

NORTH WEST UNIVERSITY

MIGRANT WORKERS AND THE RIGHT TO SOCIAL SECURITY: SOUTH AFRICAN PERSPECTIVES

By

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DECLARATION

I declare that this dissertation for the degree of Master of Laws at the University of North West hereby submitted has not previously been submitted by me for a degree at this or any other University, that it my own work in design and execution and that all material contained herein has been duly acknowledged.

A handwritten signature in black ink, appearing to read 'Thuso', followed by a horizontal line and a small dash.

THUSO RAMABOLU (21001944)

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DEDICATION

To my mother, 'M'e 'Mabafokeng Ramabolu and my father, Ntate Khethang Ramabolu.

LIST OF ACRONYMS

CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
CERD	CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
COIDA	COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT
TEBA	THE EMPLOYMENT BUREAU OF AFRICA
ICERD	INTERNATIONAL COVENANT ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
ILO	INTERNATIONAL LABOUR ORGANISATION
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SAHRC	SOUTH AFRICAN HUMAN RIGHTS COMMISSION
UIA	UNEMPLOYMENT INSURANCE ACT
UIF	UNEMPLOYMENT INSURANCE FUND
UN	UNITED NATIONS

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ABSTRACT

The relationship between migration and social security is attracting an increasing amount of attention in academic circles. Increasingly migrant workers, documented as well as undocumented become victims of a broad range of social security exclusions. Social security systems are firmly rooted in national state considerations, and States fervently defend their decision-making monopoly in the social sector. Such a national order of social security is in discord with the globalization of labour markets and intensifying mobility of individuals in search of better lives and employment opportunities elsewhere. The principle of territoriality, which encompasses that the scope of application of social security legislation is confined to the boundaries of that country by which it has been enacted, optly excludes foreigners from the coverage or entitlements or benefits or may afford them less favourable treatment, or even absolutely deny any social security coverage to them. Hence, there was a need to indulge in the discussion of this nature to find out to what extent the social security laws in South Africa and international law protect migrant workers.

This study therefore attempts to discuss the various problems that migrant workers experience in South Africa as far as social security is concerned. It generally analyses, critically so, the role of social security in protecting migrant workers in South Africa. The central finding is that narrowing the gap in social security protection between migrants and citizens would yield a broad set of benefits. The study therefore calls for an equal access to coverage and entitlement to benefits as national workers. Although the focus is on migrant workers, many of the concerns and issues raised, analysis and discussions cut across different categories of non-citizens. The research comprises five chapters which are interrelated. Chapter one introduces the dynamics and the magnitude of the problem, while two and three generally discuss policy and constitutional imperatives of social security in relation to migrants. Chapter four goes beyond the boundaries by venturing into the international perspectives, while the last chapter concludes and recommends accordingly.

CHAPTER 1: INTRODUCTION

Migrant Workers in the SADC Region are being doubly punished when it comes to recouping Social Security, writes Stuart Rothgiesser.¹

1.1 BACKGROUND OF THE STUDY

Migration which involves movement of people from one country to another is an essential, inevitable and potentially beneficial component of the economic and social life of every country in the African region. The UN has estimated that over 16 million people in Africa are living in a country other than that of their birth.² By the same token, the ILO has estimated that the number of labour migrants in the continent constituted one fifth of the global total and that by 2025 one in ten Africans will live and work outside their countries of origin³. Given that the number of migrants is increasing and that this trend is likely to persist in the nearby future, the social security coverage of these migrants has necessarily become important.

South Africa, just like many developing countries, is facing an increased movement of people including migrant workers. This state of affairs has been driven mainly by the political and economic transformation of post-apartheid South Africa and the economic and political depression experienced by surrounding countries chiefly, Zimbabwe. In like manner, the end of apartheid and consequent lifting of trade sanctions has fuelled a huge increase of inflow of migrants seeking work in other countries.⁴

Be that as it may, it would seem that these workers face a serious challenge when it comes to their social security coverage, as it has become apparent that they are excluded. As Olivier aptly puts it, social security systems are firmly rooted in national state considerations, and States fervently defend their decision-making monopoly in the

¹ *Mail & Guardian*, September, 2008 at 21.

² Franz Von BB and Kirsch R "Informal Social Security Systems in Southern Africa and Approaches to Strengthen them Through Policy Measures", *Journal of Social Development in Africa* (1999), 21-38.

³ *Ibid.*

⁴ Olivier MP. 2001, *The Extension of Social Security Protection in South Africa*, Siber Ink, Cape Town 62.

social sector⁵. Such a national order of social security is in discord with the globalization of labor markets and intensifying mobility of individuals⁶. Olivier further notes that the principle of territoriality, which encompasses that the scope of application of social security legislation is confined to the boundaries of that country by which it has been enacted, excludes foreigners from the coverage, entitlements, benefits or may afford them less favorable treatment, or even deny any social security coverage to them⁷. Based on the above evidence, access by migrant workers to social security is problematic as will further be demonstrated below.

1.2 STATEMENT OF THE PROBLEM AND SUBSTANTIATION

1.2.1 General Exclusion of Migrant Workers

Migrant workers are often confronted with difficulties regarding their social security coverage and entitlement to benefits, a problem which national workers do not face. These difficulties are due to a number of factors, such as the principle of territoriality, which limits the scope of application of social security legislation to the territory of a country, with the consequence that its nationals working abroad are not covered by such legislation and therefore not entitled to benefits. Migrant workers' rights can also be affected by the principle of nationality, the application of which may result in the exclusion of foreigners from coverage or entitlement to benefits in the country of employment. While such exclusionary rules can be found in some countries, few go so far as to deny any social security coverage to foreigners. Olivier⁸ further opines by saying that such exclusion can also be attributable to the lack of bilateral or multilateral social security agreements through which social security rights, acquired in the country of employment, are maintained and which provide for the export of benefits from the country of employment to the country of origin.

⁵ Olivier MP. 2001,ibid.

⁶ ibid 62.

⁷ Olivier op cit 62.

⁸ ibid.

1.2.2 Legal Exclusion

With the foregoing in mind, there is also a legal exclusion of this category of workers within the social security mainstream. In the case of South Africa, despite its inclusions, its unemployment insurance system still marginalizes persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership within the republic, if upon the termination thereof the employer is required by law or by contract of service, apprenticeship or learnership to repatriate that particular person, or he/ she is so required to leave this country⁹. It is, therefore, important from the onset to acknowledge that both the national laws and international instruments usually draw a distinction between permanent residents, temporary residents, migrant workers, refugees, asylum seekers and illegal non-citizens. More significantly the interplay between immigration, termination of service and social security laws is crucial to the understanding of the status of non-citizen workers, hence the overall conclusion to be drawn is that the stronger the immigration status, the better the access to social security.”¹⁰The exclusion of this category of workers can be challenged both under international law and constitutional law as will be apparent hereunder.

1.2.3. Constitutional Implications

Apparent in the South African constitutional dispensation is the entrenchment of the principles of equality and non-discrimination provisions which aim at curbing the previous historical inequalities¹¹. Even though citizenship for purposes of contributions and benefits is generally not a requirement, non-citizen fixed-term contract workers are excluded from the *Unemployment Insurance Act*¹². Olivier adds by saying that the UIA

⁹ S.16(1) (a) (i) of the *Unemployment Insurance Act* 63 of 2001.

¹⁰ Olivier MP and Guthrine R “Extending employment injury and disease protection to the non-formal sector and non-citizen workers; The Quest for innovative approaches” Paper presented at the 7th International Conference on Work Injuries Prevention, Rehabilitation and Compensation, Hong Kong 27-29 June 2006 accessed on www.ilo.org.

¹¹ The Preamble and section 9 of the 1996 Constitution.

¹² S. 3[1] [d] UIA and also 4[1][d] Unemployment Insurance Contributions Act 2002.

itself seems to be inconsistent as far as different categories of fixed-term contract are concerned¹³.

The above submission is founded because fixed-term contract workers who lose their employment as a result of termination of their contract remain entitled to receiving UIF benefits while non-citizen fixed-term contract workers are specifically excluded from coverage in the UIA¹⁴. This inconsistency in the treatment of these non-citizens workers can be challenged as discriminatory on the basis of nationality.¹⁵ This state of affairs can also be challenged from the international law perspective, wherein it can be argued to be in contravention of the ILO Conventions and others treaties. The ILO Conventions require member states to treat non-citizens on the same basis as citizens in social security matters, including unemployment insurance.¹⁶

South Africa has ratified the Unemployment Convention 2 of 1919¹⁷. This convention requires South Africa to make arrangements with other member countries to ensure that non-citizens from such countries who are employed in South Africa are eligible for the same rate of benefit as that available to the local workers.¹⁸ Since this arrangement is lacking in South Africa, that can be regarded as a violation of an international obligation by South Africa.¹⁹ We therefore submit that migrant workers, do not enjoy the same legal rights as citizens and permanent residents, hence this is a clear manifestation of a gap in our law as far as social security coverage for migrant workers is concerned. To do away with such a deficiency, South Africa will have to include non-citizens fixed term contract workers to benefit from its unemployment insurance system.

¹³ Olivier op cit.

¹⁴ S.3 supra.

¹⁵ See Olivier MP et al "Constitutional Issues" in Olivier MP *et al Social Security: A Legal Analysis*, (LexisNexis/ Butterwoths) 49 at 98-99.

¹⁶ For example see, The Migration for Employment (Revised) Convention 97 of 1949 and the Equality of Treatment (Social Security) Convention 118 of 1962.

¹⁷ As on the 25th May 2009, South Africa was among the countries which ratified this Convention. (ILOLEX, Data of International Standards) accessed at www.ilo.org.

¹⁸ Article 3 of the Unemployment Convention 2 of 1919.

¹⁹ Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al, Social Security; A Legal Analysis*. (LexisNexis/ Butterwoths) 2003 P-442.

1.2.4 Conclusion

It is therefore worth noting that, migration and social security is a problematic theme as migrant workers face a series of challenges. It has been stated above that they face these challenges both under social insurance and social assistance. National social security regulation is often drafted in way which adversely affects social security rights of migrants. Sometimes nationality conditions are applied, which conditions usually exclude foreigners generally and migrant workers in particular from the coverage of the social security schemes. Olivier adds by saying that as a substitute for the nationality condition, entitlement is more often than not based on the immigration status of the worker²⁰. In other words there may be different residence requirements which may end up preventing entitlement to benefits or the payment of benefits abroad.

Having briefly discussed the above, it can safely be concluded that the expansion of globalization and the greater flow of people across national boundaries (migrant workers) have legal, economic, social and cultural impact which leads to new forms of relations that require corresponding economic and social policies as well as the law reform. The social needs of migrant workers are not a new concern. However, the large number of migrant workers involved and the anticipated continuing increase in their number worldwide have made the issue more critical and urgent than ever, hence this study.

1.3 DETAILED JUSTIFICATION OF THE STUDY

Social security is an important element in the on-going debate about migrant workers because of the following reasons: First, it exerts an important influence on the quality of migrant worker's lives and their families, just as it does on the lives of non-migrant workers. Their eligibility for benefits or its lack can determine, for example, whether the family of a retrenched worker can retain its home; whether an injured worker receives

²⁰ Olivier M.P & Kalula. 2004, *Social Protection in SADC: Developing An Integrated and Inclusive Framework*. CIGCLASS P-55.

treatment and rehabilitation; or whether a deceased worker's children can continue their schooling.

Secondly, the social insurance of migrant workers also has some important economic effects. By promoting their well-being, health and sense of security, it can enhance their productivity. It can also make migration more attractive to foreign workers contemplating relocation, thereby influencing the mobility of labour²¹.

Thirdly, the extension of social security to cover the fixed term foreign workers could achieve equity among migrants. The legal distinction between temporary and permanent workers has been severely blurred in practice. Tens of thousands of 'temporary' migrants have been working in South Africa for years and some for decades.

Given the above situation, there is no clear rationale for denying them access to social security while extending it to workers who are citizens. Even though working on temporary basis, many of these individuals now have strong roots in South African communities including long-term employment, spouses, children and even grandchildren. To deny them social security will be discriminatory. We therefore wish to propose for a reconstruction of South African social security law as far as migrant workers are concerned so as to eradicate this existing deficiency.

1.4 RESEARCH OBJECTIVES

1.4.1 Broad Objectives

- This study is intended at enhancing knowledge and understanding of the vulnerability of migrant workers to discrimination resulting from the exclusion of social security protection in South Africa.
- To contribute to the general debate and reflections of the exclusion of non-citizens from the social security coverage.

²¹ Moore. S.V. 1999 "The Concept of Social Security" in Olivier M *et al* .*Social Security Law* (Butterworths) 576.

- It is also intended to contribute to the promotion and improvement of legislation and policies to prevent such discrimination with the aim of protecting these migrant workers.

1.4.2 Specific Objectives

In addition to the stated overall objectives, the present study will specifically aim:

- To discuss the impact of migration policies upon the position of migrants in the South African social security law.
- To determine whether, the exclusion of migrant workers from social security provisioning is unconstitutional.
- To find out to what extent migrant workers are afforded social security protection under the national and international law.
- To determine and analyse the degree of the emerging challenges and recommending the necessary law reform.

1.5 RESEARCH METHODOLOGY

Bailey defines research methodology as the philosophy of the research process²². This involves the assumptions and values that serve as a rationale for the research and the standards or criteria the researcher uses for interpreting data and reaching conclusions.

The research methodology in this study is qualitative. The qualitative method has been described as “the non-numerical examination and interpretation of observations for the purpose of discovering underlying meanings and patterns of relationships”²³. On the other hand, quantitative method is defined as ‘the numerical representation and manipulation of observations for the purpose of describing and explaining the phenomena that those observations reflect’²⁴. Under this method the existing material is analyzed so as to conclude on the quality of the trends in the social security provisioning for migrant workers. The major advantage of the qualitative method as

²² Bailey, K.D. 1987 *Methods of Social Research*; the Free Press, New York 33.

²³ Ibid. pg 34.

²⁴ Supra note 14.

applied here is that it is efficient in that it is time saving and cost effective as opposed to quantitative method. And also the justification for this methodology is that the study intends to analyse the quality of trends and state of affairs as opposed to the quantitative analysis of the variables.

1.6 LITERATURE REVIEW

The issue of social security and non-citizens has been debated by different scholars and publications most of which were presented in various conferences regionally and abroad. In most instances these presentations were made by specialists in the social security. The exclusion of non-citizens generally was discussed by different scholars.

Scholars like De Vos have written on the subject in so far as exclusion of non-citizens generally from the cover of social security is concerned²⁵. They are of the view that it is discriminatory and unconstitutional to exclude non-citizens from social assistance. They have argued that the value of equality and the equality clause as contained in the Bill of Rights strive to repair the historical inequalities and injustices of the past²⁶.

De Vos remarks that the rights contained in the Bill of Rights are interrelated and mutually supportive. He argues further that there is a relationship between social and economic rights and the right to equality and transformative vision of the constitution is one that is committed to remedy socio-economic inequality. He further points out that the court thus takes historical, socio-economic and political factors into account when giving content to socio-economic rights. The same assumption can be made with regard to the right to access to social security in particular. He said that the conclusion could be made that the state cannot realize all socio-economic rights immediately, that the courts

²⁵ De Vos, 2001 "Grootboom, The Right of access to housing and substantive equality as contextual fairness". *South African Journal of Human Rights* 258.

²⁶ Alexander P *et al.* 2002. *Social Security for Non-citizens in South Africa*. A Draft Report on Sociological Research, Rand Afrikaans University, Center for Sociological Research 45.

must keep this in mind, and that the material needs of those persons who are the most vulnerable ought to enjoy priority²⁷.

The point of departure in this study is the submission that the fixed term migrant workers, though the minority in the country, form part of the vulnerable groups. This submission can be supported by the jurisprudence of the Constitutional Court in the *Larbi-Odam* case²⁸, where the unanimous judgment found that non-citizens were protected by the Bill of Rights in its non-discrimination clause. The Constitutional Court's judgment therefore reaffirmed the general proposition that all rights contained in the Bill of Rights, with the exception of those specifically limited to citizens²⁹, provide protection to non-South Africans as well as South Africans. Thus the treatment of temporary migrant workers in South Africa should be viewed in the light of the protections provided by the Bill of Rights. This interpretation is consistent with the preamble to the Constitution, which envisions a society based on democratic values, social justice and fundamental human rights.

The courts have also dealt with unfair discrimination against non-citizens. One of those cases is again the *Larbi-Ordam* case³⁰, where the Constitutional Court found that unfair discrimination against permanent residents is prohibited under South African law. The case involved foreign teachers who were served with notices in pursuance of regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Education, Educators' Employment Act³¹, to the effect that their services might be terminated in the event of their posts being filled by South African citizens. The applicants challenged the regulation as being inconsistent with the Interim Constitution³², which provided that 'No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular race, gender, sex, ethnic or social origin,

²⁷ De Vos *ibid* 259.

²⁸ *Larbi-Odam v MEC for Education* (North West Province) 1997 12 BCLR 1655 (CC).

²⁹ Such as the political rights contained in Section 19 of the Constitutions.

³⁰ *Ibid*.

³¹ Proclamation 138 of 1994.

³² Section 8(2).

colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

In so far as discriminating against people on the basis of their status as non-citizens or nationality, the court held that 'citizenship is a personal attribute which is difficult to change...the differentiating ground of citizenship in regulation 2(2) is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens hit by the regulation.'³³ The court was also of the view that it made little sense to permit people to stay permanently in a country but then exclude them from the job they are qualified to perform.³⁴

Another decision which ruled on the unconstitutionality of discrimination on the basis of one's nationality status is *Baloro and Others v. University of Bophuthatswana*³⁵. In this case the court held that a moratorium placed on the promotion of foreign nationals on work and residence permits, holding academic posts at the University of Bophuthatswana, while promoting members of staff with South African citizenship was a gross violation of section 8(2) of the Interim Constitution. The court held that the words "no person" in section 8(2) also applied to non-nationals, and was not restricted to South African citizens.

It is worth noting that the court in this instance extended the protection under the equality clause to foreign nationals who were on work and resident permits, and not those on permanent residence status, as was the case in *Larbi-Ordam* case. The most recent case on this subject is the *Khosa*³⁶ case where the majority of the Constitutional Court held that permanent residents are entitled to social assistance grants, namely those grants which were the subject of the enquiry in the case, namely the Old Age Grant, the Child Support Grant, and the Care Dependency Grant. Non-citizens who

³³ *ibid* 8.

³⁴ *ibid* 8.

³⁵ 1995 (8) BCLR 1018 (B).

³⁶ *Khosa and Others v. The Minister of Social Development and Other (supra)*.

have temporary resident status are not entitled to the same level of protection as citizens.

Much has been written on non-citizens generally, but for the purposes of this research and as a point of departure, specific focus will be on migrant workers and the role of social security in providing legal protection. The particular focus of the research is therefore on the social security policies and legislation concerning migrant workers in South Africa. As already mentioned above, the greatest challenge for the study is that of the exclusion of non-citizens workers from various social security schemes. The point of departure for this research is therefore that the exclusion of the fixed term migrant workers under the various social security schemes amounts to unfair discrimination as between the South Africans, non-citizen permanent residents and temporary migrant workers. It is unfair because fixed term migrant workers are cast to the margins and are deprived of exactly those rights, for example, those recognized in the Constitution³⁷. We are also of the view that this has a strong stigmatizing effect because it creates an impression that temporary migrant workers are in some way inferior as compared to citizens and permanent residents, and they are less worthy of social security.

1.7 SCOPE OF THE STUDY

As argued from the onset, the study is confined to migrant workers under the South African social security jurisprudence. However, the international perspective will be of vital significance towards the purpose of this study. The study is therefore divided into five inter-related chapters.

The first chapter is the introduction. This is the chapter that generally outlines the background of the study. The demarcated problem that forms the reason for this study is stated in this chapter.

³⁷ S.27 (1)© i.e. the right to have access to social security.

Chapter two will be a situational analysis of social security policies and legislative developments in South Africa as they relate to migrant workers, as well as examining whether any provision exists for the portability of benefits.

Chapter three will proceed to reflect on the impact of the South African constitutional framework on the prevention of social exclusion and marginalization, and on their reintegration in the labour market and in society, as social security imperatives.

Chapter four will venture into international perspectives. It will focus on the extent to which these international and regional instruments protect the human rights of migrant workers, in particular their right of access to social security. Chapter five will be a concluding chapter. It will discuss emerging challenges and provide the required recommendations for implementation by the government of South Africa.

1.8. DEFINITION OF MAJOR TERMS

1.8.1 Concept of Social Security

Olivier asserts that neither South African law nor international literature reveals any clear definition of the concept of social Security and what is generally accepted is that the concept is not a fixed one³⁸. He indicates further that international instruments, South African policy documents and academic writers all provide definitions with reference to the enumerated list of social risk while others define the concept in terms of the states involvement or in terms of the general aims served by the social security schemes specifically³⁹. Despite the difficulty of defining the concept of social security, it has been pointed out that it is of fundamental importance to understand the concept and ambit of social security because it enables us to understand the ambit of the Constitutional right of access to social security and also give us a broad understanding of what the system of South Africa entails, since the western concept may not capture the African context sufficiently⁴⁰. According to the Wikipedia Encyclopedia, social

³⁸ Olivier MP et al 2004, *Introduction to Social Security*, LexisNexis, p-18.

³⁹ Ibid pp 25.

⁴⁰ Ibid pp 25.

security primarily refers to social welfare service concerned with social protection, or protection against socially recognized conditions, including poverty, old age, disability, unemployment and others⁴¹.

The concept of social security can be traced from its historical background. For this reason the industrial revolution became a driving force behind the idea that there has to be some mechanisms for income protection.⁴²

Despite the difficulty of a universally accepted definition, the ILO in one of its publications defined social security as⁴³:

...the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would 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 with children.⁴⁴



For a better understanding of the complexity of social security systems it was loosely defined as the totality of organizational forms through which goods and services are provided to people in situations or periods of need and distress, in which they cannot achieve security by their own individual means. This encompasses a wide variety of services provided by state agencies, churches, NGOs, kinsmen and neighbors, and is subject to different forms of legal regulation, statutory rules, customary and religious rules as well as self-regulation. While these partial subsystems by themselves are already rather complex, the complexity of social security systems is increased by the manifold interrelationships and mutual dependencies between elements of the different

⁴¹ http://en.wikipedia.org/wiki/Social_security.

⁴² MP Olivier et al Ibid pp 23-24.

⁴³ ILO 1984.

⁴⁴ ILO Convention N0.102 of 1952.

partial systems⁴⁵. Social security has also been defined as any system by which a group provides for those of its members who may be in need⁴⁶

Although some writers use the term "social security" and "social protection" interchangeably, for the purpose of this discussion social security is used both narrowly to refer only to schemes with the formal title of 'social security' and widely referring to many kinds of social welfare schemes while social protection is more encompassing⁴⁷. Social protection is wider than social security as the former denotes a system of basic social needs which is no longer linked to the employment relationship and which is funded on the conviction that society as a whole is responsible for its weaker members⁴⁸.

1.8.2 Social Insurance

This form of social security refers to the contributory social security schemes that protect income earners and their dependants against temporary or permanent loss of income.⁴⁹ It has been defined as a form of insurance where people receive benefits or services in recognition of contributions or premium paid to an insurance scheme. In the leading English case of *Prudential Insurance CO v Inland Revenue Commissioners*⁵⁰, the main features of social insurance were identified including the payment of some consideration called premium to secure some benefit usually money but not always so, upon the happening of a some event and the event must be one which involves some amount of uncertainty as to whether or when the contemplated event would happen⁵¹. These services typically include provision for retirement pensions, disability insurance, survivor benefits and unemployment insurance. Social insurance is provided to protect employees and their dependents, through insurance, against contingencies which interrupt income. These schemes are contributory for both employers and employees. The contributions are wage-related and the employees and the employers agree upon a

⁴⁵ Franz Von BB and Kirsch R "Informal Social Security Systems in Southern Africa and Approaches to Strengthen them Through Policy Measures". *Journal of Social Development in Africa*(1999)21-38.

⁴⁶ <http://www.yourdictionary.com/social-security>.

⁴⁷ Wikipedia encyclopedia Ibid.

⁴⁸ MP Olivier et al Ibid pp 7.

⁴⁹ See Kaseke supra.

⁵⁰ (1940) 2 KB 658.

⁵¹ Ibid.

percentage. Social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, family benefits and survivor's benefits⁵².

1.8.3 Social Assistance.

Our Constitution grants the right of access to social security including social assistance for those who are unable to support themselves and their families⁵³. But what exactly constitutes social assistance lacks an internationally accepted definition because different countries have different interpretations to the concept⁵⁴. It is usually regulated by legislation and it is the exclusive responsibility of the state. The main piece of legislation regulating social assistance in South Africa is the Social Assistance Act⁵⁵ as it regulates the payment of child, disability pension and foster grants and other relief measures including primary and basic medical health care. This assistance is funded by the state through taxes and has two components: the provision of social services and the payment of grants. Social assistance is means tested as it is intended to benefit only those suffering from severe deprivation and aimed at maintaining a basic subsistence level.

1.8.4 Migrant Worker

Last but not least is the meaning of 'migrant worker' for the purpose of this research. Migrant workers can be defined as those who travel to another country for, the primary purpose of seeking or carrying out work and usually with the intention of returning to their country of origin. The term overlaps with 'foreign worker', and some official definitions treat the two as identical. The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families defines 'migrant

⁵² Triegaardt JD, "Transformation of Social Security in South Africa: Accomplishments and Challenges for Partnerships in Development". Accessed on 01-08-2008 at <http://www.dbsa.org/Research/Documents/Transformation>.

⁵³ Section 27(1)(c).

⁵⁴ Strydom EML et al (2001) *Essential Social Security Law*. Juta & Co, Cape Town.

⁵⁵ Act 59 of 1992.

worker' as a person who is engaged in a remunerated activity in a State of which he or she is not a national.

Germane to the present discussion, the definition of Social Security by the White Paper on Social Welfare shall be adopted. This is for the simple reason that it is more comprehensive and relevant to South Africa. The strands of social security considered in this study are social insurance and social assistance.

1.9 CHAPTER SUMMARY

From the above introductory remarks, it would seem that the issue of migrant workers and social security triggers a new climate of criticism and analysis. It has been seen as a matter of fact, that the position of migrant workers in social security is a problematic theme in general. Therefore this chapter aimed at introducing the subject by looking into the background and of course stating clearly the problem to be dissected in this study. Hence, at the end of this chapter, we would have enhanced knowledge and understanding of the vulnerability of migrant workers to the exclusions from the social security provisioning.

CHAPTER TWO

SOCIAL SECURITY: POLICIES AND LEGISLATIVE DEVELOPMENTS RELATED TO MIGRANT WORKERS

2.1 INTRODUCTION

Having laid-down a foundation to this research in the previous chapter, the present chapter serves as a 'springboard' to an in-depth analysis of subsequent chapters. This chapter therefore evaluates the impact of migration policies and related legislation upon the position of migrants in social security law. It will start by establishing general understanding of the concept of social security followed by analysis of the origins of the provision of social security and will conclude by a detailed discussion of the current legal provisions in terms of its access and benefits to migrant workers. The ultimate objective of the entire study is to ensure or call for attainment of equal access by migrant workers to coverage and entitlement to benefits as national workers. This chapter therefore seeks to contribute to the attainment of such objective by examining policy and legislative development issues relevant to migrant workers.

2.2 UNDERSTANDING SOCIAL SECURITY SYSTEMS IN THE WORLD

2.2.1 General Overview of Social Security Systems

The development of the social security system in the late 19th and 20th century was characterized by the gradual extension of the scope of application of the various benefit schemes, both in terms of categories of protected persons as in terms of the risks and contingencies which are covered⁵⁶. Early social insurance schemes covered only limited categories of wage earners for specific risks such as industrial accidents and

⁵⁶ Kasente T. 2000. "Gender and Social Security Reform in Africa" *International Social Security Review* (ISSR) Vol.53, No3 at 30.

occupational diseases, invalidity, old age and death⁵⁷. But gradually the material scope of application was extended to include other risks which are now generally identified with the social security system⁵⁸ such as medical care, sickness, maternity, unemployment and the burden of children. Likewise, the personal scope of application has constantly widened, first to include all categories of wage earners and subsequently extending to categories of self-employed persons and finally to categories of non-active persons⁵⁹.

The way this process of extension of the personal scope of application has taken place varies from country to country. Often a mixture of solutions can be found, such as including non-wage earners in traditional social insurance schemes, introducing national insurance schemes which cover the entire population, or creating special benefits (often on a non-contributory basis) for certain categories of vulnerable persons, such as the handicapped, single parents, *etc*⁶⁰.

The extension of the scope of application is related with the development of the concept of social security. This concept originated in the United States as part of Roosevelt's new deal policy. It was further embraced by the Beveridge proposals⁶¹ during the Second World War and has subsequently been adopted in various international conventions on human rights and national constitutions.⁶² However the concept of social security was given consideration again in England following the publication of the Beveridge Report. The report noted that the goal of social security is to guarantee a basic level of income for all citizens without stifling their initiative to secure more than a mere subsistence⁶³.

⁵⁷ Alexander P & Shindondola H *Social Security for Non-Citizens in South Africa*. A Draft Report on Sociological Research, at 34 (RAU October 2002).

⁵⁸ ILO-Convention 102 *Concerning Minimum Standards of Social Security*, 1952.

⁵⁹ Kasente *supra*.

⁶⁰ Ibid.

⁶¹ N Smit in MP Olivier *et al* (2003) *Social Security: A Legal Analysis*. LexisNexis Butterworths, Durban at 462.

⁶² Ibid.

⁶³ Alexandra P. *supra* at p-35.

The Beverage report recommended that the whole population enjoy social protection through a combination of programmes encompassing the following; social insurance, social assistance, children allowance, comprehensive, free health services and rehabilitation services and maintenance of full employment through public works⁶⁴. The British adopted the Beveridgean model for use in their colonies in Africa, although on a selective basis. The schemes and programmes that were introduced were initially meant for the benefit of the white settler community. Consequently, the majority population was excluded. After attaining independence, governments in the southern African region tried to extend coverage of contributory schemes but this has not been very successful because of rising unemployment.⁶⁵

The concept of social security constitutes the expression of the notion that each citizen is entitled to an adequate standard of living and that the state has the responsibility to ensure such. The emergence of the concept of social security has also affected the evolution of social welfare provisions that existed outside the social insurance system in the form of social aid programmes and poverty assistance laws⁶⁶. The recognition of the right to an adequate standard of living implied that the granting of aid could no longer be construed as a sort of state charity, but rather as a subjective right to assistance for each citizen⁶⁷. After the Second World War, this right resulted in the introduction of general social assistance schemes that offer periodical benefits to persons who do not have sufficient resources to cover their costs of living⁶⁸.

A typical characteristic of the right to social security since Second World War is its *universality*. The right presupposes that persons who are in a vulnerable position should be protected not because of their status as workers, or because of their nationality, but by virtue of their membership of the society.⁶⁹ In other words, the right to social security

⁶⁴ N. Smit *supra*.

⁶⁵ Olivier MP *et al* 2004 *Social Protection in SADC: Developing An Integrated and Inclusive Framework* 161.

⁶⁶ Kasente *supra*.

⁶⁷ *Op cit*.

⁶⁸ *Supra*.

⁶⁹ The universal character of the right to social security is also expressed by the specific phrasing of this right in international texts on human rights. For example the Universal Declaration on human rights formulates the right to

was due to the destitute people not as a charity but as a matter of right of which they can lawfully claim. For this reason, it has always been common cause that, with every right, there is a responsibility. Hence in this scenario, the responsibility lies solely with the state to ensure that everyone enjoys this right of access to social security, without any reference to the social origin of a person. Be that as it, the multi-million question still remains; to what extent has the universal character of the right to social security had an inclusive effect for migrants? This question will be addressed by the following discussion.

2.2.2 The Position of Migrants in Social Insurance Schemes

The personal scope of application of early social insurance schemes has always been based upon the existence of a contract of service with the employer.⁷⁰ Restrictions on grounds of nationality were not necessarily required to delimit the scope of application of the schemes. In most of the social insurance schemes of the European states nationality was not an issue, at least where coverage was concerned. Apart from some exceptions this situation has never really changed.⁷¹ For immigrants the absence of the nationality condition implies that they can be adopted within the social insurance schemes of the host-state, but for them this is not the end of the story. As a result of the specific legal conditions that apply in national legislation, migrants can be faced with all sorts of other disadvantages in claiming benefit rights.

The fact that migrants usually do not have insurance records filed, leads to reduced pension rights or to no rights at all where they do not meet the minimum insurance records. Territorial restrictions for the payment of benefits can stand in the way of the payment of benefits abroad, while sometimes entitlement to benefits for non-nationals is made subject to the condition of reciprocity with the country of origin. Such problems

social security to everyone, as a member of society. Similarly, the International Covenant on economic, social and cultural rights expresses the right of everyone to social security.

⁷⁰ B. Hepple B., 1996 "Welfare legislation and Wage Labour". In: B. Hepple ed., *The making of labour law in Europe, a comparative study of nine countries up to 1945*. London/New York, 115-153.

⁷¹ ILO, (1977), 'Social Security for Migrant Workers' 116 *International Labour Review*. 3 at 19.

can to some extent be alleviated by national legislative efforts, but in the end the realization of true solutions requires the linking together of national social security schemes on the basis of international agreements⁷².

International agreements on the co-ordination of social insurance schemes are almost as old as social insurance itself⁷³. The first social insurance agreement was concluded in 1904 between France and Italy and since then a network of bilateral and multilateral treaties has come into being, covering all branches of social insurance and including a number of techniques which are specially designed to protect the rights of migrant workers⁷⁴. This network of social security treaties extends throughout the entire world. The treaties provide *inter alia* for equality of treatment on grounds of nationality, the exportability of pension rights and the accumulation of insurance periods that have been built up in different countries⁷⁵.

It can be argued that the growth of international co-ordination law is a by-product of attempts to encourage labour mobility. This is a solid argument that is further elaborated upon in chapter 4 on the international perspectives on the social security protection of migrant workers. But at this stage it must be pointed out that the conclusion of international co-ordination treaties can also be interpreted in the light of social policy notions underlying the social security system. The growth of the body of international coordination law has kept pace with the extension of the scope of protection of the social security systems in general. Hepple points out that as the system has gradually opened its gates to all sorts of other vulnerable groups, who were previously unprotected, it has also expanded to include the various categories of migrants who, for one reason or another are unable to reap the full benefits of the existing schemes.⁷⁶

⁷² *Labour Migration in Southern Africa*, SADC Today, available online at www.sardc.met/editorial/ accessed on 11th August 2007.

⁷³ Hepple B. *supra* 245.

⁷⁴ *Ibid.*

⁷⁵ ILO, *supra* 15.

⁷⁶ Hepple *supra* at 245.

For migrants the right to social security could not solely be achieved by unilateral legislative measures; the international coordination of national social security schemes was also necessary⁷⁷. The very existence of the network of international co-ordination treaties emphasizes the universal character of the right to social security leading to the conclusion of a number of world wide conventions within the framework of the ILO for the protection of migrant workers in social security alongside all sorts of other conventions that set minimum standards for social security, would confirm this line of reasoning.⁷⁸

2.2.3 Developments in the Treatment of Migrants under Social Assistance Schemes

Access to social assistance for migrants was always more problematic than access to social insurance. The fact that the origins of social assistance schemes are based upon the notion of a unilateral charitable obligation, rather than a reciprocal insurance relation between the insured person and the social insurance institutions is largely responsible for this. Initially the traditional laws had a strictly local character. For example, for a long time the English laws did not offer support for persons who were born outside the parish.⁷⁹ Such persons had to return to the parish of their birth. Similar constructions existed in The Netherlands⁸⁰ and in Germany⁸¹ during the 19th century.

Only in the second half of the 19th century were strict local requirements abolished, although this did not end but merely shifted the problem of offering assistance to “strangers”. Similar restrictions that previously existed for persons, who were born outside the local communities, were now made applicable to nationals of other states. The nationality requirement was introduced. The prevailing opinion in Europe was that

⁷⁷ Ibid 247.

⁷⁸ See for example ILO Conventions nr. 19 of 1925 (Equal Treatment in Accident Insurance), 48 of 1935 (Maintenance of Acquired Rights), 118 of 1962 (Equal Treatment of Foreign Nationals in Social Security) and 157 of 1983 (Maintenance of Social Security Rights).

⁷⁹ Ogus A. 1988, *The law of social security*. London, 450.

⁸⁰ Vonk. J1991, *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*. Deventer., 83-87. www.ilo.org accessed on 13th September 2008.

⁸¹ Schuler R. 1988, *Das Internationale Sozialrecht der Bundesrepublik Deutschland*, 1 Deventer 50-151.

not the host-state but the state of origin was responsible for offering support to the needy.

Since the Second World War the nationality condition has been replaced by the notion of territoriality. Vonk submits that this process has taken place gradually through legislative changes and the jurisprudence of the courts⁸². The process of the erosion of the nationality condition in social security law is actually still taking place. The much-discussed *Gaygusuz* judgement of the European Court of Human Rights of 16 September 1996 is an illustration of this.⁸³ In this judgement the court ruled for the first time that unequal treatment in social security solely on nationality grounds constitutes a violation of Article 14 of the European Convention on human rights, unless it is justified by very weighty reasons. The replacement of the nationality condition by the territoriality condition is in line with the principle that modern states should take responsibility for the social welfare of all citizens.⁸⁴

However, in social assistance this principle has never been fully accepted. In almost all African and European countries the nationality condition and the territoriality conditions are intertwined by establishing links between the right to social assistance and the legality of residence. Here we find a curious form of interaction between immigration law and social security law. Entitlement to social assistance depends on the legality of residence, while in its turn the legality of residence may depend upon the foreigner claiming social assistance⁸⁵. Only for those with permanent residence status may such conditions be alleviated. International law does little to improve the legal position of illegal residence in social assistance⁸⁶.

The European Convention (herein after referred to as EC) on social and medical assistance⁸⁷ offers some basic guarantees, but under EC law the reciprocal link

⁸² Ibid.

⁸³ European Court on Human Rights, (*Gaygusuz/Austria*), RJ&D 1996-IV, no. 14, 1129-1157.

⁸⁴ *Supra* Vonk 85.

⁸⁵ Ibid.

⁸⁶ *Supra* 84.

⁸⁷ Concluded on 11 December 1953 within the framework of the Council of Europe.

between social assistance and residence status is left essentially unaffected. Having discussed the world trends, at this juncture we look into the South African perspectives.

2.3 SOUTH AFRICAN PERSPECTIVE OF THE DEVELOPMENT OF SOCIAL SECURITY

2.3.1 The Historical Development of Social Security in South Africa

For a better understanding of the development of social security in South Africa, one needs to consider the following:

2.3.1.1 Social Security during Colonial and Apartheid Era

Under white minority rule a South African social system was established along the lines of early social security in Western Europe where it evolved mainly as social insurance, first for the industrial workforce and later for the whole population.⁸⁸ In apartheid South Africa, an embryonic welfare state was erected to protect whites against various contingencies. The expansion of this system to other groups ironically put South Africa in the common situation of a semi-industrial country having the trappings of a modern social welfare state, the core of which is the provision of a basic pension for everyone in need.⁸⁹

The Western European social security system influenced the South African social security through colonization⁹⁰ and through the influx of foreigners from all over the Europe the during gold and diamond rush.⁹¹ The gold and diamond rush marked the beginning of industrialization and the introduction of waged labour in South Africa. An

⁸⁸ Kotze D. 2000, "The Political Economy of Development in South Africa" in *African Security Review*, 9 www.iss.co.za/Pubs/ABR/No3. 11.29.2007.

⁸⁹ Ibid.

⁹⁰ South Africa is a former British colony. The British Empire facilitated the spread of British technology, and government around much of the world. Accessed at <http://www.wordiq.am/definition/britishempire>. On 17 February 2009.

⁹¹ 'The History of Labour Law' accessed at <http://www.ilo.org/public/english/dialogue/ifpda/profiles/sa.htm> on 18 March 2009.

industrial revolution never took place in South Africa, but the discovery of gold and diamonds led to a shift in the economy away from that of an agrarian society.⁹²

The gold and diamond rush at the end of the nineteenth century served as the catalyst for creating a wage-based workforce. The rise of industry in South Africa also resulted in the exploitation of workers, dangerous working conditions and resultant need for protective social security legislation.⁹³ The social security system, however, never culminated in a welfare state comparable with that of Western Europe. Whereas the Western European system expanded to protect the entire population, the South African system expanded to protect the minority white population. This resulted in a welfare state for the minority of the population and in social insecurity for the majority of the African population.⁹⁴

The development of social security is intrinsically linked to the troubled past of the country as manifested in colonialism which was characterized by serious inhumane practices. The copying of certain elements of the Western European social security model indirectly contributed to racial inequalities. For example, the Western European social security model and an inherent employment bias, protected only workers in the formal sector.⁹⁵ This employment bias was copied in South Africa in an environment where African workers were mostly unskilled and marginalized owing to the policy of job reservation for white South Africans. This resulted indirectly in the exclusion of Africans from formal employment and therefore from social security protection. Africans were often specifically excluded from the definition of 'employee'⁹⁶ and separate labour legislation was created for African and white workers. This resulted in a large number of people being excluded from formal employment and formal social security protection.

⁹² Ibid.

⁹³ Supra 16.

⁹⁴ Haarman C. 2000. Social Assistance in South Africa; Its potential impact on Poverty' at 12-14 accessed at <http://www.cdhaarman.com/publications/c/phdpdf> on 18 march 2009.

⁹⁵ Von Steenberge J 7 Jorens Y 'New challenges for European social security' in Olivier at al *The extension of social Security Protection in South Africa* opcit note 1 at 12.

⁹⁶ For example in terms of s.1 of the Miners Phthisis Act, 19 of 1912, a 'miner' was defined as any person of European descent who worked below the surface of a mine, as opposed to a 'native' labourer, who was a black worker.

The following major stages in South African history can be distinguished as the stages that had a severe effect on the development of social security in the country.

STAGE	Major Effect on development of social security support
Pre-colonization (Before 200AD-1652)	Family and community support constituted social security support.
Early Colonization (1652-1910)	Transplanting of western Europe social values and social security mechanisms.
Gold and Diamond Rush (Industrialization) (1910-1952)	Beginning of worker-based social security programmes focused mainly in protective legislative instruments. Beginning of differentiation and discrimination between Africans and white workers.
Apartheid system entrenched (1948-1993)	Racial segregation marked by social security provisioning.
Constitutional democracy (1994- present)	Reform and extension of social security system.

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*Table 1: Developmental stages of social security in South Africa.*⁹⁷

South African social security evolved two main components. The first is occupational insurance, which includes retirement benefits for a substantial proportion of the formally employed labour force, a somewhat inadequate system of unemployment insurance which cannot address the major unemployment risks associated with structural rather than cyclical unemployment, and health insurance for the better skilled, in conjunction with universal health care for those who cannot afford private care.⁹⁸

⁹⁷ www.postcolonialweb.org/sachron.html

⁹⁸ Supra Jorens at 13.

The second one is social assistance. It has three main pillars namely, social old age pensions, disability grants and child and family grants, all means tested to ensure that they are targeted at the poorest.⁹⁹ Similar to early 20th century of industrial conflict in Europe, the growing (white) labour movement in South Africa generated class conflict at the beginning of the 1920's. In 1922 the country's biggest industrial clash to date took place between organized labour and mining capital on the Witwatersrand industrial complex. Although the workers lost the industrial battle, by 1924 its consequences eventually resulted in a political victory of organized labour in partnership with their Afrikaner Nationalist allies. Soon after assuming power the Nationalist-Labour coalition, or Pact government as it was called, introduced affirmative 'action style' legislation which reflected aspects of occupational insurance and social assistance¹⁰⁰.

Later on in the nineties, there was a call to reform the social security system in South Africa. The first move towards reform of the previous welfare dispensation came with the publication of the Welfare White Paper in 1997.¹⁰¹ The white paper for social welfare focused on "development" aspects of social welfare. One of the main features of the developmental social welfare is the fact that social development and economic development are mutually interdependent. The paper has been criticised for being strong on rhetoric and principle, but weak on concrete targets for restructuring and delivering.¹⁰² The paper goes further to define social security as denoting those policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs. It also states that, state social assistance (grants) includes the following four categories of benefits: those associated with old age, disability, child and family care, and relief for the poor. It further points out that, the terms 'social security' and 'social protection' are used interchangeably. According to the paper, social protection refers to income protection programmes.

⁹⁹ Vander Berg, S 1997 "South African Social Security Under Apartheid and Beyond". *Development of Southern Africa* accessed at <http://www.safoundation.org.za>.

¹⁰⁰ Ibid.

¹⁰¹ See White Paper on Social Welfare, General Notice 1108 in GG 18166 of 8 August 1997, chapter 7.

¹⁰² Ibid.

A social welfare action plan was released in April 1998 to put the White Paper into reality. The Taylor Committee was later appointed to engage in consultations and to generate proposals with regard to an improved and better-structured social security system. The committee made several recommendations towards developing the social security system. The most significant changes since publication of the report have been the introduction of Social Security Agency¹⁰³ and Social Assistance Act.¹⁰⁴

2.3.3 The Current South African Social Security System

The discussion of the regulatory framework of the present social security is instrumental to the development of this research for the following reasons. To illustrate what the present, regulatory framework of the social security looks like. After the historical developments above, it is still apparent that the system still suffers from many deficiencies including the exclusion of migrant workers.

As seen from above, the South African system is characterised by a division into social assistance and social insurance.¹⁰⁵ Due to historical reasons, some of the traditional social security contingencies are not regulated on a public insurance fund basis, but covered in terms of essentially private mechanisms in particular retirement and health,¹⁰⁶ though health care is provided for the bulk of the population by limited public measures in terms of free primary health care, as well as hospital care for women with young children and the aged. For the rest, medical services are covered by private schemes.¹⁰⁷ Social insurance entails the existence of statutory schemes to provide protection against unemployment, occupational injuries and diseases and injuries occurring in road accidents. Social insurance for health care and retirement is not

¹⁰³ *South African Social Security Agency, Act 9 of 2004.*

¹⁰⁴ *South African Social Assistance Act 13 of 2004.*

¹⁰⁵ *Ibid.*

¹⁰⁶ In these cases public provision is made to cover in particular those without sufficient means – such as by means of the state old-age grant and public health services. In the South African context the private measures must be seen as part of the social security system.

¹⁰⁷ Alexander P & Shindondola H “Social Security for Non-Citizens in South Africa”. *A draft report on Sociological Research* (RAU October 2002).

provided through statutory schemes, but several private schemes exist to provide protection against these risks. This approach of designing a system to address basic social security risks is called risk-based approach. This is in keeping with a traditional western European model.¹⁰⁸

Social assistance¹⁰⁹ is financed through taxes, regulated by legislation and is the exclusive responsibility of the State.¹¹⁰ Social relief¹¹¹ forms part of the social assistance branch of the South African social security system, and entails short-term measures undertaken by the State, and private institutions, to assist persons during individual or community crises that have caused the persons or communities to be unable to meet their most basic needs.¹¹² A series of legislation in South Africa deals with the various social security contingencies. In the area of social assistance, the *Social Assistance Act*¹¹³ is the most fundamental instrument. Common law, particularly administrative law¹¹⁴ plays an important role as far as social security discretion exercise and social delivery are concerned.¹¹⁵ Social insurance contingencies are regulated by individual pieces of legislation.

Outside social assistance retirement coverage is regulated mainly in terms of the *Pension Funds Act*.¹¹⁶ This Act mainly governs private retirement. However, some occupational-based retirement schemes are provided for by other statutes and cover particular categories of workers. These include the *Military Pensions Act*,¹¹⁷ *Special*

¹⁰⁸ Liebenberg S & Tilley A "Poverty and Inequality Hearings Social Security Theme Background" paper for SANGOCO & South African Human Rights Commission and the Commission for Gender Equality (April 1998).

¹⁰⁹ According to the Social Assistance Act 13 of 2004, this means a social grant including social relief of distress.

¹¹⁰ Strydom EML *et al Essential Social Security Law* (Juta 2006) 7.

¹¹¹ As defined in the *Fund Raising Act 107 of 1978*. See now also the definition of social assistance in s 1 of the *Social Assistance Act 13 of 2004*.

¹¹² Mpedi LG, Kuppan GY and Olivier MP "Welfare and legal aid" in Olivier MP *et al Social Security: A Legal Analysis* (Butterworths Durban 2003) 205.

¹¹³ 13 of 2004.

¹¹⁴ The Promotion of Administrative Justice Act 3 of 2000 gives expression to the constitutional requirement that national legislation be enacted, setting out the details of the broad framework of administrative law rights enshrined in the Bill of Rights.

¹¹⁵ See Olivier M & Mhone G "South Africa" (country report) in Olivier MP & Kalula ER *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (CICLASS & Institute of Development and Labour Law) (Creda 2004) 121-122.

¹¹⁶ 24 of 1956.

¹¹⁷ 84 of 1976.

Pensions Act,¹¹⁸ and *General Pensions Act*.¹¹⁹ This particular category is more in the nature of social compensation than social security. It is a condition of these pensions and gratitudes that the beneficiaries were not able to provide adequately for themselves owing to their involvement in political conflicts and their sacrifices are deemed to be deserving the gratitude of society.

Different sets of legislation deal with employment-related injuries and diseases in and outside the mining sector, and are administered by different institutional frameworks for occupational health and safety. The laws concerned with preventing or reducing accidents, injuries and ill health at workplaces are, generally, the *Occupational Health and Safety Act* (OHSA)¹²⁰ and the *Mines Health and Safety Act* (MHSA)¹²¹. Compensation is regulated by the *Compensation for Occupational Injuries and Diseases Act* (COIDA)¹²² and *Occupational Diseases in Mines and Works Act* (ODMWA)¹²³. COIDA is the main legislative tool regulating occupational injuries and diseases in the country. COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of, and in the course of, their employment, or who contract occupational diseases.¹²⁴ COIDA provides benefits for employees in the case of permanent and temporary disablement, as well as for dependants of employees who die as a result of injuries sustained, or diseases contracted at work. Lastly, the *Unemployment Insurance Act*¹²⁵ and *Unemployment Insurance Contribution Act*¹²⁶ were introduced in South Africa to make provision for the regulation of unemployment insurance.

¹¹⁸ 69 of 1996.

¹¹⁹ 29 of 1979.

¹²⁰ Act 85 of 1993.

¹²¹ Act 29 of 1996.

¹²² Act 130 of 1993.

¹²³ Act 78 of 1973.

¹²⁴ See *Jooste v. Score Supermarket Trading (pty) Ltd* 1999 2 BCLR 139 (CC).

¹²⁵ Act 63 of 2001. The UIA has been enacted amongst other reasons to establish Unemployment Insurance Fund, provide for the payment from the fund of unemployment benefits to certain employees, and for payment of illness, maternity, adoption and dependants' benefits related to the unemployment of such employees and provide for the establishment of Unemployment Insurance Board. (preamble UIA).

¹²⁶ Act 4 of 2002 was enacted to provide for the imposition and collection of contributions for the benefit of the Unemployment Insurance Fund and the procedures thereto. (preamble and section 2 UICA).

2.4. SOCIAL SECURITY FOR MIGRANT WORKERS IN SOUTH AFRICA

2.4.1. Access to Forms of Social Security by Migrant Workers: A General Overview

From the above remarks, it is evident that in South Africa the position of migrant workers as far as social security is concerned needs to be re-looked into, this is mainly because they remain excluded from most benefits. In order to unpack this, it is befitting to observe the following. First, any migrant worker who is in the country illegally, by definition cannot enter into a legally valid contract of employment. As such, the migrant worker does not acquire the status of an employee in terms of South African law, and the worker will not be protected as such by South African law¹²⁷. Therefore, there will be no question of entitlement to any benefits arising from an employment relationship. If a migrant worker is in this country legally, they are here as non-citizens but may, after certain criteria have been met, acquire the status of permanent residents.¹²⁸

In contrast to the position of temporary residents, it would seem the position of permanent residents is different in that for example, permanent residents are entitled to compensation for occupational injuries and diseases and permanent residents are entitled to unemployment insurance¹²⁹. The position of both these residents will be elaborated hereunder. It is our opinion, that this exclusion is not justifiable and may be contrary to the right to equality. This argument will be further developed in chapter 3.

2.4.2 Access by Migrant Workers Who are Permanent Residents

Initially, the position was that the eligibility criterion for assessing social assistance benefits was South African citizenship. As already observed this position was placed under constitutional challenge in the landmark case of *Khosa and Others v The Minister*

¹²⁷ Strydom supra 253.

¹²⁸ op cit Strydom 253.

¹²⁹ See also *Larbi-Ordam & Others v. MEC for Education (NW) and Another* 1998 (1) SA 745(cc) where the Constitutional Court distinguished between non-citizens with permanent residence status and non-citizens with temporary residents status. The court pointed out that the latter did not enjoy the same status as the former and that discrimination against them may thus be justified.

of *Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others*.¹³⁰ The court gave the interpretation of the bill of rights. It made a distinction between permanent residents on the one hand and temporary residents with regard to the right to access social assistance and found the former to have a stronger link with the country as opposed to the latter. It found that permanent residents had a strong link with the country as opposed to temporary residents. Permanent residents reside legally in the country and may have done so for a considerable lengthy period of time; like citizens, they have made South Africa their home; permanent residents are compelled to return to the country at least once every three years; they have a right to work in South Africa and even owe a duty of allegiance to the State. The court found that, save for political rights; they were for most purposes in the same position as citizens. The court found the provisions excluding permanent residents from social assistance to be unconstitutional. The current position is that permanent residents are entitled to access social assistance in terms of the *Social Assistance Act*.

In the judgment of the Constitutional Court in the *Khosa case*¹³¹ the court held that non-citizens are included in the constitutional entitlement of "everyone" to access to social security and appropriate social assistance.¹³² Their exclusion from the social security system must therefore pass the constitutional test of reasonableness.¹³³ As indicated above, but subject to the qualifications mentioned, the consideration of international law and of foreign law may be of assistance in this regard.

Non-citizens who have acquired permanent residence status are eligible for social assistance on the same basis as South Africans. For example, non-citizens with permanent resident status are entitled to workers compensation in the event of an

¹³⁰ See footnote 124. It found that the Constitution expressly provides that the Bill of Rights enshrines the rights of "all people in our country" and in the absence of any indication that section 27(1) is restricted to citizens as in other provisions in the Bill of Rights, the word "everyone" cannot be construed as referring only to citizens.

¹³¹ 2004 (6) *BCLR* 569 (CC).

¹³² Para 590D *supra*.

¹³³ See above.

accident or disease.¹³⁴ They can also access funding for tertiary education and health care on the same footing as citizens.

Foreigners with permanent residence status are entitled to the same socio-economic rights as citizens. A permanent resident is defined as the holder of a section 25 permit as defined in the Act. A permanent resident has all the rights, privileges, duties and obligations of a citizen with the exception of those that the Constitution explicitly ascribes to a citizen.¹³⁵

In the *Larbi Odam case*¹³⁶ the court decided on the constitutionality of regulations disqualifying non-citizens from permanent employment as teachers in state schools. The court found discrimination on the basis of citizenship to be unconstitutional.¹³⁷ The court further held that denying permanent residents job security when they are allowed to live and work in South Africa indefinitely (and to apply in due course for citizenship) was unfair discrimination. Currently permanent residents can compete with South African citizens in the job market.

Non-citizens with permanent residence are entitled to social insurance. In the event that permanent residents are involved in an accident or contract an occupational disease in the workplace, they are entitled to workers compensation.¹³⁸ Permanent residents, being contributors to the Unemployment Insurance Act (UIA),¹³⁹ are entitled to benefits in the event of retrenchment, illness, adoption of young children or pregnancy. In terms

¹³⁴ See *Compensation for Occupational Injuries and Diseases Act* 130 of 1993, section 12.

¹³⁵ Section 25 of Act 31 of 2002.

¹³⁶ *Larbi-Odam v MEC for Education (North West Province)* 1997 (12) BCLR 1655 (CC). In this case, the Constitutional Court applied the equality protections of the interim Constitution to non-South African citizens and struck down a Department of Education regulation prohibiting foreign citizens from being permanently employed as teachers in state schools. The regulation had provided that, subject to certain exceptions, only South African citizens could be appointed to permanent teaching posts in state schools.

¹³⁷ The court noted three reasons for this: that foreign citizens are a minority in South Africa and all countries, with little political power; that citizenship is a personal attribute which is difficult to change; and that there were specific threats and intimidation that these foreign teachers faced. All of these reasons made the foreign citizens a vulnerable group that should be protected in terms of the equality clause. While some jobs might be constitutionally limited because of particular political sensitivity (e.g. a Judge of the Constitutional Court), in general, employment opportunities should be available to permanent residents and South African citizens on an equal basis.

¹³⁸ Section 22 (1) of *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹³⁹ See section 3(1) (d) 63 of 2001.

of the Unemployment Insurance Act (UIA), they will be entitled to benefits, if they are retrenched, become ill or pregnant, or adopt young children. Their dependants will also be entitled to benefits in the event of their death.

2.4.3 Access by Temporary Residents

The *Immigration Act* defines a foreigner as a person who is neither a citizen nor a resident, but is not an illegal foreigner.¹⁴⁰ A foreigner may be admitted to enter and sojourn in the country only if in possession of a temporary residence permit. There are various categories under which a person may get a temporary resident permit and these are, *inter alia*: work, holiday, study, asylum, medical treatment, relative permit, business, treaty.¹⁴¹

With regard to health care, temporary residents are not covered in the public sector. The means of social security available to them is in the private sector through private schemes as regulated by the *Medical Schemes Act*,¹⁴² which is contributory. It is a pre-requisite, before enrollment to study in South Africa, for a foreign student to be a member of a medical aid scheme. This is to avoid a situation whereby they place a strain on the resources available to citizens/permanent residents¹⁴³.

Temporary residents who are migrant workers are excluded from unemployment insurance and thus, as a result of termination of services, illness, maternity or adoption, they will receive no coverage. The *Unemployment Insurance Act* excludes temporary residents who enter the country for purposes of carrying out a fixed contract of service if that person is obliged to leave the country on termination of the contract.

The *Road Accident Fund*, on the other hand, is a non-employment based social insurance scheme which is funded through compulsory fuel levy. It pays out

¹⁴⁰ Section 1(1) of 13 of 2002.

¹⁴¹ Section 11 – 25 of 2002.

¹⁴² 131 of 1998.

¹⁴³ Perbedy S. “A Brief History of South African Immigration Policy” accessed from <http://www.polity.org.za.paper/migration/html>.

compensation for bodily injuries or deaths arising from the negligent driving of motor vehicles. The fund is obliged to compensate any person and there is no limitation in terms of citizenship or permanent residence. Therefore temporary residents can access this form of social insurance. Temporary residents also qualify for compensation for occupational injuries and diseases in the event that an injury occurs at the workplace. The *Compensation of Occupational Injuries and Diseases Act* provides that if an employee or a dependant of an employee to whom a pension is payable in terms of the Act is resident outside the republic or is absent from the republic for a period or periods totaling more than six months, the Director-General may award a lump sum as determined by him in *lieu* of such person, and upon payment of such lump sum the right to the pension shall expire.¹⁴⁴

As indicated, in the absence of specific state provision of social security to temporary residents, employers usually privately take the initiative to provide some form of social security benefits for their temporary resident employees. One such initiative is The Employment Bureau of Africa (TEBA) which recruits miners for the mining industry and provides housing, medical care, life insurance and matching contributions for a provident fund as contractual benefits¹⁴⁵. It is a form of social protection for temporary migrants working in South Africa, in the mining industry only.

With regard to education, temporary residents cannot access free primary education. At tertiary level, they do not qualify for the loan given by government either. In addition, temporary residents who are not in possession of a study permit (even though they may be in possession of a work permit or another permit) are prevented from studying. This is due to a recent interpretation of section 10 of the *Immigration Act*. Section 10 of the Act,¹⁴⁶ states that “a foreigner may enter and sojourn in the Republic only if he or she is in possession of one of the above temporary residence permits”. It is unclear whether it was the intention of the legislature, in section 10(4) of the Act that the issuing of a particular permit to a foreigner excluded any other permit being issued to the same

¹⁴⁴ Section 60(1) of *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹⁴⁵ *Supra*.

¹⁴⁶ Ss 1 –5.

person. If this were to be the case, it implies a turn around from an earlier position where, as an example, a permit was issued allowing a foreigner to work and study at the same time.¹⁴⁷ Temporary residents in South Africa, also, cannot access social assistance as this is restricted to citizens and permanent residents¹⁴⁸.

To add to the above, it is, of course important to remember that the South African Constitution¹⁴⁹, as interpreted by the courts, does not require citizenship as a precondition for access to most of the rights contained in the Bill of Rights. This is the case, for example, as far as the rights to equality¹⁵⁰, to dignity¹⁵¹, and perhaps most importantly, to health care, food, water and social security¹⁵² are concerned. Furthermore, it has been accepted by our courts that citizenship, although not listed as an unacceptable ground of discrimination in the Constitution, is analogous to those listed grounds and, as such qualifies as a so-called unlisted ground on which the State is not allowed to discriminate unfairly.¹⁵³

Moreover, section 27(1)(c) of the Constitution affords "everyone" the right to have access to social security, including those who are unable to support themselves and their dependents and appropriate social assistance. Since the constitution does not expressly exclude non-citizens and temporary residents from the ambit of the Bill of Rights¹⁵⁴, it would seem that "everyone" who finds himself or herself in need has access to social security and social assistance. The question whether the right to access to social security rights restricted to citizens and permanent residents will be dissected in chapter 3 and its constitutionality. This question is particularly relevant in view of the fact that the system of migrant workers (both skilled and unskilled workers) is a well established practice in the South African workplace, particularly on South African mines where thousands of migrant workers are employed every year, the system of migrant

¹⁴⁷ North West University regulations at www.nwu.ac.za.

¹⁴⁸ Ibid.

¹⁴⁹ 108 of 1996.

¹⁵⁰ S.9 of the Constitution.

¹⁵¹ S.10 of the Constitution.

¹⁵² S.27 of the Constitution.

¹⁵³ Strydom et al, supra 253.

¹⁵⁴ Apart from the rights such as the right to vote and the right to stand for office.

workers is sustained by factors such as political and economical instability, limited employment opportunities and poverty in neighbouring countries, forcing millions of workers into seeking employment outside the borders of their own countries.¹⁵⁵

The phenomenon of regional migration raises many questions in the context of social security, one of which is access to the social security benefits provided for by our social legislation. Migrant workers are exposed to the same risks as any other worker in South Africa. Loss of work, the reduction or disappearance of income as a result of illness, pregnancy or injury (sustained inside and outside the workplace) all give rise to a demand for social security. Large scale retrenchments on the mines also often result in unemployment and the displacement of migrant workers. If these workers are excluded from access to the social security benefits provided for by our social security legislation, they will undeniably find themselves in a particularly precarious and vulnerable position.

2.4.4 Access by Undocumented Migrants

The *Immigration Act of 2002* defines an illegal foreigner as a foreigner who is in South Africa and in contravention of the Act. An undocumented immigrant would therefore be considered as an illegal foreigner under the South African immigration law¹⁵⁶.

The most notable legal gap in the immigration and labour laws affecting foreign migrants arises from the protection of undocumented migrants. In the event that an employer hires undocumented migrants, there is no means to ensure minimum wages are paid or any compensation for work-related injuries.¹⁵⁷

General Recommendation № 30 issued by the Committee on the Elimination of all Forms of Racial Discrimination set by the ILO to protect non-citizens, states that once an employment relationship has been initiated and until it is terminated, all individuals, whether they have work permits or not, are entitled to the enjoyment of labour and

¹⁵⁵ Supra.

¹⁵⁶ Op cit Perberty.

¹⁵⁷ ibid.

employment rights, including freedom of assembly and association. Since South Africa is a state party to the International Covenant on the Elimination of all forms of Racial Discrimination (ICERD), it has an obligation to ensure that, at minimum, employers must pay the prescribed minimum wages and incur responsibility for work-related injuries of even undocumented workers, including those whom the government seeks to deport.¹⁵⁸

Section 32 of the *Immigration Act* explicitly states that undocumented migrants will be deported. Whereas the deportation is justifiable, it is the means that this deportation is effected that must be able to stand constitutional scrutiny. In South Africa, the deportation system has been widely criticized by human rights groups, including the South African Human Rights Commission with the gist of the critique attacking the methods of arrest and removal as being no different from those deployed to control black South Africans during the apartheid era. Evidence to back up this claim has emerged during the current trial of several South African policemen for setting attack dogs on defenseless Mozambican migrants. Similarly, a holding centre known as Lindela, through which many migrants pass prior to deportation, has also been the focus of major human rights investigations and complaints.¹⁵⁹

In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, undocumented migrants who are apprehended and held in custody must have "an effective opportunity" to have their case reviewed "promptly" by a judicial or other authority. Continued detention should be on the basis of specified conditions, and should be subject to periodic review and to a maximum time limit. The current practices, allowing for the judicially unsupervised detention of undocumented migrants for an initial period of thirty days, are inconsistent with international human rights standards and the provisions of the South African constitution.¹⁶⁰

¹⁵⁸Human Rights Watch "Keep your head down" undocumented migrants in South Africa. Accessed at <http://hrw.org/reports/2007/southafrica0207/4.htm> 43.

¹⁵⁹ Supra.

¹⁶⁰ Human Rights Watch "Prohibited persons" Abuse of undocumented migrants, asylum seekers and refugees in South Africa. Accessed at <http://www.hrw.org/reports98/sareport/>

In the *Khosa*¹⁶¹ judgment, the court expressly stated that undocumented migrants were exempt from access to social security. The court made a distinction between permanent and temporary residents. It stated that whilst with the latter, their link with the country was a tenuous one, with regard to the former; they resided legally in the country and may have done so for a considerable length of time.¹⁶²

However the reality of undocumented migrants in South Africa cannot be ignored and they must enjoy some protection under the law. In *Lawyers for Human Rights v The Minister of Home Affairs*,¹⁶³ the court rejected the argument that persons illegally resident in the country had no rights and were protected only by international law. It stressed that illegal foreigners at ports of entry are protected by the rights in the Constitution.

However, illegal immigrants or migrant workers would not qualify for compensation under COIDA or ODMWA. The reason is that a person who is not in possession of a work permit as required by section 19 of the Immigration Act¹⁶⁴ is not an employee for labour law and, one could add, social security law purposes (such as for purposes of bringing a case before the labour law adjudicating institutions)¹⁶⁵ as no valid contract of employment exists and such a person cannot be understood to be “an employee”.¹⁶⁶

With regard to access to housing, undocumented migrants cannot access housing subsidies nor can they buy a house, in the unlikely event of them having the funds to purchase it. The very reason of them having no documentation to reside legally in the country precludes them from accessing most of the social security system in South

¹⁶¹ *Supra*.

¹⁶² Permanent residents are compelled to return to the country at least once every three years, they have their homes and families in the country, have the right to work in South Africa and even owe a duty of allegiance to the state. The court found that for these reasons temporary migrants were excluded from access to social assistance in South Africa.

¹⁶³ 2004 (4) SA 125 (CC).

¹⁶⁴ 13 of 2002.

¹⁶⁵ *Moses v Safika Holdings (Pty) Ltd* 2001 22 ILJ 1261 (CCMA); *Vundla v Millies Fashions* 2003 24 ILJ 462 (CCMA); *Lende v Goldberg* 1983 2 SA 284 (C).

¹⁶⁶ Smit N “Employment Injuries and Diseases” in Olivier M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) 472.

Africa. The reality of the situation is that most undocumented migrants are impoverished and reside in informal dwellings and shacks. In a recent Supreme Court of Appeal case of *Tswelopele Non-profit Organisation v City of Tshwnane Metropolitan Municipality*¹⁶⁷ whereby sixteen undocumented migrants were amongst one hundred people forcibly evicted from their homes and their structures erected on the land on which they were squatting burnt down, the court found that this action had infringed on the occupier's property rights. Although the court was silent as to the right of undocumented migrants with regard to housing, it reiterated that the action trampled on their feelings and affronted their social standing. It stressed that the Constitution entrenches the inherent right to dignity to 'everyone' which must be respected and protected and it stressed that the occupiers were bearers of constitutional rights.

From the above discussion it follows that, whereas undocumented migrants, by their lack of documentation are excluded from the bulk of social protection in South Africa, the Constitution guarantees the right to inherent dignity and as such, they have a right to be treated with dignity in the host country.

2.5 PORTABILITY OF BENEFITS

2.5.1 A General Overview

A number of migrant sending and receiving countries have negotiated bilateral social security agreements to enhance the co-operation between social security authorities of the countries involved and to ensure the adequate portability of contributions and entitlements of migrant workers and their families. "Portability" in this context is understood as the migrant worker's ability to "preserve, maintain, and transfer acquired social security" independent of nationality and country of residence.¹⁶⁸

¹⁶⁷ (2007) SCA 70 /Case 303/2006.

¹⁶⁸ Crux A.T. 2004, 'Portability of Benefit Rights in Response to External and Internal Labor Mobility: The Philippine Experience.' Paper presented at the International Social Security Association.(ISSA), Thirteenth Regional Conference For Asia and the Pacific in Kuwait, March 8-10. Available at <http://www.issa.int/pdf/kuwait>. last accessed on February 9,2008.

The administrative procedures associated with portability mainly refer to the totalization of periods of insurance in the host and the home country to determine the migrant worker's pension benefits in both countries, the extraterritorial payment of pensions, and transfers between public health care authorities in both countries to guarantee continued health coverage for migrants. While the issue of portability has been in discussion for sometime, international interest has increased substantially as part of the rising focus on migration in recent years. Yet, the information base about issues and good practices of benefit portability is extremely thin at the international level.¹⁶⁹ Below, is the position of South Africa as far as the portability of migrant workers is concerned.

2.5.2 South African Portability of Benefits

Olivier postulates that with a limited number of exceptions, South Africa is not yet part of the network of bilateral and multilateral conventions on the coordination of social security and that such situation operates to the disadvantage of both non-citizens in South Africa and of South Africans who take up temporary or permanent employment or residence in other countries.¹⁷⁰ In terms of comparative approaches, the territorial principle operative in social security is in these conventions replaced by a personal entitlement to benefits, which follows the beneficiary. The general principles which constitute the content of bi- and multilateral arrangements in this regard, usually relate to the following:¹⁷¹

- the choice of law principle, identifying the legal system which is applicable (as a rule, the applicable law is that of the place of employment, the *lex loci laboris*);
- equal treatment (in the sense that all discrimination based on nationality is prohibited);

¹⁶⁹ Boudahrain, A. 2000. "The Insecure Social Protection of Migrant Workers from The Maghreb." *International Social Security Review* 53(2); 47-73

¹⁷⁰ Eg, in terms of s 60 of the COIDA, an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.

¹⁷¹ Barnard C *EC Employment Law* (Oxford: OUP 2002) 302, commenting on the position in the EU.

- aggregation of insurance periods (in that all periods taken into account by the various national laws are aggregated for the purposes of acquiring and maintaining an entitlement to benefits, and of calculating such benefits); and
- Maintenance of acquired benefits and the payment of benefits to residents, irrespective of the country to the agreement where they reside (“exportability” principle).

Various ILO Conventions require co-ordination on the part of State parties in order to guarantee migrant workers comprehensive and continuous protection on the basis of effective equality and reciprocity.¹⁷²

Also, South African benefits may be remitted through government to government agreements or through the mines’ major recruitment agency. In South Africa, the mining industry has two kinds of remittance in operation. The compulsory deferred pay, whereby in the case of Mozambique and Lesotho, home country legislation compels migrants to remit 60% and 30% respectively of their earnings to their home countries.¹⁷³ Voluntary remittance is also involved, whereby TEBA and the banks have instituted efficient systems for voluntary deferment of wages. TEBA’s voluntary system has been known to remit more funds to the home countries than the compulsory deferred pay system.¹⁷⁴

It was earlier illustrated above that, South Africa is not yet part of the multilateral and bilateral agreements on the co-ordination of social security¹⁷⁵. The absence of proper bi- or multilateral arrangements in this regard between South Africa and other neighboring states have been said to amount to non-observance of international obligations by

¹⁷² E.g. the Maintenance of Social Security Rights Convention (No 157 of 1982) and the supplementing Recommendation (No 167 of 1983).

¹⁷³ Jonathan C. *Contract Migration to South Africa: Past, Present and Future*. Accessed at <http://www.queensu.ca/samp/transform/crush.htm>. On the South African side, this compulsory deference policy has been critiqued by the Chamber of Mines as violating the basic rights of a person to earn and spend their money as they wish.

¹⁷⁴ Ibid.

¹⁷⁵ Olivier and Mpedi LG 2003. “Coordination and Intergration of Social Security in the SADC Region, Developing Intergration” *Journal for Juridical Science* 10.

South Africa, which opens migrant workers, both documented and undocumented to vulnerabilities of exploitation and abuse in the host country.¹⁷⁶

2.6 CHAPTER SUMMARY

The analysis above shows how strongly the legal position of migrants in social security is governed by immigration policies. The inclusion of migrants in the social security system can to some extent be explained with reference to the forces that have led to gradual development of the right to social security itself. But in the end it appears that the quality of treatment of migrants in social security law is strongly dependent upon the migration policies conducted by a country as illustrated by the developments in South Africa and other trends.

Moreover, any approach to combating discrimination against non-citizens should take into account the varying state interests at stake with due regard to categories of rights (e.g. political rights, right to education, social security, other economic rights etc) as to various kinds of non-citizens with their distinct relationships to the country in which they are residing (e.g. permanent residents, migrant workers, temporary residents). This must be done in proportion to the legitimacy of state interest or rationales for distinctions between citizens and non-citizens or among non-citizens.¹⁷⁷ South Africans case study in this chapter provides a good example.

To conclude therefore, it is evident from the discussion so far that the social security jurisprudence in South Africa hitherto, has received the legislative and policy recognition. The point is to develop such jurisprudence so as to enable it to attain its ideals. The declared objective of this chapter was to sketch the social security policies in South Africa as they relate to migrant workers. The following chapter examines how

¹⁷⁶ Ibid. Also see art 3 of ILO Convention 2 of 1919, to which South Africa is a party (South Africa ratified the Convention 20 February 1924). It stipulates: "The Members of the International Labour Organisation which ratify this Convention and which have established systems of insurance against unemployment shall, upon terms being agreed between the Members concerned, make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter."

¹⁷⁷ Weissbrodt David, "Final Report on the Rights of Non-citizens", UN Doc E/CN.4/Sub.2/2003/23 (2003)11.

the current constitutional set-up has been able to systematize the social security protection of migrant workers.

CHAPTER THREE

CONSTITUTIONAL IMPERATIVE ON THE RIGHT TO SOCIAL SECURITY: IMPLICATIONS FOR MIGRANT WORKERS

3.1 INTRODUCTION

Following the previous chapter, which briefly discussed the social security policies, law and their developments in South Africa as they relate to migrant workers, it is now befitting therefore to proceed to analyze how the current constitutional provisions have influenced the concept and application of social security. The objective of this chapter is to reflect on the impact of the South African constitutional framework on the exclusion of non-citizens especially of migrant workers as a vulnerable group from social security provisioning. This is discussed from both a theoretical and practical or implementation perspective, as is apparent from the developing constitutional jurisprudence in the field of social security in South Africa. The inquiry is largely of a constitutional and social security law nature. Its ultimate objective is to determine to what extent the social security right of migrant workers has been safeguarded in the South African Constitution.

The chapter is divided into two three sections. The first section evaluates the South African theoretical perspectives on the constitutional imperative relating to social security for non-citizens as a vulnerable group. Under this section we will attempt to unpack the constitutional provisions of social security as well as look into how the marginalization of this group has been addressed. The second part deals with interpretation and enforcement of the constitutional imperatives by courts. Third part deals with the possibility of providing equal access to migrant workers under both social insurance and social assistance.

3.2. CONSTITUTIONAL BACKGROUND

3.2.1 A General Overview

In any discussion dealing with the regulatory framework of social security, it is compelling to consider the underlying foundation of the framework, which, in this case would be constitutional imperative to guarantee everyone access to social security as a fundamental socio-economic right. The view of the Constitutional Court in this regard will also provide important guidelines on the shaping of the future policy and legislative reform towards being inclusive. For the first time in our historical dispensation, the South African Constitution signaled a milestone by putting an end to an era which was characterized by untold sorrow and no respect for human rights.¹⁷⁸

One of the aims of the Constitution is to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights.¹⁷⁹ A further aim is to improve the quality of life of all citizens and to free the potential of each person¹⁸⁰. Social security can play a major role in ensuring social justice, in freeing the potential of all citizens and in improving their quality of life as clearly stipulated in the preamble.

Section 1 of the Constitution contains the values on which the country is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms.¹⁸¹ The introduction of this new constitution came with a host of rights (both socio-economic and civil and political rights) and duties in its Bill of rights and duties which signified the dawn of the new era¹⁸². Socio-economic rights entrenched in the Constitution include, among others, the following ; the right of access

¹⁷⁸ See the Preamble to the South African Constitution Act 108 of 1996. This Constitution, often referred to as the Final Constitution, replaced the Interim Constitution (Act 200 of 1993).

¹⁷⁹ Preamble to the South African Constitution, 108 of 1996.

¹⁸⁰ Ibid.

¹⁸¹ Section 1 (a).

¹⁸² Sarkin J 1998 " The Development of the Human Rights culture in South Africa" 20 *Human Rights Quarterly* 628.

to housing¹⁸³, the right of access to health care¹⁸⁴, the right of access to sufficient food and water and the right to basic information.¹⁸⁵

3.2.2 Current Status of the Constitution as the Supreme Law

Section 2 of the Constitution expresses the role the Constitution is meant to play with regard to social security regulation, policy-making and administrative practice. It states that the Constitution is the supreme law of the land, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.¹⁸⁶

The state is obliged to conform to the rights contained in its Bill of Rights, as they are said to bind the legislature, the executive, the judiciary and all organs of the state, as well as, to the extent foreseen by the Constitution, natural and juristic persons¹⁸⁷. In recent times, the courts have not hesitated to enforce the supremacy of the Constitution in the area of social security on circumstances where its prerequisites have not been adhered. The Constitution now makes the Constitutional Court the final obiter over all constitutional matters.¹⁸⁸ Interpreting the provisions of the Constitution, particularly section 2 one cannot refrain but borrow (as a comparative analysis) from Chief justice Marshall's assertion that certainly, 'all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, consequently the theory of every such government must be, that an Act of the legislature repugnant to the Constitution, is void'.¹⁸⁹ These rights which appear in the Constitution as well as the obligations which go along with them, have some implications on the South African social security system as will be shown hereunder.

¹⁸³ Section 26 of the Constitution.

¹⁸⁴ Section 26 (1)(a).

¹⁸⁵ Section 29.

¹⁸⁶ Section 2.

¹⁸⁷ Ibid.

¹⁸⁸ Section 167 (5) proclaims "The Constitutional Court makes the final decision whether the Act of Parliament, a provincial Act or conduct of the President is Constitutional".

¹⁸⁹ See *Marbury v Madison* 5 U.S. 137 (1803) at 176.

3.3 CONSTITUTIONAL IMPERATIVES ON SOCIAL SECURITY: IMPLICATIONS FOR MIGRANT WORKERS

The South African Constitution provides every person with the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.¹⁹⁰ It imposes an obligation on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right¹⁹¹. Furthermore, the State has a duty to respect, protect, promote and fulfill the aforesaid right of access to social security.¹⁹² Lastly, in interpreting this right, the South African courts are required to promote the values that underlie an open and democratic society based on human dignity, equality and freedom¹⁹³. In addition, they must promote the spirit, purport and objects of the Bill of Rights.¹⁹⁴

There are, therefore, several core principles which underlie and enhance the constitutional protection of social security as a human right in South Africa, examples of which are:

- The constitutional supremacy (effectively replacing the principle of parliamentary sovereignty);¹⁹⁵
- an international law-friendly approach, which allows institutions entrusted with interpreting and enforcing fundamental rights to rely extensively on international law norms and precedent;¹⁹⁶

¹⁹⁰ S.27(1)© of the Constitution.

¹⁹¹ S.27 (2).

¹⁹² S.7(2).

¹⁹³ S.39 (1) (a) of the Constitution.

¹⁹⁴ S.39 (2).

¹⁹⁵ This follows from the supreme status which has been allocated to the Constitution: according to s 2 it is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

¹⁹⁶ S 39(1)(b) stipulates that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law. According to the Constitutional Court decision in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 35 (quoted with approval in *The Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC)) in the context of this provision, public international law would include non-binding as well as binding law. Furthermore, s 233 provides that "... when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

- The right to equality, and from a social security point of view, *equality and administrative justice*: the social security system must not unfairly discriminate (directly or indirectly) against person.¹⁹⁷

The abovementioned principles are very much significant to the present discussion. This is for the reason that for our system to be inclusive, it has to be guided or based on the abovementioned principles. The exclusion of migrant workers raises serious questions of a constitutional nature¹⁹⁸.

Jurisprudentially the right to equal treatment has already in the area of employment been interpreted to imply that there is no basis to distinguish between foreigners who have obtained permanent resident status and South African citizens.¹⁹⁹ Furthermore, some of the present exclusions pertaining to migrant workers may be contrary to South Africans treaty obligations, for example the exclusion of fixed term migrant workers under the *Unemployment Insurance Act*²⁰⁰.

From the social security point perspective, this does not point to the fact that all categories of non-citizens migrants would have to be treated alike. This may affect in particular the position of non-citizens who are illegally in the country. However, the White Paper on International Migration²⁰¹ recognizes that there is no constitutional basis to exclude in general, the application of the Bill of Rights based on the status of a person while in South Africa. This means that it should apply to all those living in South Africa including refugees, migrant workers, and including illegal immigrants.²⁰²

¹⁹⁷ The exclusion of permanent residents from being eligible for social grants in terms of the Social Assistance Act is questionable in the light of the Constitutional Court's decision in *Larbi-Odam and others v Member of the Executive Council for Education (North West Province) and another* 1997(12) BCLR 1655 (CC).

¹⁹⁸ *Unemployment Insurance Act* 63 of 2001.

¹⁹⁹ see *Larbi-Odam v. Member of Executive Council for education* 1998 (1) SA 745 paras 30-31.

²⁰⁰ Supra section 6.

²⁰¹ 31 March 1999.

²⁰² White Paper on International Migration paras 2.2-2.4.

3.3.1 The Constitutional Set-up and its implication on the quality of life for all

In order for us to effectively advocate for a change or lobby for the inclusion of the marginalized, we first have to ascertain the purpose of the South African Constitution. It is apparent that the prevailing constitutional framework in South Africa has been mainly designed to prevent exclusion as a result of and as a response to past human rights abuses which lead to large-scale marginalization. This flows from the fact that the Constitution of the Republic of South Africa is clearly intended at avoiding a repetition of past injustices and to forge a new culture of accommodation, mutual respect, equality and freedom in South Africa. The preamble to the final (1996) Constitution²⁰³ bears clear testimony to this. It states:

"We, the people of South Africa, Recognize the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people."

In addition, in one of its first judgments, the Constitutional Court had this to say:²⁰⁴

". . . the Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction . . ."

Apart from ensuring that there is no repetition of injustices of the past as shown above, the constitution also entrenches a Bill of Rights chapter which has deviated from the traditional approach which used to distinguish between second generation rights and

²⁰³ 108 of 1996.

²⁰⁴ *S v. Mhlungu* 1995 3 SA 867 (CC).

first generation rights. In its Bill of Rights chapter, the Constitution gives extensive recognition to and entrenches all the fundamental human rights without classifying them into categories as was the case before. This is evident particularly in the areas of labour relations, environment, land, housing, health care, food, water, and social security, and with regard to children, education, language and culture rights, the rights of cultural, religious and linguistic communities, and just administrative action.²⁰⁵ The entrenchment of social security in a bill of rights notionally and conceptually constitutes an example of socio-economic rights protection.

When these rights and the way in which they are provided for and protected are viewed in context and as a whole, the inference can be drawn that the Constitution clearly intends to regard South Africa as a social state. This also flows from the stated aim to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person²⁰⁶. Also, the Constitutional Court has often reiterated that the meaning of the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses, and that the Constitution endeavors to bring about reconciliation and reconstruction.²⁰⁷ That is to say all of this is intended to have an impact on the quality of life of those subject to the Constitution.

3.3.2 Dissecting the Purpose of the Constitution as it relates to Social Security and Migrant Workers

A certain minimum approach will ensure that the spirit as has been envisaged in the Constitution is upheld, especially that of cementing the preventive and inclusive elements discernable from the overall constitutional framework. This fact appears from the strengthening of the right of access to social security by other fundamental rights, such as the right to access to health care services, to sufficient food and water, to

²⁰⁵ S.23 – 30.

²⁰⁶ In the Preamble.

²⁰⁷ See above and the quotation from the *Mhlungu* judgment.

adequate housing and the right to basic education, as well as the rights of children to basic nutrition, shelter, basic health care services and social services.²⁰⁸ Olivier postulates that these rights when put together can be said to ensure from a constitutional and a human rights perspective adequate social security²⁰⁹.

Additionally, the Constitutional Court has affirmed that all the rights contained in the Bill of Rights are interrelated, indivisible and mutually supporting.²¹⁰ The Constitutional Court made it clear that realizing 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 other socio-economic rights, such as access to land, must be in place as well²¹¹. Furthermore, giving effect to one or some of these rights may have an impact on the extent to which or manner in which the State has to give effect to the other rights. This is particularly true in the area of social assistance. As noted by the court in *Grootboom*, if under section 27:

"[t]he state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights".²¹²

In particular as far as social security is concerned, the Constitutional Court postulated that when considering the purpose of providing access to social security to those in need, a society has to make an attempt to ensure that basic necessities of life were accessible to all.²¹³

²⁰⁸ S.27 (1)(a), S.27(1)(b), S.26(1), S.28(1)(c) & S.29(1).

²⁰⁹ Olivier MP & Kalula ER "Scope of Coverage" in Olivier M *et al Social Security: A Legal Analysis* (Butterworths Durban 2003) 127.

²¹⁰ *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 53; *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) par 40.

²¹¹ *Ibid.*

²¹² *Government of the Republic of South Africa v Grootboom* par 36.

²¹³ *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC) 573A (case head note summary).

The impact of the interrelated nature of the fundamental rights contained in the South African Constitution in the area of social assistance has been clearly illustrated in a recent case dealing with the exclusion of permanent residents from the purview of the South African social assistance system. In *Khosa* the court once again stressed the importance of adopting a holistic approach which takes into account the fact that all rights are interrelated, interdependent and equally important,²¹⁴ the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness, and other factors that may be relevant in a given case.²¹⁵ It remarked that where the State argues that resources are not available to pay benefits to everyone entitled under section 27(1)(c), the criteria for excluding a specific group (in this case permanent residents) must be consistent with the Bill of Rights as a whole.²¹⁶ Whatever differentiation is made must be constitutionally valid and cannot be arbitrary, irrational or manifest a naked preference.²¹⁷

3.3.3 Dealing with the excluded category or the marginalized people in South Africa

It has to be noted that there is a specific constitutional focus on addressing the plight of the most vulnerable and desperate in society. In particular, where categories of people belonging to deprived and impoverished communities are marginalized or excluded, and the right infringed is fundamental to their well-being (such as appropriate social assistance, or adequate housing), the Constitutional Court appears to be willing to intervene. This is, in particular, the case where the said communities have been historically marginalized and/or excluded or appear to be particularly vulnerable.

In *Grootboom* the Constitutional Court also emphasized that regard must be had to the extent and impact of historical disadvantage, the need to ensure that basic necessities of life are available to all, and the importance of not neglecting particularly vulnerable

²¹⁴ Ibid para 40.

²¹⁵ *Khosa* pars 43-44.

²¹⁶ *supra* pars 45.

²¹⁷ *op cit* 53.

groups.²¹⁸ We therefore argue that reasonableness should also be aligned or understood in the spirit of the Bills of Rights as a whole. That is, the State must be seen to be prioritizing the needs of the most disadvantaged groups. This opinion was emphasized again in *Treatment Action Campaign*.²¹⁹

The Constitutional Court held that the criterion of reasonableness²²⁰, *inter alia* implies that (especially in relation to dealing with the plight of the vulnerable):

- the vulnerable status of an affected category of people subject to the infringement of a particular right such as the right to access to social security, the extent and impact of historical disadvantage, the need to ensure that basic necessities of life are available to all, and the importance of not neglecting particularly vulnerable groups,
- The extent of the impairment and the impact thereof on an affected category of people,
- the purpose of social security, and the impact of the infringement or exclusion on other intersecting rights.

Vulnerable people can also be likened to people who are socially excluded. Social exclusion has, at least so far, lacked a uniform or consistent definition. The problem of social exclusion is that some groups in society are denied the opportunity to meaningfully take part in the mechanisms offered by society through which they may realize their livelihood, and a sense of self-respect.²²¹ Some authors, for example, define social exclusion as a process of social disqualification²²². While scholars like Kronauer²²³ unpacked the term by identifying six dimensions, namely exclusion from the

²¹⁸ Pars 44.

²¹⁹ Par 68, quoting from *Grootboom* par 44. From this it follows that regard must be had to the extent and impact of historical disadvantage. Furthermore, particularly vulnerable groups may not be neglected. Finally, basic human dignity must be seen to be accorded to everyone when a social security programme is constructed and implemented.

²²⁰ S 27(2) indicates that the state must adopt *reasonable* measures, within its available resources, to achieve the progressive realisation of the right to access to social security.

²²¹ Collins H 2003 "Discrimination, equality and social exclusion" *Modern Law Review* 16 at 29.

²²² Starrin M *et al.* "Employment and social Exclusion". *A comparison of 6 European Countries* 15 at 17-18.

²²³ *Ibid.*

labour market, economic exclusion, cultural exclusion, exclusion through social isolation, institutional exclusion and spatial exclusion.

With the foregoing in picture, it is submitted that social exclusion has three features social, political and economical. Many countries, either at national or regional level, have developed a variety of measures and policies to address the plight of the marginalized groups such as women, the aged, non-citizens, and people living with disability.

Non-citizens were identified as forming part and parcel of the vulnerable groups, therefore calling for urgent protection.²²⁴. Hence, excluding migrant workers from the social security protection is discriminatory against them. This is so because their position puts them in a vulnerable situation which warrants constitutional protection. Their exclusion has a strong stigmatizing effect. Because both migrants and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to migrant workers almost inevitably creates the impression that migrants are in some way inferior to citizens and less worthy of social security.

3.3.4 The Relationship between Human Dignity, Equality and Social Security: Analysis on their impact on exclusion

In examining the constitutional right of access to social security, it is of utmost importance that these rights be not examined and analyzed in isolation. This section will provide an overview of the right to equality and the right to human dignity. It is argued that these rights should underpin the realization of the rights of migrant workers. A lot is evident from the equality jurisprudence of the Constitutional Court, where the

²²⁴ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC) 572I. For example, in *Khosa* the Court held that *in casu* where the right to social assistance was conferred by the Constitution on "everyone" and permanent residents were denied access to this right, the equality guarantee entrenched in s 9 of the Constitution was directly engaged (572J).

impairment or violation of a person's dignity has been elevated to a decisive criterion in cases where the unfairness of discrimination has to be proved.²²⁵

As far as the employment area is concerned, the South African courts have consistently held that there is a close correlation between the right to equality and the protection of a person's dignity.²²⁶ It could be said that the strong link between human dignity and equality is evidently in line with the purpose of social security rights, given the emphasis social security places on the eradication of poverty, vulnerability and inequalities.²²⁷ Treating human beings with dignity requires of the State to act in a reasonable manner towards those claiming social security rights, such as the right to access to housing.²²⁸

²²⁵ According to judgments such as found in the case of *Harksen v Lane NO* 1997 (6) BCLR 1489 (CC); *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); *Brink v Kitschoff NO* 1996 (6) BCLR 752 (CC); See also Klinck, E "It takes three to tango: The right to equality, social security and constitutional law in South Africa" 2001 *European Journal of Law Reform* Vol 3, no 2 at 182. Two elements are important to establish unfairness: the "listed grounds" in the Constitution and the establishment of "impact":

(i) Under the listed or unlisted grounds one would determine whether the complainant (or group of complainants) is part of a disadvantaged or vulnerable group; whether it can/has led to patterns of harm or disadvantage; whether that is due to the group or the person's attributes and whether it impairs the person's (or group's) dignity or have a comparably serious effect.

(ii) Under the test for "impact" the person's (or group's) position in society; the nature of the discriminating provisions or power; the purpose for which the provision or power is used; the extent to which it affects the person's (or group's) rights; whether it violates the person's dignity or have a comparably serious impact; all in view of the constitutional goals.

²²⁶ *Larbi-Odam v Member of the Executive Council for Education (North-West Province) and the Minister of Education* 1997 BCLR 1655 (CC); *Hoffmann v SA Airways* 2000 (21) ILJ 2357 (CC); *Walters v Transitional Local Council of Port Elizabeth & another* 2001 BCLR 98 (LC).

²²⁷ Klinck 2001. 'Constitutional Perspectives on the Enforcement of Socio-Economics' *European Journal of Law Reform* 182.

²²⁸ *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 83: "The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen."

Liebenberg writes that dignity demands that society does its utmost to ensure that those groups who are unable to gain access to basic economic needs are assisted.²²⁹ Human dignity thus as a fundamental constitutional value as well as a fundamental right contained in the Bill of Rights plays a very important role with regard to social rights pertaining to the alleviation of poverty, and the equal treatment of those who are historically deprived. The importance of recognising the interplay between human dignity and equality in giving meaning to the socio-economic rights embedded in the Constitution has recently been commented upon by the Constitutional Court in a recent judgment reflecting on the exclusion of permanent residents from the South African social assistance system.

The Constitutional Court weighed up the competing considerations and took into account the intersecting fundamental rights (i.e. the right to human dignity, the right to equality and the right to access to social security and in the event of deprivation the right to access to appropriate social assistance) that were involved. The court relied on a purposive approach to give meaning to the entitlement of "everyone" to the right(s) enshrined in section 27(1) (c). It found that this notion in principle includes "all people in our country".²³⁰ The majority came to the conclusion that by excluding permanent residents from the scheme for social security, the legislation limited their rights in a manner that affected their dignity and equality in material respects. Dignity and equality were founding values of the Constitution and lay at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents had not been established. The exclusion could, therefore, not be justified under the Constitution.

²²⁹ Liebenberg 2005 (21) "The Value of Human Dignity in Interpreting Socio-economic Rights" *South African Journal of Human Rights* 17.

²³⁰ *Khosa* pars 46-47.

3.5 SOCIAL INSURANCE AND SOCIAL ASSISTANCE: TOWARDS PROVIDING EQUAL TREATMENT FOR MIGRANT WORKERS IN SOUTH AFRICA.

One of the basic characteristics of a right to social security is its universality. The right presupposes that persons who are in a vulnerable position should be protected not because of their status as workers, or because of their nationality, but by virtue of their membership of society.²³¹ However, in the case of migrants, the universal character of the right to social security has been considerably undermined. Access to social assistance for migrants has always been more problematic than access to social insurance. Because social insurance schemes have to a large extent always presupposed a contract of service with the employer, nationality has not really been an issue, at least where coverage of migrants is concerned.²³² For migrants, the absence of a nationality condition implies that migrants can be integrated into the social insurance schemes of the host-State.

However, migrants nevertheless experience disadvantages in claiming social insurance benefits; disadvantages resulting from the specific legal requirements which may exist in national legislation.²³³ These include reduced pension rights as a result of inconsistent insurance records, problems in accessing benefits abroad, and many others. The solution to these problems can be alleviated by national legislative efforts, but in the end the realization of effective solutions requires the linking together of national social security schemes on the basis of international agreements.²³⁴ The point is, however, that in principle, nationality has not been a barrier to the extension of social insurance rights to migrants.²³⁵

Extending social assistance to migrants, however, has been less straightforward. The reason is not difficult to discern: while the origins of social insurance schemes are based upon a reciprocal insurance relation between an insured person and a social

²³¹ *ibid* 245.

²³² *Supra*.

²³³ *Opcit*.

²³⁴ See Smit above 394.

²³⁵ *opcit* Vonk 325.

insurance institution, the origins of social assistance schemes are based upon the notion of unilateral charitable obligation. In this regard, the prevailing opinion is that “it is not the host-state but the state of origin which is responsible for offering support to the needy”.²³⁶ Nationality has gradually been replaced by the condition of territoriality in social security law.

However, in social assistance this principle has never been fully accepted. The two principles are rather intertwined (at least in South Africa) where there are links between social assistance and the legality of residence. This means that, in practice, only those with permanent residence status usually qualify for social assistance.²³⁷ While some countries simply deny access to social assistance to undocumented migrants; other countries only recognize entitlement to certain forms of minimal aid.²³⁸ However, most countries follow an “in between approach” in which some (but not all) social assistance benefits are granted to irregular migrants.²³⁹ These benefits usually include non pecuniary services such as food, clothing, housing as well as assistance benefits for children and minors. International law does little to improve the position of undocumented or irregular migrants in these instances, and social assistance is also largely excluded from international coordination treaties. For instance, UN Convention 97 specifically allows countries, in their national laws or regulations, to prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds.

It is clear that migrants pay taxes, including indirect taxes, from the moment of arrival in the host country, thereby contributing to the financing of the social security system. It is hard to make a fair case for allowing migrants to contribute economically, but then

²³⁶ Supra.

²³⁷ As it had been seen from the above case law.

²³⁸ See Vonk. 2002. ‘Migration, Social Security and the Law: Some European Dilemmas’. *European Journal of Social Security* 320.

²³⁹ One example is that of the Netherlands where, in terms of the so-called “Linking Act”, irregular migrants have since 1998 been fully excluded from all public services [secondary or higher education, housing, rent subsidy, facilities for handicapped persons, health care and all social security benefits, including national assistance]. However, legal aid, emergency health care and education for children to the age of eighteen years remain accessible to all migrants, including regular ones. See Minderhoud “The Dutch Linking Act and the Violation of Various International Non-Discrimination Clauses” 2000 *European Journal of Migration and the Law* 186-187.

refuse to share the economic benefits and risks. It therefore becomes necessary to amend the relevant international instruments to expressly provide for the extension of certain minimum standards of protection to all migrant workers.

3.6. CHAPTER SUMMARY

As seen from the above, the South African Constitution provides every person with the right of access to social security which includes social security and social insurance. It further imposes a duty on the State, subject to the availability of resources, to give effect to this particular right²⁴⁰. So the State attempts to fulfill this right through for example an unemployment insurance scheme to cover unemployment and social assistant's grants. However, these seemed to be imperfect as they exclude certain categories of people especially migrant workers in South Africa. Furthermore it was apparent from the analysis of the South African constitutional framework in this chapter, that the adoption of a fundamental rights-based approach could one way or the other, counteract the exclusion of this group of people. In fact, it is clear that, from the particular constitutional design adopted by the drafters of the Constitution, special attention has been paid to importing measures into the Constitution, in particular in the form of fundamental rights and constitutional values, which has as their ultimate aim the reintegration in particular of the marginalized and excluded in society and even, to some extent, the labour market.

However, from the same analysis it is also clear that the mere constitutional embodiment of these measures are, on their own, not sufficient. In addition, as the South African example would prove, it is in actual fact the presence of an independent court system entrusted with constitutional jurisprudence which now guarantees that the prevention and integrative elements discernable in the Constitution are given their rightful place and effect.

²⁴⁰ Op cit.

Furthermore and from the discussions in this chapter, how effective and permeating the constitutionally provided preventive and integrative measures would in concrete terms be, would be dependent on the particular direction and approaches adopted by courts, in particular the Constitutional Court, entrusted with constitutional jurisdiction. It is evident that in South Africa the Constitutional Court has through its interpretive activities adopted progressive stances. Overall, the court has been sensitive to the demands of the Constitution in its attempt to address the plight of the people of this country, also from the perspectives of prevention and integration.

CHAPTER FOUR

MIGRANT WORKERS AND THE RIGHT TO SOCIAL SECURITY: AN INTERNATIONAL PERSPECTIVE

4.1 INTRODUCTION

In the preceding chapters of this study, sufficient effort was spent on analyzing and dissecting the constitutional imperatives on social security and migrant workers in South Africa without necessarily invoking international law. It therefore remains the purpose of this chapter to place the discussion within the international law context. The extent to which international standards through various legal instruments protect the human rights of migrant workers and, in particular, their right of access to social security will be the focus of this chapter. Any effort to reform the South African social security system relating to migrant workers calls for necessary consideration of the international social security standards. This is mainly because, South Africa is a member of a variety of international organizations which include the ILO²⁴¹ and because South Africa has an international-law friendly Constitution, which requires the courts to consider international law when interpreting the social security rights entrenched in the Bill of Rights.²⁴²

Although migrant workers enjoy the protection, as do all individuals, of a range of international²⁴³ and regional²⁴⁴ human rights instruments, a discussion of all these instruments falls beyond the scope of this paper. As such, this chapter will focus on those instruments that relate specifically to the protection of migrant workers and their

²⁴¹ South Africa became a member in 1919, but was compelled to withdraw in 1964 because of the apartheid policies. It was again readmitted in 1994- accessed at <http://www.anc.org.za/un>.

²⁴² Section 233.

²⁴³ Here reference is made to the "International Bill of Rights", namely the Universal Declaration of Human Rights(UDHR), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Other instruments include the Convention against Torture and other Cruel Inhuman or Degrading Treatment and Punishment, the International Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.(CEDAW).

²⁴⁴ Such regional instruments include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and People's Rights and the American Convention on Human Rights.

families, and whether and to what extent they safeguard the right to social security.²⁴⁵ The determination of these facts will assist in measuring the extent to which South Africa complies with international law standards.

For that purpose the chapter will be divided into five main headings. After providing some clarification of conceptual issues and a brief background, the analysis will be devoted to an examination of the international instruments, in particular their treatment of the right to social security. Then the discussion will be geared towards the regional regulation of social security for migrant workers. In addition, the role of bilateral and multilateral international agreements is discussed under and the agreements that play a vital role in defining and strengthening the rights of migrant workers to social security. Africa as a region and SADC as a sub-region will receive special attention given the fact that South Africa forms an important part of these areas.

4.2 CLARIFICATIONS OF CONCEPTUAL ISSUES

In the international sphere, reference is often made to the term “international migrants”, of which “migrants” or “migrant workers” constitute one albeit sizeable part. In chapter one, we defined ‘migrant worker’ when dealing with the national regulation of social security. In this chapter we would like to refer to international migrant’ within the international concept. Apart from migrant workers, the term “international migrants” also includes refugees, stateless persons and displaced persons²⁴⁶. This part will focus on the extension of the right to social security specifically to migrant workers, although many of the arguments also are applicable to other categories of international migrants. There is no commonly accepted generic or general legal concept of the “migrant

²⁴⁵ These are the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the United Nations (UN) in 1990, as well as the following instruments adopted by the International Labour Organisation (ILO): Migration for Employment Convention (Revised) (No 97) and Recommendation (Revised) (No 86), adopted in 1949, and the Migrant Workers (Supplementary Provisions) Convention (No 143) and the Migrant Workers Recommendation (No 151), adopted in 1975.

²⁴⁶ Art.1A(2) of the Convention Relating to the Status of Refugees, 1951 as modified by the 1967 Protocol, defines a refugee as a person who, “owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and in unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

worker” in international law.²⁴⁷ Different definitions can be found in the various international instruments dealing with international migration.

However, a useful starting point is to consider the definition contained in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereafter Migrant Workers Convention). Apart from its universality of application to all migrant workers and members of their families, the Convention²⁴⁸ defines a migrant worker as:

“A person, who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.

It has to be kept in mind that, the above definition raises a number of conceptual issues which require clarification. Firstly we will define what is meant by a national, followed by undocumented migrants. For the purposes of this study, all those who have not acquired the citizenship of the State of employment and are working or have worked in that country, are included in the definition of “migrant worker”. The question of citizenship is normally a matter regulated by domestic law in particular laws on immigration. Based upon the principle of “territorial sovereignty”, it is generally accepted that a State has the power to exercise exclusive control over its physical domain, subject to limitations imposed by international law.²⁴⁹ This principle is also reflected in the Migrant Workers Convention²⁵⁰ itself, where it is stated that;

²⁴⁷ United Nations Commission on Human Rights, Report of the Special Rapporteur, *Human Rights of Migrants* par 28.

²⁴⁸ Art.2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (hereafter Migrant Workers Convention)

²⁴⁹ See Bosniak G. “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention” 1991 *International Migration Review* 742 743: “States power to refuse entry and to expel aliens, and their discretion to confer nationality has been treated as an integral part of... territorial sovereign power since the late nineteenth century.

²⁵⁰ Art. 79.

4.3.2.2 The General Role of the United Nations

The United Nations (UN) had demonstrated its conviction for the protection of human rights, regardless of nationality or origin through several basic legal instruments such as the United Declaration of 1948. Within the UN system, standard-setting on migrant workers fall squarely within the ILO's sphere of competence. The ILO alone, among UN organizations, is constitutionally charged with the "protection of the interests of workers when employed in countries other than their own".²⁶¹ However, for a variety of reasons, political and otherwise, the ILO was circumvented in 1990 when the UN adopted the Migrant Workers Convention, an instrument that has been described as the "epitome of international human rights"²⁶² and is considered to be one of the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups worldwide.²⁶³ The Convention entered into force on 1 July 2003, and has a total of 35 ratifications and 28 signatures to date.²⁶⁴ The fact that it took more than ten years for the Convention to receive enough ratifications for it to enter into force is often viewed as a reflection of the broader general resistance to the recognition of the application of human rights standards to migrants, particularly irregular migrants.²⁶⁵

The Convention has four stated purposes.²⁶⁶ These are:

²⁶¹ Bohning T. 1991. "The ILO and the New UN Convention on Migrant Workers; The Past and the Future" 1991 *International Migration Review* 698,700.

²⁶² Supra 699.

²⁶³ see Taran 2000, *International Migration* 17, referring to a discussion paper of the United Nations High Commissioner for Refugees *Reconciling Migration Control and Refugee Protection in the European Union: a UNCHR Perspective* (2000). The other six human rights instruments are the international Covenant on civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the convention on the Elimination of Racism and Racial Discrimination (CERD), the Convention Against Torture (CAT), the Convention on the Elimination of All Forms of discrimination (CERD), the Convention on the Elimination of All Forms of discrimination against women (CEDAW), and the convention on the rights of the Child (CRC).

²⁶⁴ The most recent update of the list occurred on 26 January 2006. it is interesting to note that the countries that have signed and/or ratified the convention consist only of so called "sending States". None of the major "labour-receiving" countries, that is states which primarily attract migrant labour, have to date either signed or ratified the Convention. South Africa has neither signed or ratified the Convention. For a list of signatories and ratifications, see <http://ohchr.org/english/countries/ratification/13>. last accessed on 30 June 2008.

²⁶⁵ See Taran 2000 *International Migration* 18.

²⁶⁶ See Preamble of the Convention.

- To unify the body of law applicable to migrant workers;
- To complement other instruments;
- To improve the distinctive status of migrant workers and their families; and
- To reduce clandestine trafficking.

Although the UN Migrant Workers Convention is the most comprehensive instrument on the topic of migrant workers, it inevitably overlaps in some respects with the other ILO instruments referred to earlier.²⁶⁷

4.3.3 International Instruments and Social Security Rights

In general, the approach of international instruments to the protection of social security rights are similar, being confined to statements of general principles rather than concerning themselves with the intricate details of the subject. The reason for this is the belief that the affirmation and maintenance of fundamental principles and general guidelines are better ensured at the universal multilateral level, whereas the technical matters arising in what is arguably a complex and diverse field are best left to bilateral or specific multilateral treaties.²⁶⁸

Before examining the social security provisions in the specific migrant workers instruments, an outline of other ILO standards concerned with social security warrant description, if only to indicate their degree of overlap with (and sometimes even divergence from) the specialized migrant worker instruments.²⁶⁹ Convention 102 of 1952 concerning Minimum Standards of Social Security entrenches, in article 68(2), the principle of equality of treatment between national and non-national workers in respect of *contributory* social security schemes, subject to any conditions of reciprocity provided for in bilateral and multilateral agreements. Echoing provisions contained in instruments

²⁶⁷ It has been pointed out by Nafziger & Bartel "The Migrant Workers convention: It's Place in human Rights Law" 1991 *International Migration Review* 785 that this overlap with other ILO instruments, as well as with human rights instruments (such as the UDHR, ICESCR, ICCPR, ESC, e.t.c.).

²⁶⁸ See Cholewinski H. 1997. *Migrant Workers in International Human Rights Law* 114.

²⁶⁹ The ILO's Committee of Experts have observed that the social security provisions in the migrant workers instruments should be read in the context of the other ILO standards concerned with social security. Cholewinski 114.

that deal specifically with migrant workers, it permits exclusions of non-nationals in cases where benefits or part of benefits are payable wholly out of public funds.²⁷⁰

In other words, States parties have the right to exclude non-nationals from tax-funded or non-contributory social security benefits. One other convention is specifically concerned with equal treatment between nationals and non-nationals in the area of social security are Convention 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security. South Africa is yet to ratify this convention. This Convention provides for equal treatment between nationals and non-nationals from other States parties in respect of the accepted branches of social security.²⁷¹ Benefits are to be awarded without any condition of residence.²⁷² There are nonetheless exceptions to this general principle. Similar to the provision in Convention 102 that allows States some flexibility in respect of non-contributory benefits, it provides that conditions of residence of a prescribed duration may be prescribed for receipt of such benefits. However, article 4(2) of Convention 118 excludes medical care, sickness benefit, employment injury benefit and family benefit from this requirement. In other words, non-nationals may have to fulfill prescribed periods of residence to be eligible for non contributory benefits other than the four benefits specifically referred to and mentioned above.

Finally, Convention 157 of 1982 concerning the Establishment of an International System for the Maintenance of Social Security Rights applies to all branches of social security, and establishes an international framework for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another.²⁷³ It further ensures the effective provision of benefits abroad when they return to their country of origin.²⁷⁴ The Convention permits States parties to give effect to their obligations by concluding bilateral and multilateral

²⁷⁰ See art 68(1).

²⁷¹ Art.2(1) provides that member states may accept the obligation of this Convention in respect of any one or more of the nine branches of social security of which it has in effective operation legislation covering its own nationals within its own territory.

²⁷² Art.4(1).

²⁷³ Part III.

²⁷⁴ Part IV.

agreements. However, these agreements need not cover all branches of social security, nor apply to all categories of people.

The provisions of the instruments specifically focused on migrant workers, namely ILO Conventions 97 and 143 and the UN Migrant Workers Convention, will now be discussed.

4.3.4 Specific provisions on Migrant Workers

4.3.4.1 ILO Convention № 97 of 1982

Like its predecessors, ILO Convention № 97 (and Recommendation № 86) contains a set of standards on the organization of migration and equality of treatment.²⁷⁵ However, in contrast to the earlier instruments, the set of standards in Convention 97 is more elaborate, while simultaneously reflecting a more flexible response to the needs of migrant workers. It is important to note that neither Convention 97 nor Convention 143 draws any distinction between workers who have migrated for permanent settlement, and those who have migrated for short-term or even seasonal work.²⁷⁶ However, certain categories of migrants are expressly excluded from the protection afforded by one or the other of the two instruments. These are:

- Frontier workers;²⁷⁷
- Members of the liberal professions and artistes who are given permission to enter for an (undefined) short duration;²⁷⁸
- Persons coming specifically for the purposes of training and education;²⁷⁹ and

²⁷⁵ The preceding 1939 Convention had by 1946 not been ratified by any State and therefore did not come into force.

²⁷⁶ See Bohning N *The Protection of Temporary Migrants by Conventions of the ILO and the UN*, Presentation to the Workshop on Temporary Migration: Assessment and Practical Proposals for Overcoming Protection Gaps at the International Institute for Labour Studies, Geneva (18-19 Sept 2003).

²⁷⁷ The term is not defined in either of the ILO Conventions. It seems to refer to workers who cross national borders on a temporary basis to work, and who return daily, weekly or monthly to their place of domicile. However, it is defined as follows in art.2 of the UN Migrant Workers Convention; “The term ‘frontier worker’ refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week”.

²⁷⁸ Art 11.2 (b) in both Conventions.

²⁷⁹ Art 11.2(d) Convention 143.

- employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments for a limited and defined period of time and who are required to leave that country on the completion of their duties or assignments.²⁸⁰

This last provision essentially applies to those workers who have special skills and who go to another country to undertake specific short-term assignments.²⁸¹ However, the Committee of Experts of the ILO has pointed out that the provision does not imply that all fixed-term workers can be excluded from the provisions of Convention 143. Finally, the Committee of Experts point out that seasonal migrant workers are not excluded from Conventions 97 and 143, and “should therefore benefit from equality of opportunity and treatment”. However, the extent to which they will really be able to benefit from national policy will depend on the length of time they stay in the country of employment.²⁸² It should be noted that the UN Migrant Workers Convention goes beyond the definitions contained in the ILO instruments by including categories of workers thus far excluded, namely frontier workers, seasonal workers, seafarers, workers on offshore installations, itinerant workers, project-tied workers, and self-employed workers²⁸³. Part V of the Convention (articles 57- 63) establishes special protections for these categories of workers.

Article 6 of Convention 97 confirms the principle of equality of treatment, and prohibits inequality of treatment between “immigrants lawfully within its territory” and nationals in four areas, namely employment rights, trade union rights, social security rights, and accommodation rights. Social security benefits are those stemming from legal provisions in respect of employment injury, maternity, sickness, invalidity, old-age,

²⁸⁰ Art 11.2(e) Convention 143.

²⁸¹ ILO, Migrant Workers para 115.

²⁸² *supra* 378.

²⁸³ For definitions of all these terms, see art 2 UN Migrant workers Convention.

death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme.²⁸⁴

4.3.4.2 Convention 143 on Migrant Workers

In contrast, Convention 143 (which supplements Convention 97) refers to “social security” in general, but this provision has to be read in conjunction with the aforementioned provision of Convention 97.²⁸⁵

The principle of equal treatment is, however, narrowly applied, in that inequality of treatment is only proscribed when it is “regulated by law or regulations, or is subject to the control of administrative authorities”.²⁸⁶ The principle is expanded by the subsequent Convention 143,²⁸⁷ which provides that the State undertakes to promote and guarantee,

“equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory”.

Nevertheless, the equality of treatment is subject to the following express limitations: there may be appropriate arrangements for the maintenance of acquired rights in the course of acquisition,²⁸⁸ and, more importantly, national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds,²⁸⁹ and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension.²⁹⁰

²⁸⁴ Art 6.1(b) Convention 97.

²⁸⁵ Art 10 Convention 143.

²⁸⁶ Art 6.1(a.).

²⁸⁷ Art 10.

²⁸⁸ Art 6.1(b)(i) Convention 97.

²⁸⁹ This means that social security benefits financed out of public funds on non-contributory basis may be restricted to nationals. See Cholewinski *Migrant Workers* 113.

²⁹⁰ Art 6.1(b)(ii) Convention 97.

It has been pointed out that, while Convention 143 represents an improvement over Convention 97, a number of problems remain. In the first place, as equality is sought with nationals, where the treatment of nationals themselves is poor, the situation of migrant workers is not affected.²⁹¹ Secondly, where migrants are carrying out work not done by nationals, the lack of comparator may make it difficult, if not impossible, to compare differential treatment.²⁹²

4.3.4.3 UN Migrant Workers Convention

A significant point to note from the above discussion is that the UN Migrant Workers Convention includes the families of migrant workers within the scope of the Convention.²⁹³ Secondly, it is applicable to all migrant workers, regardless of reciprocity²⁹⁴ and irrespective of their status²⁹⁵. In this regard, it has been hailed as the “most ambitious statement to date of international concern for the problematic condition of undocumented migrants”. In the preamble, the Convention recognizes that “workers who are non-documented or in an irregular situation are frequently employed under less favorable conditions of work than other workers”²⁹⁶, and that “the human problems involved in migration are even more serious in the case of irregular migration”.²⁹⁷

²⁹¹ See Sivakumaran 2004, *Georgetown Journal of International Law* 120.

²⁹² See Sivakumaran 120. The author points out that this is a very real problem given the fact that migrant workers often undertake work that nationals are unwilling to carry out.

²⁹³ In art 4, “members of a family” are defined as persons who are married to migrant workers, plus their dependent children.

²⁹⁴ This principle (of non-reciprocity) is also enshrined in ILO Convention 97 and 143. This means that so long as the country of employment has ratified the Convention in question, the social security rights of migrants are to be respected, irrespective of whether the migrant worker’s home country has ratified the instrument.

²⁹⁵ For the sake of completeness it must be mentioned that the *ILO Multilateral Framework on Labour Migration*, adopted by a tripartite meeting of experts in November 2005, proposes that “where appropriate”, social security coverage and portability of benefits should be extended to “migrant workers in an irregular situation”(par9.9). <http://www.ilo.org/public/english/standards/pdf> (last accessed on 20 June 2008).

²⁹⁶ Bosniak V. 1991. *International Migration Review* 740.

²⁹⁷ However, it must be noted that the Convention does distinguish between regular and irregular migrant workers by providing the former with additional rights (Part III provides rights to all migrant workers and their families, while Part IV provides additional rights only to those workers and their families who are documented or in a regular situation). It thus creates, in effect, two classes of human rights protection.

However, despite acknowledging the precarious situation of non-documented migrants, the Convention nevertheless still differentiates between regular and irregular migrant workers by providing the former with additional rights. Part III of the Convention extends certain rights to *all* migrant workers and their families, while Part IV provides additional rights only to those workers and their families who are documented or in a regular situation. It thus creates, in effect, two classes of human rights protection. For example, States parties are entitled to discriminate against undocumented migrants with respect to rights to family unity, liberty of movement, participation in the public affairs of the State of employment, equality of treatment with nationals as regards the receipt of various social services, equality of treatment for family members, freedom from double taxation, and further employment protections and trade union rights, among others²⁹⁸.

This differentiation between regular and irregular migrants must be viewed against the background of the persistent tension that the entire field of human rights suffers from, namely between the principles of universal human rights and those of State sovereignty. In the migration context, human rights and territorial principles meet and compete in two different regulatory domains. In the first, namely that governing matters concerning the admission and expulsion of aliens into and from a national territory, the tension “has largely been resolved in favor of the State”.²⁹⁹

In the second place, for a variety of reasons,³⁰⁰ international law treats the power of States to discriminate as both greater and more vital with respect to irregular immigrants.³⁰¹ This is also reflected in the UN Convention, which, despite extending substantial human rights protections to undocumented migrants, also makes it clear that their irregular status makes these migrants less entitled to international protection than other migrants. However, as far as social security is concerned, the UN Convention extends this right to all migrants, irrespective of status. It provides for social security protection to migrant workers on the condition that those workers fulfill the requirements

²⁹⁸ Ibid.

²⁹⁹ Ibid 753.

³⁰⁰ States mainly view the presence of irregular migrants both as a violation of their sovereign exclusionary powers and as a breach of the social contract which bind the nation. See Bosniak 755.

³⁰¹ Supra 755.

provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties³⁰². It further says that where such laws do not provide migrant workers a benefit, the State concerned is obliged to examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in the same circumstances.

Article 27(1) is a “framework provision” and not self-executing. The reason is that it refers not only to the applicable legislation, but also to the terms of bilateral and multilateral agreements that have to be fulfilled. By virtue of these provisos, States parties can adopt provisions that would, for example, differentiate between regular and irregular migrants, thereby negating the protection that the article is meant to confer on all migrants, irrespective of their status. The article does not require reciprocity for social security provisions to take effect, and therefore applies to migrant workers who are nationals of States that have not ratified the Convention. Article 27(2) applies to migrant workers’ rights in the course of acquisition. This refers to migrant workers who have left their employment in the country in which they are not nationals, have acquired rights in that State, but not the right to receive benefits abroad. The protection that article 27(2) provides is rather weak, urging States to “examine the possibility” of reimbursing the contributions of migrant workers and their families in cases where the applicable legislation does not permit them to receive benefits. This is in contrast to more strongly worded protection offered by the relevant ILO instruments.³⁰³ It must also be noted that the lack of definition of “social security” raises doubts whether the term includes non-contributory benefits, from which migrant workers are often excluded.

Finally, article 27 is a statement of general principle and therefore does not define the scope of social security. However, at least two branches of social security are covered by other Convention provisions. Article 25 refers to equality of treatment between

³⁰² Article 27.

³⁰³ For example, art 9(1) of Convention 143 protects the social security rights of migrant workers arising out of “past employment”, and Recommendation 151 stipulates in par 34(1)©(ii) that all migrant workers who leave the country of employment should be entitled to “reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements”.

nationals and migrant workers in respect of remuneration and other conditions of work, and arguably covers the right to employment injury benefits. Article 28 covers emergency medical care. It provides that;

“migrant workers and their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their life on the basis of equality of treatment with nationals of the State concerned ... and ... such emergency care shall not be refused them by reason of any irregularity with regard to stay and employment”.

The right to emergency care has been called the “bottom line with regard to access to social benefits for illegal migrant workers”.³⁰⁴ What is considered as “emergency care” and how access to it is guaranteed, differ across countries.

4.3.4.4 Unemployment Convention № 2 of 1919

The above convention requires member states which have ratified this convention to treat non-citizens on the same basis as citizens regarding access to unemployment insurance. Article 3 of this convention requires member states of the ILO which have ratified it to “make arrangements whereby workers belonging to one member and working in the territory of another shall be admitted to the same rates of benefits of such insurance as those which obtain for the workers belonging to the latter.” That is to say member states which have ratified this convention are required to enter into bilateral agreements and or pass national legislation providing for equality of treatment as regards the unemployment benefit scheme.³⁰⁵

The equal treatment granted under this Convention is based on the principle of reciprocity. South Africa, which is one of the countries which have ratified this

³⁰⁴ Pieters & Schoukens “Explanatory Report on the Access to Social Protection for Illegal Labour Migrants”. Paper presented at the ISSA European Regional Meeting, *Migrants and Social Protection* in Oslo (21-23 April 2004) 11.

³⁰⁵ Equality of treatment is provided for in the following ILO instruments, Art. 68 on Minimum standards of Social Security 1952, the Equality Treatment Convention on Social Security 118 of 1962, Art. 6(1) of the Migration for Employment Convention (Revised) 97 of 1049. South Africa has not ratified this Conventions.

Convention, is yet to be covered by a network of bilateral agreements envisaged by the aforementioned instrument. In addition, its unemployment insurance laws exclude non-citizen fixed-term contract workers from the unemployment insurance scheme. To address this problem, as suggested earlier, South Africa should extend the scope of coverage of its unemployment insurance scheme to include non-citizen fixed-term contract workers (e.g. migrant workers).

4.3.5 Other Multinational and Bilateral Agreements on Migrant Workers Social Security

4.3.5.1 Multinational Agreements

International social security agreements between countries, whether bilateral or multilateral, have been in use for a long time.³⁰⁶ In 2003, the ILO reported that most countries surveyed had signed bilateral agreements, mainly on labour migration and social security.³⁰⁷

The advantages of these agreements are that they can be adapted to the particularities of specific groups of migrants, and that both the sending and receiving State can share the burden of ensuring adequate living and working conditions as well as monitoring the migration processes.³⁰⁸ The ILO has actively recommended the adoption of bilateral instruments as a means of managing migration flows more effectively. For example, Recommendation No 86 contains a model bilateral agreement, and several provisions of Conventions 97 and 143 emphasize the importance of bilateral cooperation in the

³⁰⁶ The history of international social security agreements goes back to the latter part of the 19th century. The first treaties were concerned with accidents at work. For example the 1882 agreement and 1897 Convention between France and Belgium introduced the fundamental principle of all subsequent international social security agreements, namely that of equal treatment. www.ilo.org/parochalism/pdf

³⁰⁷ Pieters *supra*.

³⁰⁸ ILO *Migrant Workers* par 76. The purpose of bilateral agreements has been described as follows:

“Although international standard-setting activities provide a framework which may be regarded as indispensable for the elaboration of bilateral agreements between the countries of origin of migrant workers and the host countries, such bilateral agreements are still necessary in order to give precise application to international principles and settle specific problems.” See 26 UN ESCOR Commission for Social Development. (UN doc. E/CN5/564(1978)).

field of migration.³⁰⁹ The purpose of these agreements is to ameliorate the various disadvantages faced by migrants by regulating the respective reciprocal obligations of the signatory countries. Indeed, the underlying principle informing such agreements is reciprocity of the treatment afforded to migrant nationals of the two contracting countries.³¹⁰

In general, five *principles* underpin these international agreements. These are:

- *Equality of treatment* (or the prohibition of discrimination on grounds of nationality in respect of rights and obligations under the legislation of each of the contracting parties);
- *Determination of applicable legislation* (to prevent migrant workers from being insured in both countries or, in the worst case scenario, from not being insured in either country's scheme);
- *maintenance of acquired rights* (ensuring that any right to a benefit, or paid-up prospective right, should be guaranteed to the migrant in either country, even if it has been acquired in the other);
- *maintenance of rights in the course of acquisition* (ensuring that where a right to a benefit is conditional upon the completion of a qualifying period, account should be taken of periods served by the migrant worker in each country); and finally,
- *Payment of benefits abroad* (ensuring that there is no restriction on the payment, in any of the countries concerned, of benefits for which the migrant has qualified in any of the others).³¹¹

It is important to note that these principles, which are the cornerstone of bilateral and multilateral instruments, are reflected in a variety of ILO instruments on social security. International social security agreements use five methods to ameliorate the disadvantages faced by migrants. These are:

- The prohibition of discrimination on the grounds of nationality in respect of rights and obligations under the legislation of each of the contracting parties;

³⁰⁹ ILO *Migrant Workers* 77.

³¹⁰ See Bosnik *supra*.

³¹¹ Creutz B.1996. "The ILO and Social Security for Foreign and Workers" *International Labour Review* 351.

- Provisions to prevent a situation in which the migrant worker is not insured in either country's scheme and thus without any social protection, or to prevent him or her being insured in both;
- Aggregation of periods of insurance spent in each of the countries when calculating entitlement to benefits;
- Proratisation, that each of the countries pays a proportion of the pension determined by the period of insurance spent in each; and,
- Export of benefits.³¹²

While international agreements undoubtedly play a vital role in defining and strengthening the rights of migrant workers to social security, they are not without their shortcomings. In the first place, they only partially succeed in putting into practice the principles affirmed at multilateral level by the international Conventions. The reasons lie in the reciprocity principle, which was formulated in a historical context when migration took place on a much smaller scale than is the case today. Immigrant workers originate from a much larger number of countries than in the past, and many of these countries either do not have any bilateral agreements or have insufficient bargaining power to conclude them or to negotiate more favorable terms. There is also an absence of reciprocity in migrant flows (meaning that the flow of migrants is often one-directional rather than multi-directional), and finally, there is asymmetry between the economic, political, institutional and administrative conditions regulating pension and other social security policies in the emigrant and immigrant countries respectively.³¹³

4.3.5.2 Bilateral Agreements

Bilateral agreements do not always provide for all contingencies. The benefits included are, in the main, insurance-based benefits. At the core of most agreements are arrangements for long-term benefits that provide for invalidity, retirement and widowhood. Periods of insurance for these benefits are aggregated and the principle of

³¹² Op cit 356.

³¹³ supra Cruetz 355.

“proratarisation” is utilized to distribute costs between the countries according to insurance. The benefits are also exportable. Less likely to be included are short-term benefits for maternity or sickness, and unemployment benefits are the least likely to make their way into these bilateral agreements.

A recent report of the Global Commission on International Migration³¹⁴ highlights the negative consequences that flow from the non-exportability of pensions and social security entitlements something that mainly affects migrants not covered by international agreements. The reason for the dearth of bilateral agreements between developed countries and developing countries can be placed at the door of the reciprocity principle.

However, there are no technical obstacles to extending equal treatment to migrants or to exporting retirement pensions. Roberts³¹⁵ argues that in these situations, one needs to move beyond the principle of reciprocity and “rethink the obligations of the receiving country”. In this regard, he proposes unilateral action on the part of the receiving country. Along similar lines, Vonk calls upon the EU to impose, at the very least, a number of minimum requirements which apply unilaterally to the treatment of third country migrants, such as equality of treatment on grounds of nationality, exportability of benefits and alleviation from minimum insurance periods for the right to benefit.

4.4 REGIONAL INSTRUMENTS

4.4.1 African Charter on Human and Peoples Rights

Within the African context, the relevant instrument is the African Charter on Human and Peoples Rights. The charter was approved by the Organization of African Unity in 1981

³¹⁴ Even though this problem pertains mainly to migrants not covered by international agreements, it also affects those migrants covered by international agreements. This is because few agreements provide for exportability of all benefits, especially health care benefits.

³¹⁵ Ibid

and came into force in 1986. South Africa ratified this charter in 1996. The Charter pledges member states to eradicate all forms of Colonialism from Africa, to co-ordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa.³¹⁶ It calls for particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception and their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.³¹⁷

It does not define or guarantee social security in a direct sense but reference is made indirectly to rights that are regarded as specific contingencies of social security, as illustrated in 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 that state parties are obliged to take necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick. As opposed to the world trends, the African continent has a unique way of defining social security³¹⁸. The duties of the family and community are of paramount importance in the social protection of the most needy. Such an approach was however amplified in the case of *Grootboom*, in particular as far as the family context is concerned. The court remarked that the primary responsibility to provide housing to children is that of the parents. Only when parents cannot afford to provide will the state be called upon to provide support.

4.4.2 SADC Region

The Southern African Development Community (the SADC) is a regional organization in Southern Africa. It comprises fourteen southern African countries, namely: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. SADC is a relatively young organization. It evolved from the Southern African

³¹⁶ Pillay K.2000, *South African Constitutional and International Obligations with regard to children with disabilities*. Child Health Policy Institute. UCT

³¹⁷ Preamble.

³¹⁸ Olivier M. 2003 and Kalula E "Regional Social Security" at 671-675.

Development Coordination Conference (the SADCC). SADCC was established in 1980 by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The primary aim of SADCC was to achieve regional cooperation among its members. Its ultimate goal was to reduce economic, technological and transport dependence on the then apartheid South Africa. The end of apartheid saw SADCC transforming into a larger (in terms of the number of countries) development-oriented regional organization in southern Africa called SADC. The objectives of SADC, as expounded in the SADC Treaty (as amended) (i.e. the treaty establishing SADC), are 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; evolve common political values, systems.³¹⁹

It is worth noting that, at a regional level the SADC treaty commits members to the fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy, rule of law and equity amongst others. According to the treaty the objectives of SADC include to achieve economic growth and development, alleviate poverty, enhance the quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration. In this regard a number of measures have been undertaken in the social security field. These include the development of the Charter of Fundamental Social Rights in SADC that recognizes social security as a right and underpins the need for the development of social security systems.

Furthermore, a draft Protocol on Freedom of Movement of Persons in the SADC was concluded in May 1998³²⁰. 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. The Charter further provides for the establishment of comprehensive and harmonized programmes throughout the region.

³¹⁹ Goosen, C *et al* 1999. "International and Comparative Social Security Standards" in Olivier M *et al Social security Law; General Principles*. 527-584.

³²⁰ Known as the Draft Protocol on the Facilitation of Movement in the Southern African Development Community(SADC) reproduced in http://www.iss.co.za/af/regorg/unity_to_union/pdfs/sadc/protocolmoveaug05.pdf

In addition, the SADC Social Charter directs member states to take appropriate action to ratify and implement relevant ILO instruments.³²¹ The Draft Code on Social Security in the SADC, on the other hand, is aimed at providing 'member states with strategic direction and guidelines in the development and improvement of social security schemes to enhance the welfare of the people of the SADC region.'³²²

The Charter contains provisions relating to the social protection of both workers and those who are not employed and regulates the position of workers more comprehensively (in terms of social protection) than those who do not work³²³. The most important article in this regard is Article 10 which stipulates as follows:

"Member States shall create an enabling environment so that every worker in the 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 entitled to receive sufficient resources and social assistance."

In addition, equal treatment for men and women is required and in particular equal opportunities to both men and women in, amongst others, the area of social protection.³²⁴ The SADC Social Charter and the Draft Code on Social Security in the SADC, article 22(1) of the SADC Treaty require member states to conclude Protocols in each area of co-operation³²⁵ and institutional mechanisms for co-operation and integration.

4.4.3 Towards Extending Social Security to Migrants in the SADC Region

Both bilateral and multilateral agreements between states have been emphasized for their importance in the social security context. These agreements regulate the treatment of migrant workers moving between the member countries as far as their social security

³²¹ Article 5(1) of The *SADC Social Charter*.

³²² Clause 2 of the *Draft Code on Social Security*.

³²³ Ibid.

³²⁴ Article 6©.

³²⁵ Article 21 (3).

is concerned³²⁶. Although there has been some positive progress in terms of taking some initiatives to bring social security to recognition by the legal instruments as seen from above, the region still experience some challenges of exclusion.

There is no common regional agreement on the maintenance of rights and benefits, the aggregation of insurance periods or on the exportability of benefits. Professor Marius Olivier notes that SADC stands out as being particularly weak in regional and bilateral social benefit agreements, while other regional bodies such as Carifta, the Caribbean Free Trade Association, and Mercosur, a South American common trade body, have well developed agreements in place³²⁷. The only existing bilateral agreement in the SADC region is a workers' compensation agreement between Zambia and Malawi. SADC countries have vastly different social benefit programmes³²⁸.

Some, such as South Africa, Tanzania and Zambia, offer wide ranging social insurance covering adoption, maternity and unemployment; others, such as Lesotho, Botswana and Zimbabwe, offer limited social insurance but have specific noncontributory schemes (such as War Veterans, in the case of the latter two countries). Add to this differing eligibility criteria, laws that are nationality or residency oriented (as opposed to purely employment oriented) and overly strict immigration policies and it is no wonder that many migrant workers prefer to opt out of the formal sector completely.

The consequences are severe. "This [lack of portability] discourages migrant workers from investing in saving schemes and from returning home. Migrant workers also end up using cash to pay for basic services both in their host country and their country of origin", says Barbara Kalima-Phiri, a policy analyst for poverty reduction strategies³²⁹.

The general discussion from the preceding chapters of this study have revealed beyond reasonable doubt that migration has been in existence for quite some time. Within the

³²⁶ See in generally Olivier M, and Kalula.E, 'Regional Social Security' in Olivier M *et al Social Security*; at 669-675.

³²⁷ *Mail & Guardian* 2008, September. 19-25.

³²⁸ *Ibid* 21.

³²⁹ *Supra*.

social security coverage context, this has provoked a climate of debate as to the appropriateness of covering this group in view of the fact that they are non-citizens.³³⁰ Olivier submits that exclusion of migrant workers raises serious questions of public international law and constitutional nature.³³¹

Lack of protection granted to these people in the field of social security is one of the root causes of social exclusion in Southern Africa.³³² The reason behind this exclusion is that social security arrangements in most SADC countries are dissimilar and often nationality or citizenship-based.³³³ In other words, it is granted only to those who are the citizens of a given country. The territoriality nature of social security protection has the implication that there is loss of entitlement the moment a person crosses the border.³³⁴

This situation leads down to a necessity that the region has to strive towards formulating coordinated rules that will address this issue. Some countries within the region have attempted to deal with this challenge by entering into some bilateral agreements. South Africa signed an agreement with Mozambique in respect of which payment is to be made in relation to employment injuries and diseases in Mozambique.³³⁵ This appears to be a good move although its practical implementation has received some criticism. This arrangement is defective because payments are said to be rarely reaching the beneficiaries.³³⁶ Seemingly the problem is attributable to the proper monitoring of these pensions. A further example is the Zambia-Malawi bilateral agreement regarding the social protection of each other's nationals. There is a Zambia-Malawi Joint Permanent Commission which is the committee meant to monitor the settlement of pension and other benefits rights of Malawian nationals that had worked in the Zambian public and

³³⁰ Olivier M.P. *Regional Social Security: Are Innovative Development in Southern African to the European Context?*, Paper presented at EISS Conference, Bergen.. 27-29 September 2001.

³³¹ Ibid 5.

³³² Opcit 191.

³³³ Olivier M.P and Kalula E.R. *The Future of Social Security in SADC: Some Critical Elements?* Paper presented at IRASA Conference on Regional Social Security (SADC) Protection, Minimum Standards and Coordination, Stellenbosch, Spier, (October 2005,4).

³³⁴ Ibid.

³³⁵ Olivier and Mpedi, *The Extension of Social Protection to Non-formal sector workers-Experience from SADC, the Caribbean and South Pacific*, Paper presented at the 5th Asian Regional Congress of the International Industrial Relations Association (IRRA) in Seoul, Korea, June, 2004 at 7.

³³⁶ Ibid.

private entities.³³⁷ However, generally at the regional level there is absence of coordination of social security which would enable those who migrate within the region to retain their social security entitlements except with the few examples stated above.³³⁸

4.5 CHAPTER SUMMARY

Migration and, by implication, migrant workers, are predominant features of the contemporary age of globalization. However, as can be discernable from the above discussion, an equally defining feature of the globalised world is the generalized, widespread and commonplace violation of migrants' human rights. The plethora of international standards concerned with migrant workers and their families, many of which were examined in this chapter, certainly gives the impression that international human rights law has given adequate attention to the protection of the rights of this group. This then leaves it to individual member's states to do the same.

While the reach of the UN and ILO instruments is extensive, many problems remain. These relate to both the content and enforcement of the international standards. In respect of content, one of the most glaring shortcomings is the exclusion of irregular migrants from the reach of the instruments. Even when they are included, as is the case under the UN Convention, their protection is limited and in many cases inadequate. It was pointed out that efforts to exercise the rights prescribed in the Convention may well expose the migrants to expulsion and punishment for immigration-related violations.

With respect of social security specifically, the role of bilateral and multilateral agreements cannot be overstated. These agreements have the advantage of flexibility by ensuring precise application of international principles and solving unique problems that may be experienced by the countries or regions concerned. However, despite the positive role that these agreements play, their overall reach is limited, covering less than a quarter of all international migrants. The suggestion made in this chapter is that, under

³³⁷ Chisupa N. 2003, *Zambian Country Report* par.2- 3.

³³⁸ Olivier and Mpedi op cit 7.

these circumstances, the reciprocity principle may need to be jettisoned in favour of unilateral action on the part of the receiving State. It was also observed that there are ILO instruments which require equality of treatment as regards access to social security, for example unemployment benefits schemes.³³⁹ South Africa is yet to ratify these instruments requiring the same. Nevertheless it is bound by a similar provision contained in the Unemployment Convention. Given the fact that South Africa ratified this instrument, it follows that its exclusion of non-citizens fixed term migrant workers is inconsistent with obligations flowing from this instrument. Therefore in order to remedy this situation, concrete action is required to include this category of workers in the unemployment insurance scheme.

The following chapter presents the conclusions that have been drawn from the entire study and the recommendations on the suggested social security protection as far as migrant workers are concerned.

³³⁹ For example, article 68 of the Social Security Minimum Standards, Convention 102 of 1952.

CHAPTER FIVE:

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The central aim of this study has been to analyze the role of social security in protecting migrant workers in South Africa. Thus, the purpose of this chapter, as the caption suggests, is to present the conclusions and recommendations of the study. It sums up the major findings of the study and suggests, by way of recommendations, the reforms accordingly. The chapter is divided into two major components. The first section presents the conclusions and findings of this study. The second part presents the recommendations as to how migrant workers should be afforded more protection. There will be general recommendations at international level, regional level and the specific ones at the South African level.

5.2 CONCLUSIONS

Through this study, the analysis shows how problematic and topical is the issue of protection of social security and migrant workers. The inclusion of migrants in the social security system can to some extent be explained with reference to the forces that have led to the gradual development of the right to social security itself. But in the end it appears that the quality of treatment of migrants in social security law is strongly dependent upon the migration policies conducted by each state. Not the existence of migration itself but rather the desirability of the migration affects the legal position of migrants in social security. Before suggesting a way forward, we will present a brief summary of the findings of this study.

It was apparent from chapter two above that governments sometimes conduct policies to allow labour immigration on a temporary basis and sometimes this is coupled with measures or implicit constructions that deny full or equal access to the social security system. Because such measures may run contrary to legal guarantees that are built into

the social security system for migrants, they are vulnerable to corrections by the courts. The situation of ambiguous immigration policies consequently increases the tensions between the legislature and the judiciary, which often occur in the area of granting social rights to migrants.

Perhaps there is some logic that exists between migration policies and the shaping of the social security position of migrants. Indeed, from the point of view of the guiding principles that govern the right to social security, the state of law is not very satisfactory. Especially the absence of any legal guarantees for undocumented migrants and asylum seekers is a cause for concern. It is as if these groups are literally outlawed by the national and international community. This means that in times when states fall back upon harsh immigration policies they become very vulnerable to further measures which are designed to scale down the levels of relief and protection. In our view, the right to an adequate standard of living for all infers that there should be at least a minimum standard of protection for migrants, even when official immigration policies do not favour their stay in the host-state.

Furthermore, the social security coordination principles discussed under chapter four, contained in the ILO instruments are very fundamental to promoting access to social security for migrants and their families. But the main challenge lies with the ratification of these international instruments by the majority of the countries.³⁴⁰ It is worth mentioning that even though South Africa has not yet ratified some of these Conventions dealing with the equal treatment of foreigners and citizens, it is very important to remember that its constitution provides every person within its boundaries, subject of course to the limitation clause, with the right to equal treatment³⁴¹ as well as the right of access to social security.³⁴²

³⁴⁰ For example South Africa has not yet ratified the Equality of Treatment Social Security Convention as on the 20th August 2008.

³⁴¹ Section 9 of the Constitution.

³⁴² Section 27(1)(c).

From a regional perspective in chapter four, one has to conclude that there is little social security coordination in the SADC, and that in itself undermines the efforts to integrate the region and also to promote free movement of persons. Olivier³⁴³ submits that 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.³⁴⁴ This leaves migrating SADC citizens marginalized due to their exposure to the largely nationality-based social security systems of some member states³⁴⁵.

Coming specifically to the South African situation, it has been evident from chapter three that any approach to combating discrimination against non-citizens should take into account the varying state interests at stake with due regard to categories of rights (for example political rights, right to education, social security, other economic rights etc) as to various kinds of non-citizens with their distinct relationships to the country in which they are residing (e.g. permanent residents, migrant workers, temporary residents, undocumented workers etc). This must be done in proportion to the legitimacy of state interest or rationales for distinctions between citizens and non-citizens or among non-citizens.³⁴⁶ As far as the exclusion discussed above is concerned, our submission is that such exclusion could also be challenged as discriminatory on the basis of nationality³⁴⁷. The principle of equality is also alluded to in the international instruments. Therefore South Africa having ratified the Unemployment Convention is required to make arrangements which will ensure that non-citizens from countries whose people are employed in South Africa are eligible for the same protection as that afforded to national workers.³⁴⁸ Hence, we submit that since the

³⁴³ Supra Olivier MP *et al.*

³⁴⁴ For example, in terms of s.60 of the *Compensation for Occupational Injuries and Diseases Act* (COIDA) 130 of 1993 an employee or dependant of an employee who is resident outside the Republic of South Africa or is absent from the Republic for a period of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.

³⁴⁵ Ibid.

³⁴⁶ Weissbrodt David, "Final report on the rights of non-citizens", UN Doc E/CN.4/Sub.2/2003/23 (2003)11.

³⁴⁷ Sec. 9 of the Constitution.

³⁴⁸ Article 3 of the Unemployment Convention 2 of 1919.

arrangements of this kind are absent, South Africa is in violation of its International obligations.³⁴⁹

5.3 RECOMMENDATIONS

In order to guarantee that social security as a basic human right, is granted to migrant workers, the member states should be encouraged to ratify the ILO social security Conventions relating to migrant workers and implement them through bilateral and multilateral social security arrangements, following the model provisions laid down in Recommendation No.167 on the maintenance of social security rights.

By ratifying a Convention, not only does a country generally demonstrate publicly its adherence to the principles contained therein, but it also pledges to apply these principles in national law and practice. This is particularly important in situations where an international element is involved as it is the case for the international migration of labour. The ratification of the relevant Conventions ensures the application of common rules by the different States which are then dissuaded from unilaterally deviating from them.

However, in the absence either of ratification of these Conventions, or of the conclusion of bilateral and multilateral social security arrangements, both migrant sending and migrant receiving countries should be encouraged to adopt unilateral measures for the protection of migrant workers social security rights. Hence we recommend that South Africa should redraft its social security system in an inclusive manner, especially as migrant workers are concerned. Providing social security protection to migrant workers has become one of the most important social challenges facing the international community. As labour migration has grown over the years, affecting an increasing number of countries and workers, there is an urgent need for the reinforcement of

³⁴⁹ Olivier MP and Van Kerkern ET "Unemployment Insurance" in Olivier MP et al *Social Security: A Legal Analysis* (LexisNexis/Butterworth (2003) 415 @ 442.

existing measures and the adoption of new ones, at the international, regional and national levels.

In this respect, the ILO has initiated with its constituents and in partnership with other relevant international organizations, a plan of action for migrant workers, which includes a non-binding multilateral framework for a rights-based approach to labour migration. With regard to social security, this ILO Multilateral on Labour Migration, which was received by the ILO Governing Body in March 2006³⁵⁰, for submission to the Director General of the ILO for publication, strongly encourages ILO member states to base their relevant national laws and policies in the relevant ILO social security conventions and recommendations and promotes the conclusion of agreements to guarantee social security coverage and benefits, in addition to portability of social security entitlements to migrant workers. Various ILO Conventions require co-ordination on the part of State parties in order to guarantee migrant workers comprehensive and continuous protection on the basis of effective equality and reciprocity.

In the SADC region, we would like to advocate for the coordination of social security systems by the member states. This, we submit will be in favour of the migrant workers because that will enable them to carry along their benefits wherever they decided to work within the region. While outright harmonization 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 coordinating the various systems must as a matter of priority be developed. This flows from the high rate of migration in the region, driven highly by different economic and political factors, 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.

Much can also be achieved by way of unilateral action, which may help towards creating a culture of accommodation within the region³⁵¹. The strong human rights-based in

³⁵⁰ Draft ILO Multilateral Framework on Labour Migration, Doc.TMMFLM/2005/D.ILO, Geneva 2008.

³⁵¹ Ibid.

South Africa has already had a major impact on addressing the plight of particularly vulnerable groups in South African social security. As indicated in the discussion above, non-citizens constitute another marginalized 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 marginalizing lawfully residing citizens of other SADC member states should be removed.³⁵²

We further make a submission that such exclusion is in breach of the Unemployment Convention. We therefore recommend that South Africa should comply accordingly. South Africa can do this by extending the scope of coverage of its unemployment insurance scheme to non-citizens fixed term workers. Moreover, it should make an effort to enter into bilateral agreements with other countries towards fulfilling the requirements of the said Convention. This will ideally serve to extend the equality of treatment to non-citizens in respect of the unemployment insurance scheme.³⁵³

In the long term, it is recommended that legislative and administrative initiatives be undertaken to systematically introduce the means of subsistence test in immigration law for purposes of residence status.³⁵⁴ The withdrawal of the temporary permit³⁵⁵ in the event and on the basis that the means of subsistence test is no longer met should also be introduced. This will make it possible to extend the scope of protection of social assistance grants to all lawful residents who have not become a burden to the State, without any major consequences for the South African budget. It should be borne in mind, however, that this system can only operate effectively when there is an infrastructure for the exchange of data between the immigration and social assistance

³⁵² Treasury document, 72.

³⁵³ Jonathan Crush, *Contract Migration to South Africa: Past, present and future*. Accessed at <http://www.queensu.ca/samp/transform/crush.htm>. Also there is the practice of consistently renewing asylum permits without granting final refugee status.

³⁵⁴ Treasury document 72. It is in particular recommended that obtaining a temporary and a permanent residence permit be made subject to a clearly defined means of subsistence test.

³⁵⁵ But not the permanent residence permit, in view of the approach adopted by the Constitutional Court in the *Khosa* judgment.

administrations and an effective system of deportation.³⁵⁶ The state has an integral role to play in this regard.

Finally, it is recommended that appropriate cross-border co-ordination arrangements be developed (at least for purposes of cross-border coverage and protection of social insurance entitlement), to be adopted by way of national legislation and bi- and/or multilateral agreements, as mentioned herein.³⁵⁷ This will go along way in guaranteeing social security protection for migrant workers in South Africa and also extend social security protection to South African workers in other countries. Summarily, we strongly believe that migrant workers in Africa can best be secured by exploring and responding to access constraints to social security provisioning in host countries and also by thinking creatively about re-orienting social security so that it becomes mobile with the migrant.

³⁵⁶ Treasury document 72.

³⁵⁷ *Supra*, 74.

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