Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers

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SASPEN and FES International Conference
Social Protection for Migrants in the SADC: Prospects, Vulnerability and Benefits across Borders
29-30 October 2014; Braamfontein, Johannesburg

Abstract
Social protection is a fundamental human right; yet a great proportion, about 80 percent, of the world’s working-age population (and their families) has no access to social security. This trend is undoubtedly worse when observed in individual countries. In South Africa specifically, there appears to be a social protection gap. Domestically, work-related social protection coverage is concentrated in the formal economy (i.e. on formal sector workers) and when it is not, nationality or residency is a key requirement for access. Such restrictive provisions unfavourably impact on the social security rights of many foreign workers in the country. The situation is particularly severe for unauthorised or irregular migrants as they are categorically precluded from any legal coverage owing to their precarious legal status. The exclusionary nature of the welfare policy highlights a complex interplay between immigration, labour and social security laws when considered in the context of clandestine labour migration. Research suggests that the level of social and labour protection that a foreigner can enjoy is directly related to his/her immigration status. Thus, the more tenuous one’s immigration status is the more barriers to access to social protection. The legal disparity in access to social protection raises issues of serious human rights concerns; especially considering the fact that the main purpose of social protection is to protect the most vulnerable members of a society. Short of completely eroding the power of policy makers, it is important to ensure that immigration, labour, and social security laws are carefully juxtaposed so as to ensure that while the state is exercising its territorial right, it will still ensure that everyone’s right to access fundamental social and labour rights are given effect. A fair balance of these laws needs to be struck if we are to manage migration effectively to the benefit of all stakeholders.

The paper argues in favour offers a pragmatic argument for promoting the rights of unauthorised migrant based on a structural analysis of clandestine migration trend.
Introduction
Social protection is increasingly gaining attention on development agendas worldwide. National economies, both developed and developing, are recognising its effectiveness in the struggle against poverty and vulnerability. This current salience of social protection in many policy debates could be partially attributed to concerns about globalised economic risks and the changing nature of work, among other reasons.

Conceptually, social protection has been viewed in terms of the traditional view of poverty reduction as it mainly concentrated on mechanisms intended to mitigate or protect people against life shocks. However, contemporary understanding of social protection transcends mere attempts at improving the livelihoods of the poor as an end goal to include the creation of opportunities for the vulnerable to contribute to and benefit from economic growth. In this view, the broad conceptualisation of social protection put forward by Devereux and Sabates-Wheeler, and adopted in this paper, is a more appropriate understanding of this increasingly important concept. According to Devereux and Sabates-Wheeler, social protection is much more than simply reducing poverty or managing risks, it encompasses ‘the set of all initiatives, both formal and informal, that provide: social assistance to extremely poor individuals and households; social services to groups who need special care or would otherwise be denied access to basic services; social insurance to protect people against the risks and consequences of livelihood shocks; and social equity to protect people against social risks such as discrimination or abuse.’ In addition to the obvious protective, preventive and promotive elements embedded in this definition, this characterisation highlights the transformative dimension of social protection that is often missed or overlooked. In focusing on the underlying structural inequalities which give rise to vulnerability and exclusion (i.e. the transformative dimension), one is alerted to the need for legal and regulatory reforms to assist those locked in exploitative relationships.

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3 Ibid at 10.
The transformative dimension of social protection becomes ever more pertinent when considered in the context of migration, particularly that of the clandestine kind. It is undoubted that the primary purpose of social protection is to protect the most vulnerable and needy in society. Yet some of the most in need are often left with no recourse in dire times. This is particularly true when discussing migrants entering or working in countries without formal authorisation or approval. Individuals who are engaged in clandestine or irregular migration for labour are often at risk of high exploitation, forced labour and severe human rights abuse. Granted that such workers evidently will benefit more from employment-related social protection, yet they are wholly or partially denied the very rights that can help improve their situation.

Accordingly, the paper reflects on the domestic exclusion of unauthorised migrants from accessing important social protection usually accessed via employment. Structural analysis of clandestine migration flows suggests that this exclusion is flawed. It is argued that despite public discourse to the contrary, the social protection right of irregular migrants is possible and should be promoted.

**Migration trends: quantifying a vulnerable group**

Before exploring the possibility of rights extension to unauthorised migrant workers, it is important to establish the context from which this advocacy originates. Existing approximation of the world’s total migration population, i.e. people living outside their birth country, closes in on some 232 million people. A significant proportion of said total migrant population (some 120 million odd people) makes up migrant workers. The African region alone is said to account for nearly 20 million of this migrant-workers population. Moreover, about 10-15 percent of all international migration that takes place is thought to be of a clandestine kind, thus occur without legal authorisation.

Domestically, immigrants are estimated to make up about two percent of the South African population. Current data, though disputed, puts the number of unauthorised migrants in the country between 1 and

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6 Ibid.
8 Figure obtained from the 2001 census. 2001 is the latest date for which migration records are available. Also see Jonathan Crush ‘South Africa: Policy in the face of xenophobia’ (2008) available at [http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia](http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia) accessed on 13 February 2014.
However, a conservative estimate by Statistics South Africa puts the number of these migrants in the 500 thousand to one million ranges. It must be noted that these figures are often constructed and magnified to politicize a perceived “immigration problem” that often stigmatizes migrants and perpetuates xenophobic sentiments. Despite the apparent lack of available reliable and accurate information about unauthorised migrant workers in the country, one can attempt to gauge the number of this population through available deportation figures. Deportation data indicates that since 1994, the Department of Home Affairs (DHA) has extradited over a million foreigners (mostly from Zimbabwe, Mozambique and Lesotho). It is still difficult to accurately gauge prevalence of unauthorised migrants in the country through examination of deportation figures given the clandestine nature of the migration. Although this clandestine population may not be as numerous in reality as estimates suggest, they constitute a sizeable enough number to be a recognisable group around the globe.

Enumerating issues aside, unauthorised migrant workers are, by nature, highly susceptible to varied forms of discrimination, marginalisation and human rights abuses in host nations. In South Africa, like elsewhere in the world, they are often found in sectors of the economy that are not adequately covered by protective legislations. Almost always, they are economically engaged in some dirty, dangerous and degrading jobs that locals avoid entirely. Their precarious legal position means they are more likely to accept or even suffer under deleterious working and living conditions out of fear of detection and prosecution for immigration violations. In the field of social protection, migrant workers, globally, tend to be situated in areas of the labour market that are ‘not covered by social security or in which compliance with social security laws is poorly enforced.’ The uncertainties associated with labour migration, particularly the clandestine kind, raise the question of the protection of migrant workers, specifically their right to access to social security.

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Reviewing the South African social protection framework

South Africa has a relatively comprehensive social security system, albeit fragmented and incoherent across different government departments,\(^{14}\) encompassing a variety of public and private measures intended to protect ‘in the event of an individual’s earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty...’\(^{15}\)

Table 1: The forms and nature of social security in South Africa

<table>
<thead>
<tr>
<th>Forms of social security</th>
<th>Nature of social security</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Social insurance</strong></td>
<td></td>
</tr>
<tr>
<td>Unemployment Insurance Fund (UIF)</td>
<td>Offers temporary income relief in the event of wage-related risks such as job loss, illness, maternity, adoption and death. Contributory; joint contributions by employers and employees. Regulated through the Unemployment Insurance Act 75 of 1966 (UIA).</td>
</tr>
<tr>
<td>Compensation Funds</td>
<td>Offers medical care and wage reimbursements to workers for employment related disease or injury. Regulated through the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).</td>
</tr>
<tr>
<td>Road Accident Fund</td>
<td>Offers protection against risks with regard to motor vehicle accidents Not employment based</td>
</tr>
<tr>
<td>Private savings (Voluntary insurance arrangements)</td>
<td>Individuals voluntarily save for unexpected contingencies. Voluntary contribution, e.g. private medical schemes, private pensions and provident funds. Pension Funds Act 24 of 1956 Medical Scheme Act 131 of 1998</td>
</tr>
<tr>
<td><strong>Social assistance (Social grants)</strong></td>
<td>Safety net for impoverished individuals. Non-contributory; means-tested</td>
</tr>
<tr>
<td><strong>Social relief</strong></td>
<td>Offers temporary relief for major disasters e.g. floods, fire. Non-contributory, means-tested</td>
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However, the South African social security system, though comparatively comprehensive, tends to exclude or marginalise many categories of people; thus creating a social protection gap. One such category or group of people adversely affected are foreign workers, specifically unauthorised migrant workers.

Globally, migrant workers are not covered or are inadequately covered by work-related social security. In South Africa particularly, the rights of access to social security benefits and/or entitlements for foreigners tends to be directly related to immigration status as eligibility is often linked to nationality, residency, contributions, periods of employment or a combination thereof.\(^{16}\) It is therefore implied that the legal status (often immigration status in this context) of non-citizens, to some degree, determines the level of access to social protection. In this respect, the more tenuous the immigration status is, the more barriers to the right of access to social security.

A precursory examination of the South African social welfare policies supports the aforementioned assertions. The facts suggest that foreign nationals, with the exception of permanent residents, are mostly barred from the South African social security policy. The most obvious exclusion can be seen in relation to social assistance. Unauthorised migrant workers have no recourse to social assistance benefits as South African citizenship is the main eligibility requirement to accessing almost all social assistance benefits.

While the preclusion of these workers from accessing social assistance may be understandable, owing to its non-contributory nature, the same argument cannot be made for their barring from social insurance coverage. Granted social insurance coverage in South Africa is restricted to people who qualify as ‘employees’ or similar other term used in the relevant pieces of legislation.\(^{17}\) This eligibility criterion still does not justify why unauthorised migrant workers are statutorily precluded from certain social insurance schemes. The reliance on ‘employees’ or similar other term as an eligibility requirement to access unemployment (UIA) and compensation (COIDA) benefits presupposes the existence of a valid contract of employment.\(^{18}\) However, it has since been established that the common held assumption


suggesting that employment contracts entered into with foreign workers, who do not possess the necessary work permit required by law, is supposedly invalid and consequently those workers cannot be considered as ‘employees’ is unsound.\(^{19}\) Despite the formal recognition of unauthorised foreign workers as ‘employees’ in labour law, their newly acquired status does not translate into substantive protection as far as occupational insurance is concerned. Even if their newly acquired status affords them the legal recognition they deserve in social security law, this will still not be enough as benefits do not extend to workers outside formal employment.\(^{20}\) Seeing as most unauthorised migrant workers in the country are atypically employed or operate on the periphery of the formal economy, it can be safely construed that unauthorised migrants are categorically excluded from accessing social insurance mechanisms.

While it is understandable that all categories of migrants cannot be afforded the same treatment; the apparent legal and institutional exclusion of irregular migrant workers from important work-related protections in the field of social security law is not only severe for this category of foreign workers but unjustifiable. It is asserted that the use of immigration law regulation and migration status to restrict access to social security entitlements is unsound in view of the structural exploration of clandestine migration flows.

**Promoting the rights of unauthorised migrant workers: a structural argument**

Legal policies and practices that preclude unauthorised migrant workers from enjoying basic social rights seem to suggest that these people are themselves to be blamed for their precarious position, without much consideration for the wider societal factors that stimulate clandestine migration itself.\(^{21}\) While this presupposition may seem valid at face value, it is not entirely accurate. The reality is that unauthorised migrant workers are victims of a structural phenomenon that places them in a position of extreme vulnerability.

In the first instance, clandestine migration, albeit by all accounts openly opposed by countries, tends to be subtly allowed or even promoted by governments and employers.\(^{22}\)

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\(^{19}\) See *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC).

\(^{20}\) Marius Olivier ‘Critical issues in South African social security: The need for creating a social security paradigm for the excluded and the marginalized’ (1999) 20 ILJ 2199 at 2205.


territorial sovereignty suggests that states’ have sovereign prerogative to control its physical domains.\textsuperscript{23} This territorial discretionary power permits states to control the entry and expulsion of foreign nationals into and within their territory. In practice, however, states often fail to exercise such rights as growing clandestine migration trends attest.\textsuperscript{24} Therefore, permeable national borders can be said to be indicative of subtle encouragement to enter on the part of the government. One of the overarching purpose of the South African the Immigration Act 13 of 2002, as stated in the preamble, is to ‘set in place a system of immigration control which ensures that...border monitoring is strengthened to ensure that the borders of the Republic do not remain porous and illegal immigration through them may be effectively detected, reduced and deterred.’ Yet, South African borders, particularly the border shared with Zimbabwe, have become undeniably porous for undocumented workers as people commonly cross without going through immigration posts.\textsuperscript{25} The failure of the South African government to use its ‘immigration-regulatory powers’ to regulate or manage its borders effectively could be a silent offer to irregular migrants to enter.

Secondly, host countries are more than happy to accept and even approve of the physical labour offered by non-nationals, particularly the low-skilled ones, but are unwilling to increase their admission quotas for the legal entry of this category of workers.\textsuperscript{26} They place too tight a control on the number of legally issued visas for this foreign low-wage labour group, all in the name of immigration control. It is therefore unsurprising that some foreigners end up entering and working in violation of immigration laws, with such restrictive practices clandestine migration is inevitable. In addition, public discourse incorrectly assumes that unauthorised foreign workers should not be entitled to rights protections because they are not legally allowed to be in the country.\textsuperscript{27} Such assumptions is not cognisant of the fact that irregular migrant workers pool offers a cheaper and flexible workforce alternative to what would otherwise be a burden on the payrolls of most firms in the economy.\textsuperscript{28}

\textsuperscript{23} Linda Bosniak ‘Human rights, state sovereignty and the protection of undocumented migrants under the international migrant workers convention’ (1991) 25(4) International Migration Review 737 at 742.
\textsuperscript{24} Ibid.
\textsuperscript{27} Office of the High Commissioner for Human Rights (OHCHR) Out of the shadows: a human rights perspective on irregular migration (October, 2012) at 4.
\textsuperscript{28} Guy standing The Precariat: The new Dangerous Class (2011) 103.
These observations are particularly true in the South African context. South African immigration policy is restrictive to the point that there is virtually little to no prospect for low-skilled foreign workers wanting to migrate legally. A case in point is S2 (1) (j) of the Immigration Act which explicitly states that, ‘to regulate the influx of foreigners and residents in the Republic to promote economic growth, inter alia, by ensuring that businesses in the Republic may employ foreigners who are needed; enabling exceptionally skilled or qualified people to sojourn in the Republic; increasing skilled human resources in the Republic; where applicable, encouraging the training of citizens and residents by employers to reduce employers’ dependence on foreigners’ labour and promote the transfer of skills from foreigners to citizens and residents’. It can be deduced from this provision that only a select number of foreigners, ‘an insignificant percentage of the actual number of workers demanded by domestic employers’,\(^\text{29}\) are given legal opportunities to enter and work in South Africa. Although restrictive provisions such as s 2(1) (j) and other reported administrative red tapes set by the Department of Home Affairs may pass constitutional scrutiny, they are nonetheless indicative of the structural issues that stimulate irregular migration flows.\(^\text{30}\)

Seemingly, the South African government is overtly combating clandestine migration through specialised policies that limit the entry as well as other rights given to unauthorised migrant workers. Section 38 (1) of the Immigration Act, intended to prosecute employers who hire unauthorised foreigners, is evidently prove of this fact. Yet there are sectors of the economy that are heavily reliant on migrant labour, particularly the irregular kind because they are cheap and easy to exploit. The mining, agricultural, hospitality and construction sectors of the contemporary South African economy rely on low-skill migrant labour for survival.\(^\text{31}\) It also happens that these sectors of the economy are not adequately covered by protective legislations as labour standards are frequently violated; wages are sub-minimum and exploitation often high in these sectors.\(^\text{32}\)

\(^{29}\) Lyon, note 26.


Some may argue that extending any domestic social protection rights to these irregular workers is problematic in and of its own. Those who harbour this view perceive any extension of rights as encouraging or even rewarding these people for their transgressions.\(^33\) In their view, protection will only be making the country attractive to these “illegals”, and subsequently the only correct response policy-wise will be to make border control measures more stringent in order to deter clandestine migration and the exploitation that comes with it.\(^34\) Thus, if foreigners are prevented from illegally entering or working in the country in the first place, they will be safe from any exploitation.

In theory, it cannot be denied that punitive immigration control measures can serve as a deterrent to clandestine migration. However, the reality is that irregular migration flows exist and punitive measures have done little to halt the process. This begs the question of rights extension for this group of migrants. Although extending substantial social protection rights to this category of workers undoubtedly serves the best interest of the migrants involved, the South African people and economy stand to benefit from such prospect. It is recognised that unauthorised migrant workers, as they currently stand, are an attractive option for unscrupulous employers who seek cheap and no-strings-attached labour pool. Should they be granted some legal rights, they will become less desirable to these employers as their competitive edge (in this context is their vulnerability) over domestic labour will be removed.\(^35\) Consequently the demand for their cheap exploitative labour will be reduced as employers incur legal obligations for engaging their labour. Ultimately this is good news for the domestic workforce as conditions are set to improve for them as they will no longer be competing with cheap unregulated external labour force\(^36\). Essentially everyone is set to benefit from illegals guests being granted legal rights: the guests will be treated better; the host will be fulfilling its international human rights obligations and simultaneously improving the conditions of all within the territory.

**Conclusion**

While it is understood that unauthorised migrant workers are not as numerous as estimates often portray, they still represent a significant group in the economy. Their irregular status denotes apparent disregard and violation of immigration laws and consequently undeserving of rights protection and or extension. However, structural analysis of clandestine migration trends suggest otherwise. It is

\(^{33}\) Bosniak at 749.
\(^{34}\) Ibid.
\(^{35}\) Ibid.
\(^{36}\) Ibid.
recognised that governments have territorial powers to manage and regulate their borders to protect domestic interests. Yet often times, they fail to exercise these powers and subsequently borders are left porous and attractive to those seeking greater economic opportunity.

What is more, domestic demands for cheap malleable labour by employers stimulate irregular migration flow. The heavy reliance on low-skilled migrant labour in some sectors of the economy is testament to this fact. Once in the country, these workers become victims of circumstances as they are precluded from accessing important work-related legal and institutional protections. This is most severe in the field of social protection where unauthorised migrant workers are categorically barred from accessing benefits owing to their immigration status.

The exclusion of these vulnerable workers from accessing the social security framework is ironic given that social protection is intended for the most vulnerable in society. The vulnerability of these workers necessitates that they be given proper access to social security protection. In any case, continuous legal disparities in opportunities or access to social rights will undoubtedly impact on the human rights of these workers.
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