

REFLECTIONS ON THE LEGAL MANDATE FOR SUSTAINABLE SOCIAL PROTECTION IN SADC

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Overview

- ▶ Developing international law framework
- ▶ AU: Constructing a baseline for the continent
- ▶ SADC: A benchmark for national development
- ▶ National level framework
 - Constitutional protection
 - Statutory basis
 - Jurisprudential guidance
- ▶ Conclusions

Developing international law framework

- ▶ Value of considering international social security
 - Indicating direction and setting basic standards
 - Providing benchmarks for national standard-setting
 - Human-rights (=rights-based) approach

International instruments and standards

▶ Declaration of Philadelphia, 1944

- “extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”

▶ UN Declaration of Human Rights of 1948

- Importance and status
- Art 22: right to social security and linkage with dignity and personality development
- Art 25(1): adequate standard of living
- Art 25(2): protection of mothers and children
- Art 25(3): employment benefits

International instruments and standards

- ▶ **International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)**
 - Importance and status: detailed exposition; significant provisions; public and private measures
 - Art 9: social security and to social insurance
 - Art 10: family assistance; maternity protection
 - Art 11: adequate standard of living: adequate food; clothing & housing; improvement of living conditions
 - Art 12: highest attainable standard of physical and mental health
 - Art 13: education
 - Art 7: employment-based social protection
 - Art 2: obligations
 - General Comments: role and value

International instruments and standards

- ▶ International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) (cont)
 - Prioritising the plight of the marginalised and the excluded
 - General Comment No 4: Article 11(1) of the ICESCR (adequate standard of living) – state parties to give "due priority to those groups living in unfavourable conditions by giving them particular consideration". It has also held that "... policies and legislation should correspondingly not be designed to benefit already advantaged groups at the expense of others."
 - See *Grootboom* and other CC cases (South Africa) for a similar approach

International instruments and standards

- ▶ To same effect: new General Comment No 19 (2008) on the right to social security (art 9 ICESCR)
 - Indicating core components of the right to social security
 - Stressing several elements: availability, accessibility and affordability
 - Reiterating three main state obligations: to respect, protect, fulfil
 - Suggesting various ways in which social security can be extended
 - Emphasising in particular the rights of and extending protection to vulnerable persons, such as migrant workers and informal sector workers

International instruments and standards

- ▶ Key differences with the (historical) ILO approach
 - ILO Committee of Experts: ILO standards do not view social security as an individual right but rather as a social institution regulated by its own legislative framework ...” (*Social security and the rule of law* par 159)
 - However, UN standards treat social security as a human right (see Vonk; Bachelet)
 - A rights-based approach versus a state duty approach
 - Final state responsibility versus direct state responsibility – “The state must take steps ... by all appropriate means to achieve progressively the full realisation of the rights to the maximum of its available resources”
 - Universal principles versus minimum requirements
 - Core obligation – minimum essential level of benefits should be available

International instruments and standards

- ▶ **The ILO: International labour and social protection standard-setting (cont)**
 - Convention 102/1952: 9 classical risks; minimum standards with regard to scope and benefits; general level to be attained everywhere; governance; adjudication
 - Preference for public social insurance arrangements
 - Little specific treatment of social assistance

International instruments and standards

- ▶ Therefore, a need for a new instrument
- ▶ Recommendation 202 of 2012 on National Floors of Social Protection
 - Defines social protection floors as nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion (par 2)
 - National social protection floors should comprise at least the following basic social security guarantees, which could among others be achieved via social assistance schemes (paras 5 and 9(3)):

International instruments and standards

- Access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality;
- Basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;
- Basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and
- Basic income security, at least at a nationally defined minimum level, for older persons.

International instruments and standards

- ▶ Recommendation 202 – note:
 - Principles supportive of a rights-based approach, in addition to these social security guarantees
 - universality of protection, based on social solidarity;
 - entitlement to benefits prescribed by national law;
 - adequacy and predictability of benefits;
 - non-discrimination, gender equality and responsiveness to special needs;
 - social inclusion, including of persons in the informal economy;
 - respect for the rights and dignity of people;
 - progressive realization, including by setting targets and time frames;
 - transparent, accountable & sound financial management and administration;
 - financial, fiscal and economic sustainability with due regard to social justice and equity;
 - high-quality public services enhancing social security systems delivery;
 - efficiency and accessibility of complaint and appeal procedures;
 - Emphasis on access to justice

AU framework – constructing a baseline

- ▶ Social protection and social security – a developing agenda
- ▶ AU Social Policy Framework (2009) – "minimum package of essential social protection" (par 32)
- ▶ Specialised frameworks:
 - See Social Protection for the Informal Economy and Rural Workers 2011–2015 (SPIREWORK) – again, the minimum package approach
 - See also the new Joint Labour Migration Programme (social protection of migrant workers)

AU framework – constructing a baseline

- ▶ Declaration on employment, poverty eradication and inclusive development in Africa (2014) – one of the six key areas = “Social Protection and Productivity for Sustainable and Inclusive Growth”
- ▶ AU Council decision – June 2015
 - “The implementation of the Social Policy Framework of Africa to be accelerated, that Member States pursue a rights-based approach to social protection and social security of all citizens, aiming at inclusive development that leaves no one behind, through appropriate legal and policy frameworks, complementing the AU charter on Human and People’s Rights”

AU framework – constructing a baseline

- ▶ AU Council decision – June 2015
 - Requests the AU Commission, In collaboration with the African Commission on Human and Peoples Rights, to develop an additional protocol to the African Charter on Human and People's Rights on the Rights of citizens to Social Protection and Social Security

SADC: A benchmark for national development

- ▶ SADC Treaty
 - Economic *and* social development
 - Emphasis on regional integration
 - Uplifting the socially disadvantaged
 - Protocols: legally binding instruments

SADC: A benchmark for national development

- ▶ Social Charter (2003) – see in particular art 10
- ▶ Code on Social Security (2007) – acknowledges the right to social assistance
 - “Everyone in SADC who has insufficient means of subsistence to support themselves and their dependants should be entitled to social assistance, in accordance with the level of socio-economic development of the particular Member State” (art. 5.2)

SADC: A benchmark for national development

- ▶ The 2014 Protocol on Employment and Labour – article 11:
 - (1) State Parties shall, with due regard to the means available, ensure that:
 - Every worker in the Region and his or her dependants shall have a right to adequate social protection and shall, regardless of status and the kind of employment of the worker, enjoy adequate social security benefits; and
 - Persons who are unable to enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.
 - (2) Every State Party shall establish, maintain and progressively raise its system of social security to a level consistent with international and regional instruments, by ratifying and implementing ILO Social Security (Minimum Standards) Convention 1952 (No. 102) and implementing the ILO National Floors of Social Protection Recommendation 2012 (No. 202).

SADC: A benchmark for national development

- ▶ The 2014 Protocol on Employment and Labour – article 11:
 - (3) Each State Party shall aim at developing an integrated and comprehensive social protection system which:
 - ensures meaningful coverage of everyone under the system, in terms of among others social insurance schemes and social assistance measures;
 - protects against special and collective risks, including political conflict and natural disasters;
 - adequately integrates sufficient preventive and reintegrative measures, including measures aimed at integrating and reintegrating workers into the labour force;
 - encompassed co-ordinated formal and non-formal types and direct and indirect forms of social support; and

Constitutional framework

- ▶ Value of constitutional protection
- ▶ Socio-economic rights: a mixed picture
 - Right to social security: RSA, Seychelles, Angola
 - General reference
- ▶ Jurisprudential effect: e.g. Malawi, Tanzania
- ▶ South Africa

SADC: Constitutional framework (cont)

► Evaluation

- At times – not enforceable rights
- But important: interpretive value
- Social security as a right? – weak development in most SADC countries

SADC: Jurisprudential context (national & regional)

- ▶ National level responses
 - Weak and disappointing
 - But see Tanzania, Lesotho, South Africa
- ▶ Regional level responses
 - SADC Tribunal – human rights approach
 - Art 4(c) of the SADC Treaty: SADC member states shall act in accordance with the principles of “human rights, democracy and the rule of law”
 - Art 21(b) of the Tribunal Protocol: Tribunal may have regard to “applicable treaties, general principles and rules of public international law”
 - Suspension and review of Tribunal

SADC: Jurisprudential context (national & regional)

- ▶ Progressive jurisprudence, e.g. in South Africa
 - National roll-out of social assistance imperative (*Mashava*)
 - Class actions allowed (*Ngxuza*)
 - Extension of social assistance to permanent residents (*Khosa*) and refugees (*Bishogo*; *Scalabrini Centre*; see also *Somali Refugees*)

Statutory basis

- ▶ Value of a statutory basis for social assistance
- ▶ The example of South Africa
- ▶ Position in several SADC countries – absence of sufficient statutory guarantees/framework

Conclusions

- ▶ A human rights framework for sustainable social protection in SADC clearly exists
- ▶ However, several factors impede the realisation thereof in many SADC countries, such as –
 - Weak ratification record
 - Absence of an appropriate constitutional and/or statutory framework
 - Insufficient access to justice arrangements
- ▶ There is need to address the underlying context giving rise to dependency on social assistance – e.g. the persisting inequality (e.g., example of Namibia)
- ▶ There is need to appreciate the links between a rights-based approach and holistic approaches – confirmed by the preventive and reintegrative role of social security