

INFORMALITY, EMPLOYMENT AND SOCIAL PROTECTION: SOME CRITICAL PERSPECTIVES FOR/FROM DEVELOPING COUNTRIES

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1. Introduction

This paper reflects on the extension of social security coverage to the informal sector in developing countries.¹ It starts by providing a brief profile of the informal sector in terms of definition, magnitude and characteristics. It further discusses the challenges of extending social security coverage to informal sector workers with a particular focus on the conceptual limitations and the constraints emanating from the social security regulatory and institutional framework. It then discusses the possibilities for extending social security coverage so as to bridge the existing social security gap. The study considers the various opportunities for extending social protection coverage and observes that despite the complexities of extending social security coverage, it is possible to do so through a variety of approaches, for example, by using contractual tracking approaches to determine the existence of a hierarchical relationship of work which would require regulatory responses. Other approaches include widening the sphere of social security coverage; adopting complementary/tailor-made institutional arrangements; specialized contributions, eligibility criteria and benefits regimes; and also innovative expressions of the human rights framework. Finally, it looks at the possibility and prospects for invoking a new approach to international standard-setting, -implementation and -enforcement.

2. Definition, size and characteristic of the informal sector in developing countries

The term ‘informal sector’ is not uniquely defined. When it was used for the first time in a research paper by the ILO for purposes of the Kenyan context in 1972, no specific definition was attached to it. Rather, it was used as an ‘analytical terminology to describe the duality in the labour market.’² From this time, researchers and analysts have ventured into attaching an appropriate meaning to this term but they are yet to reach a consensus on the appropriate conceptual or operational meaning.³ This notwithstanding, the term has gained considerable recognition and is used in a variety of fields including law, economics and developmental studies.

A proposition has also been put forward by Reynaud for replacement of this term with the broader term “informal economy.”⁴ This proposition which is primarily based on the multi-faceted activities nature of this sector, raises an argument that the word "sector" can no longer be sustained because the work in what is categorized as ‘informal sector’ covers all sectors and all categories of workers: wage earners, the self-employed, home workers and unpaid family workers. Thus, the term “informal economy” would be more appropriate as it takes account of the considerable diversity of workers and economic units in different sectors of the economy and across rural and urban contexts. However, both these phrases fail to fully

¹This paper is to a large extent based on a report produced by the first author, Marius Olivier, for the International Social Security Association (ISSA), and has been adapted for purposes of the contribution: see Olivier M, “Informality, Employment Contracts and Extension of Social Insurance Coverage” (Report prepared for the International Social Security Association (ISSA)), (2009) (A study produced under the ISSA Project on "Examining the Existing Knowledge on Social Security Coverage Extension", Working Paper No. 9 International Social Security Association, Geneva) – available at

<http://www.issa.int/content/download/91354/1830644/file/2-paper9-Olivier.pdf>

² International Labour Office (ILO), *Employment, incomes and equality: A strategy for increasing productive employment in Kenya*, Geneva, 1972, at 503.

³ Zimmer, S & Höffer, E.-M. (2009). "The challenge of occupational diseases in developing countries: Exemplary observations and good practice proposals from a cycle of seminars in four continents", in *International Journal for Social Security and Workers Compensation (IJSSWC)*, 1: 10.

⁴ Reynaud, E. (2002) “*The extension of social security coverage: The approach of the International Labour Office*”, Social Security Policy and Development Branch- ESS Paper No. 3, Geneva: International Labour Office, at 2).

encapsulate the nature of what they are explaining. Activities within the informal sector fall into a variety of sectors, often with no similarities, whilst "informal economy" fails to illustrate the significant grey areas between the informal and formal economy.⁵

It is sometimes maintained that the informal sector definition debate takes into account some form of formal accountancy. Through this approach, the informal sector is distinguished from the formal sector which normally employs the use of modern accounting techniques, with employees receiving payslips – written accounts in personal books through formal accountancy. Another possible approach is that which considers an individual as part of the sector in which he or she is employed whereas in the informal sector the individual is considered in the sector relevant to his or her contract. According to this approach the informal sector is conceptualized by individuals rather than enterprises.⁶ However, the broader definition adopted by the Fifteenth International Conference on Labour Statisticians (ICLS) conceptualizes the informal sector (also) with reference to enterprises.⁷

Amidst this debate, there is a growing recognition, to some extent, that informality implies the absence or non-application of a regulatory (legal) framework. Yet, this raises a range of fundamental challenges. One of the challenges flowing from this approach pertains to the nature or extent of the absence or non-applicability of legal regulation. Would it be proper for instance to categorize a worker who is covered, for example, by tax and property laws, but not by labour and social security laws as an informal (sector) worker?⁸ A possible challenge is that the use of this approach as a benchmark is likely to trigger different categorizations of workers who are working in the same sector. Certain categories of workers in a particular country, for example, domestic workers or own account workers involved in informal trade, could be deemed to be informal, while workers involved in similar regulated occupations in another country may be regarded as operating in the formal economy. This could, of course, have a rather skewed impact on developing and interpreting formality/informality statistics and associated responses.⁹

With regard to the size, the informal is predominately large and rapidly growing compared to the formal sector. It currently constitutes the majority of the working population in developing countries.¹⁰ In Kenya, for example, informal employment rose from barely 10 per cent in 1972 to about two-thirds of all urban employment in 1996.¹¹ In the Southern African Development Countries (SADC) the size of informal employment is correspondingly

⁵ Olivier M, "Informality, Employment Contracts and Extension of Social Insurance Coverage" (Report prepared for the International Social Security Association (ISSA)), (2009) (A study produced under the ISSA Project on "Examining the Existing Knowledge on Social Security Coverage Extension", Working Paper No. 9 International Social Security Association, Geneva), at 5 available at <http://www.issa.int/aiss/content/download/91354/1830644/file/2-paper9-Olivier>.

⁶ Bocquier, P. (2005) "*Informal Sector Versus Informal Contracts in Nairobi, Kenya*", DT/2005-10, Paris: DIAL, pp. 9–10.

⁷ Resolution concerning statistics of employment in the informal sector, adopted by the Fifteenth International Conference of Labour Statisticians (January 1993)

⁸ Chen, M., Jhabvala, R. and F. Lund (2002) *Supporting Workers in the Informal Economy: A Policy Framework* (ILO Working Paper on the Informal Economy, 2002, pp. 13–15

⁹ Olivier (2009) at 4.

¹⁰ Quinlan, M. (2003) *The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge* (paper) (Australian Council of Trade Unions, 2003) 2-3.

¹¹ Reynaud, E (2002) at 2.

alarming. In some of the countries the proportion is as high as 90 per cent¹² compared to the approximately 10 to 20 percent of the economically active population in the formal sector. In other parts of sub-Saharan Africa the figures are also generally high and reflective of the number depicted above. About 72 per cent of all non-agricultural employment in the region is informal. The situation is more or less similar for other parts of the developing world. In India, for example, a total of 423 million workers, an equivalent of 92 percent of the total work force are in unorganized work. In Asia, the size of the informal economy is between 45 percent and 85 percent, whereas in Latin America it represents 55 percent.¹³

This is contributed to by multiple reasons including, but not limited to, inability of the formal economies in these countries to create jobs and to absorb the new job entrants and the impacts of structural adjustment programmes (SAPs).¹⁴ Other reasons include poverty and the racial and discriminatory policies pursued in colonial times, particularly in Africa, whereby the majority of Africans were excluded from participating in the formal labour market.¹⁵ The increasing job insecurity and precarious conditions of work are also directly responsible for the rapidly growing informalization. As a way of containing competitive pressures and retaining competitiveness, enterprises resort to mixed-mode labour arrangements in which “observance of labour regulations for a number of workers is combined with the use of non-standard, atypical, irregular, precarious...” and other similar types of labour or various forms of subcontracting.¹⁶

The informal sector is not only growing but also dynamic in terms of characteristics. This has contributed to a debate as to what are its true characteristics. That debate falls outside the scope of this paper and hence will not be advanced here. Suffice it to point out that the informal sector in developing countries is said to be, by and large, fragmented, encompassing an array of profile of people and economic activities, including (but not limited to) home-based work, street vendors, entrepreneurs who employ other workers and self-employed persons.¹⁷ In Africa, for example, the informal sector is dominated by trade-related activities with services and manufacturing accounting for only a small percentage of this sector.¹⁸ Another defining characteristic of this sector is that it accommodates an array of persons, some of whom were previously employed in the formal sector, with a notably high proportion of women. Studies point out that the informal sector, while it employs both men and women, is more accessible by female workers because of its flexibility which, different from the formal sector, allows women to work without necessarily depriving them of their ability to attend to family responsibilities. Others associate this sector with low wage, low education,

¹² Fenwick, C. & E. Kalula (2005) *Law and labour market regulation in East Asia and Southern Africa: Comparative Perspectives*, 2005 at 4.

¹³ Sankaran, K. (2008) *Legislating for the Informal Economy: The challenges for labour law* (Paper presented at the Fifth African Regional Congress of the IIRA (International Industrial Relations Association), Cape Town, South Africa, 28-30 March 2008, also see Olivier (2009) at 6-7.

¹⁴ Olivier, P. (2009) at 7.

¹⁵ Mhone, G.Z. and Kalula, E.R. 2001. Report of a study on the formulation of policy objectives, priorities and strategies for the SADC, prepared for the Southern African Development Community (SADC) Employment and Labour Sector (ELS).

¹⁶ Hussmanns, R. (2001) *Informal Sector and Informal Employment: Elements of a Conceptual Framework*, ILO/WIEGO Workshop on Informal Employment Statistics in Latin America (Santiago/Chile, 16-18 October 2001), at 2, available at <http://previous.wiego.org/publications/Hussmanns-IEpaper%20for%20lac%20event.pdf>.

¹⁷ Xaba, J. et al (2002) *The Informal Sector in Sub-Saharan Africa, Working Paper on the Informal Economy*, ILO, at 13.

¹⁸ Verick, S, (2006) *The Impact of Globalization on the Informal Sector in Africa*, United Nations Economic Commission for Africa (ECA) and the Institute for the Study of Labor (IZA), at 5.

poor working conditions, precariousness and decent work deficit.¹⁹ There are also notable variations in terms of the nature of the enterprises in this sector, ranging from household enterprises, informal own-account enterprises and employer owned enterprises.²⁰

3. Reasons for limited social protection coverage

3.1 The insufficiency of the traditional social security concept

Social security coverage is extremely insufficient particularly in the developing countries. It is recorded that whereas, in the industrialised nations more than 90 per cent of the population is covered by various forms of state or market-organised social security systems,²¹ in sub-Saharan Africa and South Asia only 5 to 10 per cent of the active population are covered by social security schemes.²² In general only 20% of workers enjoy adequate social security coverage worldwide.²³

This insufficiency partly emanates from the very concept of social security as it has found its way into national legal systems and policy frameworks, and largely also in international and regional instruments. Traditionally, the concept as is the case with social security schemes established in developing countries draws a relatively strict distinction between formal employment-based social insurance and poverty-related social assistance instruments.²⁴ The former rarely applies to informal workers, while the latter is more often, not available to the majority of these workers in the developing world. As a result of this, and the inherent biasness towards the formal sector, social security systems reach only a small percentage of the population in the developing countries.²⁵

Secondly, the traditional categories of contingencies: retirement, sickness, unemployment, employment injuries and diseases and maternity, which largely inform international and regional social security standards and which form the basis of social security schemes in developing countries are largely incompatible with the realities in these countries.²⁶ While these risk categories may be helpful in identifying more common life experiences and the situations to which human beings are generally exposed, they are not suited to extending social security to informal sector workers because they prioritize state-regulated and formal social security as opposed to non-formal and non state-regulated social security arrangements which service the majority of the workers in the informal sector.

In addition, the risks enumerated in the ILO definition are individual-centred, concentrating on protecting the individual from insecurity that may affect him or her. They largely ignore the common collective risks which normally befall informal sector workers in developing

¹⁹ Xaba, J (2002) 13-14.

²⁰ Resolution concerning statistics of employment in the informal sector, adopted by the Fifteenth International Conference of Labour Statisticians (January 1993)

²¹ Jutting, J (1999) *Strengthening Social Security Systems in Rural Areas of Developing Countries* (Centre for Development Research, Bonn: ZEF Discussion Papers on Development Policy, at 12.

²² Olivier M (2009) at 3.

²³ Reynaud, E. *The extension of social security coverage: The approach of the International Labour Office*, Social Security Policy and Development Branch - ESS Paper No. 3, Geneva: International Labour Office (2002) at 1, available at <http://www.socialsecurityextension.org/gimi/gess/ResShowResource.do?resourceId=874>

²⁴ ILO (1989) *Introduction to social security*, Geneva: International Labour Office, at. 3-5; Pieters, D. 1993. *Introduction to the basic principles of social security* (London, Kluwer1993, p. 5).

²⁵ Olivier, M (2009) at 3-4.

²⁶ Jutting, J (1999) at 2.

countries such as war, crop failure and natural disasters.²⁷ As observed by Jutting, ‘risks enumerated in the ILO definition refer to a specific ecological and socio-economic setting found in developed countries.’²⁸ The definition also gives a wrong impression that those who are affected by the contingencies work in the formal labour market. Persons in irregular non-formal employment are therefore consequently excluded.

Finally, there is a wrong presumption that ‘the members of society have already reached an acceptable standard of living which has to be protected.’²⁹ Hence, the risks concentrate on protecting the individual from insecurity that may affect him or her. Primarily, the role of social security has exclusively focused on maintenance and redistribution of income as opposed to poverty reduction. This is rather unfortunate. The reality in developing countries, Africa in particular, indicates that the majority of people live in abject poverty and they need to be uplifted to an acceptable standard of living.³⁰ Most of the social security systems in developing countries overwhelmingly focus on compensation, giving only little or no attention to remedial measures which are more likely to provide long-lasting solutions.

3.2 Limited relevance of international standards

It has often been remarked that international labour and social security standards emanating from the ILO instruments generally apply to informal workers as well, also and in particular within the framework of the ILO’s Decent Work Agenda.³¹ In fact, few ILO Conventions and Recommendations have been developed specifically with certain informal sector groups in mind, for instance the Plantation Convention 110 of 1958, the Home Work Convention 177 of 1996, the Job Creation in Small and Medium-sized Enterprises Recommendation 189 of 1998, and the Part-Time Work Convention 175 of 1994.

On the other hand, ILO standards incorporate certain conditions which directly affect their relevance and efficiency in this area. Firstly, the ILO standards on social security contain exemption clauses, ideally conceived to encourage the adoption of the particular instruments, which can be used by ratifying countries to withhold the application of a particular Convention for particular groups of people or to adopt lower standards in relation to categories of benefits on the basis of perceived difficulty in complying with certain provisions of the Convention.³² Flexibility arrangements are also allowed in respect of the benefit categories provided for in the "mother" Convention, Convention 102 of 1952 on Minimum Standards (Social Security).³³ Allowance is made in this Convention for countries to accept obligations in respect of only three of the nine benefit categories provided for in the Convention.³⁴ While this flexibility may encourage ratification of Conventions by developing countries, it risks excluding informal sector workers. For example, most often, small and

²⁷ Olivier, M (2011) Informality, employment contracts and social insurance coverage: Rights based perspectives in a developing world context, *International Journal of Comparative Labour Law and Industrial Relations*, 2(4) : 419-433, at 424.

²⁸ Jutting, J. (1999) at 2.

²⁹ Ibid, at 5.

³⁰ Kaseke, E., Social security and older people: An African perspective, *International Social Work* 48(1): 89–98, at 91.

³¹ See ILO *Contribution to the joint AU/ILO workshop on the informal economy in Africa* (Dakar 2008) 18-19; Reynaud, E. (2002) 16; ILO *Decent Work for Domestic Workers* (Report IV(1) prepared for the International Labour Conference, 99th Session, 2010) (ILO, Geneva, 2009) paras 55-82.

³² See Article 3(1) of Convention 102 read together with articles 9(d), 12(2), 15(d), 18(2), 21(c), 27(d), 33(b), 34(3), 41(d), 48(c), 55(d), and 61(d).

³³ See article 2(a)(ii), read with article 2(b) for specific details.

³⁴ See article 2(a)(ii), read with article 2(b) of the Convention for specific details.

medium-sized enterprises (SMEs) are excluded as result of this flexibility.³⁵ Thus, it is rather questionable whether ILO Conventions generally can offer any meaningful protection to informal workers.

Secondly, the qualifications for social security coverage also raise some questions. While the social security Conventions may in theory apply to the informal sector/economy, it is clear from the discussion above that the conceptual framework relied upon in these instruments was not developed with the informal work context in mind.³⁶ The provisions of the instruments do not shed any light on how the social security concept and the institutions created, including their structures and operational management can be applied to the informal sector.

The third limitation relates to the standard model utilised in relation to the target population and also to the way in which the benefit regime has been constructed in the Conventions. As regards the first factor, the Conventions employ a standard formulation in relation to most of the benefit categories,³⁷ in order to determine extent of coverage. In terms of this formulation, the persons who are protected must comprise either: classes of employees constituting not less than 50% of all employees; or classes of the economically active population constituting not less than 20% of all residents; or all residents with means not exceeding the average income for a typical industrial manual employee.³⁸ The implication of the ability of developing countries to select coverage on the basis of 50% of employees in undertakings with less than 20 workers³⁹ is that, insurance-based social security schemes could apply to employees in large enterprises and the public sector only, leaving the bulk of workers in most developing countries outside the sphere of protection – in view of the preponderance of informal workers and micro-enterprises in these very countries. As noted by Meknassi:⁴⁰

"Far from expanding, a social security system constructed on this basis is likely to collapse if industrial employment stagnates or declines, as often happens in relatively uncompetitive economies in today's world of the virtual economy and free trade. Yet both the potential offered by and the needs of informal and small-scale activities remain excluded from any organized social protection. Social security law places them on the margins of a legal and institutional framework that is designed exclusively for the industrial economy. It could not be extended to the majority of workers without root and branch reform, given the predominance of 'atypical' forms of work and pay."

³⁵ ILO (2008) at 14. See also Meknassi (2006) "Extending social security in the developing countries: between universal entitlement and the selectiveness of international standards" *Comparative Labor Law and Policy Journal*, vol 27, 207-223 at 211-213. There may be some contrary tendencies – for example, the 2009 ILO report on Decent Work for Domestic Workers indicates that these exemption clauses have rarely been used to exclude domestic workers from coverage: ILO *Decent Work for Domestic Workers* (Report IV(1) prepared for the International Labour Conference, 99th Session, 2010)(ILO, Geneva, 2009) paras 74-74, 81-82.

³⁶ See now, for example, article 1(b) of the ILO Domestic Workers Convention (Convention 189 of 2011), which defines a domestic worker, for purposes of the Convention, as "any person engaged in domestic work within an *employment relationship*" (emphasis added).

³⁷ See in particular articles 9, 15, 21, 27, 33, 41, 48, 55 and 61: the standard formulation has been adapted for purposes of some of the benefit categories.

³⁸ See article 67(c), read with article 66. Article 66(4) contains the standard definition of an "adult male labourer": "(a) a person deemed typical of unskilled labour in the manufacture of machinery other than electrical machinery; or (b) a person deemed typical of unskilled labour selected in accordance with the provisions of the following paragraph."

³⁹ Assuming a country has elected to rely on the exception clause provided for in article 3(1).

⁴⁰ Meknassi (2006) at 214.

The construction of the benefit regime too in Convention 102 reinforces the exclusionary effect.⁴¹ One of the examples of the possible exclusions embedded in the benefit regime is that, the old age and survivors' benefits may be of limited value for those working in the developing world, in particular in view of the low life expectancy of many workers, and frequent movement in and out of formal employment, which could have a dramatic impact on the ability to qualify for, or the sufficiency of these benefits. Secondly, employment injury benefits are clearly intended to benefit employees and their dependants.⁴² Literally, this excludes the informal sector because considerable numbers of workers in this sector are self-employed. Yet, the very nature of work in this sector raises the greatest need for workers' compensation coverage. The negative impacts of a limited benefits regime can also be felt in terms of policy development and coherence, particularly with regard to occupational health and safety and workers' compensation, across different sectors of the economy. Also relevant in this discussion are unemployment benefits which basically are aimed at protecting employees who already subscribe to an insurance-based scheme.⁴³ Those outside the framework of an employment relationship, including the long-term unemployed and the young unemployed, are therefore excluded from protection.

Furthermore, finally, the ratification of ILO instruments on social security does not compare with the ratification of other ILO instruments, particularly the fundamental or core labour law Conventions such as the those on freedom of association,⁴⁴ collective bargaining,⁴⁵ and employment equity.⁴⁶ Even more striking is the significantly low ratification status in developing countries particularly in Africa and Asia, where as the discussion in section 2 above indicates, most of the workers are involved in the informal economy.⁴⁷ The absence of legal commitment in this area implies that, in these countries, the current social security Conventions of the ILO provide little more than a theoretical framework for the application of these standards to the informal work context. The further implication is that dedicated action, supported by targeted instruments, needs to be embarked upon to ensure that international social security standards are effectively and meaningfully extended to the informal work context.

4. Possible opportunities and challenges for extending social protection

4.1 Utilizing the employment contract?

In an attempt to address the difficulties in extending the protection of labour law to certain categories of workers, the ILO adopted a Recommendation in 2006 (The Employment Relationship Recommendation 198 of 2006) which can also be useful in the social security debate. The Recommendation is aimed at, among other things, providing a framework for dealing with difficulties in establishing the existence of an employment relationship. It calls for adoption of measures to combat disguised employment relationships and to extend labour law protection to the workers in this group including those who are in triangular relationships.⁴⁸ Member countries are further required to ensure effective protection to

⁴¹ Ibid.

⁴² See in particular article 33 of the Convention.

⁴³ This follows among others from the emphasis on "suspension of earning" as a requirement for coverage: see article 20 of the Convention.

⁴⁴ Convention 87 of 1948.

⁴⁵ Convention 98 of 1949.

⁴⁶ Conventions 100 of 1951 and 111 of 1958.

⁴⁷ Olivier (2009) at 10.

⁴⁸ Clause 4(b) (clause 4(b)).

workers especially affected by the uncertainty as to the existence of an employment relationship, including workers in the informal economy.⁴⁹ The Recommendation proposes that, countries should make use of legal presumptions, in addition to other means, in determining the existence of an employment relationship.⁵⁰

The provisions of this Recommendation are of particular importance to the debate on the extension of social security coverage to informal workers given the fact that social insurance coverage is often and in Africa in particular, based on the existence of an employment relationship. However, it is important to keep in mind that the Recommendation is not in itself a panacea for the social security-extension problems. There are some important qualifications which are more likely to mitigate against the applicability of this Recommendation.

The limitations are foremost evident in the kind of work relationships covered. The marked distinction of *self-employed workers* as a category of workers different from *employed workers* proves the point.⁵¹ Also, the Recommendation preserves other contract types entered into without the intention to disguise an employment relationship (for instance true civil and commercial relationships).⁵² Both of these limit the applicability the Recommendation in extending social protection to informal workers. Secondly, expanding the employment relationship notion for labour law purposes does not automatically imply that the same would be true for social security purposes particularly in the current environment where, most often, social security legislation tends to be very categorical and exclusionary with respect to coverage. Protection is normally not available to certain categories of non-standard employees, and in particular not to those who work informally, to the extent that no employer could be identified.

The absence of statutory-based regulation could prove to be problematic. The Recommendation is more likely to remain ineffective unless there is deliberate statutory intervention which would force the trappings or create legal consequences of an employment relationship (for example in the form of labour and social security rights) on parties who basically intended a different kind of relationship. In traditional labour law it would be highly unlikely for judges and arbitrators to venture into the creation of employment relationship or to impose an obligation which was not, in the first place, intended by parties. In view of this and other limitations discussed above it remains uncertain if the attempt to invent the application of employment contract beyond the traditional employment relationship can yield good results. The absence of statutory regulation and the tendency of courts to rely on the 'nature of relationship' in determining the existence of an employment relationship or otherwise, are likely to obstruct the desired impact of this Recommendation. It must also be recalled that the normal position is that a written contract is as a rule not required to constitute an employment relationship or, for that matter, a different kind of relationship.⁵³

There are currently progressive statutory adjustments across countries which attempt, for labour law purposes, to extend coverage to some categories of workers outside the framework of the traditional employment relationship. An example may be drawn from Swaziland where the Swaziland Industrial Relations Act 1 of 2000 defines an employee as "a person, whether

⁴⁹ Clause 5.

⁵⁰ Clause 11.

⁵¹ Clauses 4(a) and 11(c).

⁵² Clause 8.

⁵³ ILO (2009): par 123-128.

or not the person is an employee at common law, who works for pay or other remuneration under a contract of service, or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person." This implies that "arrangements", indicating control by or sustained dependence upon another person will be sufficient to trigger the protective labour rights contained in the legislation.⁵⁴ Corresponding adjustments are found in Tanzania,⁵⁵ South Africa and in the Caribbean countries. In the latter case, independent contractors have been included in the protective framework of labour legislation.⁵⁶

4.2 Conceptual innovation

Countries have also increasingly sought innovative conceptualization of social security to widen its application beyond the traditionally envisaged groups. The innovations in this area could also be of benefit to developing countries. In India, for example, the Unorganised Workers' Social Security Act, 2008⁵⁷ has adopted a deliberately wide notion, firstly, of what is comprehended by the term "unorganised sector" and, secondly, of who is intended to be an employer and a worker for the purposes of covering those embedded in a relationship of work in the informal economy.⁵⁸ It defines "employer" as "a person or an association of persons, who has engaged or employed an unorganised sector worker either directly or otherwise for remuneration".⁵⁹ It attaches a specific meaning to unorganised sector workers, and defines this term with reference to a distinction to be drawn between a home-based worker, self-employed worker and a wage worker.⁶⁰ Similarly, the scope of definition of "unorganised sector worker" has been widened. Under the 2008 version of the Act, the term "unorganised sector worker" includes "an unorganized sector worker and workers in the organized sector who are not covered by the existing laws relating to social security."⁶¹ Perhaps more relevant to this discussion is the definition of "wage worker", which evidently aims at including workers with little income who render services in subcontracted capacity, who may work for more than one employer, and who may fall within a range of atypical work relationships.⁶²

Corresponding innovations are also found in some countries in Africa. In Tanzania, for example, the Social Security (Regulatory Authority) Act, 2008 defines the "informal sector" as the sector which includes workers who work informally and who do not work in terms of an employment contract or another contract contemplated in the definition of employee. A "self-employed person" is defined as a person who works for gain for him/herself, whereas a "worker" is defined to include a self-employed person and a worker in the informal sector.⁶³ Also under the labour laws, an employee is defined with reference not only to a contract of employment but also any other contract under which the individual undertakes to work individually for the other party to the contract and the other party is not a client or customer of any profession, business, or undertaking carried on by the individual.⁶⁴ In Swaziland,

⁵⁴ Benjamin, P. (2008b) *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5th African Regional Congress, Cape Town, March 2008): 10-11.

⁵⁵ See the definition of an 'employee' in Section 3 of the Employment and Labour Relations Act 6 of 2004 (Tanzania).

⁵⁶ Olivier (2009):20-23.

⁵⁷ Act 33 of 2008.

⁵⁸ Section 2(k).

⁵⁹ Section 2(a).

⁶⁰ Sections 2(b) and (j) respectively.

⁶¹ New section 2(n).

⁶² See section 2m.

⁶³ Section 3.

⁶⁴ See section 4 of the Employment and Labour Relations Act, 2004.

‘employee’ includes a person who works for pay or other remuneration not only under a contract of service but also ‘under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person.’⁶⁵ In South Africa, these innovations include the introduction in the major labour legislation of an administrative capacity given to the Minister of Labour to extend the provisions of all labour laws to persons other than employees⁶⁶ and a rebuttable presumption of employment. The latter is triggered by a range of factors some of which are of relevant to informal sector workers. One of these is the notion of "economic dependence".⁶⁷

In dependency situations, contractual tracking may be useful in determining who the real employer is (or combination of employers).⁶⁸ It has been suggested that the "real" employer or provider of work down (or perhaps up) the chain – that is to say the unit that has responsibility for the rights and protection of all workers in the chain – is the lead firm that outsources production, even if it is only a retail firm.⁶⁹ In fact, introducing regulatory approaches that centre on the regulation of supply chains could go a long way to extending not only labour law, but also social security protection to informal workers. The potential use of contractual tracking and supply chains and their relevance for establishing a suitable regulatory regime is summarised by Benjamin:

"These approaches are a response to the outsourcing of aspects of the work process in sectors such as the clothing industry to categories of workers who fall outside of the conventional definition of employment such as outworkers and home-workers as well as to the increasing use of unprotected “owner-drivers” to transport goods. This approach has been used in state level legislation within Australia. It has the potential to apply to any situations in which businesses utilise supply chains that include “non-employee” workers. Aspects of this approach include applying minimum employment standards to all workers in a supply chain and placing obligations on entities such as retailers, manufacturers and primary contactors to disclose information on their supply chains to interested groupings such as trade unions and inspectorates.⁷⁰

Also, the standards and guidelines for extension of labour law protection to different categories of non-standard workers contained in the ILO Employment Relationship Recommendation of 2006 may be helpful in endeavours to extend social security coverage. Countries may use these guidelines as one of the benchmarks in developing relative concepts and approaches to facilitate the extension of social security coverage to informal sector workers. Lessons may also be drawn from some developed countries such as Australia where social security systems allow some form of flexibility to accommodate workers and risks which would otherwise be excluded.⁷¹

⁶⁵ Swaziland Industrial Relations Act 1 of 2000.

⁶⁶ See section 83 of the Basic Conditions of Employment Act (BCEA) 75 of 1997; Benjamin, 2008b: 3-4.

⁶⁷ Benjamin, 2008b: 3-4).

⁶⁸ Quinlan, (2003): 2-3, 22.

⁶⁹ Chen *et al*, (2002): 34.

⁷⁰ Benjamin, P. (2008a) *Informal work and labour rights in South Africa* (Paper presented at the IIRA 5th African Regional Congress, Cape Town, March 2008):10.

⁷¹ Olivier (2009) at 12-13. This applies in particular to the coverage of workers other than employees in terms of Australian workers' compensation laws; in the case of occupational health and safety legislation persons other than those who work are in principle included.

4.3 Complementary/tailor-made institutional measures: formal and informal social security

This approach seeks to introduce linkages with formal social security systems so as to improve social protection.⁷² This implies the use of the existing social security both, formal and informal to enhance coverage and benefits. This requires that governments should, first and foremost, recognize and acknowledge the importance of informal social security networks in the provision of social security and secondly, to provide them with fiscal and non-fiscal support.⁷³ This will strengthen and enable them to widen their scope of protection to allow the application of wide-ranging complementary measures which are sustainable and capable of providing comprehensive coverage. Economies of scale can be achieved if proper links are developed between these informal arrangements and the formal social security system. It is therefore imperative to construct a proper model aimed at developing an integrated approach towards formal and informal social security coverage. This may require a limited measure of formalisation, in particular if government support were to be extended to these informal schemes.⁷⁴

4.4 The need for specialised arrangements: contributions, benefits and eligibility criteria

Extending social security coverage to informal sector workers can also be facilitated through wide-ranging complementary measures, in the form of specialized contribution modalities, eligibility criteria and benefit packages to suit the needs of informal workers. These measures have been implemented with considerable success in a number of countries including India, Tanzania, South Africa and Thailand.

Through governmental initiative in India, for example, five welfare funds have been introduced to provide protection for workers in occupations where a direct employer-employee relationship cannot be established. These funds are administered by the Ministry of Labour and cover approximately 10 million workers in the unorganised sector. They are financed through levies collected from selected employers and manufacturers. They provide a range of benefits including medical care, maternity and assistance with children's education, housing and water supply. In the latter case, a tax (levy/cess) is imposed by state governments on the aggregate output of selected industries (e.g. the Beedi Welfare Fund is financed by a tax on beedis).⁷⁵ Secondly, provision is made for specialized multi-layered arrangements for unorganized workers which are regulated through the Unorganized Workers' Social Security Act, 2008. This also provides a set of benefits including minimum pension ("old age protection"), health benefits, maternity benefits, life and disability cover.⁷⁶ The Central Government may determine other forms of benefits, and develop suitable welfare schemes for different sections of unorganised sector workers with respect to certain benefits and services.⁷⁷ The scheme is financed by the beneficiaries and the government, both at central and state level depending on the nature/level of the scheme.⁷⁸ Another successful example from India is the Self-Employed Women's Association (SEWA). Registered in 1972 with the aim of improving the welfare of women, it covers over one million women in the

⁷² Kaseke, *Informal Social Security in Eastern and Southern Africa* 8, quoted also in Olivier and Mpedi (2003): 27.

⁷³ *Ibid.*.

⁷⁴ Olivier (2009) at 16-17.

⁷⁵ *Ibid.*, at 15.

⁷⁶ Section 3(1).

⁷⁷ Section 3(4).

⁷⁸ Section 4(1), Also see section 7(1)-(3).

informal sector. Through its links with formal insurance schemes, SEWA has managed to provide its members with wide-ranging services including credit, training, child care, health care, pension, life insurance (death and disability) and insurance against loss of work equipment.⁷⁹

In Tanzania, a hybrid model is currently implemented through the Community Health Fund (CHF) introduced by the Ministry of Health in 1996 as part of the endeavours to make health care affordable and available to the rural population and workers in the informal sector.⁸⁰ The CHF is an insurance-based hybrid scheme administered at district level and co-financed by the community (household) and the government. The scheme is voluntary whereby the households pay uniform contributions and the government tops-up by 100% of the total contribution from members. Basically, the CHF benefits are limited to curative and preventative health services at dispensaries and health centres, although some of the districts have innovatively extended the benefit beyond this level to hospitals.⁸¹

In Thailand, the government introduced a Gold Card Scheme in 2001 based on a house ration which allowed members to get medical treatment for a nominal fee of 30 baht (US\$ 0.83) which was later abolished in 2006. The scheme, subsidised from government revenue, successfully extended coverage to the majority of workers in the informal sector.⁸² In South Africa, although it was thought to be difficult to do so, the government has successfully extended unemployment protection to this group.⁸³ In the case of Tunisia, in 1995, the government took a bold step to unify the two social security schemes (one for self-employed agricultural workers and another for self-employed non-agricultural workers) which co-existed. The unification of these schemes which also went in hand with attempts to rationalize contributions to accommodate income variations of members increased both the coverage of members (also associated with successful awareness campaigns) and the benefits. Although these reforms have not been successful in extending coverage to everyone in the informal sector, many in the informal sector, including casual and seasonal workers, domestic helpers and workers on development sites, are covered in relation to compensation for industrial injury and occupational diseases.⁸⁴

Ghana provides an illustration of an initially less than successful attempt to use an existing public fund to extend social security coverage to the informally employed. However, recently innovative measures aimed at creating a dedicated framework for covering the self- and informally employed have had a positive impact. The Social Security and National Insurance Trust Fund (SSNIT) of Ghana covers the self-employed on a voluntary basis. Of its 942,000 active members (10 per cent of the working population) a few years ago, there were only 5,400 voluntary members in spite of the fact that those in the informal sector represent 70 per cent of the working population. However, recently arrangements were made to accommodate the self-employed and informal workers under the existing social insurance scheme (SSNIT), but via a dedicated suitable and specialised framework. This entailed the creation of the Informal Sector Fund set up by SSNIT. The dedicated arrangements for informal workers relate to both contributions and benefits. Contributions to this Fund need not be fixed, but

⁷⁹ Discussed in detail in Olivier (2009): 31-32.

⁸⁰ Mtei, G & Mulligan, J *Community Health Funds in Tanzania: A literature review*, Ifakara Health Research and Development Centre, 2007 at 2.

⁸¹ *Ibid*, at 8-9.

⁸² See Thailand case study in Olivier (2009):27-29.

⁸³ *Ibid*, 24-27.

⁸⁴ *Ibid*, 29-31.

could be based on their ability to pay on a basis preferred by them, be it daily, weekly, monthly, annually or seasonally. Informal workers contribute to two accounts: (i) a retirement account (to provide benefits on retirement); and (ii) a personal savings account with rules for withdrawals before retirement (e.g. for education and business enhancement). Within three years since the establishment of this Fund, as a subsidiary of SSNIT, 90 000 members have joined on this basis.⁸⁵

Although as demonstrated above, approaches embedding tailor-made solutions, provisions and prescriptions for particular groups of workers in the informal economy are viable methods for extending social security coverage, their success depends on a number of factors which include: progressive implementation approach (as is the case in Tunisia); existence of a sufficiently sizeable and relatively homogeneous sector in terms of its characteristics; existence of actual need for enhanced protection (as is the case of domestic workers in South Africa and the India welfare schemes); political will and policy determination (as in Thailand and Tunisia), supported by public awareness and persuasion (Tunisia and South Africa), backed by consultative approaches and, where possible, some measure of international support.

4.5 Human rights framework

Human rights instruments constitute an important tool for extending social security coverage to workers in the informal economy. It must be recalled that, social security is, first and foremost, in essential terms, a human right recognized in fundamental human rights instruments and enshrined in other international and regional legal instruments.⁸⁶ Both, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) underline the universal nature of social security.

In a recent General Comment on the right to social security⁸⁷ as embedded in article 9 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights stresses the need for social security systems in ratifying countries to extend coverage to workers in the informal economy.⁸⁸ The Committee further defines the circumstances under which coverage for social risks such as occupational injuries, maternity and disability should be provided for in such a way as to include informal workers as well.⁸⁹ In paragraph 34 of this Comment, the Committee suggests three avenues for extending social security for this group. This would include removing obstacles that prevent workers in the informal economy from accessing informal social security schemes and also respecting and supporting social security schemes developed within the informal economy such as micro-insurance schemes. It is the conviction of the Committee that, despite limited financial capacity, countries should consider lower-cost and alternative schemes to provide for marginalised groups.⁹⁰ Whilst a progressive approach towards full realization of social security is preferred,⁹¹ it is expected that ratifying states move as expeditiously and effectively towards that goal and to avoid any deliberately

⁸⁵ Arku, J & Akagbo, E "90,000 Join SSNIT – from the Informal Sector"

(<http://www.graphic.com.gh/dailygraphic/page.php?news=14354>, accessed on 8 May 2012).

⁸⁶ See among others article 22 of the Universal Declaration of Human Rights of 1948 and article 9 of the International Covenant on Economic, Social and Cultural Rights of 1966.

⁸⁷ General Comment No. 19 (E/C.12/GC/19 of 4 February 2008 (adopted on 23 November 2007)).

⁸⁸ Paras 16 and 28.

⁸⁹ Paras 17, 19 and 20 respectively.

⁹⁰ Para 51.

⁹¹ Article 2(1) of the UN International Covenant on Economic, Social and Cultural Rights, read with article 9.

retrogressive measures⁹² which reduce the coverage or level of benefits provided under the social security system. In this way, social security will be able to achieve its main aim which in the words of the Declaration of Philadelphia, is to "provide a basic income to all in need of such protection."⁹³

A human rights-based approach contained in these instruments has advantages compared to the current ILO arrangements. Firstly, as already indicated, the conceptual framework relied upon in ILO social security instruments, was not developed with the informal work context in mind. Secondly, ILO social security standard-setting instruments are not premised on a rights-based approach, but stress the state obligation to ensure and secure an appropriate social security system. "Unlike human rights instruments, ILO standards view social security not as an individual right but rather as a social institution regulated by its own legislative framework."⁹⁴ Thirdly, ILO instruments stress the role and responsibility of the State as direct provider and supervisor; external provision of social security by private institutions or via informal means is not emphasised.⁹⁵ Fourthly, ILO instruments require compliance with minimal standards in particular areas of social security concern, rather than the progressive realisation of a broader-based right to social security, operating in a wider domain of human rights protection and affecting a significantly comprehensive range of persons and groups than compliance with ILO standards would require.⁹⁶ Finally, also, unlike the human rights instruments which are widely ratified, as mentioned above, many of the ILO Conventions relating to social security are generally poorly ratified and weakly implemented. The ILO Social Security (Minimum Standards) Convention, 102 of 1952, which is the "mother" Convention in this field has been ratified by only 47 countries.⁹⁷ Against this background, it is not unsurprising that the ILO (via the International Labour Bureau) has recognised the limitations of the current approach, and the need for need for innovation.⁹⁸

Regional human rights instruments can also, within their sphere of influence, play an important role in bridging the social security gap. For example, the Charter of Fundamental Social Rights in SADC ("Social Charter") contains important provisions relating to the social protection of both workers and those who are not employed – and regulates the position of workers (in terms of social protection) more comprehensively than those who do not work.⁹⁹ Further provisions are contained in the Code on Social Security in the SADC,¹⁰⁰ in terms of which the right to social security is accorded to everyone.¹⁰¹ SADC Member States are requested to provide compulsory coverage, either through public or private mechanisms or

⁹² UN Committee on Economic Social and Cultural Rights, General Comment 3 (1990) 'The nature of State Parties Obligations' UN Doc HRI/Gen 1/Rev 1 at 45 (1994) para 9.

⁹³ Declaration of Philadelphia, par III(f).

⁹⁴ See ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference, 100th Session, 2011- Report III (Part 1B)) (2011) par 159.

⁹⁵ Cf article 6(1) of ILO Convention 102 of 1952, read with article 72.

⁹⁶ See also Meknassi "Extending social security in the developing countries: between universal entitlement and the selectiveness of international standards" 207.

⁹⁷ Information obtained from the ILO Website (ilo.org) on 12 February 2012.

⁹⁸ ILO *Social protection floors for social justice and fair globalization* (Report prepared by the International Labour Bureau for the 101th session of the International Labour Conference in 2012), consideration no. 39.

⁹⁹ See art 10.

¹⁰⁰ Approved by the SADC Ministers of Labour in 2007.

¹⁰¹ Article 4(1).

through a combination of both.¹⁰² At the national level, fundamental rights provisions in constitutions could also be used as one of the strategies for the extension of social protection to vulnerable groups of society, including informal economy workers. The constitutions of Kenya and that of South Africa, for example, provide that everyone has the right to access to social security including, if they are unable to support themselves and their dependants, the right to receive social assistance.

In the current situation where the ILO-based social security standards and systems are conceptually, structurally and operationally inefficient and less relevant in extending social protection, it has become imperative to refer to and rely on the human rights framework in enhancing the extension of social security coverage and benefits to workers in the informal economy.

4.6 A new approach to international standard-setting, -implementation and -enforcement

Recently, there have been deliberate efforts within the ILO to address social security inefficiencies. The extension of social security coverage has become an important agenda in ILO forums with a focus being placed on formulating appropriate policy and regulatory standards to promote social protection for persons who fall outside the current framework. Thus for example, in 1996 the ILO specifically included in its Home Work Convention (No. 177) and its accompanying Recommendation (No. 184), the need for national policies to promote equality of treatment between home workers and other wage earners with regard to statutory social security protection and maternity protection within the existing schemes or through special schemes. Also in 1998 it was recommended, through the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), that labour and social legislation be reviewed to determine whether, and how social protection can be extended to workers in these enterprises.

These developments took a new shape in the 2000s with a consensus on social security reached at the 89th Session of the International Labour Conference in 2001 which placed the extension of social security coverage to the poor at the centre of ILO policy priorities and initiatives. This was followed by the Global campaign on social security launched in 2003 which led to the adoption of the Social Protection Floor (SPF) initiative.¹⁰³ In 2009 the SPF was endorsed by the United Nations as one of the joint crisis initiatives to address the impact of the global economic crisis.

The SPF entails a basic level of social protection, implying access to essential services and social transfers for the poor and vulnerable.¹⁰⁴ It is envisaged that, under the social protection floor, countries should be able to adopt strategies aimed at achieving universal coverage of the population with at least minimum levels of protection (horizontal dimension) and progressively ensuring higher levels of protection guided by up-to-date ILO social security standards (vertical dimension).¹⁰⁵ According to the ILO, the SPF corresponds to a set of

¹⁰² See arts 5-6 and 12.

¹⁰³ See the ILC *Conclusions concerning social security* (2011), paras 8 and 9, also reproduced in ILO, *Social protection floors for social justice and a fair globalization*, 2011:7-8

¹⁰⁴ ILO-UN *Social Protection Floor Initiative: The role of social security in crisis response and recovery, and beyond* (ILO, 17 June 2010). See also Cichon, M and Hagemeyer, K "Changing the development policy paradigm: Investing in a social security floor for all", *International Social Security Review* 2007, 169-196.

¹⁰⁵ *Conclusions concerning social security* (2011), paras 8 and 9, reproduced in ILO, *Social protection floors for social justice and a fair globalization*, 2011:7-8.

essential transfers, services and facilities that all citizens everywhere should enjoy to ensure the realisation of the rights embodied in human right treaties.¹⁰⁶ The Social Protection Floor Initiative foresees that, in addition to and building upon a basic level of protection for all, developing countries should be able to extend the scope, level and quality of benefits to the point of being able to ratify the main ILO instrument in the area of social security, ILO Convention 102 of 1952 on Social Security (Minimum Standards).¹⁰⁷ Taking into account the economic and social diversities, country-specific and context-sensitive approaches towards introducing and implementing social protection floor interventions are accepted. Each country should therefore be able to implement policies which are commensurate with her social needs, development objectives and fiscal capacity to achieve them. There are, certainly, “no best solutions or 'one-size-fits-all' formulas to set up the SPF.”¹⁰⁸

The SPF envisages the adoption of an instrument in the form of a Recommendation to remedy the inefficiency of the ILO instruments in extending coverage. According to the SPF the new Recommendation should facilitate the concretization of the ‘principle of full social security coverage for all in need of such protection in law and in practice, as soon as possible.’ The new Recommendation, “Elaboration of an autonomous Recommendation on the Social Protection Floor,” is due to be tabled for discussion during the 101st Session of the International Labour Conference, 2012. The draft text of the new recommendation¹⁰⁹ highlights the need for embedding national social protection floors into national social protection and development policy and also the role of the ‘up -to-date’ ILO instruments in promoting high level of protection. Also, not least, the new Recommendation is expected to provide principled guidelines which would govern national social security extension strategies, such as: the need to formulate the ultimate objective for universal protection in line with national social needs and economic and fiscal capacities; progressive implementation of national extension strategies; establishment of clear links and coherence between the extension strategies and the employment and other national social and economic policy objectives; incorporation of social security guarantees and benefits in national legislations, robust and transparent governance principles and a gender-responsive approach.¹¹⁰

The most interesting aspect of the ongoing initiative is that it has high regard for the human rights-based approach. The ILO recognizes that ‘providing adequate social security benefits is also considered by the CESCR as one of the essential factors that should apply in all circumstances for guaranteeing the realization of the right to social security and the right to an adequate standard of living’. Social security in the new initiatives is viewed in a wider context as a human right, a social necessity and an economic necessity. The ILC Conclusions on Social Security, 2011 carry the following clause:

“The Conference recognizes and reiterates that:

a) Social security is a human right.

Everyone as a member of society has a right to social security as stated in the Universal Declaration of Human Rights, Article 22.....

¹⁰⁶ See ILO *Social Floor Protection Initiative* (2009).

¹⁰⁷ ILO-UN "Social Protection Floor Initiative".

¹⁰⁸ *Ibid.*

¹⁰⁹ See ILO "Proposed Recommendation concerning national floors of social protection" in ILO *Social protection floors for social justice and a fair globalization* (Report IV (2B), International Labour Conference, 101st session, 2012).

¹¹⁰ ILO (2011), *Social security for social justice and a fair globalization Recurrent Discussion on Social Protection (social security) under the ILO Declaration on Social Justice for a Fair Globalisation*, Geneva: International Labour Office, at 51-52.

- b) *Social security is a social necessity*.....
 c) *Social security is an economic necessity*.....¹¹¹

With this in mind, the proposed text of the new Recommendation incorporates these principles at its heart so as to achieve the desired improvements. Guaranteeing a basic right to social protection for all in concrete terms will certainly constitute a major step on the road to realising the right to social security. In addition, a core set of social security principles will also be contained in the envisaged new Recommendation. The effectiveness of the new instrument is, however, largely influenced by the question whether the formulation of the new instrument effectively establishes rights-based entitlements, or merely replicate the approach adopted in other ILO social security instruments.¹¹² In this regard it has to be noted that the draft text of the Recommendation does not create individually enforceable rights or entitlements, but requires member states to ensure that these rights and entitlements are recognised in and enforced through domestic legal systems. Furthermore and importantly for informal workers, a global floor of essential protection would be the first step towards more comprehensive coverage. And yet, as was indicated above, in the case of informal workers the more enhanced protection provided under Convention 102 may not be suitable, given their specific context and needs. In other words, the need for specialised and dedicated social security interventions to deal with the plight of informal workers still exists, and ideally needs to be supported by appropriate international standard-setting interventions, which go beyond a basic floor of protection and the current standards framework. Also, the sheer extent of technical advice and financial support that may be required to give effect, on a country level, to the provisions of the envisaged new instrument could be problematic. Not least, the nature of the envisaged instrument is weak (it is essentially a Recommendation and not a Convention) and not subject to enforcement, a fact which is likely to affect its effectiveness.

5. Conclusion

This contribution has reflected on the need, challenges and possibilities for the possible extension of social security to informal sector workers in developing countries. It points to the precarious nature of social protection for workers in this group who are not only proportionally large in number but constitute an important part of the economy. The majority of workers in this group which currently constitutes up to 90 per cent of the active population in some of the developing countries are barely protected or totally excluded from the social security system due to a variety of reasons, some of which are associated with conceptual inefficiency and the limited scope of current ILO standards. Attempts to extend coverage to this group are extremely limited because of the various barriers embedded in the traditional social security systems. Similarly, attempts to widen the scope of social insurance coverage to include those who work informally and/or outside the confines of the traditional employer-employee relationship, have largely been unsatisfactory.

On the other hand, there are currently deliberate attempts to address this inefficiency. These include, as is evident from a range of best practice examples, the attempt to accommodate the specific context of informal and self-employed workers within the traditional social insurance framework by way of, for example, specialized arrangements; and the extension of social assistance/social protection interventions; tailor-made solutions; and wide-ranging

¹¹¹ Clause 5.

¹¹² Vonk, G "The resolution on the recurrent discussion on social protection (social security): will the ILO standards keep up with the human right to social security?" (paper presented at an International Conference on the Interaction Between International, Regional and National Labour Law and Social Security: Standards and Methods, held in Stellenbosch, South Africa, 13-14 October 2011) pp 20-21.

complementary and innovative approaches aimed at extending the application, potentially also of social security, to cover workers in the informal sector particularly those in a dependency relationship, where it is naturally difficult to determine the employment relationship. The ILO adopted a Recommendation (Employment Relationship Recommendation 198 of 2006) which provides some guidelines on how labour law protection can be extended to workers in disguised and multiple party employment relationships; this Recommendation is potentially also relevant in extending social security to workers in this group. However, the Recommendation, too, has certain limitations which restrict its relevance and effectiveness in advancing this course. Generally, one of the barriers relates to the exclusion of some categories of the informal sector and insufficient support from ILO standards setting instruments.

Although these barriers limit the opportunities for the extension of social security, there are some other possibilities which are more viable and sustainable in developing economies. These include, progressive statutory adjustments aimed at increasingly extending the scope of application not only of labour law (as already demonstrated in some countries), but also of social security law; and deliberate revision of the social security terminology and statutory intervention to force the trappings or legal consequences of an employment relationship (such as in the form of labour and social security rights) on parties who intended a different kind of relationship so as to mitigate the impact of social security (insurance) systems which, as already noted, are invariably confined to formal employment relationships. The contractual tracking method may also be used to determine the employer in dependency work relationships. The progressive statutory adjustments may in particular be a more viable option for facilitating the extension of social insurance coverage to largely uncovered informal economy workers. Examples may be drawn from India, Tanzania, South Africa and other countries where similar approaches have been adopted and/or tested to demonstrate the suitability and viability of this model.

Another viable option for the extension of social security coverage to informal sector workers is by way of specialized arrangements (contributions, benefits and eligibility) and complementary institutional measures. This implies adoption of new specific schemes or some adjustment of the existing schemes to align them with the needs of informal workers. The latter would involve recognition of the existing informal sector and informal social security schemes, linking them with formal security schemes and providing them with fiscal and non-fiscal support to strengthen their base. Finally and certainly most importantly, is the use of human rights instruments. Social security has been recognized as a basic human right in international and regional instruments and in some national constitutions. The universal nature of social security demonstrated in these instruments offers a relatively better tool for extending social security as opposed to ILO instruments which are conceptually, structurally and practically limited and inadequately ratified too.

The focus also needs to be placed on the developments taking place within the ILO in respect of the formulation of policy and new standards to bridge the social protection gap and to extend social security protection to informal sector workers. It is important that these developments, particularly the envisaged new Recommendation, incorporate a human rights approach and also adequately elaborate on the guidelines which are necessary to achieve vertical and horizontal extension. The effectiveness of the new initiatives largely depends on their ability to establish rights-based entitlements.

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