The extension of social security protection to non-standard workers :a comparative study between South Africa and the United Kingdom

by

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Submitted in partial fulfilment to the requirements of the Degree of Master of Laws (in Labour and Social Security Law) in the School of Post-Graduate Studies, Faculty of Law, Mafikeng Campus, North-West University.

Supervisor: Professor MLM Mbao

Date of Submission: 13 July 2007

CANDIDATE'S DECLARATION

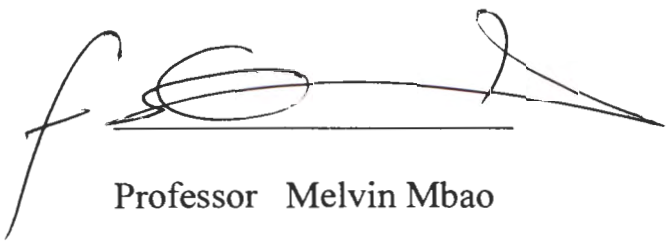
I DECLARE THAT THIS DISSERTATION FOR THE DEGREE OF MASTER OF LAWS (IN LABOUR AND SOCIAL SECURITY LAW) AT THE UNIVERSTY OF NORTH WEST HEREBY SUBMITTED, HAS NOT PREVIOUSLY BEEN SUBMITTED BY ME FOR A DEGREE AT THIS OR OTHER UNIVERSITY, THAT IS MY OWN WORK IN DESIGN AND EXECUTION AND THAT ALL MATERIAL CONTAINED HEREIN HAS BEEN DULY ACKNOWLEDGED.

N.P Madube

NKAGISANG PATRICK MADUBE

STATUTARY DECLARATION

I, Professor Melvin Mbao, hereby declare that this dissertation by Nkagisang Patrick Madube for the Degree of Masters of Law (in Labour and Social Security Law) be accepted for examination.



Professor Melvin Mbao

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ABSTRACT

Basically this study seeks to address the exclusions with regard to social security protection. Investigations have been undertaken particularly on the legislation dealing with social security protection. In this country the overwhelming majority of employees are working in the informal sector, that is, temporary workers, tele-workers, part-time workers, fixed-term workers and other categories of employees (non-standard workers.) The right of those workers has dominated our discussion in an endeavor to find out the extent to which legislation affords social security protection to them. In doing so, the dissertation compares the legal regimes in two countries, the United Kingdom and the Republic of South Africa.

It is imperative at this time of our constitutional dispensation to ask the question as to whether the current system of social security in South Africa is comprehensive enough to accommodate those who have been previously disadvantaged by the legacy of apartheid? Is there a need to extend social security protection to those who are not covered in terms of the existing social security legislation? This study seeks to establish the scope of protection under the existing social security legislation and institutional arrangements.

The Constitution of the Republic of South Africa, as the foundation or the pillar of all laws in our country, serves as the point of departure in ensuring that all the legislation dealing or regulating social security conform to the principles envisaged in the Constitution.

It is hoped that this dissertation will assist those who are involved in the process of building an integrated and inclusive framework of social security protection in South

Africa. It will further strengthen the hopes and confidence in those who are seeking solutions to the problems of the poor, unemployed, disabled, old and young in terms of uplifting their socio-economic status. In this way architects of social policy and governments planners will hopefully draw inspiration from this modest undertaking.

The reason why the dissertation has used the United Kingdom for comparison is that, their system is more comprehensive than the system we are using in South Africa. The system there is challenging enough for doing a better comparative study with South Africa and its sub-regional partners in the Southern African Development Community, taking into consideration that the United Kingdom has subjected part of their sovereignty to the European Union as their regional structure.

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6. United Nations Organization, International Covenant on Civil and Political Rights, 1966.
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LIST OF ACRONYMS

BCEA:	Basic Conditions of Employment Act
COIDA:	Compensation for Occupational Injuries and Diseases Act
EEA:	Employment Equity Act
EU:	European Union
ETUC:	European Trade Union Confederation
LRA:	Labour Relations Act
ILO:	International Labour Organization
RSA:	Republic of South Africa
SADC:	Southern African Development Community
TAC:	Treatment Action Campaign
UIA:	Unemployment Insurance Act
UICA:	Unemployment Insurance Contribution Act
UK:	United Kingdom

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CHAPTER ONE: INTRODUCTION

1.0 Background to the study

This study investigates the extent of social security[1] protection afforded to non-standard workers (atypical employees) in South Africa as compared to the position in the United Kingdom. Reference has been made to both labour law and social security law. Deficiencies in the said framework of protection and causes of these deficiencies are highlighted. The fact that the United Kingdom is a Member State of the European Union is considered including its implications for domestic policies and legislation.

Relevant regulations of non-standard work are evaluated and examined with the aim of establishing the reach of social security protection in both countries.

Clearly, comparative lessons are drawn and suggestions are made for further improvement of social protection of non-standard workers, including the need to further develop an integrated labour and social security law approach in order to ensure the extension of adequate social protection to all categories of workers.

The research questions herein include:

a) Are the provisions of social security afforded to non-standard workers (atypical sector employees) adequate?

b) Are they enjoying sufficient protection in terms of South African Labour law and social security legislation?

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[1] According to the ILO, Social Security means 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 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 for families with children- ILO, Convention 102 of 1952

In trying to answer these questions we are guided by this poignant observation:

> social security is very important for the well being of workers, their families and entire community. It is a basic human right and a fundamental means for creating social cohesion, one way helping to ensure social peace and social inclusion. It is an indispensable part of government social policy and important tool to prevent and alleviate poverty. It can, through national solidarity and fair burden-sharing, contribute to the attainment of human dignity, equity and social justice. It is also important for political inclusion, empowerment and the development of democracy.[2]

1.1 Problem under investigation

It is common cause that there is insufficient coverage afforded to the different categories of marginalized people and also that there is marginalization of certain categories of disadvantaged people (Atypical employees) by the state. In the light of this state of affairs, this study seeks to find out whether their marginalization amounts to an infringement of their rights to equality, human dignity and to have access to social security as enshrined in the South African Bill of Rights. The study also undertakes to investigate the extent of social security protection afforded by the state to non-standard workers/Atypical employees in the light of Constitutional imperatives.[3]

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[2] Government White Paper on Social Security, for Social Welfare, GN 1108 IN Government Gazette 18166 of August 1997.

[3] Section 27 of the Constitution of RSA 1996.

Social security is a universal need and a basic human right, on the other hand and only one in five people globally has adequate social security protection, half of the world 's population is without social security protection.[4]

It is estimated that in South Africa, over 50% of the population remains uncovered against social security risks, the rural and the urban poor and the informally employed as well as structurally unemployed generally face major hardships to social security protection.[5]

The informal social security sector provides a means for survival but does not constitute a sustainable option to provide long- term solution to the needs and calamities. The informally employed do not, as a rule, have a regular source of income and cannot therefore provide for their own social security insurance, which makes them exceptionally vulnerable.[6]

There are various factors which inform the need to restructure South African social security system in that a very large proportion of citizens, namely unemployed persons and persons who live in absolute poverty have no proper housing, running water, electricity, sanitation services or easy access to health care services. The reality facing South Africa today is that the formal social security system is not adequately providing protection to the majority of South Africans.[7] In the case of Soobramoney v Minister of Health, KwaZulu-Natal,[8] Chaskalson stated that "there is a high level of

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[4] Olivier M.P, et al, The Extension of Social Security in South Africa, Legal Inquiry, Siber Ink, Cape Town, 2001, p264.
[5] Olivier et al Social Security: A legal Analysis, South Africa, Durban, Butterworths, 2003 p17.
[6] Op cit n5 p22.
[7] Dekker A.H Social Security: A Legal Analysis, South Africa, Durban, Butterworths, 2003, p 559.
[8] Soombramoney v Minister of Health Kwazulu Natal 1997 12 BCLR1 1696; 1998 1 SA, 765 (CC).

unemployment, inadequate social security, and many do not have access to clean water or adequate health services".[9]

It must further be kept in mind that the current system reinforces the existing poverty circle where the poor will get poorer and the rich get richer. It is common cause that employees in the informal sector mostly live below the poverty line. Recent studies estimate that nearly half (45%) of South African population is considered to be poor and living below poverty line.[10] A further problem is that employees in the informal sector at times work in dangerous and unhealthy conditions.[11] The informal sector is considered by the World Bank as the main source of job-creation in the future and it contains many activities which may contribute to raising productivity and which are therefore worth supporting.[12]

1. 2 Objective of the study

This study seek to achieve the following objectives:

- To compare the South African social security system on protection of non-standard workers with that in the United Kingdom.
- To come up with recommendations that will seek to improve the structure of benefits to be more attuned to the needs of non-standard workers.
- To come up with measures that will ensure equality in rendering social security services in South Africa and within the SADC region.

[9] Soombramoney v Minister of Health Kwazulu Natal 1997 12 BCLR1 1696; 1998 1 SA, 765 (CC).
[10] Olivier M, September 2005, ABR 0408#33, p04.
[11] Dekker Op Cit n8 p7.
[12] Olivier Ibid n4 p265.

- To empower atypical employees/non-standard workers to use the guidelines to fight for the benefits of social security.
- To come up with recommendations that will assist the policy makers in the development and implementation of an integrated and inclusive legal framework of social security protection within the SADC Region.

1.3 Rationale for the Study

This study seeks to put forward certain arguments for enlarging the scope of coverage as well as the extent of protection of social security and social protection[13] to non-standard workers/Atypical employees in South Africa. The point of departure is that the majority of people working in the informal sector have no access to social security protection to meet contingencies.[14]

On the other hand social security protection is directly related to addressing absolute poverty as a manifestation of the problem of deficiencies.[15] Employees in non-standard work sector do not enjoy legally enforceable social security rights in employment relations, wages and non-wages benefits, that is, little or no coverage in respect of pregnancy, unemployment, illness and disability benefits. The absence of any legally

[13] As defined by the SADC Draft Code on Social Security, a background document, it refers to the overarching concept, which includes social security as well as social services and developmental social security, it operates through public and private measures, or mixed public and private measures which are designed to protect individuals against life cycle crises that impede the capacity of individuals to meet their needs. Its broad aim is to enhance human welfare, however, social protection goes beyond the social security concept. It also covers social services and developmental welfare, and is not restricted to protect against income insecurity caused by particular contingency. Its objective therefore is to enhance human welfare.

[14] Olivier Ibid n4 Chapter one, p1-8.

[15] Olivier Ibid n4 p26.

binding social security provision is therefore a hallmark of a non-standard work sector.[16]

It is evident from the point of social security cover that the most vulnerable sections of workers in the informal economy belong to street vendors and home-based workers followed by contributing family workers with or without payment.[17] That is immoral, as it militates against the constitutional imperative of social security. These objectives provided the initial stimuli and impetus to undertake this study.

Social security protection is directly linked to the problem of poverty for those who are not in a position to access minimum of recourses to meet their economic and social requirements for dignified life. It is directly related to the question of addressing absolute poverty as a manifestation of the problem of deficiency.[18]This study is also willing to assists human rights activists to fight for dignified lives of all our people. This study will basically assist improving the socio-economic status of those who are currently excluded and suffering from social risk.

As pointed out above, this study will also help the lawmakers and policy makers to align social security legislation with the Constitution and regional instruments. This dissertation will further assist in preventing the abuse of atypical forms of employment and suggests a way forward by providing sufficient and effective measures to utilise

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[16] Olivier Atypical employment, partly based on: Olivier Interpretation and Application in chapter 5: Statutory Employment Relations in South Africa in Slabbert et al, Managing Employment Relations in South Africa, Butterworths, 2004, Centre for International Comparative Labour and Social Security Law, University of Johannesburg, April, 2005.

[17] Information obtained from the ILO Website http://www.ilo.org. On the 08 of March 2006.

[18] See the Government Document on Social Security, White Paper for Social Welfare, GN 1108, Government Gazette 18166 of August 1997.

atypical forms of employment. Measures which will assists to provide co-coordinated, harmonized and integrated social security system are also recommended.

1.4 Literature Review

Social security is one of the means that assists people in circumventing destitution by meeting their intrinsic needs when their income stream has ceased, disrupted or has not developed sufficiently.[19] It embraces the sphere of complete protection against human damage, an adequate standard of living and a social safety net against destitution through preventative measures.[20]

> The general long-term objective is to have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes. A well-informed public would support this, which is economically self reliant, in a country which has active labour market policies aiming at work for all, while accepting that all will not necessarily have formal employment. Where these broad goals cannot be met, social assistance should be a reliable and accessible provider of last resort. A comprehensive and integrated social security policy is needed to give effect to the constitutional right to social security.[21]

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[19] Lifeman R et al Social Security as a Constitutional Imperative: An Analysis and Comparative Perspective with Emphasis on the Effect of Globalisation on Marginalization and Olivier et al Ibid n26 p41).

[20] Olivier Ibid n04 p267.

[21] White Paper for Social Welfare, Government Gazette,GN: 1108, August 1997.

According to Strydom, social security protection is very often only extended to those individuals who qualify as an employee in terms of the provisions of the various statutes which regulate the provisions of social security in one way or the other.[22]
On the other hand Section 27 of the Constitution provides that everyone has the right to have access to social security and appropriate social assistance including if they are unable to support themselves and their dependents, appropriate social assistance.[23]

The existence of a social security system is a prerequisite for a modern state based on human rights.[24] Potentially the constitutional embodiment of socio-economic rights, and, in particular of rights related to social protection, is of particular importance as this creates the possibility to hold government bound to granting the protection foreseen in the Constitution.[25]In developing countries such as South Africa, social security includes reference to informal sector social security, as well as kinship or community-based social security.[26]

These forms of social security are currently not directly regulated by the State and thus, lack legislative framework.[27] The informal network of social security sometimes also relies on principles of reciprocity, constituting a risk of sustainability, because members who cannot contribute are excluded. The limited nature of protection in terms of the South African social security system has therefore affected the poor as well as the informally employed and structurally unemployed in particular.

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[22] Strydom et al Essential Social Security Law, Juta, Cape Town, 2001, p239.
[23] S 27 of the Constitution of the Republic of South Africa /Act 108 of 1996.
[24] Olivier Ibid n5 p22.
[25] Olivier Ibid n04 p2.
[26] Lifeman Ibid n19 p8.
[27] Lifeman Ibid n19 p562-563.

This stems from the fact that social insurance legislation, notably the Unemployment Insurance Act[28] and Compensation for Occupational Injuries and Diseases Act,[29] as a rule do not provide coverage to those outside formal employment.[30]An analysis of the social security system confirms that several categories and groups can be regarded as excluded and/or marginalized in terms of the present system. This include the unemployed (both in temporary and structural sense), e.t.c.[31]

One of the curious characteristics of social security legislation in South Africa remains the exclusion of the categories of persons from the ambit of the definitions of "employee" or in a similar term contained in the relevant laws, even though these persons who would otherwise perfectly fit the notion of being an employee, as a results such person end up being excluded from protection of social security legislation.[32] Since it is almost impossible to enforce the standards laid down by these laws on employers in the informal sector, employees in the informal sector mostly live below the poverty line in most countries.[33]

This general lack of appropriate and all-inclusive statutory protection lies at the heart of the potential for discrimination in an hiring and general disparity in treatment suffered by the vast categories of non-standard workers.[34] The exclusion of non-standard workers is multi-facetted and has consequences that go beyond those directly affected.

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[28] Act 63 of 2001.
[29] Act 130 of 1993.
[30] Dekker Ibid n7 p130.
[31] Dekker Ibid n7 p18.
[32] Olivier Ibid n17 p6, Para 2.
[33] Olivier, M September 2005,ABR 0408# 33, p04.
[34] Oliver Ibid n16 p3.

Protection is only extended to those who qualify as employees, or a similar term used such as "contributor".[35]

1.5 Definitions of Concepts

A number of technical terms are used in this dissertation. For ease of reference, the following meanings are assigned to them.

"Social Security"

According to the Government's White Paper on Social Welfare, 1997 social security is defined as follows:

> Social security covers a wide variety of public and private measures that provide a cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing and such person being unable to avoid poverty and secondly, in order to maintain children.[36]

The ILO Definition of Social Security:

According to the International Labour Organization social security is being defined to mean:

> 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 stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death, the

[35] Act no 63 of 2001 section 1& Act no 130 of 1993 section 1
[36] Strydom Ibid n22 p3.

provision of medical care and the provision for families with children.[37]

Social security:

According to Olivier etal, this is the definition:
A body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e. income from paid Labour) or particular costs.[38]

Informal sector workers

Informal sector workers include those employed in micro enterprises, the informally working, self-employed, temporarily workers and casual workers.

Atypical Employees:

An atypical employee is a non-standard worker such as independent contractor, home workers, dependant contractors and some categories of consultants who are rendering services outside employment contracts.[39]

Part-time Workers:

This category refers to employees who regularly work less than the ordinary hours of work in the sector in which they are employed.[40]

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[37] See the definition of social security as contained the International Labour Organization, Convention on Minimum Standards, and Convention 102 of 1952.
[38] Olivier Ibid n5.
[39] Olivier Ibid n16 p5.
[40] Green Paper on Labour – February –1 996.

Employee:

The Basic Conditions of Employment Act defines an employee as:

Any person, excluding an independent contractor who works for another person or for the State and who receive or is entitled to receives any remuneration.[41]

Any other person, who, in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have a corresponding meaning.[42]

An employee is a person who has entered into or works under a contract of services or apprenticeship or learnership, with an employer, whether the remuneration is calculated by time or by work done, or is in cash or in kind. [43]

Fixed-term contract:

A fixed term contract "means a contract of employment that, under its provisions, determines how it will terminate in the normal course. It terminates in the following circumstances:

> (a) On the expiry of a specific term,
> (b) on the completion of a particular task, or
> (c) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him".[44]

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[41] Olivier Ibid n16 p5.
[42] BCEA 75 of 1997.
[43] Strydom Ibid n22 p44.
[44] See Section 2 (two) of the Regulation of 2002: 2034.

1.6 Scope and Limitations of the Study

This study investigates the possibility of extending social protection to non-standard workers in the labour market, in South Africa in particular the SADC sub-region in general as compared to the arrangements in the United Kingdom and its regional structure, the European Union. These categories of non-standard workers comprise of fixed-term workers, part-time workers, tele-workers, atypical employees and the home workers.

As a comparative study, it will reflect on the developments in this regard, in two distinct countries in the world: South Africa and the United Kingdom, taking into account the influence of their commitments from their regions and the influence of International Law from their treaty obligations on the international plane.

To achieve the objective of this study, this study is divided into five interrelated chapters, each chapter dealing with a specific aspect. The chapters are corroborative so as to achieve internal logic and cohesive flow of argument. The first chapter is on introduction, identifying the problem under investigation, rationale of the study, objective of the study, defining major concepts, method used to collect data and also the scope and limitations of the study. The second chapter evaluates the South African regulations on non-standard workers. In the third chapter, the focus is on the regulation of non-standard-workers in the United Kingdom. The fourth chapter is on comparative analysis of the two systems while the last chapter, carries our broad conclusions and recommendations.

Due to financial constraints I was unable to visit The United Kingdom for comprehensive investigations on the study. However one of the European countries specifically Germany, was visited for the purpose of carrying out research on the European system since it legislates for its Member States. The UK is a member state of the EU. The study is confined to the legal systems of South Africa and the UK on the need to extend social security protection to non-standard workers.

1.7 Methodology and Data collection

The method used in collecting data for this study was the case method. It has its own advantages and disadvantages. The case study develops critical thinking.[45] It also tends to be selective, focusing on one or two issues that are fundamental to understanding the system being examined.[46] Selecting a case study is a difficult process but literature provides guidance in this area knowing that time is limited. Another important thing about case study is that you achieve reliability in many ways.

As already outlined above, it has its own weakness in that; it is confined to theory and not an imperical investigation not to populations Literature in case method is "primitive and limited" in comparison to that of experimental or quasi-experimental research.[47] The study relied mainly on library resources, such as textbooks, articles in journals, decided cases, dissertations, conference papers, statutes and other publications. A modern and innovative tool utilized in this study was the Internet. it was of much help in locating fresh and current information.

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[45] Tellis W. "The Qualitative Report" Volume 3, no 2, July 1997.
[46] http://www.nova.edu.ssss/QR/QR3-2/tellis1 html)-The Qualitative Report.
[47] Tellis Ibid n45

1.8 Summary

In this chapter, an attempt has been made to introduce the dissertation. In the next chapter the South African legal framework relating to non-standard workers will be analyzed.

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It is imperative to find out exactly what is happening with non-standard workers. The domestic work sector as part of non-standard workers accounts for about 800,000 employees.[54] Significant numbers of people work in the informal sector and face the problem of lack of social security protection to meet contingencies.[55]

There is discrimination in hiring and inequality in treatment of non-standard workers. Typically they lack support from the workers, recognized employees, as described by the social security legislations,[56] in the sense that individual employees do not insist on the employers not resorting to or to use atypical forms of employment in order to discriminate against and ill-treat some of the workers or say anything in the structure of the work force.[57]

As Olivier has pointed out that:

> Procuring a workforce is a matter which traditionally belongs to the employer's prerogative. Individual employers and employees have relatively wide freedom, often on the employer's insistence to agree as to whether the employment would be of atypical nature.[58]

In this regard Olivier continue to comment that, this initiative which the employer can make in this regard is subject to constitutional, statutory and collective bargaining constraints.[59]

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[54] See Olivier M.P, et al Statistics South Africa Unemployment and Employment in South Africa LexisNexis, Butterworths Durban, 1998.
[55] Olivier Op cit n54.
[56] Refers to Employment Equity Act 55 of 1998/the Compensation for Occupational Injuries and Diseases Act 30 of 1993, the Labour Relations Act 66of 1995, the Basic Conditions of Employment Act 75 of 1997, the Unemployment Insurance Act 63 of 2001, e.t.c.
[57] Olivier Ibid n 16 p5.
[58] Olivier Ibid n16 p3.
[59] Strydom Ibid n22.

It is important to test how far this category or form of employment (part-time employees, temporary employees, home workers, the tele-workers, fixed tem workers and employees at piece rates) are protected, or not in terms of the existing social security legislation, the Constitution, collective agreements and international agreements or treaties, if any, concluded and ratified by South Africa.

2.1 Bilateral and Multilateral Agreements

South Africa joined the ILO in 1919, but it left the Organization in 1966 because of the ILO's position concerning the government's apartheid policy. It resumed its membership in 1994. Since country 's re-entry into the family of "civilized nations" Our labour laws are being re-shaped and aligned to the ILO Conventions.[60] By being a member of the family of nations there are conventions and treaties on social security, which South Africa has signed and ratified. The following treaties in respect of social security protection on non-standard workers have been signed and ratified, thereby assuming international and domestic obligations.

2.1.1 Convention 155 of 1981 on Occupational Safety and Health [61]

This Convention sets out minimum international standards which serve as a yardstick for compliance with occupational health and safety measures. It also seeks to address the safety and health of the workers in the work place. The Convention was signed and ratified in an attempt to meet the international minimum standards in terms of

[60] S 2 of the RSA Constitution Act 108 of 1996 on the adoption of Constitutional Supremacy.

[61] It is clear that this particular Convention as concluded or entered into by the International Labour Organization Member States, binds all those who have ratified it, taking into consideration the fact that International Law exist through the /by the Conventions, Treaties, Covenants, e.t.c. Since there is no universal sovereign Legislature or World Government.

occupational health and safety.[62] Substantial progress should be made in harmonising occupational health and safety standard in South Africa and in the SADC region to the point where a common health and safety standards across the SADC is a feasible reality.

The South African Government has enacted legislations such as the Compensation for Occupational Injuries and Diseases Act,[63] the Basic Conditions of Employment Act[64] and the Occupational Safety and Health Act[65] in order to domestic the country's international law obligations

2.1.2 Convention 176 of 1995 on Safety and Health in Mines [66]

This Convention seek to address the safety and health needs of the workplace in the mining sector. There are also other pieces of legislations to that effect. Apart from this Convention there is also the International Social Security Agreement, which South Africa signed with the Government of the Netherlands on May 2001.[67]The agreement was entered into purposefully for provision of minimum standards on social security.

The two Covenants of the United Nations Organization, Civil and Political Rights of 1966 and Economic, Social and Cultural Rights are not clear on the question of extension of social security protection to non-standard workers. They only provide for general equal treatment and social security rights. Those two Covenants are the

[62] Referred to the standards, which are contained in the ILO Convention 102 of 1952.
[63] Act 130 of 1993.
[64] Act 75 of 1997.
[65] Act 85 of 1993.
[66] As concluded by the International Labour Organization.
[67] Information obtained from the ILO Website http://www.ilo.org. On the 08 of March 2006.

Covenant on Civil and Political Rights of 1966 and Covenant on Economic, Social and Cultural Rights of 1966.[68]The important aspects of these Covenants are that, all those states which have ratified these Covenants are bound in terms of the Vienna Convention on the Law of Treaties, 1969, to entrench the rights contained in the Covenants in their national laws. South Africa has signed both Covenants but has only ratified the International Covenant on Civil and Political Rights.

The second Covenant on Economic, Social and Cultural Right has not been ratified so far with the obvious implication that the protection offered by the Covenant is not available to South Africans. It is important to note that South Africa has entrenched social security provisions in its Constitution. However it is difficult to realise social security right

> because of the peculiar nature of socio economic rights, the court cannot enforce them without intruding upon the terrain of the legislature and executive branch of the governments.[69]

On that issue, the Constitutional Court in the case of Minister of Health and Others v Treatment Action Campaign and Others stated that:

> Courts are ill suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to

[68] These are the two important Covenants of the United Nations Organization that was entered into with the aim of protecting the human being from the barbarous acts that outraged the consciousness of human kind – there by containing the so-called Human Rights.

[69] Olivier M.P. Constitutional Perspective on the Enforcement of Socio Economic Rights: Recent South African Experiences. Wellington Law Review 33 (1) 2002.

> meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may infact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judiciary, legislative and executive functions achieve appropriate balance.

The Constitution [70]of South Africa entrenched the Rights as contained in the Covenant on Civil and Political Rights.[71] Now we have to see from legislation and our Constitution as to whether non-standard workers enjoy the protection of social security. International law does not apply directly in the domestic sphere, the task is left with the state to reduce the international agreements into laws for nationals through national legislation.[72] The South African government bears the overall responsibility for ensuring that the State complies with these obligations.

2.2 Regulation of non-standard work at SADC regional level

The South African Development Community (SADC) is a regional organization comprising 14 countries.[73] Its main objective is to achieve development and economic growth, poverty alleviating, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.[74]

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[70] Constitution of the Republic of South Africa Act 108 of 1996.

[71] Chapter two of the Constitution of the Republic of South Africa Act 108 of 1996 on the Bill of Rights

[72] Section 231(2) of the Constitution of RSA provides, inter alia, that International Agreement bind the Republic of South Africa only after it has been approved by resolution in both National Assembly and National Council of Provinces unless it is an agreement referred to in subsection (3).

[73] Angola, Botswana, DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe those are the SADC countries in terms of the Treaty

[74] Mpedi et al, Co-ordination and Integration of Social Security in the SADC Region: Developing the Social Dimension of Economic Co-operation and Integration Paper presented at the Conference on The

In August 1992, the Southern African Development Co-ordination Conference (as the organization was initially known) was transformed into SADC.

The emphasis of the Organization changed from development coordination to the developmental, economic and regional integration.[75] Since this study seeks to investigate the extent of social security protection afforded to non-standard workers in South Africa as compared to the position in the UK, it is also imperative to establish in the light of this study as to whether there is any obligation arising from the SADC protocols in terms of the treaty obligation binding South Africa.

The reason for establishing as to whether there is any treaty obligation binding South Africa is that, it is imperative to establish the scope of coverage on social security protection for atypical employment from the SADC perspective and to establish the influence of the SADC laws on South Africa on the status of non-standard workers. Co-ordination, harmonization, inclusive, comprehensive and integrated legal framework of social security is almost absent in the SADC Region.[76]

Of serious concern is the fact that social security in the SADC region through its limited coverage contributes to social differentiation. Social security is therefore seen as serving the interests of the working elite, and not reaching out to those in most need of coverage of social security protection. Yet it is clear that the general picture in

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Development of a Regulatory Framework for Economic Co-operation and Integration Within SADC, Johannesburg International Airport Holiday Inn, Johannesburg, 31 May 2002, find this paper also on Journal for juridical science 2003: 28 (3).

[75] Mpedi et al The Extension of Social Security Protection to Non-formal Sector Workers- Experiences from SADC and the Caribbean-CF Muller -2/2005 –p 146

[76] Olivier et al Developing an Integrated and Inclusive Framework for Social Protection in SADC – Report for Conference of Social Security experts in SADC Region, held at Johannesburg (South Africa) in 2001 under the theme: Towards the Development of Social Protection in SADC Region, the Second Conference was held in Maputo, Mozambique in November 2002, under the theme: Developing an integrated and inclusive framework for social protection in SADC SA country-p 270.

SADC reveals an increase in the informal sector and in unemployment, while the formal sector is generally shrinking.[77]

Social assistance usually lacks a constitutional and statutory basis with the result that social assistance is often seen as a matter of discretion, and not as a right.[78] There is, therefore, no universal coverage, something that is exacerbated by the needs based approach, adopted in some of the countries. Only those who qualify in terms of a set means test (by reference to a maximum level of income and or maximum amount of assets allowed by the applicable legislation) are eligible to receive protection from the social assistance system.[79] There are challenges facing governments and social security systems in Africa and many of these challenges have translated into a lack of accessibility and sustainability on the part of contributors and beneficiaries and the public at large.

2.2.1 Institutional design and governance problems

2.2.1.1. Government interference:

Good governance in social security schemes is critical for the viability and sustainability of the schemes. It is equally critical for building trust in institutions that have been the subject of suspicion and scorn. And yet, in many countries there are clear indications of excessive state intervention or interference. Governments often control the composition and appointment of governing boards, as well as social security administrations, the management of funds and investments decisions.[80]

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[77] Olivier "Acceptance of Social Security in Africa". Paper presented at the International Social Security Association ISSA Regional Conference for Africa Lusaka, Zambia Aug 9-12 p18.
[78] Olivier "Social Protection in SADC Region" et al Ibid, n80, p09, Para 2.
[79] Mpedi Op cit n75 p151.
[80] Olivier Ibid n77 p 06.

2.2.1.2. Investment decisions:

This appears to be a problematic, as investment opportunities within these countries are limited. Fund managers also often tend to invest in assets, which may not provide the best yield, such as real estate. In fact, the position is based on various studies carried out by the World Bank and other multi-lateral institutions, that the returns on the investment of social security institutions in Southern Africa in the last three decades have been negative. These losses have been passed on to members in the form of poor benefits.[81]

2.2.1.3. From lump sums to periodical pension:

Lump sum payments are often the desired form of payment for those who are struggling in poverty. However, the quick absorption of funds so acquired has some repercussions for the debate regarding the suitability of social security arrangements as a medium – to –long-term source of provision, especially in the event that contributions have been made over a long period of time, and as an effective measure to combat poverty.[82]

2.2.1.4. Mismanagement- redirecting sources and high administrative costs:

Many of social security institutions in Southern Africa lack proper management of the operation of schemes. This is largely attributable to lack of adequate training and an understanding of prudent social security principles. Even as far as growing and well–

[81] Olivier Ibid n 77 p06-08
[82] Olivier Ibid n 77.

established schemes are concerned, there is a danger of unnecessary cross- subsidizing between different categories of benefits.[83]

2.2.1.5. Service delivery:

Reduction in costs, better services and good record keeping will go a long way to addressing the mistrust of members and beneficiaries. Using information technology to achieve some of these is certainly important. However, this will not help much, unless there has been marked improvement in service delivery. And yet, the importance of public awareness campaigns cannot be overemphasized. But then one should be clear about target audiences. They include members, beneficiaries and the public at large, but also trade unions, employers and employers' organizations, policy makers, lawmakers and politicians as all of them require a clear understanding of social security in order to fulfil their respective roles.

2.2.1.6. The need for proper regulation at a national level

Regulation of social security schemes could contribute much to make social security institutions to perform in accordance with acceptable standards and to build trust in these institutions. Regulation of both the public and private environment is important to increases transparency and protecting of the beneficiaries. However, there is little experience of this in many Southern African countries.

[83] Olivier Ibid., n77 p144-147.

2.3 Regulation of non-standard work in the Republic of South Africa

This part of the study focuses on South African regulatory refine relevant to non-standard forms of employment. The objective are to establish the extent of social security protection afforded to non-standard work.

2.3.0 Constitution of South Africa

The Constitution, Act 108 of 1996, is the supreme law of the Republic.[84] It is relevant to this study in the sense that it regulates all the relationships of employment.[85] It prohibits unfair discrimination and further provides for the enactment of national legislation to prevent unfair discrimination.[86] It then provides for the right to fair labour practice,[87] access to social security to everyone including, if they are unable to support themselves and their dependents, appropriate social assistance. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.[88]

The exclusion of some categories of non-standard workers from the basic labour law (social security law) protection may still leave them with the constitutional challenge.[89]In the land mark case of SA National Defence Union v Minister of Defence and another 1999 ILJ 2265 (CC) the Constitutional Court found that even though the

[84] Section 2 of the Constitution of the Republic of South Africa Act 108 of 1996.
[85]Section 8 of the Constitution on the horizontal and vertical application of the Constitution is applicable.
[86] Section 9 of the Constitution, Act 108 of 1996, it paved the way for the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[87] S 23 of Act 108 of 1996
[88] S 27 of the Constitution of RSA.
[89] SA National Defence Union v Minister of Defence and another 1999 ILJ 2265 (CC).

members of the Defence Force are not employees in the normal sense of the word, they should, according to the Court, still be regarded as being covered by the fundamental right to freedom of association extended by Section 23 (2) of the Constitution to "every worker".[90]

In actual fact the constitutional entrenchment of social security rights has significantly strengthened the mandate of the state to provide comprehensive social protection. In the chapter dealing with the Bill of Rights the Constitution introduces a constitutional imperative. The government is compelled to ensure the progressive realization of the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance." It also obliges the state to implement appropriate measures, legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.[91]

In giving meaning to the socio-economic rights embedded in the Constitution of RSA, the Constitutional Court has had this to say in the seminal judgement of Grootboom that:

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society are denied to those who have no food, clothing or shelter, affording socio economic rights to all people there fore enables them to enjoy the other rights enshrined in the Bill of Rights. The realization of these rights is also critical to the advancement of race and gender equality and the evolution of society in which men and women are equally able to achieve their full potential.[92]

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[90] SA National Defence Union v Minister of Defence and another 1999 ILJ 2265 (CC).
[91] Olivier Constitutional Perspective on the Enforcement of Socio-Economic Rights: recent South African Experiences. Wellington Law Review 33 (1) 2002.
[92] The Government of the Republic of South Africa V Grootboom (2000) 11BCLR 1169 (CC) Par 23

It is up to the relevant line ministry to promulgate, further regulate the right protected by the Constitution.[93] It is imperative to go further to the subordinate legislation and establish the extent of social security protection, since the supreme law left the task with subordinate legislation.

As appeared from the first two annul reports on second generation of rights (economic and social rights)[94], the South African Human Rights Commission stressed that there is a need for a proper concept of social security in South Africa. The Commission has noted that the Social Assistance Act is too narrow from the constitutional perspective as it restricts the concept to the income replacement grants system.[95]

2.3.1 Labour Relations Act

There are increasing numbers of part-time workers, temporary workers, workers supplied by labour brokers, home workers and contract workers in the labour market. They are particularly vulnerable to exploitation. They are not covered adequately by labour legislation. In an attempt to regulate the employment relationship the Labour Relations Act[96] was enacted. In terms of the Labour Relations Act, there are beneficiaries who enjoy protection of the law.

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[93] See the provision of the Constitution specifically section 23 (5) which provide that the national legislation may be enacted to regulate collective bargaining.
[94] ILO World Labour Report, 2000-June –21, entitled, Most World Lacks Unemployment Insurance: Social Protection System under Strain,. Geneva, 2000.
[95] Olivier Ibid n5 p25.
[96] Labour Relations Act 66 of 1995.

The concept "employee" is being used to identify the beneficiaries of the latter legislation in the sense that if the category of one's employment, does not fall within the purview of the definition of an employee as contained in the Labour Relations Act, one does not qualify for protection.[97] However there are other categories of employment such as the domestic workers employed in the household and independent contractors who are explicitly excluded from the scope of coverage.[98] For the purpose of this study we are not going to deal with the protection of independent contractors even though they fall within the category of non-standard workers.

The protection granted by labour legislation does not extend beyond the employer-employee relationship.[99] In terms of the Labour Relations Act,[100] there is no employment relationship which exists between the parties to a non-standard work form of employment. Yet the law makers are presumed to have been aware of the increasing use of non-standard work. The Labour Relations Act[101] does not offer them protection. Instead it explicitly excludes some other form of atypical employment from the scope of coverage.[102]

The provisions protect a fixed term worker from unfair dismissal, in that it states that a dismissal takes place in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment, on the same or similar terms and the employer offers to renew it on less favorable terms or did not renew it.

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[97] On the definition of an "employee" if you are not included, you do not qualify for protection as regards you are not an employee in terms of S213 of LRA 66 of 1995.
[98] See Section 1 of the COIDA 130 of 1993.
[99] Olivier Ibid n16 p 5.
[100] Act 66 of 1995.
[101] S213 of the LRA 66 of 1995 on the definition of an "employee."
[102] See the definition of an "employee" as contained in Section 213 of the Labour Relations Act 66 of 1995.

In the case of King Sabata Dalindyebo Municipality V CCMA and Others,[103] the King Sabata Dalindyebo Municipality did not renew a fixed term contract of 44 workers as was the case in the past. It basically constituted legitimate expectation on the employee who relied on that little earnings for survival that their contracts would be renewed as a matter of course. The matter was referred to CCMA for arbitration. The Commissioner of the CCMA stated that, "where the employer's conduct created a reasonable expectation to the employees of renewal of their contracts and does not renew it, that non-renewal of the employees' fixed term contracts constituted an unfair dismissal".[104] The CCMA ordered the latter municipality to reinstate the workers on similar terms. This indicates unfair treatment afforded to non-standard employment.

Labour Relations Act has been amended.[105] In terms of that Amendment Act the powers and functions of the bargaining councils have been expanded to extend their services and functions of two categories of non- standard workers, namely workers in informal sector and home workers.[106] This is indeed a welcome development in the law.

2.3.2 Compensation for Occupational Injuries and Diseases Act[107]

The Compensation for Occupational Diseases and Injuries Act[108] came into effect on 1 March 1994. This particular legislation provides for the so-called no-fault compensation for employees who are injured in an accident that arises out of and in the

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[103] King Sabata Dalindyebo Municipality V CCMA and Others, P437 /03.
[104] LRA Section 186(1)(b) as interpreted and applied in the case of King Sabata Dalindyebo Municipality V CCMA and Others
[105] Amendment of the Labour Relations Act 12 of 2002.
[106] LRA as amended on the basis of section 3 of the Labour Relations Amendment Act 12 of 2002
[107] The Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[108] As its intended purpose was to cover for the employees who sustain injury during the course of employment action, however negligence must be proved, since the concept such as volenti non-fit injuries apply, (Compensation for Occupational Injuries and Diseases Act 130 of 1993.

course of their employment or who contract occupational diseases.[109] It is also important to note that the Act[110] applies to certain categories of employees as stipulated in Section 1.[111]

Section 1 of the Compensation for Occupational Diseases and Injuries Act,[112]defines employee as follows;

1.Employee means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes:

(a) a casual employee employed for the purpose of the employer's business;

(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contracts;

(c) a person provided by the labour broker against payment to a client for the rendering of service or the performance of work, and for which service or work such person is paid by the labour broker;

(d) in the case of the deceased employee, his dependent, and in the case of an employee who is the person under disability, a curator acting on behalf of that employee;

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[109] Compensation for Occupational Injuries and Diseases Act 130 of 1993.

[110] Compensation for Occupational injuries and Diseases Act 130 of 1993 as effected on the 1of March 1994.

[111] Particular reference should be made to Section 1 of Compensation for Occupational Injuries and Diseases Act 130 of 1993.

[112] Compensation for Occupational Injuries and Diseases Act 130 of 1993.

2. But does not include:

    i) a person including a person in the employee of the state performing military services or undergoing training referred to in the Defence Act;

    ii) and who is not a permanent member of the Defence force as defined in the Defence Act;

    iii) a member of the South African Police force while employed in terms of the Police Act;

    iv) a person who contract for the carrying out of work himself engages other person to perform work:

    v) a domestic worker employed as such in a private household.

3. Person who contracts for or carrying out of work and for him, engages other persons to perform work and the domestic workers employed as such in a private households, are not deemed to be the employees".[113]

The implication of this section is that several categories of non-standard workers are presently not able to rely on the protection afforded by the social security legislation,[114] consequently they cannot claim the compensation under this Act. The benefits are only payable to the employee for accident or injuries sustained during the course of employment to the "employee" as defined by the Act.

[113] Strydom et al Ibid n 22 p45.
[114] Olivier Ibid n16 p3

Since some categories of non-standard workers do not satisfy the definition of an employee contained in the Labour Relations Act,[115] the Basic Conditions of the Employment Act,[116] Employment Equity Act, [117] as well as other Labour Laws, they lack protection. Section 1 of COIDA[118] defines who is an employee with aim of intending to benefit only the employee.

The most crucial part of it is that it also recognizes the use of non-standard workers, but excludes them in terms of coverage for purpose of protection. It defines who is an employee and only those who qualify as the employee in terms of the definition contained in section one qualify for protection.[119] One of the curious characteristics of the Social Security legislation in South Africa remains the exclusions of other categories of workers from the ambit of the definition of an "employee" (or similar terms contained in the relevant laws, even though these persons would otherwise perfectly fit the notion of being employees.[120]

2.3.3 Unemployment Insurance Act[121]

In the area of social insurance the Unemployment Insurance Fund pays out benefits to contributors and their dependants in the event of unemployment, illness, maternity, and adoption. Practically those who do not contribute are not covered; employers and the

[115] Section 213 of the LRA 66 of 1995.
[116] BCEA of 75 of 1997.
[117] EEA 55 of 1998.
[118] Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[119] S1 of COIDA 130 of 1993.
[120] Olivier Ibid n16 p6.
[121] Act 63 of 2001.

employees contribute on an equal basis to the fund with practically no state contribution.[122]

The Unemployment Insurance Act[123] follows the same trend with other social security legislation discussed above by describing who is a contributor. The definition of who is an employee is also similar.

At least as of 2001 the Unemployment Insurance Act,[124] to some extent, recognized and protected some categories of non-standard worker such as domestic workers and seasonal workers.[125] Section 3(3) accordingly covers domestic workers and seasonal workers as of the 1 of April 2003.

Prior to the enactment of the Unemployment Insurance Amendment Act 32 of 2003, Section 1 of the Unemployment Insurance Contribution Act[126] defined a "seasonal worker" to mean "any person who is employed by an employer for an aggregate period of at least three months over a 12 months period with the same employer and whose work is interrupted by a reason of seasonal variation in the availability of work." This definition has been deleted by s 1 of the Unemployment insurance Amendment Act 32, of 2003. The rationale behind this deletion is the Memorandum on the Object of the Unemployment Insurance Amendment Bill 35 of 2003 states, treat seasonal workers the same as the other employees.[127]

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[122] Olivier et al Ibid n77 p119.
[123] Act 63 of 2001, Section 1.
[124] Act 63 of 2001.
[125] See Section 3 (3) of the Unemployment insurance Act 63 of 2001.
[126] Act 4 of 2002
[127] Mpedi Ibid n75 p14

It is however problematic to say that the UIA treatment of the different categories of fixed-terms contract workers is inconsistent, fixed-term contract workers are covered under the unemployment insurance scheme, on the other hand, non-citizen fixed-term contract-workers, who are required to return to their home countries at the end of their employment contract, are excluded from the ambit of the UIA. This differential treatment of non-citizen could be challenged as discriminatory on the basis of nationality.[128]

Lastly it is important to note that with regards to unemployment protection, part-time workers, fixed-term workers and other informal sector workers need full coverage. Since their jobs are not guaranteed, not permanent, ultimately they will remain unemployed; hence, they will lack social security protection. Even the benefits from the UIA[129] are not sufficient for a person to sustain a person for life, actually the benefits from the unemployment insurance system through the UIA are very low.[130]

They are all temporary measures to relieve poverty. Mpedi 2006 argues that the Unemployment Insurance Act is not aiming at providing unemployment insurance benefits for lifelong, but it is intending to integrate or reintegrate the unemployed person into the labour market, that is the reason that makes it possible for the unemployment insurance benefits to be exhausted.

[128] Olivier et al Ibid n5 p98-99
[129] Act 63 of 2001.
[130] Mpedi Ibid n75 p 12.

2.3.4 Basic Condition of Employment Act

The White Paper on Social Welfare[131] recognizes that the number of non-standard workers was increasing in South Africa and more workers were falling outside the legislative protection because of their status as non-standard workers or because of hiring practices that meant that they fall outside the definition of an employee, that practice is called "casualization".[132] In fact the background documents and earlier drafts of the Basic Conditions of Employment Act[133] acknowledged the rise of non-standard workers and associated lack of regulation for those employment arrangements. [134]

The limited amount of protection available for workers in non-standard forms of employment was stated in the first draft of the BCEA, that its objects was to protect vulnerable employees in non-standard employment.[135] Despite the recognition of this problem, the Governments must committ to ensure new legislation would regulate atypical forms of employment and better protect workers in such employment relationship.

The Basic Conditions of Employment Act[136] and subsequent legislation has been weak in addressing these trends. Indeed other types of non-standard workers are still excluded from the Act that is non-standard workers that fall outside the definition of an employee in terms of the Act would not enjoy protection.

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[131] White Paper for Social Welfare, Government Gazette, GN: 1108, August 1997.
[132] Olivier Ibid n16 p01.
[133] Basic Condition of Employment Act 75 of 1997.
[134] Marlea et al Workers Protection: An Update on the Situation in South Africa, 2002 p34
[135] Green Paper 1996:19 Poicy Proposal for New Employment Standard Statutes, Government Gazette No: 17002, February 1996.
[136] Basic Conditions of Employment Act 75 of 1997.

It is stated in the long title to the Act that the purpose is to give effect to section 23 (1) of the Constitution[137]on the right to fair labour practice and the South African international law obligations as a member of the International Labour Organization.[138] The BCEA greatly extends protection to the part-time workers. In terms of the previous legislation, an employee who worked on three or less days per week for an employer was excluded from enjoyment of coverage on the rights to annual leave, sick leave and notice of termination or certificate service on termination.

The threshold for protection in the Basic Conditions of Employment Act[139] has been reduced, and all the employees who work for more than 24 hours per month for an employer are entitled to almost all of benefits under the Act. They are no longer classified as temporary employees, the classification as casual workers no longer exists.[140]

With the temporary employment service, the Labour Relations Act[141] and the Basic Conditions of Employment Act[142] regulate them in the same manner. The temporary employment service that procures or provides the services of the employees for a client is treated as the employer of the employees concerned. The temporary employment service and the client of it are jointly and severally liable, if the temporary employment

[137] Constitution of the Republic of South Africa Act 108 of 1996.
[138] Http//: www. ILÖ, equality @work.
[139] Act 75 of 1997.
[140] Du Toit, etal, Labour Relations Law, Comprehensive Guide, 3rd Edition, Butterworths, 2000, p515-516.
[141] Labour Relations Act 66 of 1995.
[142] Basic Condition of Employment Act 75 of 1997.

service does not comply with its obligations as an employer in terms of the Act or any Sectoral Determination.[143]

The Basic Conditions of Employment Act[144] and subsequent legislation have been weak in addressing these trends. Other types of non-standard workers are still excluded from the Act. Non-standard workers that fall outside the definition of an employee in terms of the Act would not enjoy protection.

The position of most of non-standard workers is not adequately covered as far as the scope of application of the Basic Conditions of Employment Act 75 of 1997 is concerned. At this point at least those normally work's for 24 hours in a month for an employer such as the domestic workers, part-time workers, temporary and seasonal-workers are almost covered in terms of this Act. However it should be noted that non-standard workers only benefit from the remedies afforded for and the protective measures provided for by the latter legislation.

It is apparent from the Basic Conditions of Employment Act [145] that there is possibility of labour law protection to non-standard workers. Section 55(4) (g) states that, a sectoral determination may in a sector and area prohibit or regulate task-based work, piecework, home-work and contract work. It may also specify the minimum conditions of employment for persons other than employees.[146]

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[143] Olivier Ibid n16 p01.
[144] BCEA 75 of 1997.
[145] Basic Conditions of Employment Act 75 of 1997.
[146] Refer to section 55 (4) (k) of Basic Conditions of Employment Act 75 of 1997.

Section 83 of BCEA as, amended, [147] further permits the Minister, on the advice of the Employment Condition Commission, to deem any category of persons specified in a notice published in the Government Gazette, to be employees for the purpose of the whole or any part of the Act[148]and any other employment law, or any sectoral determination.[149]

That is the position of non-standard workers. They are not free to join trade unions. They are not regarded as employee in terms of the LRA that regulates the relationship between the employer and the employees. The Act does not clearly regulate the protection of these categories of employment (non-standard employment), other than standard employment directly.

The definition of 'employee' contained in Section 1 of the Basic Conditions of Employment Act 75 of 1997 and Section 213 of Labour Relations Act 66 of 1995, for example, covers "any other person who in any manner assists in carrying on or conducting the business of an employer." In addition, Section 83A of the BCEA and Section 200A of the LRA (as amended) make provision for a rebuttable presumption as to who is an employee as follows:

> A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of contract, if any one or more of the following factors is present: the manner in which the person works is subject to the control or directions of another person, the person's hours of work

[147] The Basic Conditions of Employment Amendment Act 11 of 2002.
[148] BCEA 75 of 1997.
[149] Olivier Ibid n16 p09.

> are subject to the control or direction of another person, in the case of person who works for an organization, the person is part of that organization, the person has worked for that other person for an average of at least 40 hours per month over the last three months, the person is economically dependant on other person for whom that person works or renders services, the person is provided for with tools of trade or work equipment by other person, the person only works for or renders services to one person

The Amendment has not widened up the definition of an "employee" as contained in the Act.[150] It is unfortunate to note that this presumption as well as "the resultant shift in the burden of proof to employers to rebut the presumption, has not been incorporated in the structures of the UIA".[151] However the employer dominates the drafting and the contents of the employment arrangements.[152] The legislation we have been discussing above almost invariably fails to provide coverage by merely including non-standard workers within the definition of an employee.

2.3.5 Other Social Security Legislations

There are pieces of legislation, which are also relevant here such as the Employment Equity Act,[153] Occupational Health and Safety Act[154] as well as the Skills Development

[150] Amendment Act 11 of 2002
[151] Olivier et al Ibid n5 p436
[152] Olivier et al Ibid n16 p 1-8
[153] Act 55 of 1998.
[154] Act 85 of 1993.

Act.[155] However this study does not go in to detail in to these piece of SA legislation since they are not directly relevant, they are only of tangential interest to this study.

In order to have access to protection from a particular piece of legislation in South Africa, you have to be covered by the applicable law. The applicable law clearly indicates which category of person can or may rely on that legislation for protection.

2.3.6 Collective Bargaining

Collective bargaining is the preferred method of regulating the labour market. Trade unions may play an important role if they become involved in an attempt to have minimum protection extended to non-standard workers. Trade unions are unwilling and unable to deal with the issue of those who work/employed in atypical forms of employment, for the simple reason that they are not members of such union.

In terms of the changes in employment law, it is envisaged that Collective Agreement can be binding in respect of a person who is employed by a temporary employment services (labour broker) but who renders service to a client. Non-compliance with the agreement implies joint and several liabilities for both the temporary employment service and the client.[156] It is important and possible for collective bargaining to vary basic employment standards by collective agreement.

The centralized bargaining path chosen by South Africa will result only in relatively higher protection for an increasing minority of workers, as jobs in the formal sector are shed, union members shrink and employers makes increasing use of atypical forms of

[155] Act 97 of 1998.
[156] Section 198(a) of the Labour Relations Act 66 of 1995.

employment and outsourcing because there is no or there is a little coverage for the non-standard workers.[157]

2.3.7 Summary

This chapter focused on South African regulation of non-standard employment. It aimed at evaluating legal and institutional arrangements relevant to non-standard employment. The Constitution of South Africa was used as a reference point for all legislation. The social security legislation was examined and evaluated. SADC treaty on social security was also evaluated and examined, in an attempt to establish compliance with the domestic, regional and international obligations.

The contributions highlighted the sheer extent of the inadequate social protection provisioning in the SADC region and the apparent failure of domestic social security measures to address poverty alleviation meaningfully and to bring about the social inclusion and participation of large numbers and significantly categories of people who have been left out. The chapter also examined different possibilities for the co-ordination of social security measures in SADC region.

There were some deficiencies in the said framework of legislative provision. Employment security is the main means to income security. It enhances worker's welfare. As remarked earlier, the benefits provided under the South African unemployment insurance scheme are inadequate. Furthermore, there are no unemployment assistance benefits for those unemployment insurance beneficiaries who exhaust their unemployment insurance benefits. As regards finding alternative

[157] Olivier et al Ibid n5 p5.

employment, it should be recalled that the South African unemployment protection system is mainly characterized by limited measures to reintegrate those individuals who lost their jobs into the labour market.

It is the duty of the government to maintain or ensure the maintenance of a free public employment service. The argument that by not including/covering non-standard workers the state will be able to do more in terms of social security for the poor, does not, itself, constitute a legitimate government purpose of sufficient importance. Such an approach mixes and confuses the role of the state as employer and its role as a provider of social security for the indigent. It also creates all sorts of unnecessary imbalances. One of the issues that a court must consider in this regard, is question whether a legitimate (law makers) purpose of sufficient importance is being served by the limitation of fundamental rights referred to, on the legislations which exclude non-standard workers in the next chapter, we will focus on regulation of non-standard work in the United Kingdom in the hope that South Africa can draw important lessons from that country.

CHAPTER THREE:THE UNITED KINGDOM REGULATION OF NON-STANDARD WORK

3.0 Introduction

This chapter focuses on the regulation of non-standard work in the United Kingdom in the hope that this country can draw inspirations from the UK. It is imperative to point out that there are obvious differences in the two legal systems: the UK is being legislated by the Council of Europe on certain matters, which includes social protection. For when the European Union is legislating for its Member States, it involves social partners. Social partners are involved in the law making process through the process of social dialogue where the representatives of the member states, the employers' representatives and the trade unions deliberate on what can be done for the best interests of the stakeholders. Once they agree on a certain matter, they may thereafter enter into a Framework Agreement. The Framework Agreement does not have binding effect, however it only provides guidance to the legislative drafters. The Council of Europe may then promulgate a Directive on the basis of the Framework Agreement.

There are also regulations apart from the Framework Agreements and Directives. The regulations apply directly to member states after being promulgated by the Council of Europe. In this chapter the study will first examine the European Social Charter, Charter of Fundamental Rights of the European Union, international law obligations of

EU member states concerning ILO Conventions.. UN Covenants.. Lastly, the discussion will focus on regulations dealing with non-standard wok and which domesticate EU Directives into British law.

3.1 Regulation of social security protection for non-standard work

How far the United Kingdom has gone in the implementation of the treaty obligations arising from the common constitutional practices or traditions of members states of EU, International Covenants and Conventions in the light of protecting or enlarging the scope of coverage to non-standard work? It is appropriate that most of the Directives and Regulations on non-standard work from the European Union show commitment to serve non-standard workers with dignity and respect despite the category of employment they are working in.

Legal instruments have been promulgated in an attempt to protect the position of non-standard work. It is the aim of this study to establish the extent of social security protection afforded to non-standard workers in the light of these directives and regulations.

3.1.0 The European Social Charter.

The European Social Charter was adopted as counterpart to the European Convention on Human Rights, which guarantees civil and political rights. The Social Charter is a binding document or instrument setting out a broad range of economic and social rights. It entered into force on 26 February 1965, even though it was opened for

signature in 1961.[158] By recognizing social protection as a fundamental social right, the European Social Charter contributes to the strengthening of this right by setting a minimum guarantees at the European level.

A right to social security was first recognized internationally as a human right in the Universal Declaration of Human Rights[159]. It is also at the core of several International Labour Conventions. It was included in the Covenant on Economic, Social and Cultural Rights of the United Nations Organization.[160] The Charter goes beyond these instruments in the sense that it is the only treaty to address all aspects of social security protection system, in that addition to the right to social security the Charter provides for the right to social and medical assistance and right to benefit from social services.[161]

The Charter goes further to include within its sphere of coverage workers (without making a distinction between formal sector workers and informal sector workers) as well as the unemployed. It contains provisions relating to social protection of both categories of workers and those who are not employed and regulates the position of workers (in terms of social protection) more comprehensively than those who do not work.[162] It is of great significance to come to a conclusion that the system of social security protection in the European Union is inclusive, in the sense that everyone is able to enjoy social security protection.[163]

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[158] Human rights Monograph-No:o7- Social Protection in the European Union – Social charter- study compiled on the basis of the case law of the European committee of social rights -2nd Edition, 2000, Council of Europe publishing.

[159] As adopted and proclaimed by the general assembly of the United Nations on the 10th of December 1948.

[160] Covenant on Economic, Social and Cultural Rights of the United Nations organization of 16 December 1966,

[161] Information obtained from the ILO Website http://www.ilo.org. On the 08 of March 2006

[162] Mpedi et al Ibid n75 p154.

[163] See Article 10 of the Social Charter.

It is clear from the provision of the European Social Charter that the Contracting Parties has even committed themselves to be bound by provisions providing social protection:

a) to consider Part of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part:
b) to consider themselves bound by at least five of following Articles of Part II of the Charter: Article 1, 5, 6, 12, 13, 16, and 19
c) in addition to the Articles selected by it in accordance with the proceeding subparagraph, to consider itself by such a number of Articles or numbered paragraph of Part II of the Charter as it may select, provided that the total number of Articles or numbered paragraphs by which it is bound is not less than or 45numbered paragraph.[164]

It goes further to commit the Contracting Parties to adequate social protection by providing, inter alia, that:

> The articles or paragraphs selected in accordance with the preceding subparagraph b and c of paragraph 1 of this Articles shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification or approval of the Contracting Party concerned is deposited.

Article 12 of the Charter dealing with social security protection is included as among the core provision of the Charter and is even listed on the list of Articles which at least

[164] Article 20 (1) of the Social Charter, European Union, 1961.

a Contracting Party to the Charter must comply with: This article 12 of Charter provides, inter alia, that:

> With a view to ensuring the effective exercise of the right to social security, Contracting Parties undertake:
>
> 1. to establish or maintain system of social security;
> 2. to maintain a social security system at a satisfactory level at least equal to that required for ratification of International Convention No:102 of 1952 Concerning Minimum Standards of Social Security;
> 3. to endeavor to rise progressively the system of social security to a higher level;
> 4. to take steps, conclusion of appropriate bilateral and multilateral agreements, or by other means , and subject to the conditions laid down in such agreements , in order to ensure:
>
> a) equal treatment with their own nationals or nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of undertaken between the territories of the Contracting Parties ;
>
> b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.

European Social Charter influenced the system of social security in the United Kingdom and contributed to the development of social security protection. It is even stated in the Charter that, in so far as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

3.1.1 Charter of Fundamental Rights of the European Union, 1953

Apart from the European Social Charter there is also the Charter of the Fundament Rights of the European Union, which also intensifies the protection of fundamental rights. Social security rights as economic and social rights are protected in the Charter. The Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices[165].

It goes further to say that everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with the Union law and national laws and practices[166]. In order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union laws and national laws and practices. In the Charter of Fundamental Rights of the European Union, it is stated that:

> This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principles of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligation common to the Member States...[167]

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[165] Article 34 (1) of Charter of Fundamental Rights of the European Union.

[166] Article 34 (2) of the EU Charter, then the is still another important Article 34(3) which succeeded this article on that it stipulates that: in order to combat social exclusion and poverty, the Union recognises and respect the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by community law and national laws and practices.

[167] Preamble of the Charter of Fundamental Rights of the European Union.

This clearly indicates how the system of social security protection in the United Kingdom and within the European Union is integrated and inclusive. The system of protection within the European Union is as the result of the contributions of each Contracting Parties to the Union. It is in their common constitutional traditions to respect, protect and promote the fundamental rights, which include social security protection.

3.1.2 The European Framework Agreement on Part-Time Work.

The social partners signed the Framework Agreement on Part-time Work on 6 June 1997. It concerns the conditions of employment of part-time workers.[168] It states as follows:

> That matters relating to statutory social security are for decision by the Member States, in this respect the social partners note the employment declaration of the Dublin European Council in 1996 which emphasized, inter alia, that the need to develop more employment–friendly social security system by developing a social protection system capable of adapting to a new patterns of work and providing appropriate protection to those engaged in such a work.[169]

The purpose of this Framework Agreement on Part-time Work is to remove discrimination against part-time work, to improve the quality of part-time work and to

[168] The European Framework Agreement on Part-time work of 06 June 1997, however the Framework Agreement does not have the binding effect per se , it is the results of the negotiation between the social partners , which paved a way for the actors on which they will legislate.

[169] See paragraph 2 of the preamble of the Framework agreement on part-time work of 6 June 1997.

facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner, which takes into account the needs of the employers and workers.[170]

Only part-time workers enjoy the protection or coverage under this Framework Agreement. In terms of the definition of the part-time work as provided for by the agreement, it refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time work.[171]

The European Court of Justice has had occasion to decide upon the matter of equal treatment between part-time and the full-time workers, equal treatment as between female and the male workers in the case of Nicole V Peek And Cloppenburg GmbH and Co. KG[172]. The Council Directive[173] of 9 February 1976 on the implementation of the principles of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions and Council Directive[174] 97/81/EC of 15 December 1997 concerning the Framework Agreement on the part-time work concluded by the social partners. The reference was submitted in the context of a dispute between Ms Wippel, who was employed part-time on the basis of a framework contract of employment based on the principles of work on the demand and her employer Peek and Cloppenburg GmbH and Co .KG hereinafter P and C'')

[170] See the clause 1 of the Agreement.
[171] Blanpain European Labour Law, Seventh revised Edition, 2000, published by Kluwer Law International – London, Boston and Hayne.
[172] Nicole V Peek and Cloppenburg GmbH and Co. KG C- 313/02.
[173] Council Directive 76/207/EEC of 9 February 1976.
[174] Council Directive 97/81/EC of 15 December 1997.

concerning the absence in her contract of employment of an agreement as to the hours of work and organization of working time.

The European Court of Justice held that in the circumstances where all the contracts of employment of the other employees of an undertaking made provision for the length of a weekly working time and for the organisation of working time, they did not preclude a contract of part-time employment of workers of the same undertaking, such as that in the main proceedings, under which the length of weekly working time and the organisation of work to be performed were determined on the case-by-case basis, such workers being entitled to accept or refuse that work.[175]

This Framework Agreement on part-time work does not have a binding effect. The role of the social partners in shaping the pillars and the contours of the labour law is to prepare a platform for the role players to act. Hence a Council Directive later transformed the Framework Agreement into a European legislation.[176] Now there is legislation that has the binding effect on part-time work. A Directive is binding as to the results to be achieved upon each Member State to which it is addressed, but it leaves to the national authorities the choice of form and method, it is a much more flexible measure which leaves it up to the national authorities to transform it into a national law.[177]

With the transformation of the Council Directive on the part-time work into legislation, part-time workers are now protected and enjoy coverage under the Council Directive on

[175] Nicole V Peek and Cloppenburg GmbH and Co. KG, C- 313/02.

[176] Council Directive of 15 December 1997.

[177] See Article 249(3) of the EC Treaty.

part-time work. . In terms of the European law the principles of equal pay for men and women for equal work or work of equal pay or equal value is emphasized in most of the cases.[178]

3.1.3 The European Framework Agreement on Fixed Term Work.

The social partners through the social dialogue help in representing the interests of the workers. The process of social dialogue helps in shaping the contours and pillars of the European Labour law, looking at the importance of the Framework Agreements that had been concluded by the social partners in an attempt to protect non-standard work. Most of the Framework Agreements that had been concluded in an attempt to extend social security protection to the non-standard workers ended up been transformed into Council Directives.[179]

A Council Directive also transformed this Framework Agreement on Fixed-term Work into European legislation.[180] It is no longer a statements of concerns by the social partners but it has a binding effect as it has been transformed into a European legislation. It is clear that fixed term work is now protected under the European Union. Social security is now extended to fixed term workers in terms of which they may enjoy coverage for work injuries, job security, unfair dismissal and any other risks that may occur to them.[181]

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[178] B.F. Cadman V Health and Safety Executive Intervener: Equal Opportunities Commission. Case C-17/05.
[179] Council Directive 1999/70 / EC of 28 June 1999, this is important Directive on fixed-term work.
[180] Council Directive 1999/70 / EC of 28 June 1999.
[181] It is as contemplated by the EU to protect those in fixed-term work.

Employment conditions of the fixed term work are now regulated by Council Directive of June 1999[182]. The Framework Agreement on fixed-term work a result of the latter Directive is now in effect. In terms of the last mentioned Framework Agreement, the Contracting Parties recognize that contracts of an indefinite duration are and will continue to be the general form of employment relationship between employers and workers. They also recognize that fixed-term employment contracts respond in certain circumstances to the needs of both the employers and the workers.

It is clear from the purpose of the Framework Agreement that the Contracting Parties aim to improving the quality of fixed-term work by ensuring the application of the principle of non-discrimination and to establish a Framework Agreement to prevent abuse of successive fixed term employment contracts or relationships[183]. The most important aspect of the Framework Agreement on Fixed-Term Work is that there is that fixed-term work, which is in turn is defined as:

> A person having an employment contract or relationship entered into directly between the employer and a worker where at the end of a employment contract or relationship is determined by the objective condition such as reaching the specific date, completing a task or the occurrence of a specific event. [184]

Apart from the above fixed term agreement and its Directive there is also Council Directive[185] 91/383/EEC. This Directive supplements measures to encourage

[182] Blanpain Ibid n172.
[183] See the Clause one of the Framework Agreement on fixed-term work.
[184] Blanpain Ibid n172, pg 272.
[185] Council Directive 91/383/EEC

improvements in the safety and health at work of workers with a fixed duration employment relationship or temporary employment relationship. It was concluded and adopted in June 1991.

3.1.4 The European Framework Agreement on Tele-Work.

Tele-work is a form of organizing and/or performing work using information technology in the context of/in the form of employment contract or relationship where work which could also be performed at the employer's premises is carried out away from those premises on regular basis.[186]

The Framework Agreement on Tele-Work was concluded by the social partners in an attempt to regulate tele-working. The Framework Agreement on Tele-Work was concluded on the 16 of July 2002. The conclusion of this Agreement was insufficient in that for the first time in the negotiations by the social partners to conclude a voluntary Framework Agreement, the European Union left the implementation of the agreement to member states. There is no Directive from the Council of Europe on tele-working. The Agreement was a voluntary Framework Agreement.

3.2 International protection of non-standard work in the context of the European Union treaty obligations

There are various treaties, which are in existence, particularly at the international level, concluded or ratified by the European Union member states. The United Kingdom is

[186] http://ec.europa.eu.emplyment-social-news-2002...

bound by these international agreements. The obligation arising out of ratification of a treaty in terms of the Vienna Convention on the Law of Treaties, is that a state party to a treaty undertakes a solemn obligation to fulfil the duties imposed by such treaty in utmost good faith.

3.2.0 International Labour Organization Part-Time Work Convention

This treaty was adopted in 1994 by the ILO and opened for ratification to the member states of the ILO.[187] It is aiming at protecting and equalizing the benefits of non-standard workers especially part-time workers. This particular treaty has the binding effect on all the signatories to it. Article 6 of this treaty provides, inter alia, that statutory social security schemes, which are based on occupational activities, shall be adopted so that part-time workers enjoy conditions of employment equivalent to those of comparable full-time workers. It further states that those conditions may be determined in a proportion to hours of work, contributions or earnings or through other methods consistent with national laws and practices.[188]

The International Labour Organization through Part-time Work Recommendation 182 of 1994 further recommend accelerating implementation of the stipulations of Convention 175 of 1994 of the Part-Time Workers. It was recommended to provide minimum social security protection without making distinction between atypical and typical employment.[189] The most important aspect of this Convention is that it is a binding instrument, which came into force on 28 January 1998.

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[187] International Labour Organization Part-time Work Convention 175 of 1994.
[188] Article 6 of the Convention 175 of 1994 of the ILO.
[189] Recommendation 182 of 1994.

3.2.1 International Labour Organization Convention on Home-work.

The International Labour Organization also adopted the Convention on Home-work (Convention 177 of 1996). This Convention on Homework protects the rights of the home-workers. It seeks to afford minimum protection of employment rights and social security rights to home-workers. The ILO further emphasizes the enforcement of terms agreed upon by the Contracting Parties to the Home-work Convention through Recommendation 184 of 1996 on Home-workers. It provides for equal treatment of workers or equal treatment of atypical and typical employment relationship with regard to the statutory scheme of social security.[190]

The point of departure here concerns the British regulation on the position of non-standard workers. These Conventions and Recommendations by the International Labour Organization signed and ratified by the member states of the European Union also bind the United Kingdom. They are relevant in our discussion in the sense that through the obligation arising from those Treaties and Conventions of the ILO, the member states have committed themselves to serving the needs of non-standard workers, the European Union Commission had invited all its members states to ratify the Convention through its recommendation. [191]

Apart from the International Labour Organization Conventions and Recommendations, there are also other two important Covenants of the United Nations Organization, namely the International Covenant on Civil and Political Rights of 1966 and the

[190] ILO Convention 177 of 1996 and its Recommendation 184 of 1996 on home-workers
[191] Recommendation 98/370/CE of 17 May 1998.

International Covenants on Economic, Social and Cultural Rights of 1966.[192] These two Covenants have been signed and ratified by the UK. They also provide for the rights to equal treatment and the right to access to social security.

3.3 Regulation of non-standard workers in the United Kingdom

It is important to take one of the member states of the European Union so as to assess how that state protects non-standard work. There is less to highlight about the Constitution of the UK since it is an unwritten one, there is no single document called "the Constitution", however there are ILO and UN Treaties and EU Directives, which are reduced in writing as per obligations resulting from those Regulations. Fundamental rights in the Charter also result from the constitutional traditions common to the member states. Our focus is on assessing the extent of social security coverage to atypical forms of employment, whether that category of employment relationship enjoys sufficient coverage under social security legislation? The United Kingdom has been used as a case study on how to protect and improve non-standard employment.

This study further evaluates state practices in the UK to see how Directives from the EU have been domesticated into British law. A non-standard worker in the United Kingdom is defined as:

> A large and growing area of more or less new types of employment jobs, including the jobs which are not permanent and or not full-time, such as for example, the part-time work, fixed-

[192] UN Covenant on Civil and Political Rights of 1966 and the Covenant on Economic, Social and Cultural Rights of 1966.

> term work, temporary agency work, working from home, tele-work, "on call" work, the seasonal-work, student jobs, sub contracted work and the pseudo- self employment, of the workers who are in practice bound to a single employer.[193]

The meaning was given with the aim to integrate the non-standard form of employment into standard form of employment.

The Regulations on non-standard work were partly promulgated in order to combat the residual cases of less favorable treatment across the EU, which the Directives on non-standard employment were drawn up and to provide social protection to all forms of employment.

3.3.0 Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulation of 2002

The British government promulgated the Prevention of Less Favourable Treatment Regulation of 2002. This Regulation was promulgated by the British parliament in response to the Council Directive on fixed-term work. This Regulation was promulgated purposefully to implement Council Directive in order to afford non-standard employees protection. This Regulation was designed to protect the needs of employees on fixed-term contracts.

[193] International Industrial Relations Association 4th Regional Congress of the Americas –Trade and Labour Protection- Held at Toronto, Canada June 25-28 June 2002- Social security and Atypical Employment- A European Trade Union perspective; Compiled by Martin Hutsebount-The Administrative Manager of the European Trade Union Institute.

A Fixed-term contract as defined by the latter Regulation means:

> A contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate -
>
> a) on the expiry of a specific term,
> b) on the completion of a particular task, or
> c) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him.[194]

Employees on fixed-term contracts enjoy the protection under the latter regulation. It is clear that the system in the United Kingdom affords protection to fixed-term workers. Social security protection is now extended to fixed-term work in terms of which they may enjoy coverage for work injuries, job security, unfair dismissal and any other risk that may occur to them. Employments condition of fixed-term work are regulated by this Regulation.[195] Article 8 (8) of this Regulation further provides for equal access to occupational health scheme for full-time and part-time employees.

[194] See Section 2 (two) of the Regulation of 2002 no: 2034.
[195] The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, no. 2034.

3.3.1 Part-time Workers (Prevention of Less Favorable Treatment) Regulation of 2000

With regard to part-time work the British Government has also responded to the Directive by the Council of Europe. The British Government has implemented the Directive by way of Regulation: Part-time (Prevention of Less Favorable Treatment) Regulation.[196]

The Regulation is in operation because of the Council Directive. The social partners through the process of social dialogue (Trade Union representing employees, employer s' Organization/employer 's representatives and Business of Europe) prepare a platform by framework agreements. The Council of Europe may endorse the Framework Agreement into Council Directive, then the member states will transform the Directive into national legislation through regulation promulgated by their respective Governments. The Directive sets guidelines for the member states so that they can apply directly in the territories of member states concerned. If one of the Contracting Parties to a Framework Agreement resulting in a Council Directive fails to domesticate it within the stipulated periods, the Directive will then be applicable directly to the member state concern by default or sanctions will be imposed.[197]

It is stipulated further that in recognizing workloads, part-time workers should not be treated less favorably than full-time workers, unless this treatment can be objectively justified[198]. It is clear that the British Government is in compliance with European Union Regulations concerning the treatment of the part-time workers. Article 5 of the Regulation stipulates that:

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[196] http//: www.lowpay.gov.uk/ER/pt-detail.htm.
[197] See the Vienna Convention on the Law of Treaties
[198] Information obtained from the ILO Website http://www.ilo.org. On the 08 of March 2006

> (1) A part-time worker has the right not to be treated by his employer less favorably than the employer treats a comparable full-time worker-
> (a) as regards the terms of his contract, or
> (b) by being subjected to any other detriment by any act, or deliberate failure to act of his employer.

Further than that Article 2 (b) requires employers to justify, on objective grounds, if there is unequal treatment of employees. Clearly, social security protection is being provided to non-standard form of employment.

3.3.2 Tele-work regulation in the United Kingdom

It is important to address the problems of tele-work, to ensure that there is a regulation for those employed or working in tele-work. This category of employment relationship is defined as follows:

> Tele-work is a form of organizing and/or performing work, using the information technology, in the context of/in the form of employment contract or relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on regular basis.[199]

There is a voluntary Framework Agreement signed by the social partners on tele-work. It is now a matter for each member state to regulate the tele-work. Social Partners left

[199] http://ec.europa.eu.emplyment-social-news-2002...

member states/contracting parties to a Framework Agreement on Tele-work duty to regulate this category of work at national level.

> The novelty of this agreement, concluded after 8 months of negotiations, is that for the first time an European Union framework agreement signed by the ETUC, UNICE/UEAPME and CEEP (social partners) will be implemented by their members, rather than by European Council through Council Directive.[200]

So far there is no regulation protecting those who are working on tele-work in the United Kingdom. The European Council also has not done anything so far since the negotiation by the social partners on regulating tele-work resulted in a voluntary Framework Agreement. In the premises tele-workers are not enjoying protection under social security legislation in the UK.

3.4 Summary

In this chapter social security legislation in the UK has been evaluated. It is clear that the United Kingdom has a very good system of social security capable of accommodating all categories of employment. It is on the objective of the International Labour Organization to promote equal treatment of workers. Social protection is an aspect of sovereignty which the contracting parties have surrendered to the EU. Both stakeholders to the employment relationship play a pivotal role in the law-making process. The United Kingdom has responded fairly well to the Directives promulgated by the Council of Europe. The Charter of Social Rights and the Charter of Fundamental

[200] www.ivc.ca/studies/European.html.

Rights reveal the constitutional traditions of the contracting parties, i.e. (UK Constitution).

In the next chapter the study focuses on comparing the two systems in the hoping of drawing out the major differences and similarities in the two systems. The next chapter brings to the attention of the study lessons from the United Kingdom.

CHAPTER FOUR: COMPARATIVE PERSPECTIVES

4.0 Introduction

This chapter seeks to highlights the difference and similarities in the regulation of non-standard work in the two legal systems under investigation. It is now proposed to synthesize our strands of thought and underlying themes, with the aim of establishing what is there to be learnt from the two systems for the purpose of adaptation to the material conditions of South Africa and within the SADC region. This study identifies the advantages and the disadvantages of both systems of social security in the United Kingdom and in South Africa, with the aim of recommending changes in the South African legal regime on non-standard employment relations.

4.1 The similarities in the regulation of non-standard work in South Africa and the United Kingdom legal systems.

It is also important to highlight that both countries have signed the relevant UN Covenants and Conventions[201] on human rights. However these Covenants provide for general equal treatment and social security rights. The United Kingdom has also ratified the Covenant on Economic, Social and Cultural Rights. The other important aspect which is similar in both systems is that, the UK and RSA follow dualism in relation to treaties. Treaties do not automatically alter domestic relations in the absence of an Act of Parliament incorporating such treaties into domestic law in South Africa Section 231 of the Constitution is applicable to international agreements.

[201] The Covenant on Economic Social and Cultural Rights and the Covenant on Civil and Political Rights

According to the definition of a non-standard work, in the United Kingdom non-standard work is defined as follows:

> It is commonly used to refer to a large and growing area of more or less new types of jobs, including the jobs which are not permanent and or not full-time, such as for example, part-time work, fixed-term work, temporary agency work, working from home, tele-work, "on call" work, seasonal-work, student jobs, sub-contracted work and the pseudo-self employment, of the workers who are in practice bound to a single employer.[202]

The definition is almost similar as compared to the definition of non-standard work in the South African perspective. The EU Framework Agreement on fixed-term work also defines fixed-term work as follows:

> A fixed-term contract means a contract of employment that, under its provisions determining how it will terminate in the normal course, it will terminate –
>
> (a) on the expiry of a specific term,
>
> (b) on the completion of a particular task, or
>
> (c) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him.[203]

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[202] Martin Hutsebount, Administrative Manager of the European Trade Union Institute, International Industrial Relations Association 4th Regional Congress of the Americas – Trade and Labour Protection- Held at Toronto, Canada June 25-28 June 2002- Social security and Atypical Employment – A European Trade Union perspective.2002.

[203] See Section 2 (two) of the Regulation of 2002 NO: 2034.

The definitions in the study are almost identical, what matters the most is the extent of protection afforded to non-standard employment. Non-standard employment is less regulated in South Africa. There is no sufficient provision of social security protection afforded to non-standard employment.

4.2 Dissimilarities in the regulation of the position of the non-standard workers in South African Labour law.

In terms of social security protection to non-standard workers, coverage under the United Kingdom is not a serious problem unlike here in South Africa. A sufficient majority of South Africans rely on informal social security.[204]Informal social security provides a means for survival but does not constitute a sustainable option to provide long-term solution to their needs and calamities. The informally employed do not, as a rule, have a regular source of income and cannot therefore provide for their own social security insurance, which makes them exceptionally vulnerable.[205]

In South Africa the Labour Relations Act protects fixed-term work from unfair dismissal. The minimum protection that the Labour Relations Act is affording to non-standard employment (fixed-term work),is to provide as follows:

> A dismissal takes place in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms and the employer offers to renew it on less favorable terms or did not renew

[204] Dekker. Ibid n7 p 559.
[205]Olivier Op cit n5 218p 23.

it that is deemed to be unfair dismissal.[206]The protection for non-standard employment is provided for in the Fixed-Term Work (Prevention of Less Favorable Treatment) Regulation 2000.

South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights. That poses a challenge to the South African social security system. There is a need to align SA social security legislation with international and regional standards.

The system that South Africa is using is exclusionary in the sense that social assistance in terms of the social protection is not universal.[207] In terms of social security legislation coverage is based on employee and employer relationship.

If you are not an "employee" in terms of the social security legislation, you are excluded. The Unemployment Insurance Act[208] may provide for coverage of some of the employees in the informal sector or the unemployed, however the coverage in terms of the latter legislation is based on the employee's contribution. The fund[209] may be exhausted along the way as the fund is aiming at the integration/re-integration of the unemployed into the labour market, not to provide lifelong social protection[210]as a long term solution.

[206] Section 186 (1) b of the LRA
[207] Social Assistance Act 59 of 1992.
[208] Refers to Act 63 of 2001.
[209] The Unemployment Insurance Funds, as it is a temporary relief measure for the person who suffered as a result of loss of employment.
[210] Mpedi, L.G (Un) Employment Protection In South Africa (From: Redesigning the South African Unemployment Protection System: A Socio Legal Inquiry (LLD thesis, University of Johannesburg, 2006), p 12.
[210] Mpedi Ibid n220.

> One of the curious characteristics of social legislation in South Africa remain the exclusion of categories of persons from the ambit of the definition of employee or similar term contained in relevant laws, even though these persons would otherwise perfectly fit the notion of being employees. [211]

Further than that, some of the people in South Africa are excluded from the social security legislation not because the legislation precisely excludes them from coverage but only because there is no statutory compulsion to participate, or legal obligation to participate in particular schemes or programmes of social security which are aiming at protecting people against certain social risk.[212]

The most vulnerable section of workers in the informal economy belong to the street vendors and home-based workers followed by contributing family workers with or without payment.[213]

The limited nature of protection in terms of the South African social security system has, therefore, affected the poor, as well as the informally employed and structurally unemployed amongst them in particular. This stems from the fact that social insurance legislation, notably the Unemployment Insurance Act[214] and Compensation for Occupational Injuries and Diseases Act, [215]as a rule, do not provide coverage to those outside formal employment.[216] An analysis of the social security system confirms that

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[211] Olivier Ibid n5 p345.
[212] Olivier Ibid n16.
[213] Information obtained from the ILO Website http://www.ilo.org. On the 08 of March 2006.
[214] Act 63 of 2001.
[215] Act 30 of 1993.
[216] Olivier Ibid n 5 p130.

several categories and groups can be regarded as excluded and/or marginalized in terms of the present system. These include the unemployed (both in temporary and structural sense).[217]

Article 6 of the Part-time Work Convention provides, inter alia, that:

> Statutory social security schemes, which are based on occupational activities shall be adopted so that part-time workers enjoy conditions of employment equivalent to those of comparable full-time workers, it further states that those conditions may be determined in the proportion to the hours of work, contributions or earnings or through other methods consistent with national laws and practice.[218]

That clearly indicates the intention to cover all the categories of employment despite the employee's category.

4.3 Potential lessons from the United Kingdom system.

The European Social Charter goes beyond other instruments in the sense that it is the only treaty to address all aspects of social protection system. In addition to the right to social security, the Charter provides for the right to social and medical assistance and the right to benefit from social services.[219]

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[217] Olivier Ibid n 5 p 131.
[218] Article 6 of the Convention 175 of 1994 of the ILO.
[219] Article 6 of the Convention 175 of 1994 of the ILO

The Charter of Fundamental Rights of the European Union[220] is potentially of great significance, since it includes within its sphere of coverage workers (without making distinction between formal sector workers and the informal sector workers. It regulates the position of workers in terms of social protection more comprehensively than those who do not work. It is of great significance to note that the system of social security protection in the European Union is inclusive, in the sense that everyone is able to enjoy social security protection.[221]

As indicated earlier in the case of Nicole V Peek and Cloppenburg GmbH and Co. KG[222], the European Court of Justice held that, part-time and full-time workers deserve equal treatment regarding access to employment, vocational training, promotion and working conditions. The decision heavily relied on the provision of Part-time Work (Prevention of Less Favorable Treatment) Regulation 2000.

Most countries with high-levels of social security protection have a second layer of unemployment benefits, usually called unemployment assistance. This layer covers workers who have exhausted their entitlements to unemployment insurance and provides them with a grace period before they come within the purview of less generous social assistance schemes.[223] In order to preserve the dignity of the human being, appropriate social assistance should be rendered.

In this study especially the UK system of social security is comprehensive, inclusive, coordinated and integrated. Employment and social security laws cover every individual in the UK in order for British citizens to live a dignified life. There is little

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[220] Official Journal of the European Communities .18.12.2000.

[221] See Article 34 of the Social Charter Fundamental Rights, European Union. Council of Europe publishing.

[222] Nicole V Peek and Cloppenburg GmbH and Co. KG C- 313/02.

[223] ILO World Labour Report, 2000-June –21, entitled, Most World Lacks Unemployment Insurance: Social Protection System under Strain,. Geneva, 2000.

exploitation unlike in South Africa, considering tele-workers who are not protected at all.

The British people are divided into different categories for the purposes of benefits of labour law and social security,

Category A: children

These are persons between the ages of 0- 18 years, they are not regarded as fit and proper person to work. There is legislation and agreements which prohibit and condemn child labour. Those who are legally within the boundaries of Europe are entitled to social security, however it depends from one country to the other. The U.K provides for child support grant to this category of persons.

Category B: Unemployed persons

The state provides basic income grants to unemployed persons. This differs from unemployment insurance in South Africa, as it does not provide life long solution to the problem of unemployment. The Unemployment insurance fund aims to helping those who have lost employment to be reintegrated into the labour market.

Category C: Employees

These are further divided into different sub-categories, our interests is on these categories. These categories are entitled to payments from their employers or prospective employers. In the event that the salary is lower than the prescribed threshold the state assists with some social security benefits; labour and social security

law also provides protection for them. They enjoy most of labour law rights and social security rights.

The European Union and the United Kingdom have influenced social security programmes and systems in the developing countries.[224]South Africa incorporated many of these elements into its social security system during the formative years of this country's constitutional dispensation.[225]

The idea of 'social security' implies that people ought to be able to feel secure. This involves not only being protected against poverty, but being protected against the hardships that may arise through a change in circumstances.

4.4 Advantages of the South African Social Security System

The main advantage of the South African system of social security are that, there is constitutional embodiment of social security rights. The manner, in which the Republic of South Africa approaches international law is user-friendly. The country has been admitted in the international arena for well over ten years now. The economy is promising and our democracy is still young.

4.5 Disadvantages of the South African Social Security System

The South African system of social security is not comprehensive and integrated. People are living in poverty. There is an increase in the rate of crime as a poverty-related factor. People in our country are being dehumanized by existing poverty cycle

[224] Midgley et al Challenges to Social Security in Developing Countries: Coverage and Poverty in Zimbabwe. 1996 and also see Midgley et al Challenges to Social Security. An International Exploration. Westport, Connecticut: Greenwood Publishing Company: 103-122.

[225] Op cit p 239

as the Government is not addressing their needs. The majority of the people working in non-standard work are lacking protection.

There are also no effective remedies at the disposal of the courts in terms of socio-economic rights, given the capacity of resources and other equally competing claimer. There is lack of sufficient budgetary support to finance social security. Labour laws do not protect both non-standard and standard workers equally in the premises.

4.6 Advantages of the United Kingdom system of social security

The British system of social security has an integrated and inclusive framework which protects its citizen from poverty. The system is coordinated within the European Union system. There is adequate regulation at national and regional levels for the benefits of British citizens. The benefits are extended to all the workers despite being engaged in formal and non-formal employment. There are also policy-based programmes and legislative measures in the area of social protection which are being implemented.

4.7 Disadvantages of the United Kingdom system of social security

People tended to rely on social security, as there is sufficient coverage. Social security has obvious budgetary implications as they are spending a lot on funding social security schemes.

4.8 Summary

It is clear that the South African legal system does not extend social protection to non-standard workers in South Africa. There is so much promise from the progressive provisions of and enlightened stances adopted by South African Constitution, statutory enactments and administrative law regime. And yet it would appear that these remarkable developments are qualified by serious deficiencies in the service delivery system and insufficient access to the grants system of social security protection to non-standard workers.

Certain workers are specifically excluded. These are the matters which requires urgent attention by policy makers and law-makers alike.

The alternatives, it is suggested, would do a grave injustice to the most vulnerable members of South African society, who are denied access to a system, which has a real potential to provide a basis for truly dignified life. Human dignity must be inviolable and it is the duty of state to provide for its people when they are most vulnerable. A lot remains to be achieved by way of policy and law reform before we can have universal system of social security protection whether that is feasible in the short to medium terms is another matter.

South Africa needs to remove unnecessary exclusions and develop a comprehensive framework, adopt holistic and integrated approach needed to give effect to the constitutional right of access to social security. South Africa needs to align the position of non-standard workers in line with the international law obligations and constitutional requirements. This in turn, calls for the realignment of informal social security

frameworks with the formal social security system. This can be done through ratification of CESCR to at least realise the so-called "minimum core obligation", hence a right to access to social security must still be developed. The most important of these matters, which requires intensive legal reform, relates to finding ways and means of achieving meaningful and progressive extension of social security protection to the millions who are, due to very nature of the system, excluded from social security framework. It is very disappointing to have system of social security which still excludes the most vulnerable categories of workers from statutory protection. The next chapter focus on the findings of the study and the recommendations to improve or accelerate service delivery in the area of social security and social assistance.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion

The main problem with the current social security system is that it was for the most part not designed to address the needs of the informal sector. Since it is based on the employee relationship, it normally requires the payment of amounts much higher than what workers in the informal sector can afford. Another reason why the mere extension of tradition (formal) social security mechanisms may not be feasible is because the African people, especially in rural communities, have a strong sense of pride in their own traditions and functioning of their communities, and thus often resist changes imposed on them from the outside and which do not evolve from the communities themselves.[226]

Social assistance benefits often fail to reach the intended beneficiaries due to, among others, social stigma, ignorance, complicated application procedures and excessive administration discretion.[227] It should be stressed that social assistance benefits do alleviate the impact of unemployment. In similar vein the progressive extension of social assistance grants, in terms of value as well as the scope of coverage could play an important role in an endeavor to alleviate poverty, which is one of the direct consequences of unemployment.[228]

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[226] http://www.issa.int/pdf/anvers03/topic2/2olivier.pdf.
[227] ILO Social Security: Issues, Challenges and Prospects (ILO (2001)) 66.
[228] Streak et al Fitting the Pieces Together: A Composite View of Government's Strategy to Assist the Unemployed in South Africa 1994 –2004 {IDASA (2004)) 32-33.

As far back as 2002, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa suggested that:

> it is necessary to develop a common framework and a charter on social protection and to ensure that a consistent approach is implemented. Thirdly, it will be necessary for South Africa as a SADC member state to engage actively in promoting the social protection dimension of SADC integration and interdependence. Fourthly, active involvement in developing acceptable baseline standards in the area of social protection for the region is required.[229]

These standards should be implemented with reference to the particular socio-economic status of each member country as suggested above.

Finally, it will be necessary for South Africa to adopt measures aimed at co-coordinating its social security system with those of the other SADC member states, this can be done either bilaterally and / or (preferably) multilaterally.[230]

One has to conclude that the position in social security law of SADC citizens migrating within the region are poorly regulated, specifically those in non- standard employment, there is discrimination of fixed-term workers who return home at the end of their contract. It would also appear that, barring a limited number of exceptions, SADC member states are not yet linked to the network of bilateral and multilateral conventions on the co-ordination of social security.[231] That is also a constitutional challenge, there is a huge distinction between non-standard forms of employment and the standard forms

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[229] Olivier Ibid n5 p 344.

[230] Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002), Transforming the present- Protecting the Future: Consolidated Report. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa

[231] Mpedi Op cit n 75 p 153

of employment makes them vulnerable to exploitation. The other problem is that policy makers and all those in legislative drafting are aware of the existing problem facing the non-standard workers.

5.1 Challenges

It is generally accepted in the Republic of South Africa, that there is a high rate of unemployment and lack of social security coverage amongst the unemployed. There is also a serious problem of a growing shift towards non-standard work (atypical employment) from formal sector work. Businesses consider atypical work to be an important element of a flexible labour market.[232] The poor are becoming poorer as the results of reduction in income, which is caused by loss of formal sector work and the increasing use of atypical forms of employment. It must further be kept in mind that the current system will reinforce the existing poverty circle where the poor will get poorer. Exclusion and marginalization in South African social security may be the result of the lack of a legal obligation to participate in a particular scheme or programmes aiming at insuring workers against certain social risks. Membership of occupational retirement funds (i.e. provident and pension funds) serves as an example. There is no statutory compulsion to belong to a pension or provident fund, resulting in around 40% of the economically active population in South Africa not being covered[233]. This has a detrimental effect on the state social assistance system. The Labour Law is discriminating and excluding non-standard workers. Efforts to co-ordinate, harmonize, and integrate social security systems in South Africa and SADC is singularly lacking. A

[232] Olivier Ibid n04 p93.
[233] Olivier "Critical issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Maginalised" 1999 Industrial Law Journal (South Africa) p 2199-2212.

further problem is that employees in the informal sector at times work under very dangerous and unhealthy conditions. On the other hand, the formal sector is generally shrinking, social assistance usually lacks a constitutional and statutory basis with the result that social assistance is often seen as a matter of discretion, and not as a right.[234] Many cases of bad practice towards workers might relate to companies failing to comply with their existing obligations (e.g. minimum wage) or contractual issues rather than the workers 's lack of access to statutory rights applying only to employees as defined by the social security legislations. The non-standard employment does not enjoy legislative protection in South Africa. There is a need to extend social security protection to cover those employed in non-standard employment.

5.2 Recommendations

The study recommends that a priority be given to schemes specially designed to meet the needs of informal sector workers. Government support is deemed "indispensable" in the effort and a possible starting point would be the extension of statutory social insurance schemes "toward increased - and possibly universal – coverage". The three main options towards meeting the goal include extension of existing programmes, creating new programmes, which target informal sector workers and the development of a tax-financed social benefit systems. The Government could also introduce compulsory social security coverage to all employees including the categories in which women are heavily represented (e.g. domestic and part-time workers).

The starting point in the effort to strengthen non-formal social security systems and schemes is recognition by governments that non-formal social security schemes are

[234] Olivier Ibid n5 p33-34 p09, Para 2

providing social security protection to the majority of the people. Governments also need to accept that formal social security schemes as currently conceptualized and designed do not capture the poor who constitute the majority of the population.

The following are pertinent:

- Providing training to members of mutual support schemes in order to improve the management of these schemes.
- Provision of financial assistance by the government and non-government organizations in order to improve their financial base and thereby enhance their capacity to provide better social protection.
- Widening the scope of non-formal social security systems in order to enhance social protection
- Introducing linkages with formal social security schemes so as to improve social protection. This would make it possible for non-formal social security schemes to incorporate the social insurance principle of risk-sharing.
- Introduction of a social security tax, to finance the envisaged social security system and to enable it to be inclusive, integrated and comprehensive.
- Widening the definition of an employee in order to accommodate those in non-standard employment relationship.
- Harmonization of the system of social protection by properly regulating the movement of citizens of SADC countries by allowing them to have protection as long as they are legally within the boundaries of South Africa, for example, migrant contract workers who normally return home country at the end of their contract.

- Coordinating the systems of social security, in South Africa and SADC region. SADC member states need to create and observe/comply with the SADC rules so as to enable their citizens to enjoy full and equal protection and benefits of law within their respective countries and the region at large.
- Ensuring compliance with international standards. There are important Conventions setting minimum standards, South Africa should have them as a guiding documents in working towards an integrated and inclusive framework of social security. South Africa must sign and ratify treaties which are aiming at protecting its citizens and ensuring that they live dignified lives in peace, contributing to increase commitment and responsibility towards serving the needs of our people.

In conclusion, it is important to note that social security will remain a dream for the poor unless efforts are taken to expand and strengthen non-formal social security schemes. Confining government efforts to formal social security will only serve to exacerbate existing inequalities between the rich and the poor

Van Ginneken mentions three basic options as to how governments can promote social security for the informal sector:

> Assisting informal sector workers setting up their own social insurance schemes: Setting up social assistance schemes aimed at people in need and reforming the formal social insurance schemes in order to accommodate regular workers as well as casual and some self–employed workers.[235]

[235] Van Ginneken "Designing Pilot Projects in Social Security for the Informal Sector: Investigating the Feasibility of Pilot Projects in Benin, India, Elsalvador and Tanzania",(Discussion on Paper 5 Geneva) Geneva :ILO

There is a need to design social security schemes that are suited to the needs and contributory capacity of the rural poor instead of merely extending statutory social security programmes trying to accommodate the rural poor. The study finds that, poor rural people are the same people who work under atypical employment, the majority of whom cannot be easily integrated or if after the end of their employment contract cannot be reintegrated easily into the labour market. This can be achieved by specially designing social security schemes for the rural poor and extending the existing formal social security paradigm to incorporate the rural poor. Transformation of the present social security framework should, therefore, aim at supporting and strengthening informal social security with the view to enhancing solidarity. In the first instance this requires considering ways and means of integrating currently excluded groups into formal schemes.

The definition of "work" should be extended in order to accommodate most of the people currently in informal employment in the formal sector.

This will enable more informal sector employees to be incorporated into the formal social security structures. A modified definition of "work" could also lead the way in transforming the traditional Western idea of social security into a usable definition of social security in the South Africa context.

- Mutual support options, which also endorse a multi-dimensional approach by suggesting a combination of measures, that is, in the first instances this requires considering ways to integrate currently excluded groups into formal schemes aimed at supporting informal social security mechanisms, removing unnecessary legal restrictions in relation to access to schemes, devising tailor-

made schemes to cater for those excluded and marginalized categories and groups.

- The scope of coverage of existing informal support mechanisms should be extended to also cover other contingencies, Voluntary participation in formal schemes should be allowed.
- There is the need for the proper research and awareness basis, to promote and develop cost-effective social assistance and to reform the statutory (formal) social insurance schemes in order to extend their coverage to larger groups of regular and casual workers. The involvement of all social partners in the design and execution of a comprehensive social security policy is important.
- The government should recognize and acknowledge the importance of informal social security networks, they should then be strengthened by means of training in aspects of financial assistance and management skills. Linkages with the formal social security framework and instrument should also be established.
- Developing micro-finance within social protection programmes (inclusive of micro –savings and micro insurance) as well as developing new models around a combination of community-based arrangement (insurance) that will meet both financial and social sustainability criteria.
- State involvement and non-state actors, that is, NGO'S, semi formal and traditional arrangements of informal social security.

Risks should be defined in a non-restrictive manner in order to allow for a number of contingencies that may occur. This is relevant in order to reflect the tension between the future and immediate risks; therefore it is important that the proposed definition of informal social security should, allow for reference to risks as well the needs. Social

insurance should, where possible, be feasible, be extended where possible to include as many of the employed as possible. However, certain groups of workers are likely to remain excluded due to the location of this workforce – for those workers other arrangements for providing social security are proposed. Coverage of social assistance grants should be urgently widened to relieve the income poverty of many who will not be rescued by policies designed to stimulate gainful labour market insertion. Indirect social protection should be fostered by the deployment of every policy instrument that can help to do so.

- Policy instrument to address the problems of poverty and unemployment/ employment must be monitored and evaluated.

The ILO insists that these groups of workers should be assisted through employment in labour-intensive infrastructure programmes - feeder roads, land reclamation, minor dams, wells and irrigation systems, drainage and sewerage, schools and health centres. Employment provided under such programmes can be organized so that workers can obtain an employment guarantee for a number of days per year. This study recommends proper regulation, protection, and social security assistance to non-standard forms of employment.

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