. 2008).

⁸ Sankaran, *supra* n. 7.

⁹ M. Chen, R. Jhabvala & F. Lund, 'Supporting Workers in the Informal Economy: A Policy Framework', ILO Working Paper on the Informal Economy (2002), 6.

The reasons for this state of affairs are varied. One of these relates to the contraction of the formal sector in many developing countries. The formal economy in these countries has been unable to create jobs and to absorb labour entrants.¹⁰ In addition, the basis on which work is performed has shifted significantly, as is evident from the composition/segmentation of the labour market. Recent trends indicate that a dual phenomenon of informalization, consisting of two different processes, characterizes the changing nature of work in the labour market. These processes are called *casualization* and *externalization*. The former relates to the displacement of standard employment by temporary or part-time employment (or both). The latter refers to a process of economic restructuring in which employment is regulated by a commercial contract rather than a contract of employment.¹¹ As noted by Benjamin, both represent shifts from the norm of the standard employment relationship that is understood as being indefinite (permanent) and full-time employment, usually at a workplace controlled by the employer. He indicates that these processes have led to an informalization of work as employment is increasingly unregulated and workers are not protected by labour law (and, one could add, social security) either because they are unable to enforce their rights or because they do not have the legal status of an employee.

Informal employment can include a wide variety of people. In broad terms, it is therefore necessary to distinguish between non-standard workers in wage employment and those in non-wage employment.¹² The latter category would often be excluded from statutory protection, as is borne out by the discussion below. From a different perspective, those who work informally can be categorized into three different groups: (a) owner-employers of microenterprises, which employ a few paid workers, with or without apprentices; (b) own-account workers, who own and operate one-person businesses, working alone or with the help of unpaid workers, generally family members and apprentices; and (c) dependent workers, paid or unpaid, including wage workers in microenterprises, unpaid family workers, apprentices, contract labour, home workers, and paid domestic workers.¹³ In other words, there are those who have an identifiable employer (contract workers, domestic servants, home workers, casual workers, and so on), those who work for their own account (employers, the self-employed, small farmers, fishers), and those who work as part of a group or community (as members of a cooperative or association). There are wide disparities in the type of work within each category, especially the last two categories.¹⁴

This raises two further interrelated considerations. The first is that the borderlines between formal and informal and between traditional and non-traditional have become

¹⁰ ILO, 2008, 10.

¹¹ P. Benjamin, 'Informal Work and Labour Rights in South Africa', paper presented at the IIRA 5th African Regional Congress (Cape Town, March 2008), 6.

¹² Chen et al., 5.

¹³ ILO, *Employment and Social Protection in the Informal Sector* (Geneva, 2000), <www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/esp-1-2.pdf>, 5 Oct. 2011.

¹⁴ Reynaud, 7. See also R. Hussmanns, 'Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment', Working Paper No. 53 (Geneva: Policy Integration Department, Bureau of Statistics, ILO, 2004), 5–6.

increasingly fluid and blurred as formal employment has decreased worldwide and as people tend to move out of formal and into informal and non-traditional employment, and vice versa, more readily than in the past.¹⁵ There is, therefore, both a continuum and a fluidity or mobility between the formal and informal economies. People who work are often, and increasingly so, moving between formal economy wage employment and informal economy (wage and) non-wage employment.¹⁶ This may have severe consequences from the perspective of labour law and social security protection, as discussed below. The second factor has to do with the phenomenon that people who work informally in non-wage employment or otherwise non-traditionally may, nevertheless, be bound in a network of dependency relationships. Yet, in the absence of an identifiable employment relationship, they are often wholly excluded from social security coverage. This is reflected on below.¹⁷

There has been a long-standing debate about the definition and use of the terms 'informal sector' and 'informal economy'.¹⁸ This contribution does not engage in that debate. Whenever either of these two concepts are used, while acknowledging the incompleteness of the suggested approach,¹⁹ the emphasis is on informality, encapsulating those activities falling de facto (factually or in practice) or de jure (legally) outside the reach of law, in particular the current social security (legal and therefore institutional) framework.²⁰

3. THE INSUFFICIENCY OF THE TRADITIONAL SOCIAL SECURITY CONCEPT

One of the reasons for this state of affairs has to do with the concept of social security, as this concept has found its way into national legal systems and policy frameworks and largely also in international and regional instruments. Traditionally, the concept of social security,

¹⁵ A. Barrientos & S.W. Barrientos, 'Extending Social Protection to Informal Workers in the Horticulture Global Value Chain', Social Protection Discussion Paper Series No. 0126, World Bank Report (Washington, 2002), 18–19. See also ILO, 2008, 15.

¹⁶ *Ibid.*

¹⁷ See s. 4 *infra*.

¹⁸ See generally ILO, *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya* (Geneva: International Labour Office, 1972); Reynaud, 2; Chapter III of Report VI of the International Labour Conference, 89th Session, 5–21 Jun. 2001 – Social Security: Issues, Challenges and Prospects; A. Trebilcock, 'Decent Work and the Informal Economy', EGD1/UNI-WIDER Discussion Paper 2005/04, 2; see ILO, *Regional Office for Asia and the Pacific: The Informal Sector* (ILO, 2000) [Online], <www.ilo.org/public/english/region/asro/bangkok/feature/inf_sect.htm>, 5 Oct. 2011; ILO, 2008, 7; K.P. Kannan & T.S. Papola, 'Workers in the Informal Sector: Initiatives by India's National Commission for Enterprises in the Unorganized Sector (NCEUS)', *International Labour Review* 146, no. 3–4 (2008): 323; D.S. Saini, 'Social Protection to Informal Sector Workers in India through the Community-Based Approach', *ZIAS* 22 (2008): 39, 45; P. Bocquier, *Informal Sector versus Informal Contracts in Nairobi, Kenya, DT/2005-10* (Paris: DIAL, 2005), 9–10; ILO, 'World Labour Report 2000 (Income Security and Social Protection in a Changing World)' (Geneva, 2000), 194, Box 10.2; Chen et al., 5; A. Henley, R. Arabsheiban & F.G. Carneiro, 'On Defining and Measuring the Informal Sector: Evidence from Brazil', *World Development* 37, no. 5 (2009): 993; F. Lund & S. Srinivas, *Learning from Experience: A Gendered Approach to Social Protection for Workers in the Informal Economy* (Geneva: ILO, 2000), 3.

¹⁹ To the extent that it is accepted that informality implies the absence or non-application of a regulatory (legal) framework, this raises a range of fundamental challenges. For example, it is not clear to what extent legal regulation must be absent or not applied – in particular, the question arises whether a person would be deemed to be an informal economy worker if he/she is covered by, for example, tax and property laws but not by labour and social security laws: see also Chen et al., 13–15.

²⁰ This appears to be the more or less general consensus emerging from the vast amount of expert opinion: see ILO, 2008, 12.

as is the case with social security schemes traditionally established in developing countries, has been associated with a relatively strict distinction between formal employment-based social insurance and poverty-related social assistance instruments.²¹ The first category would rarely be applicable to informal workers, while the latter may, for all kinds of reasons, not be available to the majority of these workers in the developing world.

Furthermore, traditionally nine classical risks, which, by and large, form the basis of a range of international and regional standards, have informed the make-up and orientation of social security systems, also in the developing world: health care; retirement; survivors' benefits; disability; maternity; occupational injuries and diseases; unemployment; sickness; and family benefits.²² Social security systems in the developing world, where informal workers abound, invariably employ these narrow risk-based approaches. In addition, reliance is often placed on the definition of social security traditionally used by the ILO. This definition, which also underlies the structure, content, and orientation of the Social Security (Minimum Standards) Convention 102 of 1952, has been defined as:

The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families and children.²³

Again, in the World Labour Report 2000, the ILO defined social security as:²⁴

- the protection that the society provides for its members through a series of public measures;
- provisions to offset the absence or substantial reduction of income from work resulting from various contingencies (notably sickness, maternity, employment injury, unemployment, invalidity, old age, and death of the breadwinner);
- measures to provide people with health care; and
- measures to provide benefits for families with children.

The traditional risk categories indicated in the ILO definitions may be helpful in identifying more common life experiences and the situations to which human beings are generally exposed (such as retirement, sickness, unemployment, employment injuries and diseases, and maternity). However, such a definition of social security are not best suited to extending coverage in the developing world to the informal sector as it prioritizes protection through 'public measures', that is, state-regulated and formal social security schemes.²⁵

²¹ In terms of this distinction, social insurance denotes contributory- and risk-based arrangements giving rise to fixed benefit payments aimed at income maintenance, while social assistance refers to tax-based benefit payments on a universal or targeted basis, aimed at minimum income support. See ILO, *Introduction to Social Security* (Geneva: ILO, 1989), 3–5; D. Pieters, *Introduction into the Basic Principles of Social Security* (Alphen aan den Rijn: Kluwer, 1993), 5. Social assistance normally is targeted at those who are poor (e.g., through income and means testing). In some (limited) cases, universal benefits are available.

²² ILO Social Security (Minimum Standards) Convention 102 of 1952; ILO, 1989, 3.

²³ ILO, 1989, 3.

²⁴ ILO, 'World Labour Report 2000', 29.

²⁵ J. Jutting, 'Strengthening Social Security Systems in Rural Areas of Developing Countries', ZEF Discussion Papers on Development Policy (Bonn: Centre for Development Research, 1999), 5.

It fails to take into consideration non-formal and non-state-regulated social security, which the majority of people in the informal sector rely on. The definition also implies that people have achieved an acceptable standard of living that needs to be protected. However, this does not apply to the majority of people employed in the informal sector in the developing world.²⁶ Ideally, social security in the informal sector also needs to be developmental.

Another problem with these definitions is that they concentrate on protecting the individual from insecurity that may affect him or her, neglecting collective risks affecting informal workers in particular, such as war, crop failure, or natural disasters that often befall those living in the developing world. As noted by Jutting,²⁷ 'Risks enumerated in the ILO definition refer to a specific ecological and socio-economic setting found in developed countries'. The definition also presupposes that those affected by the said risks or contingencies are involved in the (formal) labour market: hence, the reference to the stoppage or reduction of earnings. Such an approach does not cater for the position of large segments of informal workers who do not have access to earnings flowing from regular employment.²⁸

Finally, the focus on risks or contingencies does not sufficiently address the need of social security to focus on an overarching primary goal, which in the developing world relates to addressing and redressing poverty and exclusion. As remarked in a recent International Social Security Association (ISSA) Report: 'Globally, the conventional role of social security has been considered one of income maintenance and redistribution; in many countries, the role of poverty reduction has not been considered a central role of social security'.²⁹ This role, of course, is particularly relevant for informal workers. Furthermore, most social security systems in the developing world are mainly compensation-focused, not giving effect to the principle that social security also has a preventive and remedial character. However, compensation can never be an end in itself. Where possible, it should be only a temporary measure, while preventive measures and reintegration (in the sense of an attempt to get the victim integrated into the labour market and society) should be given priority. This implies that measures aimed at preventing the risks from arising (such as employment-creation policies, health and safety regulation, preventive health care) and remedying or repairing damage (e.g., reskilling or retraining; labour market and social integration) should be adopted as an integral part of the social security system, alongside compensatory measures.³⁰

The implication of this narrow compensation focus is that there is little appreciation of the need of informal workers to be protected against risks in the work environment from

²⁶ E. Kaseke, 'Social Security and Older People: An African Perspective', *International Social Work* 48, no. 1 (2005): 91.

²⁷ *Ibid.*

²⁸ M. Olivier, 'Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Country Perspectives, with Specific Reference to Southern Africa', in *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*, eds R. Blanpain et al. (Alphen aan den Rijn: Kluwer, 2009), 254.

²⁹ ISSA, *Dynamic Social Security for Africa: An Agenda for Development – Developments and Trends* (Geneva, 2008), 4.

³⁰ J. Berghman, 'Basic Concepts of Social Security', in *Social Security in Europe* (Antwerp, Brussels: Maklu, 1991), 18, 20; Pieters, 2–4.

arising (such as occupational health and safety risks). Nor do they benefit from reskilling, should they, for example, lose a formal sector position and be forced to join the informal sector.

It is suggested that one should refrain from defining the concept of social security too narrowly, as this may cause the concept to be inappropriate for the informal sector context. In particular, in Africa, Latin America, and (most parts of) Asia, where poverty is endemic, where people are exposed to a range of risks not traditionally captured by the social security concept (e.g., droughts, calamities, natural disasters, HIV/AIDS), and where the focus is often on satisfying immediate needs rather than meeting long-term risks, it may be necessary to adopt alternative or additional nomenclature that would sufficiently capture the broad range of social security measures,³¹ as well as the chronic forms of deprivation alongside the temporary adversity to which people living in developing countries are exposed.³²

4. DOMESTIC LEGAL SYSTEM RESTRICTIONS

One of the core problems experienced with existing labour law and social security systems is that, subject to exception, they essentially cover those in the formal economy, who work within the framework of an identifiable employment relationship. In terms of its traditional scope, labour law, along with labour law-related social insurance arrangements, is restricted to the employment relationship and does not cover autonomous or independent contractors.³³ This also has implications for compliance, as ‘the introduction of third parties creates more complicated and potentially attenuated webs of legal responsibility that place heavier logistical demands on the inspectorate’.³⁴

It follows that the impact of labour law on informal (economy) work relationships appears to be severely restricted.³⁵ This flows from the fact that labour laws in many parts of the developing world, in particular Africa, inherited from the colonial masters, traditionally apply to the formal employment context, thereby excluding those who work informally or in many non-standard arrangements from coverage. The same, and to some extent more restricted, picture emerges from social security laws in the developing world, as appears to be the case in Southern Africa.³⁶ Much of the area of social insurance is purely formal

³¹ Such as indirect forms of social security (e.g., essential housing, nutrition) and informal forms of social security. See, among others, S. Devereux, *Social Protection Mechanisms in Southern Africa* (Institute of Development Studies, 2006). See also M. Olivier, ‘The Concept of Social Security’, in *Social Security: A Legal Analysis*, eds M. Olivier et al. (Durban: LexisNexis Butterworths, 2003), Ch. 2.

³² See E. Ahmad et al., *Social Security in Developing Countries* (Oxford: Clarendon Press, 1991), 43.

³³ ILO, 2008, 19.

³⁴ Quinlan, 10.

³⁵ See M. Olivier, ‘The End of Labour Law in the Global Workplace Context? A South and Southern African Response’, in *Global Labor Market: From Globalization to Flexicurity*, eds R. Blanpain & M. Tiraboschi (Alphen aan den Rijn: Kluwer, 2008) on which this paragraph is based partly; C. Fenwick & E. Kalula, ‘Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives’, *Development and Labour Monographs Series Occasional Paper 2/2204* (Cape Town: Institute of Development and Labour Law, UCT, 2007), 31.

³⁶ See M. Olivier, ‘Social Protection in SADC: Developing an Integrated and Inclusive Framework – A Rights-Based Perspective’, in *Social Protection in SADC: Developing an Integrated and Inclusive Framework*, eds M. Olivier & E. Kalula

employment-based, in the sense that one must be an employee (in the formal sector) as defined in the relevant legislation in order to qualify as a contributor and, consequently, as primary beneficiary.³⁷ In addition, in particular for the purposes of access to long-term benefits (e.g., pension payments), one may be required to have been a contributing member of a particular social insurance fund for quite some time in order to qualify for benefits. In addition, the definition of ‘dependant’ in the various social security laws is normally linked to the employee/contract of service concept, in the sense that coverage is extended only to dependants of deceased employees or persons who rendered services on the basis of a contract of employment.

Furthermore, informal workers may be excluded from coverage because:

- a national social insurance scheme covering a particular benefit – such as pensions – does not exist, while participating in the private or occupational scheme alternatives may not be affordable for (or otherwise attractive to) informal workers;
- informal workers may not be compelled to take up membership of an existing national scheme; or
- little incentive exists to join a scheme that may be open to informal workers – this may be the result of the fact that:
 - (a) (self-employed) informal workers are often required to pay a double contribution (since there is no employer to pay an ‘employer’s’ contribution),³⁸ or
 - (b) informal workers who employ others may be barred from participating in a social insurance scheme, as they are deemed to be employers only and not (also) as persons in need of coverage,³⁹ and
 - (c) no incentives to join a national scheme, in the form of flexible contribution modalities and targeted or tailor-made benefit packages exist.

As noted elsewhere,⁴⁰ the overall effect of all of the above is that dealing with and managing the risks to which informal economy workers and their dependants are exposed, due to the absence of labour law and social security protection, are effectively shifted onto such workers and their families and, ultimately, to other social security schemes (such as health-care schemes) and state-provided social assistance.⁴¹

(Johannesburg: Centre for International and Comparative Labour and Social Security Law (CICLASS) and Institute of Development and Labour Law, 2004), 34–35, on which the following paragraphs are largely based.

³⁷ Some exceptions do exist: for example, the Mauritian social security system is, for most part, residence-based – and not formal sector employment-based – e.g., self-employed people may join the National Pensions Scheme established under the National Pensions Act of 1976.

³⁸ This applies in particular to developing countries in Africa (e.g., Ghana (in terms of earlier arrangements), Namibia, Rwanda, Tanzania, and Zambia).

³⁹ See, for example, s. 20(2) of the Namibian Social Security Act 1994.

⁴⁰ Olivier, 2009, 249–250.

⁴¹ Quinlan, 16. Loewenson indicates that in Southern Africa, for example, there is no assessment of the public health burden of occupational injury and illness: R. Loewenson, ‘Occupational Health and Safety in Southern Africa: Trends and Policy Issues’, ILO/SAMAT Policy Paper No. 8 (Harare, 1998), 5.

5. RESTRICTED APPLICATION OF INTERNATIONAL SOCIAL SECURITY STANDARDS

It has often been remarked that international labour and social security standards emanating from the ILO instruments generally apply to informal workers as well, particularly within the framework of the ILO's Decent Work Agenda.⁴² In fact, a few ILO Conventions and Recommendations have been developed specifically with particular informal sector groups in mind – for example, the Plantation Convention 110 of 1958, the Home Work Convention 177 of 1996, the Job Creation in Small and Medium-Sized Enterprises Recommendation 189 of 1998, and the Part-Time Work Convention 175 of 1994.

However, several qualifications need to be heeded. First, in many cases, it remains possible for countries to use the flexibility clauses (i.e., the exemption clauses) contained in certain Conventions to withhold application of a Convention concerned to particular groups on the basis of perceived difficulty in complying with the provisions of the Convention as regards these groups. The result is that small- and medium-sized enterprises are often excluded in this way.⁴³ There may be some contrary tendencies – for example, the recently released ILO report on Decent Work for Domestic Workers indicates that these exemption clauses have rarely been used to exclude domestic workers from coverage.⁴⁴

Second, while the social security Conventions may, in theory, apply to the informal sector/economy, it is clear from the earlier discussion in this contribution that the conceptual framework relied upon in these instruments was not developed with the informal work context in mind.⁴⁵ In fact, there is little indication in these instruments how the provisions thereof could conceptually, institutionally, structurally, and operationally be rolled out to the informal sector/economy. Finally, the rate of ratification of many developing countries, in particular in Africa⁴⁶ and Asia,⁴⁷ of social security Conventions is alarmingly low, with specific reference to post-World War II social security Conventions. The implication is that the current social security Conventions of the ILO provide little more than a theoretical framework for the application of these standards to the informal work context. The further implication is that dedicated action, supported by targeted instruments, need to be embarked upon to ensure that international social security standards are effectively and meaningfully extended to the informal work context.

⁴² See ILO, 2008, 18–19; Reynaud, 16; ILO, 'Decent Work for Domestic Workers, Report IV(1) Prepared for the International Labour Conference, 99th Session, 2010' (Geneva: ILO, 2009), paras 55–82.

⁴³ ILO, 2008, 14.

⁴⁴ ILO, 2009, paras 74–74 and 81–82.

⁴⁵ See now, for example, Art. 1(b) of the ILO Domestic Workers Convention (Convention 189 of 2011), which defines a domestic worker, for purposes of the Convention, as 'any person engaged in domestic work within an employment relationship' (emphasis added).

⁴⁶ For the position in Southern African Development Community (SADC), see Olivier, 'The End of Labour Law in the Global Workplace Context? A South and Southern African Response', 35–38.

⁴⁷ See M. Olivier, 'Old Age Security in Asia and the Pacific: Reflections on a Rights-Based Framework', *Indian Journal of Human Development* 2, no. 2 (2008): 371–404.

6. UTILIZING THE EMPLOYMENT CONTRACT AS A BASIS FOR EXTENDED COVERAGE?

In 2006, the International Labour Conference adopted the Employment Relationship Recommendation 198 of 2006. One of its primary aims is to provide a framework for dealing with difficulties in establishing the existence of an employment relationship that may create serious problems for those workers concerned, their communities, and society at large.⁴⁸ The Recommendation requires the adoption of measures to combat disguised employment relationships, that is, where other forms of contractual arrangements are used to hide the true legal status of the (employment) relationship.⁴⁹ Measures should also be adopted to ensure protection to employed workers in relationships involving multiple parties⁵⁰ – such as a triangular relationship, for example, a labour hiring arrangement. Of particular importance is the provision requiring member countries to ensure effective protection for workers especially affected by the uncertainty as to the existence of an employment relationship, including workers in the informal economy.⁵¹ Countries are encouraged to use measures such as legal presumptions to help determine the existence of an employment relationship and to distinguish between being employed and being self-employed.⁵²

The provisions of this Recommendation are of particular importance to the debate on the extension of social security coverage to informal workers. This is so in view of the fact that social insurance coverage is often based on the existence of an employment relationship.

However, there are important qualifications to the above. First, the Recommendation is evidently not intended to cover all relationships where work is being performed. On several occasions, the Recommendation acknowledges *self-employed workers* as a category of workers distinct from *employed workers*.⁵³ In addition, the Recommendation preserves other contract types entered into without the intention to disguise an employment relationship (e.g., true civil and commercial relationships).⁵⁴ From these provisions, it is clear that work performed on the basis of, for example, a genuine independent contract relationship will not be treated as an employment relationship. The Recommendation therefore has limited application.

Second, expanding the employment relationship notion for labour law purposes does not automatically imply that the same would be true for social security purposes. The reason is that a more restricted notion of employee or worker is often used for the purposes of access to public social insurance institutions, as indicated above. Deliberate revision of the social security terminology in this regard needs to be effected as well.

⁴⁸ See the Preamble to the Recommendation.

⁴⁹ Clause 4(b).

⁵⁰ Clause 4(c).

⁵¹ Clause 5.

⁵² Clause 11.

⁵³ Clauses 4(a) and 11(c).

⁵⁴ Clause 8.

Third, in the absence of dedicated statutory intervention to force the trappings or legal consequences of an employment relationship (e.g., in the form of labour and social security rights) on parties who intended a different kind of relationship, it is highly unlikely that courts or arbitrators would do the same. The traditional ambit and role of the employment relationship remain of a restricted nature.

In view of the above, would it, in the fourth instance, help to apply employment contracts outside the framework of the traditional employment relationship to support coverage extension of social insurance arrangements? Several caveats are relevant, one would think. First, it is unlikely to achieve this result in the absence of a statutory framework providing for same. Second, courts tend to investigate the true nature of a relationship in order to determine whether an employment relationship or another kind of relationship exists. In fact, the normal position is that a written contract is as a rule not required to constitute an employment relationship or, for that matter, a different kind of relationship.⁵⁵ Therefore, merely entering into a written contract that calls a particular relationship an employment relationship will not necessarily have this effect in law.

7. TOWARDS DEVELOPING A FRAMEWORK FOR EXTENSION: CONCEPTUAL ADJUSTMENT⁵⁶

Definitional or conceptual widening of coverage to include at least certain categories of informal economy workers is an important step to extend (labour law and) social security protection. Mention should be made of a range of innovative recent attempts in the developing world aimed at extending protection and including informal workers within the statutory framework of social security.⁵⁷

In India, for example, the recently approved Unorganized Workers' Social Security Act 2008⁵⁸ has adopted a deliberately wide notion, first, of what is comprehended by the term 'unorganized sector'⁵⁹ and, second, of who is intended to be an employer and a worker for the purposes of covering those embedded in a relationship of work in the informal economy. It defines 'employer' as 'a person or an association of persons, who has engaged or employed an unorganised sector worker either directly or otherwise for remuneration'.⁶⁰ It attaches a specific meaning to unorganized sector workers and defines this term with reference to a distinction to be drawn between a home-based worker, self-employed worker, and a wage worker.⁶¹ The 2008 version of the Act has widened the

⁵⁵ ILO, 2009, paras 123–128.

⁵⁶ Olivier, 2009, 254–268.

⁵⁷ See, among others, Barrientos & Barrientos, 37 (in respect of Chile). See also P. Horn, 'Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment', paper presented at the EGDI and UNU-WIDER Conference on Unlocking Human Potential: Linking the Informal and Formal Sectors (17–18 Sep. 2004), 1.

⁵⁸ Act 33 of 2008.

⁵⁹ 'Unorganised sector' means 'an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten' (Art. 2(k)).

⁶⁰ Article 2(a).

⁶¹ See s. 2(b) and (j), respectively.

scope of the definition of 'unorganized sector worker', by stipulating that an unorganized worker means 'an unorganized sector worker and also includes workers in the organized sector not covered by the existing laws relating to social security'.⁶² Of particular importance is the definition of 'wage worker', which evidently aims at including workers with little income who render services in subcontracted capacity, who may work for more than one employer, and who may fall within a range of non-standard work relationships.⁶³

Progressive statutory adjustments in various developing world jurisdictions are increasingly extending the scope of application of labour law. In the process, labour rights have been extended to a range of workers who are not employees in the strict sense of the word but who otherwise work in a dependent or subordinate relationship. This may serve as a useful example and precedent for the extension in principle of social security rights too.

For example, in the case of some Caribbean countries, dependent contractors have been included in the protective framework of labour legislation.⁶⁴ In Tanzania,⁶⁵ an employee is defined with reference not only to a contract of employment but also any other contract under which the individual undertakes to work individually for the other party to the contract and the other party is not a client or customer of any profession, business, or undertaking carried on by the individual.⁶⁶ In Swaziland,⁶⁷ 'employee' includes a person who works for pay or other remuneration not only under a contract of service but also 'under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person'. In South Africa, an administrative capacity to regulate unprotected work was given to the Minister of Labour to apply provisions of all labour laws to persons other than employees.⁶⁸ In addition, a rebuttable presumption of employment has been introduced into some of the major South African labour laws.⁶⁹ The presumption is triggered by a range of factors, of which at least one may be particularly relevant to the informal worker context. This is the notion of 'economic dependence'.⁷⁰

⁶² New s. 2(n).

⁶³ See s. 2(m): 'Wage worker means a person employed for remuneration in the unorganised sector, directly by an employer or through any contractor, irrespective of the place of work, whether exclusively for one employer or for one or more employers, whether in cash or in kind, whether as a home-based worker, or, workers employed by households including domestic workers, with a monthly wage of an amount as may be notified by the Central Government and State Government, as the case may be' (own emphasis).

⁶⁴ See O. Taylor, 'The Jamaican Labour Relations and Industrial Disputes Act (LRIDA): A Critical Assessment', in *Human Resource Development and Workplace Governance in the Caribbean*, eds N. Cowell & C. Branche (Kingston: Ian Randle Publishers, 2003), 426–450. See also Barrientos & Barrientos, 29–30.

⁶⁵ See the provisions of the Tanzanian Employment and Labour Relations Act 2004.

⁶⁶ As quoted by P. Benjamin, 'No Longer at Ease: Approaches to the Scope of the Employment Relationship in SADC Countries', paper presented at the IIRA 5th African Regional Congress (Cape Town, March 2008), 12–13.

⁶⁷ Swaziland Industrial Relations Act 1 of 2000.

⁶⁸ Section 83 of the Basic Conditions of Employment Act 75 of 1997; Benjamin, 'No Longer at Ease: Approaches to the Scope of the Employment Relationship in SADC Countries', 3–4.

⁶⁹ Section 83A of the Basic Conditions of Employment Act 75 of 1997 and s. 200A of the Labour Relations Act 66 of 1995; Benjamin, 'No Longer at Ease: Approaches to the Scope of the Employment relationship in SADC Countries', 4–5.

⁷⁰ Benjamin, 'No Longer at Ease: Approaches to the Scope of the Employment Relationship in SADC Countries', 3–7.

In his study on the scope of the employment relationship in Southern African countries, Benjamin concludes that legislative responses have expanded the scope of labour law and assisted individuals to prove the existence of an employment relationship. This may be relevant when the extension of social security coverage is considered.⁷¹

In dependency scenarios, it might be necessary to embark on a contractual tracking exercise to determine who the real employer is (or combination of employers).⁷² It has been suggested that the 'real' employer or provider of work down (or perhaps up) the chain – that is, the unit that has responsibility for the rights and protection of all workers in the chain – is the lead firm that outsources production, even if it is only a retail firm.⁷³ In fact, introducing regulatory approaches that centre on the regulation of supply chains could go a long way to extend not only labour law but also social security protection to informal workers. To quote Benjamin:⁷⁴

These approaches are a response to the outsourcing of aspects of the work process in sectors such as the clothing industry to categories of workers who fall outside of the conventional definition of employment such as outworkers and home-workers as well as to the increasing use of unprotected 'owner-drivers' to transport goods. This approach has been used in state level legislation within Australia. It has the potential to apply to any situations in which businesses utilise supply chains that include 'non-employee' workers. Aspects of this approach include applying minimum employment standards to all workers in a supply chain and placing obligations on entities such as retailers, manufacturers and primary contactors to disclose information on their supply chains to interested groupings such as trade unions and inspectorates.

Finally, while no attempt is made here to discuss the range of innovative institutional models that have developed to extend social security coverage to informal workers,⁷⁵ mention should be made of increasing indications of the successful accommodation of informal workers under existing social insurance schemes, provided suitable and specialized arrangements, aimed at this category of workers, have been put in place. One such example is the Informal Sector Fund set up by the national scheme in Ghana, that is, Social Security and National Insurance Trust (SSNIT). In the three years since the establishment of this Fund, as a subsidiary of SSNIT, 90,000 members have joined on this basis.⁷⁶

⁷¹ *Ibid.*, 21.

⁷² Quinlan, 22.

⁷³ Chen et al., 34. See also Quinlan, 22, who refers to the New South Wales (in Australia) experience in this regard, in terms whereof a 'multi-agency approach to mutually assured standards with contractual tracking mechanisms and workplace/worker registration (to track the flow of work and conditions of employment) has been developed, utilizing the technique of rebuttable presumption (with regard to dispute of wages and workers compensation claims) to ensure that the top of the supply... could not escape their legislative responsibilities'.

⁷⁴ Benjamin, 'Informal Work and Labour Rights in South Africa'.

⁷⁵ See, in this regard, Olivier, 'Informality, Employment Contracts and Extension of Social Insurance Coverage', 14–17.

⁷⁶ J. Arku & E. Akagbo, '90,000 Join SSNIT – from the Informal Sector', <www.graphic.com.gh/dailygraphic/page.php?news=14354>, 18 Sep. 2011. The dedicated arrangements for informal workers relate to both contributions and benefits. Contributions to this Fund need not be fixed but could be based on their ability to pay on a basis preferred by them, be it daily, weekly, monthly, annually, or seasonally. Informal workers contribute to two accounts:

a retirement account (to provide benefits on retirement); and
a personal savings account with rules for withdrawals before retirement (e.g., for education and business enhancement).

8. CONCLUSION: THE IMPORTANCE OF A RIGHTS-BASED AND STANDARDS APPROACH

Earlier,⁷⁷ it was indicated that most of the ILO Conventions and Recommendations were not developed with informal workers in mind. In addition, while it is true that the decent work agenda of the ILO applies to all workers, including those who work informally,⁷⁸ the measures and interventions foreseen under decent work programmes, as is the case with the so-called social protection floor interventions, lack (for the moment) an enforceable standard-setting framework and have limited relevance for social insurance contexts. Therefore, from an international standard-setting perspective, there is clear need for a careful reconceptualization and remodelling to ensure that ILO norms are suited for the informal work environment and are, in fact, extended to and applied in this context.

In particular as a result of the limited relevance of ILO standards, it is imperative to refer to and rely on other norms that could constitute a rights-based framework for covering the informally employed in social security, including social insurance terms. At the international level, one of the most important and widely ratified⁷⁹ international instruments providing for the right to social security, also in relation to informal workers, is the UN International Covenant on Economic, Social and Cultural Rights (UNICESCR) of 1966. Article 9, which guarantees the right to social security, has recently been comprehensively commented on by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 19.⁸⁰ The Committee makes it clear that the social security system of a ratifying country should cover informal (economy) workers.⁸¹ It defines the circumstances under which coverage for social risks such as occupational injuries, maternity, and disability should be provided for in such a way as to include informal workers as well.⁸² It expects governments to respect and support social security schemes developed within the informal economy, such as micro-insurance schemes.⁸³ Despite limited financial capacity, countries should consider lower cost and alternative schemes to provide for marginalized groups and should ensure the progressive inclusion of informal (economy) workers.⁸⁴

Regional standards, even if not necessarily binding, could nevertheless support and inform a rights-based approach, as long as a sufficient focus is placed on those who work informally. Within the Southern African Development Community (SADC) framework, mention can, in this regard, be made of two potentially relevant instruments. First, the 2003 Charter of Fundamental Social Rights in SADC ('Social Charter') has this to say about persons who have been able to access the labour market:

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

⁷⁷ Section 5 *supra*.

⁷⁸ Barrientos & Barrientos, 29.

⁷⁹ In addition, by countries in the developing world.

⁸⁰ E/C.12/GC/19 of 4 Feb. 2008 (adopted on 23 Nov. 2007).

⁸¹ Paragraphs 16, 28, and 34 of the General Comment.

⁸² See paras 17, 19, and 20, respectively.

⁸³ Paragraph 34.

⁸⁴ Paragraph 51.

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.

Second, the 2007 Code on Social Security in the SADC acknowledges the right of every person in SADC to social security.⁸⁵ SADC Member States are required to provide compulsory coverage, either through public or private mechanisms or through a combination of both.⁸⁶ In particular, Article 6.5 stipulates that Member States should provide and regulate social insurance mechanisms for the informal sector.⁸⁷

Third, fundamental rights provisions in constitutions could contribute to the extension of social protection to vulnerable groups of society, including informal workers. The South African Constitution, for example, provides that everyone has the right to access to social security including, if they are unable to support themselves and their dependants, the right to appropriate social assistance.⁸⁸

In conclusion, the truth is that the lack of appropriate social security, including social insurance protection for informal workers, is a human rights issue and needs to be addressed as such.⁸⁹ As has been noted,⁹⁰ workplace regulation played a major role 100 years ago when labour law and social security legislation were introduced. Some of the non-traditional work arrangements that were prevalent at that time are similar to those found today (such as temporary work). They are in need of proper regulation. A second wave of rigorous but innovative legislative drafting, accompanied by a fresh workplace registration drive, will assist in the endeavour to extend labour law and social security coverage to those who work informally in the present-day context.⁹¹

⁸⁵ Article 4.1.

⁸⁶ See Arts 5–6 and 12 of the Code.

⁸⁷ See also Art. 12.2, which requires the coverage of all modalities of disablement, irrespective of whether the disablement occurs in the formal or informal sector.

⁸⁸ Section 27(1)(c) of the Constitution of the Republic of South Africa, Act 108 of 1996. See *Khosa & Others v. the Minister of Social Development & Others*; *Mahlaule & others v. the Minister of Social Development & Others* [2004] 6 BCLR 569 (CC) 573A.

⁸⁹ Chen et al., 13.

⁹⁰ Olivier, 2009, 268.

⁹¹ See, in particular, Quinlan, 24.