



ACCESS TO SOCIAL SECURITY FOR NON-CITIZENS AND INFORMAL SECTOR WORKERS

An International, South African and German Perspective

EDITORS

Ulrich Becker
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PREFACE

Access to social security has always been, and is still, a social policy issue of major concern. It is a question of facts: of actual social protection and the effectiveness of social security systems. And it has, despite all the developments and achievements of the last century, not ceased to be a question of appropriately circumscribing the scope of personal coverage.

Access to social security can prove difficult under various aspects. Two of these aspects are basic in nature and, as we may expect, thus universal as well. The first involves the protection of non-citizens which, despite its longstanding history, remains on the list of the most serious problems: because of the linkages and tensions between social security and redistribution, and between citizenship, immigration policies, the legitimization of redistributive measures through voting, and human rights. The second relates to the fact that traditional social insurance systems are employment-based, with the consequence that this form of social security is selective. It not only leaves out all persons without employment, but also those who work in the so-called informal sector. Moreover, social assistance is often provided on a categorical basis, excluding in principle not only the able-bodied but also non-citizens.

On the assumption that the above aspects are of both a general and a universal nature, despite regional and country differences, we brought together legal scholars from South Africa and Germany, as well as a social security expert from Zimbabwe, in order to discuss the present problems of access to social security for non-citizens and informal sector workers. Our intention was not to obtain reports highlighting specific facets of the two problems and discussing them in a parallel way (as we would normally design a comparative study on the methodological basis of a functional approach). Instead, we asked the participants to describe and analyse the problems from a specific perspective. Together these chapters cover treatment of these issues in relation to the two selected categories (i.e. non-citizens and informal sector workers) not only from a domestic law perspective, but also from the perspective of public international, supra-national and regional instruments. In this way, the contributions to this book give an overview of a broad variety of legal questions encountered in different legal orders. And two of them are particularly interesting as they take an outsider's perspective on a foreign social security system.

After an introduction which sets the framework for the publication (*Letlhokwa George Mpedi*), the book contains two general reports: an international perspective on migrant workers and the right to social security (*Ockert Dupper*), and the adjudication and enforcement mechanisms as well as the administrative framework as far as the access to social security for non-citizens and informal sector workers is concerned (*Mathias Nyenti*). The following four chapters deal with specific aspects of the inclusion of non-citizens: the portability of social security benefits of non-citizens in South Africa and SADC (*Daleen Millard*), the institutional framework, legal instruments and legal techniques relating to the promotion of access to social security to non-citizens from a German and EU perspective (*Bernd Schulte*), and an outside perspective on the *Xhosa*

decision of the Constitutional Court of South Africa (*Alexander Graser*), followed by a South African perspective on the same judgment (*Marius Paul Olivier*). The last three chapters focus on the social protection of informal sector workers. They report on the institutional framework, legal instruments and legal techniques relating to the promotion of access to social security to informal sector workers from an international perspective (*Nicola Smit*), a Southern African perspective (*Edwin Kaseke*), and on the promotion of access to social security for informal sector workers from a German perspective (*Letlhokwa George Mpedi*).

Ulrich Becker
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Munich and Johannesburg
August 2008

CHAPTER I
INTRODUCTION

Letlhokwa George MPEDI

1. INTRODUCTION

The aim of this book is to investigate the *legal techniques* (e.g., coordination of social security schemes), the *institutional framework* (e.g., adjudication and enforcement mechanisms) and the *legal instruments* (e.g., Constitutions, Treaties and Protocols) for extending access to social security to *non-citizens* and *informal sector workers*. This publication, which focuses mainly on South Africa and Germany, endeavours to examine the specific causes (from a legal perspective) of the social exclusion of migrants and informal sector workers from accessing social security. Once such causes have been investigated, differences and similarities between the two systems are mapped out. This is done with the intention of developing appropriate strategies for extending social protection to the migrants and informal sector workers.

2. BACKGROUND TO THE ISSUES COVERED

2.1 Institutional framework

2.1.1 International and regional

International organisations such as the International Labour Organisation (the ILO) set out the international standards that should guide the social security institutional framework of their Members. The Social Security (Minimum Standards) Convention,¹ for example, has (to a large extent) influenced the social security institutional framework of almost all countries of the world. In line with this Convention most countries have established institutions or government departments to administer social security schemes. Although there are private social security institutions, governments fulfil an

¹ Convention 102 of 1952.

important function of outlining the regulatory framework within which social security institutions should operate.

The influence of international standards has paved the way in most countries for the establishment of social security institutions focusing on various social risks. In South Africa, for example, social risks listed in the Social Security (Minimum Standards) Convention, are spread across a variety of government departments and private institutions. This has, in the process, created problems which impact negatively on access to social security such as fragmentation and duplication of services. Another area, essential in the administration of social security, where international standards have been influential is the adjudication and enforcement of social security rights. International standards require individual countries to guarantee in their national laws the right for social security participants and/or beneficiaries to challenge decisions that adversely affect their right to access to social security benefits. Article 70(1) of the Social Security (Minimum Standards) Convention, for example, provides social security claimant with the right to appeal against a refusal of the benefits or to lodge a complaint as to its quality or quantity. While most SADC countries have endeavoured to comply with this obligation, it should be noted, however, that there is a serious lack of a uniform and an integrated adjudication system in the SADC region.²

2.1.2 National

(a) Administrative institutions

The social security institutional framework (which is in often split between the public and private sector) is at times supported by Non Governmental Organisations and the Community Based Organisations. In developing countries such as those of the SADC region, informal social security providers (e.g., family) cannot be counted out. The challenge that has emerged, particularly in developing countries, is that of developing links and/or strengthening the abovementioned informal social security institutions.

(b) Adjudication institutions, monitoring and enforcement mechanisms

Social security laws, rules and regulations do not always provide a clear-cut answer as to one's eligibility to social security benefits. There are always exceptions and conditions which are left to the administrative institutions to apply or monitor and enforce. This in turn necessitates adjudication institutions, monitoring and enforcement mechanisms. These are an integral component of a social security system. A lack of these institutions and mechanisms invariably results in the denial of access to social security as the excluded and marginalised would be unable to enforce their social security rights. To this end, most countries of the world have endeavoured to provide social security participants and/or beneficiaries with a platform from which they are able to enforce their social security

² See Centre for International and Comparative Labour and Social Security Law & Institute of Development and Labour Law *Developing and Integrated and Inclusive Framework for Social Protection in SADC* (2003 Johannesburg and Cape Town).

rights. South Africa and Germany are no exceptions. In South Africa, there are a variety of routes that could be utilised to enforce or monitor social security rights. These routes, stemming from a variety of social security statutes and the common law, include the following: *courts* (e.g., Constitutional Court, High Court, Labour Courts and Magistrates Court), *boards* (e.g., Special Pensions Board, Special Pensions Review Board, Appeals Committee of the Unemployment Insurance Board etc), *tribunals* (Pensions Fund Adjudicator, Council for Medical Schemes, Commission for Conciliation, Mediation and Arbitration etc), *offices* (Director General of the Department of Social Development, Minister for the Ministry of Social Development etc) and *commissions* (e.g., the South African Human Rights Commission).³ South Africa, unlike Germany, has no specialised social security courts or administrative tribunals.⁴

The abovementioned variety of routes that could be followed to, for example, enforce social security rights highlights the problem of a lack of a uniform social security adjudication system in South Africa. This has in turn produced a variety of problems. To mention but a few: “there is little consistency, as different bodies or officials are called upon to hear complaints and appeals in respect of different parts of the social security system, undue delays are common and the power of the courts to deal with these matters is unsatisfactory.”⁵ In addition, “[i]t is often argued that normally, the courts have only review and no appeal powers, that the ordinary courts of the country are not specialised enough to deal effectively with social security matters, that access to courts is limited, particularly as far as the indigent are concerned, that cases are often dealt with on a purely technical and legalistic basis, with little regard to the broader considerations of fairness, and that court proceedings tend to be prohibitively expensive.”⁶

2.2 Legal instruments

2.2.1 International

There are a variety of international legal instruments making provision for social security. These instruments include, among others, international instruments originating from international organisations (such as the United Nations Organisation (UN) and ILO) and international agreements (bilateral or multilateral) between countries.

³ See Olivier MP *et al* “Adjudication and enforcement of social security; review and appeal” in Olivier MP *et al* (eds) *Introduction to Social Security* (2004 LexisNexis Butterworths Durban) 503 at 527-528.

⁴ See Eichenhofer E “Judicial protection of social security in Germany” (1995/1996) 1 *East-West Review of Social Policy* 75.

⁵ Olivier MP *et al* “Adjudication and enforcement of social security; review and appeal” in Olivier MP *et al* (eds) *Introduction to Social Security* (2004 LexisNexis Butterworths Durban) 503 at 525.

⁶ *Ibid* at 525-526.