

CAN A CASE BE MADE FOR THE PROVISION OF GOVERNMENT
FUNDED SOCIAL ASSISTANCE TO REFUGEES IN SOUTH
AFRICA?

DEFINING A CONSTITUTIONAL STANDARD FOR REFUGEE
PROTECTION IN SOUTH AFRICA

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Chapter One: International Refugee Protection and South Africa's Response

1.1 Introduction

*'The litmus test of the morality of any society is how it provides for its most vulnerable members'*¹

The conviction that the international community of States has a duty to provide refugees with protection and find solutions to their problem dates back to the League of Nations. When the United Nations replaced the League of Nations in 1945, it recognised from the outset that the task of caring for refugees was a matter of international concern and that in keeping with the charter, the community of States should assume collective responsibility for those fleeing persecution². The international refugee protection regime was formed in 1951 by the signing on of the Refugee Convention³ which established the legal framework of the protection regime.

International protection is the system which has been devised by the international community to enable refugees to gain access to the safety and security which they are compelled to seek away from home. It makes it possible for them as persons who have lost or are unable to claim national protection in both its legal and territorial sense, to find another approximate, extra-territorial framework to secure their lives, safety and liberty.⁴ Its specific purpose is to ensure that those whose basic rights are not protected (for a Convention reason) in their own country, are if able to

¹ Submission of the South African Council of Churches to the Parliamentary Portfolio Committee meeting on Social Development on the Social Assistance Bill [B57-2003]

² George Okoth-Obbo, "Does Refugee Protection In Africa Need Mediation" Track Two Vol 9 No 3 p1

³ UN Convention Relating to the Status of Refugees, 1951

⁴ op cit (note 2)

reach an asylum state, entitled to invoke rights of substitute protection in any state party to the Convention⁵.

The idea was that those people fleeing persecution should be able to cross international borders and find protection in their countries of refuge⁶. The cornerstone of international refugee protection is article 33 of the 1951 Refugee Convention, the principle of *non-refoulement* or non-return⁷. This principle is also reflected in the 1969 OAU Refugee Convention in article 2(3). Like the right to seek and enjoy asylum, it is considered to be a principle of customary international law, binding all States whether or not they are States parties to the relevant international instruments. However, both logic and the law require that international protection encompass much more than respect for the principle of *non-refoulement*⁸.

Thus a central tenet of the 1951 Refugee Convention is that refugees as 'human beings shall enjoy fundamental rights and freedoms without discrimination'⁹. This is to enable them to not only seek but also to enjoy asylum. There are three main international legal instruments that are applicable for this purpose in South Africa. The first is the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees and the third is Africa's own continental refugee instrument, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

⁵ This is according to Professor Hathaway in his, *The Rights of Refugees under International Law* 2005 at 5. He goes on to emphasise the point that, "In pith and substance, refugee law is not immigration law at all, but rather is a system for the surrogate or substitute protection of human rights.

⁶ Refuge itself of course ultimately had to come to an end. Therefore, the attainment of a durable solution, either through integration in the country of refuge, or by being able to return voluntarily and in safety to the country of origin, was just as cardinal an objective of the system of international protection and is an important one to preserve. This is according to Okoth-Obbo (note2)

⁷ It provides that 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

⁸ This is because to survive in the country of asylum, the refugee needs to have some means of subsistence, as well as shelter, health care and other basic necessities. This entails obtaining some form of recognized legal status, providing authorization to work, or at least access to humanitarian assistance, social benefits, and documentation. Refugees also need respect for the other fundamental human rights to which all individuals are entitled without discrimination beyond what is required for immediate survival.

⁹ This is set out in the preamble of the Convention highlighting the fundamental importance of recognising refugee rights as human rights and their need for equal treatment when it came to the respect of human rights generally.

The system of refugee protection elaborated in these instruments sets down criteria for claiming the protections they establish, the key element being the definition of a refugee. According to the 1951 Convention, a refugee is a person who, because of:

*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*¹⁰

The 1969 OAU Convention employs this definition of a refugee as well and further adds what is commonly referred to as the ‘expanded OAU definition’¹¹. It provides that:

*The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*¹²

Persons or groups who meet these criteria are owed the obligation to be treated in accordance with certain human rights and refugee-specific standards. International protection, like national protection, is therefore based on human rights principles which respect the inherent dignity of the human being. Being the surrogate protection necessary for those for whom national protection of their fundamental human rights has demonstrably failed them, it necessarily follows that the standard of attainment of international protection must be equated with the quality of the core protection a national is owed by her State¹³.

¹⁰ Article 1 of the UN Refugee Convention, 1951

¹¹ This Convention was an explicit recognition by African states of the nature and scope of modern refugee movements in Africa at the time. This was during the wars of independence in Africa where refugee protection was an expression of solidarity with the struggle for independence and refugees were accepted as fellow comrades. It indicated the willingness of post- independent African states to take responsibility for the protection of persons forcibly displaced under these circumstances. See J Schneider in his ‘The Refugee Crisis In Southern and Central Africa’ Global Dialogue, Volume 4.1 April 1999

¹² Article 1(2) of the 1969 OAU Convention

¹³ This is a position that is also advanced by WARIPNET & Human Rights First in their paper titled ‘From response to solutions – strengthening the protection of refugees through economic, social and cultural rights’, A Discussion Paper on the Economic, Social and Cultural Rights of Refugees in West

In South Africa this right to equal treatment and respect for one's human rights is enshrined in the Constitution^{14 15} which guarantees an extensive set of rights to all without discrimination. The Constitution strives to achieve political, civil as well as socio-economic equality for all in response to the inequality that existed in all spheres and was at the root of the wrongs of the past in South Africa¹⁶. It is within the above understanding of the core obligations of international protection that this paper examines the short comings of the policy implementation of the rights contained in the Refugees Act¹⁷ within the greater constitutional context of realising rights for all who live in South Africa.

In the ten years since the end of apartheid, South Africa has made a remarkable transformation from a refugee-producing country to a foremost destination for refugees and asylum seekers from all over Africa and beyond South Africa has created a refugee system whereby all the refugees are urban refugees¹⁸ and where local integration has been deemed to be the most appropriate temporary assistance strategy¹⁹. This system is at a nascent stage at the moment with the legal framework being only five years old in existence and already fundamental problems have come to the fore with respect to the integration of the refugee population in South Africa.

Refugees coming to South Africa seeking protection are faced with a myriad of obstacles, most of which stem from the lack of timely adjudication of their refugee claims by the Department of Home Affairs, the lack of understanding of refugees and

Africa, which was presented during the 51st meeting of the Executive Committee of the High Commissioner's Programme, Geneva, October 2000

¹⁴ Constitution of South Africa, 1996

¹⁵ The importance of this document is also emphasised in the Draft Refugee White Paper which sets out the refugee policy when the government stated that, 'As far as refugees are concerned, the government recognises that its responsibilities and obligations, and the quality and quantity of the measures which it is called upon to deliver pursuant to these obligations are set out in an essentially mandatory manner in international legal and human rights standards. The government has assumed these obligations both through its accession to the relevant international refugee and human rights instruments and by incorporating a number of basic principles and standards in the Constitution of the country.

¹⁶ C Heyns 'Advancing Social Justice in South Africa Through Economic and Social Rights – From The Margins to the Main Stream' *ESR Review* Vol. 1 No. 1 March 1998 p1

¹⁷ The Refugees Act 130 of 1998 which sets out the legal framework and structure for the implementation and fulfilment of South Africa's Convention obligations.

¹⁸ This is a term coined by UNHCR and only really used in Africa

asylum seekers of their rights and the services at their disposal, and the discrimination that refugees and asylum seekers are faced with from the rest of society.

1.2 Main Purpose and Central Argument

This paper is a critique of the implementation of the progressive refugee protection through the local integration policy that has been established by the South African Government. It is premised on the belief that the South African government has failed to create an ‘enabling environment for refugees’²⁰ and that this failure makes it imperative for the South Africa government to remove the exclusion of refugees from their social security scheme. The case put forward by this paper is that the inclusion of refugees into the South African social security scheme will not only improve the quality of its refugee protection policies but it will make them more compatible with constitutional standards.

The central argument of the paper is that the South African refugee policy does not go far enough in allowing refugees access to all the rights that it is mandated to by the Constitution, in particular the right to access social assistance which is guaranteed in s27 (1) (c) of the Constitution²¹. It argues that there is a need for the refugee policy to facilitate access by refugees to all the rights that they are entitled to in terms of the Constitution in light of the challenges that they face in trying to integrate in South Africa. It highlights the critical need for this access to be given to extremely vulnerable refugees in light of the inadequacy of the policy implementation, particularly the failure to create the so-called ‘enabling environment’ necessary to facilitate local integration as a temporary assistance strategy.

This is seen as one of the best ways in which the consequences of refugees’ failure to integrate due to the lack of an enabling environment can be mitigated in such a way that they can live lives of dignity. This paper proposes that this failure to create the crucial enabling environment necessary for the successful integration of

¹⁹ This is in terms of the Draft Refugee White Paper of 1998 which sets out the refugee policy for South Africa and is discussed in more detail below

²⁰ The meaning of this concept is discussed in more detail below in Chapter 2 when the rationale behind the creation of the local integration strategy is discussed in greater depth.

refugees makes it critical for the government to provide refugees with material assistance to assist them to build meaningful lives that take into account their human dignity as defined in the Constitution.

This is because the policy of excluding extremely vulnerable refugees from accessing social security or from providing them with material assistance in the face of the pursuit of exclusionary policies which deny them entrance to some of the most accessible jobs, failure to recognise their qualifications, for instance, has led to extreme poverty and vulnerability of some segments of the refugee population in South Africa²² making the realisation of refugees' right to social assistance of critical importance, especially in light of the fact that it is unconstitutional²³.

The role of the Constitution has become critical for the refugee protection discourse in South Africa as its local integration solution without a right to social assistance or recourse to some sort of material assistance impairs the rights and human dignity of extremely vulnerable refugees, necessitating the need for it to be enhanced in its essential human rights-oriented and refugee-centered character. This is because the Constitution mandates the government to observe a particular human right standard in its treatment of all who live in South Africa. The assertion is that the Constitution can be used as an instrument of social change to facilitate this inclusion as it has the transformative potential as a visionary document²⁴ aimed at establishing a society based on democratic values, social justice and fundamental human rights²⁵

The argument is that what is needed in this situation is a granting of social assistance to refugees to restore the central position of protection priorities which can be done by looking at Constitutional court jurisprudence on socio-economic rights

²¹ s 27 (1) (c) provides that 'Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'

²² This is in spite of the fact that refugees have formal rights in terms of not only the International Conventions that South Africa is a signatory to, but also South Africa's new Constitution and its Refugees Act.

²³ This is because Refugees are entitled to all the rights in the Bill of Rights in terms of s27 of the Refugees Act 130 of 1998 and the right to access social security is guaranteed in s27 (1) (c) of the Constitution. This is discussed in more detail below.

²⁴ This is because as South Africa emerged from despotic, apartheid rule in 1994, into the international arena it not only pledged itself to observe and uphold a number of international human rights treaties but it also enshrined as its highest law one of the most progressive Constitutions in the world. See Heyns supra at (note14)

which, it is argued, set minimum standards of protection for the government. These Constitutional pronouncements on the realisation of socio-economic rights such as social assistance are seen as being best placed to address this problem and to assist the South African government in bringing their policy delivery regarding refugee protection in line with its international and Constitutional obligations²⁶.

This means therefore that government is under a real obligation to provide social assistance to recognized refugees and with regards to asylum seekers²⁷ there are minimum standards of protection that must be applied guided by Constitutional principles. The pursuit of particular policies, which facilitate exclusion of refugees from their ambit such as the Social Security Act,²⁸ is unconstitutional because it does not meet Convention obligations and Constitutional standards.

The provision of material or social assistance is a necessary step towards the achievement of a more constitutionally sound legal standard of refugee protection in South Africa. This is in light of the fact that the government is required to promote and protect the rights, including socio-economic rights, of all who live in it under its liberal and progressive Constitution. This is a significant time in South African history for critical discourse on refugee protection to be undertaken in the context of the government's obligation to progressively realise rights for all, at a time when government is trying to build the constitutional democracy envisaged by the Constitution and to build a South African society based on a human rights culture.

Constitutionally speaking the acceptable standard for refugee protection is one that is equal to the standard of human rights protection that is afforded to South African nationals. It is premised on the Constitutional imperative that the rights contained in Bill of rights are guaranteed for all who live in South Africa and are meant to be realised in a society founded on values of human dignity, equality and

²⁵ This is contained in the preamble of the Constitution of South Africa, 1996

²⁶ This is also in light of the fact that there exist no internationally defined standards which articulate minimum standards of treatment that are imposed by the Convention obligations.

²⁷ An asylum seeker is a person who has come to South Africa and has applied for asylum, for recognition as a refugee and whose case is pending before the DHA. The Department of Home Affairs then makes a decision about whether the asylum seeker qualifies as a refugee based on the above criteria. An asylum seeker is legal in South Africa if he or she is in possession of a valid Section 22 Permit under the Refugees Act or a Section 23 asylum permit under Immigration Act 2002. The Refugees Act states that an asylum seeker's application should be determined within a six-month period but the process usually takes much longer.

freedom for all. The Refugees Act does not go far enough in granting these rights in so far as it does not make provision for the provision of material assistance and in its failure to give refugees the ability to access state funded social assistance.

The Constitutional Court stressed the point that the inclusion of economic and social rights in the Constitution represents a commitment to achieving substantive equality in South Africa when it stated that, 'The Constitution promises us a future in which equality will not merely be an empty and formalistic shell, but a living reality'.²⁹ This has obvious implications for the achievement of equality for refugees in the socio-economic sphere and is one of the main principles on which the argument for an equal standard of treatment is based. A critical assertion that this paper makes is that the Refugees Act should ensure this constitutional standard of legal protection for refugees, a standard which is supported by the Convention spirit and obligations.

The inadequacies that are identified as being inherent in the South African refugee protection system clearly reflect inadequacies in socio-economic rights protections which necessitates the need for the local integration assistance strategy to be approached from an all-embracing rights perspective. This in light of the fact that it is not sufficient to view refugee protection as a combination of civil and political rights protection as refugee protection demands a rights-based approach which embraces economic, social and cultural rights. The Constitution defines a certain standard of living that people in South Africa are entitled to, thus it guarantees for example, the right to dignity and the right to particular assistance from the government to enable one to achieve this.

This means that, for example, in the South African context where most of the refugee rights have been framed in such a manner that they mostly place a negative obligation on the government, there is a need for the government to also take some sort of positive action to be able to properly meet all their convention obligations, especially socio-economic rights. Thus it is not enough for the government to simply guarantee refugees' rights to work for instance, but it is imperative for them to also implement positive obligations such as the provision of social or material assistance.

²⁸ Social Assistance Act 13 of 2004

²⁹ *Harksen v Lane NO* 1998 (1) SA 300 (CC)

The argument is that the manner in which the government is implementing the Refugees Act as it currently stands, fails to give refugees the ability to live the life of dignity guaranteed to them by the Constitution as it does not go far enough in addressing their unique vulnerabilities and the particular challenges that they face. So while refugees have the right to work for instance, most of their qualifications are not recognised by the South African labour market, making them economically vulnerable and susceptible to unemployment and poverty.

This then raises the need or necessity for the government to provide some sort of material assistance to refugees, which assistance should be available, in response to the inherent difficulty that refugees can be expected to have in integrating in a foreign country. This is also in light of the fact that the Constitution mandates that right for all who are resident in South Africa.

This paper turns to Constitutional Court jurisprudence on the realisation of national's socio-economic rights to make an argument for the inclusion of refugees into the social security scheme. One of the main underlying assumptions of this thesis is that there are emerging standards of protection that are being established by the Constitutional Court in this regard. The main reasons for this assumption are advanced from an in depth analysis of Constitutional Court jurisprudence in this area of the government's obligations in the realisation of socio-economic rights concerning nationals. Secondly South Africa has protection responsibilities in terms of its refugee legislation that include elements of socio-economic rights. Thirdly the Constitutional Court rulings give cause to believe that foreigners (especially refugees) should be included in such protections and, moreover, that there are standards of protection that are applicable to foreigners and citizens.

1.3 The broader socio-economic and legal context

The proposed critique of the South African refugee policy has to be understood and explored within the broader concept of international refugee protection. It is argued that this concept of refugee protection, which was created by the 1951 Convention and its Protocol and the OAU convention of 1969, can be

utilized to strengthen the human rights centered character of the local integration policy in South Africa. This is because the essential function of the protection regime was to ensure that those compelled to flee or remain outside their country of origin because of danger to their lives and liberties were admitted into another³⁰ and once there, their safety and human rights had to be guaranteed.

The state authorities in the country of asylum were obliged to assure them social, economic and community rights in the most fulsome manner possible³¹. It is in this context, that the refugee protection regime is supposed to guarantee refugees access to safety, security and the ability to recreate the normalcy and fulsomeness of a human life to the greatest degree possible in their countries of refuge or asylum³² and the argument contained in this paper is that the South African government will be able to achieve this kind of protection regime by the inclusion of refugees into the social security scheme or at least by providing some sort of material assistance to the extremely vulnerable members of their communities.

One of the reasons why there is a reliance on constitutional standards in this paper is because there is no mechanism which enables signatory states to be held accountable for the implementation of their convention obligations nor a supervisory body that can articulate best practices, minimum standards of treatment that are consistent with the nature of their convention obligations and in line with the spirit and purport of the convention itself and the intention of its drafters. The argument is that there has to therefore be reliance on domestic courts to ensure adequate minimum standards of protection.

It is suggested that in the absence of a specific international guiding standard with regard to refugee protection, domestic legislation and practice can be a useful guide in the creation of practical and acceptable minimum standards of protection. Domestic law and standards can be used as guiding principles of expected standards of treatment of refugees and domestic institutions and mechanisms can be used to

³⁰ Okoth-Obbo, G 'Does Refugee Protection in Africa need mediation?' Track Two, Vol. 9 No. 3 p1

³¹ *ibid*

³² *ibid*

hold states accountable to their convention obligations in the absence of an international mechanism or institution³³.

The proposition is that one can look at the standards of protection of nationals in individual countries and that these can then form the basis on which governments can formulate comprehensible rights regarding policy with regard to refugees in their territory. The area of social security has been identified as being one of the most undefined areas of refugee protection in terms of clearly defined standards and in terms of existing clearly articulated minimum core obligations. And yet it is simultaneously one of the most critical areas needing minimum standards for this extremely vulnerable population group.

1.4 Outline of paper

The next section looks firstly at the history of the evolution of the South African refugee policy and the rationale behind the local integration strategy. This is canvassed quite broadly to give an understanding of what the refugee protection landscape was supposed to look like. One can, once armed with this understanding, appreciate why the government might have deemed it unnecessary to include refugees in the social security scheme.

The realities of the refugee's life on the ground are then canvassed covered quite extensively as evidence of why there is an urgent need for a reconsideration of government exclusionary policy with regard to social security. The argument is that in light of the harsh realities that refugees face there is a real need for South Africa to include them in their poverty alleviation and material assistance schemes as a way of maintaining a credible rights based protection system. The whole section provides an understanding of South Africa's position, policy and the challenges it faces.

A look at the history and nature of socio-economic rights is then undertaken in an attempt to properly frame the issue of the justiciability of the right to social

³³ The idea is that we can harness and utilise the rights consciousness of democratic societies to garner support and for the preservation of a necessary and useful protection system.

assistance and to examine how useful socio-economic rights as such can be utilised as a tool in setting minimum standards of protection. This is followed by an analysis of Constitutional Court judgments on socio-economic rights and how they establish a right for the inclusion of refugees into the Social Security scheme. This is then followed by a set of recommendations and conclusions.

Chapter Two: Refugee Policies in South Africa and Their Practical Impact

2.1 Setting the context

Migration has become one of the hallmarks of the contemporary period. Despite its prevalence, few African governments or public institutions are positioned to manage the social, economic, and political demands of providing humanitarian assistance or to address the consequences of displacement and humanitarian action³⁴ and South Africa is no exception to this³⁵. With the passing of the recent *Refugees Act 130 of 1998*³⁶, South Africa has now set in place a legal framework as a response aimed at properly managing the absorption of forced migrants³⁷, particularly refugees and asylum seekers into the South African community and to provide for the necessary legal protection of refugees³⁸, who form a sub class of this community of forced migrants.

This new legislation created both ethical and legal obligations for South Africa to provide protection to the refugees and asylum seekers within its territory.³⁹ This Act gives expression to all the core values of international protection as it provides the legal basis for the protection of refugees in South Africa, which is consistent with the principles that are enshrined in international and regional instruments⁴⁰. As mentioned above the presence of and the protection of refugees in South Africa are a relatively new phenomenon.

³⁴ L Landau (Draft) Proposal to Establish an African Forced Migration Research and Training Network 22 May 2005

³⁵ *ibid*

³⁶ This Act came into effect on the 1st of April 2000 with the passing of its Regulations. Upon enactment the government established machinery for the management of refugee affairs, including the establishment of systems and procedures for registration and status determination, refugee records and a database and the issuance of refugee documents among others.

³⁷ Above (note 34)

³⁸ It can arguably be said that in theory, South Africa has managed to legislatively create a modern, progressive and superior refugee protection system which is in line with the spirit and letter of the Conventions governing refugee protection.

³⁹ The beginning of 1996 saw South Africa finally become a signatory to all three major international instruments pertaining to international migration: the 1951 Refugee Convention, the 1967 UN Protocol and the 1969 OAU Convention.

⁴⁰ This was reflected in the Government policy position as enumerated by the Home Affairs Director General in the White Paper where he stated that, "The granting of asylum to refugees and their

Until the early 1990s, South Africa was a net producer of exiles and refugees and, except for the hundreds of thousands of Mozambicans who fled into South Africa during that country's civil war, received relatively few asylum seekers or refugees⁴¹. It was only in mid-1990s that South Africa began signing legislation and conventions creating the 'refugee' as a legal category⁴².

Unlike most other African countries refugees and asylum seekers are not accommodated in refugee camps where they are dependent on material assistance from the local government, UNHCR and civil society. South Africa has instead put in place a protection system whereby refugees in South Africa are characterized as urban refugees.⁴³ The policy of local integration⁴⁴ was seen as being the best temporary assistance strategy for the duration of their stay in South Africa since they were going to be urban refugees⁴⁵. They are expected to fully integrate themselves into the South African society and they are expected to be fully functional and self-sufficient and to do all this with virtually no special assistance or privileges from the government⁴⁶, which does not have a public relief program for refugees.

The South African Government stated in the Policy Paper on Refugee issues that it did not have the financial capacity to offer material assistance to refugees and asylum seekers. The government believed that given the high unemployment and limited resources available to nationals, it lacked concrete means to enable self-

protection in South African territory is a matter fundamentally of securing human rights protection." Draft Refugee White Paper submitted by the White Paper for Refugee Affairs Task Team 1998 p2

⁴¹ Landau, LB (Draft) 'Background Paper for Open Hearing on Xenophobia and Problems Relating to It' October 2004 p2

⁴² *ibid.*

⁴³ The total number of asylum applications received from 1994-2003 is 152,414. Of these, 26 624 have been granted refugee status while 39,578 have been rejected. The remainder are still awaiting adjudication.

⁴⁴ The meaning of local integration as set out in international refugee conventions, refers to the granting of full and permanent asylum, membership and residency status, by the host government. It takes place through a process of legal, economic, social and cultural incorporation of refugees, culminating in the offer of citizenship. This is according to Jacobsen, K 'Local Integration; The Forgotten Solution' p1 Local integration in the South African context excludes an automatic right to permanent asylum and the ability to apply for citizenship however.

⁴⁵ The government acknowledged that full protection of refugees required the attainment of a degree of self-sufficiency and local integration within the host community for the duration of their exile. Paragraph 4.8.2.1 of the Local Integration Section of the Draft Refugee White Paper

sufficiency for refugees⁴⁷. The government acknowledged that since it did not have the financial capacity to provide material assistance to refugees it would seek instead to create an enabling environment, which would facilitate the successful integration of refugees.

This was to be achieved by legislative, regulatory and administrative measures, such as the issuing of identity cards and travel documents, the granting of the right to work and study, the speeding up of eligibility procedures to guarantee security of status. Public awareness was also to be raised in order to sensitise the local population to the plight of refugees, explain the differences between refugees and economic migrants, and emphasise the need for acceptance and understanding⁴⁸.

To enable refugees⁴⁹ to integrate, the Refugees Act has literally given to them most of the rights vested in its citizenry, i.e. all the rights in the Bill of Rights except those guaranteed to citizens⁵⁰. The understanding was that it was only by becoming self-sufficient that refugees could lead a productive life, which would make them assets to their host country and facilitate their integration within the local community. They believed that by allowing refugees to use their skills or develop new ones while in exile would facilitate meaningful reintegration in their countries of origin when they are able to return⁵¹.

⁴⁶ The United Nations High Commissioner for Refugees (UNHCR) funds certain NGO's to provide legal and social assistance to refugees. This is a very limited amount and it is only for newly arrived asylum seekers and extremely vulnerable refugees and it is for a very limited period.

⁴⁷ Paragraph 4.8.2.2 of the Local Integration Section in the Draft Refugee White Paper

⁴⁸ Paragraph 4.8.2.2 of the Local Integration Section of the Draft Refugee White Paper

⁴⁹ An individual is not considered a refugee until they have been recognised as such by South Africa's Department of Home Affairs. Once granted refugee status/asylum, refugees are entitled to a set of rights and subject to a set of regulations, for the duration of their refugee status. Until such time as an individual's application for refugee status is accepted or rejected, they are considered an asylum seeker.

⁵⁰ These are mainly the political rights such as the right to vote and the right to stand for political office.

⁵¹ Paragraph 4.8.2.1 of the Local Integration Section of the Draft Refugee White Paper

2.2 Failure of implementation of the local integration initiative

There has however been a failure on the part of the South African government to create this enabling environment which was intended to assist refugees in becoming self reliant and successfully integrated during their time in exile in a foreign and often hostile and xenophobic environment, which undermines the quality of its refugee protection policies and initiatives which are based on a progressive piece of legislation and the Constitution⁵².

Although it has established a legal framework for refugee protection, in practice the government of South Africa has not done much in the area of facilitating the local integration of refugee communities⁵³. This has impacted adversely on the ability of these communities which are already vulnerable and marginalized, to integrate successfully into the local community.

Refugees are struggling to fully integrate themselves into the South African society as their ability to access their rights has proved to be difficult, as they are faced with a myriad of obstacles in their attempt to do so. This is from the government's failure to provide secure and proper recognisable and functional documentation⁵⁴, which impairs the ability of refugees and asylum seekers to access jobs and much needed public services⁵⁵ to the absence of proper public awareness and education⁵⁶. This necessitates the need for the articulation of minimum standards of

⁵² Constitution of South Africa, 1996

⁵³ It must be noted that whilst the UNHCR has the mandate to look after refugees, in the South African context it is the government of South Africa that has the primary legal responsibility for refugees.

⁵⁴ While refugees are likely to face similar difficulties as the poor local populace in accessing social services, refugees face a series of additional challenges in this regard. Those living without proper documentation, or where refugee documents are not widely recognized by front-line service providers, are unlikely to access public services effectively.

⁵⁵ The creation of an enabling environment requires that the government ensure that refugees have proper and recognisable identity documents which guarantee a secure legal status and the ability of refugees to access critical financial and social services, jobs etc.

⁵⁶ Others face communication challenges and are usually faced with service providers that are unaware of their special status and their rights, or some are simply not be aware of the services that are available or their rights to them. There are many reports in South Africa that even when documentation is in order, migrants are refused services as a result of outright discrimination or xenophobia. With few public champions, refugees may have little recourse and will be forced to go without services or seek them through private - often informal and unregulated - markets. This is according to Landau, L in his Draft) 'Background Paper for Open Hearing on Xenophobia and Problems Relating to It' October 2004

treatment in accordance with the set legal obligations derived from the act and Constitution.

2.3 Refugee Protection in South Africa

As mentioned above, South Africa is a party to a number of international instruments⁵⁷ that guarantee recognised refugees equal protection before the law. In terms of these instruments, those persons recognised by South Africa as refugees have the right to basic services, including social assistance. With regard to refugees the Convention sets out a number of obligations. In respect of publicly controlled housing and education, other than elementary education, refugees are to be granted “treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.” In relation to elementary education, public relief and assistance refugees are to get better treatment. The UN Refugee Convention provides that refugees are to get “*the same treatment as nationals*” in these areas⁵⁸.

This is also in line with the international understanding that human rights are not solely the rights of citizens or nationals. Refugees, too, are entitled to the protections offered by human rights law, including those in the area of economic, social and cultural rights. Like all other persons, refugees are entitled to an adequate standard of living, adequate food and housing, as well as physical and mental health.

S27 of the Refugees Act provides that recognised refugees are entitled to full protection of the law. This includes the rights guaranteed in Chapter 2 of the Constitution, including the right to social security. This ‘rights chapter’ in essence defines South Africa’s attempt to conceptualise and define their international obligations in terms of the international legal framework on refugee protection and is where the government’s obligation to observe an acceptable minimum standard derives.

⁵⁷ This includes the ICCPR and the ICSECR OF 1966 which are relevant as important international human rights instruments

⁵⁸ ESR Module 7

Furthermore and particularly for our purpose the preamble to the Social Assistance Bill states that, in terms of the Constitution, everyone has the right to social security, not only South African citizens. The fact that despite all of the above refugees and asylums seekers are not included in the social security scheme in South Africa and they receive no form of public relief and assistance from the government is a cause for concern and underscore the need for minimum standards of treatment and protection to be clearly set.

S5 of the Act⁵⁹ states: “Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he; (b) is resident in the Republic at the time of the application in question; (c) is a *South African citizen*; and (d) complies with the prescribed conditions.” This position or state of affairs is not only unconstitutional but is arguably a dereliction of duty by the South African State of its international obligations and commitments. This is more so in view of the fact that South Africa is a country that could provide the best example or best argument for the retention of a protection regime because of its progressive Constitutional democracy which sets high standards of social protection.

It can arguably be said with conviction that in theory, South Africa has managed to legislatively create a progressive and superior refugee protection system. It is in line with the spirit and letter of the Conventions governing refugee protection. Because of this the South African government should be committed to securing for refugees in South Africa full legal protection provided for under international law, which includes all the rights in the Bill of Rights as set out in the Constitution (except those rights from which non citizens have been expressly excluded).

This can be achieved by a more human rights focused implementation of the Refugee Act which in fact guarantees refugees substantial socio-economic rights. Refugees are entitled access to primary education and basic health services granted to citizens. Asylum seekers, however, have limited access to state services and may only access emergency medical treatment unless they are able to pay additional fees (their rights to services are the same as other non-nationals)⁶⁰.

⁵⁹ Social Assistance Act 13 of 2004

⁶⁰ L Landau (note 40) at 18

In terms of this Act, refugees are afforded basic freedom and security rights which include protection from the abuse of state power, such as wrongful arrest and detention.⁶¹ They are also afforded basic human dignity rights⁶² (protection against discrimination, family unity, freedom of movement and association, and freedom of religion) and self-sufficiency rights⁶³ such as the right to work and study.

In terms of s 27 (a-b) of the Refugees Act a refugee is entitled to a formal recognition of refugee status in the prescribed form and enjoys full legal protection, which includes the rights set out in the in chapter 2 of the Constitution. This of course affords refugees a substantial amount of rights as the rights contained in chapter 2 of the Constitution (the Bill of Rights) are quite extensive⁶⁴ and in fact guarantee more than the Conventions and the Covenants⁶⁵.

S 36 of the Constitution does allow for the limitation of these rights however, but only to the extent that the limitation is (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and that such limitation does not negate the essential content of the right in question⁶⁶. Refugees are also entitled in terms of this Act to an identity document⁶⁷, to a South African travel document on application as contemplated in s 31. They also have the right to apply for permanent residence after continued residence of five years and proof that they will remain a refugee indefinitely⁶⁸. In turn refugees and asylum seekers are obliged to abide by the laws of the Republic.⁶⁹

⁶¹ S 29 of the Refugees Act 130 of 1998

⁶² S 27 of the Refugees Act 130 of 1998 and reg 15 of the Regulations of the Act

⁶³ Regulation 15 (1) (f) and (g) have the Regulations that state that a refugee is entitled to seek employment and the same basic primary education as the inhabitants of the Republic.

⁶⁴ These rights are: the right: to equality; to life; to freedom and dignity of the person; not to be subject to servitude and forced labour; to privacy; to freedom of conscience, religion, thought, belief and opinion; to freedom of expression; to freedom of assembly; demonstration and petition; to freedom of association; freedom of movement; freedom of residence; of access to court; of access to information; to administrative justice; to engage in economic activity; to fair labour practices; to acquire and holds rights in property; to a healthy environment; to language and culture; and to education. There are also special children's rights and rights for persons detained, arrested and accused.

⁶⁵ Certainly refugees in South Africa enjoy important rights that are not universally enjoyed in the African context, the most prominent being the right to seek employment and right to move freely within the country.

⁶⁶ VLA de la Hunt, 'Refugees and the Law in South Africa,' p.14

⁶⁷ S 30 Of the Refugees Act

⁶⁸ s 27 (c) and regulation 15 (1) (d)

⁶⁹ Section 34 of the Refugees Act 130 of 1998

As has already been mentioned the practical realisation of this essentially rights regarding refugee protection system has been fraught with difficulties and these obstacles and reality of the actual situation of refugees on the ground will be canvassed in the following section. It is this reality that is so far removed from the one envisaged in the Act that lays the foundation for the argument on the inclusion of refugees in the social security scheme, just as one of the core minimum standards that the government has to observe to practically realise the essence of the right regarding protection system that it has established and one that is constitutionally sound.

As will become apparent in the following section, one of only ways that South Africa will be able to preserve a semblance of a respectable refugee protection system that is close to the one they envisaged, is by allowing refugees to be able to get social security benefits in light of the harsh realities of their life when they fail to successfully integrate. This is especially in light of the fact that the refugee protection regime is supposed to guarantee refugees access to safety, security and particularly the ability to recreate the normalcy and fulsomeness of a human life to the greatest degree possible in their countries of refuge or asylum which is not the case for the extremely vulnerable refugees who are not afforded access social security rights and relief.

2.4 The implementation of refugee rights in South Africa

Despite a commitment to universal rights and the promises of cosmopolitanism embedded in law and policy pronouncements, refugees, asylum seekers, and other (primarily black) immigrants tend to feel unprotected and unwelcome in South Africa.⁷⁰ Although such responses are in part due to failed unrealistic or unrealised expectations, there is strong evidence that non-nationals living in the country suffer from systematic discrimination, social exclusion, and political alienation.⁷¹ The following paragraphs outline a general overview of their experiences and challenges.

⁷⁰ This is observed by Landau LB in his paper 'Xenophobia in South Africa and Problems Related To It' which was presented for the Xenophobia hearings that were held by the Human Rights Commission and the Department of Foreign Affairs 2004

2.4.1 Employment and livelihoods

South Africa is to be commended for having such superior rights such as the right to seek employment, because most countries in the developing world wary not to undermine development objectives and scarce economic opportunities for nationals do not include such rights in their refugee protection systems⁷². Although refugees are entitled to seek employment, however, this has proved difficult for most of them.

This is despite the fact that many of them have had specialised training and entrepreneurial experience and that they are generally better educated than South Africans⁷³. They face huge obstacles in trying to integrate into the South African labour market place. Social conditions such as lack of employment opportunities⁷⁴, racial barriers and bureaucratic obstacles inhibit refugees from realising their right to seek employment⁷⁵.

In addition to xenophobia,⁷⁶ obstacles to refugee participation in the labour market include language difficulties, educational difficulties and cultural barriers and furthermore no active mechanisms have been put in place to enable them to be able to access the labour market in light of these specific limitations and vulnerabilities. In a country where unemployment touches 40 % of the economically active population, refugees and asylum seeker workers compete for an ever shrinking pie of jobs in both the formal and informal sector.

⁷¹ *ibid.*

⁷² J Hathaway & J Dent *Refugee Rights: Report on a Comparative Survey* 1995

⁷³ F Belvedere, *et al. National Refugee Baseline Survey: Final Report. Johannesburg: Community Agency for Social Enquiry (CASE), Japan International Cooperation, and United Nations High Commissioner for Refugees* 2003

⁷⁴ This is according to Landau who states that ‘unemployment is high nationally and it is estimated at between 40% and 50% in ‘Xenophobia in South Africa and Problems Related To It’

⁷⁵ J Hathaway & J Dent (note 79) who also observe that bureaucratic obstacles are often particularly daunting with respect to the liberal profession. Many countries, including South Africa, unfortunately, take an unduly narrow approach to the recognition of the validity of foreign qualifications, which severely limit the access of refugees to the liberal professions. And because documents and qualifications from their home countries are not readily recognised in South Africa—or because those documents were destroyed or left due to war—many are working far below their qualifications or are unable to find suitable employment. The need for refugees to undertake additional training in South Africa in order for them to have their qualifications recognised levies additional expenses and serves as a further hurdle to employment

⁷⁶ There are many instances in which South African employers and organisations have sought to systematically exclude foreigners from given professions or from working in particular areas. On October 23, 1997, for example, approximately 500 street-traders marched through Johannesburg’s streets chanting slogans demanding a boycott on foreigners’ goods and the deportation of foreigners (Palmary, *et al.*, 2002: 112) in Landau “Xenophobia in South Africa and Problems Related To It’

In fact a lot of other factors also militate against the meaningful exercise of this right in practice. The first is the time frames within which refugees are able to successfully get their refugee status documents and asylum seeker permits. The breakdown or inefficiency in the asylum determination process which was theoretically supposed to take a minimum of about 45 days and a maximum of 180 days to adjudicate an asylum application to its finality now takes even up to two years, five or seven years for a genuine refugee to be officially recognised and given refugee status and sometimes anything between six to eight months for an asylum seeker to get an asylum seeker permit which is renewable every three months.

Even for recognised refugees, who have permits which are valid for only two years, this still makes employers wary and disinclined to employ them⁷⁷ as they view them as insecure and as being able to only engage in work of a temporary nature and which most employers may find undesirable. Many employers simply do not recognise refugees and asylum seekers' identity papers or are unwilling to hire them out of the belief that they do not have rights to work in South Africa. This of course points to the insufficiency or the non-existence of a public awareness campaign by the government to promote refugees as a legal population in South Africa to facilitate their inclusion.

Furthermore the fact that the Section 22 asylum seeker permit can be easily forged and/or damaged (it is a single piece of paper, often with hand written amendments) only further justifies such sentiments⁷⁸. This is also because of a lack of a strategic public awareness campaign on the part of the government to promote awareness of refugees and their rights to the community at large, which is a necessary precondition for the successful recognition of refuge permits and rights by the local community in a country where local integration *sans* material assistance is deemed to be the best solution.

⁷⁷ Potential employers are unwilling to take on and train someone who appears to have only temporary status.

⁷⁸ Landau op cit

Moreover many formal employers require a bank account into which they will pay weekly or monthly wages. Because refugees do not have permanent residency and are typically unable to access banking services due to lack of documentation such as identity documents which they are entitled to as of right, effectively denies them opportunities for employment.

To add further to the lack of employment burden of refugees, getting their permits renewed is a 'nightmare' for them as this can take almost as long as the initial time of anything up to two years while they get three months extensions on their expired permits, which makes their already unstable bargaining position even more precarious. These long delays mean that refugees have to constantly go and renew them, which in turn hamper their job hunting activities or their reliability as employees and thus cost them employment opportunities and earnings in terms of time.

In fact because of a lack of understanding or appreciation of the special and unique situation that refugees are in, there are some sectors of the labour market that actually seek to exclude refugees. A case in point is the recent Security legislation⁷⁹ which seeks to regulate the service provision of the security industry, which has effectively excluded refugees from its ambit as it requires a security service provider to either be a citizen or a permanent resident amongst other things.

This has adversely affected the refugee community as this was one of the most accessible niches of the labour market for them⁸⁰. This is also the case with certain by-laws⁸¹ created by the city of Cape Town pertaining to persons rendering parking or related services. These regulations have been designed in such a way as to 'protect' the local labour market and to effectively exclude refugees from their ambit or at the most to make it difficult for them to be able to render such services.

⁷⁹ The Private Security Industry Regulation Act 56 of 2001

⁸⁰ Traditionally, many refugees have found employment in the security sector.

⁸¹ 'Proposed by-law for the Promotion of a Safe and Secure Urban environment,' by the Special Safety Portfolio Committee

While it is of course laudable to try and protect one's local labour force⁸², policy makers cannot forget the obligations that South African has undertaken with regards to the protection of refugees, and so, policies designed to protect the local labour force should have the interests and rights of refugees incorporated within them. This is also important in light of their right to equal protection and treatment before the law which is guaranteed in the Constitution.

This is important because policy makers should not only be aware but must in fact act on these obligations to protect refugees and protection in this case means access to basic human rights. A large number of the refugee community rely on parking and related services to sustain their families and these by-laws exclude the majority of refugees from doing the informal work that they have been doing for almost a decade. This is usually one of the only means available to them of gaining any form of employment and revenue to support themselves as there is great exclusivity in so many of the professions in South Africa already.

'Patterns of exclusion are also evident in private sector industries where one would expect to see the profit motive trump discriminatory tendencies'⁸³. An important point to recognise is that while many South Africans can rely on extensive family networks to support them in times of financial hardship; such resources are not typically available to recently arrived asylum seekers⁸⁴ and refugees making the need for them to benefit from the social security scheme all the more pertinent, as a mere minimum standard.

2.4.2 Accommodation⁸⁵

The majority of refugees have to stay in places for which they pay rent. Belvedere, *et al*, suggests that about two fifths of asylum seekers and refugees rent a room in a

⁸² While protection of the national labour market has always been a priority of states, especially those in Africa as they face challenging economic circumstances, with high unemployment rates, and growing economies where labour opportunities are few, one must remember that South Africa willingly entered into these obligations and that there is therefore a price to pay if it serious about its commitment to safeguarding the socio-economic rights of refugees who are disempowered and disenfranchised group whose rights, dignity and security needs need to be protected. This is becomes even more pertinent in a country like South Africa which has implemented the system of local integration as opposed to the closed camp system.

⁸³ *ibid*

⁸⁴ Landau *op cit*

⁸⁵ This introductory section is taken directly from Landau *op cit*

house or flat, or a back room or a cottage. Just over one third of applicants rent a room, but share it with other individuals. About 30% pay between R250 and R500 per month for rent. Importantly, because of immigrants' vulnerabilities, their lack of contracts, and their need for flexibility, many immigrants pay more for accommodation than South Africans.

In the Wits University survey in Johannesburg, for example, 59% of non-South Africans paid more than R800/month for accommodation compared to 37% of South Africans⁸⁶. Due to their lower earnings, accommodation often represents a far greater proportion of expenditures for immigrants' than South Africans.

It should also be recognised that because of immigrants' limited funds and the need to accommodate non-working relatives, overcrowding is a significant problem. In Belvedere, *et al's* study, respondents typically stayed in places with three rooms (excluding kitchen and bathroom), but with seven people, meaning that two or three people were sharing each room.

It is not uncommon for refugees to have close to ten people sharing a room, often requiring that they sleep in shifts and make use of bathrooms or hallways. The partitioning of flats and houses into smaller units has potentially negative effects on the health, security, and economic productivity of the residents. It also has the potential to degrade the country's built environment⁸⁷.

2.4.3 Identity documents, financial services, and travel documents

Despite being entitled to identity documents and travel documents refugees face serious hardship in trying to obtain these⁸⁸. Many refugees in Cape Town for example have long outstanding applications for refugee identity documents. The inability to get identity documents has been particularly devastating for refugees as it is almost impossible to gain access to economic and social services in an identity document driven society such as South Africa. Without an I.D. refugees are unable

⁸⁶ *ibid*

⁸⁷ *ibid*

to open bank accounts, they have difficulty entering into leases and credit agreements⁸⁹, they are denied access to benefits to which they are entitled to, just to highlight a few of the numerous problems that refugees have because of this.

With regard to travel documents, a refugee is only entitled to a travel document if he or she has an identity document. Given the delay in the issuing of identity documents there has been a corresponding delay in the issuing of travel documents. To compound the issue the department of home affairs does not issue emergency travel documents, which prejudice any travelling plans that a refugee might have or any business trips that might need to make and makes a mockery of their freedom of movement.

Refugees face further difficulties in that they are unable to access the basic child care grants⁹⁰, or disability grants as they are not entitled to any social grants as these are only for citizens and now also for permanent residents. This is despite their right to public assistance in terms of the 1951 Convention and their right to social assistance in terms of both the Constitution and the Refugees Act.

The argument that this paper advances and the reason why the plight of refugees has been highlighted in such detail is that in light of these problems that refugees face in trying to integrate and the consequent poverty and degrading circumstances that many of them are then forced to live under because of this, is to show why there exists this critical need for the establishment of some sort of minimum standards of treatment, especially for vulnerable groups that are legally protected.

This is because refugees experience the same hardships as those South African citizens covered by the social assistance legislation and therefore if their right to equal treatment before the law, non-discrimination and human dignity is of any essence and

⁸⁸ This is because the Department was apparently having technical problems with the software used in issuing these documents and has thus been unable to issue them out.

⁸⁹ VLA de la Hunt, in 'Tracking Progress: Initial Experiences with the Refugees Act, 130 of 1998'.

⁹⁰ In fact should a child be placed with refugee foster parents, they will not be able to access the foster care grant. This position might be changing however following a successful legal challenge by three refugee foster parents in the Pretoria court very recently.

meaning their exclusion not only exacerbates their integration problems but is also unconstitutional and militates against the achievement of these rights and values.

The following section on the Constitutional Court's jurisprudence examines the legal standards that have been articulated by the court as being acceptable in a South African society founded on the values of human dignity and equality, on which these minimum standards can be established. Another reason for choosing to look at the constitutionality of this exclusion is because of the belief that the constitutional principles and rights found in the Constitution must be utilised to provide for the protection of all vulnerable and marginalised groups in the South African society⁹¹ and thus when one is looking at emerging standards of protection, Constitutional declarations are the most obvious place to find them.

As Liebenberg observes, 'the inclusion of socio-economic rights in the Bill of Rights contributes to a substantive view of a transformed South African society. They establish positive duties on the State to ensure that everyone has access to the various socio-economic goods and services enshrined provision.'⁹² The hope is that through this analysis of the standards articulated by the court, broad standards can be established through which one can theorise the practical realisation of refugee rights and the improvement of refugee protection in a Constitutional democracy.

The Constitutional Court has been defining a certain standard that the government has to meet in relation to the realisation of the socio-economic rights of nationals. With regards to monitoring how well or how effectively South Africa is actually implementing its obligations towards refugees these standards developed by the court enable us to develop a core minimum standard by which the government can be held accountable for their implementation.

The Constitutional court has clearly refused to buy into the state's argument of resource incapacity and stated that there are certain minimum core standards that have to be met and realised immediately⁹³ and this same standard has to be employed in

⁹¹ The idea of using the law as a weapon to fight injustice as is done by human rights lawyers.

⁹² Liebenberg, L 'The value of human dignity when interpreting socio-economic rights',

⁹³ This will become apparent from the Constitutional court judgements examined below

holding government accountable and in assessing how successful they are in achieving the effective protection and successful social integration as expressed in s27 of the Refugees Act.

For example until recently, asylum seekers were not allowed to work or study until they were granted refugee status. Such restrictions presented significant problems considering the long duration of status determination and the lack of financial assistance. In such instances, almost any act conducted to ensure applicants' survival, working or studying was criminalised. The courts had to articulate the minimum standards of protection that were acceptable in this regard. These standards, discussed next, are illustrative of the high standard of human rights protection that the Constitution demands.

The 2003 case of *Watchenuka v. Minister of Home Affairs* challenged these provisions.⁹⁴ The judge in that case noted that:

Human dignity has no nationality. It is inherent in all people citizens and non-citizens alike, simply because they are human. And while that person happens to be in this country- for whatever reason- it must be respected, and is protected, by Section 10 of the Bill of Rights. The inherent dignity of all people, like human life itself, is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Right⁹⁵.

Chaskalson *et al* in Constitutional Law of South Africa⁹⁶ quotes with approval the following dictum in respect to the importance of having a job and the effect, which it has on a person's dignity.

Work is one of the fundamental aspects of a person's life.... An essential component of his or her sense of dignity, self worth and emotional well-being....highly significant in shaping the....psychological, emotional and physical elements of a person's dignity and self respect.

⁹⁴ *Watchenuka and Another v. Minister of Home Affairs* 2003 (1) SA 619 (C)

⁹⁵ In the judgement, the court held that the Standing Committee for Refugee Affairs and not the Minister of Home Affairs was responsible to determine the conditions relating to study or work under which an asylum seeker permit may be issued. In April 2004, the Standing Committee on Refugee Affairs took the decision to remove the prohibition against work and study for asylum seekers as a result of lobbying efforts by civil society. Asylum seekers are now entitled to seek employment and engage in study for the duration of their asylum seeker status in Landau in his paper titled, 'Xenophobia in South Africa and Problems related to it.'

⁹⁶ Review Service 2 1998 at 30

And he further stated in *S v Makwanyane* that⁹⁷,

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

If one uses the above standard it is clear that the nature of the obligation on the South Africa government with regard to refugee protection is an extensive one indeed and that the exclusion of refugees from access to social security falls short of these standards. As stated above the paper aims primarily to focus on the way in which the South African Constitutional Court has defined the nature of the obligations that are imposed on the government by the Constitutional clauses guaranteeing the socio-economic rights of the South African people.

The idea is to look at the standards that the Constitutional Court is setting for the realisation of South African national's rights and to use this to develop justiciable standards for evaluating refugee protection and as a guiding framework on how the rights of refugees as set out in the Refugees Act can be rationalized and implemented to ensure that core minimum standards can be observed.

South Africa has embarked on an ambitious project of achieving a Constitutional democracy and the ideals and principles under girding this vision have influenced the manner in which the Refugees Act was formulated and the way in which the protection regime was defined. Remarkable strides have been made in the past ten years in transforming the legal foundations of the South African state. Now the challenge for South Africa is to deliver resources and services to all people, and particularly its vulnerable populations, in a manner that demonstrates its commitment to these new priorities.

A comprehensive and integrated system of social protection is critical to the achievement of this objective. This is the yardstick against which the Social Assistance Act must be assessed. In this context, grave concerns about the capacity of the Act to improve substantially the current social safety net and generate tangible prospects of a better life for all people in South Africa, especially the most

⁹⁷ In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 144

disadvantaged have to be noted⁹⁸. The primary reservations centre on the lack of an overarching policy framework for the realisation of the constitutional right of universal access to social security and, consequently, a clear role for social assistance programmes within that larger vision and the unconstitutional exclusion of certain categories of people such as refugees from access to social assistance⁹⁹.

There is therefore a need for an effective policy framework premised on the principles articulated above by Chaskalson. The 1997 White Paper on Social Welfare represented the first major attempt by a democratic South African government to sketch the contours of a comprehensive, integrated and equitable developmental social welfare programme for South Africa. Foremost amongst the goals of this new national strategy was: "To facilitate the provision of appropriate developmental social welfare services to all South Africans, especially those living in poverty, those who are vulnerable and those who have special needs"¹⁰⁰.

Echoing the language of section 27(1) (c) of the Constitution, the White Paper promised: "The Government will take steps to ensure the progressive achievement of social security for all including appropriate social assistance for those unable to support themselves and their dependents. ... Policies and programmes will be developed to ensure that every member of society can realise his or her dignity, safety and creativity".

The idea of respect for a person's dignity is echoed here once again showing its principle place in the argument for the extension of social security to extremely vulnerable groups. Every member of society¹⁰¹ who finds him or herself in need of care is supposed to have access to support. Social welfare policies and legislation will facilitate universal access to social welfare services and social security benefits in an enabling environment.¹⁰² This policy objective is clearly not being achieved by the

⁹⁸ (note 1) above

⁹⁹ *ibid*

¹⁰⁰ The White Paper on Social Welfare of 1997 Chapter 2, para 7

¹⁰¹ My emphasis

¹⁰² (note 14) above at Chapter 2, paras 8 and 26

exclusion of vulnerable refugees from its potential benefits. With regard to social security policy in particular, the White Paper highlighted the importance of social grants in alleviating poverty¹⁰³ and recognised the importance of the observance of acceptable minimum standards.

The White Paper remains the only comprehensive statement of social protection policy guiding the development of a legislative agenda. Apart from the lack of a coherent policy framework within which to situate the Act, it has other serious deficiencies. Paramount is its manifest failure to satisfy the Constitutional obligation to provide access to social security for all who are unable to support themselves and their dependants. It fails on two counts. First, it makes no attempt to extend access to social assistance to the nearly 12 million poor people who currently live in households with no access to social assistance¹⁰⁴.

Second, it arbitrarily excludes non-citizens from social assistance, except in cases where the South African government has signed an agreement with the person's home nation. This is inconsistent with section 27(1) of the Constitution, which stipulates that "everyone" has the right of access to social security, including appropriate social assistance.

To avoid a constitutional challenge, and to make it compatible with constitutionally defined minimum standards, the Act's objects, listed in section 3, should include: (a) promote the progressive realisation of the right of access to appropriate social assistance for all who are unable to support themselves and their dependents¹⁰⁵. In addition, the eligibility of refugees and asylum seekers and their dependants and undocumented children should be recognised through an amendment to section 5(1) (c).

¹⁰³ At Chapter 7 paras 26 and 27 it states, 'The Government is committed to the provision of a comprehensive national social security system and the Government's Growth, Employment and Redistribution strategy recognises the importance of a broad social security net comprising social payments and targeted welfare services. ... There will be universal access to an integrated and sustainable social security system. Every South African should have a minimum income, sufficient to meet basic subsistence needs, and should not have to live below minimum acceptable standards.'

¹⁰⁴ (Note 1) above

¹⁰⁵ *ibid*

Chapter Three: Defining a South African Constitutional Standard for Refugee Rights

3.1 The Realisation of Socio-Economic Rights

The South African Constitution is one of the most progressive Constitutions in the world and one of the few in which socio-economic rights are expressly set out in the Bill of rights and which have been determined to be justiciable. As one commentator said, ‘In short, the inclusion of economic and social rights has dramatically changed the centre of gravity of the Bill of Rights’.¹⁰⁶ This means that the South African Constitution is a document with great potential to contribute towards greater social justice, including the internationally recognised standards of treatment necessary for effective human rights (refugee) protection in a country once known for its violation of almost every internationally recognised human right¹⁰⁷.

The aim of this section is to see therefore how refugee protection principles can be realised in such a context, what minimum standards can be preserved and therefore to show the way forward in terms of preserving the protection regime with regard to socio-economic rights. As Harrell-Bond observes,

*it is assumed that the way refugees are treated by a particular society is a yardstick by which the observance of human rights generally can be measured and that efforts to improve respect for refugees’ rights can be an entry point for improving the human rights situation for the population as a whole.*¹⁰⁸

The point can therefore be made that any investment in promoting the rights of refugees is an investment in a more just society. This analysis will be done by looking at the Constitutional Court judgments that outline the obligations of the South African

¹⁰⁶ Yacoob J in the *Grootboom* Case

¹⁰⁷ Christof Heyns ‘Socio-economic rights in South Africa’ *ESR Review* Vol.1 No.1 1998

¹⁰⁸ B Harell-Bond ‘Towards the Economic and Social ‘Integration’ of refugee populations in Host Countries in Africa,’ This document was prepared as a stimulus for discussion at the Stanley Foundation conference “Refugee Protection in Africa: How to Ensure Security and Development for Refugees and Hosts” held in Entebbe, Uganda from November 10-14, 2002

government with regards to socio-economic rights of its nationals in general¹⁰⁹ and those of non-nationals. The idea is that these Constitutional pronouncements are setting recognisable standards of treatment from which one can start defining standards of protection for refugees.

3.2 History and Nature of Socio-Economic Rights

Seeing that this paper seeks to extrapolate minimum standards of treatment from the Constitutional Court's articulation of the obligations imposed upon government by the constitutional socio-economic entitlements it is necessary to look at the history and controversy that surrounds the justiciability of these rights before an analysis of the constitutional imperative is undertaken for the sake of completeness and also as a means of centering the issue in its broader historical and jurisprudential context.

Although economic, social and cultural rights have been incorporated into the South African Constitution, they are surrounded by controversies both of an ideological and technical nature¹¹⁰. While civil and political rights are generally accepted as justiciable, there continues to be debate around the justiciability of economic, social and cultural rights.

The differences between these rights are sometimes suggested to revolve around the role of the State. Thus civil and political rights are often seen as requiring only passive duties of abstention from the State, whereas economic, social and cultural rights require active measures¹¹¹. This distinction however is specious as most rights call for active measures from the State like the provision of courts and court officials to give effect to the right to a fair trial for example¹¹².

¹⁰⁹ As one commentator observed, 'The standards that a state must adhere to with respect to the realisation of any of its obligations is most developed and exquisitely set out in the manner in which it treats its own nationals.'

¹¹⁰ Allison Tilley 'Are Non-Nationals entitled to Socio-Economic Rights?' *ESR Review* Vol 1, No. 3 1998

¹¹¹ K O'Regan 'Introducing Socio-Economic Rights' *ESR Review* Vol 1 No 4, March 99

¹¹² *ibid*

There are two main schools of thought that inform the debates surrounding the judicial enforcement of socio-economic rights. One is the polycentric debate and the other is the democracy and separation of powers debate¹¹³. The polycentric debate argues that because the realisation of socio-economic rights has budgetary and policy implications it is therefore not the court's realm to decide upon them and there this is seen as something that the elected legislature should legislate on for execution by an accountable executive¹¹⁴.

The issue becomes even more pronounced and hotly contested if the budgetary implications are in favour of non-nationals of course. This is where the recognition of the fact that refugees are a legally protected sub-population group whose rights are derived from a vital and internationally agreed human rights system, which entitles them to claim the benefit of a deliberate and coherent system of rights¹¹⁵ becomes necessary. Cognizance is taken of the fact that it is a sensitive issue however that needs to be managed carefully in conjunction with public education and awareness of refugee rights and rational of the protection system.

The separation of powers argument says that because socio-economic rights require expenditure by government in order to meet tertiary level obligations it is a matter for parliament and should not be subject to enforcement by the courts¹¹⁶. It argues further that prioritising rights is more appropriately undertaken by an elected legislature than the judiciary which is the arm of government primarily responsible for budgetary decisions¹¹⁷.

Another argument that has been made is that socio-economic rights are vague and imprecise. Herman Schwartz has noted that, 'Constitutional rights are usually written in general terms and we depend on courts to give them specific substance'¹¹⁸. This is therefore why it is necessary and essential to look at the jurisprudence of the Constitutional Court as the emerging standard by which government can be held accountable and by which we can begin to measure "effective protection" as it were.

¹¹³ (note 110) above

¹¹⁴ *ibid*

¹¹⁵ J Hathaway *The Rights of Refugees Under International Law 2005* at p4

¹¹⁶ (note 110) above

¹¹⁷ *ibid*

When it comes to constitutional litigation of socio-economic rights, state officials are required to place evidence before the court of their policy regarding the rationing of scarce resources and their budgets.¹¹⁹ These are fundamental considerations with regards to the protection regime established in a particular country. This is because these are the factors that will contribute to how generous and refugee centered it will be. This question of availability of resources and budgetary concerns is a crucial consideration especially in the African context of scarce resources, extreme poverty and underdevelopment. It will be interesting to see how this limitation can lose its centrality when faced by a fundamental right to dignity that's almost non-derogable, as it is the South African constitutional context.

Bongani Majola states that one of the envisaged effects of the Constitution is the transformation of South African society to a democratic society characterised by freedom and equality¹²⁰. This, I believe is the principle that should underlie the perception, interpretation and implementation of refugee legislation and protection system in South Africa. In this regard Okoth-Obbo says, quite rightly in my opinion, that, 'everywhere the world over, an irrefutable purpose should lie at the heart of the laws, policies and practices established to govern refugees, that is the system of international protection.'¹²¹

In South Africa the transformative nature of the bill of rights which is based on human dignity, equality and freedom is an important foundation for analysing the ability and extent of the nature of refugee protection that South Africa aimed to create and can implement. It is unique in the manner in which it seeks to bring about the transformation of the South African society, not only in terms of civil and political rights but also in terms of socio-economic entitlements.

These rights were obviously meant to be achieved without discrimination and with due regard to the principles of equality and human dignity as envisaged in the

¹¹⁸ H Schwartz 'Economic and Social Rights' *American University Journal of International Law and Policy* 551 at 562

¹¹⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (1997)

¹²⁰ B Majola 'A Response to Craig Scott, A South African Perspective' *ESR Review* Vol 1 No 4, 1999

¹²¹ G Okoth-Obbo 'Does Refugee Protection in Africa Need mediation?' p1

preamble of the Constitution and its core principles. While many Constitutions place emphasis only on civil and political rights the South African Constitution goes a step further and attempts to transform the social and economic dimensions of the lives of South Africans through the entrenchment of socio-economic rights.

It is quite obvious from the above that the Bill of Rights is the blue print on which the framers of the Constitution and the country as a whole hope to rebuild South African Society. Thus refugee protection as a phenomenon of that landscape has to be understood and interpreted in this light. It thus becomes necessary to examine the pronouncements by the 'Court' on obligations imposed upon the state by socio-economic rights. This is what should guide our understanding of the nature of refugee protection that South Africa hoped to establish and can implement if it carries on developing its refugee policies based on Constitutional principles in the spirit within which they have been interpreted.

It must be noted that the Constitutional Court¹²² has held that the issue of whether socio-economic rights are justiciable at all in South Africa was put beyond question by the text of the Constitution as construed in the judgment *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*¹²³ when it stated that

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the State 'to respect, protect, promote and fulfill the rights in the Bill of Rights' and the courts are constitutionally bound to ensure that they are protected and fulfilled.

Obviously economic realities will dictate and are in fact determining the interpretation and implementation thus far. This is not a difficult concept to grasp and in fact one sympathises with a country like South Africa which is a fairly prosperous middle income country albeit one with great disparities of wealth and one which stands alone as a beacon of hope for the masses of Africa who are affected by protracted conflicts and endemic poverty.

¹²² This was in the *Grootboom* case discussed below at p49

¹²³ 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253)

One can understand the reluctance to fully implement or rather their inability to give full effect to intended objectives of these rights. Notwithstanding this however there are certain legal measures or core minimum obligations that must be fulfilled in matters where human dignity is of the essence. Thus it is important to clarify what these standards are that have been created and that can guide and be used as a benchmark for government's implementation of the local integration initiative.

It is significant to note that the first binding international instrument guaranteeing protection of certain social and economic rights was the 1951 Refugee Convention. Although some of the guarantees discriminate between nationals and non-nationals, and may be seen to have been superceded by provisions contained in subsequent instruments, including the International Covenant on Economic, Social and Cultural Rights (the ICESCR), it is informative that the drafters of the 1951 Refugee Convention clearly viewed social and economic rights as being essential for meaningful protection of refugees¹²⁴.

3.3 Constitutional Pronouncements

The Constitutional Court has looked at a number of issues that are relevant to the argument that this paper advances. It has looked at the role and centrality of the principles of human dignity, equality and non-discrimination, which are crucial for our purpose as there are critical in the determination of minimum standards of treatment. It is these fundamental rights and core values that are infringed by the exclusion of refugees from the social security scheme and from any government funded material assistance. It has also set out the principles which guide it in the interpretation and in the realisation of socio-economic rights as they are framed in the Constitution. This section firstly looks at the court's position on the centrality of these principles and then looks at the Court's pronouncements with regard to socio-economic rights proper in the section that follows.

¹²⁴ (note 3) above

The analysis of the core values will address the following points;¹²⁵

- 3.3.1 The rights of refugees in South Africa
- 3.3.2 Unfair discrimination and impairment of dignity
- 3.3.3 Stages of enquiry in a case where the right to equality, non-discrimination and dignity are involved
- 3.3.4 Applying the stages of enquiry to the matter at hand
- 3.3.5 Limitation analysis

3.3.1 The rights of refugees in South Africa

The rights that refugees in South Africa have to equality, non-discrimination and dignity are largely contained in the provisions of the Constitution and the Refugees Act. Section 9 of the Constitution provides:

- “Equality”*
- (1) ***Everyone** is equal before the law and has the right to equal protection and benefit of the law.*
 - (2) *The state may not unfairly discriminate directly or indirectly against **anyone** on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
 - (3) ***No person** may unfairly discriminate directly or indirectly against **anyone** on one or more grounds in terms of subsection (2). National legislation must be enacted to prevent or prohibit unfair discrimination.*
 - (4) *Discrimination on one or more of the grounds listed in subsection (2) is unfair unless it is established that the discrimination is fair.*

Section 10 of the Constitution provides that:

*“**Everyone** has inherent dignity and the right to have their dignity respected and protected”*

¹²⁵ Most of the elements of this analysis are taken from the heads of argument drafted for the SIRA case being prosecuted by Lawyers for Human rights together with the UCT Legal Aid Clinic.

And s 27 (b) of the Refugees Act, 130 of 1998 entitles refugees to full legal protection of the fundamental rights set out in Chapter 2 of the Constitution.

Equality, non discrimination and dignity are without doubt core values of the Constitution and also the ideal of a democratic and open society, to which all persons and state organs in South Africa are duty bound, and ones which they are to strive to realise through all their actions. This principle resonates throughout the Constitution¹²⁶. The Constitutional Court has repeatedly confirmed and emphasized the importance of equality and dignity and the achievement of these principles in South Africa.

Goldstone J in *President of the Republic of South Africa and another v. Hugo*¹²⁷ stated the following, which finds application to the argument advanced herein,

*At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new Constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply in egalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.*¹²⁸

It therefore stands without a doubt, from the above and the wording used in the provisions of the Constitution and in the Constitutional case law, that a refugee who is resident within the borders of South Africa, has the right, not to be unfairly discriminated against by the State as is currently done by various pieces of legislation such as the Social Security legislation and also the Securities Industry Regulations. Extremely vulnerable refugees further have, without a doubt, the right in terms of the abovementioned provisions of the Refugees Act, the Constitution and the Constitutional case law to have their dignity which is impaired by this exclusion, respected and protected.

¹²⁶ See amongst others Chapter 1-, sections 7 (1), 9, 10, 36 (1) and 39 (1) (a) of the Constitution

¹²⁷ 1997 (6) BCLR 708 (CC) at Para 41

¹²⁸ See also Hoffmann v. South African Airways 2001 (11) BCLR 1211 (CC) at Para 27 and Shabalala v. Attorney General, Transvaal 1996 (1) SA 725 (CC) at Para 26

The rights of refugees and all other persons resident in South Africa, not to be unfairly discriminated against and to have their dignity respected and protected by the State, arise not only from the provisions of Chapter 2 of the Constitution, but further arise from international obligation. As said previously South Africa is a ratifying party to the 1951 United Nations Convention relating to the Status of Refugees. The right to social security and assistance is contained in two articles of the 1951 Convention: article 23 ('Public Relief'¹²⁹), and article 24 ('Labour Legislation and Social Security'). In contrast to 1951 Convention provisions on the right to work, the right to social security and assistance is granted at the level of 'national treatment' to refugees who are 'lawfully staying' in the territory of a Contracting State.

That South Africa has clear international obligations to eliminate any form of unfair discrimination, such as the one that exists in the exclusion of refugees from accessing social security has been confirmed by the Constitutional Court in *Hoffmann v South African Airways at Para 51* as follows:

"The need to eliminate unfair discrimination does not only arise from Chapter 2 of our Constitution. It also arises from international obligation. South Africa has ratified a range of anti-discrimination Conventions including the African Charter on Human and Peoples Rights. In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter, with a view to elimination of any discrimination".¹³⁰

Thus the standard of protection must correspond with the concomitant obligations as outlined.

3.3.2 Unfair Discrimination and Impairment of Dignity

It is trite law to say that the right not to be unfairly discriminated against and the right to dignity are mutually supporting and interlinked. An unfair infringement on a person's right to equality and non-discrimination usually leads to an infringement of

¹²⁹ S 23 states that 'The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.' Grahl-Madsen notes that the drafters were not concerned with how the assistance was to be delivered -- whether through national or communal funds or through separate agencies than those providing assistance to nationals -- but only that refugees receive the same material benefits as nationals. This is in J Dent *supra*

a person's dignity. Ngcobo J has confirmed this in *Hoffmann v. South African Airways* at para 27 as follows:

*At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.*¹³¹

The Constitutional Court has defined the meaning of the term unfair discrimination in *Prinsloo v. Van der Linde and Another* at Para 31 which reads as follows:

Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period in our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth: as objects whose identities could be arbitrarily defined by those in power rather than persons of infinite worth. In short they were denied their inherent dignity... In our view unfair discrimination...principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

Thus the government's discrimination of refugees in terms of access to legislation that deals with critical social assistance or economic empowerment such as the securities regulations, based on their identity as non-nationals in a manner which impairs their fundamental dignity as vulnerable human beings who are already disadvantaged as recipients of international surrogate protection is unconstitutionally unfair and therefore an unacceptable standard of treatment.

3.3.3 Stages of an Enquiry in a Case Involving the Right to Equality, Non-Discrimination and Dignity

The Constitutional Court has, on numerous occasions, set out the stages of enquiry into a case where the fundamental right of equality has come to the fore. It has also on numerous occasions confirmed that the following approach should also be followed under the 1996 Constitution:

¹³⁰ See also *Hoffmann v South African Airways* (Supra) at Para 51 footnote 43, for a list of the Conventions which South Africa has ratified prohibiting discrimination

It may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance in section 8 of the Interim Constitution¹³². They are;

- (a) *Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not then there is a violation of section 8(1). Section 9 (1) of the 1996 Constitution Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
- (b) *Does the Differentiation amount to unfair discrimination? This requires a two stage analysis:*
- (1) *Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then the discrimination will have been established. If it is not on a specified ground then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparable serious manner.*
 - (2) *If the differentiation amounts to discrimination, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8 (2) [Section 9 (3) of the 1996 Constitution].*
 - (3) *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the Interim Constitution) [Section 36 of the 1996 Constitution]¹³³*

3.3.4 Application of the Stages of the Equality Enquiry to the exclusion of refugees from the social security scheme

All the principles enumerated in the case law above find direct application to the issue being discussed in this paper. It is accordingly necessary to apply the equality enquiry test formulated and confirmed by the Constitutional Court, to this matter. As part of such enquiry it is necessary to determine whether s5 of the Act¹³⁴

¹³¹ See also *Prinsloo v. Van Der Linde and Another* 1997 (3) SA 1012 (CC) at Para 31

¹³² This is set out in s 9 of the Constitution of 1996

¹³³ *Satchwell v The President of the Republic of South Africa NO* Case no. CCT 45/ 01 at page 14 Para 21 and also footnote 20 (Accessed: www.concourt.gov.za/)

¹³⁴ Social Assistance Act op cit

differentiates between persons and/or groups of persons in South Africa. When doing so it is clear that it does indeed differentiate between persons who may either be classified as South African citizens and now permanent residents on the one hand and on the other, those persons who are not citizens of or permanent residents in South Africa.

A refugee is accordingly a person who is neither a South African citizen nor a permanent resident of South Africa and thus part of the group who is disadvantaged and excluded by the provisions of s5 of the Social Assistance Act. As the matter stands today the sole reason why the Department of Social development does not include refugees in the grants system is because of their not being a South African citizen, but a refugee¹³⁵.

Because refugee status is not one of the specified grounds mentioned in section 9 (3) of the Constitution on which discrimination is prohibited, the next step in the enquiry would be to determine whether differentiation on that ground would constitute discrimination for purpose of Constitutional interpretation. In *Harksen v. Lane No and Others*¹³⁶ the Constitutional Court stated that to determine this, one would conduct an inquiry as to whether:

*...objectively viewed, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*¹³⁷

The fact that a person is a refugee is normally due to either an event or incident over which an individual has no control, such as war, or due to very personal characteristics or attributes that such a person holds, such as his or her nationality, race, ethnicity, religion or political opinion and which such person can neither change or if it is possible to change it, the personal cost of such change would be too high so as to make it unreasonable to require it of the refugee. It is thus submitted that refugee

¹³⁵ This is implied from the arguments that they advanced in the *Khosa/Mahlaule* case on why permanent residence and other foreign nationals were excluded.

¹³⁶ 1998 (1) SA 300 (CC) at Para 53

¹³⁷ See Also *Larbi-Odam v. MEC for Education (North West Province)* 1998 (1) SA 745 (CC) at Para

status is, as with citizenship is a very personal attribute that is extremely difficult to change and one which individuals has very little control over.

Furthermore, refugees as a minority group in South Africa with no political power whatsoever are accordingly extremely vulnerable to abuse by the powers of the State or the whimsical decisions of politicians and/ or public officials or private persons. That this is indeed the case is clearly demonstrated by the facts canvassed above on the difficulties they encounter in South Africa. It is arguable therefore that the differentiation on the basis of refugee status does indeed constitute unfair discrimination which is prohibited for purpose of section 9 of the Constitution and as defined in the mentioned case law. This brings into focus the fact that the government's exclusionary policies are not in keeping with constitutionally determined standards of treatment and thus need to be revised accordingly.

The second leg of the equality enquiry dictates that it must be established, since the discrimination is on the basis of an unspecified ground, whether the discrimination is also "unfair". Mokgoro J in *Larbi-Odam v. MEC for Education (North West Province)* at Para 23 has stated that the determining factor regarding the unfairness of discrimination to be:

*....the impact of the discrimination on the appellants, which in turn requires a consideration of the nature of the group affected, the nature of the power exercised and the nature of the interest involved.*¹³⁸

It has been held by the Constitutional Court, and applies to this matter also, that:

*The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly the more invasive the nature of the discrimination, the more likely it will be held to be unfair.*¹³⁹

Clearly, Section 5 is the provision of an Act made by Parliament that contains a requirement for being able to be a beneficiary to a government poverty relief scheme. Without such access the extremely vulnerable refugee community is forced

¹³⁸ See also *Hoffmann v. South African Airways* (Supra) at para 27

¹³⁹ See *President of the Republic of South Africa and another v. Hugo* at Para 112

to live in abject poverty. Thus the provisions of the Social Assistance Act, seriously affects their ability to become self-sufficient and to successfully integrate and consequently infringing their right not only to seek but also to enjoy asylum which is a vital interest, which South Africa promised to guarantee when they signed the Convention.

Furthermore a reading and application of section 5 of the Social Assistance Act which prevents refugees from accessing much needed poverty relief, solely because they are refugees and not permanent residents of South Africa or South African citizen, can not only be classified as mere discrimination, but indeed as amounting to unfair discrimination. This is so because it amounts to an interpretation and application of a legislative provision that severely affect refugees' ability to self-sustain and to not live in abject poverty. This is especially in light of the fact that when most of them arrive in South Africa they are destitute and have virtually nothing with them that can help them start off in their host country.

It thus severely interferes with and affects their ability to create a livelihood for themselves. Further it infringes on their feeling of self worth and dignity and it detracts from South Africa's international commitments. Refugees are among the most dispossessed and vulnerable groups in South Africa today, who need the South African government to provide some form of material or social assistance or otherwise.

Refugees generally, are left to their own devices in providing for the social needs of themselves and of their families and without an opportunity of accessing some form of social relief, most of them are unable to live with dignity. This therefore impairs their fundamental dignity as human beings, who are inherently equal in dignity to South Africans and permanent residents. It therefore amounts to unfair discrimination for this reason. The Department of Social development should in terms of the South African Constitution, Refugees Act and above Constitutional case law, treat refugees no differently than South African citizens and permanent residents, when it comes to having access to public relief and social assistance.

3.3.5 Limitation Analysis

If the conclusion that has been reached above that the Department's exclusion of refugees solely because they are refugees and not permanent residents of South Africa or South African citizens indeed amounts to unfair discrimination, then next step of the equality analysis would be to determine whether such unfair discrimination is justifiable. The onus would be on the Department to show that such unfair discrimination was justifiable in terms of section 36 of the Constitution.¹⁴⁰

It is submitted that there can not be any justification given for such exclusion as it impairs their human dignity unnecessarily and fails to take into account the context of flight and the nature of the protection that should be rendered and its motivations. Refugee protection provides for special treatment because it takes into account the fact that when refugees flee from their home countries they have not prepared financially for their journey into refuge as is essential for other types of migrants.

3.4 Pronouncements on the realisation of socio-economic rights

This section will now examine the pronouncement of the Constitutional Court in two¹⁴¹ of the main cases involving socio-economic rights. These cases have profound human rights implications for vulnerable groups and non-nationals of which refugees and asylum seekers constitute a part. In the *Grootboom*¹⁴² case Yacoob J noted that because of the way in which the Constitution is drafted it showed that 'the people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The preamble to our Constitution records this commitment'¹⁴³.

¹⁴⁰ See *S v. Zuma and Others* 1995 (2) SA 642 (CC) at Paras 35-38 and *S v. Makwanyane and Another* 1995 (3) SA 391 (CC) at Para 102

¹⁴¹ These include the *Grootboom* case which dealt with the right to housing in terms of s26 of the Constitution and the rights of children to shelter in terms of s28, and the *Khosa/Mahlaule* judgment which dealt with the right of permanent residence to access social welfare

¹⁴² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)

¹⁴³ *ibid*

He noted that the Constitution declares the founding values of our society to be 'human dignity, the achievement of equality and the advancement of human rights and freedoms'¹⁴⁴. This case grappled with the realisation of these aspirations as it was concerned with the State's Constitutional obligations in relation to housing: a Constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

3.4.1 The case for inclusion in the social security scheme

It can be said from the above analysis of these core values of the constitution undertaken in the previous section that in terms of the realisation of particular rights the Court has been most generous in its interpretation of the provisions of the Constitution. The first case that afforded the court the opportunity to grapple with these issues was the *grootboom*¹⁴⁵ case. In this case the respondents based their claim on two constitutional provisions: s 26 of the Constitution, which provides that 'everyone has the right of access to adequate housing, thereby imposing an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources; and s 28(1) (c) of the Constitution which provides that children have the right to shelter'. The respondents contended that the minimum obligation incurred by the State in terms of s 26 entitled all the respondents, including those adult respondents without children, to shelter and that the children's unqualified right to shelter included in s 28(1)(c) placed the right of children to that minimum obligation beyond doubt.

The state placed evidence before the Court of the legislative and other measures they had adopted concerning housing. The central thrust of the housing development policy evidenced by the legislation and other measures in place was to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements¹⁴⁶. The point that can be made here is that the government is failing in meeting its convention obligation to accord refugees in

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

¹⁴⁶ *ibid* at para 53

their territory the same preferential treatment as non-nationals in this case permanent residents in their exclusion of refugees in their policy plan.

The High Court held that s 28(1) (c) of the Constitution obliged the State to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children. That this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of s 26 of the Constitution and that the State was bound to provide this rudimentary shelter irrespective of the availability of resources.

This means that sometimes the socio-economic rights of extremely vulnerable groups have to be realised irrespective of the availability of resources. Thus an argument can be made that the government has to make a policy plan which can be implemented with immediate effect to safe guard the rights of the vulnerable group of refugees especially with regard to the availability of social grants.

In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*¹⁴⁷, the Court made some very definitive statements concerning the adjudication of socio-economic rights. They said that,

*‘The question of how socio-economic rights were to be enforced was a difficult issue which had to be carefully explored on a case-by-case basis considering the terms and context of the relevant Constitutional provision and its application to the circumstances of the case.’*¹⁴⁸

It held further that,

*‘Interpreting a right in its context required the consideration of two types of context. On the one hand, rights had to be understood in their textual setting, which required a consideration of chap 2 and the Constitution as a whole. On the other hand, rights also had to be understood in their social and historical context’*¹⁴⁹.

The Constitutional Court laid a very important benchmark in this respect concerning one’s understanding of litigating and realising socio-economic rights in the South African context. This standard or pronouncement is crucial for our purposes as it defines the parameters in which an argument for the extension of the social

¹⁴⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253).

¹⁴⁸ At Paragraph [20] at 60A/B - 61A and 61C/D - E

¹⁴⁹ Paragraphs [22] and [24] at 61H - 62A/B and 62D

grants system to refugees can be made. It lays out important considerations that need to be taken into account in the formulation of the necessary argument and in fact enhances the scope of the argument by increasing the nature and amount of the issues that must be taken into consideration when such a deliberation is made.

In this regard the terms and context, which includes the social and historical, of the right to social assistance has to be understood in the light of South Africa's history whereby millions of people were forced to live in abject poverty. The provision of this right shows the new democratic dispensation and government's commitment to not only poverty relief but human development and the notion of assisting people out of the degrading conditions of abject poverty and in that way uplifting them out of poverty in recognition of their right to human dignity.

When one applies the circumstances of the case where the claimants of the right are refugees, the argument can be made that these are people whom South Africa has willingly extended its welcome and to whom they have undertaken to provide protection to which is human rights and refugee-centered and to whose minimum standards they promised to adhere and who face many socio-economic related challenges in South Africa. In this case concerning public relief the Convention puts the obligation to provide the same treatment to refugees as is accorded nationals. Thus some minimum core obligation has to be met in this respect.

This is in accordance with the Court's holding that, '*the State was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing*'¹⁵⁰. This is the basis on which all motivation for the inclusion of refugees into the policy framework lies, especially for the most vulnerable of refugees who are made doubly vulnerable by their status and their seeking to integrate into a foreign community with limited or no resources, taking into account the context of flight .

The Court also held that s 26 as a whole placed, at the very least, a negative obligation upon the State and all other entities and persons to desist from preventing

¹⁵⁰ At paragraph [24] at 62D - E

or impairing the right of access to adequate housing. It can be argued therefore that the government is negatively impairing the right of refugees to not only human dignity but their right to access social assistance by their exclusion in the social assistance Act.

With regard to core minimum obligation, the Court, recognised that the determination of a minimum obligation in the context of the right to have access to adequate housing, for example, presented difficult questions because the needs were so diverse: some needed land; others, both land and houses; still others, financial assistance. They then determined that the crucial issue or the fundamental question in this regard and in terms of the Constitution was whether '*the measures taken by the State to realise the right afforded by s 26 was reasonable*'¹⁵¹.

Thus the standard by which state action or inaction is to be measured is that of reasonableness. Hence in this case the question would be whether the exclusion of refugees from the social security scheme is reasonable in the circumstances. This has to take into account their circumstances where some of them are forced because of their inability to integrate successfully, to live in abject poverty with no-one that they can turn to for any assistance whatsoever. They can not turn to their own governments through their embassies for assistance nor can they go back to their home countries which are the source of their problems if the 'going gets tough' like other migrants can.

They are vulnerable forced migrants whose particular vulnerabilities were recognised by the International community when it put in place the protection system to safe guard them from these very problems and thus accorded them the same rights as those given to nationals with regard to public relief. Thus for the South African government as a willing signatory of these conventions to deny them any form of public relief is short of criminal under the circumstances and unreasonable and therefore unconstitutional.

¹⁵¹ Paragraph [33] at 66A - B and 66B/C - C/D

In their discussion of what would constitute reasonableness the Court held that, ‘a program excluding a significant segment of society would not be reasonable’. The court further held that the programs adopted by the State fell short of the requirements of s 26(2) in particular in that no provision was made for relief to the categories of people in desperate need. They held that the Constitution obliged the State to act positively to ameliorate these conditions. This obligation was to devise and implement a coherent, co-coordinated program designed to provide access to housing, healthcare, sufficient food and water and social security to those unable to support themselves and their dependants such as extremely vulnerable refugees and newly arrived asylum seekers¹⁵².

This reasoning and this standard set by the Court is absolutely critical to the realisation of the socio-economic rights of very vulnerable refugees. Reasonableness also had to be understood in the context of the Bill of Rights as a whole, especially the constitutional requirement that everyone be treated with care and concern and the fundamental constitutional value of human dignity¹⁵³ which refugees deserve in terms of the right to non-discrimination contained in the covenants.

With regard to progressive realisation of the right the Court held that, ‘the goal of the Constitution was, however, that the basic needs of all in our society be effectively met and the requirement of progressive realisation meant that the State had to take steps to achieve this goal. That meant that accessibility had to be progressively facilitated, involving the examination of legal, administrative, operational and financial hurdles which had to be lowered over time’¹⁵⁴. This would be with relevant to the rest of the refugee population that one wouldn’t normally characterise as extremely vulnerable but who will obviously be rendered vulnerable by continued legal and policy exclusion as is the practice currently.

With regard to the right of children section 28(1) (c) of the Constitution provides:

‘(1) every child has the right - . . .

(c) to basic nutrition, shelter, basic health care services and social services.’

¹⁵² *ibid*

¹⁵³ at paragraphs [41], [43], [44] and [83]

¹⁵⁴ *ibid*

In terms of this section it means that refugee children have the right to child support grant and therefore the provisions of the Social Assistance Act which exclude refugees from their ambit are unconstitutional and violate this fundamental and unqualified right. Just as one cannot talk about children's right to housing in exclusion of their parents as held by the court in *Grootboom* one cannot talk about children's unqualified right to social assistance without making provision for the parents to access it on their behalf.

Furthermore unaccompanied minors and separated children represent a distinct category of vulnerable persons. In terms of the United Nations Charter on the Rights of the Child (UNCRC), South Africa is obliged to provide special protection to refugee children appropriate to their specific circumstances and vulnerability¹⁵⁵. These children should be dealt with in two possible ways. The first would be to recognise refugee children as one of the categories of non-South Africans to whom social assistance will be made available. The alternative would be to make specific reference to refugee children in each of the clauses that deal with grants to children.

This means that there is a double argument for the provision of social assistance to extremely vulnerable refugees, not only in terms of their capacity as refugees as conferred on them by the refugee convention but also as parents of children under South African law. Furthermore these rights are justiciable as reiterated by the Constitutional Court in the certification judgment when it held that

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the State 'to respect, protect, promote and fulfill the rights in the Bill of Rights' and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution¹⁵⁶.

This therefore means that there is a definite positive duty on the state to realise these rights, since the government is constitutionally bound to fulfill these rights. Thus the wording of the social assistance act needs to be reworded to include refugees

¹⁵⁵ UNCRC 1990, Article 5

as an express category of beneficiaries entitled to social assistance and poverty alleviation grants.

The court has held that all the rights in our Bill of Rights are inter-related and mutually supporting and there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2¹⁵⁷. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. This construction of the purpose and desired effect of socio-economic rights as contained in the Constitution is especially important in the light of the fact that the Refugees Act expressly entitles refugees to all the rights that are in the Bill of Rights and therefore this interpretation of the rights must be applied to the situation and plight of refugees.

When one considers the vulnerable situation of refugees in South Africa and the fact that they get no form of government financial support in their efforts to successfully integrate, it becomes obvious that this treatment of refugees on their part is unconstitutional and violates their right to human dignity and equality through their inability to access any form of social assistance. And that the constitutional acceptable standard of treatment would be inclusion in the Social Security Act.

¹⁵⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC)

¹⁵⁷ This context in which the Bill of Rights is to be interpreted was also described by Chaskalson P in *Soobramoney*: 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new Constitutional order. For as long as these conditions continue to

3.4.2 *The relevant international law and its impact*

Section 39¹⁵⁸ of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane* Chaskalson P, in the context of s 35(1) of the interim Constitution, said:

. . . Public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].¹⁵⁹

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, such as the Refugee Convention it may be directly applicable. And in this regard the government has to fulfill some minimum core obligation of the rights granted. This minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.

It is in this context that the concept of minimum core obligation must be understood in international law. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. The poor

exist that aspiration will have a hollow ring'. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (1997 (12) BCLR 1696) at para [8].

¹⁵⁸ Section 39 of the Constitution provides:

(1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 (b) must consider international law; and
 (c) may consider foreign law.
 (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

¹⁵⁹ *S v Makwanyane op cit*

are particularly vulnerable and their needs require special attention. Thus it is in this context that the importance of socio-economic rights is most apparent.

If under s 27 the State has in place programs to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, this is relevant to the State's obligations in respect of other socio-economic rights. S27 speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection.

The *Khosa/Mahlaule*¹⁶⁰ case which is the most important case for our purposes involved a Constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997, including provisions of the latter Act that had not yet been brought into force. These provisions restricted access to social assistance to South African citizens only. The practical effect was that permanent residents aged persons and children who would otherwise have qualified for social assistance but for the requirement of citizenship – were excluded.

As the minority judgment by Judge Ngcobo succinctly points out, this case is different from previous socio-economic rights cases, namely *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* and *Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC)*. In these cases, the Constitutional Court (the Court) had to evaluate the compliance of State programmes (or their contents) with the constitutional requirements. In *Khosa/Mahlaule*, it was specifically the exclusion of non-citizens from the programme that was at issue.

3.5 The Court's approach to socio-economic rights

In *Grootboom* the court held that socio-economic rights in the Constitution are closely related to the founding values of human dignity, equality and freedom. Yacoob J observed that, 'the proposition that the rights in the Constitution are inter-related and are equally important has immense human and practical significance in a society founded on these values'.¹⁶¹

The Court found that most of the rights concerned in all of these cases were intersecting rights, which reinforce one another at the path of intersection. For instance in the *Khosa* case, it found that the right to life and dignity, which are intertwined in the Constitution, were implicated in the claims made by the applicants. In the *Dawood*¹⁶² case the Court found that human dignity was a value that informed the interpretation of many, possibly all other rights.

The Court held further that human dignity as contained in s10 was not just a value fundamental to the Constitution but it was also a justiciable and enforceable right. The court believes that s1 of the Constitution imposes a clear need and obligation on government to advance the human rights and enhance the achievement of equality. Thus there is a need for the government to enhance the achievement of equality for refugees and to concretely affirm their human dignity as contained in s1. This can be done through either their inclusion in the social security scheme or through the provision of material assistance in light of the tremendous difficulties they face in integrating.

The Court also looks at the impact that the denial of the specific right has on equality and human dignity. The right to equality is seen as a foundational right of the Constitution. In the *Khosa/Mahlaule* case it held that, 'equality in respect of access to socio-economic rights is implicit in the reference to "everyone" being entitled to access in terms of s27 of the Constitution'. Which means that in line with this

¹⁶⁰ *Khosa and Others v Minister of Social Development and Another* (CCT 12/03); *Mahlaule and Others v Minister of Social Development and Another* (CCT 13/03)

¹⁶¹ *ibid* at para 40

¹⁶² *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC)

reasoning, those who are unable to survive without social assistance are equally destitute and thus equally in need of such assistance, such as vulnerable refugees.

The Court did hold that the realisation of these rights requires a balancing act however. It held that it was important to realise that even where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) had to be consistent with the Bill of Rights as a whole.¹⁶³

Thus if the means chosen by the legislature to give effect to the state's positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account. When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness.

This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. And furthermore what is relevant may vary from case to case depending on the particular facts and circumstances.

In the *Khosa/Mahlaule* case the Court held that,

What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination¹⁶⁴.

¹⁶³ *ibid*

¹⁶⁴ *ibid* at para 3

3.5.1 *Ambit of right to access to social assistance in terms of s27 (c)*

The court adopted a purposive approach to the interpretation of rights.¹⁶⁵ The bill of rights the court said, ‘expressly enshrines the rights of all people in our country’.¹⁶⁶

3.5.2 *The reasonableness of the legislative scheme*¹⁶⁷

The court held that when dealing with the issue of reasonableness the context is all important. It is necessary to have regard to purpose served by social security for example and the relevance of the citizenship requirement to that purpose. One also has to look at the impact of the exclusion of permanent residence in this case and also refugees for our purpose. It is also important to have regard to the impact that this has on other intersecting rights for instance the reference to everyone in the clause containing the right to access means that equality rights are directly implicated.¹⁶⁸

3.5.3 *Purpose of the Right of Access to Social Security*

The right of access to social security is for those who are unable to support themselves and their dependents is entrenched because as a society South Africa values human beings and wants to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.¹⁶⁹

3.5.4 *The reasonableness of citizenship as a criterion of differentiation*

The court held that while it was necessary to differentiate between people and groups of people in society by classification in order for the state to allocate rights, duties, immunities, privileges, benefits or even disadvantages and to provide efficient

¹⁶⁵ *S v Mhlungu and Others* at para 8

¹⁶⁶ *Khosa/Mahlaule* para 47 ft55 s 7 (1)

¹⁶⁷ This commentary is taken from para 48 of the *Khosa/Mahlaule* judgment

¹⁶⁸ *Khosa/Mahlaule* para49

¹⁶⁹ *ibid* para 52

and effective delivery of social services, those classifications had to satisfy the constitutional requirement of "reasonableness" in section 27(2)¹⁷⁰. In the case of Khosa, the state had chosen to differentiate between citizens and non-citizens.

The Court held that the differentiation, if it is to pass constitutional muster, could not be arbitrary or irrational nor can it manifest a naked preference. There has to be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve. The Court held further that a differentiating law or action, which does not meet these standards, would be in violation of section 9(1) and section 27(2) of the Constitution.

The government argued that citizenship is a criteria used in all developing countries. To which the court replied that not all developing countries had a Constitution in which "everyone" has the right to access social security, and thus their immigration and welfare laws would not necessary be the same as South Africa's. The proper constitutional interpretation provides that a person need not be a citizen in order to qualify for access to social assistance.

3.5.5 Financial considerations

The court did however accept the concern that non-citizens may become a financial burden on the country and legitimately so and that they were compelling reasons as to why social benefits should not be made available to all who are in South Africa irrespective of their immigration status. With regard to illegal immigrants for example the court saw the need and the right of the state to be able to differentiate and ascribe duties and obligations accordingly.

The court did however go on to make a very fundamental observation in this regard, which is important for our purposes, as it applies directly to refugees. It said that,

'The exclusion of all non-citizens who are destitute, however, irrespective of their immigration status, fails to distinguish between those who have become part of our society and have made their homes in South Africa, (this would

¹⁷⁰ *ibid*

also apply to refugees), and those who have not. It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent residents is, however, quite different to that of temporary or illegal residents. They reside legally in the country and may have done so for a considerable length of time. Like citizens, they have made South Africa their home'.¹⁷¹

The government argued that the inclusion of permanent residence would impose an impermissibly high financial burden on the state. To which the court held that limiting the cost of social welfare was a legitimate government concern but that it had to be done in accordance with the Constitution and its values. This is because as the court pointed out quite succinctly, 'we have to pay for the constitutional commitment to develop a caring society, and granting access to socio-economic rights to all who make their homes here.'¹⁷²

In the case of the permanent residence for example the court was of the view that Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times. The court was therefore sending a clear message that deliberately allowing people into the country and then abandoning them to destitution is unacceptable.

This is precisely what the government is doing by allowing refugees into the country and giving them legal status in terms of the Refugees Act and then through their inability to access social assistance abandoning the most vulnerable amongst them such as disabled and aged refugees, women at risk, refugee children and extremely poor refugee families to destitution.

The development of a system of social grants has been a key pillar of the government's strategy to fight poverty and to promote human development. The right to enjoy asylum therefore should not be willfully subjected to conditions that promote abject poverty. It is in South Africa's best interest to promote the human development

¹⁷¹ *ibid*, para 58

¹⁷² *ibid*, para65

¹⁷³ Draft White Paper on Refugees s4

of refugees so that when they go back to their countries of origin they can make a meaningful contribution there and help to rebuild their countries.

This will hopefully reduce the risk and potential of further and future conflict in those regions and thus in this way South Africa would contribute to the eradication of the root causes of refugee flows and their consequences. This is in fact contained in the Department of Home Affairs' policy document on refugee protection, in which it states that, 'Furthermore, allowing refugees to use their skills or develop new ones while in exile will facilitate meaningful reintegration in their countries of origin when they are able to return'.¹⁷³

The court further held that the fact that the differentiation between citizens and non-citizens maybe rational does not mean that it is not an unfairly discriminatory criterion to use to allocate benefits. They employed the s9 unfair discrimination test developed in *Harksen v Lane* and employed in the *President of RSA v Hugo*. According to this test if differentiation is based on a listed ground of s 9 (3) it is then presumed that the discrimination is unfair by s 9 (5).

In the case of *Khosa/Mahlaule* the ground of citizenship was not listed but analogous to the listed grounds and therefore there wasn't a presumption in favor of unfairness. This is critical for our purposes, as "refugee status" is also not a listed ground. This means that the way in which the Court formulates the unfair discrimination test in this case will be of value to trying to establish a particular standard of protection and treatment for refugees in this regard.

Thus if the differentiating ground is not listed it means that unfairness first has to be established for the differentiation to be unconstitutional. In *President of the Republic of South Africa and another v Hugo* Goldstone J stated that:
"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply in egalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked".

In this regard the court held that to determine whether the impact of the differentiation on the particular was unfair or not it was necessary to look at three things. Firstly to look at the group who had had been disadvantaged; secondly to look at the nature of the power in terms of which the discrimination was effected; and thirdly to look at the nature the interest which had been affected by the discrimination. The underlying principles of dignity, life and equality are the vital interests that had to be remembered at all times.

As stated in Hoffman¹⁷⁴, 'that "at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity." To be considered an analogous ground of differentiation to those listed in section 9(3) the classification must, therefore, have an adverse effect on the dignity of the individual, or some other comparable effect. In *Larbi-Odam* the discrimination on the basis of citizenship was held to be unfair discrimination.

The main determining factor regarding the unfairness of the discrimination is the impact it has on the person or group discriminated against. The court looks at a number of issues in this regard. It looks at the position of the claimants in society. In our case it is an extremely vulnerable group in desperate need of some form of social assistance. It also looks to see if they have suffered in the past from patterns of discrimination.

In our case refugees have not been historically disadvantaged although one could argue that refugees properly construed although not recognised at the time during the apartheid era were victims of discriminatory patterns. They have however been discriminated against since South Africa made a commitment to their protection in the signing of the refugee conventions and in the policies made in terms of the green paper and the white paper. They are numerous examples of systemic discrimination and disadvantage, least of that is their exclusion from the social assistance act, in clear violation of South Africa's commitment to provide an enabling

¹⁷⁴ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27

¹⁷⁵ "Section 8 was adopted then in the recognition that discrimination against

environment for refugees to achieve self sufficiency.

The court did however hold that if the purpose is not manifestly directed at impairing the complainant but is aimed at achieving a worthy and important societal goal such as furthering equality for all, then it would most probably not be discriminatory. This cannot be implied by the present government policy of exclusion of refugees however. The other question that the court asks with due regard to the above and other relevant questions is the extent to which the discrimination has affected the rights or interests of the complainants. They also look at whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors do not constitute a closed list however. It is their cumulative effect that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair. In *Brink v Kitshoff* the court held that s8¹⁷⁵ which is the equality clause, was adopted in recognition of the fact that discrimination against people who are members of a disfavoured group can lead to patterns of group disadvantage and harm. Such discrimination the court said is unfair because it builds and entrenches inequality amongst different groups in our society.

There is no doubt that refugees are part of a vulnerable group in society who are worthy of constitutional protection. We are dealing here with intentional, statutorily sanctioned unequal treatment of a segment of the South African community. This has a strong stigmatising effect. In the Khosa case the court held that the fact that permanent residents had to pay taxes (as do refugees) and then have unequal access to benefits created an impression that they were somehow inferior to citizens and therefore less worthy of social assistance. The court went on further to make a very important point, that the decisions about the allocation of public benefits represents the extent to which poor people are treated as equal members of society.

3.5.6 *Impact of exclusion*

The exclusion of permanent residents (and also refugees who are in a similar situation as that of permanent residents) from the social security scheme, the court held, forces them into relationships of dependency upon families, friends and communities in which they live, none of whom agreed to sponsor their immigration to South Africa¹⁷⁶. These families who might need social assistance themselves are thus asked to shoulder a burden that is not asked of other citizens.

Therefore the denial of the welfare benefits impacted not only permanent residents but also the communities with which they have contact. This places an undue burden on those who take on this responsibility and is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants. The denial of the right is total the Court said, and the consequences of the denial grave. This is because they are relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution and the conventions for other purposes.

Denying their right under s 27 therefore affects them in a most fundamental way and therefore the denial is unfair.¹⁷⁷ Of crucial importance to this analysis was the fact that the Constitution provided that everyone has the right to have access to social assistance if they are unable to support themselves and their dependents. Thus the exclusion of permanent residence from the social security scheme was discriminatory and unfair and unjustifiable under s 36 of the Constitution.

In the final analysis when the court employed the balancing act necessary in these considerations, it held that providing access to social assistance to all who live permanently in South Africa and the impact that such denial has on their life and dignity far outweighs the financial and immigration considerations. The denial did not constitute a reasonable legislative measure as contemplated by s 27 (2). The court

¹⁷⁶ *op cit* at para

¹⁷⁸ In 1997, the Green Paper on International Migration declared the Aliens Control Act (one of the last remainders of apartheid legislation) as unfit for refugee protection and finally, based on the recommendations of White Paper Task Team appointed in March 1998 by the Minister of Home Affairs, Refugees Bill was passed by Parliament in November 1998 that came into force in April 2000 as Refugee Act 130.

also found that the internal limitation of reasonableness of s26 and 27 was enough to make it unjustifiable in terms of s36.

This is because the Constitution vests the right to social security in "everyone" and by excluding permanent residents from the scheme for social security, the legislation limited their rights in a manner that affects their dignity and equality in material respects. Dignity and equality are founding values of the Constitution and lie at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution and in this same line, refugees. This means therefore that the exclusion of refugees is unlawful.

CONCLUSION

This paper addressed the unconstitutionality of the dichotomy between policy and legislation on the one hand and the realities of being an asylum seeker or refugee in South Africa. It looked at how the commitments and obligations that are clearly outlined at a legislative level concerning social security can be legally realised at a policy and a practical level by refugees in South Africa. The reality of the refugee in South Africa was set out and the principles of international protection and their attendant rights clearly defined within the constitutional parameters to make the argument that a constitutional imperative exists to facilitate the realisation and inclusion of refugees in the social security scheme. And thus in terms of constitutional standards it is recommended that the Social Assistance Act be changed to include vulnerable refugees, who meet the means test, in its ambit.

The *Refugees Act* proclaims a progressive commitment to refugee protection in line with international standards¹⁷⁸. According to *Regulation 15(1) (C) of Section 27B of the Refugees Act*, refugee protection is understood as having access to basic human rights. One of the four basic international standards of treatment includes access and protection of the refugee's security rights. Security rights include protection from physical attack and assistance to meet basic human needs.

The heart of this paper was that since South Africa has made this commitment to uphold internationally sound protection it has a duty to practically realise this therefore, and it has been conclusively established that constitutionally speaking the South African government has to provide some sort of material or social assistance to refugees, in line with these principles. It has been established that indeed a high constitutional standard exists which mandates for the inclusion of refugees in the social security scheme and which mandates for a broader protection of all of their rights.

As the United Nations High Commissioner for Human Rights has pointed out, 'being a refugee means more than being an alien. It means living in exile and depending on others for such basic needs as food, clothing and shelter'.¹⁷⁹ Refugees are not a homogenous group and they have very different practical experiences and problems in their host countries. However, whatever their background and wherever they seek refuge, all too often refugees share a common problem: their socio-economic rights are always in jeopardy, and they face practical problems in accessing the economic and social entitlements that they do have, as is illustrative of the South African example¹⁸⁰.

The South African example highlights the fact that asylum seekers and refugees in urban settings could be more vulnerable than refugees in rural or camp-based settings making the issue of material assistance a very significant issue that is noteworthy of serious consideration. Urban refugees who are made vulnerable by the harsh socio-economic conditions cannot be excluded from policies that are meant to protect vulnerable populations.

With the largest 'urban refugee' program in sub-Saharan Africa, South Africa was seen as providing a critical space in which policies relating to the access of social assistance could be properly defined, in light of the hardships that urban refugees face in integrating and as one that needed strong legal motivation for implementation. The broadness and generosity of the Constitution provided a good legal context to articulate minimum standards of protection that are in line with international principles, which can be used as a model of how international protection in this regard can be achieved in a manner that safe guards and respects the human dignity of refugees as a vulnerable people group.

Taking on international obligations involves assuming the continuing responsibility to ensure that those obligations are fulfilled and that responsibility attaches to the State. Where a Convention article imposes positive obligations it will have two aspects; - 1) to require the introduction of legislation or an administrative

¹⁷⁹ See United Nations High Commissioner for Human Rights, Fact Sheet No. 20, *Human Rights and Refugees 1997*, available on the Internet at <http://www.unhchr.ch/html/menu6/2/fs20.htm>

scheme to protect the right. The administrative scheme has to be operated competently so as to achieve its aim however. There is a stage where the dictates of humanity require the state to intervene to prevent any person within its territory suffering dire consequences as a result of deprivation of sustenance. For example, material assistance is sometimes necessary to ensure basic survival. Therefore where treatment humiliates or debases an individual this shows a lack of respect for or a diminishing of his or her human dignity. This has obvious implication for policy. It's an area in which the influence of human rights law and doctrine should be felt¹⁸¹ as has been argued in this paper.

Under the UN Refugee Convention, protection of refugees' socio-economic rights is thus not simply a question of humanitarian assistance, but is a matter of a legally binding international obligation¹⁸². The ECHR in the *Soering Case* said that, "the obligations and purpose of the Convention as an instrument for the protection of individual human rights require that's that its provisions be interpreted and applied so as to make its safe guards practical and effective¹⁸³ and this can only be achieved by the inclusion of refugees in the social security scheme in the South African context.

This is the challenge for the government, international lawyers and refugee advocates. Article 14 of UDHR, "everyone has the right to seek and enjoy asylum from persecution'. This declaration is based on the recognition of the inherent dignity and worth of every human being. A refugee has to be seen as a rights holder and the UDHR is mentioned in the preamble of the Convention. The refugee is a beneficiary, beholden to the state with a status to which certain standards of treatment and certain guarantees attach¹⁸⁴.

¹⁸⁰ Refugees and ESC Rights, Module 7 by Circle of Rights, Economic, Social and Cultural Rights Activism, A Training Resource at p5

¹⁸¹ *ibid*

¹⁸² Article 7(1) sets the tone. It provides that "except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally

¹⁸⁴ *ibid*

Up until now the main concern in terms of refugee protection in South Africa has been ensuring that the legal framework is put in place and properly established. However now that there is a fully established and very progressive legal framework that fully embodies the spirit and purport of the Conventions, the time has now come for us to consider the complex issue of facilitating the successful integration of this vulnerable group of people whom the South African government has conferred all these rights. This is evidenced even by the theme of last year's world refugee day which focused on "home in exile: local integration."

Therefore since the legislative framework already exists the challenge for the government now is to take other measures for the realisation of the rights. This would include the inclusion of refugees as a sub category in all the relevant statutes that deal with socio-economic rights such as the Social Assistance Act. The government needs to create a comprehensive policy plan for the realisation of these rights and the legitimate inclusion of refugees. This Constitution also provides a basis for establishing a strong democratic and rights respecting society.

The South African government committed itself to securing for refugees in South Africa full legal protection provided for under international law, which legal protection has been defined above and which legal protection was to include all the rights in the Bill of Rights as set out in the Constitution. This is in line with its stated objectives and commitment as set out in the draft white paper on refugee affairs which should therefore be realised accordingly and as mandated by the Constitution of the Republic.

The basic but fundamental philosophy in the government's approach to refugee policy is unambiguous. As far as refugees are concerned, the government recognises that its responsibilities and obligations, and the quality and quantity of the measures which it is called upon to deliver pursuant to these obligations are set out in an essentially mandatory manner in international legal and human rights standards. The government has assumed these obligations both through its accession to the relevant international refugee and human rights instruments and by incorporating a number of basic principles and standards in the Constitution of the country.

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