

# **INEQUALITY OF OPPORTUNITY: THE PLIGHT OF FOREIGN WORKERS IN SOUTH AFRICA**

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**ABSTRACT**

Migration can be a hazardous venture, particularly if carried out clandestinely. Evidence indicates that foreigners working without formal authorisation, i.e. ‘irregular migrant workers’, are in a particularly vulnerable position primarily because of their irregular immigration status. They are more likely to be subjected to exploitative and unsafe employment practices in terms of benefits and conditions. This study examines the protection available to this category of migrant workers in South Africa, particularly their right of access to work-related social protection.

South Africa is a major migrant-receiving country in Southern Africa because of its relatively stronger economy and political stability. However, the employment of foreign nationals without work permits, or foreigners working contrary to visa requirements, raises a series of policy issues. These issues, against the background of fairness and equity discourses pertaining to socio-economic entitlements, become exacerbated. This study examines the adequacy of domestic, constitutional and legislative frameworks that offer work-related social protection to foreign workers in South Africa. In the context of international, continental, and regional instruments that provide similar protection to irregular migrants, it could be argued that South Africa’s restrictive legislative framework compromises equality in the right of access to social protection for some migrants.

Although effective migration management depends on careful juxtaposition of myriad policies, emerging evidence suggests conflicting interplay between key South African policies intended to manage the rights of workers specifically and labour migration in the country generally. Critical analysis of relevant national immigration, labour, and social security laws indicates inconsistency with international human rights principles concerning the equality of opportunity or treatment of irregular migrants vis-à-vis regular migrants and nationals regarding social protection. Yet, inequalities in the actual processes or opportunities (means) embedded in these policies disentitle many vulnerable foreign workers from important constitutionally entrenched fundamental rights because their presence and/or employment violates existing immigration laws. The study concludes by recommending policy interventions that may help remedy these problems.

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My people have an axiom that aptly says ‘if one finger tries to pick up something from the ground, it cannot’. I fully comprehend my significance in the broader scheme of things. I would, therefore, be remiss not to take a moment to recognise the many fingers that helped me pick up this research from the ground.

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*Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC).

*Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC)

*Chemical & Industrial Workers Union v Sopedog CC* (1993) 14 ILJ 144 (LAC)

*City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC)

*Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC)

*Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC)

*Du Toit and Another v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC)

*Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC)

*Georgieva-Deyanova v Craighall Spar* (2004) 9 BALR 1143 (CCMA)

*Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)

*Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC)

*Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC)

*IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC)

*J and Another v Director General Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC)

*Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); (1999) 20 ILJ 525 (CC)

*Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC)

*Joseph v University of Limpopo & others* (2011) 32 ILJ 2085 (LAC)

*Khosa and Others v Minister of Social Development and others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC)

*Kleynhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC)

*Koyabe and Others v Minister for Home affairs and Others* (Lawyers for Human rights as Amicus Curiae) 2010 (4) SA 327 (CC)

*Kylie v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 1918 (LC)

*Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC)

*Lawyers for Human Rights v The Minister of Home Affairs* 2004 (4) SA 125 (CC)

*MECS Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2014) 35 ILJ 745 (LC)

*Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC)

*Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC)

*Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC)

*Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC)

*Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC)

*Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC)

*Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA)

*Mohamed and Another v President of the RSA and Others* 2001 (3) SA 893 (CC)

*Monare v South African Tourism and Others* (JA45/14) [2015] ZALAC 47; [2016] 2 BLLR 115 (LAC); (2016) 37 ILJ 394 (LAC)

*Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA)

*Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA)

*NAPTOSA and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (CC)

*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 JOL 5877 (CC)

*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)

*National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC)

*Ndikumdavyi v Valkenberg Hospital & others* (2012) 33 ILJ 2648 (LC)

*Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC)

*Phillips and Another v Director of Public Prosecutions, (Witwatersrand Local Division) and Others* 2003 (3) SA 345 (CC)

*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

*President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC)

*Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC)

*Public Servants' Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T), 18 ILJ 241 (T)

*Rumbles v KwaBat Marketing* (2003) 24 ILJ 1587 (LC)

*S V Boesak* 2001 (1) SA 912 (CC)

*S v Makwanyane* 1995 (3) SA 391 (CC)

*S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC)

*Satchwell v President of Republic of South Africa and Another* 2002 (6) SA 1 (CC)

*Solidarity obo Steyn v Minister of Correctional Services* (2009) 30 ILJ 2508 (LC)

*Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC)

*South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC)

*South African Police Service v Solidarity obo Barnard* (2014) (6) SA 123 (CC)

*State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008 ) 29 ILJ 2234 (LAC)

*Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC)

*Van der Merwe v Road Accident Fund and Another* (CCT48/05) [2006] ZACC 4; 2006 (4) SA 230 (CC)

*Van Wyk obo Van Wyk v Daytona Stud Farms & Others* [2007] JOL 20730 (C)

*Volks NO v Robinson* 2005 (5) BCLR 446 (CC)

*Vundla v Millies Fashions* (2003) 24 ILJ 462 (CCMA)

*Wallace v Du Toit* 2006 8 BLLR 757 (LC)

*White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC)

**Other jurisdictions**

*Bigaeva v Greece* App No 26713/05 (ECtHR, 28 May 2009)

*Hoffman Plastic Compounds v. National Labor Relations Board* 535 U.S. 137 (2002)

Inter-American Court of Human Rights *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03

*MSS v Belgium and Greece* (2011) 53 EHRR 2

**TABLE OF STATUTES****South Africa**

Constitution of the Republic of South Africa, Act 108 of 1996  
Compensation for Occupational Injuries and Diseases Act 130 of 1993  
Employment Equity Act 55 of 1998  
Employment Equity Amendment Act, Act 47 of 2013  
Immigration Act 13 of 2002  
Labour Relations Act 66 of 1995  
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000  
Social Assistance Act 13 of 2004  
Unemployment Insurance Act 75 of 1966

**International legal instruments**

African [Banjul] Charter on Human and Peoples' Rights (1981)  
African Common Position on Migration and Development (2006)  
AU Migration Policy Framework for Africa (2006)  
AU Social Policy Framework for Africa (2008)  
ILO Convention on Migration for Employment (Revised), No 97 of 1949  
ILO Convention on Migrant workers (Supplementary Provisions), No 143 of 1975  
International Covenant on Economic, Social, and Cultural Rights, 1966  
International Convention on the Protection of the Rights of all Migrant workers and  
Members of their Families, 1990  
SADC Charter of Fundamental Social Rights (2003)  
SADC Code on Social Security (2007)  
Universal Declaration of Human Rights, 1948

**LIST OF ABBREVIATIONS OR ACRONYMS**

ACA	Aliens Control Act
ACHPR	African Charter on Human and Peoples' Rights
ADB	Asian Development Bank
ANC	African National Congress
AU	African Union
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation, and Arbitration
CODESA	Convention for a Democratic South Africa
COIDA	Compensation for Occupational Injuries and Diseases Act
DHA	Department of Home Affairs
ECOWAS	Economic Community of West African States
EEA	Employment Equity Act
EU	European Union
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILO	International Labour Organization
LC	Labour Court
LRA	Labour Relations Act
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
RECs	Regional Economic Communities
SADC	Southern African Development Community
SPF	Social Protection Framework for Africa
TCNs	Third-Country Nationals
UDHR	Universal Declaration of Human Rights
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UN	United Nations

## CHAPTER I INTRODUCTION

### 1.1 Overview

The movement of people from one place to another, or human migration, has become topical in the political arena and on social media platforms. The migration phenomenon, particularly the clandestine type, poses a number of policy challenges to most countries. It requires careful coordination of various concerns, including national security, economic interests and human rights. In recent years, policy makers are paying greater attention to clandestine migration because the old-fashioned response of prioritising security has proven ineffective in stemming irregular cross-border movement.<sup>1</sup> The European Union (EU) exemplifies a case where strict external border control measures are not enough at curtailing clandestine migration.

For instance, the 2015 mass movement of refugees, mainly from conflict zones like Syria, into Europe sparked fervent debates about a European migration crisis, to the point of creating division within the European Union over how best to address the problem. The 2015 refugee surge in Europe did not only reveal deep-seated political divisions within the EU on the issue of migration.<sup>2</sup> It also highlighted important challenges in contemporary migration discourse, namely migration governance and migrants' rights.

However, this study is not particularly concerned with the kind of migration experienced in Europe. The events shaping the EU migration crisis were more politically inspired since people were mostly escaping political turmoil, violence and/or persecution. This kind of cross-border movement is different to traditional migration where movements are motivated by economic difficulties or factors. Thus, this study is primarily interested in the type of migration inspired by the prospect for economic betterment rather than for personal safety.

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<sup>1</sup> Pia Orrenius & Madeline Zavodny 'Irregular immigration in the European Union' (2016) 2 *European Policy Analysis* 1 at 14.

<sup>2</sup> Pierre Vimont 'Migration in Europe: Bridging the solidarity gap' (2016) *Carnegie Europe*, available at <http://carnegieeurope.eu/2016/09/12/migration-in-europe-bridging-solidarity-gap-pub-64546>, accessed 28 November 2016.

Nonetheless, the challenges posed by the European case remain relevant. Migration, particularly irregular migration, seemingly presents a challenging dualism between migration governance (immigration law) and migrant workers' protection (labour law) objectives for policy makers worldwide.

Since the advent of the democratic dispensation in 1994, South Africa has been attracting increasing numbers of foreign nationals, mainly from unstable neighbouring countries, given the deteriorating political and economic conditions on the continent generally. This increasing cross-border movement has made the rendering of work by foreign nationals in the country a highly contentious issue. The primary contention relates to the formal reliance on the term 'employee' as an eligibility criterion by almost all the relevant protective employment and social security legislation. Almost all South African protective laws presuppose an existing formal employer-employee relationship that tends to affect some workers negatively in accessing certain legal institutions and economic benefits. The workers involved, particularly if they do not possess the required formal permission to participate in the domestic labour market, can further exacerbate the contention.

Whether deliberate or inadvertent, there appears to be an inherent discrimination embedded in the domestic legal process from the onset, which compromises the very opportunities or protection envisaged by these laws. Consequently, domestic protection laws compromise opportunities with resultant unequal outcomes, like social or economic consequences, due to an existing exclusionary tendency from the inception. This calls for a critical inquiry into the legal protection position of foreign workers in South Africa to ascertain how their regulation or lack thereof, raises issues of human rights and social justice, particularly if the migratory flow in question is of the clandestine type.

## **1.2 General trends and issues in labour migration in South Africa**

Increasing advancements in information and communications technologies (ICTs) — a direct result of globalisation — among other developments, and to some extent rising political and economic instability the world over, has led to a significant increase in international migration and refugee movement in recent years.<sup>3</sup> The United Nations

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<sup>3</sup> H. Patrick Glenn *Strangers at the gate: refugees, illegal entrants and procedural justice* (1992) 1.

estimates that the world's total migration population, that is people living outside their country of birth, totals around 214 million people.<sup>4</sup> Approximately 105 million of this total migrant population constitutes migrant workers; that is, people working in a country other than their country of birth.<sup>5</sup> Efforts of individual autonomous states to control these movements become great challenges. The biggest of which is the annual cost of enforcing immigration restrictions (i.e. border controls, issuing of visas and passports, inspecting labour conditions) and eliminating clandestine cross-border movements altogether (i.e. apprehending, detaining, prosecuting and deporting unwanted migrants).<sup>6</sup>

South Africa, as a member of the international community, is equally susceptible to this growing and challenging phenomenon. Whilst the actual number of unauthorised foreign nationals entering, living, and/or working in South Africa is uncertain, there is a consensus that clandestine migration into the country has and will persist.<sup>7</sup> Moreover, the South African labour market, in light of globalisation, has experienced major structural changes, particularly with regard to the forms of employment engagement. There has been a rise in a trend where employers create varying processes of employment engagements that place some workers in an increasingly weak employment relationship. This increasing attempt at diluting and camouflaging standard employment manifests in various forms of eternalisation, including sub-contracting, casualisation, outsourcing, labour broking, part-time and fixed-term contracts.<sup>8</sup>

Consequently, these newly constructed processes of engagement have led to workers with less job security, little to no bargaining power, worsening working conditions, wages, and benefits, as compared to their traditional, more permanent

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<sup>4</sup> Hania Zlotnik, Philip Guest, Bela Hovy & Sabine Henning *Data and analysis: Partnering to better understand and address the human development implications of migration* (2010) 1.

<sup>5</sup> International Organization for Migration 'Labour Migration' available at <http://iom.int/cms/en/sites/iom/home/what-we-do/labour-migration.html>, accessed on 19 August 2015.

<sup>6</sup> Jeff Handmaker & Jennifer Parsley 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refugee* 40 at 48.

<sup>7</sup> Darshan Vigneswaran 'Undocumented migration: risks and myths' in Aurelia Wa Kabwe-Segatti (ed) *Migration in post-apartheid South Africa: challenges and questions to policy makers* (2008) 97.

<sup>8</sup> Rochelle le Roux 'The world of work: Forms of engagement in South Africa' (2009) *Development and Labour Monograph Series* 13.

counterparts. These diluted versions of the standard employment form essentially produce vulnerable workers who are at a greater risk of labour abuse and exploitation.<sup>9</sup> Whilst this trend is real for many local workers, foreign nationals operating without legal authorisation feel the brunt of its effect. Legislative efforts to curtail the influx of foreign workers have raised serious human rights and equality concerns.

One important area where the plight of foreign workers, particularly unauthorised migrants, presents interest in this study is in the field of social protection. A recent report by the International Labour Organisation (ILO) reveals that social protection does not adequately cover a significant proportion (over 70 per cent) of the world population.<sup>10</sup> This piece of data and many like it throughout the report shows the staggering lack of access to social protection for a significant proportion of the world's populace. Here, the precarious situations of unauthorised migrant workers are particularly pertinent. They suffer diverse forms of marginalisation, discrimination, and human rights abuses in host nations. Essentially they suffer doubly as the 'human problems involved in migration are even more serious in the case of irregular migration'.<sup>11</sup>

Whilst social protection is an essential mechanism for mitigating and protecting individuals against many shocks, some people do not have this basic opportunity to attempt managing risks in order to avoid or even survive these shocks should they occur. These individuals trapped in exploitative relationships are unable to move out, so they can contribute to or benefit from national economic growth.<sup>12</sup> Available evidence thus far suggests that there appears to be a direct connection between the immigration policy instituted and the right of access to social (and labour) protection enjoyed.<sup>13</sup> Thus, the type of immigration policies in operation determines, to an extent, the level of social security

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<sup>9</sup> International Labour Organization *Facts on labour migration* (2006) 1.

<sup>10</sup> International Labour Organization (ILO) *World social Protection Report 2014-15: Building economic recovery, inclusive development and social justice* (2014) 2.

<sup>11</sup> Preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>12</sup> Abena D Oduro 'Formal and informal social protection in sub-Saharan Africa' Paper prepared for the ERD August 2010 at 11.

<sup>13</sup> Ockert Dupper 'Migrant workers and the right to social security: An international perspective' (2007) 2 *Stellenbosch Law Review* 219 at 222.

protection enjoyed by non-nationals.<sup>14</sup> So the more tenuous an individual's immigration status is, the more barriers that individual faces in accessing social security benefits.<sup>15</sup> National economies often tend to lock out unauthorised migrant workers, despite their willingness and ability to work, and consequently deprive them of much needed social protection. Moreover, most foreign nationals, with exception of permanent residents, do not qualify for equal treatment with citizens in the field of social protection as far as policies in host nations are concerned.

Although South Africa has significantly extended its social (security) protection coverage in recent years — i.e. increased efforts to offer at least basic protection to needy individuals — there is still much to be done as far as the full realisation of the (human) right to social security is concerned.<sup>16</sup> The South African social security system excludes most foreign nationals, with the exception of those with permanent residence status and, to some extent, those with valid work permits.<sup>17</sup>

The irony here is that the Constitutional Court has repeatedly recognised these workers as a vulnerable minority group whom often lack political power, and have 'their interests overlooked and their rights to equal concern and respect violated'.<sup>18</sup> As a category of workers, they are highly susceptible to exploitation as they operate in sectors (in host-nations) where workers' organisations and trade union movements are minimal or absent altogether.<sup>19</sup> Yet, domestic law often afford unauthorised foreign workers very few legal rights.<sup>20</sup> Additionally, they often experience unequal treatment and opportunities as well as discriminatory behaviours and sentiments in host nations.

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<sup>14</sup> Marius Olivier & Avinash Govindjee 'Labour rights and social protection of migrant workers: In search of a coordinated legal response' Paper presented at the Inaugural conference of the Labour Law Research Network (LLRN), Barcelona, Spain, 13-15 June 2013, 1-40 at 9.

<sup>15</sup> International Labour Organization *International labour migration: A rights-based approach* (2010) 77.

<sup>16</sup> ILO op cit note 10 at 2.

<sup>17</sup> Marius Olivier 'Critical issues in South African social security: The need for creating a social security paradigm for the excluded and the marginalized' (1999) 20 *ILJ* 2199 at 2207.

<sup>18</sup> See *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) para 19.

<sup>19</sup> Paul Benjamin 'Informal work and labour rights in South Africa' (2008) 29 *ILJ* 1579 at 1590.

<sup>20</sup> ILO op cit note 15 at 172.

Despite their acknowledged vulnerabilities, unauthorised foreign workers in South Africa have little to no recourse to social protection. The irony is more pronounced when considering the fact that social protection measures are intended to safeguard the most vulnerable members of society. Therefore, legislative provisions that are from the onset unequal and thereby compromise the very opportunities accessible to these migrants can account for the prejudicial treatment of these foreign workers in accessing this important protection.

Seemingly, the exclusion of vulnerable foreign workers from important protective legislation exhibit a conflicting interplay between immigration, social security, and labour laws in South Africa. The complexity and to some degree the root of the problem lies within the relationship between state sovereignty vis-à-vis human rights obligations. On the one hand, a state has a primary sovereign responsibility towards its citizens, not necessarily to the nationals of another country. In light of this, nation states have the prerogative to control the entry and expulsion of foreign nationals.<sup>21</sup> On the other hand, at the heart of the conception of human rights are principles of dignity and equality. The right to equality demands not only equal or consistent treatment, but also a redress of systemic and pervasive group-based inequality.<sup>22</sup> However, the idea of human rights seems to be always in competition with the conception of sovereignty.

Whilst the South African Immigration Act 13 of 2002 aims to control the influx of ‘illegal’ immigrants by criminalising the employers who employ unauthorised foreign workers;<sup>23</sup> the Constitution will have us believe this democratic state is founded on the values of human dignity, equality and the advancement of human rights and freedoms.<sup>24</sup> This goes to show that state sovereign prerogative, in the form of the immigration law, seems to be in opposition to the doctrine of equality enshrined by the Constitution and which consequently constitute the bedrock of all other legislated policies. It is within this

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<sup>21</sup> See article 79 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>22</sup> Saras Jagwanth ‘South Africa: The inequality challenge’ (2000) 15(3) SAR 30 at 31.

<sup>23</sup> See s 38 of the Immigration Act 13 of 2002.

<sup>24</sup> See s 1(a) of the Constitution of the Republic of South Africa, 1996.

theoretical framework that this research aims to look for ways to manage this tension, using the plight of unauthorised migrant workers as the case study.

In spite of the conflicting relationship, the rapid expansion of globalisation is eroding the traditional idea of territorial sovereignty as we have come to understand.<sup>25</sup> In this regard, international instruments have increasingly become significant in exerting a moral and political power above that of the state's legal order.<sup>26</sup> International normative instruments are necessary to guide and synchronise various national legislation, policies, and practices in order to protect the interest of both migrant workers and the State.<sup>27</sup> Yet when it comes to social protection rights, relevant international protective instruments, at best, vaguely allude to unauthorised migrant workers.<sup>28</sup> In effect, the presumed uncertainty around the legal protection of unauthorised migrants in international law calls for a reinterpretation of whether international instruments are realistic given the socio-economic context and current labour migration challenges of a developing South Africa.

Whatever the case, the increasing xenophobic or anti-migrant sentiments, and rhetoric in South Africa call for a closer look at the internal difficulties foreign nationals put up with, particularly in accessing important work-related social protection. Advocating for the extension of social protection to this vulnerable group of foreign workers is not only beneficial for all foreign nationals (in terms of human rights protection). It has the added benefit of 'boosting human capital development and productivity, supporting domestic demand and supporting structural transformation of national economies'.<sup>29</sup> Put differently, universal access to social protection is vital as these 'policies play a critical role in realising the human right to social security for all, reducing poverty and inequality, and supporting inclusive growth' in any country in any region.<sup>30</sup>

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<sup>25</sup> Gyan Basnet 'State sovereignty vs. human rights' (2013) available at [http://www.nepalnews.com/archive/2013/others/guestcolumn/feb/guest\\_columns\\_05.php](http://www.nepalnews.com/archive/2013/others/guestcolumn/feb/guest_columns_05.php), accessed 19 August 2015.

<sup>26</sup> Ibid.

<sup>27</sup> ILO op cit note 15 at 117.

<sup>28</sup> Jonathan Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2000) 38 *International Migration* 103 at 104.

<sup>29</sup> ILO op cit note 10 at 2.

<sup>30</sup> Ibid at xix.

### 1.3 Research questions

The thesis addresses one key question: ‘To what extent do South African laws protect the rights of unauthorised migrant workers?’ This major question comprises the following specific questions:

- Do South African laws adequately safeguard the social protection rights of unauthorised foreign workers?<sup>31</sup>
- Is there any labour migration policy or framework in South Africa?<sup>32</sup>
- What is the nature of the existing labour migration policy?
- What are the realistic options for policy reform?<sup>33</sup>

Thus the key question put forward in this research reviews the interplay of immigration, labour, and social protection laws; the ongoing tension between their intended aims on the one hand, and the effective realisation of the constitutional rights to equality, dignity, and social protection on the other. Additionally, it raises a number of issues about the current disparities in law and practices in access to social protection between different categories of migrant workers which are yet to be answered.

### 1.4 Significance and scope of the study

First and foremost, the study proceeds to explore contradictions — by way of comparative analysis — embedded in South African immigration, labour and social policies as an indicator of inequality in opportunities that could lead to compromised capabilities which further lead to unequal outcomes for foreign nationals working in South Africa. It examines some legal and administrative barriers to opportunities afforded to vulnerable foreign nationals working in South Africa, and the need to address the aforementioned dualism in order to overcome these barriers to opportunities.

In doing so, the thesis advocates for a nuanced human rights discourse on the rights of unauthorised foreign nationals that lends support for an alternate approach to handling the rights of migrant workers. Although the research primarily focuses on the extension of

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<sup>31</sup> This question is explored in detail and answered in chapter 6 of the study.

<sup>32</sup> This question and the one that follows it are explored and answered in chapter 4 of the study.

<sup>33</sup> Chapter 6.6 explores some of the avenues for policy reform to bring irregular migrants into the social protection fold.

the right of access to social protection specifically to unauthorised foreign workers in South Africa, many of the arguments made can also apply *mutatis mutandis* to other categories of atypical or vulnerable workers within the domestic workforce.

Moreover, the research is expected to contribute to the current debate on what aspect of equality should ideally be measured — outcomes or opportunities — by shedding light on a practice that already places foreign nationals in South Africa into different social strata, which in turn impacts on their level of exposure and susceptibility to exploitation, and consequently to xenophobia and poverty.

Addressing these issues represents a significant move towards creating an enabling environment for all individuals within South Africa and unlocking the economic potential of all people living and working within its borders. Thus, the value of this research is in prescribing a different approach to addressing the supposed current ‘immigration problem’ in order to manage the process effectively to benefit all stakeholders, both migrants and the host economy.

## **1.5 Research method**

The research does not rely directly on empirical evidence. I acknowledge that empirical data would have generated some, if not more, significant data. However, this method was ruled out as inappropriate given the sensitive nature of the subject matter. It is well-known that unauthorised foreign nationals prefer to remain under the radar because of their precarious legal position in the host country; so any field research would have been problematic and unreliable to say the least. What is more, any official records on clandestine migration are conjecture at best, often highly politicised. Therefore in order to avoid any ethical hurdles and to ensure information reliability and validity, empirical research was ruled out.

As an alternative, the study relies on contextual legal and policy analysis, with some comparative elements. While the focus is primarily on the South African context, comparative analysis is applied to draw attention to any normative or deficiencies in the domestic protection offered, and in other instances present relative best practices from parallel jurisdictions that offer comparably better protection for this class of workers.

The preference for the comparative legal analysis method is mainly due to its ability to expose the potential adequacy of the protection offered to foreign workers in the chosen domestic legal framework. The United States and EU jurisdictions are the main comparators, also because of accessibility of material. The United States has been chosen because it is a migrant receiving country with relative progressive regulation. The EU provides comparable best practice at the regional level.

This method allows for the measuring of domestic legal framework against major international and regional (employment-related human rights protection) instruments as well as best practices from parallel jurisdictions, in order to improve on domestic legal reform. The method also allows for understanding available relevant international protection norms, how other similar foreign jurisdictions have adapted these norms successfully, and the need for reinterpretation of these international instruments to fit these objectives, while remaining mindful of the socio-economic context.

In seeking to achieve this, the study draws heavily on intensive analyses of primary (legislation, case law, international and regional instruments) and secondary (books, articles and other commentary) sources in putting the arguments together.

## **1.6 Definition of key terms**

### ***Labour migration***

As far as the migration discourse is concerned, no formal definition for labour migration as a concept exists. Nonetheless, labour migration is generally conceptualised (and applied in this context) as the cross-border movement of people for employment purposes. People who engage in labour migration are ‘labour migrants’ or ‘economic migrants’. However, none of the international instruments refers to the terms ‘labour migrants’ and ‘economic migrants’. In its place, the international community adopts the more neutral term ‘migrant workers’.<sup>34</sup>

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<sup>34</sup> Piyasiri Wickramasekara ‘Protection of migrant workers in an era of globalization: The role of international instruments’ in R Blanpain (ed) *Comparative labour law and industrial relations in industrialized market economies* (2010) 245-283 at 246.

### *Migrant (foreign) worker*

The term ‘migrants’ broadly refers to all persons living and working outside of their country of birth or citizenship.<sup>35</sup> There are different categories of migrants ranging from people who migrate for economic, political, and environmental reasons, to family reunion. Domestically, South African legislation recognises different categories of foreign nationals according to their immigration status and/or reason for entering the country. In this respect, migrants in the South African context vary and can include permanent residents, individuals holding any of the numerous temporary residence permits in terms of the Immigration Act 13 of 2002 (including individual contract migrants), refugees, asylum seekers, and irregular or ‘undocumented’ foreign nationals.

However, for this research, the more relevant term is ‘migrant workers’, the economically active cluster of the total migrant population.<sup>36</sup> A migrant worker, in this context, is a ‘person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national’.<sup>37</sup> This definition includes often-excluded migrants such as frontier workers, seafarers, seasonal workers, project-tied workers, workers on offshore installations, itinerant workers, specified-employment workers, and self-employed workers.<sup>38</sup> Domestically, the term refers to ‘an individual who is neither a citizen nor a resident of the receiving country, but is not illegal’.<sup>39</sup> The study uses the terms ‘migrant workers’ and ‘foreign workers’ interchangeably.

Furthermore, this study divides migrant workers into two broad groups based on channels of entry or admission, i.e. their legal immigration status. The first group constitutes foreign nationals who are legally employed or self-employed in countries other

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<sup>35</sup> United Nations Department of Economic and Social Affairs, Population Division ‘Population Facts No. 2013/2’ available at [http://esa.un.org/unmigration/documents/The\\_number\\_of\\_international\\_migrants.pdf](http://esa.un.org/unmigration/documents/The_number_of_international_migrants.pdf), accessed 19 August 2015.

<sup>36</sup> Wickramasekara op cit note 334 at 246.

<sup>37</sup> Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (ICRMW).

<sup>38</sup> Wickramasekara op cit note 34 at 246.

<sup>39</sup> Section 1(1)(xvii) of the Immigration Act 13 of 2002.

than their home states. This group comprises of a privileged skilled few, who perhaps have the potential to legally relocate or become permanent residents.

The second group, and the category of particular interest in this study, consists of those in an irregular situation. This group comprises semi-skilled and unskilled workers with little or no education working abroad without the necessary formal authorisation or documentation. At various stages during the migration process — departure, transit, entry, and return — irregularities can occur.<sup>40</sup> These irregularities may be committed by the migrants themselves or against them by third parties.<sup>41</sup>

### ***Irregular or unauthorised migrant (foreign) worker***

Previously, researchers characterised individuals who enter or work in host countries without official authorisation as illegal, clandestine, or undocumented. However, the term ‘illegal migrant’ is inappropriate because it has a negative connotation that suggests criminality.<sup>42</sup> Likewise, the term ‘undocumented’ is deficient because it does not capture the full picture in special cases such as the migrant who enters legally but later violates the conditions of entry, or the migrant trafficked across borders.<sup>43</sup> In these scenarios, both may possess documents, albeit false. Instead, the study uses the international recommended term ‘irregular’.

An irregular or unauthorised migrant is a person who is not ‘authorised to enter, to stay, and to engage in a remunerated activity in the State of employment pursuant to the law of that state and to international agreements to which that state is a party’.<sup>44</sup> Another available definition of unauthorised migrant worker is a person ‘whose remunerated, otherwise lawful employment violates national immigration laws’.<sup>45</sup>

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<sup>40</sup> International Labour Organization ‘Towards a fair deal for migrant workers in the global economy’ (2004) para 36 at 11 available at [http://www.ilo.org/public/libdoc/ilo/2004/104B09\\_110\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2004/104B09_110_engl.pdf), accessed 19 August 2015.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Article 5(b) of the ICRMW.

<sup>45</sup> Beth Lyon ‘Tipping the balance: why courts should look to international and foreign law on unauthorized immigrant worker rights (2007) 29(1) *Journal of International Law* 169 at 171.

In the South African context, it refers to an individual who is in the country in contravention of the Immigration Act 13 of 2002 and/or the Refugees Act 130 of 1998, and includes a prohibited person. This study uses the terms ‘irregular’, ‘undocumented’, and ‘unauthorised’ interchangeably, unless otherwise indicated, to refer to a category of three kinds of foreign workers. The first group constitutes people who enter the country clandestinely by crossing the border at a place other than a recognised port or post. The second group consists of people who acquire fraudulent documents prior to coming or during their stay in the country. The final group constituting people who (after entering the country legally) contravene the terms of their entry permit, by staying beyond the allowed period, failing to renew, or by working, trading, studying or receiving government services in defiance of their permit conditions.<sup>46</sup>

The definition chosen in this thesis is a broad one: it includes all aforementioned migrants in an irregular situation, refugees in vulnerable situation, and unsuccessful or rejected asylum seekers. The focus will be on men and women migrants and not on children.

## **1.7 Research structure**

The study comprises of seven chapters with each chapter dealing with a specific issue. However, equality is the recurring theme all through the thesis. Chapter 1 broadly introduces the study, presenting an overview of the research proposal, the research question, and definitions for key terms employed in the study.

Chapter 2 reflects on the equality discourse generally and in South Africa specifically with reference to key legislation and relevant case law. It does so by reviewing historical movement towards equality, and giving an overview of the development of the Constitutional Court’s jurisprudence on equality in broad-spectrum.

Chapter 3 deliberates on how to measure the parameters of equality. It provides a brief discussion of three conceptions of distributive equality (welfare, resources and opportunities) in presenting the best-perceived measure of the ideal of equality. The chapter argues for addressing the inequity embedded in the actual processes or

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<sup>46</sup> ILO op cit note 15 at 20.

opportunities (starting points) offered to individuals rather than fixating on the resultant outcomes.

Chapter 4 argues for the need to extend social protection coverage to unauthorised foreign workers from migration, labour, and human rights perspectives. It examines both the conceptualisation of social protection and the evolution of immigration law in South Africa. It provides an understanding of the factors necessitating migration for employment and the subsequent need for the extension of the right of access to social security to the most vulnerable of all, unauthorised foreign workers. In doing so, it paves the way for a more focused discussion in subsequent chapters.

Chapter 5 explores the role of international, continental and regional instruments in protecting irregular migrant workers. It gives a detailed analysis of the regulatory frameworks of the UN, ILO, AU and SADC applicable to the social protection concerns of irregular migrants, given South Africa's membership in each of these bodies. The chapter observes that transnational legal instruments are useful in shaping domestic regulatory policies. In this respect, the contents of the standards outlined in these instruments are important for the evaluation of the adequacy of the South African national framework.

Chapter 6 examines the position of unauthorised foreign workers in the South African social security system as it pertains to issues of coverage and access to benefits. It starts by tracing the judicial interpretations of relevant constitutional and statutory social protection provisions and application thereof in order to identify any discrepancies in judicial adjudication and relief of cases involving foreign nationals regarding social protection.

Finally, chapter 7 draws together all the discussions and conclusions in a final attempt to propose recommendations to address the issues raised.

## CHAPTER II            EQUALITY IN SOUTH AFRICA: A LITERATURE REVIEW

*'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.'*<sup>1</sup>

### 2.1 Introduction

The equality discourse over the years, generally speaking, has progressed to incorporate anti-discrimination ideas intended to eradicate various forms of stigma, stereotyping, and prejudices. Equality is without a doubt linked to, if not synonymous with, the principle of non-discrimination. Current equality policies supposedly developed as a way to contest the negative differential treatment accorded to some groups but not to others in society.<sup>2</sup> Still, most people ostensibly condone inequality, considering that it emerges in all societies.

Essentially, many grounds of discrimination exist: race, gender, disability, age, religion, wealth, and so forth. Some forms of discrimination define a distinct group, while others are firmly rooted in society. According to Chaskalson P, inequality occurs 'through differentiation that perpetuates disadvantage and results in the scarring of the sense of dignity and self-worth'.<sup>3</sup> Hence, equality has become one of the most likely principles, for which most democratic societies would advocate. Despite this increasing interest, equality has become an elusive liberal, universal, moral, and legal concept with myriad interpretations.<sup>4</sup> Couched succinctly, 'equality possesses a variety of different meanings'.<sup>5</sup>

Accordingly, this chapter briefly reflects on the equality discourse generally and in South Africa specifically with reference to key legislation and relevant case law. Section

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<sup>1</sup> Preamble to the U.S. Declaration of Independence, 1776

<sup>2</sup> Ockert Dupper 'The current legislative framework' in EML Strydom (ed) *Essential employment discrimination law* (2004) 14.

<sup>3</sup> Arthur Chaskalson 'Human dignity as a constitutional value' in Kretzmer & Klein (eds) *The concept of human dignity in human rights discourse* (2002) 140.

<sup>4</sup> Titia Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 401 at 402.

<sup>5</sup> Bob Hepple 'The aims and limits of equality laws' in Dupper & Garbers (eds) *Equality in the workplace: Reflections from South Africa and beyond* (2009) 4.

2.2 reviews select theories of equality prevalent in the literature. Sections 2.3 and 2.4 then proceed to give a broad overview of the statutory provisions and the jurisprudence of the South African Constitutional Court relating to the right to equality. Finally, section 2.5 focuses on equality jurisprudence as it pertains to foreign nationals. Unless otherwise stated, unfair discrimination will be conceptualised as ‘the differential treatment of persons in a way which impairs their fundamental dignity as human beings’.<sup>6</sup>

## 2.2 Selected theories of equality

The concept of equality straddles diverse disciplines, rendering it a complex ideal with more than one connotation. Equality can take many different forms, depending on one’s perspective and goal. For instance, an economist may be concerned with income or wealth (economic) equality, a political scientist with political equality, whilst a sociologist may pursue gender or social equality. The diverse uses of the ‘equality’ concept renders it an ambiguous rhetorical device that can split into many other concepts to suit any purpose.<sup>7</sup> For that reason, in order to comprehend fully the progression of the equality discourse in South Africa, it is necessary to survey some of the broader theories underlying the concept.

### 2.2.1 Utilitarianism

Utilitarianism as a political philosophy predominantly concerns maximising the total wellbeing in society.<sup>8</sup> Thus, the principal concern for a utilitarian is simply utility. Equality in terms of this theory is apportioned an instrumental value; i.e. equality is valuable as far as it promotes other values.<sup>9</sup> Philosophers who belong to this school of thought analyse equality in terms of the degree of the resulting benefits for those concerned or for society

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<sup>6</sup> Ackermann, O’Regan and Sachs JJ in *Prinsloo v. Van der Linde* [1997] 6 BCLR 759 (CC) para 31.

<sup>7</sup> Ronald Dworkin ‘What is Equality? Part 1: Equality of Welfare’ (1981a) 10(3) *Philosophy & Public Affairs* 185.

<sup>8</sup> Martin Hevia & Joel Colon-Rios ‘Contemporary theories of equality: A critical review’ (2009) 74 *Revista Juridica Universidad de Puerto Rico* 131; *Victoria University of Wellington Legal Research Paper No 15/2013*.

<sup>9</sup> Nils Holtug & Kasper Lippert-Rasmussen (eds) *Egalitarianism* (2007) 2.

as a whole.<sup>10</sup> The manner of distribution of welfare among beneficiaries, for instance, is not of such great relevance as the ensuing satisfaction.<sup>11</sup>

In a purely utilitarian fashion therefore, all interests of beneficiaries involved are equally important as everyone is equally weighted.<sup>12</sup> Thus, the outcome of a distribution can be uneven if that distribution is the best one from the total amount of overall welfare. Thus to a utilitarian, when deciding between two policies or acts for instance, a major deciding factor is simply the resulting outcome. Put differently, the act or policy that offers the greatest benefits to beneficiaries is of more immediate relevance to a utilitarian, not necessarily the process of distribution itself.<sup>13</sup>

### 2.2.2 Egalitarianism

Egalitarianism, like utilitarianism, rests on a similar moral assumption that all human beings are fundamentally equal in worth and therefore people should treat or relate to one another as equals.<sup>14</sup> However, unlike utilitarianism, equality in terms of egalitarian principles transcends simply making people better off overall.

In classic egalitarianism, equality is good in itself; it is more than instrumental, it has intrinsic value.<sup>15</sup> As a result, individuals should, all things being equal, have identical shares of welfare or resources or at least the same access to obtain these desired goods by virtue of them having equal moral status.<sup>16</sup> For egalitarians, when faced with a choice between two distributive options, it is sometimes necessary to choose an option that amounts to lesser benefits for all beneficiaries if the same allocation results in the

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<sup>10</sup> Derek Parfit 'Equality and priority' (1997) 10 *Ratio* 202 at 202.

<sup>11</sup> Dworkin op cit note 7 at 185.

<sup>12</sup> Holtug & Lippert-Rasmussen op cit note 9 at 2. Premised on an assumption of moral equality.

<sup>13</sup> Parfit op cit note 10 at 202.

<sup>14</sup> Richard Arneson 'Egalitarianism' in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2013) available at <http://plato.stanford.edu/archives/sum2013/entries/egalitarianism>, accessed 25 February 2014.

<sup>15</sup> Parfit op cite note 10 at 206.

<sup>16</sup> Holtug & Lippert-Rasmussen op cit note 9 at 2.

process.<sup>17</sup> Thus, it is sometimes better if everyone is equally worse off than if everyone is better off, though not equally so.<sup>18</sup>

Egalitarianism and the pursuit of economic equality are commonly related; nonetheless, egalitarianism varies because there are numerous ways in which people can be equal.<sup>19</sup> There have been many attempts by various scholars to classify types of egalitarianism. Yet, like the very concept of equality, egalitarianism as a theory is a constantly evolving principle. Irrespective of the tenuous nature of the concept, this chapter briefly surveys the formal and substantive forms of egalitarian theory for purposes of what the study aims to highlight.

### 2.2.3 Formal equality versus substantive equality

The notion of formal equality is premised on the Aristotelian principle of equal treatment; i.e. likes should be treated alike and vice versa.<sup>20</sup> According to this understanding, injustice ensues when one treats those who are alike differently and vice versa. Supporters of formal equality view inequality as an unnatural and irrational phenomenon because people are born free and equal.<sup>21</sup> Thus, the failure to treat people as equally free creates discrimination.<sup>22</sup> Consequently, inequality can be removed by simply treating all people who are similarly situated in the same broad and abstract terms, i.e. in the same manner, regardless of personal circumstance, history or any such contextual considerations.<sup>23</sup>

Moreover, the formal interpretation of equality is seemingly neutral, as it rejects different treatment of people who may be different from one another socially and/or economically.<sup>24</sup> Formal equality arguably promotes the notion of meritocracy. Meritocracy demands that individuals should be treated entirely on their merit and not based on some

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<sup>17</sup> Parfit op cit note 10 at 203.

<sup>18</sup> Holtug & Lippert-Rasmussen op cit note 9 at 16.

<sup>19</sup> Arneson op cit note 14 at 13.

<sup>20</sup> Sandra Fredman 'Facing the future: Substantive equality under the spotlight' in Dupper & Garbers (eds) *Equality in the workplace: Reflections from South Africa and beyond* (2009) 17.

<sup>21</sup> Pierre de Vos & Warren Freedman (eds) *South African constitutional law in context* (2014) 421.

<sup>22</sup> Ibid.

<sup>23</sup> Janet Kentridge 'Equality' in Chaskalson et al *Constitutional law of South Africa* (1999) 14.4.

<sup>24</sup> De Vos & Freedman op cit note 21 at 421.

arbitrary physical or personal characteristic in determining whether they have a right to a benefit or not.<sup>25</sup> There appears to be inherent neutrality in this model because individual physical or personal characteristics are irrelevant in determining a right to some social benefit or gain. Thus, this school of thought is likely to propose the use of standard measures in order to ensure the same treatment to all people, regardless of outcome.<sup>26</sup>

Accordingly, those who advocate for formal equality, as do libertarians to some degree, primarily seek to address status-based discrimination. However, the neutral approach to equality, as premised by formal equality and meritocracy, is problematic in that it has the potential to perpetuate inequality. Whilst the removal of supposed arbitrary distinctions may advance the attainment of equity to some degree, the use of the merit or the identical treatment approach to benefits and opportunities — without taking into account the actual social and economic differences between people — can intensify the inequality between privileged and marginalised groups.<sup>27</sup> As observed by Sandra Fredman, ‘merit is itself a function of previous advantage rather than an objective characteristic’.<sup>28</sup>

At face value, formal equality appears harmless as it advocates for a mere consistency of treatment. Thus, a formal understanding of the right to equality therefore ‘focuses merely on whether two people have been treated in an identical manner by the legal rule or by the institution or individual concerned’.<sup>29</sup> This understanding suggests that any two people are identical in terms of their capabilities, attributes, or intelligence to start with. However, this is not so as people are constrained by economic and other factors to different degrees.

In this respect, some scholars criticise the formal approach to equality as being superficial and reinforcing rather than redressing discrimination because it fails to recognise underlying patterns of group-based disadvantage characteristic of inequality.<sup>30</sup> Louis Pojman asserts that formal equality gives a sense of ‘pseudo-equality’ that cannot

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<sup>25</sup> Fredman op cit note 20 at 17.

<sup>26</sup> Saras Jagwanth ‘South Africa: The inequality challenge’ (2000) 15(3) *SAR* 30 at 31.

<sup>27</sup> De Vos & Freedman op cit note 21 at 422.

<sup>28</sup> Fredman op cit note 20 at 17.

<sup>29</sup> De Vos & Freedman op cit note 21 at 421.

<sup>30</sup> Kentridge op cit note 23 at 14.4.

serve as a sufficient principle of justice owing to its lack of content.<sup>31</sup> Peter Westen echoes similar sentiments in his claim that equality, and to some extent formal equality, is ‘an empty vessel with no substantive moral content of its own’.<sup>32</sup> Pojman and Westen agree that without moral standards or content, equality as an idea is meaningless. If left to Westen alone, scholars will completely strip the concept of equality (the formal understanding of it at the very least) from legal discourse owing to its supposed ambiguity.

The criticisms levelled against the concept of formal equality prove particularly true in the South African context. Given the country’s turbulent history of discrimination, sole reliance on a formal approach to equality could exacerbate inequality. Formal equality is about treating similarly situated people the same, regardless of personal characteristics or circumstances. However, because of South Africa’s legacy of inequality and unequal distribution of economic and social privileges and opportunities,<sup>33</sup> adopting a formal or neutral approach to equality can exacerbate the subordination of those who were historically disadvantaged and deprived of their human dignity. Undoubtedly, the need for equality in this instance requires a formal prohibition against discrimination. However, the quest for procedural justice exclusively is not enough because inequality persists in South African society despite formal prohibitions against discrimination.

The Constitutional Court has rejected the sole reliance on the traditional *de jure* equality due to its emphasis on the principle of same treatment.<sup>34</sup> The South African equality jurisprudence began to transition from a formal notion to a substantive understanding of the equality right in *Brink v Kitshoff NO*<sup>35</sup> and finalised the test, with a substantive focus, for determining whether there has been a violation of the right to

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<sup>31</sup> Louis Pojman ‘Theories of equality: a critical analysis’ (1995) 23(2) *Behavior and Philosophy* 1 at 4.

<sup>32</sup> Peter Westen ‘The empty idea of equality’ (1982) 95(3) *Harvard Law Review* 537 at 547.

<sup>33</sup> De Vos & Freedman op cit note 21 at 419.

<sup>34</sup> See *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC), *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC), *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC), *Harksen v Lane NO* 1997 11 BCLR 1489 (CC), *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC), *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC).

<sup>35</sup> 1996 (6) BCLR 752 (CC); hereinafter referred to as *Brink*.

equality in *Harksen v Lane NO*.<sup>36</sup> *Brink* set precedent for the court's substantive approach to the equality right, and provided the preliminary contextual structure within which the equality jurisprudence was to be developed.<sup>37</sup> The constitutional adjudication of equality disputes since then has followed an impact-based or context-based approach in giving a more substantive meaning and interpretation of the right to equality.<sup>38</sup> This is not to suggest that the formal conception of equality is without use in understanding and interpreting the right to equality. It merely suggests that the right to equality in the South African context 'must guarantee more than equality before the law'.<sup>39</sup>

In a purely egalitarian society, everyone should ideally get the same measure of resources, welfare, gratification, good, evil, and so forth. However, this kind of absolute fairness is impossible. Similarly, the notion of equal or consistent treatment is untenable as there 'is a difference between treating people equally and treating them as equals'.<sup>40</sup> In order to attain true equity, equal treatment will need to be tempered with justice.<sup>41</sup>

Unlike the model of formal equality, there is also the view that equality cannot simply be about equal treatment or applying existing 'neutral' legal rules to people. People are neither the same nor do they enjoy identical opportunities or benefits.<sup>42</sup> Accordingly, a substantive approach to equality does not presume a fair social order.<sup>43</sup>

Instead, advocates of substantive equality recognise that there is a connection between status (e.g. race, age, gender etc.) and disadvantage, and a need to break the cycle of deprivation linked to status.<sup>44</sup> They acknowledge that no two people are identical or

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<sup>36</sup> Tameshnie Deane & Rashjee Brijmohanlall 'The constitutional court's approach to equality' (2003) 44(2) *Codicillus* 92 at 98.

<sup>37</sup> Saras Jagwanth & Christina Murray 'Ten years of transformation: How has gender equality in South Africa fared?' (2002) 14 *Canadian Journal of Women & Law* 255 at 279.

<sup>38</sup> *Ibid* at 274.

<sup>39</sup> De Vos & Freedman op cit note 21 at 421.

<sup>40</sup> Dworkin op cit note 7 at 185.

<sup>41</sup> Pojman op cit note 31 at 8.

<sup>42</sup> De Vos & Freedman op cit note 21 at 420.

<sup>43</sup> Kentridge op cit note 23 at 14.4.

<sup>44</sup> Fredman op cit note 20 at 15.

enjoy the same opportunities owing to structural or systemic reasons.<sup>45</sup> That is to say, they support the redressing of systemic and pervasive group-based inequality, not only the removal of it.<sup>46</sup> In their view, the need is to create distinctions and apply differential treatment accordingly in order to achieve equal opportunity.<sup>47</sup>

Thus, substantive equality accommodates the differential treatment of people who differ economically and socially.<sup>48</sup> Supporters of this doctrine of equality are as concerned with outcomes as with treatment, perhaps even more so.<sup>49</sup> Thus, the attainment of remedial and procedural justice is of equal importance to them.

Although specific provisions of South African legislation reflect the principle of equal treatment, the equality clause of the Bill of Rights provides for a substantive conception of equality.<sup>50</sup> South African equity laws aims for both recognition of individuals regardless of cultural and social status (formal equality) and addressing economic and social inequality (substantive equality).

For instance, the Constitutional Court, when determining adherence to the Constitution's commitment to equality, takes into account the economic, social, and political conditions of affected groups and individuals in resolving disputes of direct challenges to discriminatory legislation, policies or conducts.<sup>51</sup> This focus on context in interpreting and applying the right to equality suggests that the adjudication structure goes beyond the formal way in which the law treats people or groups.<sup>52</sup> The emphasis on a contextual analysis — or more specifically the impact of the treatment instead of the treatment itself — in resolving equality disputes is evident in the approach to the

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<sup>45</sup> De Vos & Freedman op cit note 21 at 422.

<sup>46</sup> Jagwanth op cit note 26 at 31.

<sup>47</sup> Kentridge op cit note 23 at 14.5.

<sup>48</sup> De Vos & Freedman op cit note 21 at 421.

<sup>49</sup> Fredman op cit note 20 at 18

<sup>50</sup> Catherine Albertyn & Janet Kentridge 'Introducing the right to equality in the interim Constitution' (1994) 10 *SAJHR* 149 at 152.

<sup>51</sup> Saras Jagwanth 'Expanding equality' (2005) *Acta Juridica* 131 at 134.

<sup>52</sup> De Vos & Freedman op cit note 21 at 421.

Constitutional Court's equality jurisprudence.<sup>53</sup> Undoubtedly, the country's political past, in large part, shapes this substantive understanding of equality in South African equity legislation and jurisprudence.<sup>54</sup>

### 2.3 Constructing equality in the South African context

The equality discourse has been in the international arena much longer than in South Africa. Even before South Africa re-entered the international fold, the international community had long been grappling with the notion. Other nations had instituted and endorsed international standards dealing with specific aspects of discrimination, such as the core UN human right treaties constituting the International Bill of Human Rights and ILO Discrimination (Employment and Occupation) Convention 1958.

Despite the delay, South Africa has caught up with the international community in the equality discourse. The equality rhetoric is a prevailing aspect of contemporary South African politics. However, the equality discourse in South Africa contains an interesting and unique development. In a 1998 speech, Thabo Mbeki notably argued that South Africa comprised 'two-nations' divided by poverty and inequality. He elaborated on his 'two-nation' imagery by expressing that:

[o]ne of these nations is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication, and other infrastructure. The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural

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<sup>53</sup> The Constitutional Court applied a substantive understanding of equality in the following: *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC); *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC); *Harksen v Lane NO* 1997 11 BCLR 1489 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC); *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 CC; *Hoffmann v South African Airways* 2000 11 BCLR 1211 (CC); *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC); *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC); *J v Director General, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Khosa and Others v Minister of Social Development and Others* 2004 6 BCLR 569 (CC); *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC); *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 1 BCLR 1 (CC); and *Minister of Home Affairs and Another v Fourie and Others* 2006 3 BCLR 355 (CC).

<sup>54</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 para 60.

areas, the black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication, and other infrastructure. It has virtually no possibility to exercise what in reality amounts to a theoretical right to equal opportunity.<sup>55</sup>

More than a decade and a half later, Mbeki's observation still resonates. South African society is one of the most unequal in the world,<sup>56</sup> recording the highest level of income inequality.<sup>57</sup> On the one hand, South Africa has experienced growth in household income, albeit concentrated among groups at the top or high-income levels.<sup>58</sup> On the other hand, income inequality has steadily increased because of extreme wage disparities within the country. Therefore, although income inequality has fallen in rural areas, it has risen in urban areas.<sup>59</sup> The present juxtaposition of extreme poverty alongside excessive wealth adequately captures the idea of the 'two-nation' Mbeki was alluding to in 1998.

Oxfam cautions that the 'strong economic growth in South Africa will not stop the stop the number of people living in poverty increasing by 2020 unless inequality is brought under control'.<sup>60</sup> Addressing inequality in South Africa will aid in eradicating poverty, but until then, the situation will be dire. Literature suggests that minimal inequity correlates with lower crime rates, stronger social cohesion and trust, as well as better population health.<sup>61</sup> Given this country's high crime rates, strong xenophobic and prejudicial sentiments coupled with numerous public protests, inequality not only persists, but is presumably on the rise.

Moreover, a 2011 Organisation for Economic Co-operation and Development (OECD) study on global inequalities identified four driving forces of inequality common to

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<sup>55</sup> Jeremy Seekings & Nicolai Nattrass 'The post-apartheid distributional regime' (2004) CSSR Working Paper No. 76 at 3.

<sup>56</sup> Statisticians use a measure of statistical dispersion known as a Gini coefficient to determine inequality, mainly inequality of income or wealth. A Gini coefficient of 0 expresses perfect equality whereas that of 1 expresses maximal inequality among values.

<sup>57</sup> Oxfam *Left behind by the G20: How inequality and environmental degradation threaten to exclude poor people* (2012) Oxfam International at 13.

<sup>58</sup> Ibid at 16.

<sup>59</sup> Courtney Ivins *Inequality matters: BRICS inequality fact sheet* (2012) BRICS Policy Center at 6.

<sup>60</sup> Oxfam op cit note 57 at 27.

<sup>61</sup> Ivins op cit note 59 at 2.

emerging economies, including South Africa: labour force (formal-informal) inequalities; gaps in education; barriers to employment and career advancement for women; and spatial (rural-urban) divides.<sup>62</sup> This OECD finding is only a partial extract of the bigger situation. The reality is that patterns of complex and multiple forms of inequality permeate the South African society. The complexity ensues in the manner in which current inequality intertwines with poverty, economic growth, and race. In South Africa, like the United States, the phenomenon of inequality has a unique strong racial undertone.

In view of that, contemporary analysis of South African law and jurisprudence on equality will be incomplete without considering the historical developments that precede and shape existing inequality trends. A historical perspective is necessary in understanding the contemporary approach to equality discourse since almost all existing and emerging inequalities in the country reach back to the past.

### **2.3.1 Contemporary historical background**

South Africa has always been an unequal society. In order to comprehend fully contemporary South Africa's stance on equality, it is necessary to examine the historical context that shapes the discourse. South Africa's history of inequality can be traced as far back as the colonial period, with the arrival of the first Europeans in the 1600s. Whilst a comprehensive account of 350 years of history is beyond the scope of this chapter, an attempt will be made to paint, in broad strokes, the historical developments leading up to the democratic dispensation and the adoption of existing equity laws.

The year 1948 is a good starting point to give a contemporary historical account of a complex equality debate. By 1948, the country had survived a great internal struggle for dominance (Anglo-Boer or South African war of 1899-1902),<sup>63</sup> two World Wars, and its first attempt at a unitary state (i.e. the unification of South Africa in 1910).<sup>64</sup> Moreover, by 1948, the formulation of apartheid as an ideology was fully-fledged. Thus, by this period, the National Party was in power and began the process of collating and formulating all pre-

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<sup>62</sup> Ibid at 5.

<sup>63</sup> Shula Marks 'War and union' in R Ross *et al* (eds) *The Cambridge History of South Africa* (2011) 157.

<sup>64</sup> Bill Freund 'South Africa: The union years, 1910-1948 – political and economic foundations' in R Ross *et al* (eds) *The Cambridge History of South Africa* (2011) 215.

existing racial policies into relatively coherent and comprehensive segregation policies under the social and economic engineering project christened ‘apartheid’.<sup>65</sup>

The British imperialists instituted a range of policies intended to gain control of South Africa during their control of the Cape.<sup>66</sup> The Glen Grey Act of 1894, the Natives Land Act 27 of 1913, the Native Affairs Act 23 of 1920, the Native Urban Areas Act 21 of 1923, the Native Administration Act 38 of 1927 and to some extent the 1936 legislation on land and franchise were some of the foundational repressive and ineffective laws initiated under the unitary parliament of the British rule.<sup>67</sup> These policies may have been mere attempts at racial segregation. However, they laid the basis for the evolution for many contentious racial policies that would have ramifications to date.

Undoubtedly, apartheid played a role in institutionalising racial inequality and the disempowerment and large-scale marginalisation of the black population. However, the apartheid government cannot be blamed for single-handedly creating all the current social inequalities. Evidence suggests that the National Party successfully managed to bring racial segregation more comprehensively on to the statute book; a feat the pre-apartheid government tried but failed to achieve.<sup>68</sup> Apartheid did not happen in isolation; it was an extension of colonial conquest and settlement.<sup>69</sup>

As such, apartheid was more than a reiteration of the imperialists’ rhetoric. It was an ideology and a system of legally enforceable rules that systematically discriminated against black South Africans in all spheres of social and economic activity.<sup>70</sup> It sought to disenfranchise black South Africans through a series of rules that crudely reserved all power to the white population.<sup>71</sup>

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<sup>65</sup> Hermann Giliomee & Bernard Mbenga *New History of South Africa* (2007) 314.

<sup>66</sup> Bethuel Setai *The making of poverty in South Africa* (1998) 3. The British captured the Cape from the Dutch East-India Company in 1806.

<sup>67</sup> Martin Legassick ‘Legislation, ideology and economy in post-1948 South Africa’ (1974) 1(1) *Journal of Southern African Studies* 5 at 8.

<sup>68</sup> Alan Mabin ‘Comprehensive segregation: the origins of the Group Areas Act and its planning apparatus’ (1992) 18(2) *Journal of Southern African Studies* 405 at 421.

<sup>69</sup> Sampie Terreblanche *A History of inequality in South Africa, 1652-2002* (2002) 26.

<sup>70</sup> De Vos & Freedman op cit note 21 at 420.

<sup>71</sup> Giliomee & Mbenga op cit note 65 at 314.

Myriads of successful statutory racial policies helped attain and maintain this grand system over time. Instigation of anti-miscegenation laws like the Population Registration Act 30 of 1950 succeeded in categorising all citizens into specific statutory racial groups, whilst the Prohibition of Mixed Marriages Act 55 of 1949 coupled with the Immorality Amendment Act 21 of 1950 criminalised all interracial conjugal and sexual relationships.<sup>72</sup> The Reservation of Separate Amenities Act 49 of 1953 eliminated all integrated public facilities from public transport to benches to the use of the beach. The Bantu Education Act 47 of 1953 racially segregated all educational institutions (schools and universities), limiting the level of knowledge and skills transferred to black people simultaneously.<sup>73</sup> The Group Areas Act 41 of 1950, a protraction of the British's Natives Land Act 27 of 1913 and Native Urban Areas Act 21 of 1923, created a comprehensive urban residential segregation.<sup>74</sup> Like its precursors, the Groups Area Act was a restrictive land-tenure policy that regulated the ownership and occupation of land to specific statutory groups.

On the labour front, the National Party institutionalised discrimination by means of laws such as the Group Areas Act and the Native Laws Amendment Act 54 of 1952. Together, the two laws worked to establish a dual system of strict influx control of the migrant labour and pass systems that curtailed the movement of black people into cities for economic purposes.<sup>75</sup> Consequently, the law designated non-whites (mainly black people) into 'homelands', and required them to carry and present 'pass books' before entering urban areas for employment. The Group Areas Act particularly restricted the mobility of black female work seekers.<sup>76</sup> Moreover, the Industrial Conciliation Act 28 of 1956 and the Mines and Works Act 27 of 1956 excluded black people from collective bargaining and reserved jobs for white people respectively.<sup>77</sup> This translated into the refusal for black

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<sup>72</sup> Terreblanche op cit note 69 at 334.

<sup>73</sup> Deborah Posel 'The apartheid project, 1948-1970' in R Ross et al (eds) *The Cambridge History of South Africa* (2011) 340.

<sup>74</sup> Mabin op cit note 69 at 428.

<sup>75</sup> Anne Kelk Mager & Maanda Mulaudzi 'Popular responses to apartheid: 1948-C.1975' in R Ross et al (eds) *The Cambridge History of South Africa* (2011) 373.

<sup>76</sup> Marie McGregor 'A legal-historical perspective on affirmative action in South Africa (Part 1)' (2006) 12(2) *Fundamina* 87 at 92.

<sup>77</sup> Mager & Mulaudzi op cit note 75 at 373.

people to hold any skilled or even semi-skilled employment, and the simultaneous protection of the economic privilege whites enjoyed in the labour market.<sup>78</sup> Finally, the Wage Act 5 of 1957 and the Unemployment Insurance Act 30 of 1966 allowed for variations in wage determinations based on race and sex, and unequal benefits for men and women respectively.<sup>79</sup>

However, the marginalisation and exploitation of black workers by means of legislation existed even before its salience by the apartheid state. History suggests that the undermining of black workers (and their organisations) started as far back as the 1920s. This is evident in legislation on industrial bargaining containing racially discriminatory provisions intended to control black workers in the interests of the dominant classes.<sup>80</sup> The Industrial Conciliation Act 11 of 1924 was the first legislative attempt by the imperialist government to establish an ‘industrial relations’ system that institutionalised the power of white workers.<sup>81</sup> The 1924 Act and its successors (i.e. Industrial Conciliation Act 36 of 1937 and Industrial Conciliation (Labour Relations) Act 28 of 1956) excluded black people from the definition of employee and as a result from its ambit.<sup>82</sup> Thus, the imperialist government were the first to initiate racial divide in employment; the National Party fostered, reinforced and formalised it into a complete statute.

These draconian policies ensured that the majority of the population (mostly black people) were dispossessed of their land, relegated to low-quality public education and healthcare, restricted from opportunities for employment, and physically confined to the most impoverished parts of the countryside and cities, whilst the white minority benefited. The apartheid regime not only discriminated against black people by denying them the same opportunity to amass any form of capital (be it income, education, land, skills or

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<sup>78</sup> Setai op cit note 66 at 148.

<sup>79</sup> McGregor op cit note 76 at 93.

<sup>80</sup> Rob Davies ‘The class character of South Africa’s industrial conciliation legislation’ in E Webster (ed) *Essays in South African Labour History* (1978) 69.

<sup>81</sup> Ibid at 79.

<sup>82</sup> Rochelle le Roux ‘The evolution of the contract of employment in South Africa’ (2010) 39(2) *ILJ* 139 at 161.

social networks), it brought about most of the poverty and income inequality existing today. Briefly, the apartheid system was extremely unequal, uneven, and unjust.<sup>83</sup>

The policy of exclusion that had dominated the apartheid era began to crumble by the mid-1970s. A series of events made it intolerable for the white government to continue to govern the country in the old manner, ultimately collapsing the apartheid structure. There was a great deal of resistance by the oppressed majority from the mid-1970s to the early 1990s. In the labour arena, a gradual move towards equality began near the end of the 1970s with the Wiehahn Commission. The result of the Commission's inquiry into labour legislation led to the revision of the Industrial Conciliation Act to include 'unfair labour practice' provision and the subsequent establishment of the Industrial Court as a court of equity and fairness.<sup>84</sup> Van Niekerk contends that the justification for the enactment of the unfair labour practice doctrine in 1979 was far from noble — the legislature intended for it to maintain racial privilege by protecting the interests of white workers who risked losing the statutory protection that job reservation afforded them.<sup>85</sup>

The lifting of the ban on all prohibited organisations, including the African National Congress (ANC), and the release of political prisoners in 1990 initiated a lengthy process of political negotiation towards the creation of a democratic society premised on equality for all.<sup>86</sup> Shortly after then State President FW de Klerk's announcements, formal negotiations commenced with the convening of the Convention for a Democratic South Africa (CODESA).<sup>87</sup> The negotiation process appeared to be making headway when the key parties (the ANC and the National Party government) settled on important details

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<sup>83</sup> Terreblanche op cit note 69 at 17.

<sup>84</sup> McGregor op cit note 76 at 94-6.

<sup>85</sup> Andre van Niekerk 'In search of justification: The origins of the statutory protection of security of employment in South Africa' (2004) 25 *ILJ* 853 at 861.

<sup>86</sup> Tom Lodge 'Resistance and reform, 1973-1994' in R Ross *et al* (eds) *The Cambridge History of South Africa* (2011) 481.

<sup>87</sup> Heinz Klug 'A constitutional history of South Africa' in Currie & de Waal (eds) *The new constitutional & administrative law* (2001) 59. CODESA constituted of representatives from major political parties and liberation movements.

about the constitutional structure of the post-apartheid state, with a whites-only referendum in support of continuing on the negotiations path.<sup>88</sup>

Some of the initial settlements were a unitary South Africa (with the reintegration of the ‘independent’ and self-governing black states) run by a multi-party democracy, and a constitution with an entrenched bill of rights to be adjudicated by a constitutional court.<sup>89</sup> However, the CODESA process collapsed as negotiations broke down over several contentious issues, chief of which centred on which body would draft the new Constitution.<sup>90</sup>

In order for the negotiations to resume, the government had to make concessions. The ANC conceded to a five-year period of executive power sharing with the National Party government after the first democratic elections<sup>91</sup> and the National Party agreed to the adoption of a negotiated interim constitution.<sup>92</sup> Negotiations resumed and so did the steady transition from apartheid to democracy. The year 1994 was a momentous time for South Africa for many reasons. The democratic election of Nelson Mandela ushered in political transformation and an end to almost five decades of government-mandated separatism, racism and high levels of intolerance.<sup>93</sup> Prior to this democratic election, government approved the interim Constitution and established the Constitutional Court to give effect to the supremacy of the Constitution and its Bill of Rights.<sup>94</sup> The interim Constitution began the legal revolution.<sup>95</sup>

The varied oppressive and economically inequitable laws passed during the reign of the National Party influenced and shaped contemporary anti-discrimination policies in South Africa. Thus, current equality policies seemingly developed as a way to contest the negative differential treatment accorded to the black majority in this era of white supremacy. Whilst this assertion may be true, in large part, race relations prior to this

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid at 60.

<sup>91</sup> “Sunset clause”.

<sup>92</sup> McGregor op cit note 76 at 62.

<sup>93</sup> Terreblanche op cit note 69 at 35.

<sup>94</sup> Ibid at 65.

<sup>95</sup> Ibid at 41.

period were far from amicable. Policies from the decades preceding apartheid (i.e. prior to 1948) entailed many elements of segregationism.<sup>96</sup>

Years of struggle and negotiation were over and revolutionary changes to legal system were under way.<sup>97</sup> The ANC government introduced a wide range of legislative programmes intended to address the legacy of apartheid and create a non-racial society.<sup>98</sup> The adoption of the final Constitution<sup>99</sup> and specific anti-discrimination legislation completed the process of attempts at weakening the institutionalised inequality established by the apartheid regime.<sup>100</sup> All of these policies tackle the legacy of systematic discrimination and seek to correct demographic imbalances embedded in the South African society.<sup>101</sup>

Yet, two decades after democracy, there is still a need to redress past inequalities among previously disadvantaged groups as South Africa still suffers from wide disparities in income, employment and living standards.<sup>102</sup> Post-apartheid South Africa still has a long way to go if it is to fully ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...’<sup>103</sup>

### **2.3.2 Contemporary statutory approaches to equality**

The legal dispensation of contemporary South Africa addresses the issue of discrimination holistically through the Constitution (with its Bill of Rights) and specific anti-discrimination statutes.<sup>104</sup> In light of South Africa’s troubled past, it is unsurprising that equality plays a foundational role in the existing constitutional order. The enactment of the final Constitution and other anti-discrimination laws is perhaps the first act of commitment

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<sup>96</sup> Posel op cit note 73 at 321.

<sup>97</sup> Du Toit *et al Labour relations law: a comprehensive guide* (2003) 59

<sup>98</sup> Terreblanche op cit note 69 at 47.

<sup>99</sup> Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter ‘the Constitution’).

<sup>100</sup> Employment Equity Act 55 of 1998 in Ockert *et al Understanding the Employment Equity Act* (2009) 20.

<sup>101</sup> Ibid at 36.

<sup>102</sup> Terreblanche op cit note 69 at 25.

<sup>103</sup> Preamble to the Constitution.

<sup>104</sup> These include the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

by post-apartheid South Africa towards addressing the severe inequalities and discrimination inherited from the apartheid era. This section explores constitutional and legislative provisions promoting equality in a democratic South Africa.

**(a) *Constitutional provisions***

The comprehensive piece of legislation that is the Constitution is crucial in South Africa's equality discourse. It contains a strong commitment to addressing inequality in the country due to the pre-eminence given to non-racialism, non-sexism, equality, and non-discrimination throughout its content.<sup>105</sup> Like its precursor (the interim Constitution), the Constitution embraces a substantive approach to equality.<sup>106</sup> It emphasises equality as one of its foundational values.<sup>107</sup>

Chapter 2 of the Constitution, commonly known as the Bill of Rights, specifically spells out democratic rights of human dignity, equality, and freedom.<sup>108</sup> In addition, the Constitution compels the State to respect, protect, promote, and fulfil the rights accorded in the Bill of Rights.<sup>109</sup> Moreover, it provides a legal framework to address some of the unfairness prevalent in South African society.<sup>110</sup>

Section 9 of the Constitution, the equality clause, enshrines the right to equality and non-discrimination by providing substantive protection against unfair discrimination. Subsection 1 entrenches the principal equality guarantees to all persons. It explicitly states that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. The Constitutional Court has interpreted this section to mean that everyone is entitled, 'at the very least, to equal treatment by South African courts of law', and that nobody should be 'above or beneath the law and that all people are subject to law

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<sup>105</sup> Jagwanth op cit note 26 at 30.

<sup>106</sup> Kentridge op cit note 23 at 14.11.

<sup>107</sup> Section 1(a) of the Constitution.

<sup>108</sup> Section 7(1) of the Constitution.

<sup>109</sup> Section 7(2) of the Constitution.

<sup>110</sup> De Vos & Freedman op cit note 21 at 421.

impartially applied and administered'.<sup>111</sup> Thus, this aspect of the right to equality, i.e. s 9(1), promotes 'difference blind' equality.<sup>112</sup>

Subsection (2) on the other hand takes into consideration differences, as it offers opportunity for the attainment of remedial equality (redress) by permitting the state to institute positive equality measures.<sup>113</sup> The Constitution prohibits all forms of unfair discrimination; subsection (3) promises protection against unfair discrimination by prohibiting the use of arbitrary classifications in the allocation or enjoyment of benefits.<sup>114</sup>

Finally, subsections (4) and (5) of the equality provision unambiguously prohibit the use of direct or indirect discrimination by the State and individuals on certain listed grounds.<sup>115</sup> Section 9(4) explicitly provides that national legislation must be enacted to prevent or prohibit unfair discrimination.

The right to equality provided for in s 9 of the Constitution is similar to those previously provided for in s 8 of the interim Constitution. It is worth noting that the Constitutional Court has developed three different legal tests that apply respectively to s 9(1), 9(2) and 9(3). Section 2.4 of this chapter provides a detailed discussion of the general jurisprudential approach to each of these provisions, as developed by the Constitutional Court.

The constitutional equality provisions have been heavily scrutinised. The Bill of Rights has been pivotal in almost all constitutional equality claims dealt with in South African case law.<sup>116</sup> However, in order to avoid creating dual systems of jurisprudence

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<sup>111</sup> See *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) para 18, *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) para 22, and *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) para 27.

<sup>112</sup> Ralph Mathekga 'The Formulation of Equality Clause in the South African Constitution: a Juristic question, or a Political Point of Departure' (2003) at 2 available at: [http://www.clearcontent.co.za/storage/files/prev\\_Formulation\\_of\\_equality\\_clause.pdf](http://www.clearcontent.co.za/storage/files/prev_Formulation_of_equality_clause.pdf), accessed 19 August 2015.

<sup>113</sup> Catherine Albertyn 'Constitutional equality in South Africa' in Dupper & Garbers (eds) *Equality in the workplace: Reflections from South Africa and beyond* (2009) 78.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> See discussion under equality jurisprudence.

under the Constitution and under legislation, the Constitutional Court has affirmed a principle that ‘where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard’.<sup>117</sup> This is the principle of avoidance or subsidiarity.<sup>118</sup>

This indirect approach in constitutional interpretation and adjudication requires the courts, as a first attempt, to interpret a statutory provision in accordance with the underlying values of the Bill of Rights, before testing it against a specific provision of the Bill of Rights.<sup>119</sup> Thus, in relation to the current discussion, a court must interpret a legislation enacted to give effect to s 9 in light of the Constitutional Court’s jurisprudence on section 9.<sup>120</sup>

**(b) Other statutory provisions**

Aside from constitutional provisions, the government has propagated a variety of specific anti-discrimination legislation to address current forms of discrimination and inequality in employment and the broader South African society in general.

In the employment context, South Africa labour law examines the notion of equality in the labour arena. Although the constitutional right to equality fundamentally influences equality in employment law, two specific statutes provide for anti-discrimination measures in labour law; namely the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (the EEA).

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<sup>117</sup> *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 51. Also see Dawn Norton ‘What is (and what isn’t) a “constitutional matter” in the context of labour law?’ (2009) 30 *ILJ* 772 at 775.

<sup>118</sup> The principle of subsidiarity has been dealt with in a number of judgments including: *NAPTOSA and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C), *Minister of Health And Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC), and *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC).

<sup>119</sup> De Vos & Freedman op cit note 21 at 338.

<sup>120</sup> Ibid at 429.

The LRA was the foremost piece of workplace legislation enacted by the democratic parliament. The primary purpose of the LRA, among other things, is to ‘advance economic development, social justice, labour peace and the democratisation of the [South African] workplace’.<sup>121</sup> One of the ways the Act fulfils its objectives is through the regulation of the employment relationship generally and the promotion of fair labour practices,<sup>122</sup> particularly in relation to dismissals,<sup>123</sup> as well as trade union organisation and membership.<sup>124</sup> The ‘unfair labour practice’ provision contained in the LRA played a central role in the employment equity jurisprudence, albeit only a small part of the jurisprudence related to anti-discrimination or equality issues.<sup>125</sup>

Additionally, the legislature enacted the EEA to give effect to the provisions on the right to equality in section 9, primarily s 9(5), of the Constitution.<sup>126</sup> As a mechanism for addressing the legacy of the apartheid colour bar, which excluded black people from jobs above a basic level,<sup>127</sup> the EEA aims to ensure the equitable representation of individuals, particularly black people, in all employment categories and levels in the workplace.<sup>128</sup> However, it regulates equality and anti-discrimination solely in the employment context. Thus, unlike the broader constitutional context, the EEA contains comprehensive

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<sup>121</sup> Section 1 of the LRA.

<sup>122</sup> Section 185 (substituted by s 40 of Act 12 of 2002) guarantees to every employee the right not to be subjected to unfair labour practice. Unfair labour practice include, but not limited to, any unfair conduct or omission relating to promotion, demotion, probation, training, benefits, suspension and disciplinary action.

<sup>123</sup> According to s 187(1)(f), in dismissing an employee, the employer may not unfairly discriminate against the employee, directly or indirectly, on any arbitrary ground, including race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. A dismissal based on any of these grounds or any arbitrary ground is automatically unfair.

<sup>124</sup> Section 95(6) prohibit a trade union from including in its constitution any provision that discriminates directly or indirectly against any person on the grounds of race or sex.

<sup>125</sup> Carole Cooper ‘The boundaries of equality in labour law’ (2004) 25 *ILJ* 813 at 815.

<sup>126</sup> I M Rautenbach & Elmarie Fourie ‘The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act’ 2016 *TSAR* 110.

<sup>127</sup> Terreblanche op cit note 69 at 47.

<sup>128</sup> See s 2(b) of the EEA.

provisions intended to eliminate unfair discrimination and promote equality in post-apartheid South African workplaces.<sup>129</sup> As a tool for achieving equity in the workplace, it pursues a substantive notion of equality by prohibiting unfair discrimination, as well as promoting positive measures or affirmative action to achieve workplace equity.<sup>130</sup>

For the most part, chapters II (ss 5-11) and III (ss 12-27) — the prohibition of unfair discrimination and affirmative action — form the cornerstones of the EEA. More importantly, the provisions on the right to equality or non-discrimination in employment — Chapter II or ss 5 and 6 of the EEA — are noteworthy or relevant for reference purposes in this discussion. Section 5 actively calls on employers to promote equal opportunity by eliminating unfair discrimination in any employment policies or practices. Similarly, s 6, particularly subsection 1, prohibits unfair discrimination against employees, directly or indirectly, in any employment policy or practice.<sup>131</sup>

The expressed aims of the EEA are not as problematic as the manner in which one goes about achieving them.<sup>132</sup> As such, the interpretation of the EEA, and to some extent the implementation thereof, has raised some controversy. The debate lies with the interpretation of the concept of ‘unfair discrimination’ in the employment discrimination jurisprudence. Since the Constitutional Court’s formulation of a systematic test for determining the constitutionality of differential treatment in *Harksen v Lane NO and Others* (discussed below),<sup>133</sup> many judgments dealing with s 6 of the EEA often heavily rely on the interpretations of s 9 of the Constitution.<sup>134</sup>

Some scholars find the superimposition of the *Harksen* test into the employment discrimination discourse inevitable. Cooper asserts that the ‘absence of the term ‘arbitrary’ in the EEA’s s 6(1) and the Act’s reference to the equality provision now place it beyond

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<sup>129</sup> Basson *et al Essential labour law 4th combined edition* (2005) 201.

<sup>130</sup> Cooper *op cit* note 125 at 821. Also see s 2 of the EEA.

<sup>131</sup> Section 6 of the EEA replaced item 2(1)(a) of schedule 7 of the LRA. Before s 6 of the EEA, unfair discrimination formed part of the ‘unfair labour practice’ provision of the LRA.

<sup>132</sup> JV du Plessis & MA Fouche *A practical guide to labour law sixth edition* (2006) 79.

<sup>133</sup> 1997 (11) BCLR 1489 (CC), hereafter the *Harksen*.

<sup>134</sup> Darcy du Toit ‘The evolution of the concept of “unfair discrimination” in South African labour law’ (2006) 27 *ILJ* 1311 at 1315.

doubt that labour law should follow the constitutional approach.’<sup>135</sup> Perhaps in reaction to criticisms such as Cooper’s, a current amendment to s 6(1) of the EEA includes the phrase ‘or on any other arbitrary ground’.<sup>136</sup> Section 6(1) now reads:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth *or any other arbitrary ground* (emphasis added).

However, other scholars argue that the insertion of the phrase ‘arbitrary ground’ in the amended s 6(1) is confusing and perhaps superfluous. According to Rautenbach and Fourie, even without the inclusion of ‘or on any other arbitrary ground’ in the amendment, ‘the legislature’s use of the word ‘including’ meant that the list of grounds expressly referred to in section 6 was not a closed list’.<sup>137</sup> This is evident from the various cases where the courts considered applications based on unlisted grounds.<sup>138</sup> The explanatory memorandum suggests that the reason for the amendment is either to clarify that the prohibition covers both expressly listed grounds and analogous grounds, or to harmonise it with the formulation in s 187(1)(f) of the LRA.<sup>139</sup> Whatever the reason, it is obvious that the test for unfair discrimination in employment law is similar to that of the constitutional approach in *Harksen*.<sup>140</sup> The Constitutional Court has said as much.<sup>141</sup>

On the other hand, some scholars find this transplantation inappropriate, since it allows judges to revert to case law dealing with the interpretation of the right to equality

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<sup>135</sup> Cooper op cit note 125 at 825.

<sup>136</sup> Section 3(a) of the Employment Equity Amendment Act, Act 47 of 2013.

<sup>137</sup> Rautenbach & Fourie op cit note 126 at 117.

<sup>138</sup> For instance, the courts have considered, among others, applications based on citizenship (*Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 1 (CC)); HIV status (*Hoffmann v SAA* 2000 (11) BCLR 1211 (CC)); medical condition (*IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC)); and parenthood (*Wallace v Du Toit* 2006 8 BLLR 757 (LC)).

<sup>139</sup> Rautenbach & Fourie op cit note 126 at 118. See also para 3.3.1 of the ‘Memorandum on objects of Employment Equity Amendment Bill’ in the Employment Equity Amendment Bill [B 31B-2012] available at [https://jutralaw.co.za/media/filestore/2013/10/B31B\\_2012.pdf](https://jutralaw.co.za/media/filestore/2013/10/B31B_2012.pdf), accessed 25 February 2016.

<sup>140</sup> Ibid.

<sup>141</sup> *Mbana v Shepstone & Wylie* (2015) 36 ILJ 1805 (CC) para 25.

rather than the EEA.<sup>142</sup> Granted, the prohibition of unfair discrimination provision contained in s 6 of the EEA builds on the fundamental protection against unfair discrimination enshrined in s 9(3) of the Constitution,<sup>143</sup> yet to assume the provisions are identical is erroneous. The EEA regulates discrimination in employment and as such all work-related unfair discrimination disputes should be interpreted in terms of the EEA, not the Constitution. To do otherwise would not only be bypassing a specific legislation promulgated to regulate a constitutional right, it would confuse an important part of its meaning.<sup>144</sup>

The supposed controversy that arises when adjudicators inappropriately transplant constitutional interpretation into the EEA plays itself out in a Constitutional Court's decision on race and equity at the workplace. In *South African Police Service v Solidarity obo Barnard*,<sup>145</sup> the Constitutional Court had to rule on whether the decision of the National Commissioner of the Police Service not promoting an employee to the position of superintendent on the grounds of her race constituted unfair discrimination.

In 2005, the National Commissioner advertised a position for the rank of superintendent, to which Captain Renate M Barnard (Ms Barnard) applied twice. On both occasions, she was shortlisted, interviewed and recommended as the best candidate. However, the National Commissioner failed to appoint her to the position on each occasion because her appointment would not enhance racial diversity at that salary level. Ms Barnard approached the Labour Court for an order declaring unfair discrimination on the ground of race contrary to section 6(1) of the EEA.

At the Constitutional Court, the court, albeit via four judgments, unanimously held that the decision of the National Commissioner not to appoint Barnard on the grounds of her race was fair in terms of s 9(2) of the Constitution and s 6(2) of the EEA.<sup>146</sup> Incidentally, one of the reasons the Constitutional Court upheld the appeal was that the

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<sup>142</sup> Darcy du Toit 'The prohibition of unfair discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998' in Dupper and Garbers (eds) *Equality in the workplace* (2009) 151; Du Toit 'Protection against unfair discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623 at 2634.

<sup>143</sup> Ibid.

<sup>144</sup> Du Toit op cit note 134 at 1314.

<sup>145</sup> 2014 (6) SA 123 (CC), hereafter *Barnard*.

<sup>146</sup> *Supra* para 70.

Supreme Court of Appeal erred in employing the *Harksen* analysis of unfair discrimination, instead of approaching it through the prism of s 9(2) of the Constitution and s 6(2) of the EEA;<sup>147</sup> thus the lower court based its appeal decision on the wrong principle.<sup>148</sup> Some commentators have argued that the court missed an important opportunity to develop the interpretation of the EEA within the framework of the Constitution, especially s 9.<sup>149</sup>

Du Toit argues, perhaps not directly connected to the *Barnard* case but not entirely unrelated, that the meaning of unfair discrimination contained in the EEA should be understood in context of ‘the substantive meaning of ‘discrimination’ on prohibited grounds as contemplated by Convention 111’.<sup>150</sup> Thus, ILO Convention 111 should equally serve as an interpretative guide to the EEA as far as employment discrimination is concerned, not just the Constitutional Court’s *Harksen* test, or the Constitution generally.

He further argues that ‘the broad manner in which the Constitution frames the prohibition of unfair discrimination allows for considerably more scope for interpretation than the more precise meaning that the EEA, construed in accordance with s 3(d) seeks to give’.<sup>151</sup> Accordingly, he warns that disregarding s 3(d) could potentially create scope for employers to discriminate against employees.<sup>152</sup> Still others have criticised the EEA as having benefited only ‘the aspirant African petit bourgeois’, who have jobs and belong to trade unions.<sup>153</sup>

Outside of the employment context, parliament has enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) to fulfil s 9(4) of the Constitution. It aims to promote equality, non-racism, and non-sexism by preventing and eliminating unfair discrimination, harassment, and hate speech generally. The

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<sup>147</sup> Ibid para 51.

<sup>148</sup> Ibid para 53.

<sup>149</sup> C H Albertyn ‘Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act — An opportunity missed? *South African Police Service v Solidarity obo Barnard*’ (2015) *SALJ* 711 at 733.

<sup>150</sup> Du Toit op cit note 134 at 1340. Also see s 3(d) of the EEA.

<sup>151</sup> Du Toit op cit note 142 at 140.

<sup>152</sup> Ibid.

<sup>153</sup> Terreblanche op cit note 69 at 47.

government envisaged it as a large-scale redistributive programme to effect societal transformation.<sup>154</sup> Like all of the anti-discrimination legislation in the country, it embraces a substantive notion of equality.<sup>155</sup> However, unlike similar laws, it has a broader scope of application as it applies to those workers precluded from the EEA. Moreover, unlike other anti-discrimination legislation, it contains an open list of ‘prohibited grounds’ and a test for identifying ‘prohibited grounds’ not explicitly listed in the Act,<sup>156</sup> as well as a general test for ‘fairness or unfairness’.<sup>157</sup>

These features of the PEPUDA mirror that of s 9(3) of the Constitution and consequently the s 9 jurisprudence. PEPUDA also establishes Equality Courts to develop in more contextual detail what constitutes fairness or unfairness on a case-by-case basis.<sup>158</sup> These courts are lower level courts so they are more accessible and cheaper alternatives to the High Courts. Given the socio-economic and institutional obstacles experienced by disadvantaged groups in accessing legal assistance,<sup>159</sup> the Act requires no legal representation.<sup>160</sup>

Despite constitutional and legislative provisions promoting equality in South African society, inequality still prevails. Therefore, it is asserted that the realisation of equality goes beyond simply repealing past discriminatory laws or attempting to curtail discriminatory practices and customs by judicial decision.<sup>161</sup>

## **2.4 The South African Constitutional Court’s equality jurisprudence**

The South African judicial system has greatly advanced equality discourses in the country. South African courts have had a hand in addressing some of the complex and systemic

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<sup>154</sup> Anton Kok ‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislation-driven societal transformation’ (2008a) 19 *Stellenbosch Law Review* 122 at 122.

<sup>155</sup> S 1(1)(ix).

<sup>156</sup> S 1(1)(xxii)(b).

<sup>157</sup> S 14. Also see Anton Kok ‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform’ (2008b) 24 *SAJHR* 445 at 448.

<sup>158</sup> Kok op cit note 154 at 138.

<sup>159</sup> Jagwanth op cit note 26 at 33.

<sup>160</sup> Section 16 of PEPUDA.

<sup>161</sup> McGregor op cit note 76 at 94.

forms of discrimination and inequalities inherited from the apartheid era by means of adjudicating equality claims.<sup>162</sup> The Constitutional Court's jurisprudence regarding the right to equality is significant in this regard. Note, however, that much of the Constitutional Court's jurisprudence deals with s 8 of the interim Constitution.<sup>163</sup> Nonetheless, since the formulation of the right to equality in both s 8 of the interim constitution and s 9 of the Constitution are relatively similar, so any interpretations of s 8 apply to s 9.<sup>164</sup>

The South African equality jurisprudence focuses largely on the concept of unfair discrimination as it manifests in legal provisions that exclude certain groups.<sup>165</sup> Litigation that invokes the equality clause dealt with by the Constitutional Court thus far have usually focused on the interpretation, protection, and enforcement of the unfair discrimination prohibition of the equality provision in the Constitution.

However, the Constitutional Court's jurisprudence regarding the right to equality (s 9) has yielded three different legal tests that apply to three distinct situations in which a litigant can lodge an equality complaint. The three legal tests relate to ss 9(1), 9(2), and 9(3) respectively. Therefore, when attacking the constitutionality of a legislative provision, the litigant faces the task of deciding which of the three subsections to base his or her attack on. The subsequent discussions examine each of the three situations and the corresponding legal tests in turn.

#### **2.4.1 Section 9(1) analysis: mere differentiation**

The Constitutional Court, in its early equality jurisprudence, has established an analysis of the equality clause encompassing two separate inquiries constituted of three separate analyses.<sup>166</sup> Different legal provisions are relied on for each of the analyses, and each applies in different cases or situations.

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<sup>162</sup> Albertyn op cit note 112 at 78.

<sup>163</sup> Iain Currie & Johan De Waal (eds) *The Bill of Rights Handbook 6<sup>th</sup> Edition* (2013) 217.

<sup>164</sup> Ibid.

<sup>165</sup> Albertyn op cit note 113 at 96.

<sup>166</sup> Warren Freedman 'Understanding the right to equality' (1998) 115 *SALJ* 243 at 248.

The first of these inquiries relates to instances where a differentiation amounts to mere differentiation. In this scenario, a legislative provision or executive conduct may differentiate between people or groups of people, but the distinction is neither directly nor indirectly based on the grounds listed in or similar to those listed in s 9(3) of the Constitution. In this respect, the distinction constitutes mere differentiation and is not necessarily discriminatory or unfair.

The general idea behind the court distinguishing between mere differentiation and other adverse forms of differentiation is that not all forms or cases of differentiation will be constitutionally problematic. If that was not so there would be a flood of litigation as some people will indeed challenge every conceivable form of differentiation. This could potentially create a situation where the courts would be required to review nearly all legislative measures. In *Prinsloo v Van der Linde and Another*,<sup>167</sup> the Constitutional Court explicated that:

In order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently.<sup>168</sup>

In this respect, the court has distinguished between two types of differentiation: differentiation involving unfair discrimination and differentiation without unfair discrimination.<sup>169</sup> The latter constitutes mere differentiation. This suggests that some level

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<sup>167</sup> 1997 (6) BCLR 759 (CC), hereafter referred to as *Prinsloo*. This case dealt with a constitutional challenge of the provisions of s 84 of the Forest Act 122 of 1984. Section 84 stipulates that ‘when in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed until the contrary is proved’. The main issue of contention raised was that the form of reverse onus embedded in s 84 of the Forestry Act breached the equality promise in terms of s 8 of the interim Constitution. The challenged failed as the court found that there was no breach to s 8(1) or (2) of the interim Constitution.

<sup>168</sup> *Supra* note para 24.

<sup>169</sup> *Ibid* para 23. The Constitutional Court has been criticised for its approach in resolving the *Prinsloo* case, in that the facts of the case did not require such a rigorous approach. Although the conclusion reached by Ackermann, O’Regan and Sachs JJ might be accurate given the facts of the case, commentators like Denis

of differentiation or distinction between individuals or groups of people is expected in any given democracy, particularly one as diverse as South Africa.

In fact, people are prone to make numerous distinctions between individuals or groups of people in their daily interactions that may have no serious or adverse effects.<sup>170</sup> Therefore, the law allows for the state or private individuals and institutions to make some forms of differentiation or distinction, provided the differentiation is relatively benign. That is, they do not involve unfair discrimination, i.e. should not be based on the grounds or similar to those identified in s 9(3) of the Constitution.

Cases or situations where legislative provision constitutes mere differentiation are dealt with in terms of s 9(1) of the Constitution. To reiterate, s 9(1) has been interpreted by the court to mean that everyone is entitled, ‘at the very least, to equal treatment by South African courts of law’, and that nobody should be ‘above or beneath the law and that all people are subject to law impartially applied and administered’.<sup>171</sup> In terms of s 9(1), therefore, differentiation not involving unfair discrimination is simply a ‘mere differentiation’, nothing more. It is this analysis of differentiation that lends support to the court’s adoption of substantive equality.<sup>172</sup>

Moreover, part of the s 9(1) analysis involves a strict rationality enquiry or test into the differentiation between individuals or groups of people. A rationality standard requires that any distinction made between people or groups of people is neither arbitrary nor irrational, but serves a legitimate purpose. More explicitly, the state or other relevant third parties ‘should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose’.<sup>173</sup>

However, the differentiation infringes s 9(1) if it is illegitimate, i.e. there is no rational relationship between the differentiation in question and the purpose given to

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Davies are of the view that the equality inquiry employed was deemed too complex and inappropriate to the kind of issue the case triggered.

<sup>170</sup> De Vos & Freedman op cit note 21 at 425.

<sup>171</sup> See *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) para 18, *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) para 22, and *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) para 27.

<sup>172</sup> Freedman op cite note 166 at 243.

<sup>173</sup> *Supra* note 167 para 25.

justify it.<sup>174</sup> In a rationality enquiry, the court is required ‘to identify and examine the specific government object sought to be achieved by the impugned rule of law or provision’.<sup>175</sup> However, the court is not required to enquire into the availability of other methods or the efficiency of the chosen method.<sup>176</sup> In this regard, rationality serves an accountability and justification function.<sup>177</sup> Note, however, that reliance on the rationality enquiry of s 9(1) has decreased since the court’s formulation of a general ‘rule of law rationality’ test based on s 1 of the Constitution.<sup>178</sup>

In summation, the notion of differentiation is central to South Africa’s equality jurisprudence generally and to the s 9(1) analysis specifically.<sup>179</sup> In certain situations distinctions made between individuals or groups of people are nothing more than mere differentiation. In those cases, the constitutional attack based on s 9(1) will likely fail if a litigant is unable to show that the differentiation in question was arbitrary or irrational. In any event, before a court rules on the validity of the differentiation, it will first evaluate the basis for the differentiation to determine the legitimacy of the purpose of the distinction. The court will then consider if there is a rational relation between the differentiation and the purpose.

#### **2.4.2 Section 9(2) analysis: remedial measures (affirmative action)**

At times differentiation amounts to mere differentiation, with no adverse effects on the people being differentiated. In other times, differentiation is applied with an express aim of protecting or advancing previously disadvantaged individuals or groups of people.<sup>180</sup> The

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<sup>174</sup> Ibid para 26. See also *Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC).

<sup>175</sup> *Van der Merwe v Road Accident Fund and Another* (CCT48/05) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (30 March 2006) para 33.

<sup>176</sup> *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); (1999) 20 ILJ 525 (CC) para 16.

<sup>177</sup> De Vos & Freedman op cit note 21 at 432.

<sup>178</sup> Currie & De Waal op cit note 163 at 222. The rule of law rationality attempts to prevent all forms of arbitrariness, not just arbitrary differentiation as specified in s 9(1).

<sup>179</sup> Supra note 167 para 23.

<sup>180</sup> Currie & De Waal op cit note 163 at 241.

latter scenario is the second situation in which a litigant can lodge an equality complaint. In this instance, a policy or certain provisions of a law may mandate differential treatment as a way of advancing restitution or redress. That is, a legislative provision or an executive conduct may require the state or private institutions to implement redress measures or affirmative action policies or programmes.

Affirmative action by design advocates for the preferential treatment for some people (typically members of a previously disadvantaged group) over others in the distribution of some benefit.<sup>181</sup> In the South African context, the bases for the preference are predominantly race and gender, but disability is increasingly becoming a factor.<sup>182</sup>

In this regard, the precedent-setting case of *Minister of Finance v Van Heerden*<sup>183</sup> offers the best illustration for a jurisprudential analysis on the remedial equality mandated by s 9(2). The case involved an application for leave to appeal from an order of the Cape High Court declaring Rule 4.2.1 of the Political office-Bearers Pension Fund discriminatory and constitutionally invalid. Rule 4.2.1 of the pension scheme seemingly provided for differentiated employer contributions in respect to Members of Parliament (MPs) who joined pre-1994 and those who joined post-1994. Thus, the scheme provided post-1994 MPs with more pension benefits for a period of five years, but not to those MPs who joined pre-1994 and continued to serve after 1994.<sup>184</sup>

At the High Court, the respondent alleged that the differentiation made by Rule 4.2.1 was arbitrary, irrational, unfairly discriminatory and therefore unconstitutional. It suffices to say that the High Court found in favour of the respondent. However, the Constitutional Court unanimously granted leave to appeal. At the Constitutional Court, the court explored the constitutional understanding of remedial or restitutionary equality, cementing its stance on measures designed to promote or shield previously disadvantaged people.

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<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> 2004 (11) BCLR 1125 (CC), hereafter *Van Heerden*.

<sup>184</sup> De Vos & Freedman op cit note 21 at 439.

In the event of a constitutional challenge to a restitutionary measure or provision (even based on any of the grounds listed in s 9(3),<sup>185</sup> as in the case of *Van Heerden*), the impugned measure or provision is first tested under s 9(2) of the Constitution.<sup>186</sup> If the impugned measure or provision passes muster under s 9(2), then it is constitutionally valid and the enquiry ends there.<sup>187</sup> However, if the court finds that the disputed measure or provision does not comply with the internal test set by s 9(2), i.e. is unconstitutional, then the court can further test its constitutionality against s 9(3) of the Constitution.<sup>188</sup>

Since s 9(2) of the Constitution is the first legal provision relied on in cases where legislative provision introduces affirmative action, it is necessary to elucidate on the section in a little more detail. Section 9(2) expressly states:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Section 9(2) is an important legal provision not only because it allows for constitutionally permissible affirmative action measures; it also encapsulates the notion of substantive equality previously discussed. In *Van Heerden*, the Constitutional Court validated the positive measures mandated by s 9(2) when it stated that ‘our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework’.<sup>189</sup>

Moreover, the importance of s 9(2) is apparent within the broader historical context of South Africa. It has been established in this chapter and elsewhere in the research that contemporary South Africa is a product of a discriminatory past. The social engineering that took place under colonialism and apartheid created a grossly unequal society, with black South Africans faring the worse. Decades after democracy and the dismantling of

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<sup>185</sup> Ibid at 434.

<sup>186</sup> Ibid at 430.

<sup>187</sup> Supra note 183 para 33.

<sup>188</sup> De Vos & Freedman op cit note 21 at 430.

<sup>189</sup> Supra note 183 para 25.

apartheid, deep divisions along racial lines and uneven distribution of resources and privileges still persists.

There is still work to be done to correct the imbalances of the past, to place everyone on an equal playing field. If we accept this premise then we accept that remedial measures (s 9(2)) are a means to achieve substantive equality,<sup>190</sup> not a form of reverse or positive discrimination as some people argue. This premise views affirmative action as a composite part of the right to equality, not an exception to it.<sup>191</sup>

As the Constitutional Court put it in *Van Heerden*, the South African equality jurisprudence, unlike the United States, views remedial measures as ‘integral to the reach of our equality protection’, and not as ‘deviation from, or invasive of, the right to equality guaranteed by the Constitution’.<sup>192</sup> Therefore, remedial equality is neither ‘reverse discrimination’ nor ‘positive discrimination’ as some people would argue.<sup>193</sup>

The legal test for remedial measures in terms of s 9(2) practically rests on three separate but related questions:

- Do the measures target persons or categories of persons who have been disadvantaged by unfair discrimination?
- Are the measures designed to protect or advance such persons or categories of persons?
- Do the measures promote the achievement of equality in the long term?

Accordingly, when someone challenges a remedial measure as violating the right to equality, the defender must first show that the impugned measure targets persons or categories of persons who have been disadvantaged by unfair discrimination.<sup>194</sup> The state or the institution liable for the affirmative action must prove that it targeted the right beneficiaries or the undeserving group will unduly benefit from the measure.<sup>195</sup> However, in *Van Heerden* the court was split on this first requirement for a valid restitutionary

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<sup>190</sup> Ibid para 27.

<sup>191</sup> Currie & De Waal op cit note 163 at 241.

<sup>192</sup> Supra note 183 para 30.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid para 38.

<sup>195</sup> De Vos & Freedman op cit note 21 at 438.

measure. On the one hand, the majority judgment found that the remedial measure of the pension scheme in issue did indeed target the right group, in this case black MPs legally excluded from parliamentary participation prior to 1994.<sup>196</sup>

The minority judgment of Mokgoro J, on the other hand, disagreed on the precision in defining a targeted class.<sup>197</sup> She contested that based on the facts of the case an overwhelming majority of the beneficiaries were undeserving or not eligible for affirmative action.<sup>198</sup> This meant that the measure in issue could not pass the first yardstick of the internal test in s 9(2). Dissenting views aside, the court acknowledged the difficulty in precisely defining the targeted class for affirmative action. In fact, it is expected that ‘within each class, favoured or otherwise, there may indeed be exceptional or “hard cases” or windfall beneficiaries’.<sup>199</sup> The important factor is that an ‘overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion’.<sup>200</sup>

The second requirement for a valid affirmative action measure is that it be designed to protect or advance those disadvantaged by unfair discrimination.<sup>201</sup> The premise is that affirmative action is ‘justified by its consequences’ and should therefore be directed at a desired future consequence.<sup>202</sup> The desired future consequence could be an equal society or advancing the interests of previously disadvantaged groups. Thus, a court requires the defender of the programme to show that the measure in issue is designed to or intended to achieve ‘an envisaged future outcome’ or, at the very least, is reasonably likely to achieve the desired end goal.<sup>203</sup> However, a defendant is not required to show that the measure is necessary to achieve or will definitely achieve the intended goals, and/or a ‘necessity to

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<sup>196</sup> Supra note 183 para 38.

<sup>197</sup> De Vos & Freedman op cit note 21 at 439.

<sup>198</sup> Supra note 183 para 93.

<sup>199</sup> Ibid para 39.

<sup>200</sup> Ibid para 40.

<sup>201</sup> De Vos & Freedman op cit note 21 at 440.

<sup>202</sup> Supra note 183 para 41, Currie & De Waal op cit note 163 at 242.

<sup>203</sup> Ibid.

disfavour one class in order to uplift another'.<sup>204</sup> Therefore, a litigant attacking the measure must convince the court that the measure is not reasonably capable of achieving the stated goals, or is 'arbitrary, capricious or displays naked preference'.<sup>205</sup>

The third and final requirement in determining a valid affirmative action hinges on whether the measure promotes the achievement of equality in the end. According to De Vos and Freedman,<sup>206</sup> this last requirement is perhaps the most difficult and complex to deal with since it requires a court to make a value judgment. Nonetheless, it is a key step in determining the constitutionality of an affirmative action measure, i.e. whether it conforms to s 9(2).<sup>207</sup> This third requirement of the test necessitates a balancing of differing interests,<sup>208</sup> or 'an appreciation of the effect of the measure in the context of our broader society'.<sup>209</sup>

A court will need to consider, among other things, both the interests of those who suffered and may continue to suffer from the effects of past or ongoing unfair discrimination, and those who benefitted or continue to benefit from past unfair discrimination.<sup>210</sup> In order to make this value judgment and achieve an appropriate balance of these interests, a contextual analysis (both historical and contemporary circumstances) is necessary. Sachs J in *Van Heerden*, in his concurring judgment, explicates it succinctly as follows:

Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way. At the same time, if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere. Given our historical circumstances and the massive inequalities that plague

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<sup>204</sup> Supra note 183 paras 42-43. This interpretation overruled previous interpretation that suggested that the words "design" and "achieve" means a rational or causal relationship between the measure (means) and the objectives (ends). See also *Public Servants' Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T), 18 *ILJ* 241 (T).

<sup>205</sup> Supra note 183 para 41.

<sup>206</sup> De Vos & Freedman op cit note 21 at 441.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Supra note 183 para 44.

<sup>210</sup> De Vos & Freedman op cit note 21 at 441.

our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged. That is what promoting equality (section 9(2)) and fairness (section 9(3)) require. Yet some degree of proportionality, based on the particular context and circumstances of each case, can never be ruled out.<sup>211</sup>

Thus, remedial or restitutionary equality — protecting certain groups from continued social, legal, and political disadvantages — requires the courts to assess equality claims in factual, textual, and historical context.<sup>212</sup> However, some scholars have argued that this balancing of interests required in the final leg of the s 9(2) test subtly imports the fairness requirement into the s 9(2) analysis.<sup>213</sup>

In summation, redress is a substantive part of the constitutional right to equality. In a society as diverse as South Africa, and one still battling the effects of historical marginalisation and oppression, remedial measures are necessary to break down forms of misrecognition. However, this does not suggest that the state or other private institutions can institute preferential treatment measures under the guise of affirmative action. All remedial measures or programmes must conform to the internal test of s 9(2) developed by the Constitutional Court.

### **2.4.3 Section 9(3) analysis: unfair discrimination**

As already alluded to in the above discussions, differentiation is central to South Africa's equality jurisprudence. The Constitutional Court distinguishes between two types of differentiation, each dealt with under separate legal tests. The first relates to a benign form of differentiation or 'mere differentiation', and the second relates to a differentiation based on illegitimate or analogous grounds, or discrimination. Although the Constitutional Court does not intend separating sections 9(1) and 9(3) into watertight compartments, it analyses mere differentiations under s 9(1) and discrimination in terms of s 9(3) respectively.<sup>214</sup>

This second form of differentiation, i.e. discrimination, is primarily dealt with under s 9(3) of the Constitution. Section 9(3) expressly prohibits against differentiation on

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<sup>211</sup> Supra note 182 para 152.

<sup>212</sup> Kentridge op cit note 23 at 14.5, supra note 18 para 26.

<sup>213</sup> De Vos & Freedman op cit note 21 at 443.

<sup>214</sup> Supra note 167 para 22.

16 listed grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Differentiation or differential treatment based on any or a combination of these prohibited grounds is presumed to be unfairly discriminatory unless the contrary is proved.<sup>215</sup> Thus, s 9(3) primarily deals with instances where a differentiation amounts to discrimination but does not form part of an affirmative action measure.

Discrimination theoretically is pejorative in nature.<sup>216</sup> Given the negative meaning or association with the word, a discrimination analysis will intrinsically require a fairness/unfairness test to distinguish between permissible (fair) and impermissible (unfair) discrimination.<sup>217</sup> The premise is that not all discrimination will necessarily be problematic or unconstitutional. More importantly, the equality clause only prohibits unfair discrimination, not all forms of discrimination.<sup>218</sup> Thus, the court further distinguishes between discrimination and unfair discrimination. These concepts of discrimination and unfair discrimination (discussed below) have come to dominate the Constitutional Court's approach to equality.<sup>219</sup>

**(a) *Distinguishing between discrimination and unfair discrimination***

Both discrimination and unfair discrimination are specific forms of differentiation.<sup>220</sup> In *Harksen v Lane NO and Others*,<sup>221</sup> the Constitutional Court developed a two-staged analysis for determining whether a differentiation constitutes discrimination or unfair discrimination, as envisaged by s 9(3). The court summarised the stages in the enquiry as follows:

(b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon

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<sup>215</sup> Section 9(5) of the Constitution; Currie & De Waal op cit note 162 at 224.

<sup>216</sup> Du Toit op cit note 142 at 145, De Vos & Freedman op cit note 21 at 445.

<sup>217</sup> Currie & De Waal op cit note 163 at 223.

<sup>218</sup> Ibid, De Vos & Freedman op cit note 21 at 445.

<sup>219</sup> Supra note 167 para 23, De Vos & Freedman op cit note 21 at 425.

<sup>220</sup> Currie & De Waal op cit note 163 at 222.

<sup>221</sup> Supra note 133. Although this case dealt with the provisions of s 8 of the interim Constitution, the equality jurisprudence also applies to s 9 of the Constitution.

whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounted to “discrimination”, did it amount to “unfair discrimination”? If it had been found to have been on a specified ground, unfairness would be presumed. If on an unspecified ground, unfairness would have to be established by the complainant. The test of unfairness focused primarily on the impact of the discrimination on the complainant and others in his or her situation.<sup>222</sup>

The first stage of the analysis above primarily relates to the concept of discrimination. It requires a court to determine whether the differentiation in fact amounts to discrimination. Nonetheless, a finding that there was discrimination does not necessarily conclude the enquiry. Discrimination must still be proven to be either fair or unfair.

In *President of the Republic of South Africa v Hugo*,<sup>223</sup> the Constitutional Court (per Goldstone J) explored the idea of ‘fair discrimination’. In this case, the then President Mandela granted a special remission of sentences to all imprisoned mothers at the time that had children under the age of 12.<sup>224</sup> The respondent, a male prisoner with a child under the age of 12 at the time, challenged that the presidential order unfairly discriminated against him on the grounds of his sex or gender.<sup>225</sup> Thus, the court had to decide whether the way in which the president exercised his power to acquit prisoners violated the rights of male prisoners.

The majority of the court found that the presidential order in fact discriminated on a combined basis of gender (sex) and parenthood of children below 12 years old.<sup>226</sup> Since sex or gender was a listed ground, the differentiation was considered unfair discrimination unless proven otherwise. However, the court, accepting a generalised view that women bear an unequal share of the burden of child rearing in our society as compared to men,<sup>227</sup>

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<sup>222</sup> Ibid para 53.

<sup>223</sup> 1997 (6) BCLR 708 (CC); hereafter referred to as *Hugo*.

<sup>224</sup> Ibid para 2.

<sup>225</sup> Ibid para 3.

<sup>226</sup> Ibid para 33.

<sup>227</sup> Ibid para 37.

held the discrimination fair because it was against a group who had not historically been disadvantaged.<sup>228</sup>

The Constitutional Court's exploration of fair discrimination in *Hugo* has not gone without controversy. Some scholars applauded the *Hugo* judgment as being 'in line with a contextual, substantive and group-based understanding of equality' given its sensitivity to the social context of women.<sup>229</sup> Yet, some people accused the Constitutional Court of adopting pragmatism instead of principle and consequently failed to apply a substantive concept of equality in its approach in *Hugo*.<sup>230</sup> Commentators like Kende lauded the majority of *Hugo* for this very pragmatism. In his view, the pragmatic nature of the judgment renders the judgment correct and consistent with the 'fundamentally transformative purpose behind the South African constitution's promise of substantive, not formal, equality'.<sup>231</sup>

Scholars like Carpenter and Davis tend to favour Kriegler's minority judgment that asserts that we should not tolerate gender stereotypes, as it is the closest explanation to the constitutional ideal of sex and gender equality.<sup>232</sup> In his support of the minority judgment, Davis argues that the majority reasoning reverted to a process of generalisation and adherence to 'a static concept of equality which refuses to recognise new forms of identity'.<sup>233</sup> Conversely, Kende finds Kriegler's judgment rather formalistic, preferring the majority's willingness to support preferential treatment that provides concrete benefits to women in spite of stereotypes.<sup>234</sup> In any event, *Hugo* offers the best illustration that we have for the idea of fair discrimination as developed in equality jurisprudence.

Nonetheless, the crux of the s 9(3) analysis rests on the concept of unfair discrimination, as s 9(3) read together with s 9(5) specifically prohibits unfair

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<sup>228</sup> Ibid para 40, Currie & De Waal op cit note 163 at 224.

<sup>229</sup> Jagwanth & Murray op cit note 37 at 280.

<sup>230</sup> Denis Davis *Democracy and deliberation* (1999) 78.

<sup>231</sup> Mark Kende 'Gender stereotypes in South Africa and American constitutional law: the advantage of a pragmatic approach to equality and transformation' (2000) 117 *SALJ* 745 at 760.

<sup>232</sup> Gretchen Carpenter 'Of prostitutes, pimps and patrons- some still more equal than others?' (2004) 19(1) *SAPR/PL* 232 at 248.

<sup>233</sup> Davis op cit note 230 at 83.

<sup>234</sup> Kende op cit note 231 at 759.

discrimination. Accordingly, a finding of discrimination subsequently triggers the second stage of the enquiry, the fairness or unfairness of the discrimination. This part of the discussion is concerned with what makes discrimination unfair, and ultimately constitutionally invalid. The determining factor in unfair discrimination is the impact of the discrimination on the victim.<sup>235</sup> According to the Constitutional Court, a court must consider the following factors in determining whether discrimination has an unfair impact:<sup>236</sup>

- a. the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage.
- b. the nature of the provision/law or action and the purpose sought to be achieved by it. If its purpose is... aimed at achieving a worthy and important societal goal.
- c. the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors by no means constitute a closed list, although an objective assessment of their cumulative effect helps in 'giving precision and elaboration to the constitutional test of unfairness'.<sup>237</sup>

The case of *City Council of Pretoria v Walker*<sup>238</sup> perhaps best illustrates the distinction between fair and unfair discrimination. The case examines the effects of certain actions of the Pretoria City Council. The Council was an amalgamation of the former black townships of Mamelodi and Atteridgeville and the formerly exclusively white municipality of Pretoria ('old Pretoria'). The Council was charging residents of old Pretoria on a consumption-based tariff measured by meters placed in each household, whilst residents of Mamelodi and Atteridgeville were charged a flat rate per household due to the absence of meters. Moreover, the Council had differing policies for defaulters in the two areas. It

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<sup>235</sup> Supra note 223 para 50, Currie & De Waal op cit note 163 at 223, De Vos & Freedman op cit note 21 at 450.

<sup>236</sup> Supra note 223 para 51, Currie & De Waal op cit note 162 at 223.

<sup>237</sup> Ibid para 51.

<sup>238</sup> 1998 (3) BCLR 257 (CC), hereafter referred to as *Walker*.

instituted legal action to recover arrears in old Pretoria but not in Mamelodi and Atteridgeville.

Mr Walker, a resident of old Pretoria, was unhappy with the differential rates and subsequently refused to pay the metered rate. The Council sued Mr Walker for outstanding municipal service charges for water and electricity. At the Constitutional Court, the majority of the court found that the Council's imposition of a flat rate and the resultant cross subsidisation did not constitute unfair discrimination because it neither adversely affected the respondent in any material way nor affected his dignity in a comparably serious manner.<sup>239</sup> However, the court found that the Council's policy of selective enforcement of debts constitute unfair discrimination based on indirect racial discrimination. It held that 'no members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups'.<sup>240</sup>

In summary, unfair discrimination in effect is discrimination with an unfair impact.<sup>241</sup> Thus, it is necessary to assess the impact on the lives of the people actually affected to determine the denial or advancement of equality.<sup>242</sup> Consideration of impact requires comparators. So in order to establish 'the manner in which inequality systematically forms from patterns of disadvantage, subordination and dominance, which may exist outside of the measure under consideration'<sup>243</sup> it is necessary to examine whether the complainant belongs to a group that was subject to past discrimination.<sup>244</sup> Whilst the identification of different groups is seemingly clear-cut given the history of this society, classification of previous victims of discrimination can be challenging. As noted by Saras Jagwanth, 'groups can comprise persons who are simultaneously privileged and disadvantaged, and individuals who suffer more than one form of disadvantage.'<sup>245</sup>

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<sup>239</sup> Ibid para 68.

<sup>240</sup> Ibid para 81.

<sup>241</sup> Currie & De Waal op cit note 163 at 225.

<sup>242</sup> Albie Sachs 'Equality jurisprudence: the origin of doctrine in the South African Constitutional Court' (1999) 5 (1) *Review of Constitutional Studies* 76 at 96.

<sup>243</sup> Ibid at 97.

<sup>244</sup> Supra note 223 para 112.

<sup>245</sup> Jagwanth op cit note 26 at 31.

**(b) *Listed versus analogous grounds***

The court, in its equality jurisprudence, has set out two categories of discrimination. The first category relates to discrimination resulting from differentiation based on one or more of the 16 prohibited lists of grounds, and the second relates to differentiation on an unspecified but analogous to the prohibited grounds.<sup>246</sup> A discrimination enquiry involves determining which of these two categories of discrimination to deal with the differentiation in issue. However, determining whether there has been differentiation on either specified or unspecified ground requires an objective assessment.<sup>247</sup> Objectivity in this instance means that an intention to discriminate is irrelevant to the discrimination enquiry.<sup>248</sup>

**(i) *Listed grounds***

In the first category, the text of s 9(3) provides a list of 16 grounds that cannot be the basis of any differentiation. These grounds relate to traits that affect human dignity.<sup>249</sup> Therefore, differentiation based on any of the grounds listed in s 9(3) is presumably unfair discrimination. Additionally, a claimant may bring a case on one or more of the grounds in s 9(3).<sup>250</sup> Differentiation based on the listed grounds are easy to identify and adjudicate.

Numerous equality challenges dealt with by the Constitutional Court related to discrimination against groups defined by a specified ground in the equality provision, predominantly on the grounds of gender and sexual orientation.<sup>251</sup> Although there have been incidents of discrimination on the grounds of race, age, disability, religion, and birth. However, issues around gender and sexual orientation dominate the equality jurisprudence.

In respect of gender equality, the controversy lies with the term itself. Gender is a social construct, meaning social and cultural norms shape male and female roles.<sup>252</sup> Therefore, differentiation along gender lines can subjugate one gender to the other. The judgments of *Brink*, *Hugo*, and *Harksen* all related to gender equality to some degree, with

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<sup>246</sup> *Prinsloo* para 29, *Harksen* at para 46, De Vos & Freedman op cit note 21 at 444.

<sup>247</sup> *Supra* note 223 para 47.

<sup>248</sup> *Currie & De Waal* op cit note 163 at 240, De Vos & Freedman op cit note 21 at 445.

<sup>249</sup> *Ibid* at 236.

<sup>250</sup> *Ibid* at 227.

<sup>251</sup> *Albertyn* op cit note 113 at 96.

<sup>252</sup> *Currie & De Waal* op cit note 163 at 227.

both *Brink* and *Harksen* also discriminatory along the lines of marital status. In *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*,<sup>253</sup> the court struck down s 23 of the Black Administration Act 38 of 1927 and its regulations together with the rule of male primogeniture as it applies in African customary law of succession.<sup>254</sup> According to the court, the impugned provision (s 23) ‘created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances’, and was therefore unconstitutional.<sup>255</sup> It was further held that the ‘African customary law rule of male primogeniture was unconstitutional and invalid because it discriminated unfairly against women and children born out of wedlock’.<sup>256</sup>

The Constitutional Court has also interpreted and applied sexual orientation as a ground of discrimination in six key cases. The court’s jurisprudence on interpreting and applying sexual orientation has aided in widening the scope of human rights in a number of ways. It has led to the decriminalisation or purging of discriminatory anti-homosexual laws and disallowed anti-homosexual rhetoric in the country. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>257</sup> the court unanimously nullified anti-sodomy laws. It reasoned that the provisions of s 20A of the Sexual Offences Act 23 of 1957, the inclusion of common-law offence of sodomy in Schedules 1 of the Criminal Procedure Act 51 of 1977, and the Security Officers Act 92 of 1987 discriminated against homosexual men on the grounds of their sexual orientation.

In some instances, it has led to the invalidation of legislation that sought to exclude people in same-sex relationships from benefits accorded to married couples.<sup>258</sup> The Constitutional Court has dealt with this in four specific instances or cases. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,<sup>259</sup> the court

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<sup>253</sup> 2005 (1) BCLR 1 (CC).

<sup>254</sup> The case dealt with unfair discrimination relating to the succession to black African estates.

<sup>255</sup> Para 73.

<sup>256</sup> Para 125.

<sup>257</sup> 1999 (1) SA 6 (CC).

<sup>258</sup> Currie & De Waal op cit note 163 at 228.

<sup>259</sup> 2000 JOL 5877 (CC).

considered the rights of foreign same-sex partners in South Africa under immigration law.

The court held that s 25(5) of the Aliens Control Act 96 of 1991, which allowed only spouses of citizens and permanent residents to apply for immigration permits from within South Africa, was unfairly and unjustifiably discriminatory in that it afforded preferential treatment to some (i.e. spouses of citizens and permanent residents) and not others. The exclusion of same-sex partners from the benefit of s 25(5) constituted discrimination based on sexual orientation. As noted by Ackermann J, the use of the term ‘spouse’ affords ‘protection only to conjugal relationships between heterosexuals and excludes any protection to a life partnership which entails a conjugal same-sex relationship, which is the only form of conjugal relationship open to gays and lesbians in harmony with their sexual orientation’.<sup>260</sup>

In *Satchwell v President of Republic of South Africa and Another*,<sup>261</sup> the court struck down s 8 and s 9 of the Judges’ Remuneration and Conditions of employment Act 88 of 1989 and its corresponding Regulations. The disputed provisions afforded benefits to the spouses of judges but not to their same-sex life partners. The court upheld the claim by interpreting the Act to include same-sex partners. However, it qualified its order by asserting that ‘marriage involves reciprocal duties of support between spouses’<sup>262</sup> and therefore the law affords marital benefits only in cases where same-sex partners have undertaken reciprocal duties towards one another.

In *Du Toit and Another v Minister of Welfare and Population Development*,<sup>263</sup> the lesbian partner of a judge who had adopted twins sought equal parental rights to the children. The court declared that her prevention from achieving this status under the Adoption Act unfairly discriminated against her and consequently struck down the provision. The judgment lifted the prohibition on and extended the right of same-sex couples to adopt children.

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<sup>260</sup> Ibid para 36.

<sup>261</sup> 2002 (6) SA 1 (CC). Applicant was a female judge who had been in an intimate, committed, and permanent same-sex relationship since 1986.

<sup>262</sup> Ibid para 12.

<sup>263</sup> 2003 (2) SA 198 (CC).

Finally, the dispute in *J and Another v Director General Department of Home Affairs and Others*<sup>264</sup> concerned the parentage of a child born through in-vitro fertilization to a partner of a same-sex union. All four of these cases speak to how the right of protection of family life is equally important in conventional and unconventional relationships.

In other instances, it has led to the extension of the institution of marriage to include people in same-sex relationships. In *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs*,<sup>265</sup> the equality challenge was specifically to the law of marriage, i.e. the right of same-sex couples to get married. In this judgment, the court struck down the common-law definition of marriage in South Africa<sup>266</sup> and the exclusion of same-sex couples from the wording of s 30(1) of the Marriage Act 25 of 1961 as they infringed on the right to equal protection of the law as well as unfairly discriminated based on sexual orientation.

Some scholars suggest that it is nearly impossible for the court to find a differentiation that has no rational connection to a legitimate government objective.<sup>267</sup> Yet, this judgment proved the exception. The court found the state's detailed regulation of heterosexual marriages but lack of regulation for same-sex unions in contravention of s 9(1) of the equality clause.<sup>268</sup> The court's directive order to parliament to recognise and regulate same-sex unions in a manner consistent with dignity resulted in the promulgation of the Civil Union Act 17 of 2006. Legal commentators applaud the *Fourie* judgment for three reasons: it demonstrated that a law or action could infringe both s 9(1) and s 9(3), it affirmed the rights of same-sex couples, and led to the regulation of same-sex unions by way of the Civil Union Act.<sup>269</sup> Prior to *Fourie*, the law treated marriage, in terms of common law, as a union between a man and woman.

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<sup>264</sup> 2003 (5) BCLR 463 (CC).

<sup>265</sup> 2006 (1) SA 524 (CC).

<sup>266</sup> Which clearly states 'a union of one man with one woman'.

<sup>267</sup> Freedman op cit note 166 at 249.

<sup>268</sup> Karthy Govender 'Equality, sexuality and taking rights seriously' (2008) 29(1) *Obiter* 1 at 7.

<sup>269</sup> *Ibid* at 5.

The court has repeatedly held it unfair to privilege marriage as the only protected institution in its equality jurisprudence.<sup>270</sup> By accepting domestic partnerships as a form of family deserving protection,<sup>271</sup> the court not only conceded to the explicit prohibition of unfair discrimination based on sexual orientation, but also fulfilled the constitutional commitment to substantive equality.<sup>272</sup> The court's equality jurisprudence relating to sexual orientation has been proactive in eradicating discriminatory anti-gay laws and progressively developing South African family law to confer some of the benefits and responsibilities of marriage to same-sex couples.<sup>273</sup>

(ii) *Analogous grounds*

The phrasing of s 9(3), particularly the inclusion of the word 'including', suggests that the list of prohibited grounds is not a closed list.<sup>274</sup> In view of that, people may make distinctions based on grounds that are not clearly recognised in s 9(3) but may also constitute discrimination because they are based on attributes fairly similar to the grounds specified in s 9(3).<sup>275</sup> The court calls these other unspecified grounds analogous grounds.

A determination of whether there has been discrimination on an analogous ground requires an objective examination of two important questions. First, the court must decide whether the differentiation is linked to the differential treatment of people 'based on attributes and characteristics attaching to them' that are comparable with the specified grounds.<sup>276</sup> In this part of the enquiry, the Constitutional Court advises against a narrow definition of these attributes and characteristics.<sup>277</sup> Secondly, the court must decide

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<sup>270</sup> Beth Goldblatt 'Regulating domestic partnerships — a necessary step in the development of South African family law' (2003) 120 *SALJ* 610 at 618.

<sup>271</sup> *Ibid.*

<sup>272</sup> Govender *op cit* note 268 at 5.

<sup>273</sup> *Ibid* at 13.

<sup>274</sup> De Vos & Freedman *op cit* note 21 at 446.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Supra* note 223 para 48, De Vos & Freedman *op cit* note 21 at 446.

<sup>277</sup> *Supra* note 223 para 49.

whether the differentiation potentially ‘impairs the fundamental dignity of persons as human beings, or affects them adversely in a comparably serious manner’.<sup>278</sup>

Presently, the Constitutional Court has recognised differentiation based on HIV status and South African citizenship as constituting analogous grounds of discrimination. The court explored the former in *Hoffmann v South African Airways*.<sup>279</sup> In that case, the appellant had applied for work with SA Airways as a cabin attendant. SAA rejected his application upon discovery of his HIV-positive status, following a blood test done during the selection process. The court held that SAA’s refusal to employ someone because of his HIV status violated the right to equality guaranteed by the Constitution. *Hoffmann* categorically condemned all forms of stereotyping and prejudice on the analogous ground of HIV status that may impair the dignity of people living with HIV.<sup>280</sup>

In *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*,<sup>281</sup> the Constitutional Court established citizenship status as an analogous ground of discrimination when it held that Regulation 2(2) of the Regulations regarding the Terms and Conditions of Educators<sup>282</sup> differentiated between citizens and foreign nationals, to the detriment of foreign nationals.<sup>283</sup> The applicants were foreign nationals with permanent residency who were temporarily employed as teachers in the North-West Province. The MEC for Education in the North-West province issued them with notices with the intention to terminate their employment and proceeded to advertise their posts because only South African nationals could teach in a permanent capacity in state schools. The court found that ‘permanent residency status’ entitled the applicants to compete with locals in the employment market and any limitation or exclusion on the grounds of citizenship status was purely discriminatory. Essentially, citizenship is a ‘personal attribute which is difficult to change’.<sup>284</sup>

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<sup>278</sup> Ibid para 46.

<sup>279</sup> 2000 (11) BCLR 1211 (CC).

<sup>280</sup> Carpenter op cit note 232 at 249.

<sup>281</sup> 1998 (1) SA 745 (CC), hereafter referred to as *Larbi-Odam*.

<sup>282</sup> GN R1743 of 13 November 1995. Reg. 2(2) stipulates that ‘no person shall be appointed as an educator in a State school in a permanent capacity, unless he or she is a South African citizen’.

<sup>283</sup> According to the court, citizenship is a personal attribute over which one has relatively little control.

<sup>284</sup> Supra note 281 para 19.

Similarly, in *Khosa and Others v Minister of Social Development and others*; *Mahlaule and Others v Minister of Social Development and Others*,<sup>285</sup> the court held that the exclusion of permanent residents from the social welfare scheme was unfairly discriminatory as it infringed their constitutional right to equality. Thus, the differentiation on the grounds of citizenship was clearly on a ground ‘analogous’ to those grounds listed in s 9(3) of the Constitution. The *Khosa* case not only illustrates the Constitutional Court’s recognition of analogous grounds of discrimination, it shows how the courts sometimes read the right to equality with other rights (in this case socio-economic rights).

In summation, the s 9(3) inquiry, the test for unfairness, has been at the heart of the equality analysis and has elicited much controversy.<sup>286</sup> In some instances, the courts have been lauded for its ability to read the Constitution asymmetrically to allow acts benefitting certain vulnerable groups.<sup>287</sup> In other instances, they have been criticised for the very same ability. Some commentators have gone so far as to accuse the Constitutional Court of tilting the balance of fairness under the Constitution in favour of the marginalised and vulnerable.<sup>288</sup>

#### **2.4.4 The role of human dignity in the equality jurisprudence**

Evidently, South African equality jurisprudence emphasises a substantive conception of equality. Underlying this equality jurisprudence is yet another concept, namely human dignity. The Constitutional Court first linked the right to equality to the concept of dignity in *Hugo* when it asserted that:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than 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.<sup>289</sup>

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<sup>285</sup> 2004 (6) SA 505 (CC).

<sup>286</sup> Freedman op cit note 166 at 250.

<sup>287</sup> Kende op cit note 231 at 761.

<sup>288</sup> Albertyn op cit note 113 at 95.

<sup>289</sup> Supra note 223 para 41.

Subsequent Constitutional Court decisions since *Hugo* have often inextricably linked the two concepts.<sup>290</sup> In this respect, the court has invoked the value of dignity in its equality judgments in three ways: first, to describe the prohibited grounds in s 9(3); secondly, to determine the fairness of discrimination; and finally, to assess the reasonableness of discrimination under the limitation clause.<sup>291</sup> The court's continuous reference to human dignity in interpreting the right to equality firmly places dignity as the fundamental value underlying the principle of equality.<sup>292</sup> This centrality and prominence given to the value of dignity, both in relation to unfair discrimination and as a value underlying the principles of equality generally, has elicited some controversy within academia.

The Constitutional Court's dignity-centred approach to equality particularly appears to highlight a dichotomy about the substantive obligation of the equality provision. In some quarters, the prominence of dignity in relation to unfair discrimination only limits the pursuit of substantive equality. Those who belong to this cluster view dignity as an individualistic concept incapable of capturing transformation. Scholars like Anton Fagan consider this prominence as deeply flawed claiming that there is no connection between unfair discrimination and dignity.<sup>293</sup>

In a slightly different manner, Hepple argues that despite it being a background value to all human rights, dignity is rather too vague to be the basis of equality law.<sup>294</sup> Likewise, Albertyn and Goldblatt feel equality should have 'meaning independent of the value of dignity', i.e. the value of equality should define the right to equality instead of the value of dignity.<sup>295</sup> They contend that 'importing dignity into the heart of the equality right

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<sup>290</sup> See for example *Prinsloo* at paras 31-33, *Harksen* at paras 43-54, *Sodomy* at paras 15-28

<sup>291</sup> Albertyn op cit note 113 at 82, Susie Cowen (2001) 'Can 'dignity' guide South Africa's equality jurisprudence?' 17 *SAJHR* 34 at 35-7.

<sup>292</sup> Hepple op cit note 5 at 7.

<sup>293</sup> Anton Fagan 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220.

<sup>294</sup> Hepple op cit note 5 at 8.

<sup>295</sup> Cathi Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248 at 258.

decisively shifts the emphasis away from a group-based understanding of equality...<sup>296</sup> and away from the transformative use of the right.<sup>297</sup>

For critics like Dennis Davis, the problem was endemic from the very beginning; the *Hugo* court ‘introduced the principle of dignity to interpret equality without ever explaining whether it was the absence of a prior constitutional right to equality or a breach of the self-standing dignity right that has been infringed.’<sup>298</sup> In doing so, it relegated equality to an abstract notion without any use of a comparator.<sup>299</sup> In his view, ‘the Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both content and a scope that make for a piece of a jurisprudential legoland’.<sup>300</sup> He further avers that ‘by conflating equality with dignity or its variants the court has failed to engage with the component parts of equality, let alone achieve any working balance’.<sup>301</sup>

Essentially, these critics are of the same opinion that the dignity-based equality jurisprudence focuses too much on the individual and his or her personal feelings of harm suffered. This focus on the individual narrows the understanding of the right to equality.<sup>302</sup> Therefore, the central role given to human dignity (a vague and complicated concept) could inadvertently relegate equality to a secondary meaning that risks its transformative potential.<sup>303</sup> In short, the court’s dignity-based analysis is uncritical, individualistic, and incongruent with the need to balance individual and community.<sup>304</sup>

However, other quarters see the Constitutional Court’s dignity-based approach to equality as a human rights approach that serves the pursuit of substantive equality. Susie Cowen, unlike Albertyn and Goldblatt, perceives dignity as a concept that not only focuses

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<sup>296</sup> Ibid at 257.

<sup>297</sup> Ibid at 272.

<sup>298</sup> Davis op cit note 230 at 95.

<sup>299</sup> Ibid at 82.

<sup>300</sup> D M Davis ‘Equality: The majesty of legoland jurisprudence’ (1999) 116 *SALJ* 398 at 413.

<sup>301</sup> Davis op cit note 230 at 97.

<sup>302</sup> Albertyn & Goldblatt op cit note 295 at 256-60, De Vos & Freedman op cit note 21 at 427.

<sup>303</sup> Albertyn op cit note 113 at 82.

<sup>304</sup> Davis op cit note 230 at 95.

on the individual but also on collective concerns.<sup>305</sup> In her assessment, ‘there is nothing in the concept of dignity itself, nor in its relationship with other rights and values, that inhibits its ability to serve the equality jurisprudence well’.<sup>306</sup>

Sandra Liebenberg echoes similar sentiments. In her view, the confines of human dignity transcend subjective personality issues, contrary to the assertion by Albertyn and Goldblatt, to include acknowledgment of both the conditions of material disadvantage and its impact on different groups in society.<sup>307</sup> Laurie Ackermann is inclined to agree with them in this observation to some degree.<sup>308</sup>

All three dignity-advocates recognise the important role dignity plays in the right to equality, as the value of equality cannot single-handedly support the right as critics like Davis, Fagan, Albertyn, and Goldblatt advocate. That is to say, ‘dignity, alongside the value of equality, is capable of being (and should be) developed as an important interpretive vehicle for a substantive understanding of equality’.<sup>309</sup> This affirms Malherbe’s claim that ‘equality without dignity is inhuman’.<sup>310</sup>

Irrespective of the position taken, there appears to be a degree of persuasion in both sides of the debate. The Constitutional Court has invoked the value of human dignity in its analyses in a number of diverse situations.<sup>311</sup> Human dignity featured prominently in analyses of discrimination based on sexual orientation that eventually led to the decriminalisation of sodomy laws and the extension of certain laws to include homosexual people.<sup>312</sup> Similarly, the court has often invoked the value of dignity in interpreting socio-

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<sup>305</sup> Cowen op cit note 291 at 50.

<sup>306</sup> Ibid at 55.

<sup>307</sup> Sandra Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ (2005) 21 *SAJHR* 1 at 9.

<sup>308</sup> Laurie Ackermann ‘Equality and non-discrimination: some analytical thoughts’ (2006) 22 *SAJHR* 597.

<sup>309</sup> Sandra Liebenberg & Beth Goldblatt ‘The interrelationship between equality and socio-economic rights under South Africa’s transformative Constitution’ (2007) 23 *SAJHR* 335 at 344.

<sup>310</sup> Rassie Malherbe ‘Some Thoughts on Unity, Diversity and Human Dignity in the New South Africa’ (2007) 70(1) *Journal of South African Law* 127 at 132

<sup>311</sup> De Vos & Freedman op cit note 21 at 459.

<sup>312</sup> Ibid. Also see *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), and *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC).

economic rights.<sup>313</sup> However, the court has arguably not always engaged with the value of dignity consistently.

#### 2.4.5 Where the court (possibly) got it wrong

The Constitutional Court has occasionally been criticised for failing to engage with the value of dignity, particularly in three equality claims concerning sex workers, cohabitants, and refugees. The first of these claims was in *Jordan and Others v S and Others*,<sup>314</sup> where the court failed to apply its substantive equality test with sensitivity to the social context of women.<sup>315</sup> Given that the majority of sex workers are female and their customers male,<sup>316</sup> it came as a big surprise to many when the majority of the court ruled that s 20(1) (A) of the Sexual Offences Act 23 of 1957 did not constitute unfair indirect discrimination against women.

The majority of the court, per Ngcobo J, refused to approve the decriminalisation of adult sex workers because they were ‘not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes’.<sup>317</sup> In their view, the impugned provision was merely ‘a gender neutral provision which differentiates between the dealer and the customer, a distinction that makes them liable to the same punishment, cannot be said to be discriminating on the basis of gender, simply because the majority of those who violate such a statute happen to be women’.<sup>318</sup> This reasoning, and many like it, has elicited severe disapproval and criticism from various scholars.

Some commentators are of a mind that the majority judgment completely disregarded its own test for unfair discrimination laid out in *Harksen*, as evident from the lack of consideration for and application of context, impact or constitutional values in this

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<sup>313</sup> *Khosa and Others v Minister of Social Development and others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

<sup>314</sup> 2002 (11) BCLR 1117 (CC). The case concerned the constitutionality of legislation that criminalised commercial sex work and the keeping of a brothel, criminalising only the prostitute and not the customer.

<sup>315</sup> Jagwanth op cit note 26 at 135.

<sup>316</sup> Rosaan Kruger ‘Sex work from a feminist perspective: A visit to the Jordan case’ (2004) 20 *SAJHR* 138.

<sup>317</sup> Supra note 314 para 17.

<sup>318</sup> Ibid para 18.

case.<sup>319</sup> By ignoring the gender dimension as well as the economic and social motives underpinning prostitution, the majority failed to employ its own substantive equality test.

In contrast, the minority (per O'Regan and Sachs JJ) noted that the impugned law stems from and perpetuates gender stereotypes in a manner that causes discrimination.<sup>320</sup> In their view, the impugned law not only constituted indirect discrimination against women, directly linked to stereotypes and patterns of gender disadvantage;<sup>321</sup> it reinforced these by imposing a stigma on the prostitute but not the customer.<sup>322</sup> This apparent neutral measure in fact strengthens the view that 'a prostitute is a "fallen" woman while the customer is rather manly, though sometimes weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.'<sup>323</sup>

The minority judgment at least took into consideration context, albeit limited, when they noted that prostitutes are women who constitute a vulnerable marginal group who are often forced to become vulnerable.<sup>324</sup> Many women turn to prostitution out of dire need, not choice; an important social and economic consideration the majority failed to recognise.

Furthermore, some commentators criticise the case for its lack of engagement with the value of dignity. The Constitutional Court has repeatedly emphasized the pivotal role of human dignity in the equality analysis.<sup>325</sup> Yet, this dignity-centred approach proved irrelevant, as the question of fairness was somewhat overlooked by the majority and

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<sup>319</sup> Carpenter op cit note 232 at 233; Jagwanth op cite note 51 at 135; Albertyn op cit note 113 at 83. Also see Rosaan Kruger 'Equality and unfair discrimination: Refining the Harksen test' (2011) 128 *SALJ* 479 at 484.

<sup>320</sup> Supra note 314 para 65.

<sup>321</sup> Ibid para 60.

<sup>322</sup> Ibid para 63.

<sup>323</sup> Ibid para 65.

<sup>324</sup> Ibid para 60. Carpenter op cit note 231 at 238.

<sup>325</sup> Govender op cit note 268 at 12. See also *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) ; *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) ; *Harksen v Lane NO* 1997 11 BCLR 1489 (CC) ; *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 CC.

dubiously applied by the minority.<sup>326</sup> The majority of the court barely broached the issue of the rights of sex workers to dignity. The minority on the other hand felt that:

[o]ur Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body that is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(A) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself...the dignity of prostitutes is diminished not by section 20(1)(A) but by their engaging in commercial sex work....<sup>327</sup>

Therefore, according to the minority, sex workers are vulnerable and marginalised because of their occupational choice. Taking this argument further leads to the obvious deduction that certain occupational choices or activities can diminish human dignity. Some scholars found this reasoning by the minority court erroneous. Barrett asserts that while it is likely that the profession of sex workers may diminish or jeopardise their social dignity (*dignitas*), it is rather perverse to suggest that their inherent human dignity (*dignatio*) or personhood diminishes in the process.<sup>328</sup>

Inherent human dignity, unlike social dignity, is not diminishable because it does not have degrees of intactness that can be determined by factors such as status or behaviour.<sup>329</sup> This is where, according to Barrett, the court went wrong. The *Jordan* case was not merely about female sexuality or prostitution;<sup>330</sup> it was an opportunity for the court to address an Act that imposes a particular view of morality.<sup>331</sup> By failing to see the impact of the criminalisation of prostitution on sex workers, the court failed to protect the rights of a vulnerable group to equality and as a result failed to endorse its own equality test.<sup>332</sup>

In the second of the equality claims, the court failed to consider gender differences in economic and social power of those involved in domestic partnerships in their rejection

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<sup>326</sup> Albertyn op cit note 113 at 90.

<sup>327</sup> Supra note 314 para 74.

<sup>328</sup> Jonathan Barrett 'Dignatio and the human body' (2005) 21 *SAJHR* 525 at 539.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid at 526.

<sup>331</sup> Carpenter op cit note 232 at 242.

<sup>332</sup> Kruger op cit note 316 at 484.

of the equality claim brought before them in *Volks NO v Robinson*.<sup>333</sup> The case involved the constitutionality of s 1 of the Maintenance of Surviving Spouses Act 27 of 1990 that excludes partners of co-habiting relationships from claiming maintenance from the estates of their deceased partners.

The majority of the court held it appropriate to distinguish between married and unmarried couples, to the advantage of the former. Albertyn argues that ‘the court neatly sidesteps the claim by placing the context of cohabitation for poor and vulnerable women outside the consideration of unfair discrimination’, leaving the gendered structure of society intact.<sup>334</sup> Thus, the actual test for unfairness in the equality analysis (the extent of impact on human dignity) was somewhat overlooked.

The majority further averred that ‘Mrs Robinson is not being told that her dignity is worth less than that of someone who is married...she is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance’.<sup>335</sup> This, coupled with the contextual oversight, affirms the assertion that *Robinson* was predominately hinged on a rather superficial analysis of dignity and devoid of context and impact.<sup>336</sup> The majority’s reasoning comes back to an argument on the choice for cohabiting women to marry.<sup>337</sup> The focus on the ‘choice’ to marry does not

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<sup>333</sup> 2005 (5) BCLR 446 (CC). Mrs Robinson and Mr Shandling were in a permanent life partner until his death in 2001. During the span of their relationship, they did not marry or have any children. In terms of the deceased’s will, he bequeathed to Mrs Robinson a sum of R100 000 among other things. The executor rejected Mrs Robinson’s claim for maintenance against the deceased estate because she was not a “spouse” as contemplated in the Maintenance of Surviving Spouses Act. She launched an application in the High Court seeking an order declaring the Act unconstitutional and invalid and that s 1 should be read to include “the surviving partner of the life partnership”. The High Court held that the exclusion of permanent life partners did indeed violate their rights to equality and dignity and subsequently unconstitutional. Mr Volks then appealed to the Constitutional Court against the decision.

<sup>334</sup> Albertyn op cit note 113 at 86.

<sup>335</sup> Supra note 320 para 62.

<sup>336</sup> Albertyn op cit note 113 at 90.

<sup>337</sup> Supra note 333 para 154. See also Kruger op cit note 318 at 494.

necessarily take into consideration social context and practical realities associated with choice.<sup>338</sup>

As pointed out by Jagwanth, relationships (domestic partnerships being no different) involve power dynamics and these powers tend to be unequal and gendered to the detriment of women since they tend to be financially and socially vulnerable.<sup>339</sup> In addition, historically cohabiting couples have been subject to prejudice and stigmatization.<sup>340</sup> By failing to see this, the court was unable to recognise cohabitants as a marginalised group deserving of constitutional protection, and consequently failed to apply its own dignity jurisprudence appropriately.

In the third of the equality claims, the *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*,<sup>341</sup> the majority (per Kondile AJ) found that the provisions of the Private Security Industry Regulation Act 56 of 2001 did in fact differentiate between citizens and permanent residents on one hand, and all foreigners on the other. However, this differentiation was a fair one that served a legitimate government purpose. Besides, the constitutional protection (the right to choose a vocation) sought after is not available to refugees or other foreigners. Thus refugees, as a category of foreign nationals, have the right to seek employment but not to choose an occupation.

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<sup>338</sup> B Smith 'Rethinking *Volks v Robinson*: The implications of applying a "contextualised choice model" to prospective South African domestic partnerships legislation' (2010) 13(3) *PER/PELJ* 238/508 at 245/508.

<sup>339</sup> Jagwanth op cite note 51 at 136.

<sup>340</sup> *Ibid.*

<sup>341</sup> 2007 (4) SA 395 (CC). The applicants in this case were all recognised refugees who had applied for registration as security service providers in the private security industry. In order to become a service provider in the industry, one is required to register with the Private Security Industry Regulatory Authority as required by the Private Security Industry Regulation Act 56 of 2001. Moreover, s23 (1) (a) of the Act requires individuals wanting to register with the Authority as a service provider to be a citizen or a permanent resident of South Africa. Their applications for registration as service providers, in terms of s21 of the Act, were unsuccessful. Their appeals to the Private Security Industry Appeal Committee (the Appeal Committee) against the decisions were denied and/or withdrawn. Application to the High court for a judicial review into and for the decisions of both the Authority and Appeals Committee to be set-aside; or otherwise for an order declaring the provision of s23 (1) (a) unconstitutional was also unsuccessful.

Accordingly, the majority held that the apparent internal discrimination embedded in the provision was fair and consequently did not violate the equality right as challenged. Despite refugees being a vulnerable group in society, the majority avoided any contextual factors and their subsequent impact on the group in its inquiry of the claim.<sup>342</sup> The court altogether circumvented the *Harksen* substantive test, rendering the judgment too formalistic. Conversely, the minority judgment (per Mokgoro J and O'Regan J in a joint dissent) was relatively contextual and as such a substantive judgment due to its application of the *Harksen* test.<sup>343</sup>

In these three equality claims, the minority judgments tended to show a proper approach to substantive equality by way of contextual analysis and engagement with the value of dignity, in contrast to the majority judgments' abstract and formalistic approach. In all three instances, the majority vaguely alluded to or entirely ignored the context-based approach that gives rise to substantive equality. These seemingly missed opportunities to vindicate the rights of vulnerable members of society have raised questions about the courts ability to aid the transformative process.

## **2.5 Situating foreign nationals in the equality discourse**

Historical and contemporary analysis of domestic law and jurisprudence on equality suggests that inequality is highly controversial in South Africa. The controversy engendered by the general equality discourse in the country is further complicated when it is assessed in the context of migration, particularly in relation to non-nationals or foreigners engaged in economic activities. South Africa has long had a deep-rooted reliance on migrant labour from surrounding countries. It is unsurprising that the existence of foreign nationals remain a significant feature of present-day South African society.

Historically, foreign nationals (initially as slaves and indentured labourers and later as contract migrant workers) have been required to mitigate domestic labour shortages.<sup>344</sup> This cheap migrant labour pool was mostly concentrated in the mining, agriculture and construction sectors, the so-called migrant sectors. For instance, the mining sector is

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<sup>342</sup> Albertyn op cit note 112 at 86.

<sup>343</sup> Supra note 340 paras 112-2.

<sup>344</sup> Jonathan Crush 'Contract migration to South Africa: Past, present and future' (no date) *Southern African Migration Project* 1.

considered the leading recruiter of non-nationals, employing the most foreign workers from both surrounding and other nations.<sup>345</sup> Tracing the use of foreign labour in the mining industry during apartheid reveals a consistent and large supply of labour from Mozambique, Lesotho, Swaziland and Botswana.<sup>346</sup>

Granted that such trends have diminished considerably in recent times, South Africa remains very much a migrant-receiving country, with some sectors still heavily dependent on foreign labour. However, unlike the apartheid era when foreign nationals were cautiously welcomed, even encouraged, into South Africa for their cheap labour, contemporary South Africa has become increasingly hostile, anti-migrant and xenophobic where foreigners are concerned. Xenophobia and anti-migrant rhetoric permeates every level of South African society. It is reflected in the media and government policies as well as political and everyday discourses.<sup>347</sup>

What is more, xenophobic attitudes and sentiments against foreigners in South Africa tend to have a racial tone coupled with some degree of physical violence. This newly constructed black-on-black hatred or 'Afro-phobia' often positions foreign nationals as scapegoats for various domestic social and economic ills, including: rising crime rate, unemployment, the HIV/Aids pandemic, and lack of social services among other things.<sup>348</sup> The hostile and often differential treatment of foreign nationals within the wider society and in the workplace speaks to issues of equality.

Even though there is not a lot of equality jurisprudence relating to foreign nationals on record, it is a reality nonetheless. Foreign nationals, as a protected class in the domestic context, include a variety of individuals: permanent residents, asylum seekers, refugees, persons in possession of any of the various South African temporary residence permits or

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<sup>345</sup> Michael Burawoy 'The Functions and Reproduction of Migrant Labor: Comparative Material from Southern Africa and the United States' (1976) 81(5) *American Journal of Sociology* 1050 at 1062.

<sup>346</sup> Jonathan Crush & Vincent Williams *Labour Migration In Southern Africa: Contemporary Trends and Issues, A Preliminary Review* Paper Presented at the ILO Tripartite Forum on Labour Migration in Southern Africa, Pretoria, 26-29 November (2002) 7.

<sup>347</sup> Bronwyn Harris 'A foreign experience: Violence, crime and xenophobia during South Africa's transition' (2011) 5 *Violence and Transition Series*.

<sup>348</sup> Jeff Handmaker & Jennifer Parsley 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refugee* 40 at 44.

those holding an exemption in terms of s 31(2)(b) of the Immigration Act 13 of 2002.<sup>349</sup> Foreign nationals can theoretically rely on the South African Constitution to challenge any legal infringements to their fundamental rights because most rights in the Bill of Rights, with the exception of three reserved for citizens only,<sup>350</sup> apply to ‘everyone’.<sup>351</sup> South African courts have interpreted ‘everyone’ to include permanent residents,<sup>352</sup> foreigners with temporary permits like a work or study permit,<sup>353</sup> and even those yet to be officially admitted into the country.<sup>354</sup>

More specifically, s 9, like most of the rights in the Bill of Rights, accords the right to equality universally, i.e. applies to everyone. Therefore foreign nationals can be beneficiaries of the right to equality. On two occasions, the Constitutional Court decided that s 9 (3) of the Constitution prohibits discriminating against foreign nationals. In both the *Larbi-Odam* and *Khosa* judgments, the court held that differentiation on the grounds of citizenship was clearly analogous to the grounds listed in s 9(3), and therefore constitutes discrimination on unlisted or analogous grounds. It is worth noting, however, that in both instances, the court dealt with a category of non-nationals it deemed legally worthy as they had acquired permanent residency status, which entitled them to certain rights on par with citizenship status. Thus, the right to equality seemingly extends only to regular or authorised foreign nationals.

A further survey of litigation involving foreign nationals alluding to an infringement of the constitutional equality provisions highlights the supremacy and broad application of the Constitution itself. Given that the Constitution affects all branches of South African law, it is not restricted to the jurisdiction of the Constitutional Court alone. Often times, decisions on a contentious interpretation or application of certain provisions

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<sup>349</sup> Jonathan Klaaren ‘Human Rights Protection of Foreign Nationals’ (2009) 30 *ILJ* 82 at 86.

<sup>350</sup> Sections 19, 20 and 22 of the Constitution.

<sup>351</sup> Currie & De Waal op cit note 163 at 34.

<sup>352</sup> Supra note 313 para 47

<sup>353</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 37.

<sup>354</sup> *Lawyers for Human Rights and Other v Minister of Home Affairs and Other* (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004) para 27.

in other legislation, regulations or policies have been made at other levels of the judiciary system. In *Minister of Home Affairs and Others v Watchenuka and Another*,<sup>355</sup> the Supreme Court of Appeal (SCA) has endorsed a constitutional ruling by the Cape of Good Hope Provincial Division of the High Court on the rights of asylum seekers to work and study whilst awaiting formal recognition as refugees. This case lifted a blanket prohibition on employment and/or studies.

Due to the myriad policies that govern foreign nationals, there tends to be an overlap between constitutional framework and other pieces of legislation promulgated to give effect to its principles and spirit. Legal actions involving foreign nationals almost always overlap with immigration law to some extent. When the constitutional framework is superimposed onto immigration law, the legal status of the non-nationals in question and the rights they are entitled to become critical in resolving equality claims. Simply put, non-nationals differ when viewed through the legal lens. In some instances, foreigners, like those with permanent residence status in the abovementioned cases, receive special dispensation and are comparable to citizens in treatment and specific rights enjoyment.<sup>356</sup>

In other instances, foreign nationals rely strongly on the progressive nature of the constitutional democracy and its liberal substantive enjoyment of rights to lay strong claims to certain entitlements to which they would ordinarily have no claim. When this is the case, the issue is not so much the disputed entitlement and its significance as the eligibility of the individual contesting for the recognition of the disputed restricted entitlement. This was precisely the situation in *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*.<sup>357</sup>

In this dispute, the Constitutional Court had the difficult task of deciding on the rights of refugees to work in the private security industry. One of the issues raised by the applicants in the appeal application to the Constitutional Court involved the

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<sup>355</sup> 2004 (2) BCLR 120 (SCA)

<sup>356</sup> See the following aforesaid cases: *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC), *Khosa and others v Minister of social development and others*; *Mahlaule and others v Minister of social development and others* 2004 (6) SA 505 (CC).

<sup>357</sup> 2007 (4) SA 395 (CC); hereafter, 'Refugee women'.

constitutionality of s 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 (PSIRA). Section 23(1)(a) of the PSIRA requires individuals wanting to register with the Private Security Industry Regulatory Authority as a service provider to be a citizen or a permanent resident of South Africa. The applicants, all recognised refugees under the Refugees Act 130 of 1998, contested that the aforementioned provision discriminated against them because of their refugee status and consequently encroached on their constitutional right to equality.

In resolving the dispute, the court was split in their conclusion. First, the court reiterated and applied its general equality test as consolidated in *Harksen v Lane NO and Others*.<sup>358</sup> Accordingly, the majority judgment (per Kondile AJ) concluded that the internal discrimination embedded in the provision was fair and consequently did not violate the applicants' rights to equality as challenged. The rationale was simple: although the disputed provision did in fact differentiate between citizens and permanent residents on the one hand, and all foreigners on the other, this differentiation served a legitimate government purpose — to limit the registration eligibility to people whose trustworthiness could be objectively verified. Moreover, the differentiation could not be deemed unfair because the specific constitutional protection (the right to choose a vocation) the applicants sought is not available to refugees or other foreigners.

In opposition, the minority judgment (per Mokgoro J and O'Regan J in a joint dissent), after considering the status of refugees and South Africa's international law obligations, found the disputed provision to be unfairly discriminatory and constitutionally invalid. In their view, the 'section did not recognise that refugees occupied a position most similar to permanent resident status and should therefore be entitled to admission to the industry.'<sup>359</sup>

Dissenting views aside, this case was particularly challenging on two fronts: first, the issue in contention implicated one of two constitutional rights reserved for citizens; secondly, the individuals laying strong claims to this restricted right were not eligible to it in the first instance. While it was similar to that of the *Larbi-Odam* and *Watchenuka* cases

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<sup>358</sup> Supra note 133. Although this case dealt with the provisions of s 8 of the interim Constitution, the equality jurisprudence also applies to s 9 of the final Constitution.

<sup>359</sup> Ibid para 114.

in that they all, to some extent (some more than others), questioned the right of equality of foreign nationals to access wage-earning employment, it differed from them in that the peremptory provision merely limited the right to work.

The non-nationals in this case still had the right to work; only the choice of vocation was limited. The disputed Act under review still guaranteed the right to work, however limited it is, unlike in *Larbi-Odam* where the grievant was discriminated against with regards to general employment opportunities or in *Watchenuka* where there was a total exclusion from employment. One important fact to note, however, is that the *Union of Refugee Women* judgment reversed the idea accepted by the court in *Larbi-Odam* that certain categories of foreign nationals (namely permanent residents and in this case refugees who are equivalent to permanent residents) are on par with South Africans with respect to employment.

It is common knowledge that all foreign nationals are not similar; they differ with regards to their legal or immigration status, and subsequently to the rights and benefits they can enjoy. In this respect, disputes involving foreign nationals tend to overlap with immigration law to some degree. An instance when the constitutional framework overlapped with immigration (and administrative) law was clearly illustrated in *Koyabe and Others v Minister for Home Affairs and Others* (Lawyers for Human rights as Amicus Curiae).<sup>360</sup>

In this case, Kenyan nationals (the applicants) had applied for and been granted South African permanent residence permits by the Department of Home Affairs (DHA). They later applied for identity documents but the DHA withdrew their application after an internal investigation revealed that their residency status was fraudulent. This discovery meant that the applicants were now deemed ‘prohibited persons’<sup>361</sup> and subject to deportation. However, the applicants had a right — per the review procedure set out in s 8 of the Immigration Act — to request the Minister’s review of the deportation decision. The applicants failed to submit such a request within the prescribed period. Instead, they

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<sup>360</sup> 2010 (4) SA 327 (CC).

<sup>361</sup> See s 29 (1)(f) of the Immigration Act 13 of 2002.

launched an application at the North Gauteng High Court (Pretoria) for a judicial review<sup>362</sup> and for the Minister's decision to withdraw their residency status to be set-aside.

The High Court dismissed the application concluding that the applicants had not exhausted the internal remedies as required by s 7(2) of the Promotion of Administrative Justice Act 13 of 2000 (PAJA). Moreover, the Court did not find any 'exceptional circumstances' that would allow the applicants to be exempted from the obligation to exhaust the internal remedies. Both the High Court and Supreme Court of Appeal denied their applications for leave to appeal. In their application to the Constitutional Court, the applicants raised two major problems for consideration: the first concerned the scope of the constitutional right to just administrative action<sup>363</sup> that is given effect to in s 5 of PAJA; the second concerned the interpretation of s 7(2) of PAJA in light of s 34 of the Constitution. The Constitutional Court denied the appeal, reasoning that the application for judicial review was hasty, given that they had neither exhausted the available ministerial review, nor had they adequately shown any exceptional circumstances to warrant exemption from complying with the internal review procedure altogether.

Aside from the Constitutional Court domain, the equality jurisprudence in relations to foreign nationals has slowly been developing elsewhere. In the field of employment law, the Commission for Conciliation, Mediation, and Arbitration (CCMA)<sup>364</sup> and the Labour Courts have been instrumental in developing the equality jurisprudence as it pertains to foreign nationals. Section 39(2) of the Constitution requires the courts to interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights. By extension therefore, the constitutional jurisprudence informs the interpretation of other statutes. However, the Labour Court has been more progressive in advancing the equality jurisprudence as it pertains to foreign nationals, particularly the unauthorised.

In 2008, the Labour Court single-handedly changed the position of migrants in an irregular situation when it rejected the conventional notion that a foreign national who

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<sup>362</sup> In terms of s 5 of the Promotion of Administrative Justice Act 13 of 2000, hereafter 'PAJA'.

<sup>363</sup> Section 33 of the Constitution.

<sup>364</sup> The CCMA is an independent dispute resolution body established in terms of the 1995 LRA to replace the old Industrial Court system. As an independent body, it does not have affiliations with any trade union, political party, or business.

does not possess a valid work permit, issued under the Immigration Act 13 of 2002, does not qualify as ‘employee’ as defined by the LRA. In the landmark case of *Discovery Health Ltd v CCMA & Others*,<sup>365</sup> Discovery Health (the employer) terminated the employment of an Argentinian national, Lanzetta, upon discovering he did not possess a valid work permit. Consequently, Lanzetta referred an unfair dismissal dispute to the CCMA. First, the commissioner had to decide on the jurisdiction of the CCMA to determine the dispute. In this regard, the commissioner held that the CCMA did have jurisdiction because Lanzetta was an ‘employee’ as contemplated in the LRA; contrary to the employer’s contention that the CCMA had no jurisdiction because of the underlying validity of the employment. The employer argued that:

The definition of “employee” in s 213 of the LRA contemplated an underlying contract of employment and that since the contract in this instance was void ab initio because it was in conflict with the Immigration Act, it could not be said that Lanzetta was an employee.<sup>366</sup>

The employer then applied to the Labour Court to review and set aside the commissioner’s ruling on jurisdiction.

On review, the Labour Court, adopting a purposive interpretation of s 213, agreed with the Commissioner’s ruling that ‘Lanzetta was an ‘employee’ as defined in the LRA, and so the CCMA had jurisdiction to determine the unfair dismissal dispute referred to it’.<sup>367</sup> This ruling helped extend the scope of ‘employee’ to include unauthorised foreign workers, and in doing so endorsed the right of access to the dispute-resolution mechanisms of the CCMA, and brought once marginalised foreign nationals under the protection of employment law.<sup>368</sup> *Discovery Health*, albeit controversially, set a new precedent for the way labour disputes involving unauthorised foreigners are adjudicated generally. It essentially allowed for labour protection for an otherwise legally marginalised group of foreign nationals.

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<sup>365</sup> (2008) 29 ILJ 1480 (LC), hereafter *Discovery Health*.

<sup>366</sup> Ibid para 12.

<sup>367</sup> Ibid para 33.

<sup>368</sup> Dieudonne Coffie Wabo ‘Emerging jurisprudence on the labour law protection for undocumented migrant workers in South Africa: Lessons for countries’ (2009) available at [www.ilera-online.org/15thworldcongress/.../CSIW\\_28\\_COFFIE.pdf](http://www.ilera-online.org/15thworldcongress/.../CSIW_28_COFFIE.pdf), accessed 19 August 2015.

Prior to the *Discovery Health* decision, legal interpretations into the statutory definition of ‘employee’ (i.e. s 213 of the LRA) disqualified foreign nationals who do not possess valid work permits and ultimately barred them from accessing any labour protection because their employment arrangement breached the Aliens Control Act or Immigration Act. In a number of disputes,<sup>369</sup> the CCMA consistently refused jurisdiction to settle any disputes involving unauthorised migrants owing to the fact that their employment violated the Immigration Act.<sup>370</sup> Thus, pre-2008 employment dispute adjudication primarily focused on the view that a contract of employment in contravention of a statute is consequently invalid in South African law.<sup>371</sup> Such restrictive notions tended to limit the equality rights of vulnerable foreign workers.

In yet another case involving a foreign national, the Labour Court ruled that the termination of the permanent contract of employment of a Burundian refugee nurse constituted procedurally unfair dismissal. In *Ndikumdavyi v Valkenberg Hospital & Others*,<sup>372</sup> the judge interpreted the words ‘employment contract’ in s 186(1)(a) of the LRA widely to mean ‘employment relationship’. Thus, this interpretative approach provided ‘equal protection for formal refugees and other vulnerable groups of employees’,<sup>373</sup> since formal refugees were regarded as equal recipients of the rights provided by the LRA.

In summation, exploration of available literature thus far reveals that equality, as elusive as it is generally, becomes even more complex when considered in relation to

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<sup>369</sup> See *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA), *Vundla v Millies Fashions* (2003) 24 ILJ 462 (CCMA), *Georgieva-Deyanova v Craighall Spar* (2004) 9 BALR 1143 (CCMA).

<sup>370</sup> Post-*Discovery*, the CCMA issued a directive declaring its power and competence to conciliate and arbitrate disputes referred to it by illegal foreigners in terms of the LRA. Also see chapter two, specifically paragraph 2.5.5, of the fifth edition of the CCMA practice and procedure manual (2010) available at <http://www.ccm.org.za/UploadedMedia/2010%20Practice%20and%20Procedure%20Manual.pdf>.

<sup>371</sup> Dawn Norton ‘Workers in the shadows: an international comparison on the law of dismissal of illegal migrant workers’ (2010) 31 *ILJ* 1521 at 1549.

<sup>372</sup> (2012) 33 ILJ 2648 (LC). The applicant was hired as a professional nurse at Valkenberg Hospital, and started work on 1 July 2010. On 20 July 2010, the hospital informed him that, as the department's policy permitted the employment of foreign health professionals on fixed-term contracts only and his refugee status expired on 24 December 2010, it was retracting the offer of permanent employment immediately.

<sup>373</sup> *Ibid* para 20.

foreign nationals, particularly the unauthorised. While it is apparent that the South African courts (and CCMA) are gradually expanding the rights framework for foreign workers by way of purposive interpretation of laws, there is still much to be done if the equality ideal is to be fully expressed. There is still a need for reform as foreign nationals, particularly the vulnerable category, are severely constrained by the legal framework that provides very narrow legal protection owing to their immigration status.

## **2.6 Conclusion**

A review of the equality discourse is a necessary step in establishing the appropriate context for further analysis of peoples' lived realities. The fact is that South Africa is an unequal society with a discriminatory past. A cursory survey of the literature reveals a body of substantial constitutional and legislative provisions aimed at promoting equality in South Africa. The equality discourse in South Africa over the years has progressed to incorporate anti-discrimination laws intended to eradicate various forms of stigma, stereotyping, and prejudices instituted by the Apartheid government. Pre and post-constitutional equality jurisprudence in South Africa, though slow in developing, has aided in redressing some of the inequalities inherited from the country's racist past.

However, the Constitutional Court's approach to analysing the right to equality and the corresponding legal tests has not always been consistent. Even so, the court will not condone any form of prejudicial policies or discriminatory actions that does not compliment the spirit of the Constitution, which is premised on equality and dignity for all. The court has intricately linked the right to equality with dignity. Equality in the South African context is rather a complex and unique issue. The repercussion of the past inequalities is still reverberating some twenty years after democracy. The aftermath of the historic inequality is salient in the area of social welfare where social security legislation excludes some categories of people (like unauthorised migrants) from statutory protection.

When considered in relation to foreign nationals, the equality discourse is far from ideal. Foreigners, by virtue of their nationality, are like second-class citizens. This is problematic especially in places like South Africa where anti-migrant sentiments and rhetoric are very pronounced. However, the judiciary system is trying to mitigate some of

the negative perceptions held about foreign nationals through a gradual development of jurisprudence involving non-nationals.

South Africa, jurisprudentially, legislatively, and socially has a long way to go in attaining full equality. The elimination of discrimination is too critical an issue to be solved solely by a broad application of the law. Apartheid had as much psychological as it did a social impact therefore, the elimination of discrimination requires more than a mere repeal of repressive laws. Essentially, if equality is a desirable democratic ideal, then what aspect or dimension of people should be made alike? As the world and Africa embarks on a journey for greater equality and social justice, the response to this question will delineate how then to measure the parameters of equality.

## CHAPTER III      TOWARDS A CONCEPTUAL FRAMEWORK

*'Injustice anywhere is a threat to justice everywhere'*<sup>1</sup>

### 3.1 Introduction

A review of the prevailing discourse reveals that equality, as a moral and political ideal, is a contested and elusive concept, with many scholars differing on its interpretation.<sup>2</sup> Scholars who belong to the Utilitarian school of thought construe equality in terms of the degree of the resulting benefits for those involved. For these scholars equality is about maximising the total welfare (wellbeing) of individuals in society.<sup>3</sup> Other scholars, mainly egalitarians, tend to view equality as more than making people generally better off. According to these egalitarians, equality is fundamentally good in itself. Consequently, all persons, who are equal in worth, should treat or relate to one another as contemporaries.<sup>4</sup>

Given that scholars cannot agree on what the precise notion of equality should be, it is unsurprising that the measure of the ideal of equality itself — what dimension should be considered to make people alike — is just as controversial.<sup>5</sup> The political philosopher, Ronald Dworkin's two-part essay of 'what is equality?' began the debate of whether welfare or resource is the appropriate egalitarian standard of distributive equality.

Since his contribution, numerous scholars have proposed diverse theories as to the appropriate basis for measuring distributive shares, whilst still others have added to the Dworkinian theory in some manner or form. Scholars like Richard Arneson and Gerry Cohen are welfare egalitarians who promote welfare as a metric for equality, whilst John Rawls and Ronald

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<sup>1</sup> Martin Luther King Jr. 'Letter from a Birmingham jail' (1963) available at

[http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html), accessed 20 February 2014.

<sup>2</sup> Nils Holtug & Kasper Lippert-Rasmussen 'An introduction to contemporary egalitarianism' in Nils Holtug & Kasper Lippert-Rasmussen (eds) *Egalitarianism* (2007).

<sup>3</sup> Martin Hevia & Joel Colon-Rios 'Contemporary theories of equality: A critical review' (2009) 74 *Revista Juridica Universidad de Puerto Rico* 131; *Victoria University of Wellington Legal Research Paper No 15/2013*.

<sup>4</sup> Richard Arneson 'Egalitarianism' Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2013) available at <http://plato.stanford.edu/archives/sum2013/entries/egalitarianism/>.

<sup>5</sup> G.A Cohan 'Equality of What? On Welfare, Goods and Capabilities' (1990) 56 *Louvain Economic Review* 357.

Dworkin endorse the equal distribution of resources among people. Still others like John Roemer encourage adoption of a blend of the two under the banner ‘equal opportunity’.

If it is asserted that the pursuit of equality is a desirable idea in a democratic social order, then what aspects of peoples’ lives exactly should be made equal? In this chapter, the question of ‘equality of what?’ is at the forefront of the discussion. Accordingly, deliberating on how to measure the parameters of equality, three conceptions of distributive equality (welfare, resources and opportunities) are analysed in presenting the best-perceived material requirements and measures of the ideal of equality. The premise here is that there needs to be, and there is, a possibility of safeguarding the welfare of all in society as well as guaranteeing an equal share of or access to needed resources.

### **3.2 The search of appropriate criterion in the pursuit of fairness**

To reiterate, there are various conceptions of equality. The concept poses a conundrum in that people can become equal in one way, and can become unequal in others.<sup>6</sup> What form of equality is it then important to pursue? The notion of equality in the context of distributive justice is not about treating or considering everyone as contemporaries, but about distributing certain goods proportionally in accordance with peoples’ recognised inequalities.<sup>7</sup>

The critical issue then becomes the appropriate basis or metric for measuring people’s distributive shares. Should an attempt be made to make people equal in welfare, material resources, or opportunities? A consideration of a metric for equality is necessary for this discourse because the plight of foreign workers in South Africa falls within a larger equality domain. Consequently, any measures undertaken to correct their plight will concern distributive justice.

#### **3.2.1 Equal welfare**

In answering what egalitarians should seek to equalise, welfare theorists assert that what is of paramount importance is peoples’ overall wellbeing and as such society should seek to equalise

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<sup>6</sup> Ronald Dworkin ‘What is Equality? Part 1: Equality of Welfare’ (1981a) 10(3) *Philosophy & Public Affairs* 185.

<sup>7</sup> Bernard Williams ‘The idea of equality’ in Robert Goodin & Philip Pettit (eds) *Contemporary political philosophy: An anthology, second edition* (2006) at 456.

the welfare of its members.<sup>8</sup> Individuals are deemed to have been treated in the same fashion if resources are distributed among them in a manner that leaves them reasonably the same in wellbeing.<sup>9</sup> Thus, one achieves equality, and consequently justice, only when everyone enjoys the same level of wellbeing or welfare. Utilitarianism is a kind of welfare equality as it involves maximising the aggregate welfare (total wellbeing) of individuals in society.<sup>10</sup>

Yet a welfare-centred conceptualisation of equality requires making interpersonal welfare comparisons, which can be rather problematic for at least two reasons.<sup>11</sup> Firstly, welfare — like the conception of equality itself — elicits varied interpretations. Some may take it to connote success in attaining desired plans or pursuits, while others may liken it to happiness or pleasure or even satisfaction.<sup>12</sup> These different interpretations of welfare at the onset render welfarism much too subjective a theory to address equity challenges. Besides that, it is theoretically difficult, if not nearly impossible, to make interpersonal comparisons of welfare simply because people are different, have varied preferences and ideas of what constitute their wellbeing. Even if it were possible to measure welfare in interpersonally comparable units, the result would not be ethically desirable.<sup>13</sup> In consequence, it is submitted the idea of welfare as a metric for equality is inadequate.

Secondly, and perhaps the biggest criticism of welfare equality, is the objection to ‘levelling down’ or downscaling owing to the problem of ‘expensive tastes’. The crux of this concern is that some people have preferences that are expensive to satisfy. Satisfying these kinds of people to the same degree as those with modest or controlled preferences will undoubtedly require a great many more resources.<sup>14</sup> Therefore, people with expensive tastes will inadvertently secure more resources under a welfarist approach.<sup>15</sup> Taking into account peoples’ expensive tastes may very well thwart the exact aim of welfare equality, as the only way to achieve equality

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<sup>8</sup> Louis Pojman ‘Theories of equality: a critical analysis’ (1995) 23(2) *Behavior and Philosophy* 1 at 10.

<sup>9</sup> Dworkin op cit note 6 at 185.

<sup>10</sup> Amartya Sen ‘Equality of what’ (1980) in *The Tanner Lecture on Human Values*, I, 197-220 at 205.

<sup>11</sup> Richard J Arneson ‘Equality and equal opportunity for welfare’ (1989) 56 *Philosophical Studies* 77 at 81.

<sup>12</sup> Dworkin op cit note 6 at 244.

<sup>13</sup> Louis Putterman, John E. Roemer & Joaquim Silvestre ‘Does Egalitarianism Have a Future?’ (1998) 36(2) *Journal of Economic Literature* 861 at 865.

<sup>14</sup> Elizabeth Anderson ‘What is the point of equality?’ (1999) 109 *Ethics* 287 at 293.

<sup>15</sup> Putterman *et al* op cit note 13 at 866.

in this instance will be to level down, make everyone equally worse off or unhappy.<sup>16</sup> Consequently, it is also submitted that interpreting equality in terms of welfare is undesirable. Dworkin cautions that welfarism, as a theory is neither a coherent nor an attractive ideal because it does not hold people personally responsible for their own wellbeing or personal choices.<sup>17</sup> The issue of expensive tastes means individuals can attain different levels of welfare because of the choices they make. When welfare inequality occurs because of voluntary personal choice, equality of welfare turns into a poor ideal for sustaining distributive equality.<sup>18</sup>

### 3.2.2 Equal resources

Dworkin and many resourcist scholars reject equality of welfare and advocates for the adoption of a theory of equality of resources. Resource equality supposes that equality is achieved when the resources devoted to each individual leaves their share of the total resources identical.<sup>19</sup> It advocates for everyone to have the same share of resources. While it is clear that the state cannot guarantee people equal wellbeing, at least it can distribute resources (economic resources in the least) or goods so that everybody has an identical share.<sup>20</sup> The premise is that the state can control resources redistribution much better than regulating wellbeing, which can be just as elusive as equality itself.

In any case, a theory of equality of resources is supposedly a much stronger ideal for explaining equality as it holds people responsible for their choices or decisions, including their expensive tastes.<sup>21</sup> In this context, people are responsible for their bad choices or actions; and only compensated for circumstances out of their control such as gender or race.<sup>22</sup>

Despite its relative strength for explaining equality, resourcism is not without criticism. It risks the same problem of levelling down or downscaling as does welfarism. At times, it is necessary to make everyone worse off so long as they all have identical resources. However,

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<sup>16</sup> Pojman op cit note 8 at 11.

<sup>17</sup> Dworkin op cit note 6 at 244.

<sup>18</sup> Arneson op cit note 11 at 81.

<sup>19</sup> Ronald Dworkin 'What is Equality? Part 2: Equality of Resources' (1981b) 10(4) *Philosophy & Public Affairs* 283 at 289.

<sup>20</sup> Arneson op cit note 11 at 77.

<sup>21</sup> Dworkin op cit note 6 at 244.

<sup>22</sup> Pojman op cit note 8 at 12.

unlike welfarism, resource theorists hold people responsible for developing expensive tastes as a condition for being entitled to equal resources.<sup>23</sup> Still, some critics of this approach also protest that resourcism has the tendency to create over-reliance on the welfare state, especially if equality infers a duty of the state to redistribute resource continuously.<sup>24</sup>

A resource-based approach to equality is also susceptible to what has been dubbed ‘the slavery of the talented’ problem where people with high talents would be relatively disadvantaged in welfare should individual talents be included among the resources to be distributed.<sup>25</sup> This measure of resource equality is undesirable because applying it will result in objectionable distribution of welfare.

Both theories of welfarism and resource equality are essentially about equality of outcomes or results, converging onto same status and/or income. The resource-welfare discussions thus far suggest that striving to secure the same welfare or outcomes for everyone in society is impracticable and indefensible. The point being, two people may start out with equality of resources, but through some rational and voluntary choices of their own end up unequal in welfare.<sup>26</sup> The fact of the matter is that some will always end up with more than others in one way or another. How then can a society still pursue and attain the degree of distributional equality it seeks?

### **3.2.3 Equal opportunity or access**

While it is understandable that welfare and resources are both necessary, they are complicated to obtain. There is no way to guarantee people equal wellbeing; at best, they can be offered equal resources. That is not to say the pursuit of equality is futile. An alternative framework for analysing equality is needed. Perhaps the best approach will be to make opportunity the preferred concept of advantage to be equalised among people.

Perhaps it is time that the focus is shifted away from the outcomes towards addressing the inequity embedded in the actual processes or opportunities (starting positions) offered to individuals rather than the resultant outcomes. After all, equality of opportunity (starting points)

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<sup>23</sup> Anderson op cit note 14 at 293.

<sup>24</sup> Pojman op cite note 8 at 13.

<sup>25</sup> Dworkin op cit note 19 at 312.

<sup>26</sup> Arneson op cit note 11 at 84.

and equality of outcomes (end-points) are both sub-divisions of substantive equality.<sup>27</sup> It is the assertion that equalising people's real chances of getting a 'good' that they aspire to (equal opportunity or access) is a relatively much stronger and appropriate interpretation of distributive equality. Equal opportunity or access therefore is the appropriate measure of equality for the pursuit of social justice because it transcends goods and welfare to accentuate the equal moral worth of individuals.

'Equal opportunity' is not a simple notion. It is complex and requires contextualisation in a general theory of justice. Equality of opportunity means fundamentally that inequalities produced by differences in peoples' circumstances are unfair.<sup>28</sup> Therefore, equal opportunity, as a principle of equality, implies the creation of real chances so that everyone has the potential to achieve the same outcomes; the extent to which they actually do is subject to their autonomous choices or effort.<sup>29</sup> People with equal opportunity can still have intrinsic issues that affect their ability to access the opportunity. The failure to access opportunity in this case is not a matter of external barriers.

The premise with this notion of equality is that people should technically have the same chance, opportunity, or access to secure desired goods or services, or to vie for better positions in society.<sup>30</sup> Everyone should at least have the same starting position. This premise assumes that the outcomes (wellbeing or resource share) sustained by individuals are the product of their circumstances (social circumstance), effort (rational action), and policy.<sup>31</sup> If this is accepted, then the ultimate goal of the conception of equal opportunity is to 'level the playing field' among individuals by removing any irrelevant barriers that impede some people from reaching a desired final condition.<sup>32</sup> Achieving this condition requires a space where all individuals have a realistic

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<sup>27</sup> Pojman op cit note 8 at 24.

<sup>28</sup> Andrew Mason *Levelling the playing field: The idea of equal opportunity and its place in egalitarian thought* (2006) at 129.

<sup>29</sup> John E Roemer 'Equality of opportunity' in Steven N Durlauf & Lawrence E Blume (eds) *The New Palgrave dictionary of Economics*, 2 ed (2008) 1.

<sup>30</sup> John Baker 'Equality' in Healy, S, Reynolds, B & Collins, M L (eds) *Social Policy in Ireland: principles, practice and problems*, 2 ed (2006) 6.

<sup>31</sup> John E Roemer 'Equality of opportunity: A progress report' (2002) 19 *Social Choice and Welfare* 455 at 456.

<sup>32</sup> Pojman op cit note 8 at 18.

chance of success if they were to attempt to do or attain an available good or opportunity, and then leaves individual choices and their efforts to dictate further outcomes.<sup>33</sup>

For instance, if all foreign workers have equal opportunity with regard to social protection, it means they have fair access to decent and valuable employment and subsequently fair chance at securing the needed social security. This is because formal employment is a prerequisite to secure work-related formal social protection. In this model, inequalities ensue when differences in peoples' positions are such that some but not others can secure the resources needed to be able to lead a decent life.<sup>34</sup> So in order to prevent the differences in peoples' circumstances from influencing their relative access to resource or advantage (opportunities), justice will require mitigating the effects. This interpretation of equal opportunity contains the appropriate procedural components required by a theory of social justice.<sup>35</sup>

Furthermore, equal opportunity is, for the most part, a question of addressing inequalities of access to particular kinds of goods or resources.<sup>36</sup> Both the welfarist and resourcist approaches to equality overly accentuate the end goal (result) of wellbeing at the expense of the means (process) instrumental in reaching the goal.<sup>37</sup> The right to social protection is an illustration. The end goal will be to extend social protection to all, but the means of realising this goal will be to eradicate inequality relating to conditions of, and opportunities for working. In this scenario social protection may be a particular kind of 'good' or service desired by a large proportion of people in all sections of society: the employed and unemployed, abled-bodied and disabled alike, young and old, males and females and so forth.

However, not all who desire it can have it. It will be necessary, even expected, to set certain conditions of access to social protection, which may well mean that not everyone who desires the goods or services satisfies the conditions. Even if all or many people satisfied the conditions of access, there will simply not be enough funds to cover everyone, necessitating the

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<sup>33</sup> Mason op cit note 28 at 22.

<sup>34</sup> Ibid at 216.

<sup>35</sup> Social justice simplistically refers to political, social, and economic rights and opportunities. Despite the varied understanding of social justice, it is central in South African jurisprudence in general and labour law in particular. For a detailed conception of social justice, see John Rawls *A Theory of Justice* (1971) Cambridge: Harvard University Press.

<sup>36</sup> Mason op cit note 28 at 7.

<sup>37</sup> Ingrid Robeyns 'The capability approach: a theoretical survey' (2005) 6 *Journal of Human Development* 93 at 95.

need to regulate access through more stringent system of rationing.<sup>38</sup> In this situation, it will be perfectly reasonable to limit, contingently and fortuitously, social protection owing to financial feasibility.

While it would be acceptable for a policymaker to set stringent conditions that govern access to social protection, the conditions should not set an intrinsic limit to the number of people who might gain access to social protection by satisfying the established conditions. People from all sections of society should preferably have an equal chance of satisfying the conditions for the good in question should they choose to do so. Equality of access in this context necessitates that no instituted legal, bureaucratic, or other barriers should deny any members of a particular group fair access to (social protection) opportunities.<sup>39</sup>

Bernard Williams aptly articulates this argument when he describes equal opportunity as ‘the notion that a limited good shall in fact be allocated on grounds which do not *a priori* exclude any section of those that desire it’.<sup>40</sup> No policy or social intervention in this regard makes it harder for members of a particular group to participate on an equal footing with more privileged groups.<sup>41</sup> Any action short of identical participation is a limitation on opportunities since equal opportunity constitutes a degree of equality of participation to ensure a level of equal outcomes.

However, that does not mean that the equal opportunity approach incessantly guarantees equality. Absolute equal opportunity is unfeasible, as two people will never have exactly the same opportunity to reach a goal.<sup>42</sup> Equal opportunity only means all persons should enjoy the same sets of available choices or options at a point in time.<sup>43</sup> After this initial equivalent option stage intended to equalise outcomes, inequalities of outcome may ensue at a later stage owing to certain autonomous choices or ‘differentially negligent behaviour’.<sup>44</sup> Inequality is only bad or unjust when it does not arise from voluntary choices. Thus any actual differential outcomes owing to differences in choice (which are factors within the individual’s control), despite an

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<sup>38</sup> Williams op cit note 7 at 458.

<sup>39</sup> Baker op cit note 30 at 7.

<sup>40</sup> Williams op cit note 7 at 459.

<sup>41</sup> Baker op cit note 30 at 7.

<sup>42</sup> Pojman op cit note 8 at 18.

<sup>43</sup> Arneson op cit note 11 at 83.

<sup>44</sup> Ibid at 84.

initial levelled playing field, are ethically acceptable from a distributive equality standpoint.<sup>45</sup>

The assumption now is that it is fair to hold people personally responsible for the choices they make and if need be, let them bear the consequences of their choices. Whilst this may be seemingly reasonable, sometimes it is unreasonable to put too much emphasis on personal responsibility. This is because the situations under which people make choices may remarkably affect whether it is fair to require them to bear personal responsibility for the consequences.<sup>46</sup>

### **3.3 Human capability approach: Conceptual framework to equal opportunity**

Equality of opportunity has not escaped criticisms.<sup>47</sup> The concern here, however, is not so much with identifying the economic, political, or even the social obstacles that currently stand in the way of implementing equality of opportunity, but with how to limit inequality by ensuring that everyone in society is in a reasonably comparable position to lead a decent life. In order to seriously deliberate on ameliorating the social phenomenon of inequality and advocate for policy reform to bring about social change in society, there can be no reliance solely on advancing a theory of equal opportunity.

In order to ensure the principles expounded in the equal opportunity theory are realised in practice, due regard must be given to people's real opportunity or ability to choose. Peoples' realised achievements and their possible freedoms or opportunities from which to choose forms the cornerstone of the human capability approach.<sup>48</sup> The suggestion here is that policymakers will do best to utilise the capability approach in designing or evaluating (social) policies to ensure the realisation of a level of fairness and social justice. As a normative theory, the capability approach is valuable in the conceptualisation of inequality and subsequently social change. In this study, human capability plays an evaluative role in determining whether equal opportunity exists for irregular migrant workers.

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<sup>45</sup> Roemer op cit note 31 at 455.

<sup>46</sup> Mason op cit note 28 at 218.

<sup>47</sup> See Matt Cavanagh *Against equality of opportunity* (2002). Also see Thomas Pogge 'A critique of the capability approach' in Brighouse & Robeyns (eds) *Measuring equality* (2010).

<sup>48</sup> Ingrid Robeyns 'The Capability Approach' in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2011) available at <http://plato.stanford.edu/archives/sum2011/entries/capability-approach>.

### 3.3.1 Constructing capability

The capability theory,<sup>49</sup> initially intended as a theory of the ‘currency’ of justice in formulating the principles of distributive justice,<sup>50</sup> has morphed into substantive equal opportunity. For Sen, capability is about the freedom to achieve valuable beings and doings – thus what a person may value doing or being. The capability approach here is in terms of human development and equal opportunity – that is, expanding people’s freedom or ability to choose one type of life over others by removing major sources of obstacles that hamper freedom.<sup>51</sup>

In order to appreciate the human capability approach to understanding social justice, it is important to explicate what Sen meant in developing the concept. While a complete theoretical review of the capability approach, as developed by Sen, goes beyond the scope of this chapter, a brief conceptualisation is necessary in understanding its usefulness as an evaluative tool in this context.

Sen intended the capability approach to be an egalitarian response to and critic of both resourcist and welfarist approaches.<sup>52</sup> Martha Nussbaum then further developed Sen’s theory into a partial theory of justice. In Sen’s view, neither resource nor welfare is suitable for interpersonal comparison for a theory of justice. Rather, the focus should be on a person’s doings and beings (referred to as ‘functionings’), and their actual freedom to choose from those functionings.<sup>53</sup> That is, neither the resources nor the welfare derived should be the basis for an evaluation of an individual’s life, but on their ‘capability to function’.<sup>54</sup>

The two main underlining ideas of the capability approach are those of functionings (valuable doings and being) and freedom. Sen considers what a person is effectively able to do and to be as a functioning, and a capability as the freedom to achieve said functioning.<sup>55</sup> Peoples’ ‘capability set’ or opportunity set represents all the various set of functionings (possible doings

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<sup>49</sup> Originally pioneered by Amartya Sen and further advanced by Martha Nussbaum and other scholars.

<sup>50</sup> Mathias Risse ‘Immigration, ethics and the capabilities approach’ (2009) 34 *Human Development Reports Research Paper* 1 at 2.

<sup>51</sup> Ibid.

<sup>52</sup> See Amartya Sen ‘Equality of what?’ (1979) 1 *The Tanner Lecture on Human Values* 197.

<sup>53</sup> Richard Arneson ‘Distributive justice and basic capability equality: “Good enough” is not good enough’ in A Kaufman (ed) *Capabilities equality: Basic issues and problems* (2006) 21.

<sup>54</sup> Jonathan Wolff ‘Equality: The recent history of an ideal’ (2007) 4 *Journal of Moral Philosophy* 125 at 131.

<sup>55</sup> Ibid at 132.

and beings) that they are able to achieve with their given resources and opportunities.<sup>56</sup> As regards the key idea of functionings, this is rather broad and can include things such as being literate, part of a community, healthy, respected, working, resting, and so forth. Although Sen fails to set out a definitive list of functionings, it is recognised that the various things that a person may value doing or being (functionings) can be elementary (like nourishment or mobility), complex (e.g. self-respect), general or specific. What is more, functionings can either be potential or achieved, rendering them measurable and comparable.

The second main idea of freedom is relatively simpler than the first. Freedom, for Sen, has an opportunity aspect as it speaks to a person's ability to achieve desired functionings. It is about the availability of substantive opportunities so that people can choose those options that are most valuable to them.<sup>57</sup> Hence, according to Sen, the basis of social justice is actually the pursuit of basic capability equality, a scenario in which each person equally has the capability to achieve all necessary basic types of functionings.<sup>58</sup>

Therefore, a pursuit of social justice will require a situation in which policies and actions are set in a way that each person equally has freedom to achieve a suitable level of basic capabilities. This is not to suggest that the capability approach is by any means a simple one. As a theory, it cannot explain social phenomenon such as inequality;<sup>59</sup> but coupled with supplementary explanatory theories it can be effective in addressing policy challenges, particularly those pertaining to welfare.<sup>60</sup>

### **3.3.2 Assessing equal opportunity through human capabilities**

Bearing in mind that the intent is on making opportunity the preferred measure of equality, it makes sense to focus on what people are effectively able to be and do as a metric.<sup>61</sup> Assessing whether there has been equal opportunity will involve assessing the impact of policies on people's valuable opportunities or ability to choose (capabilities). In other words, the way

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<sup>56</sup> Robeyns op cit note 37 at 100.

<sup>57</sup> Ibid at 95.

<sup>58</sup> Arneson op cit note 53 at 21.

<sup>59</sup> It is a normative framework for evaluating or assessing people's wellbeing or policies.

<sup>60</sup> Robeyns op cit note 37 at 94.

<sup>61</sup> Ibid.

policies in reality influence people's ability to lead the lives they want, have what they want, and be who they desire.<sup>62</sup>

Using the right to social protection as an example yet again, suppose the government imposes a legal rule that only the formally employed citizens are entitled to access social protection. Using the capability approach to evaluate this policy will reveal that the policy does not support equality in any form. To reach this conclusion would require broad analysis of how such a policy impacts on people's substantive opportunities: to discover the social protection position of people.

The first analysis would have to assess whether the resources or means necessary for obtaining or enjoying the right to social protection is present. The inquiry is whether or not there is an existing social security policy and if people have reasonable chances of meeting eligibility criteria or conditions, i.e. whether it would extend its cover to everyone in society.

The second analysis would have to establish existing conditions for securing social protection. This stage involves, for instance, determining peoples' access to paid work or existing prospects to acquire social protection. All stages of this evaluation happen within a given context because peoples' real or effective opportunities are influenced in some degree by the social context — social institutions, legal norms or environmental factors — in which genuine choices occur.<sup>63</sup> Therefore, assessing whether the conditions in which people make choices are enabling or fair would require scrutinising the social context within which the choices are made.<sup>64</sup> Thus, the capability approach to equality forces an analysis of the context in which issues of policy and social change takes place.

As discussed in the previous chapter, current equality policy developed as a way to contest the negative treatment accorded to some groups but not to others.<sup>65</sup> Equal opportunity is likely the appropriate metric for assessing equality in South African society in view of the country's political past. Arguably, the principle of non-discrimination embedded in anti-

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<sup>62</sup> Ibid at 95.

<sup>63</sup> Ibid at 99.

<sup>64</sup> Ibid.

<sup>65</sup> Ockert Dupper 'The current legislative framework' in EML Strydom (ed) *Essential employment discrimination law* (2004) 14.

discrimination legislation are a form of equal opportunity, albeit a weak form.<sup>66</sup> This is because the principle of non-discrimination does not condone decisions, procedures, or rules that deny people access to advantage because of their race, religion, gender, or nationality, among others.<sup>67</sup> This notion of equal opportunity or access is a key requirement not captured by both welfarist and resourcist approaches to equality.

Coupling equal opportunity with the capability approach would enable scholars to gauge disparities in South African domestic policies that hinder the freedoms of some members, in an attempt to bring it more in line with international norms and standards. The capability approach is not only useful in allowing scrutiny of inequalities concerning other matters in addition to the distribution of resources,<sup>68</sup> it will also identify salient structural and psychosocial inequalities, such as de facto group segregation and other unfair informal social norms, that affect peoples' abilities to stand as equals in society.<sup>69</sup> The capability approach is sensitive to human diversity as it recognises that people's needs vary according to a range of personal, social, and environmental factors.<sup>70</sup> Thus, the proposed model is holistic in addressing a person's ability to take advantage of opportunities available to them in light of differing needs and circumstances.

### 3.4 Conclusion

The chapter has considered three conceptions of distributive equality (welfare, resources and opportunities) in an attempt to present the best requirements for measuring the parameters of equality. Welfare as a metric for equality fails because welfare is too ambiguous and lacks the necessary conditions for interpersonal comparisons.

Similarly, equality of resources, though relatively stronger than welfare equality, must fail because it is also about equality of outcomes. As already established, advocating for the same level of welfare or resource outcomes for everyone in a society is impractical and indefensible because people make autonomous choices and decisions that inevitably influence

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<sup>66</sup> Baker op cit note 30 at 6.

<sup>67</sup> Mason op cit note 28 at 29.

<sup>68</sup> Anderson op cit note 14 at 319.

<sup>69</sup> Elizabeth Anderson 'Justifying the capabilities approach to justice' in Harry Brighouse & Ingrid Robeyns (eds) *Measuring justice: Primary goods and capabilities* (2010) at 88.

<sup>70</sup> Robeyns op cit note 37 at 99.

their outcomes. All attempts to distribute goods or resources equitably will be ineffective because someone will always end up with more than others in one way or another. There is no guarantee of people's equal wellbeing or equal resources in spite of government's best intentions.

The best approach to equality will be to make opportunity the measure as it takes into consideration what people are effectively able to be and able to do. Equality of opportunity is essentially about levelling the playing field by removing any irrelevant barriers that impede some people from enjoying the same chances at reaching the outcome. The use of equality of opportunity coupled with Sen's capability approach as an evaluative tool will allow for easier detection of differential treatments that impair the dignity of a group.

The capability approach is interdisciplinary yet seldom applied in a socio-legal context. Despite its usefulness in issues of policy and social change, it alone cannot be relied on in advocating for policy reform or social justice as it is not an explanatory theory but merely a normative framework. In view of that, the equal opportunity theory coupled with the capability approach can explain and address inequality embedded in South African work-related social protection provisions.

## CHAPTER IV SOCIAL PROTECTION: MIGRATION, LABOUR, AND HUMAN RIGHTS PERSPECTIVES

*'For much of human history, movement – migration – has been the norm: an endless search for new hunting grounds, new pastures, new sources of goods to be traded, new means of work. The rise of the modern state changed all that.'*<sup>1</sup>

### 4.1 Introduction

A 2014/15 ILO World Social Security Report asserts that in the year 2012, only 27 per cent of the world's working-age population (and their families) had access to comprehensive social security systems.<sup>2</sup> This suggests that the fundamental human right to social security is unfulfilled for a significant proportion of the world's population.<sup>3</sup> Evidently, almost three-quarters of the global populace, some 5.2 billion or so vulnerable individuals, enjoy little to no access to social protection.<sup>4</sup> What is more, a great number of these people, some 800 million people, constitute the working poor, with many of them working in the informal economy.<sup>5</sup> The chronic lack of access to social protection for a large majority of people will inevitably result in growing levels of inequality as social protection policies help promote economic and social development.<sup>6</sup>

While the prospects of extending substantial rights to irregular migrants may be considered extremely problematic by some people, the promotion of the rights of unauthorised migrants is conceivable. There are reasonable normative and pragmatic arguments for advancing the rights of unauthorised migrants that warrant attention. Arguments in favour of promoting the rights of this vulnerable class of foreigners can be done from myriad perspectives, including migration, labour and human rights viewpoints.

Accordingly, this chapter delineates arguments on the need to extend social protection rights to unauthorised foreign workers from three dominant perspectives: namely migration,

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<sup>1</sup> Nigel Harris *Thinking the Unthinkable: The Immigration Myth Exposed* (2002) 9.

<sup>2</sup> International Labour Organization (ILO) *World Social Security Report 2014/15: Building economic recovery, inclusive development and social justice* (2014) 2.

<sup>3</sup> In South Africa, social security is also a constitutional right.

<sup>4</sup> ILO op cit note 2.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

labour, and human rights. Section 4.2 of the chapter broadly introduces some technical issues relating to the conceptualisation of social protection. Arriving at a working definition of social protection for purposes of the study produces conclusion regarding the concept.

Section 4.3 of the chapter commences an argument in favour of social protection rights promotion from a migration angle. Central to this argument is an analysis of clandestine migration flows to reveal structural factors facilitating and perpetuating migration for employment and the subsequent need to extend the right of access to social protection to the most vulnerable role players, unauthorised foreign workers.

Finally, sections 4.4 and 4.5 explore the need for extending social protection coverage from both a labour and human rights context respectively. In this regard, the chapter shows that migration is synonymous to labour movement, and legal protection is a way of regulating that movement.

Essentially, this chapter makes salient the complex relationship between immigration, social security, and labour laws. However, the chapter does not intend to propose solutions to the exclusion of unauthorised foreign workers from the social protection systems of host nations.<sup>7</sup> Section 6.6 of chapter 6 of the thesis explores that proposal. Presently, the chapter identifies and discusses major debates within the field of social protection.

## **4.2 Conceptualising social protection**

Social protection is increasingly gaining focus on development agendas globally. Economies across the globe are beginning to recognise it as a powerful mechanism for the fight against poverty, exclusion, and inequality. Concerns about globalised economic risks (such as the 2008 global financial and economic crisis),<sup>8</sup> the changing nature of work, as well as increasing complex labour market segmentation trends, to an extent, account for the sudden salience of social protection in many policy debates in both government and academia. The global financial and economic crisis, for instance, has had a significant impact on poverty and economic growth,

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<sup>7</sup> Recommendations for proposed reforms are dealt with in chapter 7.

<sup>8</sup> Piyasiri Wickramasekara 'Protection of migrant workers in an era of globalization: The role of international instruments' in R Blanpain (ed) *Comparative labour law and industrial relations in industrialized market economies* (2010) 251.

which impact on global migration and migrant workers.<sup>9</sup> Slack economic growth during the crisis hindered expansionary measures as governments limited funds available for social protection interventions for people in need.<sup>10</sup>

There have been several conceptualisations of social protection, each focusing on a specific kind of vulnerability. Traditional understanding of social protection often centres on poverty (mainly income poverty) reduction. Thus, social protection has focussed and continues to focus on mechanisms to mitigate and/or protect people against life's many shocks. Even so, social protection as a concept has also evolved to include a wide range of strategies that aim to make significant contributions to the promotion of economic growth and stability. The discourse has moved beyond the context of improving upon the livelihoods of the poor (as an end goal) to include giving the poor the opportunity to contribute to and benefit from the growth process.<sup>11</sup> That is to say, that social protection is a wide concept.

Major institutions, like the World Bank and the International Labour Organisation (ILO), as well as other specific states or governments, employ different definitions of social protection depending on their agenda focus or need. Note, however, that the term 'social security' is more widely used in international human rights and numerous national instruments. For instance, the World Bank uses the term social security and defines it as 'interventions that assist poor individuals, households, and communities to reduce their vulnerability by managing risks better'.<sup>12</sup> Similarly, the ILO describes social security as:

the protection which society provides for its members, through a series of public measures, against the economic and social distress that would otherwise be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old-age and death and the provision of medical care and subsidies to families with children.<sup>13</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> ILO op cit note 2 at xxiv.

<sup>11</sup> Abena D Oduro 'Formal and informal social protection in sub-Saharan Africa' Paper prepared for the ERD August 2010 at 11.

<sup>12</sup> Trina Haque 'Dynamic risk management and the poor: developing a social protection strategy for Africa' (2001) 1 *Africa Region Human Development Series* at 4.

<sup>13</sup> International Labour Organization *International labour migration: A rights-based approach* (2010) 108-9.

Both descriptions of social security by the World Bank and ILO are limited to public measures, and considerably too narrowly focused on a traditional view of poverty reduction.<sup>14</sup> These traditional views of risk management and poverty reduction lean more towards the concept of social security than social protection.

In spite of the fact that the two concepts are often interchangeable, a slight distinction warrants conceptual clarification. Social security typically refers to (a combination of) public and private measures intended to protect individuals and their families against financial insecurity caused by certain contingencies, and includes the traditional twin elements of social insurance and social assistance.<sup>15</sup>

In this respect, the South African Department of Social Development, in Chapter 7 of the White Paper for Social Welfare (1997),<sup>16</sup> defines social security as:

covering a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children....<sup>17</sup>

Although, the South African White Paper provides for a relatively broader definition that entails both public and private measures, it is still not comprehensive enough to capture all the complexities of vulnerability. The fact of the matter is that the concept of vulnerability, albeit contested, varies.<sup>18</sup>

The idea of social protection, on the other hand, is much wider than social security as it goes beyond the aspects that traditionally fall within the scope of social security. Social protection covers all features of social security (i.e. social insurance and social assistance), social services, and developmental social welfare aimed at improving human welfare.<sup>19</sup>

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<sup>14</sup> Oduro op cit note 11 at 2.

<sup>15</sup> Article 1.5 of the Code on Social Security in the SADC.

<sup>16</sup> The White Paper for Social Welfare is the baseline policy for a developmental social welfare in South Africa.

<sup>17</sup> EML Strydom 'Introduction to social security law' in Strydom, EML (ed) *Essential social security law* (2001) 23.

<sup>18</sup> Ingrid Palmay & Loren Landau 'Citizenship, human rights, empowerment and inclusion, and the implications for social protection and social security harmonisation/coordination policies in SADC' in Mpedi & Smit (eds) *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (2012) 143.

<sup>19</sup> See Article 1.4 of the Code on Social Security in the SADC.

Thus comprehensive social protection,<sup>20</sup> encompasses the following most common aspects: social assistance policies (cash or in-kind resources that are transferred to vulnerable individuals or households), social insurance (contributory schemes to mitigate risk, e.g. unemployment or health insurance schemes), and labour market interventions (programmes intended to protect workers e.g. minimum wage legislation). In this regard, the Taylor report<sup>21</sup> defines social protection as:

...basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.

Similarly, the Asian Development Bank (ADB) conceptualises the term ‘social protection’ as ‘a set of policies and programs designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people’s exposure to risks, and enhancing their capacity to protect themselves against hazards and interruption/loss of income’.<sup>22</sup>

Better still, Devereux and Sabates-Wheeler propose a more expansive meaning of social protection. They describe social protection as follows:

the set of all initiatives, both formal and informal, that provide: **social assistance** to extremely poor individuals and households; **social services** to groups who need special care or would otherwise be denied access to basic services; **social insurance** to protect people against the risks and consequences of livelihood shocks; and **social equity** to protect people against social risks such as discrimination or abuse (emphasis in original).<sup>23</sup>

The characterisation of social protection offered by Devereux and Sabates-Wheeler highlights four important dimensions that seek to recognise and deal with diverse forms of vulnerability:

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<sup>20</sup> The South African Department of Social Development makes use of the term ‘comprehensive social protection’.

See the Department of Social Development ‘Strategic plan 2009-12’ available at

[http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view), accessed 1 October 2014.

<sup>21</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa

*Transforming the Present – Protecting the Future* (Consolidated Report) (2002) 41.

<sup>22</sup> Asian Development Bank ‘Social protection’ available at <http://www.adb.org/de/node/152489>, accessed 10 November 2015.

<sup>23</sup> Stephen Devereux & Rachel Sabates-Wheeler ‘Transformative social protection’ (2004) *IDS Working Paper* 232 at 9.

protective elements (recovery assistance from shocks); preventive measures (mitigating risks in order to avoid shocks); promotive measures (promoting opportunities); and transformative elements (focusing on underlying structural inequalities which give rise to vulnerability and exclusion).<sup>24</sup>

The conceptualisation provided by Devereux and Sabates-Wheeler is preferable, and used in the rest of the discussion, not only because it is more in line with the definition contained in the Code on Social Security in the SADC.<sup>25</sup> It also transcends the simple management of risks to include a need for changes in the legal and regulatory frameworks to assist all classes of workers (local or migrants) locked in exploitative relationships owing to prevailing social inequalities.<sup>26</sup> In summation, social protection as a concept can connote various meanings. As a caveat, it is worth noting that whilst the study often mentions ‘social security’, the term serves as part of the broader idea of social protection.

#### **4.2.1 Forms of social protection**

It is clear from the above-explored characterisations of social protection that the concept is rather wide and can protect people in different ways based on their needs and status. Since social protection includes a range of possibilities, it is important to contextualise and outline the important components or areas of social protection most relevant for people of working age generally and for migrant workers particularly, given the focus of this study.

The ILO classifies the social protection needs of migrants into three general categories, all of which really pivot on income security.<sup>27</sup> The first need is for migrants to replace any short-term or permanent loss of income because of employment contingencies such as unemployment, disability, sickness, or maternity. The second relates to the need for some level of income support or other protection measures to avoid poverty and/or social exclusion in the event of earning capacity ceasing or disrupted. The third and final need concerns support in restoring and/or facilitating earning ability and employment participation after any employment contingencies.

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<sup>24</sup> Ibid at 10.

<sup>25</sup> See Article 1.4 of the Code on Social Security in the SADC.

<sup>26</sup> Oduro op cit note 11 at 2.

<sup>27</sup> ILO op cit note 2 at 25.

Because the subjects of inquiry are those involved in some kind of economic activity, it is therefore necessary to focus attention on those specific rights related to their status as workers. That is, those areas of social protection related to employment or work-related risks. Accordingly, the primary strands of social protection most relevant to migrant workers, and of particular interest in this study, are social insurance (specifically unemployment and employment injury benefits), labour security, and to some extent social assistance. Where necessary, the study will refer to specific areas of social protection.

### 4.3 A migration perspective of social protection

Migration has always been a feature of human existence.<sup>28</sup> People have been mobile as far back as recorded human history goes.<sup>29</sup> Although migration is by no means a new phenomenon, contemporary processes of globalisation have changed its drive and nature.<sup>30</sup> The world is becoming gradually smaller as economies, markets, and societies are integrating across borders.<sup>31</sup> The unintended consequence of this shrinking of the world, i.e. globalisation, has led to an increasing economic and political interdependence among diverse nation states.<sup>32</sup> Developments in technology — mainly information and communications technologies (ICTs) — further drive this globalisation phenomenon. The improvement in ICTs not only bolsters economic and political relationships across borders; it also makes it easy to connect international labour markets.<sup>33</sup>

Even with the increasing integration of global markets and economies, developments in the cross-border movement of people lag far behind.<sup>34</sup> For this reason, as more and more people move across international borders for economic reasons, individual nations are coming up with more intricate ways to control or restrict the mobility of people across their borders to protect

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<sup>28</sup> Bridget Anderson ‘Precarious past, precarious futures’ in Cathryn Costello & Mark Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) 29-43 at 29.

<sup>29</sup> Wickramasekara op cit note 8 at 245.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid at 249.

<sup>32</sup> Mathias Risse ‘Immigration, ethics and the capabilities approach’ (2009) *34 Human Development Reports Research Paper* 1 at 1.

<sup>33</sup> Wickramasekara op cit note 7 at 249.

<sup>34</sup> Ibid.

national economic interests.<sup>35</sup> Contemporary immigration policies the world over have become stricter in attempts to limit, control, or deter migration, particularly migration for employment.<sup>36</sup> Regardless of the increasing border control measures, people still leave their home countries for places where they are not entirely welcomed in the hope of finding a comparatively better life. Thus, the cross-border movement of people globally has become highly controversial.

#### 4.3.1 Internal migration in South Africa

Although the primary focus of this study is on international or cross-border migration, it is important to explore the phenomena of internal migration movements in South Africa.<sup>37</sup> A discussion of the migratory moves within the domestic borders, seemingly tangential, is necessary to provide the proper historical context in which to situate the current domestic migration trends or patterns.<sup>38</sup>

As discussed in chapter one, the apartheid regime created a system of large-scale marginalisation of the black population. It did so through myriads of draconian laws, some in the form of discriminatory migration controls that strictly regulated domestic migrants.<sup>39</sup> The apartheid homeland policies like the Bantu Authorities Act, Groups Areas Act, and the Urban Areas Act worked together to restrict the free movement of black South Africans, particularly African/Black people, within the country. The Native Urban Areas Act specifically designated South African urban areas as ‘white’ and limited the access and use of all black people, mostly black people, except for employment purposes. Black South Africans were required to carry permits called passes, a kind of internal passport, for admission into and employment in ‘white’ areas. These laws essentially determined patterns of internal migration in the country.<sup>40</sup>

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<sup>35</sup> ILO op cite note 12 at 14.

<sup>36</sup> Robin Cohen *Migration and its enemies: Global capital, migrant labour and the nation-state* (2006) 184.

<sup>37</sup> Internal migration broadly refers to movement within the same country. In the South African context, it is typically between two provinces.

<sup>38</sup> Pieter Kok & Mark Collinson *Migration and urbanization in South Africa* (2006) 1 available at <http://www.statssa.gov.za/publications/Report-03-04-02/Report-03-04-02.pdf>, accessed 1 October 2014.

<sup>39</sup> Christine Fauvelle-Aymar *MiWORC Report No. 6 Migration and employment in South Africa: An econometric analysis of domestic and international migrants (QLFS (Q3) 2012)* (2014) 14.

<sup>40</sup> Oumar Bouare ‘Determinants of internal migration in South Africa’ (2001-2002) 8(1) *SA Journal of Demography* 23.

Consequently, domestic migration, historically, was mostly circular,<sup>41</sup> involving movement mainly from rural or peri-urban areas to urban or mining areas.<sup>42</sup>

Even with the fall of apartheid, circular migration patterns and the effects of discriminatory migration controls persist.<sup>43</sup> Wentzel and Tlabela aptly summarise the historical context of current migration trends in the following observation:

South Africa has a sad history of racially based government interventions in the movement and settlement patterns of its own people and those from other countries in the region, with grave effects on the well-being of most of its population. The dramatic political changes that took place in the early 1990s did remove the cause of this pain for most but not necessarily the lasting effects. Very poor rural people, trapped in the legacy of the apartheid homeland policy, have probably found it difficult to escape from their situation.<sup>44</sup>

Perhaps it is unsurprising that labour migration<sup>45</sup> has become a sensitive and pertinent discourse in South Africa, and the Southern Africa region generally. Although there is a long history of regional cross-border movement in Southern Africa,<sup>46</sup> contemporary migration patterns have made the management of the arrivals and departures across South African borders for employment highly contentious. Such is the sensitivity of labour migration in the domestic arena that regional calls for a harmonised regional migration policy that promote free movement of labour has often being strongly opposed by regional ‘power houses’, including South Africa.<sup>47</sup>

Up until 2004, South Africa viewed two regional instruments — the 1995 SADC Draft Protocol on Free Movement and the 1998 SADC Draft Protocol on Facilitation of Movement — as threatening. For a developing economy such as South Africa, any public policy that encourages unrestricted cross-border labour flow raises apprehension, as there is both a real and perceived threat of the sudden influx of economic migrants from troubled neighbouring states

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<sup>41</sup> Circular migration is when people move for employment or educational purposes but their place of residence typically do not change with the move.

<sup>42</sup> Fauvelle-Aymar op cit note 38 at 14.

<sup>43</sup> Ibid.

<sup>44</sup> Cited in Kok & Collinson op cit note 37 at 1.

<sup>45</sup> This form of migration focuses mainly on individuals who move between countries for employment or migrant workers.

<sup>46</sup> Jonathan Crush, Vincent Williams & Sally Peberdy *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 5.

<sup>47</sup> Jason P Schachter ‘Data assessment of labour migration statistics in the SADC region: South Africa, Zambia, Zimbabwe’ (2009) *International Organization for Migration* at 5.

and elsewhere on the continent. This is precisely the current climate and sentiment in the country as popular discourse tends to view immigration into the country as negative rather than strategic. This is not to suggest that contentions surrounding migration is unique to Southern Africa or South Africa. Current affairs suggest that hostility to migration and to migrants subsists in the global north, i.e. Europe and North America.

#### **4.3.2 Migration trends: Characterising a vulnerable group, quantifying the unidentifiable**

The first step in effective migration management is having good data. In this respect, the UN Population Division projects that about 244 million people, nearly 3.3 per cent of the world's population, live outside of their country of birth or citizenship.<sup>48</sup> This global estimate constituting the global migration population includes asylum seekers, refugees, and migrants for employment and their families.<sup>49</sup> These international migrants account for a very small share, a mere 3.2 per cent, of the entire global population.<sup>50</sup> Only a small proportion of people actually migrate. Yet migrants are significant enough to warrant attention. The ILO estimates that a large proportion of this projected total international migrant stock, more than 90 per cent, migrate for work (i.e. constitute migrant workers).<sup>51</sup>

What is more, the growth of labour migration and the resulting distribution of international migrants by major source of origin and destination are notably interesting. The United Nations High-Level Dialogue on Migration and Development further projects that about half of all international migrants, some 100 million or so people, are living in just ten countries.<sup>52</sup> The United States of America, the Russian Federation, Germany, Saudi Arabia, the United Arab Emirates, the United Kingdom, France, Canada, Australia, and Spain respectively supposedly host the majority of the world's migrant population.<sup>53</sup> Data organised according to continent

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<sup>48</sup> United Nations Department of Economic and Social Affairs, Population Division 'Population Facts' No. 2013/2 September 2013. Available online at [http://esa.un.org/unmigration/documents/The\\_number\\_of\\_international\\_migrants.pdf](http://esa.un.org/unmigration/documents/The_number_of_international_migrants.pdf).

<sup>49</sup> Wickramasekara op cit note 8 at 248.

<sup>50</sup> Ibid.

<sup>51</sup> International Labour Organization *Preventing discrimination, exploitation and abuse of women migrant workers – Booklet 1* (2003) 9.

<sup>52</sup> Jean-Christophe Dumont & Bela Hovy *World migration in figures* (2013) 2.

<sup>53</sup> Ibid.

blocs suggests that the African region alone accounts for nearly 20 million of this migrant-workers population.<sup>54</sup> However, research shows that most of the migrants from the African region are more likely to remain on the continent.<sup>55</sup>

Another interesting feature of the migration phenomenon is the manner or channel in which it occurs. The ILO approximates that roughly 10-15 per cent of all international migration that take place can be categorised as unauthorised, irregular or clandestine.<sup>56</sup> Whilst the precise number of irregular migrants internationally is difficult to determine due to the clandestine nature of their movements,<sup>57</sup> anecdotal evidence suggests that the unauthorised movement of people across international borders persist. For instance, the United States supposedly boasts the highest number of irregular migrants in the world — some 10 million irregular migrants, mainly from Mexico.<sup>58</sup> Similarly, more than half of the 3-4 million migrant workers in Russia are unauthorised or irregular.<sup>59</sup> Other countries like the United Kingdom all boast a significant population of irregular migrant workers.<sup>60</sup>

Additionally, international migration is very much a gendered phenomenon. Globally, the proportion of female migrants (both regular and irregular) is comparable to their male counterparts, and rising. Migrant women constitute nearly half, roughly 49 per cent, of all international migrants worldwide.<sup>61</sup> In the African region, the feminisation of migration is even more noticeable, with women constituting half of Africa's migrant stock.<sup>62</sup> Women migrant workers often tend to cluster in low-wage sectors outside the ambit of normal labour laws, where they encounter gender bigotry, sexual exploitation, and violence, in addition to the other forms of

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<sup>54</sup> Ibid.

<sup>55</sup> Christopher Changwe Nshimbi & Loenzo Fioramonti *MiWORC report No. 1. A region without borders? Policy frameworks for regional labour migrations towards South Africa* (2013) 13.

<sup>56</sup> International Labour Organization *Facts on labour migration* (2006) 1.

<sup>57</sup> Dawn Norton 'Workers in the shadows: an international comparison on the law of dismissal of illegal migrant workers' (2010) 31 *ILJ* 1521 at 1522.

<sup>58</sup> Ibid at 1532.

<sup>59</sup> Ibid at 1522.

<sup>60</sup> Macha Farrant, Clare Grieve & Dhananjayan Sriskandarajah *Irregular migration in the UK* (2006) 11.

<sup>61</sup> Wickramasekara op cite note 8 at 247.

<sup>62</sup> ILO op cit note 51 at 10.

unfairness migrants face generally.<sup>63</sup> Evidence suggests that most women migrants are engaged in domestic worker sector, and are among the world's most vulnerable workers.<sup>64</sup>

The domestic level tends to replicate, albeit on a much smaller scale, the above global trends. The South African case is particularly interesting as it is both a sending and receiving country of migrants in the SADC region.<sup>65</sup> However, its status as a migrant-receiving country particularly tends to raise controversy. The country's comparatively strong economy and political stability partly explain its acquired status as a favourable destination for migrants in the region.<sup>66</sup> The heightened political unrest, increased poverty and famine, as well as failing economies on the continent, contribute to people leaving oppressive conditions in search of comparatively better life elsewhere.<sup>67</sup> South Africa, regarded as one of the more stable and relatively wealthier countries (economic powerhouse) left on the continent, attracts and absorbs people from its northern neighbours and other countries across the continent.

National migration data, though disputed,<sup>68</sup> indicate that between the periods of 1994 to 2004, the South African government received about 160 000 refugee claims.<sup>69</sup> In 2007 alone, the Department of Home Affairs (DHA) received about 45,673 new asylum applications.<sup>70</sup> The geographical distribution of this increasing migrant stock consists of some 687,678 migrants from Southern Africa, 41,817 from the rest of Africa, 228,318 from Europe and 40,889 from

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<sup>63</sup> Wickramasekara op cit note 8 at 256.

<sup>64</sup> ILO op cit note 13 at 95.

<sup>65</sup> Christy McConnell 'Migration and xenophobia in South Africa' (2009) 1 *Conflict Trends* 34 at 35.

<sup>66</sup> Schachter op cit note 47 at 6.

<sup>67</sup> ILO op cit note 13 at 20.

<sup>68</sup> The reliability of migration statistics in the country is questionable as it is virtually impossible to capture accurately the number of migrants, particularly unauthorised migrants, as statuses may change without notification. Some people may enter the country by legal means and later become illegal due to overstayed visas or rejected refugee status. Unauthorised migrants are near impossible to find and count as staying under the radar is imperative for survival. Moreover, statistics tend to be either very conservative or outrageously manipulated for political purposes.

<sup>69</sup> Crush *et al* op cit note 46 at 13.

<sup>70</sup> Jonathan Crush 'South Africa: Policy in the face of xenophobia' (2008) available at <http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia>, accessed 13 February 2014.

Asia.<sup>71</sup> These records offer only a snapshot of what is happening at the highly regulated formalised spectrum of cross-border migration discourse.<sup>72</sup>

At the informal end of cross-border movements, deportation data indicates that the government has deported over 1 million foreign nationals since 1994, mainly from neighbouring Mozambique, Zimbabwe, and Lesotho.<sup>73</sup> Although it is practically impossible to know how many unauthorised foreign nationals reside in South Africa, current statistics puts the number of undocumented migrants present in the country between 1 and 8 million.<sup>74</sup> Some government officials further claim the number of Zimbabweans in South Africa to be around 3 million and rising.<sup>75</sup> However, a conservative estimate by Statistics South Africa puts the number of irregular migrants in the 500 000 to 1 million range.<sup>76</sup> These migrants enter, live, and work in the country often without legal consent from the government.

In spite of this, it must be noted that these figures are often constructed and magnified to politicise a perceived ‘immigration problem’ that often stigmatises migrants and perpetuates xenophobic sentiments. In fact, foreign nationals are a numerical minority in almost all societies.<sup>77</sup> In South Africa specifically, foreign nationals constitute only about two per cent of a population of 53 million people.<sup>78</sup> Although it is arguable that this clandestine population are as numerous in reality as estimates suggest, they constitute a sizeable enough number to be a recognisable group both domestically and globally.<sup>79</sup>

Despite the reliability issues associated with current domestic records, it is undoubted that immigration into the country is rising and will continue to rise. The conspicuous rise in the

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<sup>71</sup> Ibid.

<sup>72</sup> Figures are of people entering South Africa legally. 2001 is the latest date for which migration records are available.

<sup>73</sup> Crush op cit note 70.

<sup>74</sup> Schachter op cit note 47 at 6.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Owen Fiss ‘The Immigrant as Pariah’ (1998) 23 *Boston Review*.

<sup>78</sup> Figure obtained from the 2001 census. 2001 is the latest date for which migration records are available. Also see Crush op cit note 70.

<sup>79</sup> Beth Lyon ‘New international human rights standards on unauthorized immigrant worker rights: Seizing an opportunity to pull governments out of the shadows’ in Anne Bayefsky (ed) *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (2005) 552.

inflow of migrants from neighbouring countries and across Africa into South Africa cannot be viewed in isolation. Consensus in the migration literature points to a number of social, economic, and political factors that propel this international movement of people.

**(a) Factors influencing international cross-border movement**

The literature that covers the economic and sociological explanations of why people migrate reveals that people move for a variety of reasons. Although the causes of migration are theoretically complex and difficult to determine,<sup>80</sup> the reasons for migration, broadly speaking, could be cultural, economic, environmental, and/or socio-political. In the general classification of motives for migration, there are so-called ‘push’ or ‘pull’ factors that further drive the surge.

Push factors are those conditions that drive individuals, either voluntarily or forcibly, out of their countries of origin. These factors may include environmental threats such as drought, overpopulation, and famine; political conditions such as conflict, rights violations, and fear of persecution; and economic concerns relating to unemployment, poverty and the absence of economic opportunities.<sup>81</sup>

Pull factors, on the other hand, are comparatively positive features of the destination countries that attract potential migrants to its borders. The availability of comparably better economic opportunities and the promise of a better life or standard of living can dictate where individuals end up.<sup>82</sup>

Globalisation is supposedly expanding income and security disparities among countries, which in turn increases migration pressures.<sup>83</sup> Van Niekerk J aptly reflects that not only has globalisation ‘had a profound effect on international migration’, it has ‘increased significantly the number of people who migrate as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries’.<sup>84</sup> Analysis into the important

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<sup>80</sup> Kok & Collinson op cit note 38 at 10.

<sup>81</sup> Ockert Dupper ‘Migrant workers and the right to social security: An international perspective’ (2007) 18(2) *Stellenbosch Law Review* 219.

<sup>82</sup> Ockert Dupper & Marius Olivier ‘Co-ordination of social security schemes: The case of SADC’ in Olivier, Dupper & Govindjee (eds) *The role of standards in labour and social security law: International, regional and national perspectives* (2013) 69.

<sup>83</sup> Wickramasekara op cit note 8 at 250.

<sup>84</sup> *Discovery Health Ltd v CCMA & Others* (2008) 29 *ILJ* 1480 (LC) para 47.

factors that motivate people to move in the Southern Africa region replicates global patterns. Economic factors are the single most dominant motivation for people moving within the Southern Africa region, and into South Africa particularly.<sup>85</sup> However, economic factors in this context act as both push and pull factors for potential migrants in the region. Failing economies on the continent have resulted in underemployment and lack of economic opportunities in some countries. Thus, migrants from these countries forcibly move in search of better opportunities. Alternatively, South Africa is one of the more stable and wealthier economies on the continent and is therefore attractive to migrants in search of better opportunities and standards of living.

In any case, people may leave their countries of origin for varied reasons, but it is the availability of comparably better opportunities in destination countries that mostly draws people. This is true for all regions of the world. Whether escaping political conflict, famine, or economic hardship, it is the prospect of something better elsewhere that guides people's decision to move from their location. In this context, the actual decision to migrate — often to improve life chances or opportunities — can be an informal attempt at seeking social protection, a coping strategy, to remove themselves from situations of disadvantage.<sup>86</sup>

**(b) *Typologies of foreign nationals***

There are different categories of migrants or foreign nationals, ranging from most secured to least secure. South African legislation recognises and distinguishes between citizens and various categories of migrants or non-nationals. The different legal categorisation of migrants, albeit non-exhaustive, include permanent residents, temporary residents, refugees, asylum seekers, and irregular ('illegal') foreign nationals. The law then gives the various types of non-nationals differentiated rights based on their immigration status and/or the reason for entering the country.

Permanent residents are foreign nationals permitted to live in the country indefinitely.<sup>87</sup> This group of foreign nationals typically enjoy most of the same rights, privileges, duties, and

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<sup>85</sup> Marius Olivier & Ockert Dupper 'Political and regulatory dimensions of access, portability and exclusion: Social security for migrants, with an emphasis on migrants in Southern Africa' available at <http://ilera2012.wharton.upenn.edu/RefereedPapers/DupperOckert.pdf>, accessed 4 August 2015.

<sup>86</sup> Rachel Sabates-Wheeler & Myrtha Waite 'Migration and social protection: A concept paper' (2003) IDS Working Paper 17.

<sup>87</sup> Marius Olivier 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)' (2011) 1 *SADC Law Journal* 121 at 136.

obligations as citizens, except for those explicitly reserved for citizens such as the right to vote.<sup>88</sup> The South African Constitutional Court has confirmed this provision of equal treatment of permanent residents and citizens in a number of judgments.<sup>89</sup>

Temporary residents are non-nationals permitted to enter and/or stay in the country for a certain period.<sup>90</sup> As a condition for their stay, the law requires that they do not breach the terms of their permit or become a ‘prohibited or undesirable person’.<sup>91</sup>

In line with its international obligation, refugees are foreign nationals granted asylum in terms of the South African Refugees Act 130 of 1998.<sup>92</sup> Legally, they are entitled to full access and enjoyment of the constitutional rights contained in the Bill of Rights, are allowed to work, study, and access social protection.<sup>93</sup>

Asylum seekers, on the other hand, are by definition individuals who are seeking recognition as refugees in South Africa, or those whose refugee status has not been confirmed.<sup>94</sup> Although asylum seekers may work and study in South Africa,<sup>95</sup> they are only entitled to minimum protection until they become fully recognised refugees.<sup>96</sup>

An irregular, unauthorised, or clandestine foreign national is a foreigner who is in the country in contravention of the Immigration Act and includes a ‘prohibited person’.<sup>97</sup> Such an individual is open to arrest and deportation.<sup>98</sup> The term used in South African government publications is ‘illegal’. As already pointed out in chapter one, someone can become irregular in multiple ways. Irregularity can occur when someone enters the country clandestinely by crossing the border at a place other than a recognised port or post. Others acquire fraudulent documents

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<sup>88</sup> See s 25(1) of the Immigration Act 13 of 2002.

<sup>89</sup> See for example *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC), and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>90</sup> Olivier op cit note 87 at 136.

<sup>91</sup> See ss 29 and 30 of the Immigration Act.

<sup>92</sup> See s 1(xv).

<sup>93</sup> See s 27(b), (f) and (g) of the Refugees Act 130 of 1998 respectively.

<sup>94</sup> Olivier op cit note 87 at 139. See also s 1(iv), (v) and (xv) of the Refugees Act 130 of 1998 respectively.

<sup>95</sup> See *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA).

<sup>96</sup> Olivier op cit note 87 at 139.

<sup>97</sup> Section 1(xviii) of the Immigration Act.

<sup>98</sup> Sections 32 and 33 of the Immigration Act.

prior to coming or during their stay in the country. Others still, after entering the country legally, contravene the terms of their residence permit by overstaying the allowed period, failing to renew, or by engaging in activities (working, trading, studying, and/or receiving government services) in defiance of their permit conditions. The flow of clandestine migration is not unique to South Africa. Countries in the global north like the United States, the United Kingdom, and Australia encounter this issue.

### **4.3.3 The form and nature of labour migration policy in South Africa**

The response of policymakers to the migration phenomenon is to institute domestic immigration policy and legal framework through which to address and manage migratory flows. In this respect, the South African government has decrees regulating the flow of migrants into the country, with differing impact on foreign nationals. In this respect, two broad public policies — namely the Immigration Act 13 of 2002 and the Refugees Act 130 of 1998 — regulate foreign nationals in South Africa.

While both the Immigration and the Refugees Acts broadly regulate foreign nationals in the country, the 2002 Immigration Act and its subsequent 2004 amendment constitute the principal policy or framework relevant to labour migration in South Africa.<sup>99</sup> This existing labour migration policy covers two forms of laws: ‘laws relating to the admission of persons to and removal of persons from South African territory; and laws dealing with policy towards regulations of non-citizens inside the country’s borders.’<sup>100</sup> In order to grasp the country’s current policy response to the inflows of foreigners from the region, it is necessary to outline the historical developments leading up to the current migration regime. Thus, the subsequent discussion examines the nature of past and existing domestic labour migration policies.

#### **(a) Migration policy pre-2002**

A historical assessment of developments leading up to the enactment of the Immigration Act 13 of 2002 reveals an inherent residuary system, which is a legacy from the oppressive past of the

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<sup>99</sup> The Immigration Act 13 of 2002 has been amended by the Immigration Amendment Act 19 of 2004. It falls under the purview of the Department of Home Affairs.

<sup>100</sup> Jonathan Klaaren ‘Immigration & the South African constitution’ in Jonathan Crush (ed) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 56.

country.<sup>101</sup> Immigration policing can be traced as far back as 1913, but policies regulating the admission of people into and within the country, including foreign nationals from other African countries, became increasingly restrictive during the height of the apartheid regime.<sup>102</sup>

The Immigration Regulation Act of 1913, including all subsequent amendments, arguably set the tone for the current immigration policy. South African immigration policy from 1913 up until the infancy of apartheid was characterised by ‘racial anxiety, white nationalism, and antisemitism’.<sup>103</sup> However, it never went as far as regulating Africans from outside South Africa. Immigration policies only began focusing on migrants from other African states at the peak of apartheid. Essentially, immigration regulations during this period were numerous and similar in content.

In an attempt to consolidate all policies relating to immigration into a single legislation, the apartheid (Nationalist Party) government introduced the Aliens Control Act 96 of 1991 (ACA).<sup>104</sup> The ACA did little to reform previous harsh legislation, as many of its provisions were mere transplants of preceding discriminatory policies.<sup>105</sup> The birth of the democratic dispensation in 1994 brought with it some substantive improvements to the ACA as the newly democratic government removed provisions that contained palpable violations of the rights of foreigners.<sup>106</sup> Despite this progressive move, there was still a negative connotation attached to the amended policy owing to its historical origin. The resulting outcome was thus a need for an entirely new immigration policy mechanism free of any racial exclusion and domination.<sup>107</sup>

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<sup>101</sup> Sally Peberdy & Jonathan Crush ‘Rooted in racism: The origins of the Aliens Control Act’ in Jonathan Crush (Ed.) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 19.

<sup>102</sup> Ibid at 28. Among the initial policies were two significant pieces of legislation: Population Registration Amendment Act of 1950 and the Admission of Persons to the Union Regulation Amendment Act of 1961. The former required the different racial groups to carry ID books in an attempt to control and/or identify immigrants in the country, whilst the latter helped police effort to rid the country of foreigners from neighbouring States.

<sup>103</sup> Peberdy & Crush op cit note 101 at 28.

<sup>104</sup> Ibid at 33.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid at 34.

<sup>107</sup> Maxine Reitzes ‘Immigration & human rights in South Africa’ in Jonathan Crush (ed) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 41.

Consequently, the democratic government enacted the Immigration Act 13 of 2002, among other reasons, to redress some of these negative implications.

Additionally, in 1999, the government developed the White Paper on International Migration (the White Paper) with the hope of facilitating South Africa's integration into SADC.<sup>108</sup> The 1999 White Paper on immigration policy strongly emphasised the need to deter clandestine migration and the exercise of territorial sovereignty in controlling immigration rules. Article 15 of the White Paper explicitly states, as one of its priorities: 'ensuring that illegal aliens do not take available job opportunities away from community members and do not compete with them for scarce public service'.

It is arguable that the intent of the African National Congress (ANC) to overhaul previous immigration policies and usher in a democratic era of policy reform is somewhat successful. It could be argued that the current immigration policy is merely types and shadows of both the ACA and the White Paper since it is still overly focused on control.

**(b) *Contemporary labour migration policy***

In spite of historical developments and the revision of migration legislation, the current Immigration Act is still a restrictive labour migration policy because it is unfriendly towards unskilled and semi-skilled migrants, particularly the unauthorised, in its regulation of both the movement and employment of these foreigners within the country.

The intake of foreign workers into the South African labour market is minimised as much as possible by means of the reservation of employment opportunities for South African citizens, permanent residents and some highly skilled migrants.<sup>109</sup> Employers are encouraged to make use of internal human resource reserves as far as they are able. Non-nationals are a last resort, and even so not all foreigners are welcomed.

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<sup>108</sup> Available at <http://www.info.gov.za/whitepapers/1999/migrate.htm>, accessed 4 August 2015.

<sup>109</sup> Crush *et al* op cit note 46 at 41.

S2 (1)(j) reads: 'to regulate the influx of foreigners and residents in the Republic to- promote economic growth, inter alia, by- ensuring that businesses in the Republic may employ foreigners who are needed; enabling exceptionally skilled or qualified people to sojourn in the Republic; increasing skilled human resources in the Republic; where applicable, encouraging the training of citizens and residents by employers to reduce employers' dependence on foreigners' labour and promote the transfer of skills from foreigners to citizens and residents.'

For instance, the DHA may admit some skilled foreigners into the country in certain key areas through special skills work permit quotas. Each year, per the Immigration Act, the Minister of Home Affairs, in consultation with the Ministers of Labour and Trade and Industry, identify and categorise any scarcity and critical needs in areas of the economy where skilled foreign labour can be used. The Act then permits identified qualified foreigners to apply for a scarce/critical skills work permit from the nearest Home Affairs office. However, this application process is often too bureaucratic and tedious, and success is not guaranteed. Among the application requirements are a five-year minimum practical experience, an evaluation of the formal qualification by the South African Qualifications Authority, completion of an application form and a fee payment for consideration of the visa.<sup>110</sup>

In striving to protect the existing internal labour market and simultaneously address the country's skills shortage crisis, admission for employment purposes has been restricted to highly skilled foreign workers who have the preferred exceptional or scarce skills necessary to fill existing skills gaps. Section 38 of the Immigration Act, which specifically deals with employment conditions, provides that:

[n]o person shall employ- an illegal foreigner; a foreigner whose status does not authorize him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.<sup>111</sup>

Section 49(3) of the Act, which imposes criminal sanctions on employers who employ irregular migrants, further supplements this internal prohibition. In terms of s 49(3), 'anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year...' Thus, the Act expressly criminalises those who employ foreigners working without permits.

In consequence, the immigration policy (specifically ss 38 and 49) intentionally or unintentionally establishes unequal opportunity that has repercussions on the social protection and human capability of some foreign workers.<sup>112</sup> The Act greatly deters the admission of semi-

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<sup>110</sup> For detailed information on this, see <http://www.dha.gov.za/index.php/immigration-services/scarce-skills-work-permits>

<sup>111</sup> S 38 (1). It is a criminal offence to employ an authorised foreigner knowingly. The penalty of which is a fine or imprisonment not exceeding one year for first time offenders.

<sup>112</sup> The Labour Court has recognised that the prohibition and the subsequent criminalisation embedded in ss 38(1) and 49(3) respectively does not necessarily imply that an employment contract concluded with the relevant permit is

skilled, low-skilled, or unskilled workers. Incidentally, this negatively influences the livelihood of those affected foreign workers, particularly the unauthorised ones.

Looking at the evolution of South African immigration policy, the current South African discourse on international labour migration arguably still focuses on control and exclusion. The legal approach adopted by the South African government concerning labour migration is to close its borders and restrict the number of foreign workers admitted into the country.

Essentially, the Immigration Act is selective in the types of foreigners it allows entry to and proceeds to criminalise unauthorised foreign workers and employers who employ them. This immigration policing approach still primarily focuses on security, control and exclusion rather than management and development.<sup>113</sup> It does not offer any meaningful protection since it restricts access to available opportunities.<sup>114</sup> In fact, the legal barriers to migration instituted by the government have inadvertently produced the reverse of the desired outcome. That is, the immigration law regulating the entry, stay, and exit of foreigners so austere makes it too difficult for people to cross borders legally.<sup>115</sup> Consequently, clandestine migration is very much a component of the migration discourse in South Africa.

In light of the increasing clandestine nature of economic migration into the country, the Minister of Home Affairs proposed radical changes to the current immigration law that could potentially exacerbate an already difficult situation. The proposed changes, which took effect on 1 April 2014, are likely to have adverse effect on foreign nationals desiring to work in South Africa. The government is cancelling the previous exceptional skills work permits/visas that regulated the inflow of valuable foreign skills to thwart the skills shortage problem in the country. This means that individuals once considered exceptionally skilled are no longer

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invalid or an individual is guilty of an offence if he/she accepts work from or performs work for another without a valid work permit. However, these two provisions have been the foundations for the denial of labour rights to unauthorised foreign workers under the previous Labour Relations Act. See the *Discovery Health* case.

<sup>113</sup> Crush op cit note 70 at 28.

<sup>114</sup> Eric Cavallero 'An immigration-pressure model of global distributive justice' (2006) 5 *Politics Philosophy Economics* 97-127 at 98.

<sup>115</sup> Marius Olivier & Avinash Govindjee 'Labour rights and social protection of migrant workers: In search of a co-ordinated legal response' Paper presented at the Inaugural conference of the Labour Law Research Network (LLRN), Barcelona, Spain, 13-15 June 2013, 1-40 at 7.

welcomed in terms of the amended policy, unless declared ‘critical’ by the Department of Labour.<sup>116</sup>

However, policymakers have not downplayed the challenges associated with developing a proper framework for managing migration in the country. In an address at a colloquium on immigration, the incumbent Home Affairs Minister Malusi Gigaba recognised the need for further policy reform. In his address, he stated that ‘South Africa’s “outdated” laws will undergo an overhaul to accommodate economic migrants, among other changes.’<sup>117</sup> What these changes are or will look like remain unseen; nonetheless, the Minister seems to be taking positive steps in the right direction.

Policymakers may consider public policies that deny access of unauthorised migrants to essential rights, such as the current Immigration policy, a ‘deterrence measure to curb migration’.<sup>118</sup> Yet, experience suggests that restrictive regulation and policy vis-à-vis unauthorised migrants (such as the 2002 immigration law and the now implemented proposed amendments) are problematic in that they hamper the development of human capabilities.<sup>119</sup> South Africa will need a more progressive approach to international migration. That is to say, any future immigration policies or amendments will require a careful consideration and balance of a human rights regime as well as national development and interests.

In summary, the foregoing discussion corroborates that there is an existing labour migration policy or framework in South Africa. However, the nature of the South African labour migration policy in operation is quite restrictive. This observation is notable because scholars

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<sup>116</sup> See s 18(5) of the Immigration Amendment Act 13 of 2011.

<sup>117</sup> Karl Gernetzky ‘Gigaba vows immigration policy overhaul to meet economic goals’ *Business Day* 1 July 2015 available at <http://www.bdlive.co.za/national/2015/07/01/gigaba-vows-immigration-policy-overhaul-to-meet-economic-goals>, accessed 14 July 2015.

<sup>118</sup> Office of the High Commissioner for Human Rights (OHCHR) *Out of the shadow: a human rights perspective on irregular migration* (2012) 15.

<sup>119</sup> The 2002 Act has been amended by the Immigration Amendment Act 3 of 2007, the Immigration Amendment Act 13 of 2011 and the Immigration Regulations 2014 in GN 413 GG 37679 of 22 May 2014 to reflect recent developments; although s 49 has not changed. Risse op cit note 32 at 24.

propose a linear relationship between the nature of migration policies in operation and the legal position of different category of migrants in social security (protection) law.<sup>120</sup>

#### **4.4 In search of work: Social protection from a labour perspective**

An examination of the plight of unauthorised foreign workers is incomplete without considering the most crucial element of the labour migration process, work. Migrant workers, whether in a regular or irregular situation, cross international borders with the sole intention of seeking employment. The actual term ‘migrant workers’, those economically active migrant populace, suggests that these individuals engage in some kind of economic activity to support themselves and their dependants in destination countries. It is important to explore how they gain access to the labour market of host countries, and the conditions surrounding the employment they happen to get. A labour view of social protection thus argues that individuals derive work-related social protection and/or entitlements to social benefits primarily through labour market participation. Accordingly, authorised wage work is the main mechanism to justify people’s entitlements to vital work-related social protection in South Africa.

##### **4.4.1 Access to the domestic labour market**

Work is a vital component of the international labour migration phenomenon and usually the first barrier for irregular migrants. The ILO asserts that the majority of economically active people generally gain their livelihoods through income-generating activity, namely work.<sup>121</sup> The labour market, whether formal or informal, serves as the primary source of social protection.<sup>122</sup> Thus, labour market participation in the context of migration can be either a means to or a source of social protection in itself for all migrants, including unauthorised migrant workers.

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<sup>120</sup> Olivier & Govindjee op cit note 115 at 9. Also see Wouter van Ginneken ‘Social protection for migrant workers: National and international policy challenges’ (2013) 15(2) *European Journal of Social Security* 209 at 213; Gijsbert Vonk ‘Migration, social security and the law: Observations on the impact of migration policies upon the position of migrants in social security law in Europe’ (2001) available at [https://www.rug.nl/research/portal/files/14631876/Migration\\_and\\_social\\_security.pdf](https://www.rug.nl/research/portal/files/14631876/Migration_and_social_security.pdf), accessed 26 March 2015.

<sup>121</sup> ILO op cite note 2 at 25.

<sup>122</sup> Ibid.

As a form or source of social protection, work provides a measure of income security, and income security is a necessity for the wellbeing of individuals and their families.<sup>123</sup> Paid work gives a basic level of financial security and serves as a shield against unemployment and other work-related contingencies. The reality is that most employment-related contributory social protection is limited to those individuals who are or have been previously economically active.<sup>124</sup>

As a means to social protection, work is the main avenue through which workers gain access to rights and entitlements to employment-related benefits.<sup>125</sup> The opportunity or access to work is a step in providing protection against labour market risks such as loss of employment and ultimately against poverty.<sup>126</sup> The right of access to work is an extension of social protection perhaps because the employment relationship is a key reference for accessing other essential labour and social rights in most countries. The employment relationship helps determine the kind and degree of rights and duties employers have towards their workers.<sup>127</sup>

The discussion in the second part of this chapter already alludes to the fact that one of the ‘pull’ factors escalating the movement of economic migrants is the availability or perception of comparable well-paid work in host nations. However, the admission of foreign workers is one of the most contested public policy issues in most national contexts.<sup>128</sup> As previously indicated, a significant proportion of the world’s migrant population are working in host economies without legal authorisation.

Unlike their highly skilled and/or regular counterparts who are often better accepted,<sup>129</sup> host countries tend to deny unauthorised migrant workers access to the right to work from the

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid at 26.

<sup>125</sup> Francie Lund ‘Work-related social protection for informal workers’ (2012) 65(4) *International Social Security Review* 9 at 15.

<sup>126</sup> National Planning Commission (NPC) ‘Chapter 11: Social protection’ in *National Development Plan: Vision 2030* (2011) 327.

<sup>127</sup> Wickramasekara op cit note 8 at 254.

<sup>128</sup> Martin Ruhs ‘Immigration and labour market protectionism: Protecting local workers’ preferential access to the national labour market’ in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) 60.

<sup>129</sup> Van Ginneken op cit note 120 at 212.

onset by precluding them from participating in the host labour market.<sup>130</sup> Contemporary legal controls on foreign workers show that the prohibition of unauthorised work lies at the centre of the intersection of immigration and labour law.<sup>131</sup> The fundamental tension in national labour migration policy goals — expanding employers' access to migrant workers vis-à-vis protecting the employment and conditions of local workers — is evident in the South African context.<sup>132</sup>

In South Africa, like most globalised economies, public policy grants the opportunity to access employment in the domestic labour market only to citizens and long-term residents with permanent residence status. This 'right to preferential access' to the domestic labour market (a clear form of labour market protectionism) implies that some people are undoubtedly locked out of economic growth.<sup>133</sup> It follows that the current labour migration policy in South Africa envisages the admission of only skilled migrant workers for a defined and limited period. Consequently, the policy either overtly denies or extremely limits access to the labour market by all other would-be migrants, particularly the unauthorised, who do not possess the desired skills or qualifications.<sup>134</sup>

This attempt to protect the internal labour market against influx by 'undesirable' migrants indirectly facilitates clandestine migration. National law puts labour migration through a complex administrative procedure. South African admission policy requires foreign nationals to obtain a work permit before they take up or engage in any economic activity in the country. The acquisition of a work permit supposedly serves as both a residence permit and formal authorisation to take up employment. However, the procedure for obtaining a work permit is bureaucratic and costly. These legal hurdles undoubtedly affect the legal access to the labour market. In this regard, employment, or lack of access to, can reflect or perpetuate the inequality some migrant workers experience.

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<sup>130</sup> OHCHR op cit note 118 at 14.

<sup>131</sup> Graeme Orr 'Unauthorised workers: Labouring beneath the law?' in Christopher Arup (ed) *Labour law and labour market regulation: Essays on the construction, constitution and regulation of labour markets and work relationships* (2006) 685.

<sup>132</sup> Ruhs op cit note 128 at 61.

<sup>133</sup> Ibid at 62.

<sup>134</sup> Access to the South African labour market, and by extension the full realisation of the right to work, is restricted to citizens, permanent residents, refugees and some temporary migrants with the desired 'critical skills' needed to bridge areas of acute shortages in the economy.

Social protection for this class of workers is about more than income security; it is about giving people access to the dignity of being productive as they are willing and able to work.<sup>135</sup> For that reason, labour market accessibility — thus the right of access to work — is one of the essential components of social protection that can have great consequences for the overall welfare of unauthorised foreign workers. It is therefore necessary to link these workers to opportunities for economic activities.

The right to work in this respect is more to do with access to decent work.<sup>136</sup> This is to mean:

opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.<sup>137</sup>

Access to or opportunities for decent work or economic activities will improve their capabilities, which will in turn reduce the likelihood of their reliance on social assistance mechanism, which will ultimately reduce the probability of poverty for these people.<sup>138</sup>

#### **4.4.2 Working conditions of migrant workers**

Generally, irregular migrant workers, by law, have little to no access to labour markets, given their precarious legal position in the host country. In fact, most regimes of host nations prohibit them from taking up wage labour. In reality, however, some migrants tend to engage in certain areas of the host economy in spite of known legal prohibition.<sup>139</sup> Restrictive and criminalising immigration policy negatively affects the ability of migrants to find any decent wage work, let

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<sup>135</sup> Kate Philips 'Towards a right to work: The rationale for an employment guarantee in South Africa' (2010) available at <http://www.tips.org.za/publication/tips-policy-brief-towards-right-work-rationale-employment-guarantee-south-africa>, accessed 26 March 2015.

<sup>136</sup> The ILO Decent Work Agenda proposes four strategic objectives (i.e. promoting employment, guaranteeing rights at work, extending social protection, and promoting social dialogue), with gender equality as a crosscutting objective.

<sup>137</sup> International Labour Organisation 'Decent work' (2015) available at <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>, accessed 4 August 2015.

<sup>138</sup> Antonette Lombard 'The implementation of the white paper for social welfare: A ten-year review' (2008) 20(2) *The Social Work Practitioner-Researcher* 154 at 161.

<sup>139</sup> OHCHR op cit note 118 at 14.

alone formal well-paid employment.<sup>140</sup> This is particularly true for irregular migrants who, because of their lack of legal status, take any kind of work they can find, often to their detriment.

As observed by Standing, the very nature of contemporary migration is ‘intensifying insecurities and putting many into precarious circumstances’.<sup>141</sup> The plight of irregular migrant workers is concerning, as the increasing transformation of the labour market can be a real source of deleterious employment conditions.<sup>142</sup> Unauthorised migrant workers are highly susceptible to excessive abuse and exploitation by employers and corrupt bureaucrats owing to their presence and activities being in violation of established immigration and labour laws.<sup>143</sup> Unauthorised women migrant workers, notably female domestic migrant workers, are doubly disadvantaged as migrant workers and as women.<sup>144</sup>

Aside from the common labour exploitation, female migrants find themselves in low-wage sectors lacking in basic protection and are more susceptible to trafficking, violence, and sexual exploitation by unscrupulous employers.<sup>145</sup> Yet, unemployment can be a real source of risk that can affect every facet of their lives, not just economically. Increased susceptibility to unemployment is likely to exacerbate their overall economic vulnerability, as poverty is inevitable.

Globally the informal employment argument is, for the most part, accurate for this group, as unauthorised migrants that do work are mostly doing informal work. Research shows that most migrant workers, notably the low skilled, work in sectors where employment conditions are overall flexible.<sup>146</sup> These sectors include but are not limited to agriculture, construction, domestic work, and hospitality. Therefore, those unauthorised non-nationals who find work are most likely in irregular wage employment in service as street vendors, casual labourers, or domestic workers,

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<sup>140</sup> Aderito Machava & Tara Polzer ‘Bad work if you can get it: Cycles of exploitability among Mozambican immigrants in South African labour markets’ (2006) 36(2) *Africanus* 166 at 170.

<sup>141</sup> Guy Standing ‘Migrants: Victims, Villains or Heroes’ in *The Precariat: The new Dangerous Class* (2011) 93.

<sup>142</sup> Consortium for Refugees and Migrants in South Africa (CoRMSA) ‘Protecting Refugees, Asylum Seekers and Immigrants in South Africa during 2010’ (2011) 99.

<sup>143</sup> Wickramasekara op cit note 8 at 256.

<sup>144</sup> ILO op cit note 13 at 94.

<sup>145</sup> Gloria Moreno Fontes Chammartin ‘The feminization of international migration’ in *Migrant workers Labour Education* 2002/4 No. 129 at 45; Wickramasekara op cit note 8 at 257.

<sup>146</sup> Van Ginneken op cit note 120 at 212.

out of reach of the states' regulation.<sup>147</sup> These sectors in the informal economy tend to be located at the periphery of a highly regulated formal economy. Moreover, these informal sectors of the labour market are either entirely 'not covered by social security' or often 'compliance with social security laws is poorly enforced'.<sup>148</sup> Thus, affirming the notion that conventional work-related social security provisions are limited to workers in the formal economy.<sup>149</sup>

In South Africa specifically, the levels of formal employment are rather low.<sup>150</sup> This translates into the exclusion of a large proportion of the population from participation. Many migrant workers (with the exception of the highly skilled or permanent residents) in South Africa are, in reality, informal workers operating in under-regulated work environments.<sup>151</sup> Informal workers tend to work in places or sectors of the economy where labour standards are often under-regulated or unregulated entirely, and access to social security and social protection is inadequate. Studies reveal that unauthorised migrants tend to be concentrated in precarious jobs in sectors where wages are sub-minimum and exploitation high.<sup>152</sup> These exploitative and labour-intensive sectors include mining, commercial agriculture, construction, hospitality, and security.<sup>153</sup> In fact, the agricultural sector leads as the lowest-paying sectors in the country.<sup>154</sup>

In these so-called 'migrant sectors' of the economy, employment arrangements are often atypical.<sup>155</sup> Unauthorised migrants tend to engage in so-called 3-D jobs that local workers would prefer to avoid. These jobs are not only mundane, but also dirty, dangerous and degrading,<sup>156</sup> and those who do them tend to accept or even suffer under deleterious working and living conditions

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<sup>147</sup> Lund op cit note 125 at 10.

<sup>148</sup> E Strydom (ed) *Essential employment discrimination law* (2004)109.

<sup>149</sup> Ibid.

<sup>150</sup> NPC op cit note 126 at 325.

<sup>151</sup> Research suggests that the returns poor people get from participating or engaging in economic activity in the informal sector is often too low to lift them out of poverty.

<sup>152</sup> Crush *et al* op cit note 46 at 13.

<sup>153</sup> CoRMSA op cit note 142 at 98.

<sup>154</sup> Internal Labour Organization 'Labour migration to South Africa in the 1990s' (1998) *Policy Paper Series No. 4* at 27.

<sup>155</sup> Atypical employment generally refers to any type of work that is not on a permanent or full-time basis. It covers a range of workers engaged on a part-time or fixed-contract basis.

<sup>156</sup> Toby Shelley *Exploited: Migrant labour in the new global economy* (2007) at 137.

for fear of detection and possible prosecution for immigration violations.<sup>157</sup> In that line of work, income is unreliable, jobs are neither regular nor secure, conditions are perilous, and the probability of poverty is relentless.

Reports, albeit anecdotal, suggest that migrant workers experience poorer earnings and working conditions compared to their national counterparts in so-called migrant-concentrated sectors such as construction, agriculture, and hotel.<sup>158</sup> Whatever the circumstance, these people are available and willing to engage economically; yet the law prohibits them from taking on available decent work that offers some level of protection against future risks. In this respect, laws that bar or exclude unauthorised foreign workers from employment (the right to work), by imposing criminal sanctions on employers who hire them, can have serious subordinating impact on their livelihood.<sup>159</sup>

Furthermore, South Africa has no specific labour policies or framework for migrant workers. However, the general national employment legislation - namely, the LRA, the EEA and the Basic Conditions of Employment Act 75 of 1997 (BCEA) - can regulate the working conditions of migrant workers as they apply to all workers. In spite of this, these statutes rely heavily on the definition of 'employee' in granting work-related protection to migrants. In South African employment law, an 'employee' is 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration and any other person who in any manner assists in carrying on or conducting the business of the employer'.<sup>160</sup>

The common-law view and much of the early jurisprudence concerned with interpreting the definition of 'employee' had always presumed a valid employment contract as an eligibility criterion.<sup>161</sup> By interpreting the definition of 'employee' through the lens of contract law, jurisprudence categorically denied unauthorised foreign workers from the protection of South African employment law.<sup>162</sup> The blanket omission of the protection rights of irregular migrant

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<sup>157</sup> Dupper op cit note 81 at 220.

<sup>158</sup> ILO op cit note 154 at 29.

<sup>159</sup> Fiss op cit note 77.

<sup>160</sup> See s 213 of the LRA, s 1 of the BCEA and the s 1 of the EEA respectively.

<sup>161</sup> Supra note 83 para 36.

<sup>162</sup> DJ Meyer 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 831-849 at 834.

workers under national labour law pivoted on the notion that any employment contract entered into with an undocumented foreign worker was illegal (per s 38 of the Immigration Act), and subsequently rendered null and void. This meant that the law systematically excluded and denied unauthorised foreign workers from any labour protection.<sup>163</sup>

The legal prohibition on irregular migrants from entering into employment arrangements is not unique to South Africa. In most jurisdictions, the state and national employers are not obliged to offer work to unauthorised migrants. However, unauthorised migrants, when employed, should acquire the labour rights ensuing from the employment relationship.<sup>164</sup> This is similar to the position taken in *Discovery Health Ltd v CCMA & others*.<sup>165</sup> In this judgment, the Labour Court made two important findings that changed the position of migrant workers.<sup>166</sup>

First, the court held that the intention of the legislature was to deter and penalise employers who breach ss 38(1) and 49(3) of the Immigration Act, not to invalidate broadly any concluded employment contract where one of the parties commits an offence.<sup>167</sup> Secondly, the court held that the definition of ‘employee’ in the LRA is not ‘necessarily rooted in a contract of employment’, because a ‘contract of employment is not the sole ticket for admission into the golden circle reserved for “employees”’.<sup>168</sup> Since the definition of ‘employee’ is not solely dependent on the existence of an employment contract,<sup>169</sup> foreign nationals employed without possession of valid work permits acquire ‘employee’ status and the necessary labour rights flowing from that status.

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<sup>163</sup> See the following labour matter: *Georgieva-Deyanova v Craighall Spar* (2004) 9 BALR 1143 (CCMA), *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA) and *Vundla v Millies Fashions* (2003) 24 ILJ 462 (CCMA).

<sup>164</sup> Inter-American Court of Human Rights ‘Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (requested by the United Mexican States) OC-18/03’ paras 134-36, available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf), accessed 10 December 2015.

<sup>165</sup> (2008) 29 ILJ 1480 (LC), hereafter *Discovery Health*. See also *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC) where the court held that irregular migrants may rely on the right not to be unfairly dismissed.

<sup>166</sup> Andre van Niekerk, Nicola Smit, Marylyn Christianson, Marie McGregor & Stefan van Eck (eds) *Law@work* (2015) 79.

<sup>167</sup> *Supra* note 84 para 33.

<sup>168</sup> *Ibid* para 51.

<sup>169</sup> *Ibid* para 50.

Although it could be argued that this part of the judgment is possibly an *obiter dictum*,<sup>170</sup> it is consistent with similar sentiments that the Labour Court expressed.<sup>171</sup> In summation, *Discovery Health* not only usurped the common-law narrow understanding of employment to include irregular migrant workers in the ambit of labour law and within the scope of protection of s 23 of the Constitution, it also espoused similar progressive jurisprudence of the Inter-American Court on the legal status and rights of irregular migrant workers.<sup>172</sup>

In *Kylie v CCMA and Others*,<sup>173</sup> the LAC discounted the common-law understanding of employment and proceeded to extend labour protection to workers engaged in unlawful activities or illegal work by widening the definition of ‘employee’ to include a sex worker. This may have strong implications for irregular migrant workers because it could be argued that irregular migrants are often engaged in ‘illegal’ work owing to legislative prohibitions.

The *Kylie* and *Discovery Health* cases are similar in the sense that both judgments concerned the question of whether a contract between an employer and an employee must be valid if the party rendering service is to be recognised as an employee under employment law. However, where *Kylie* relates to work that is illegal because of the nature of the industry, *Discovery Health* concerns the performance of lawful work where the status of the worker is illegal. Both judgments strongly suggest that people engaged in employment relationships, with or without a formal contract of employment, have a right to employment protection. Consequently, migrant workers, including the unauthorised, would then have the same recourse to justice in labour disputes or discriminatory labour matters as South African citizens.<sup>174</sup> However, the impact of both the *Discovery Health* and *Kylie* judgments on social security law remains unclear, as not many cases concerning the statuses of migrant workers have been adjudicated utilising the principles enunciated in these judgments.<sup>175</sup>

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<sup>170</sup> Additional reasoning and/or comments and therefore not binding.

<sup>171</sup> See for example *Rumbles v KwaBat Marketing* (2003) 24 ILJ 1587 (LC) and *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC).

<sup>172</sup> See the Inter-American Court of Human Rights *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03.

<sup>173</sup> 31 ILJ 1600 (LAC).

<sup>174</sup> CoRMSA op cit note 142 at 98.

<sup>175</sup> The impact of the *Discovery Health* judgment on social security is explored again in chapter 6 of the study.

Although irregular migrants are supposed to have equal labour rights, this is not true in practice. Like in most countries, migrant workers in South Africa often engage in jobs that are considered ‘mundane, dirty, degrading or even dangerous’ by the locals who reject them.<sup>176</sup> Typically, these jobs constitute appalling conditions of employment that border on slavery, since they involve longer working hours, poor pay, and various forms of discrimination such as xenophobic and abusive treatments.<sup>177</sup> These vulnerabilities, among others, have led to debates about the rights of migrant workers generally and unauthorised migrants specifically.

Economic opportunity afforded through the labour market and/or the availability of work is important in determining the living conditions of foreign nationals. An examination of the protection position of migrants through the lenses of work exposes an interplay of immigration and labour laws that is not always harmonious. A rigid immigration policy that strictly regulates the absorption of foreign human resource into the domestic labour market may be favourable in a country (such as South Africa) where the majority of the population (and the poorest) are without work.<sup>178</sup> Despite the appeal, overly restrictive control-centred immigration policing is not the solution. It has the potential to exacerbate an already delicate situation. In short, ‘...criminalising aliens creates a marginalised underclass who is easily open to abuse. Devoid of state protection, and denied any rights and entitlements, aliens look for jobs to survive. Because of their illegal status they are forced to accept employment whatever the payment, risk, physical demand or working hours involved.’<sup>179</sup>

#### **4.5 Social protection through a human rights lens**

Advocacy or defence for a rights-based approach to social protection will be incomplete without explicating and reiterating the vulnerabilities associated with migration, particularly the clandestine kind. The premise is that the plight of unauthorised foreign workers is inherently a human rights issue brought about by vulnerable situations attached to their immigration status. In

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<sup>176</sup> Shelley op cit note 156.

<sup>177</sup> International Labour Organization *Facts on labour migration* (2006) 1.

<sup>178</sup> NPC op cit note 126 at 325. Current evidence suggests that South Africa has one of the highest unemployment rates in the world.

<sup>179</sup> Maxine Reitzes ‘Alien issues’ (1994) 12(1) *Indicator South Africa* 7 at 9.

short, illegality is perhaps the most significant factor or source of vulnerability for unauthorised migrants in destination countries.<sup>180</sup>

Globally, it is recognised that migrants, particularly the irregular, as a category of people are most vulnerable and in need of protection.<sup>181</sup> All migrant workers encounter various obstacles in crossing international borders and more institutional hurdles once in destination countries, be it formal exclusion from participation in political life or access to legal institutions and other social and economic benefits.<sup>182</sup> These hardships may stem from being outside their home country and consequently devoid of its legal and social protection.

However, those migrants who are in an irregular situation are comparatively worse off than other categories of migrants. They often find themselves in unwelcoming lands, living on the margins of society and unable to assert their rights either because they are ignorant of the laws and practices of the land or simply out of fear of detection.<sup>183</sup> National policies do not permit them to take up employment; and when they do, they are engaged in unfavourable conditions compared to other workers.<sup>184</sup> In addition, social protection systems in host nations tend to exclude foreign nationals either wholly or partially. This is particularly true for migrants in an irregular situation. In short, the above issues characterise migrants as a vulnerable group. The vulnerabilities associated with unauthorised migrants are partly due to a lack of or ineffective legal response to the labour and social rights of these workers in host nations, as well as a lack of political commitment on the part of the destination government or society.<sup>185</sup>

In South Africa, the vulnerability of foreign nationals (migrants) is very much recognised. The Constitutional Court has consistently reiterated the vulnerability of foreign nationals in its equality jurisprudence. As a category of people, foreign nationals are extremely vulnerable because they are a ‘minority group with little political muscle in all countries’.<sup>186</sup> As

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<sup>180</sup> Sabates-Wheeler & Waite op cit note 86 at 27.

<sup>181</sup> Chammartin op cit note 145 at 26. Also, see for example, the comments of the constitutional Court in *Khosa* para 74 and in *Larbi-Odam* paras 19 and 23.

<sup>182</sup> Rachel Sabates-Wheeler & Ian Macauslan ‘Migration and social protection: Exposing problems of access’ (2007) 50(4) *Development* 26 at 27. See also NPC op cit note 126 at 325.

<sup>183</sup> Olivier & Govindjee op cit note 115 at 11.

<sup>184</sup> *Supra* note 164 para 136.

<sup>185</sup> Sabates-Wheeler & Macauslan op cit note 182 at 27.

<sup>186</sup> *Larbi-Odam* paras 19 and 23, *Khosa* para 74 and *Discovery Health* para 46.

in Canada, South Africa recognises foreign nationals as ‘a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending”’.<sup>187</sup> This characterisation, though mainly relating to regular migrants, is pertinent for unauthorised migrants too.

In spite of the recognition of the vulnerable condition of migrants generally and in South Africa particularly, unauthorised migrants are amongst the most exposed to human rights abuses. South African migration policy excessively focuses on restricting access and regulating movement and does not give much attention to protecting the actual human rights of the individuals involved in the process.<sup>188</sup> Thus the general treatment of migrant workers in the country, particularly those in an irregular situation, points to a broader human rights issue. This then raises two concerns regarding the human rights situation of this group of people, namely their economic vulnerability and social exclusion.

#### **4.5.1 Economic vulnerability**

Migrant workers, as a category of workers, are more often than not highly susceptible to diverse forms of marginalisation, discrimination, and human rights abuses in host nations.<sup>189</sup> Most of the exploitation migrants encounter happen at work. While this can be true for even regular migrants, who tend to be readily accepted by host economies, for the many migrants who find themselves at the bottom of the employment ladder, owing to their lack of permission to work, the situation is often far worse.<sup>190</sup> The economic difficulties unauthorised migrant workers face in host nations are, in large part, ascribed to the illegal nature of their entry, presence, and/or employment. The fact of the matter is that their precarious legal position does not allow for adequate integration into the labour market of host countries.

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<sup>187</sup> *Larbi-Odam* para 19

<sup>188</sup> Olivier & Dupper op cit note 85 at 8.

<sup>189</sup> International Labour Office *Towards a fair deal for migrant workers in the global economy* (2004) para 195 at 60.

<sup>190</sup> Dupper op cit note 81 at 219.

Reported instances of the maltreatment and exclusion of foreign nationals are particularly severe for those who enter and work without formal permission from the host authority.<sup>191</sup> Unauthorised foreign workers, as a group of migrants, are perhaps the most vulnerable by virtue of their precarious legal position.<sup>192</sup> Irregular migrants, because of the illegality of their presence, find themselves in a weak bargaining position.<sup>193</sup> Consequently, they are often at risk of exploitation and exposure to dangerous work conditions, only to receive unequal — lower, or in some cases no — wages compared to local workers or their legal counterparts for the same work.<sup>194</sup> More often than not, their legal status (or lack thereof) makes it difficult for them to assert their rights, even if they have knowledge of it them, or waive their rights entirely to maintain as low a profile as possible.<sup>195</sup> To put it succinctly, ‘workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers’, and that ‘the human problems involved in migration are even more serious in the case of irregular migration’.<sup>196</sup>

Locally, speculation suggests that there are a significant proportion of foreign nationals operating in the South African labour market without formal authorisation (without work visas). These migrants are engaged in ‘illegal’ jobs, receiving ‘illegal’ wages without benefits. Their lack of legal recognition further exacerbates their vulnerabilities as local workers often demonise these migrants and make them scapegoats for various existing social and economic problems.<sup>197</sup> In this respect, local workers often see migrants as, and in some cases blame them for, driving down wages, weakening their bargaining power, and/or intensifying an already acute

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<sup>191</sup> Laurie Berg ‘At the border and between the cracks: The precarious position of irregular migrant workers under international human rights law’ (2007) 8 *Melbourne Journal of International Law* 1 at 6.

<sup>192</sup> OHCHR op cit note 118 at 2.

<sup>193</sup> Sabates-Wheeler & Waite op cit note 86 at 28.

<sup>194</sup> OHCHR op cit note 118 at 14.

<sup>195</sup> Laura Jakubowski ‘International Commerce and Undocumented Workers: Using Trade to Secure Labor Rights’ (2007) 14(2) *Indiana Journal of Global Legal Studies* 509 at 513.

<sup>196</sup> Preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>197</sup> Olivier op cit note 87 at 129.

unemployment situation. Popular discourse in South Africa suggests that migrant workers ‘steal’ the jobs of locals.<sup>198</sup>

Despite the obvious appeal of irregular migrants to the local labour market, the erroneous assumption that unauthorised migrant workers should not be entitled to human rights protection, simply because they are not legally entitled to be in the country, dominates public discourse.<sup>199</sup> That is, populist views maintain that immigration contraventions abrogate any obligation for human rights protection. This sentiment resonates in different ways across different strata of the South African society, from grassroots to policy level.

#### **4.5.2 Social exclusion**

What happens at the workplace often reproduces on a bigger scale at the larger societal level. International migrants, both the legal and irregular, tend to live in permanent insecurity in host societies where the police and other community members often harass them. Those migrants entering and/or working without authorisation are most likely to encounter high levels of exploitation, human right abuses, or even forced labour.<sup>200</sup> Additionally, they are likely to experience stigmatisation and discrimination because their ‘illegal’ status is often associated with criminality.<sup>201</sup> The media often perpetuates and legitimises the criminalisation and demonisation of irregular migrants.

According to the Platform for International Cooperation on Undocumented Migrants (PICUM), ‘undocumented migrants residing in Europe are socially excluded and very vulnerable to marginalisation’.<sup>202</sup> The social exclusion and marginalisation of (unauthorised) migrants is not unique to Europe. Locally, anti-migrant or xenophobic sentiments and rhetoric and social exclusion of non-nationals are very much a feature of South African national culture. In South Africa, the social marginalisation of foreign nationals is more apparent in the treatment of ‘illegal foreigners’. South African society is highly intolerant of non-nationals and often makes

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<sup>198</sup> Vic Esselaar & Christoph Garbers ‘Migrant workers’ in Strydom *et al Essential social security law* (2006) 286.

<sup>199</sup> OHCHR op cit note 118 at 4.

<sup>200</sup> ILO op cit note 177 at 1.

<sup>201</sup> Sabates-Wheeler & Waite op cit note 86 at 28.

<sup>202</sup> ILO op cit note 189 para 197 at 61.

foreigners scapegoats for local social and economic problems.<sup>203</sup> For instance, the arrest of 35 protesting foreign workers during the 2012 De Doorns farm workers' strike is indicative of tension between foreign nationals and locals.<sup>204</sup> In fact, South Africa, unlike the United States, is unsuccessful at assimilating immigrants into its society.

It could be argued that the social tensions that often explode into the savage attacks, killings and mass displacement of many foreigners living in various South African townships is indicative of a broader societal resentment against migrants.<sup>205</sup> The sporadic surge of xenophobic acts of violence could perhaps be a physical manifestation of the country's harsh immigration discourse, hostile domestic laws, and political rhetoric around foreign nationals. Xenophobic violence could also be testimony of the government's failings to manage migration effectively.<sup>206</sup> In a society where xenophobic or anti-migrant sentiments and rhetoric are ubiquitous, the plight of this category of migrants warrants actual attention.

One cannot view the social plights of migrants in isolation. The reality is that there is interplay between immigration and labour (and social security) laws, which does not need to be necessarily antagonistic. The conflict tends to arise when policymakers give precedence to immigration laws over labour and social security laws.<sup>207</sup> Previous discussion already alludes to the fact that the nature of migration policies in operation directly affects the legal position and treatment of migrants. In the case of unauthorised migrants, their irregular immigration status gives them a weak legal position, which relegates them to a weaker social position and results in access only to work in the informal sector endemic with abuse and exploitation.<sup>208</sup>

Accordingly, 'when migration policies are made without attention to vulnerability,

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<sup>203</sup> Jeff Handmaker & Jennifer Parsley 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refugee* 40 at 44.

<sup>204</sup> Mncedisi Nobala 'De Doorns Farm Workers' Strike' (2012) 11(43) *Umsebenzi Online*, available at <http://www.sacp.org.za/main.php?ID=3800>, accessed 10 December 2015.

<sup>205</sup> In May 2008, there were country-wide xenophobic attacks that saw foreign-owned shops looted, some foreigners killed, others seriously injured, and many more displaced. This xenophobic violence spiked once again in April 2015.

<sup>206</sup> Ann Bernstein 'Managing migration in South Africa's national interest: Lessons from international experience' (2009) *Centre for Development and Enterprise (CDE) Round Table Number 12* at 2.

<sup>207</sup> Olivier & Dupper op cit note 85 at 8.

<sup>208</sup> Van Ginneken op cit note 120 at 216.

marginalisation and discrimination, then millions of vulnerable migrants become cheap, disposable labour, scape goats for xenophobic rhetoric and policy, and casualties in an ill-defined war against irregular migration.<sup>209</sup> South African migration policy overly focuses on security and population control, which tends to criminalise migrants and ultimately promote xenophobia.

Social protection in this instance becomes a necessary (employment-related) human right.<sup>210</sup> Yet, social security systems of host nations are often exclusionary to the detriment of irregular migrant workers.<sup>211</sup> In short, unequal opportunity at the onset of the process (in this case in immigration law) sets the tone for differential treatment later on in the process (labour and social security laws) and the eventual outcome (social integration).

Thus, the criminalisation of the employment of unauthorised migrants under the immigration policy undermines the potential rights owed to them in labour law and those possibly available to them in social security law.<sup>212</sup> If these foreigners are denied the opportunity to work (a necessary element in accessing benefits), it is unsurprising that their ability to access work-related social protection is hindered, in addition to being ostracised by the larger society. There is therefore a strong need for social policies that protect all migrants against hostile economic and social conditions.

#### **4.6 Socio-political pressures influencing the legal position of migrants**

Examination of the South African legal framework regulating labour migration seemingly reaffirms the notion that restrictive national migration policies affect the legal position of different groups of migrants in social protection, with unauthorised migrants enjoying fewer rights.<sup>213</sup> In this regard, it is necessary to explore some of the prevailing policy and structural debates around the socio-political pressures affecting the treatment of foreign nationals in order to ascertain how and why immigration policies can influence the level of domestic protection accessible to these foreign workers.

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<sup>209</sup> OHCHR op cit note 118 at 2.

<sup>210</sup> ILO op cit note 2 at 2.

<sup>211</sup> Ibid.

<sup>212</sup> CoRMSA op cit note 140 at 99.

<sup>213</sup> Van Ginneken op cit note 120 at 213; Vonk op cit note 120.

#### 4.6.1 A structural argument

Legal policies and practices that exclude unauthorised migrants from certain basic social rights in host countries seemingly infer that these people have themselves to blame for their precarious position, without considering larger structural forces that stimulate clandestine migration itself.<sup>214</sup> Proponents of these restrictive legal policies and practices seem to imply that unauthorised migrants are voluntary transgressors of immigration and administrative rules because they knowingly enter without the state's consent. According to these thinkers, migrants who enter clandestinely or become irregular in the host country are non-party to the shared national social contract that binds local community members.<sup>215</sup> Consequently, they forfeit any benefits of local community membership because they crossed a national boundary without that state's official authorisation.<sup>216</sup>

The main premise of this argument is that a state's primary sovereign responsibility is towards its citizens, not necessarily to the nationals of another country, especially if they are unauthorised. Therefore, states must not feel the need to offer these foreigners anything beyond the minimum protection, if even that. For that reason, those who hold these protectionist views regard rights extension to unauthorised foreigners as encouraging or rewarding them for violating immigration rules. Consequently, the natural solution to the supposed immigration crisis will be to implement more punitive border control measures to dissuade future 'illegal' foreigners, halt further clandestine activity, and subsequently eliminate the probable exploitation that comes with it.<sup>217</sup> The premise is that if policy actively prohibits these foreigners from clandestine entry or operation in the country in the first instance, they will be safe from any imminent exploitation.

It could be argued that the South African government may have had this view in mind when developing the current immigration policy. As evident from one of the stated objective in the preamble of the Immigration Act of 2002, South African migration management is about

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<sup>214</sup> Ockert Dupper 'The human rights of (irregular) migrants: An international, regional and South African perspective (Part 2)' (2011) 3(1) *International Journal of Social Security and Workers Compensation* 55 at 75.

<sup>215</sup> Linda Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the international migrant workers convention' (1991) 25(4) *International Migration Review* 737 at 749.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid* at 750.

instituting ‘a system of immigration control which ensures that...border monitoring is strengthened to ensure that the borders of the Republic do not remain porous and irregular immigration through them may be effectively detected, reduced and deterred’.

Granted the above presupposition sounds valid and rational at face value, it is not entirely accurate. Those who are in favour of advancing the rights of unauthorised migrants refute these protectionist and victim blaming arguments by offering a more pragmatic argument based on structural analyses of clandestine migration flows. For the pragmatists, and the position taken in this study, unauthorised migrants are not mere voluntary transgressors of state immigration laws who are undeserving of legal protection.<sup>218</sup> Rather they are victims of a structural phenomenon that places them in a position of extreme vulnerability.

The counter-argument is that regardless of the seemingly open opposition to clandestine migration adopted by policymakers by means of specialised policies that seek to limit the entry and other rights given to unauthorised migrant workers, local governments and employers tend to subtly allow or even promote clandestine cross-border movements.<sup>219</sup> The core of the argument is that while these immigration stakeholders take the position of being against clandestine migration, they actually encourage the phenomenon. They do so in two subtle ways.

First, governments fail to control their national borders effectively. It is common-cause that the international legal principle of state territorial sovereignty accords nation-states the sovereign prerogative, albeit within limitations, to control its physical borders.<sup>220</sup> This territorial discretionary power includes the right to regulate and manage the entry and expulsion of foreign nationals into and within their lands.<sup>221</sup> The reason being, ‘if a state is not free to decide who will enter its territory according to its own criteria and to regulate the conditions of such ingress, it is severely impeded in its function as the governing authority of the territory in question’.<sup>222</sup>

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<sup>218</sup> Sarah Paoletti ‘Human Rights for All Workers: The Emergence of Protection for Unauthorized Workers in the Inter-American Human Rights System’ (2004) 12(1) *Human Rights Brief* 5, 5.

<sup>219</sup> Stephen Castels and Alastair Davidson *Citizenship and Migration: Globalization and the Politics of Belonging* (2000) 73.

<sup>220</sup> Bosniak op cit note 215 at 742.

<sup>221</sup> See article 79 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>222</sup> Bosniak op cit note 215 at 743.

However, in practice, states often fail to exercise said territorial right. Permeable national borders are indicative of such failures on the part of states to exert their territorial powers to control the admission of foreigners into their land.<sup>223</sup> Opponents of legal policies and practices that marginalise unauthorised migrant workers consider the presence of permeable borders as a silent invitation to enter by governments.<sup>224</sup> The common-sense reason here is that leaky borders will always be attractive to people who are looking to flee from unfavourable conditions (usually economic and political instability) in their home nations.<sup>225</sup> Porous borders make it easy for people to enter hassle-free and bypass rigid formal methods or controlled borders into the country.

This argument is quite compelling in the South African context. At a first glance, the South African government is seemingly dedicated to combating clandestine migration.<sup>226</sup> In fact, South African policies openly declare ‘war’ on the issue. One of the aims of the Immigration Act is to ensure that ‘*border* monitoring is strengthened to ensure that the *borders* of the *Republic* do not remain porous and clandestine immigration through them may be effectively detected, reduced, and deterred’<sup>227</sup> (emphasis in original). Yet, South African borders — particularly the border shared with Zimbabwe<sup>228</sup> — have become undeniably porous for irregular migrants as people commonly cross without going through immigration posts.<sup>229</sup> The failure of the South African government to use its ‘immigration-regulatory powers’ to regulate or manage its borders effectively could be seen by some people as a silent offer to irregular migrants to enter.

Secondly, those belonging to this pragmatic school of thought not only see governments as negligently permitting clandestine migration by leaving the borders porous but also consider these authorities as ungracious hosts. The line of reasoning is that host countries appreciate and readily accept the physical labour offered by non-nationals, particularly those low- and semi-skilled ones, but are unwilling to increase their admission quotas for the legal entry of this

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<sup>223</sup> Ibid at 737.

<sup>224</sup> Berg op cit note 191 at 8.

<sup>225</sup> Schachter op cit note 48 at 6.

<sup>226</sup> See preamble as well as ss 2(1)(j) and 38(1) of the Immigration Act 13 of 2002.

<sup>227</sup> See preamble (e) of the Act.

<sup>228</sup> This porous post is similar to the southern border shared between the United States and Mexico.

<sup>229</sup> Cohen op cit note 36 at 184.

category of workers or accept responsibility for their labour rights.<sup>230</sup> Thus, destination countries quite liberally admit skilled migrants, but often tightly control the number of legally issued visas for low and semi-skilled foreign workers.<sup>231</sup>

This is particularly evident in the South African context, where admission policy facilitates the migration of skilled migrants and reasonably assures their rights, but rarely does so for the low and semi-skilled. It is therefore unsurprising that some foreigners end up entering and working in violation of often-stringent immigration laws. That is not to suggest that unauthorised migrants willingly refuse to conform to immigration laws (or voluntarily enter illegally); rather, they fail to conform because the immigration processes are often too bureaucratic and costly.<sup>232</sup> To enjoy the protection of labour and social security laws, foreigners intending to engage in economic activities in the South Africa must obtain permission from the Department of Home Affairs (DHA) in the form of a work permit.<sup>233</sup> It suffices to say that many people bypass the DHA process altogether. Some proceed to engage in economic activities without legal consent, while others obtain fraudulent documents in order to get work. Thus, administrative difficulties in obtaining authorisation make it simply too demanding for some migrants to obtain the required legal status.

The argument goes further in positing that the presence of irregular migrants is in fact a profitable necessity to some national economies. The fact of the matter is that there is a global competition for cheap sources of labour because of globalisation.<sup>234</sup> Therefore, the irregular migrant workers pool, often dominated by low-skilled foreign workers, provides a cheaper and flexible workforce alternative to what would otherwise be a burden on the payrolls of many employers in the local economy.<sup>235</sup>

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<sup>230</sup> Lyon op cit note 79 at 552.

<sup>231</sup> Wickramasekara op cit note 7 at 252.

<sup>232</sup> CM Rogerson & JM Rogerson 'Dealing in Scarce Skills: Employer Responses to the Brain Drain in South Africa' in McDonald D and Crush J (eds) *Destinations Unknown: Perspectives on the Brain Drain in Southern Africa* (2002) 73.

<sup>233</sup> See s 19 of the Immigration Act.

<sup>234</sup> Wickramasekara op cit note 8 at 253.

<sup>235</sup> Neil Friedman 'A human rights approach to the labor rights of undocumented workers' (1986) 74(5) *California Law Review* 1741 at 1743; Standing op cit note 141 at 103.

In United States for instance, irregular migrants constitute a part of the low-skilled workforce, where they contribute the successes of labour-intensive industries like agriculture, construction, domestic work, restaurants, and cleaning services.<sup>236</sup> In this respect, host governments and employers cannot simply profit from the labour of these workers without affording them certain fundamental rights and protection.<sup>237</sup> The rules of hospitality require that these governments play the part of gracious hosts and treat their guests with courtesy and offer them safety and guest privileges.

Locally speaking, certain sectors of the South African economy are so-called migrants sectors.<sup>238</sup> These sectors — namely the commercial agriculture, construction, and secondary sectors — heavily depend on foreign, often irregular, external labour to function.<sup>239</sup> Yet the South African immigration policy is restrictive to the point that there is virtually no prospect for these low-skilled foreign workers to migrate legally. Since only a select number of migrants, ‘an insignificant percentage of the actual number of workers demanded by domestic employers,’<sup>240</sup> are given legal opportunities to enter and work in South Africa, a continuous demand for cheap no-strings-attached labour force in some sectors of the economy will undoubtedly stimulate irregular migration flows. Logic dictates that the absence of legal opportunities for labour migration is likely to promote irregular migration.<sup>241</sup>

Essentially, the promise of a comparably better standard of living, coupled with high demand for cheap foreign labour in some sectors of the destination country as well as badly managed porous borders serve to pull all sorts of economic migrants. Therefore, governments of host countries should partly take responsibility for the clandestine migration phenomenon instead of simply characterising irregular migrants as voluntary transgressors of their immigration laws.

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<sup>236</sup> Gordon Hanson *The economic and policy of illegal migration in the United States* (2009) 5-6.

<sup>237</sup> Bosniak op cit note 215 at 750.

<sup>238</sup> Crush *et al* op cit note 46 at 13.

<sup>239</sup> Machava & Polzer op cit note 140 at 171.

<sup>240</sup> Lyon op cit note 79 at 552.

<sup>241</sup> Wickramasekara op cit note 8 at 252.

#### 4.6.2 A consequential argument

Globally, clandestine migration is increasingly being characterised as a significant legal problem that poses a threat to national sovereignty.<sup>242</sup> In response to this legal threat (real or perceived), nations are gradually enacting more punitive immigration control measures to deter the irregular migration process. In light of this, many see rights protection of those in an irregular situation as particularly problematic and often equate it to encouraging or even rewarding transgressors and/or making home territories attractive to future clandestine entry.<sup>243</sup>

Whilst protectionist measures have their merits, too much restriction in immigration policy can have dire consequences for this foreign workforce. That is not to say that governments should open up their borders or refrain from implementing or enforcing immigration laws. The point is to find a manageable compromise that ensures that rights extension serves the interests of all stakeholders, including migrants, citizens, and the state.

Popular discourse proposes that immigration, particularly the clandestine kind, poses a real threat to the domestic workforce. Some scholars have gone as far as to argue that immigration leads to unemployment and greater job insecurity for local workers.<sup>244</sup> In that line of argument and given the actual high unemployment rate in South Africa,<sup>245</sup> it is understandable how and why migrants can be perceived as a threat to the job security of locals. A mass influx of blue-collar unauthorised migrant workers can greatly disadvantage local workers who compete with them, whilst benefitting the urban elite who gain from their cheap labour.<sup>246</sup>

Specifically with regards to the pay and general employment conditions of the domestic workforce, employers willingly substitute local human resources with the existing pool of irregular migrants so as to cut their wage bill.<sup>247</sup> Unauthorised migrant workers, by virtue of their status, are vulnerable and easy to exploit, as they do not possess legal rights. Their vulnerability

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<sup>242</sup> Bosniak op cit note 215 at 745.

<sup>243</sup> Ibid at 749, Jakubowski op cit note 195 at 512.

<sup>244</sup> Robert Rowthorn 'The economic impact of immigration' (2004) 3.

<sup>245</sup> South Africa has one of the highest unemployment rates in the world. Statistics South Africa places the formal unemployment rate in the country currently around 25 per cent. Available online at [http://beta2.statssa.gov.za/?page\\_id=737&id=1](http://beta2.statssa.gov.za/?page_id=737&id=1)

<sup>246</sup> Ibid.

<sup>247</sup> Rowthorn op cit note 244 at 63; Shelley op cit note 156 at 137.

makes them attractive to unscrupulous employers who depend on their exploitability as a competitive advantage.<sup>248</sup>

Due to the ostensible threat unauthorised foreign workers pose, there have been moral panic calling on the government to eliminate ‘illegal foreigners’ and to curb the migration process entirely. Yet evidence suggests that excessive control measures intended to curtail clandestine migration prove too costly and ineffective.<sup>249</sup> A 2003 report by the International Organization for Migration puts the cost of enforcing immigration restrictions (i.e. border controls, issuing of visas and passports, apprehending, detaining, prosecuting and deporting unwanted migrants, inspecting labour conditions) at around 30 billion US Dollars annually.<sup>250</sup> Despite these substantial fiscal investments into keeping undesirable people out, irregular migration is far from ceasing. The failures on the parts of governments to deter clandestine migration, in spite of aggressive measures, speak to a broader problem than mere lack of control. Therefore, at least from a migration perspective, there is a need for policy developments that effectively manage cross-border migration as opposed to solely focusing on enforcement, control and exclusion.<sup>251</sup> In this respect, protecting the rights of unauthorised foreign workers should be seen as an investment in the right direction.

Given that the vulnerability of these migrants is a crucial factor that makes them desirable to those employers who demand cheap and exploitable labour, the lack of regulation only perpetuates irregular migration. From a labour perspective, a minimum floor of substantive rights to these workers will ensure any incentives for unscrupulous employers are eliminated.<sup>252</sup> Policing this will require processes for the reporting of abuses by migrants to the Department of Labour without fear of deportation. The extension of the right of access to social protection to these workers is a form of regularising migrant labour. The regularisation of immigration status for unauthorised foreign workers has positive knock-on effects for the local labour market.

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<sup>248</sup> Tom Feys ‘Labour standards in Southern Africa in the context of globalization: The need for a common approach’ (1999) 20 *ILJ* 1445 at 1475.

<sup>249</sup> Crush *et al* op cit note 46 at 48.

<sup>250</sup> Cohen op cit note 36 at 210.

<sup>251</sup> Crush *et al* op cit note 46 at 24.

<sup>252</sup> Berg op cit note 191 at 9, Bosniak op cit note 215 at 749.

Regularisation serves to reduce downward pressure on wage and working conditions, as they would no longer be preferred over locals.<sup>253</sup>

Competition for local jobs is likely to reduce once this foreign labour pool becomes less appealing to prospective employers.<sup>254</sup> In short, law enforcement on working and wage conditions can reduce incentives for employers to exploit migrants.<sup>255</sup> Although there are no simple solutions to the current migration challenge, the truth of the matter is that the cross-border movement of unskilled and semi-skilled workers is real and far from ceasing. Excessive restrictions on the movement of these labourers have proven to be futile and costly.

#### 4.7 Conclusion

Unauthorised migrant workers often encounter great risks in getting to their destination countries and greater difficulties once in.<sup>256</sup> Evidence further suggests that migrants entering or working in countries without the proper documents or permission are likely to experience high levels of exploitation, risk of forced labour, and abuse of human rights.<sup>257</sup> This is often because these foreign workers are either utterly ignorant of their rights, if they have any, or are tricked into renouncing them by unscrupulous employers.<sup>258</sup> It is clear then that clandestine migration reflect a range of vulnerabilities and risks.

Further analysis reveals that the nature of immigration policies of nation states (whether favourable, ambiguous, or restrictive) determines the legal status of migrants, the kind of work they can access and eventually their social position and treatment in the larger society of host countries. The existing policy framework relevant to labour migration in South Africa is rigid and restrictive. Contemporary South African labour migration policy simultaneously tries to protect the domestic labour market and skills shortages by reducing the number of non-nationals

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<sup>253</sup> Jakubowski op cit note 195 at 512.

<sup>254</sup> Feys op cit note 248 at 1474.

<sup>255</sup> Secretary of State for the Home Department, *Human Trafficking* (Command Paper 6996, Government Reply to the Twenty-Sixth Report From the Joint Committee on Human Rights, session 2005–06, HL Paper 245, HC 1127, 19 December 2006) [13], available at <http://www.official-documents.gov.uk>, accessed 10 December 2015.

<sup>256</sup> ILO op cit note 13 at 36.

<sup>257</sup> ILO op cit note 179 at 1.

<sup>258</sup> Shelley op cit note 156 at 6.

admitted into the labour market. In doing so, the policy sets in motion a system of differentiation that neither aids equal opportunity nor fosters human capabilities.

South Africa needs a new policy approach to immigration that is cognisant of both human rights and development. That is to say, the current immigration policy needs reforming into a more development-oriented policy replacing its current restrictive form. If left unchanged, the restrictive immigration policy will only lead to a further rise in clandestine migration. In order for South Africa to leverage the opportunities or benefits of migration and address its challenges simultaneously, it would need a policy that addresses the public's misconceptions of immigration and hostility towards migrants.

This is not to negate the power of government to remove undesirable people from its land; it merely proposes that immigration, labour, and social security laws need to be in careful alignment to ensure the state can exercise its power whilst giving effect to all people's rights to access fundamental social and labour benefits. Immigration control at the expense of social security and labour protection should not be the sole priority; an effective migration management needs a fair balance of the two areas of law.

Seemingly, the extension of social protection rights to unauthorised foreign workers, in a country where poverty and inequality are ubiquitous and too few people have work, raises complex legal problems. However, it is necessary for irregular migrants to have proper access to actual opportunities if they are to improve on their vulnerable legal and social status in host nations. Besides, the purpose of social protection is to defend the most vulnerable members of society in order to reduce chronic poverty and exclusion amongst the general populace. In any case, continuous marginalisation or exclusions in opportunities or access to social rights will undoubtedly exacerbate the vulnerability of affected individuals. The subsequent chapters 5 and 6 will examine international, regional, and domestic social protection instruments of relevance to the protection position of irregular migrants.

## CHAPTER V SOCIAL PROTECTION: TRANSNATIONAL NORMS FOR THE PROTECTION OF MIGRANTS

*'Migrant workers can make their best contribution to host and source countries when they enjoy decent working conditions, and when their fundamental human and labour rights are respected.'*<sup>1</sup>

### 5.1 Introduction

Individual nation states have broad sovereign discretion to determine who enters and remains in their territories; however, such authority is prone to gross abuse by those in control.<sup>2</sup> In this regard, the extent to which international and regional human rights instruments protect the human rights of all worker categories becomes increasingly important.

Research suggests that international, and to some extent regional, human rights instruments confer substantive rights protection to all migrant workers, including unauthorised foreign workers. However, in order for them to be effective, relevant nation-states, particularly migrant-receiving states, need to sign and ratify these human rights norms and other pertinent treaties envisioned to protect migrant workers.<sup>3</sup>

Additionally, and most importantly, international instruments are necessary in order to guide and synchronise various national legislation, policies and practices in order to protect both migrant workers and state interest, because domestic laws and political rhetoric are prone to hostility where debates about the rights protection of unauthorised migrant workers is concerned.<sup>4</sup> Furthermore, available evidence suggests that international norms and standards

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<sup>1</sup> *Statement by the Director-General of the International Labour Office Roundtable 3 on Globalization and Labour Migration, 2006 ECOSOC High-Level Segment, Geneva, 5 July 2006, available at <http://www.un.org/docs/ecosoc/meetings/2006/hls2006/documents/DG%20ILO-RT3.pdf>, accessed 10 June 2014.*

<sup>2</sup> Thomas Schindlmayr 'Sovereignty, Legal Regimes and International Migration' (2003) 41(2) *International Migration* 109 at 110

<sup>3</sup> Laurie Berg 'At the border and between the cracks: The precarious position of irregular migrant workers under international human rights law' (2007) 8 *Melbourne Journal of International Law* 1 at 12.

<sup>4</sup> International Labour Organization (ILO) *International labour migration: A rights-based approach* (2010) 117.

significantly influence the regulation of labour and, to some extent, the social protection frameworks in developing countries.<sup>5</sup>

Under South African law specifically, international law serves an interpretative function.<sup>6</sup> Various provisions of the South African Constitution mandate or underscore the interpretative function of international law.<sup>7</sup> Section 39(1)(b) of the Constitution, among other things, provides that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. Similarly, s 233 stipulates that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. Thus, both ss 39(1) and 233 of the Constitution mandate domestic courts to consider international law in interpreting legislation.<sup>8</sup>

In addition to the directive on the interpretational function of international law, the Constitution explicitly addresses the incorporation of international law into domestic law. South Africa seemingly adopts a hybrid approach to the reception of international law. On the one hand, s 231(4) of the Constitution applies a 'dualist' approach to treaty-law.<sup>9</sup> It requires the legislature to enact national legislation or, in the case of self-executing provisions, parliament approval before incorporating an international instrument into domestic law.

On the other hand, it adopts a 'monist-like' approach to international customary law.<sup>10</sup> Section 232 of the Constitution automatically adopts international customary law as part of domestic law as long as it is consistent with other domestic legislation.<sup>11</sup> Section 232 explicitly

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<sup>5</sup> Marius Olivier 'International labour and social security standards: A developing country critique' in Olivier, Dupper & Govindjee (eds) *The role of standards in labour & social security law: International, regional & national perspectives* (2013) 21.

<sup>6</sup> Andrew Michie 'The provisional application of treaties in South African law and practice' (2005) 30 *South African Yearbook of International Law* at 21.

<sup>7</sup> Halton Cheadle 'Reception of international labour standards in common-law legal systems' in Le Roux and Rycroft (eds) *Reinventing labour law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* 2012 *Acta Juridica* 348 at 358.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid at 353.

<sup>10</sup> Ibid at 351.

<sup>11</sup> Ibid.

provides that '[c]ustomary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament'.

It is evident from the explored constitutional provisions that international norms or standards are important in the South African context, as they serve as both substantive and interpretational tools.<sup>12</sup> In this respect, the Constitutional Court has reaffirmed the role of international law in South Africa as follows:

[P]ublic 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 [Bill of Rights] can be evaluated and understood... (emphasis added).<sup>13</sup>

Accordingly, this chapter surveys the existing relevant international, continental, and regional instruments or norms relating to the labour and social protection rights of migrants developed by both international and regional bodies. The chapter reveals that there are considerable efforts on the part of the international community (mainly the UN and ILO) and regional bodies (the AU and SADC) to address the protection concerns of the most vulnerable group of migrants, unauthorised foreign workers. The chapter concludes by arguing that whilst there is a set of norms which attempts to ensure the humane treatment of foreign workers, these standards are comparably inadequately developed.

## 5.2 Contemporary international instruments for the protection of migrants

The international community recognises the extreme vulnerabilities and plight of migrant workers, as the varied range of international and regional (soft and hard) human rights legal instruments governing the treatment of migrant workers can attest.<sup>14</sup> The UN High Commissioner for Human Rights aptly captures the general intention behind a global normative human rights response to the rights protection of migrant workers. According to the UN High Commissioner for Human Rights, 'migrants whose rights are protected, are able to live with dignity and security and, in turn, are better able to contribute to society both economically and

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<sup>12</sup> See *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 1480 (LC) para 43.

<sup>13</sup> See *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35.

<sup>14</sup> Sarah Paoletti 'Human rights for all workers: The emergence of protections for unauthorized workers in the inter-American human rights system' (2004) *Human Rights Brief* 5

socially than those who are exploited, marginalised and excluded.’<sup>15</sup> Since immigration is inherently a transnational phenomenon, the degree to which (unauthorised) migrant workers enjoy protection in terms of international human rights law, particularly in their right of access to social security, is necessary.

International standards that confer rights to migrant workers are numerous and diverse. More specifically, international law strongly affirms the right to social (security) protection. This is evident from the Declaration of Philadelphia of 1944, which called for the ‘extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care’.<sup>16</sup> Similarly, the International Labour Conference, during its 89<sup>th</sup> session in June 2001, reaffirmed that social (security) protection is ‘a basic human right and a fundamental means for creating social cohesion’.<sup>17</sup> In this respect, several international instruments establish the fundamental right to social (security) protection that extends rights to migrant workers and their families.

In any case, international instruments relevant to the protection of foreign workers take the form of three types. Some of these instruments are universal or fundamental human rights and consequently far-reaching in nature (applies to all human beings, including all migrant workers), whilst others deal specifically with migrant workers, and still others take the form of employment standards that apply to all workers in the workplace.<sup>18</sup> Furthermore, international social (security) protection standards typically take three forms with differing impact; namely, Conventions, Recommendations, and Codes of Conduct and Resolutions.

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<sup>15</sup> Office of the High Commissioner for Human Rights (OHCHR) *Out of the shadows: a human rights perspective on irregular migration* (October 2012) 2.

<sup>16</sup> Declaration concerning the aims and purposes of the International Labour Organization (ILO), annex to the Constitution of the ILO, section III (f) available at [http://blue.lim.ilo.org/cariblex/pdfs/ILO\\_dec\\_philadelphia.pdf](http://blue.lim.ilo.org/cariblex/pdfs/ILO_dec_philadelphia.pdf), accessed 4 August 2014.

<sup>17</sup> International Labour Conference, 89th session, report of the Committee on Social Security, resolutions and conclusions concerning social security available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc89/pdf/pr-16.pdf>, accessed 4 August 2014.

<sup>18</sup> Piyasiri Wickramasekara ‘Protection of migrant workers in an era of globalization: The role of international instruments’ in R Blanpain (ed) *Comparative labour law and industrial relations in industrialized market economies* (2010) 245.

Conventions and Recommendations differ in legal status. Conventions are binding international treaties, subject to ratification, that impose legal obligation on member states, whilst Recommendations are non-binding guidelines that normally supplement conventions dealing with the same subjects.<sup>19</sup> The diverse range of these protective instruments reinforces the assertion made by Dupper that ‘international efforts to defend human rights of migrants are “scattered”, “fragmented,” and “limited in impact”’.<sup>20</sup> The validity of the observation by Dupper notwithstanding, there is an existing international effort to protect human rights of migrant workers generally, and in some instances protect their right to social security specifically.

In this respect, both the United Nations (UN) and the International Labour Organisation (ILO) have been instrumental in the international arena in their concerted efforts to bring to the fore the protection interests of workers employed in countries other than their own. Both institutions recognise the need to protect migrants and their families. In view of that, an examination follows of the extent to which their contributions to an international charter on migration adequately safeguard the rights of unauthorised foreign workers, particularly their right of access to social protection.

### **5.2.1 The response of the United Nations**

The United Nations (UN) formally positions the rights of migrant workers into an international human rights framework.<sup>21</sup> The UN achieves this through a rights-based approach that codifies various major human rights treaties into one comprehensive docket, namely the International Bill of Human Rights, that offer human rights protection to all persons, including migrant workers.

The International Bill of Human Rights includes the following core instruments and their corresponding protocols:

Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Rights of the Child (CRC); International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); Convention against Torture and Other Cruel, Inhuman

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<sup>19</sup> B D Singh *Industrial Relations and Labour Laws* (2009) 212.

<sup>20</sup> Ockert Dupper ‘Migrant workers and the right to social security: An international perspective’ (2007) 2 *Stellenbosch Law Review* 219 at 240.

<sup>21</sup> Paoletti op cit note 14 at 6.

or Degrading Treatment or Punishment (CAT); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).<sup>22</sup>

The collection of human rights provisions contained in the International Bill of Human Rights, as universally accepted principles, confers protection to all human beings irrespective of nationality or status. These core international human rights treaties guarantee to all persons a number of fundamental procedural protection as well as civil, political, and socio-economic rights. Thus, foreign nationals can look to a number of universal human rights instruments of the UN for protection against discrimination and exploitation on grounds other than their non-national status.<sup>23</sup>

More importantly, the UN treats social protection as a human right. However, the discussion focuses on three select essential social protection-related instruments in the Bill, for purposes of examining the rights position of foreign workers (in South Africa) generally and in social protection particularly. The first of these is the Universal Declaration of Human Rights of 1948 (UDHR).<sup>24</sup> The UDHR affords general basic human rights and fundamental freedoms to everyone without distinction or discrimination.<sup>25</sup> Owing to the universality and general application of the UDHR, the human rights provisions contained therein applies to unauthorised or irregular migrant workers alike and are therefore inviolable.<sup>26</sup> As an instrument of general application, the UDHR does not require official acceptance by individual states for its principles to apply.<sup>27</sup>

Besides the general human rights, the UDHR also contains some important socio-economic rights that are of relevance to the rights protection of irregular migrant workers. However, these socio-economic rights of migrants in terms of the UDHR are debatable because the UDHR does not directly create legal obligation and so cannot be enforced. Nonetheless, a

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<sup>22</sup> South Africa has ratified all of the instruments in the International Bill, with the exception of the ICRMW. The most recent ratification record being that of the ICESCR, which it ratified in January 2015.

<sup>23</sup> Wickramasekara op cit note 18 at 262.

<sup>24</sup> Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

<sup>25</sup> United Nations (UN) *Fact sheet No.2 (Rev.1), the International Bill of Human rights* (1996).

<sup>26</sup> Vic Esselaar & Christoph Garbers 'Migrant workers' in Strydom et al (Eds.) *Essential social security law* (2006) 287.

<sup>27</sup> op cit note 25.

number of provisions provided for in the UDHR are of relevance to social protection and related issues; namely articles 2, 22, 23 and 25(1).

First, art 22 of the UDHR deals directly with social (security) protection. The provision expressly states that '[e]veryone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. Thus, art 22 essentially recognises social protection as a fundamental human right linked to dignity and personality development.

Article 2 on the other hand generally provides that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' This 'equal treatment' provision outlines the obligations of states in applying the rights in the UDHR. As a general rule, states may not discriminate against anyone, as far as the UDHR is concerned, on 'the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'.<sup>28</sup>

Article 23 recognises the right to work,<sup>29</sup> and with it all the necessary favourable employment conditions and benefits. The right to work in itself is arguably a form or extension of social protection,<sup>30</sup> especially where migrant workers are concerned.

Finally, art 25(1) guarantees an adequate standard of living including the right to social protection 'in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control'. Therefore, it suffices to say that article 22 read together with articles 2, 23 and 25(1) suggest that the UDHR extends socio-economic rights

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<sup>28</sup> Article 2.

<sup>29</sup> The right to work or to access the labour market is a very important principle that provides grounds for justifying other social rights, such as the right of access to work-related social protection. For a detailed discussion, see: Bob Hepple 'A right to work?' (1981) 19 *ILJ* 65, and Virginia Mantouvalou (ed) *The right to work: Legal and philosophical perspectives* (2015) UK: Hart Publishing Ltd.

<sup>30</sup> See discussion in chapter 4.

(specifically, the right of access to social protection) to all people, irrespective of their legal or immigration status.

The second relevant UN social protection-related instrument is the International Covenant on Economic, Social, and Cultural Rights of 1966 (ICESCR).<sup>31</sup> Unlike the UDHR, the ICESCR is much more targeted as it contains a detailed exposition of social protection. In addition, it is only legally binding on individual states that ratify or accede to it. South Africa signed the ICESCR in 1994 but only ratified it some twenty years after.<sup>32</sup> As a signatory to the treaty, the government is obliged to refrain, in good faith, from any acts that would undermine the purpose of the treaty. Post-ratification, the UN can now apply international political pressure on the policymakers to take steps and appropriate measures to achieve progressively the full realisation of the rights contained in the ICESCR.<sup>33</sup>

The ICESCR contains significant provisions that pertain to rights relevant to migrant workers, including the right of access to social security. For instance, art 9 of the ICESCR explicitly states that ‘[s]tates parties to the present Covenant recognize the right of everyone to social security, including social insurance.’ The phrasing of art 9 of the ICESCR suggests that the right to social security can extend to all people, including non-citizens and migrants in an irregular situation, upon ratification. South African law specifically requires the enactment of all ratified treaties or international agreements, unless their provisions are self-executing, into domestic law by means of national legislation before the courts can apply them.<sup>34</sup>

Furthermore, the ICESCR also provides for other socio-economic rights linked to the right to social protection such as the right to work,<sup>35</sup> the right to just and favourable conditions of work,<sup>36</sup> the right to an adequate standard of living,<sup>37</sup> and the right to the highest attainable

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<sup>31</sup> Adopted by General Assembly Resolution 2200A (XXI) on 16 December 1966; entered into force on 3 January 1976.

<sup>32</sup> South African government ratified the ICESCR on 12 January 2015.

<sup>33</sup> Article 2(1) of the ICESCR. See also Laura Jakubowski ‘International Commerce and Undocumented Workers: Using Trade to Secure Labor Rights’ (2007) 14(2) *Indiana Journal of Global Legal Studies* 509-525 at 517.

<sup>34</sup> See s 231(4) of the Constitution of the Republic of South Africa, 1996.

<sup>35</sup> Article 6.

<sup>36</sup> Article 7.

<sup>37</sup> Article 11.

standard of physical and mental health.<sup>38</sup> In this respect, the Committee on Economic, Social, and Cultural Rights has emphasised the need to extend social protection to vulnerable persons such as migrant workers.<sup>39</sup>

Thirdly, there is a more direct and migrant-specific and comprehensive piece of instrument — the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)<sup>40</sup> — that formally recognises and codifies human rights principles in the field of migration.<sup>41</sup> The UN's ICRMW aims to, among other things, improve the distinctive status of one of the most vulnerable groups of people (migrant workers and their families) as well as prevent and eliminate clandestine trafficking.<sup>42</sup>

The ICRMW is a laudable development in human rights discourses because it is perhaps the most ambitious human rights instrument of general applicability in the labour migration context.<sup>43</sup> Among other things, it recognises and guarantees basic human rights to all migrant workers and their families, as well as strives to extend a range of civil and work-related protection to vulnerable migrant worker groups and their families. Accordingly, it explicitly acknowledges the plight of unauthorised migrants as a group of vulnerable workers who are susceptible to less favourable employment conditions owing to their precarious legal status or situation, and consequently extends to them and their families certain fundamental human rights protection.<sup>44</sup>

The ICRMW is divided into four parts. Part I deals with scope of application and definitions, part II prohibits discrimination on listed grounds, part III establishes a set of human rights for all migrant workers (including the irregular), and part IV establishes an additional set

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<sup>38</sup> Article 12.

<sup>39</sup> See articles 36-38 of General Comment No.19 (2008) on the right to social security (art 9) available at [https://www.legal-tools.org/uploads/tx\\_ltpdb/G0840397\\_02.pdf](https://www.legal-tools.org/uploads/tx_ltpdb/G0840397_02.pdf), 10 December 2015.

<sup>40</sup> Adopted by GA res no 45 of 158 on 18 December 1990. Also referred to as the UN Migrant worker Convention

<sup>41</sup> Wickramasekara op cit note 18 at 263.

<sup>42</sup> See the preamble of the ICRMW.

<sup>43</sup> Linda Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the international migrant workers convention' (1991) 25(4) *International Migration Review* 737 at 738.

<sup>44</sup> Preamble of the ICRMW.

of rights for only regular migrants and their families.<sup>45</sup> Part III (articles 8-35), arguably the core of the Convention, is the most salient aspect of the ICRMW because it spells out a range of social and labour protection rights for all migrant workers. In effect, it protects fundamental rights of unauthorised or irregular migrant workers.

Another notable development is the provision for equality of treatment principle imbued in part III of the ICRMW. Article 27(1) provides that '[w]ith respect to social security, migrant workers and their families shall enjoy in the state of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that state....' Similarly, art 25(1) requires all migrant workers to enjoy comparable treatment with 'nationals in respect of all conditions of work.'<sup>46</sup> Ideally, all migrant workers, regardless of any irregularities in their stay or employment,<sup>47</sup> are to enjoy equality of treatment with nationals.

Essentially, the ICRMW affords all migrant workers, regardless of their legal status, the right to equality of treatment concerning employment, among others.<sup>48</sup> Like nationals, all migrant workers (under the ICRMW) are entitled to the same pay and conditions of work, to join trade unions, to receive emergency medical care, and to transfer their earnings out of the country upon termination of their stay.<sup>49</sup>

The above exploration of the ICRMW exposes two salient points that warrant brief discussion. First, the Convention seemingly provides stronger protection in respect to labour than in the case of social protection.<sup>50</sup> The phrasing of the provisions relating to labour protection of irregular migrants (art 25) appears more directive and resolute, as evident from the use of words such as 'shall'.<sup>51</sup> Secondly, the wording of art 25(3) in effect puts an unlawful contract on the

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<sup>45</sup> Bruno Paul Stefan van Eck & Felicia Snyman 'Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) 59 *Journal of African Law* 294 at 301.

<sup>46</sup> Esselaar & Garbers op cit note 26 at 288.

<sup>47</sup> Article 25(3).

<sup>48</sup> DJ Meyer 'Migrant workers and occupational health and safety protection in South Africa' (2009) 21 *SA Merc LJ* 831 at 841. See also Article 25 (1) of the Convention.

<sup>49</sup> See Part III of the Convention. Also see International Labour Organization *International labour migration: A rights-based approach* (2010) 133.

<sup>50</sup> Van Eck & Snyman op cit note 44 at 302.

<sup>51</sup> *Ibid.*

same standing as a strictly legal contract.<sup>52</sup> The provision explicitly states that ‘[s]tates Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity’.<sup>53</sup> Whilst such provisions are seemingly at odds with statutory and common-law principles of most legal systems,<sup>54</sup> South African law contends otherwise.

In South Africa, developing labour law jurisprudence on the legality of the contract of employment seemingly endorses a similar position to that of art 25(3) of the ICRMW. For instance, the Labour Court has suggested that not all contracts concluded in violation of a statutory prohibition are necessarily invalid.<sup>55</sup>

In *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others*,<sup>56</sup> the Labour Court distinguished between ‘work that is illegal, and work that is alleged to be illegally performed’.<sup>57</sup> Generally, an employment contract involving the former will be invalid and unenforceable. In that case, the court held that a contract of employment concluded with a foreign national who does not possess a work permit is not void by virtue of a contravention of statutory provisions.<sup>58</sup> The distinction is necessary because South African courts do not necessarily equalise all unlawful contracts with strictly legal ones. South African labour

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<sup>52</sup> Esselaar & Garbers op cit note 26 at 288.

<sup>53</sup> Article 25(3) of the ICRMW.

<sup>54</sup> Ibid. See also *Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA); *Moses and Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA); *Georgieva-Deyanova/Craighall Spar* [2004] 9 BALR 113 (CCMA); *Solidarity obo Steyn v Minister of Correctional Services* (2009) 30 ILJ 2508 (LC).

<sup>55</sup> John Grogan *Employment rights* (2010) 67. See also *Rumbles v KwaBat Marketing* (2003) 24 ILJ 1587 (LC); *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC); *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 1480 (LC); and to some extent *Kylie v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 1918 (LC).

<sup>56</sup> (2008) 29 ILJ 1480 (LC).

<sup>57</sup> Ibid para 56. An example of the former was explored in *Discovery Health*, while the latter was explored in ‘*Kylie*’. For detailed discussion see: *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC), and *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

<sup>58</sup> Ibid para 24.

law equates only formally illegal contracts (work allegedly performed illegally) with strictly legal contracts, not those that involve the performance of work that is illegal.<sup>59</sup>

Despite its remarkable development in extending substantial human rights protection to unauthorised foreign workers, rights previously limited to regular migrant workers, South Africa has failed to ratify the ICRMW. This has a bearing on the position of foreign workers generally and their right to social protection specifically, given the country's position as a major migrant-receiving nation on the continent. Even so, the ICRMW may prove useful in protecting irregular migrants in South Africa as it still reflects customary international law, a source of law in South Africa.

### **5.2.2 ILO labour migration and social protection-related instruments**

The ILO is a specialised UN agency with a constitutional directive to protect migrant workers.<sup>60</sup> In achieving its constitutional mandate, it has taken measures in positioning the rights of migrant workers at the centre of its discourse on workers' rights.<sup>61</sup> The ILO has adopted legal norms through its various instruments (conventions, standards, and recommendations) on labour migration and social security specifically. One of the ways the ILO addresses migrant labour is through the provision of fundamental/universal labour rights that apply to all workers without distinction, as well as standards directly relevant to migrant workers.

Like the UN, the ILO has also formulated a set of universal rights for workers in the form of the Declaration of Fundamental Principles and Rights at Work,<sup>62</sup> which promotes parallel human rights at work.<sup>63</sup> Similar to the UN's International Bill of Rights, the ILO Declaration is a compilation of diverse but important fundamental conventions that safeguard the core labour rights of all workers by virtue of their shared humanity. The important feature of the ILO

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<sup>59</sup> Grogan op cit note 54 at 67.

<sup>60</sup> Wickramasekara op cit note 18 at 266; Dupper op cit note 20 at 226. Also see the Preamble to the ILO Constitution.

<sup>61</sup> Paoletti op cit note 14 at 5.

<sup>62</sup> As a founding member of the ILO, South Africa is signatory to all eight of the conventions making up the Declaration.

<sup>63</sup> See <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>

Declaration is its employment orientation. The Declaration itself contains principles that safeguard fundamental human rights for workers, including worker rights.<sup>64</sup>

The eight fundamental conventions incorporated into the Declaration guard important rights such as freedom of association and organising rights, prohibition of compulsory and child labour as well as other form of discrimination in employment.<sup>65</sup> An important aspect of these protected principles is the notion of equality of opportunity and treatment, as can be deduced from both the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in the Declaration. Essentially, the labour rights provided in the ILO Declaration extends to all migrant workers (both in regular and irregular situations).

All ILO member States are required to respect and promote principles and rights in the Declaration, regardless of ratification, by virtue of their membership.<sup>66</sup> In this respect, as a founding member of the ILO, South Africa is obligated to respect, promote, and realise the four core principles concerning the fundamental rights enshrined in the Declaration.<sup>67</sup> That means that South Africa has an international duty to ensure that all workers within its borders, irrespective of their nationality or legal status, have their core human and labour rights guaranteed and protected. So all workers, including unauthorised foreign workers, must have their right to freedom of association and organising recognised, as well as shielded from forced or compulsory labour, child labour, and any discrimination in respect of employment, among other things.<sup>68</sup> The South African government, to some degree, has endeavoured to fulfil this international obligation as is evidenced in the Bill of Rights (Chapter 2) of the South African Constitution that seeks to

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<sup>64</sup> Esselaar & Garbers op cit note 26 at 287.

<sup>65</sup> The Declaration comprises of eight fundamental or core Conventions, namely: Forced Labour Convention (No. 29), Freedom of Association and Protection of the Right to Organise Convention (No. 87), Right to Organise and Collective Bargaining Convention (No. 98), Equal Remuneration Convention (No. 100), Abolition of Forced Labour Convention (No. 105), Discrimination (Employment and Occupation) Convention (No. 111), Minimum Age Convention (No. 138), and Worst Forms of Child Labour Convention (No. 182).

<sup>66</sup> See <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>. South Africa has ratified all of the eight core conventions.

<sup>67</sup> Declaration on Fundamental Principles and Rights at Work (June 1998) ILO document CIT/1998/PR20A, available at <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>

<sup>68</sup> Ibid. Article 2(a)-(d).

protect these fundamental worker rights.<sup>69</sup> However, the extent to which the full realisation of these core labour rights relates to unauthorised foreign workers is yet to materialise.

Additionally, the ILO has also developed a variety of conventions and recommendations specifically relating to the rights of migrant workers. Some of these instruments are specific to the social security protection of migrants and their families, while others address the plight of migrant workers generally. In this respect, two conventions — the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and the Maintenance of Social Security Rights Convention, 1982 (No. 157) — and one accompanying recommendation — the Maintenance of Social Security Rights Recommendation, 1983 (No. 167) — constitute the relevant ILO social security instruments as far as migrant workers are concerned.<sup>70</sup> Both conventions and accompanying recommendations intend to offer substantive social security protection or entitlements to foreign workers and their families. However, these conventions have not been widely ratified; ratification stands at 37 and 4 respectively.<sup>71</sup>

Moreover, there are four major ILO instruments aimed at addressing the plight of migrant workers generally. These migrant specific instruments consist of two significant conventions — the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143),<sup>72</sup> — and two Recommendations — the Migration for Employment Recommendation (Revised), 1949 (No. 86) and the Migrant Workers Recommendation, 1975 (No. 151).

Convention No. 97 and accompanying Recommendation No. 86, historically developed in the post-Second World War era, provide for protection of migrants as it pertains to the migration process and employment, including pre-departure, transit, destination, and return.<sup>73</sup> Convention No. 97 provides for the equal treatment of migrant workers and national workers

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<sup>69</sup> See ss 9, 13 18 and 23 of the South African Constitution, 1996 respectively. The wording of these provisions is rather broad and could be read to include unauthorised foreign workers.

<sup>70</sup> See <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>

<sup>71</sup> Wickramasekara op cit note 18 at 270.

<sup>72</sup> This convention is also known as the Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers Convention, 1975 (No. 143).

<sup>73</sup> Wickramasekara (2010) at 267.

regarding the full spectrum of social security and employment rights.<sup>74</sup> Convention No. 143 is perhaps the first commitment by the international community to confront the issue of clandestine migration and illegal employment.<sup>75</sup> The Convention comprises two parts: Part I (articles 1 to 9) addresses clandestine migration, and Part II (articles 10 to 14) guarantees to migrants equality of opportunity and treatment with nationals as regards employment and occupation, social security and cultural rights.<sup>76</sup>

Note, however, that neither of these conventions specifically makes direct mention of the protection of irregular migrants.<sup>77</sup> In fact, both conventions tend to exclude irregular migrants from the ambit of their protection, and consequently do nothing in improving the position of unauthorised migrant workers. This is evident in the provision of article 6(1) of Convention No. 97 which provides that '[e]ach Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, *to immigrants lawfully within its territory*, treatment no less favourable than that which it applies to its own nationals... (emphasis added)'. Article 10 of Convention No. 143 similarly mirrors this exclusion of unauthorised migrants.

It is worth mentioning that South Africa has not ratified, with the exception of those core conventions incorporated into the ILO Declaration, any of the above ILO instruments dealing with migrant workers generally and their right of access to social protection specifically.<sup>78</sup> A lack of ratification of these important instruments is indicative of a lack of willingness, on the part of the government, to commit to legally enforceable rights and obligations and/or implement international minimum standards needed for improving the position of vulnerable migrant workers.<sup>79</sup> Thus, there is no legally binding obligation on the part of the South African government to adhere to ensuing international principles and norms in its national laws and

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<sup>74</sup> See art 6. Also see Esselaar & Garbers op cit note 26 at 289; Van Eck & Snyman op cit note at 300.

<sup>75</sup> Wickramasekara op cit note 18 at 267.

<sup>76</sup> Ibid. See also art 10.

<sup>77</sup> Van Eck & Snyman op cit note 44 at 300.

<sup>78</sup> Ockert Dupper 'The human rights of (irregular) migrants: An international, regional and South African perspective (Part 1)' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 61 at 65.

<sup>79</sup> Marius Olivier 'International labour and social security standards: A developing country critique' in Olivier, Dupper & Govindjee (eds) *The role of standards in labour & social security law: International, regional & national perspectives* (2013) 21.

practices. This may have significant bearing on the position of foreign nationals generally and their access to social protection specifically.

However, unratified conventions may still form part of customary international law, which is a source of domestic law in South Africa.<sup>80</sup> As previously indicated, the Constitution specifically directs the judiciary to consider international law, which may include unratified international instruments.<sup>81</sup> Thus, unratified international instruments can still provide indirect domestic protection. In fact, the court in *Discovery Health*, arguably *obiter dictum*, considered relevant international norms of the UN and ILO in extending the definition of ‘employee’ to include unauthorised migrant workers. Judge Van Niekerk AJ emphasised the norms in the UN ICRMW and ILO Conventions 97 and 143 as useful for the interpretation of domestic legislation (particularly the LRA) in relation to the protection of fundamental rights of migrants.<sup>82</sup> Therefore, although South Africa has not ratified ILO Conventions 97 and 143, their principles are still significant and useful for legislative interpretation domestically.

In addition to the above conventions, the ILO has adopted two auxiliary non-binding but significant instruments offering useful principles and guidelines to nations for managing migration policy and practices, namely the ILO Multilateral Framework on Labour Migration, and Social Protection Floors Recommendation 202 of 2012.<sup>83</sup> The Multilateral Framework contains an annex of best practices to assist policymakers in addressing challenges faced in dealing with labour migration as well as important themes such as decent work, the protection of migrant workers, and migration governance, among others.<sup>84</sup> Principle 11 of the Framework specifically calls for the adoption and implementation of policies to prevent clandestine migration and abusive conditions.<sup>85</sup> Moreover, Guideline 9.9 of the Framework identifies the need to extend social security coverage to migrants in an irregular situation.<sup>86</sup>

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<sup>80</sup> Section 232 of the South African Constitution clearly states that ‘[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

<sup>81</sup> Sections 39(1) and 233 of the Constitution.

<sup>82</sup> *Supra* note 55 paras 47-49.

<sup>83</sup> International Labour Organization *International labour migration: A rights-based approach* (2010) at 131.

<sup>84</sup> International Labour Organization *ILO Multilateral Framework on labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006) at VI.

<sup>85</sup> Wickramasekara *op cit* note 18 at 278.

<sup>86</sup> *Ibid.*

Similarly, the ILO Recommendation relating to national floors of social protection provides important but flexible guidance to member states in building such social protection floors that cover as many people as possible. Paragraph 5 of the Recommendation outlines four basic social (protection) security guarantees that should be provided to ‘at least all residents and children, as defined in national laws and regulations’.<sup>87</sup> These guarantees include access to essential healthcare, income security for children, persons in active age who are unable to earn sufficient income, and for older persons.<sup>88</sup> However, coverage for migrants and their families, particularly irregular migrants, will be dependent on a country’s international obligation and its national laws.<sup>89</sup>

### **5.3 Continental and Regional Framework: The AU and SADC Standards on Migrant Workers**

While migration management at an international level is necessary, the regional development of legal and policy frameworks on labour migration is equally important. Available data suggest that Africa alone accounts for about 7.1 million of the total global migrant population.<sup>90</sup> On the African continent specifically, intra-regional labour migration is not a rare occurrence. The increasing movement of migrants from other troubled economies to relatively more affluent ones on the continent has necessitated a need for multi-governmental coordination in developing an integrated approach to labour migration policing.

Framework developments at continental and sub-regional levels become increasingly necessary because South Africa is yet to ratify any of the core international conventions for migrant workers. Moreover, it is virtually impractical, tedious even, to expect multiple nations (in this case, 53 diverse independent states) to conclude labour migration treaties individually. Therefore, consideration of legal efforts or developments towards labour migration policing

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<sup>87</sup> Paragraph 6 of Recommendation 202 of 2012.

<sup>88</sup> Wouter van Ginneken ‘Social protection for migrant workers: National and international policy challenges’ (2013) 15(2) *European Journal of Social Security* 209 at 211. Also, see paragraph 5 of Recommendation 202 of 2012.

<sup>89</sup> Op cit note 86.

<sup>90</sup> International Labour Organization *Facts on labour migration* (2006) 1.

within relevant regional bodies — the African Union (AU)<sup>91</sup> and the Southern African Development Community (SADC)<sup>92</sup> — is equally necessary for the purpose of this chapter.

### 5.3.1 Labour migration and social protection (related) instruments of the AU

At a continental level, Africa seemingly lags behind in the adoption of any meaningful labour migration framework that offers protection to migrant workers, especially in the field of social protection. Unlike their European or American counterparts (the European Union and the Organisation of American States respectively), the AU has yet to adopt any useful binding instruments on migrant workers, let alone develop any significant jurisprudence in the area of labour migration.

While it is outside the scope of this chapter, it is important to note that regional human rights courts in both Europe and America are developing jurisprudence that addresses the substantive rights of unauthorised migrant workers in host countries, something that is yet to emerge in the African context.

For instance in 2003, the Inter-American Court of Human Rights established a progressive jurisprudence for the international legal protection for unauthorised foreign workers.<sup>93</sup> In its Advisory Opinion on the legal status and rights of undocumented migrants, the Inter-American Court held that ‘neither States nor private employers are obligated to employ undocumented migrants...[but] once they choose to engage them, their irregular migratory status may not be used as a basis for discrimination with respect to labour rights, including social security.’<sup>94</sup> Based on general principle of equality and non-discrimination in international law,

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<sup>91</sup> The AU succeeded the Organisation of African Unity (OAU), established by agreement of 32 independent African states in 1963.

<sup>92</sup> SADC is a regional organisation consisting of 15 Member States: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>93</sup> Advisory Opinion OC-18/03 (17 September 2003), available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf)

<sup>94</sup> Doug Cassel ‘Equal Labor Rights for Undocumented Migrant Workers’ in Anne Bayefsky (ed) *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (2005) 477.

the Advisory Opinion is a significant progress as it transcends any official provisions of customary international law pertaining to irregular foreign workers.<sup>95</sup>

Similarly, the European Union (EU) has developed significant labour migration policies, albeit fragmentary, and jurisprudence on migrant workers. One of the four key freedoms of the EU is the right to free movement of workers.<sup>96</sup> In this respect, articles 45-48 of the Treaty on the Functioning of the European Union (TFEU, ex Articles 39-42 EC) grants union citizens ‘the right to move freely across the EU to seek and take up work in other Member States on the same terms as nationals’.<sup>97</sup> Underscoring this free movement of labour from one state to another within the region is the European Convention on the Legal Status of Migrant Workers, which regulates the movement and working conditions of workers within the EU. Note, however, that both the provisions in the TFEU and the European Convention apply to EU nationals only.

Moreover, there are two significant measures intended to regulate the position and facilitate the intra-EU movement of non-EU migrant workers.<sup>98</sup> These measures include the Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, and the Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive). However, both directives favour the movement of highly skilled migrants, are contingent on the passage of time, and apply solely to legal Third-Country Nationals (TCNs) or those involved in regular migration.<sup>99</sup> The EU response to irregular migrants is restrictive policies intended to deter clandestine migration. Additionally, both the European Court of Justice and the European Court of Human Rights have been instrumental in developing the European jurisprudence on migrant workers, the latter significantly recognising the right that unauthorised foreign workers hold in host nations, albeit slightly concentrated on family life or unity.<sup>100</sup>

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<sup>95</sup> Ibid, Berg op cit note 3 at 31.

<sup>96</sup> Elspeth Guild ‘The EU’s internal market and the fragmentary nature of EU labour migration’ in Cathryn Costello & Mark Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014)100.

<sup>97</sup> Catherine Barnard *The substantive law of the EU: The four freedoms* 3 ed (2010) 265.

<sup>98</sup> Guild op cit note 95 at 107.

<sup>99</sup> Ibid at 117.

<sup>100</sup> Berg op cit note 3 at 23. See *MSS v Belgium and Greece* (2011) 53 EHRR 2, and *Bigaeva v Greece* App No 26713/05 (ECtHR, 28 May 2009).

Whatever the case, the AU has effectively adopted a human rights instrument that subtly speaks to the protection concerns of migrants on the continent. The African [Banjul] Charter on Human and Peoples' Rights (ACHPR),<sup>101</sup> adopted by the Organisation of African Unity, is the relevant regional human rights instrument as far as the protection of international human rights standards on the continent is concerned. Modelled on existing core international and other regional human rights instruments,<sup>102</sup> the ACHPR encompasses all the recognisable international human rights principles, albeit imbued with a distinctly African flavour.<sup>103</sup>

Like most human rights instruments, anti-discrimination features prominently as a fundamental right in the Banjul charter.<sup>104</sup> Article 2 of the ACHPR expressly provides that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'<sup>105</sup> Thus it can be deduced that the enjoyment of all the rights and freedoms recognised and guaranteed in the ACHPR extends to every individual, migration status notwithstanding.<sup>106</sup> Moreover, Article 12 of the ACHPR contains a comprehensive list of protection for foreign nationals, including protection from arbitrary expulsion and mass expulsion.

Although the ACHPR includes many of the important civil, cultural, economic, political, and social rights; it fails to address social protection directly or explicitly.<sup>107</sup> Instead, the

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<sup>101</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 8 (1982), entered into force 21 October 1986; also known as the 'Banjul Charter'. South Africa ratified the ACHPR in 1996.

<sup>102</sup> The ACHPR reiterates a number of rights present in other international and regional instruments, particularly the UDHR, ICESCR, the European Convention on Human Rights, 1950, and the American Convention on Human Rights, 1969. See preamble to the Charter.

<sup>103</sup> Michelo Hansungule 'The African Charter on Human and Peoples' Rights' (2012) in Yusuf, A & Ouguergouz, F (eds) *The African Union: Legal and institutional framework* 422.

<sup>104</sup> Ibid at 422.

<sup>105</sup> This provision has manifested in a number of national constitutions including that of South Africa. See for example s 9 of the Constitution of the Republic of South Africa, 1996.

<sup>106</sup> Article 2 of the ACHPR.

<sup>107</sup> L Jansen van Rensburg & MP Olivier 'International and supra-national law' in M P Olivier et al (eds) *Social Security: A Legal Analysis* (2003) 634.

haphazard declarations in articles 16,<sup>108</sup> 18(1),<sup>109</sup> and 18(4)<sup>110</sup> of the ACHPR can only be construed as a guarantee of social (security) protection-related rights.<sup>111</sup> Social protection is too important a right for policymakers to relegate it to an ancillary. For this reason, the Banjul Charter fails to address adequately an important socio-economic right at a continental level.

Nonetheless, recent developments have resulted in the adoption of two very comprehensive policy documents addressing migration at a regional or continental level: namely the Migration Policy Framework for Africa and the African Common Position on Migration and Development (both adopted in 2006). The Migration Policy Framework<sup>112</sup> is perhaps the AU's real effort at regional integration in migration as it seeks to promote standardisation and harmonisation of rules and principles relating to migrants.<sup>113</sup>

Accordingly, the Framework provides guidelines and recommendations on various migration issues to assist governments and Regional Economic Communities (RECs).<sup>114</sup> One of the nine key thematic migration issues that the Framework addresses is irregular migration. In this regard, the Framework recommends strengthening of policies to combat trafficking as well as developing regional countermeasures that encourage more legal channels and orderly migration.<sup>115</sup>

Similarly, the African Common Position on Migration and Development<sup>116</sup> outlines 11 priority issues as well as several recommendations for national, continental, and international

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<sup>108</sup> Article 16 guarantees the right to enjoy the best attainable state of physical and mental health.

<sup>109</sup> Article 18(1) protects the right of the family to physical and moral health.

<sup>110</sup> Article 18(4) assures the right of the aged and the disabled to special measures of protection in keeping with their physical or moral needs.

<sup>111</sup> Jansen van Rensburg & Olivier op cit note 106 at 634.

<sup>112</sup> Executive Council Decision (EX.CL/276 (IX)) adopted during the ninth Ordinary Session in Banjul, The Gambia in June 2006 (African Union, 2006a) available at

[http://sa.au.int/en/sites/default/files/au\\_migration\\_policy\\_framework\\_africa.pdf](http://sa.au.int/en/sites/default/files/au_migration_policy_framework_africa.pdf), accessed 2 December 2015.

<sup>113</sup> Esselaar & Garbers op cit note 26 at 297.

<sup>114</sup> AU op cit note 111 at 1.

<sup>115</sup> Ibid at 15-17.

<sup>116</sup> Executive Council Decision (EX.CL/277 (IX)) adopted at the Banjul Summit in July 2006 (African Union, 2006b) available at [http://www.un.org/en/africa/osaa/pdf/au/cap\\_migrationanddev\\_2006.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_migrationanddev_2006.pdf), accessed 2 December 2015.

levels aimed at addressing migration issues.<sup>117</sup> It recommends, at a continental level, the creation of legal frameworks to fight irregular migration, as well as the conclusion of cooperation agreements to manage migration.<sup>118</sup>

Although the adoption of both migration frameworks is seemingly a step in the right direction, they unfortunately serve as facade as far as substantial protection for migrant workers and their families is concerned. For all the potential they hold, both instruments are non-binding, and therefore they do not impose legal responsibilities on member states, and are not legally enforceable. In summation, the lack of a significant binding instrument on labour migration at the continental level means that migrant workers are at the mercy of independent national practices and policies as per protection instruments.

Despite the absence of any meaningful binding continental labour migration framework that effectively addresses the protection concerns of migrant workers, the AU has adopted other instruments that seek to draw attention to the human rights, and social protection interests of migrants. As previously indicated, the ACHPR contains some provisions that allude to the defence of social protection rights.

Another of the AU social protection-related instruments of relevance here is the Social Policy Framework for Africa (SPF).<sup>119</sup> The principal aim of the SPF is ‘to provide an overarching policy structure to assist member states to strengthen and give increasing priority to their national social policies and hence promote human empowerment and development’.<sup>120</sup> One of the eighteen key thematic social issues addressed in the SPF is social protection. Social protection under the SPF includes social security measures and furthering income security.<sup>121</sup> The SPF also provides for a minimum package of essential social protection, including essential health care and benefits for children, informal workers, the unemployed, older persons and

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<sup>117</sup> Henrike Klavert ‘African Union frameworks for migration: current issues and questions for the future’ (2011) *European Centre for Development Policy Management Discussion Paper No. 108* at 4-5 available at <http://www.ecdpm.org/dp108>, accessed 2 December 2015.

<sup>118</sup> *Ibid* at 5, AU op cit note 115 at 11.

<sup>119</sup> CAMSD/EXP/4(I) adopted at the first session of the AU conference of Ministers in charge of social development in Windhoek, Namibia in October 2008 (African Union, 2008).

<sup>120</sup> African Union (2008) at 4.

<sup>121</sup> Para 30 of the SPF.

persons with disabilities.<sup>122</sup> However, the SPF is neither legally binding nor does it impose any obligations.

### 5.3.2 Southern African Development Community initiatives

In the absence of a binding continental labour migration framework, many African states have resorted to multilateral and bilateral agreements and/or the formation of economic integration blocs (Regional Economic Communities (RECs))<sup>123</sup> that focus on their circumstances and needs. South Africa is a prominent member of one such RECs, namely the Southern African Development Community (SADC). SADC aims, among other things, to foster socio-economic, political and security cooperation and integration among fifteen neighbouring Southern African States<sup>124</sup> and eradicate poverty within the sub-region.<sup>125</sup>

Until 2014, the SADC had no clear regional migration policy to speak of.<sup>126</sup> That is to say, there was no clear common or agreed immigration approach or protocol on cross-border migration in the SADC;<sup>127</sup> in its place was a collection of various immigration laws and policy in SADC countries.<sup>128</sup> The relatively newly adopted SADC Labour Migration Policy Framework provides a regional response to labour migration challenges faced by Member States. The Policy

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<sup>122</sup> Ibid para 32.

<sup>123</sup> The AU recognises the following eight RECs, the: Community of Sahel-Saharan states (CEN-SAD), Arab Maghreb Union (UMA), Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Inter-governmental Authority on Development in East Africa (IGAD).

<sup>124</sup> The 15 States constituting SADC include: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>125</sup> <http://www.sadc.int/about-sadc/overview/sa-protocols/>

<sup>126</sup> Evance Kalula, Ada Okoye Ordor and Colin Fenwick *Labour law reforms that support Decent Work: The case of Southern Africa* (2008) 1.

<sup>127</sup> Esselaar & Garbers op cit note 26 at 298.

<sup>128</sup> Marius Olivier 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)' (2011) *I SADC Law Journal* 121 at 127.

Framework seeks to promote sound management of intra-regional labour migration.<sup>129</sup> It also seeks to promote the protection of migrant workers' rights.<sup>130</sup>

Additionally, SADC has adopted twenty-seven legally binding Protocols aimed at co-ordinating, harmonising and rationalising policies and strategies of Member States on a number of issues.<sup>131</sup> Two of these Protocols, namely the Draft Protocol on the Facilitation of the Movement of Persons and the Employment and Labour Protocol, have some bearing on migration and migrant workers.<sup>132</sup>

The SADC Draft Protocol on the Facilitation of the Movement of Persons comes close to addressing cross-border regulation within the region. Despite initial oppositions by the major migrant-receiving countries in the region (i.e. South Africa, Botswana and Namibia),<sup>133</sup> the Draft Protocol was finally adopted in 2005, albeit after much negotiation and compromise. Modelled on a similar, but much stronger, instrument adopted by the Economic Community of West African States (ECOWAS), the Draft Protocol envisages an unobstructed migration by individuals into and within the territories of state parties.<sup>134</sup> Article 3(c) of the Protocol establishes the right of a citizen from one member state to live and work in the territory of another member state. Article 7 requires member states to harmonise their various national laws (including statutory rules and regulations) so they are aligned with the objectives of the Protocol. Article 20 further requires member states to extend residence and establishment rights and privileges to citizens of another member state should they acquire residence in a host state.

However, the Draft Protocol is deficient in that the envisaged protection seemingly extends only to regular migrants and not those in an irregular situation. Further, the Protocol does not directly regulate social security issues; it can potentially have significant impact on social security in a broad sense.

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<sup>129</sup> Article 3.1

<sup>130</sup> Article 3.

<sup>131</sup> Marius Olivier *Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)* (2009) (Report prepared for the World Bank, 2009) 76.

<sup>132</sup> <http://www.sadc.int/about-sadc/overview/sa-protocols/>

<sup>133</sup> Andre van Niekerk, Nicola Smit, Marylyn Christianson, Marie McGregor & Stefan van Eck (eds) *Law@work* (2015) 29.

<sup>134</sup> Article 2.

The SADC Protocol on Employment and Labour on the other hand, aims to 'create a legal and policy framework for labour migration within SADC through harmonised labour and social security legislation....'<sup>135</sup> It specifically addresses labour migration and migrant workers. Article 19(c) explicitly calls on State Parties to accord foreign nationals fundamental rights, including employment and social protection rights. Article 11.1(a) calls for Member States to ensure that every worker, regardless of status or type of employment, enjoys adequate social (protection) security benefits. Article 11 seems promising for unauthorised migrant workers within the region.

Regionally, in comparison to the AU, SADC has made developments that are more promising as far as the promotion of social protection in the region goes. Beyond the Protocols, SADC has adopted key social security-related instruments specifically envisaged to regulate the social protection position of foreign nationals. In this respect, the Treaty of the Southern African Development Community (the SADC Treaty), Charter of Fundamental Social Rights in SADC, and the Code on Social Security in the SADC all contain provision for social protection either directly or indirectly relevant to migrant workers. The cornerstone of the SADC social protection framework is perhaps the SADC Treaty.<sup>136</sup>

Although it does not spell out social protection directly, the Treaty contains specific social protection-related objectives. For instance, SADC aims to 'alleviate poverty, enhance the standard and quality of life of the peoples of the region and support the socially disadvantaged through regional integration'.<sup>137</sup> Regional integration will be through the development of policies directed at the 'progressive elimination of obstacles for the free movement of capital and labour, goods and services, and for the peoples of the region generally'.<sup>138</sup> According to Nyenti and Mpedi, the SADC Treaty objectives 'envisage a regional collaborative approach, as they can be achieved only through the development of regional social security mechanisms'.<sup>139</sup>

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<sup>135</sup> Article 3(f).

<sup>136</sup> The Treaty came into effect on 12 September 2000. It is legally binding on all SADC member states.

<sup>137</sup> Article 5(1)(a) of the SADC Treaty.

<sup>138</sup> Article 5(2)(d) of the SADC Treaty.

<sup>139</sup> M Nyenti & LG Mpedi 'The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries' (2012) 15(1) *Potchefstroom Electronic Law Journal* 244 at 252.

Similarly, the Charter of Fundamental Social Rights in SADC (SADC Social Charter)<sup>140</sup> is significant as it has vital social and labour protection provisions relevant for foreign workers.<sup>141</sup> Regarding labour rights, the SADC Social Charter requires member states to comply with all the basic employment rights similar to those found in the eight core ILO Conventions.<sup>142</sup> However, of crucial importance are the provisions relating to social protection contained in the SADC Social Charter. Note that it provides social protection for both the employed and the unemployed, but more comprehensively for the former.<sup>143</sup> Under the SADC Social Charter, member states (in this instance, South Africa) are bound to:

create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment [including potentially irregular migrant workers], enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.<sup>144</sup>

This phrasing draws no distinction between nationals and foreign nationals. In fact, it is unlikely that the provision contemplates such distinction because the harmonisation of social security schemes is central to the Charter.<sup>145</sup>

Additionally, the complementary Code on Social Security in the SADC (the SADC Code)<sup>146</sup> contains equally important provisions for social security protection. The Code offers, as broad objectives, strategic direction and guidelines, a set of general principles and minimum standards, a framework for monitoring, as well as an instrument for co-ordinating and harmonising social security in SADC.<sup>147</sup> Article 4 of the Code expressly recognises the right to social security, with distinction drawn between social insurance and social assistance.<sup>148</sup> The

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<sup>140</sup> Adopted in August 2003.

<sup>141</sup> Olivier *op cit* note 131 at 77.

<sup>142</sup> These labour rights include but are not limited to: freedom of association and collective bargaining, equal treatment for both genders, and the protection of children and the disabled.

<sup>143</sup> Olivier *op cit* note 131 at 78.

<sup>144</sup> Article 10.

<sup>145</sup> Marius Olivier & Ockert Dupper 'Political and regulatory dimensions of access, portability and exclusion: Social security for migrants, with an emphasis on migrants in Southern Africa' (2012) at 12. Available at <http://ilera2012.wharton.upenn.edu/RefereedPapers/DupperOckert.pdf> [accessed 4 August 2015].

<sup>146</sup> Approved in June 2007 and signed January 2008.

<sup>147</sup> Article 3.

<sup>148</sup> Articles 5 and 6. Also see Olivier (2009) at 79.

Code goes much further concerning the development of social protection in SADC than the Charter in addressing the social protection position of select marginalised groups.<sup>149</sup>

Migrant workers, including irregular or unauthorised migrants, are among the marginalised groups identified and specially regulated under the Code. Foreign workers theoretically enjoy equal treatment alongside citizens within the social security system of the host country as the Code prohibits the disparate treatment of non-nationals.<sup>150</sup> It goes a step further in mandating member states to provide or extend basic minimum social security protection and coverage to unauthorised foreign workers in their territories.<sup>151</sup>

There is no doubt that both the SADC Social Charter and the SADC Code are an indication of progressive commitment as far as developing a sub-regional social protection framework. The main concern, however, has to do with what is typically the disparity between the formal approval of such instruments and the actual implementation and practice thereof.<sup>152</sup> Predictably, some states may oppose the provisions available for irregular migrants contained in both policy documents, particularly the major migrant-receiving states. While this is a presumption at best, it still demands attention, given the fact that both documents impose no legal obligations on member states. The simple fact is that if something imposes no legal demands nor requires active responsibility it is easier to ignore it altogether.

#### **5.4 Impact of international law on the protection position of irregular migrants**

Scholars agree that international law can be a natural source of rights protecting migrant workers, including unauthorised migrant workers.<sup>153</sup> The premise is that international law might be better positioned to provide a progressive direction on the treatment of migrant workers because it is ‘somewhat insulated from domestic debates over immigration policies’.<sup>154</sup> This chapter further examines the extent to which this proposition is accurate by looking at the actual protection these international instruments offer to unauthorised foreign workers.

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<sup>149</sup> See arts 13-17.

<sup>150</sup> Article 17(2)(b).

<sup>151</sup> See article 17(3).

<sup>152</sup> Kalula, Ordor & Fenwick op cit note 125 at 38.

<sup>153</sup> Berg op cit note 3 at 3, Dupper op cit note 20 at 252.

<sup>154</sup> Berg op cit note 3 at 3.

The preceding analysis has categorically revealed that there are substantive international and regional instruments that seek to protect the rights of non-nationals in general and their right of access to social security in particular. However, these instruments affect the position of migrants in varied ways. Moreover, different categories of migrants appear to enjoy different degrees of protection in international law. The level and substance of the protection offered tend to be contingent on two factors: the legitimacy of the migration status of the individual involved on the one hand, and the legal character of the instrument in question on the other. Therefore, an analysis to ascertain the extent to which these existing international and regional mechanisms offer adequate protection to unauthorised foreign workers is necessary.

#### **5.4.1 International instruments dealing with fundamental rights of migrant workers**

Examination of a select number of international legal instruments (by both the ILO and UN) reveals that there are existing instruments that seek to deal with the protection concerns of foreign workers. However, the available international standards that confer rights to migrant workers vary in respect to their scope of application and lawful enforceability. It is evident that international law afford foreign nationals a range of fundamental rights in two distinct ways; either based on their personhood (deemed equal by virtue of their humanity) or specifically as a protected class because of the vulnerability associated with their migratory status.<sup>155</sup>

Under the general human rights framework, the protection offered are universal and primarily based on the 'equal personhood' doctrine, where all migrants enjoy certain rights by virtue of their shared humanity. Hence, most of the international protection norms that fall under the human rights framework are of general application, i.e. apply to all people, irrespective of residential or immigration status.

In this respect, both the UN International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work are relevant as they confer much-needed fundamental core human and labour rights to all (migrant) workers. Protection offered by both of these instruments is through general application and founded on the principle of universality. As a rule therefore, nationality, residential or immigration status cannot limit the application of the rights or protection covered by these two instruments. For this reason, unauthorised foreign workers, as human beings generally and specifically as workers, are entitled to the protection

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<sup>155</sup> Jonathan Klaaren 'Human rights protection of foreign nationals' (2009) 30 *ILJ* 82 at 83.

conferred by these instruments as they apply to all human beings, regardless of nationality or legal status.<sup>156</sup>

For instance, the ILO Declaration guarantees to unauthorised migrants protection against all forms of forced labour and discrimination in employment as well as the recognition and promotion of their right to associate freely and bargain collectively. Similarly, the instruments contained in the International Bill of Human Rights ostensibly protect unauthorised migrant workers from discrimination and exploitation on grounds other than their non-national status.<sup>157</sup> In summation, these universalistic instruments tentatively guarantee to unauthorised foreign workers minimum standards of protection, including their basic human rights.

Note, however, in spite of protecting core human and labour rights, careful scrutiny of the UN's universal human rights treaties exposes an inherent contradiction. As instruments premised on the universality of human rights, they pronounce equality of treatment between the rights of nationals and non-nationals, including no distinctions based on immigration status.<sup>158</sup> Yet, in another breath, they give states' territorial sovereignty weighty prominence over the rights of migrants. Meaning that although the rights conferred by these instruments apply to all people without discrimination, national laws can limit them as far as the limitation promotes general welfare. An obvious example is article 2(3) of the ICESCR, which allows developing countries scope to limit the rights of foreign nationals to economic rights.<sup>159</sup> Section 5.5 of this chapter explores in detail the interplay of these two principles of international law (non-discrimination vis-à-vis territoriality).

#### **5.4.2 International migrant-specific and social protection (related) instruments**

Aside from the instruments dealing with the fundamental/universal rights of migrant workers, there are select international standards that directly address the human treatment of labour migrants generally and their social protection interests specifically. Here, the international legal

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<sup>156</sup> Ibid. Ockert Dupper 'The human rights of (irregular) migrants: An international, regional and South African perspective (Part 1)' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 61 at 64.

<sup>157</sup> Wickramasekara op cit note 18 at 262.

<sup>158</sup> See Articles 2 and 2(2) of the UDHR and ICESCR respectively.

<sup>159</sup> This provision is similar to s 36 of the South African Constitution.

conventions developed by both the UN and ILO shape the protection position of irregular migrant workers.

The UN's ICRMW leads the way in advancing the substantial human rights protection of unauthorised foreign workers as a recognised vulnerable group.<sup>160</sup> It transcends the guarantee of equal treatment (protection of the right to equality) to include much needed special protection for migrants. Yet this instrument is void of one crucial factor to be effective in the progressive protection of migrants, i.e. country support in the form of ratifications. The Convention enjoys a very low ratification rate (only 41 states) as compared to that of other core UN human rights treaties.<sup>161</sup> Moreover, a survey of the list of the countries that have ratified the ICRMW indicates a clear divide between migrant-sending and migrant-receiving countries, with strong support for the instrument mainly coming from major migrant-sending countries.<sup>162</sup> Records indicate that only a small group of states have ratified it to date and Argentina is the sole major migrant-receiving nation to endorse the instrument.<sup>163</sup>

Although South Africa is yet to sign, ratify and formally acknowledge this instrument, it is still necessary to examine the degree of protection this supposedly significant instrument offers to unauthorised migrants. The ICRMW is perhaps the only instrument that truly recognises the acute vulnerability attached to clandestine migration, as it recognises and extends significant human rights to all migrants and their families, status notwithstanding.<sup>164</sup> Generally, all migrant workers can enjoy equal treatment regarding equal pay and conditions of work and the right to join trade unions, to receive emergency medical care, and to transfer their earnings out of the country upon termination of their stay.<sup>165</sup>

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<sup>160</sup> See preamble.

<sup>161</sup> Isabelle Slinckx 'Migrants' rights in UN human rights conventions' in Cholewinski, Guchteneire & Pecoud (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 124.

<sup>162</sup> Many of the key signatories to the Convention are states of origin of migration; this includes but is not limited to Egypt, Ghana, Morocco, and Senegal.

<sup>163</sup> Graziano Battistella 'Migration and human rights: the uneasy but essential relationship' in Cholewinski, Guchteneire & Pecoud (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) 59.

<sup>164</sup> Article 27(1). Should South Africa ratify this Convention, the impact may be significant because it promote equal access to social security between nationals and migrant workers.

<sup>165</sup> ILO op cit note 82 at 133.

In the field of social protection specifically, the ICRMW is particularly important as it seemingly extends the right of access to social security to all migrants, including the unauthorised. Article 27(1) specifically states:

With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals insofar as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

Despite existing UN human rights instruments aimed at ensuring the humane treatment of migrant workers, it must be noted that the development of appropriate instruments targeted at the most vulnerable group of migrants (unauthorised migrants) is inadequate compared to other categories of international migrants, such as refugees. Careful assessment of the ICRMW reveals a number of paradoxes. Although it is symbolically significant as far as the inclusion of unauthorised migrants in the human rights framework is concerned, it has a number of limitations that are likely to impinge on its envisioned goal.<sup>166</sup> First, there seems to be confusion as to what constitutes social protection. For instance, though art 27(1) of the ICRMW seemingly extends substantial social security rights to irregular migrants, it goes no further than a mere statement of general principles as it does not clearly define the scope of social security.<sup>167</sup>

Secondly, and vagueness notwithstanding, the ICRMW appears to differentiate between different categories of migrant workers and addresses their corresponding rights separately. The ICRMW distinguishes between migrant workers in irregular situations (unauthorised migrants) and those with regular status to the detriment of the former. It does so by conferring basic and non-derogable human rights to all workers but reserves additional specific rights only to regular/authorised migrant workers.<sup>168</sup>

For example, access to social services, unemployment benefits, training, and housing are exclusively available to only lawful migrant workers.<sup>169</sup> These presumably innocent differential entitlements accorded to the two groups of migrants under the Convention effectively create two

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<sup>166</sup> Jakubowski op cit note 32 at 517.

<sup>167</sup> Dupper op cit note 20 at 233.

<sup>168</sup> Available at <http://www2.ohchr.org/english/law/cmw.htm>.

<sup>169</sup> Olivier op cit note 131 at 91.

classes of human rights protection.<sup>170</sup> Such dualism, intended or not, has the potential to produce loopholes for governments to discriminate against unauthorised migrants since they are deemed less worthy of international protection than other migrant groups. Since the ICRMW allows nation states the scope to differentiate between regular and irregular migrants, it is conceivable that policymakers in destination countries will be drawn to take advantage of (or even exceed) such claw-back clauses and afford unauthorised foreign workers lesser protection as is their prerogative.

Lastly, the ICRMW preserves the right of states (territoriality principle) to pursue any preferred immigration control policies in order to govern the entry and expulsion of foreigners from their land,<sup>171</sup> as well as their right to adopt control measures to eliminate clandestine migration and the employment of unauthorised migrants.<sup>172</sup> Further, the Convention does not impose any obligation on contracting states to legalise the status of unauthorised migrants.<sup>173</sup> In fact, unauthorised migrants have to contend with immigration laws of any country of transit as well as country of employment, which are often harsh.<sup>174</sup> As will be detailed in section 5.5.2 of this chapter, the partiality towards authorised migrant workers over unauthorised migrant workers is an illustration of the conflicting relationship between states' territorial sovereignty and human rights at play in the migration discourse.

As already indicated, the ILO has instituted a range of Conventions and Recommendations offering substantive protection to foreign workers. Most of the relevant international norms and standards concerning the social protection of migrant workers are unclear on the extent to which they should apply distinctively to regular or irregular migrants.<sup>175</sup> An analysis of the ILO framework dealing with social security specifically and the plight of migrants generally reveals little to no protection as far as unauthorised foreign workers is concerned. The reality is that ILO social security instruments (with the exception of one or two)

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<sup>170</sup> Dupper op cit note 20 at 231.

<sup>171</sup> Article 79.

<sup>172</sup> See articles 68 and 69 respectively.

<sup>173</sup> See art 35.

<sup>174</sup> See art 34.

<sup>175</sup> Esselaar & Garbers op cit note 26 at 288.

tend to be silent concerning the social protection of unauthorised foreign workers.<sup>176</sup> Only two of the four core instruments on migrant workers — Convention No. 143 and Recommendation No. 151 — under the ILO framework overtly attempt to address the situation of unauthorised migrant workers.

Convention No. 143 is perhaps the sole ILO instrument that offers binding standards in support of unauthorised migrant workers. Convention No. 143 guarantees equal treatment to unauthorised migrant workers pertaining to remuneration, social security, working conditions, and other benefits for past employment.<sup>177</sup> Further, art 1 mandates the safeguard of the basic human rights of ‘all migrant workers’, including unauthorised migrants. Functioning as a supplementary instrument, Recommendation No. 151 reiterates similar principles contained in Convention No. 143. Both Convention No. 143 and Recommendation No. 151 establish the right to equality of treatment between regular and irregular migrant workers in the field of social protection.<sup>178</sup> However, this right to equal treatment is limited and applies retrospectively (for work they have already performed), and consequently does not cover the duration of continued employment of unauthorised migrant workers. In theory therefore, unauthorised migrant workers can enjoy, albeit subject to certain limitation, equal treatment on par with nationals as regards social security benefits.

Although protection conferred by Convention No. 143 and its supplementary Recommendation No. 151 cover authorised and unauthorised migrant workers alike, Convention No. 143 is still restrictive in the protection it offers unauthorised foreign workers. It extends basic human rights protection to all migrant workers, including the unauthorised, but affords additional and better protection to authorised or regular migrants.<sup>179</sup> What is more, states can choose to exclude either Part I or Part II from their acceptance of the Convention.<sup>180</sup> Granted, the goal may be to encourage regular migration. However, the option to choose which parts to exclude defeats the whole purpose of ensuring that all foreign workers, even when employed

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<sup>176</sup> International Labour Office *Towards a fair deal for migrant workers in the global economy* (2004) 91; Dupper op cit note 156 at 66.

<sup>177</sup> Article 9

<sup>178</sup> See art 9(1) and paragraph 34(1)(b) respectively.

<sup>179</sup> ILO op cit note 82 at 129-30.

<sup>180</sup> Wickramasekara op cit note 18 at 267. This is the same with ILO Convention No. 97.

‘illegally’, enjoy a basic level of employment, human and social rights. The instrument should not give with one hand and take with the other; it becomes confusing and ineffective.

In conclusion, it is important to note that the ratification rate of core migrant worker conventions is dismal to say the least. Böhning avers that these ‘global comprehensive migration conventions concerned with labour migration tend to suffer from a ratification deficit or, more precisely, from a great reticence to ratify on the part of migrant-receiving countries’.<sup>181</sup> South Africa has failed to commit to any of the instruments incorporated in the international charter on migration; it has ratified neither the ICRMW nor the two ILO Conventions (No. 97 and 143). Considering that it is a major migrant-receiving country on the continent and within the sub-region, this is disconcerting because it has significant implications for migrants (particularly the unauthorised). Undoubtedly, South Africa occupies a unique position in the migratory flow in the sub-Saharan African region. In the South African case, the flow of migrant workers is unidirectional;<sup>182</sup> this perhaps explains its resistance in formally committing to any instruments that arguably offer very little incentive.

### 5.4.3 Regional prospects for labour and social protection

Regionally, analysis of existing sub-regional norms and standards suggest a gradual, albeit slow, movement towards a ‘special SADC-wide social security coverage regime’.<sup>183</sup> This special SADC-wide regime is relevant for foreign workers in the region, particularly those within South Africa, as they will ideally be able to enjoy similar adequate social protection,<sup>184</sup> and if need be, benefit from social assistance should they have no means of support owing to an inability to gain or regain employment.<sup>185</sup> However, this equal treatment of nationals and non-nationals in the field of social protection provided for in terms of the Social Charter and the SADC Protocol on Employment and Labour may be reasonably restricted to those migrating legally.

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<sup>181</sup> Roger Böhning *A brief account of the ILO and policies on international migration, paper prepared for the ILO Century Project* (2009) 15 available at <http://www.ilo.org/public/libdoc/ilo/2012/470804.pdf>, accessed 9 December 2015.

<sup>182</sup> Esselaar & Garbers op cit note 26 at 292.

<sup>183</sup> Olivier op cit note 129 at 80.

<sup>184</sup> See art 3.2 and 10.1 of the SADC Social Charter.

<sup>185</sup> Article 10.2. See also articles 4.1 and 17.2(b) of the SADC Code.

That said, none of the regional instruments, with the exception of the provisions of the SADC Code, offer any real or meaningful protection for unauthorised foreign workers in relation to social security.<sup>186</sup> The SADC Code modestly protects the social security position of unauthorised migrants. It extends significant social security protection to unauthorised migrants based on equality. Given the provision of article 17.3 of the Code then, unauthorised migrants in South Africa, specifically SADC member citizens, are entitled to a basic minimum social security protection and/or coverage. Whilst this extension of minimum social protection to this category of foreign nationals may be progressive, it must be noted that the provisions of the Code, unlike the Social Charter, are not binding norms and therefore not legally enforceable.<sup>187</sup>

## **5.5 Competing concerns: Questions of status and power**

Analyses of applicable transnational standards intended to prescribe the appropriate treatment for unauthorised migrants reveal two pressing issues that warrant brief consideration. Both issues point to a seemingly conflicting relationship between human rights obligations and two key principles in international law. The first issue relates to the meaning and application of the general principle of equality and non-discrimination, more specifically, the equality of opportunity or treatment of irregular migrants vis-à-vis regular migrants and nationals. The second issue concerns the scope of the international legal principle of territorial sovereignty, where the appropriate treatment of unauthorised migrants is concerned.

### **5.5.1 Equality and non-discrimination in international law**

The right to equality and non-discrimination is a recognised and well-established core principle in international human rights law.<sup>188</sup> The right to equal treatment or opportunity requires that all persons be dealt with equally in law and practice (equal before the law); that is, without distinction or discrimination. The notion of non-discrimination cannot be detached from equality inasmuch as they are inseparably connected and often interchangeable.

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<sup>186</sup> Olivier op cit note 129 at 80.

<sup>187</sup> Ibid 81.

<sup>188</sup> The principle of equal treatment and non-discrimination is contained in numerous international and regional standards, including all the major human rights instruments. This includes, but is not limited to, the UDHR (art. 2), the ICESCR (art 2(2)), the ICCPR (art 2 and 26), and the ACHPR (art 2 and 3).

However, only a few international instruments have attempted to define non-discrimination. In this regard, article 1(1)(a) of ILO Convention No. 111<sup>189</sup> provides that discrimination includes ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’.<sup>190</sup> Similarly, most of the human rights instruments prohibit discrimination on analogous listed grounds. For instance, article 2 of both the UDHR and ICESCR prohibit discrimination on ten illustrative grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Despite the prominence of equality and the overt prohibition of discrimination in international law, there appears to be a confusing conundrum. International law seemingly protects the rights of all workers irrespective of citizenship; yet the status of the individual determines the rights international law grants.

On the one hand, the right to equality and non-discrimination is a crosscutting issue of concern in international law. Almost all the international instruments surveyed in this chapter, thus far, provide to migrants equality of treatment in the workplace on par with national workers, including core human rights such as non-discrimination. In this respect, both article 2 of the UDHR and article 2(2) of the ICESCR recognise the right to equality and non-discrimination. Similarly, the UN ICRMW and ILO Conventions No. 97 and 143 all maintain that there should be equality of treatment and non-discrimination.

More precisely, the ICRMW articulates non-discrimination (articles 1(1) and 7), equal treatment between nationals and non-nationals as regards employment conditions and

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<sup>189</sup> Convention concerning Discrimination in Respect of Employment and Occupation. In South Africa, Convention No. 111 is an interpretative guide to the EEA because the EEA was enacted to give effect to the Convention (s 3). For detailed discussion see: Darcy du Toit ‘Protection against unfair discrimination in the workplace: Are the courts getting it right?’ (2007) *Law, Democracy & Development* (Special Edition) 67; Carol Cooper ‘The boundaries of equality in labour law’ (2004) 25 *ILJ* 813.

<sup>190</sup> A definition of non-discrimination can also be found in the following instruments: art 1(1) of CERD, art 1 of CEDAW and art 2 of CRPD.

remuneration (art 25), and equal access to social protection (art 27).<sup>191</sup> To this end, art 88 prohibits ratifying states from excluding any part or any category of migrant worker from its application. In the same way, both ILO Conventions No. 97 and 143 seek to ensure non-discrimination and equality of treatment between nationals and migrant workers.<sup>192</sup> In fact, Convention No. 143 takes the equality concept further to include equal opportunity.<sup>193</sup>

On the other hand, international instruments regulating the position of migrant workers seemingly apply distinctively to regular and irregular migrants. The reality is that these international instruments of direct relevance to migrant workers tend to differentiate between the categories ‘national’, ‘regular migrant’, and ‘irregular migrant’. These categorisations become problematic when they result in differing classification of rights for those concerned. The very instruments that promise equal treatment of nationals and non-national simultaneously provide for some restrictions on the principle of equality.

Hence, the ICRMW and ILO Conventions No. 97 and 143 fall into this trap. The broad conception of the equality principle contained in Part II (specifically art 10) of Convention No. 143 applies only to regular migrants. Article 10, among other things, provides that members undertake to promote and guarantee ‘...equality of opportunity and treatment in respect of employment and occupation, of social security...for persons who as migrant workers or members of their families are lawfully within its territory’. Similar provision is contained in art 6 of Conventions No. 97. Thus, both ILO Conventions restrict the equality of treatment principle to regular migrants, indirectly excluding irregular or unauthorised migrants.

As previously indicated, the ICRMW is in four parts, with Parts III and IV being of particular relevance to the current equality discussion.<sup>194</sup> Despite the fact that the ICRMW avers that there should be equality of treatment,<sup>195</sup> Parts III and IV assert two parallel classifications of equal treatment for migrant workers. In this regard, it provides for equality of treatment between

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<sup>191</sup> Also see Marius Olivier ‘Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part II)’ (2012) 2(2) *SADC Law Journal* 129 at 145.

<sup>192</sup> Wickramasekara op cit note 18 at 268. See also articles 6 and 10 of Conventions No. 97 and 143 respectively.

<sup>193</sup> See Part II, particularly art 10.

<sup>194</sup> Most of the provisions contained in Parts III and IV of the ICRMW are also covered by the UDHR and ICESCR.

<sup>195</sup> See articles 1(1) and 7.

nationals and all migrant workers and their families (Part III), and equality of treatment between regular migrants and irregular migrants and their families (Part IV).

Essentially, the ICRMW permits states to distinguish between regular and irregular migrants, allowing for differential treatment to the detriment of the latter group.<sup>196</sup> The two categories of equality of treatment translate into two sets of rights protection: protection of all migrant workers (Part III) and a relatively higher protection for regular migrant workers (Part IV). This differentiation and ensuing dual classes of human rights protection is superfluous and unwarranted.

It is understandable why no right is absolute and that not every differentiation of treatment or distinction between individuals or groups will amount to discrimination.<sup>197</sup> In certain conditions, attaining equality will require taking actions that cause or perpetuate discrimination. In fact, general international law permits such (affirmative) actions. However, such actions should not violate the principle of non-discrimination. For this reason, regional supervisory bodies, such as the European Court, Inter-American Court, and the Human Rights Committee, sanction distinction or differentiation as far as they are justified, reasonable and objective, and there is proportionality between the aim and means of the differentiation.<sup>198</sup>

While there are certainly legitimate reasons for differentiating between irregular migrants and those in a regular situation, the restrictions embedded in these instruments still negate the equal treatment principle (prohibition of all discrimination based on nationality). Determining the right to equality of migrants should not be solely a question of status. Evidently, people treat unauthorised migrant workers differently because of their irregular status. Their irregular immigration status, an undesirable and prohibited characteristic, supposedly renders unauthorised migrants undeserving of equal treatment or access on par with regular migrants with regard to certain basic rights.

This approach to rights protection is problematic in that it fails to see the interconnection between immigration and labour law and the compatibility of their goals. Sole reliance on status in determining rights essentially esteems immigration law objectives at the expense of labour law

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<sup>196</sup> Articles 36 to 56 grants additional rights to regular migrants and their families.

<sup>197</sup> See par 13 of Human Rights Committee's General Comment 18.

<sup>198</sup> See par 57 of *Advisory Opinion No. 4* of the Inter-American Court and the Human Rights Committee's General Comment 18, para 13.

objectives.<sup>199</sup> Such an approach fails to recognise that migrant workers (both the authorised and unauthorised) encounter various forms of discrimination and exploitation in host countries,<sup>200</sup> and the vulnerability is more severe for unauthorised migrants who do not possess the necessary legal authorisation.<sup>201</sup>

In light of this, any differential treatment in the enjoyment of a right solely on the basis of the migratory status of a worker goes contrary to the basic human right philosophy assumptions ‘that equality, as a human right, is an entitlement and not a benefit, and like every other human right, must be legally enforceable’.<sup>202</sup> The premise is simple: migratory status *per se* should not deprive migrant workers of certain rights, particularly their human rights.

In any case, migration itself should not grant or deny any form of status.<sup>203</sup> The Inter-American Court of Human Rights, in an Advisory Opinion in September 2003,<sup>204</sup> has ruled to this effect.<sup>205</sup> In a request to the court, Mexico averred that harmfully distinct treatment (either between regular and irregular migrant workers or between nationals and non-nationals) should not be permitted in the implementation of the fundamental labour rights recognised in international human rights instruments.<sup>206</sup> The court settled this assertion reasoning that ‘the

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<sup>199</sup> Elaine Dewhurst ‘The role of irregular immigrants to back pay: The spectrum of protection in international, regional, and national legal systems’ in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) 216-238 at 216.

<sup>200</sup> Annette Lansink ‘Migrant workers and non-discrimination in the workplace: an international law perspective’ in Dupper & Garbers (eds) *Equality in the workplace: Reflections from South Africa and beyond* (2009) 259-282 at 274.

<sup>201</sup> Ibid. Also see the discussion in chapter 4.

<sup>202</sup> Dimitrina Petrova ‘The *Declaration of Principles on Equality*: A Contribution to International Human Rights’ (2008) 2 *The Equal Rights Review* 58 at 59.

<sup>203</sup> Esselaar & Garbers op cit note 26 at 301.

<sup>204</sup> Inter-American Court of Human Rights *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03. Available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf) [accessed 10 December 2015].

<sup>205</sup> The ruling relates to Mexico’s request for an advisory opinion on the denial of enjoyment and exercise of certain labour rights of migrant workers, and its compatibility with the obligation of the American States to ensure the principles of legal equality and non-discrimination contained in international human rights instruments. See para 1 of Advisory Opinion OC-18/03.

<sup>206</sup> Ibid para 47.

regular situation of a person in a state is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination'.<sup>207</sup>

The court further held, and correctly so, that a person in employment, irrespective of the migratory status, 'acquires labour rights in the state of employment because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination'.<sup>208</sup> In summary, the court conclusively declared:

The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognised and guaranteed, irrespective of his regular or irregular status in the state of employment. These rights are a consequence of the employment relationship.<sup>209</sup>

This excerpt from the Advisory Opinion suggests, and rightly so, that immigration status does not impinge on the rights and responsibilities stemming from the employment relationship.<sup>210</sup> Consequently, the right to equality and non-discrimination is and cannot be definitively a question of status. To this end, the position taken in this chapter and throughout the research is that the categories 'national', 'regular migrant' and 'irregular migrant' must be treated in the same way, at least as far as fundamental labour rights are concerned.

Advocacy for the equality of treatment or opportunity for irregular migrants does not suggest that they should be beyond the reach of the law. The first option, and perhaps the primary goal, is to encourage or gear efforts towards legal or regular migration. This will require more and user-friendly channels of entry. However, should such efforts fail and they do fail, the right of access of (unauthorised) migrants to social protection should not be exclusively dependent on their legal or migratory status. They should be entitled to a basic level of social protection by virtue of their shared humanity, if not for their vulnerability or marginalisation.<sup>211</sup>

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<sup>207</sup> Ibid para 118.

<sup>208</sup> Ibid para 133.

<sup>209</sup> Ibid para 134.

<sup>210</sup> Recent South African Labour Court jurisprudence takes a similar position. See *Discovery Health Ltd v CCMA and Others* (2008) 29 ILJ 1480 (LC).

<sup>211</sup> OHCHR op cit note 15 at 14.

### 5.5.2 International norms of human rights vs state territorial sovereignty

International law allows states to determine and organise the potential entry or refusal of migrant workers. Underlining this right is the principle of territoriality. However, when considered in the context of clandestine migration, there appears to be a tension between the two domains: i.e. between a state's immigration-regulatory powers to exclude foreigners and its general human rights obligations to unauthorised migrants.<sup>212</sup> Bosniak argues that the debate between proponents and opponents of human rights protection for unauthorised migrants involves a pertinent question about the reciprocal effect between 'human rights protection for irregular migrants and the sovereign exclusionary powers of nation-states'.<sup>213</sup>

The argument, as put forward by Bosniak, is essentially a structural debate about the conflicting interplay between state territorial sovereignty, and international human rights. The conflict lies at the boundary where the sovereign right of a state to control its territory must give way for its international obligations to protect irregular migrant workers as individuals.<sup>214</sup> Framed differently, when should human rights issues fall squarely within states' national jurisdiction and when can such issues be reasonably scrutinised by outside parties?

In order to prevent the abuse of sovereign discretionary powers, the international community has formulated a set of norms and standards to guide and synchronise various national legislation, policies, and practices in order to protect the interests of both the state and migrant workers.<sup>215</sup> At the heart of this international effort is the conception of human rights centred around principles of dignity and equality based on our shared humanity. These international norms, among other things, temper states' territorial sovereignty by imposing certain limitations on their use.<sup>216</sup> Hence, if the protection of unauthorised migrant workers' rights in agreement with international human rights principles intersects with states' sovereign rights to determine the structure of national membership, tension ensues,<sup>217</sup> tension about either protecting individual rights or preserving national sovereignty.

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<sup>212</sup> Jakubowski op cit note 32 at 518.

<sup>213</sup> Bosniak op cit note 42 at 747.

<sup>214</sup> Ibid at 751.

<sup>215</sup> ILO op cit note 82 at 117.

<sup>216</sup> Bosniak op cit note 42 at 743.

<sup>217</sup> Ibid at 742.

The tension between states' territorial sovereignty and human rights is an indication of the inextricable connection between immigration law and other areas of law such as social security law. When considering unauthorised foreign workers in international law, human rights norms will always appear to be in competition with the conception of state sovereignty. This conflict ensues because predominant belief suggests that migration issues are wholly under the state domain and so the treatment of non-nationals falls within the varied authorities of the state.<sup>218</sup>

Some scholars, a position also taken in this paper, aver that 'the tension between human rights principles and states' immigration powers have largely been resolved in favour of the state' because they essentially maintain their sovereign rights to make it a crime for irregular migrants to enter their borders or for employers to hire them.<sup>219</sup>

Presently, unauthorised foreign workers are not guaranteed all fundamental rights under international law because of the principle of state sovereignty.<sup>220</sup> Likewise, they are not guaranteed all fundamental labour rights in customary international law.<sup>221</sup> Although the preference given to states' discretion is by no means absolute, it must be noted that when states' sovereign prerogatives (particularly in immigration matters) are held superior to substantive protection in other areas of law (e.g. human rights, labour or social security), it stand to threaten the spirit and goal of the instruments in question and ultimately defeat their enforceability.

Given South Africa's security-focus immigration policy, if the country was to ratify an important instrument like the ICRMW, the anticipation is that the Department of Home Affairs will greatly favour the discretionary power to exercise control over its borders accorded by the Convention, and even unscrupulously control the entry and expulsion of 'undesirable' foreign nationals.<sup>222</sup> There is the expectation that South Africa, like any major migrant-receiving states confronted with clandestine migration, is likely to be excessively abusive in exercising its power against irregular migrant workers under certain circumstances.<sup>223</sup> In that respect, there is the

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<sup>218</sup> Berg op cit note 3 at 3.

<sup>219</sup> Bosniak op cit note 42 at 753; Cassel op cit note 93 at 487.

<sup>220</sup> Cassel op cit note 93 at 487.

<sup>221</sup> Ibid.

<sup>222</sup> Article 79 of ICRMW.

<sup>223</sup> Bosniak op cit note 42 at 742.

prospect that these migrant workers would lose any degree of employment-related social protection because states' national sovereignty would greatly limit such protection in the end.<sup>224</sup>

The use of sovereign discretionary powers to restrict irregular migrant workers concerning equal treatment with regular migrants or citizens in the field of social protection defeats the whole object and function of social protection. As noted by the UN Commission:

The ultimate purpose of social protection is to increase capabilities and opportunities and thereby, promote human development. While by its very nature social protection aims at providing at least minimum standards of well-being to people in dire circumstances enabling them to live with dignity, one should not overlook that social protection should not simply be seen as a residual policy function of assuring the welfare of the poorest – but as a foundation at a societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity.<sup>225</sup>

## 5.6 Conclusion

In view of often-hostile domestic laws and political rhetoric surrounding discussions about the rights protection of unauthorised migrant workers, scholars suggest that international law is an optimistic avenue for sourcing guidance (precedents) on the better treatment of migrant workers. However, the extension of substantial protection to unauthorised migrants under international law tends to be problematic. This is because most international human right instruments vaguely allude to the protection of unauthorised migrants, while some overtly rule them out from certain rights offered to citizens or authorised/regular migrants. Even when these instruments are seemingly intended to extend substantial rights to unauthorised migrants, the fulfilment of such legal principles are often extremely problematic.

Emerging problems associated with the actual realisation of international human rights legal principles often link to the interplay between immigration law (states' territorial sovereignty) and other areas of law. Human rights principles seem to be at odds with immigration law seeing that the prevailing view suggests that states have a broad authority over their borders and as such, the treatment of migrants falls directly under the discretionary powers of individual sovereign states. In this respect, development in international law on the rights of unauthorised foreign workers has been less than progressive.

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<sup>224</sup> Ibid.

<sup>225</sup> United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World: Report of the Secretary-General* (39<sup>th</sup> Session of the Commission for Social Development) (2002) 6 available at <http://www.globalaging.org/waa2/documents/socprotect.pdf>

Simply put, the protection of social security rights for migrants (both the regular and irregular) cannot be limited to statements of general application as is the case with the universal human rights framework. The need for more substantive protection (under labour and anti-discrimination laws) for this vulnerable category of workers has perhaps been realised, given the plethora of international instruments that relate specifically to the special protection of migrant workers.

Yet the realisation of these instruments in the lived experience of this vulnerable group is still tentative. Subtle differentiation, restrictions, or limitations embedded in international instruments concerning migrant workers suggest some uncertainty on the part of the international community about the treatment of irregular migrant workers.<sup>226</sup>

Accordingly, current international human rights instruments are inadequate to protect these workers. Therefore, there needs to be a re-interpretation of international protective provisions or norms, if these international legal instruments are to achieve their intended purposes. A progressive reformulation of international instruments will provide better domestic guidance on the treatment of all foreign workers, since international instruments are designed to guide and synchronise various national legislation, policies, and practices.

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<sup>226</sup> Neil A Friedman 'A human rights approach to the labor rights of undocumented workers' (1986) 74(5) *California Law Review* 1715 at 1726.

## CHAPTER VI SOUTH AFRICAN SOCIAL PROTECTION REGULATORY FRAMEWORK

*‘When development policies pay no attention to the human beings who move within migration flows, they contribute to inequality, injustice and incoherence in policy responses to migration.’<sup>1</sup>*

### 6.1 Introduction

It is well-established that the international community, under the auspices of the UN and ILO, collectively recognises the many deprivations that foreign workers (particularly the unauthorised) put up with in host nations. This global recognition of the plight associated with clandestine migration is made evident by the select employment-related human rights protection made available to these workers under the international human rights regime. Since a number of the available labour-related human rights protection form part of treaty law, certain principles of international human rights law are only effective once they are formally endorsed by individual nation states and executed into relevant domestic law. Additionally, because access to social protection differs across individual states (not at all integrated),<sup>2</sup> foreign workers often have to rely solely on social protection laws in host countries. Consequently, the position of foreign nationals (particularly the unauthorised) in the social protection mechanisms of destination countries, in this case South Africa, deserves careful analysis.

In the domestic domain, the concern becomes primarily whether unauthorised foreign workers can resort to constitutional and other relevant statutory provisions for rights protection. In South Africa, the supremacy of the Constitution is such that it underpins other pieces of legislation promulgated to give effects to its principles and spirit. Sometimes when the constitutionality of certain provisions in other pieces of law and/or actions is questioned, the Constitution is strongly relied on to settle such matters. In respect to disputes of a socio-economic nature involving foreign nationals, particularly the unauthorised, the constitutional

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<sup>1</sup> Office of the High Commissioner for Human Rights (OHCHR) *Out of the shadows: a human rights perspective on irregular migration* (2012) 2.

<sup>2</sup> Daleen Millard ‘The portability of social security benefits: The position of non-citizens in South Africa and the Southern African Development Community’ in Becker, U & Olivier, M (eds) *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (2008) 155.

equality provision (s 9) is often indirectly invoked. When the courts are called to interpret the rights of foreign nationals — for instance to assess whether a measure or action limiting the right of unauthorised foreign workers is reasonable, necessary or proportionate — the basis of grounding the interpretation becomes increasingly important. What is more, it is common practice for South African courts to make use of principles of international human rights law to interpret and bridge gaps in domestic law where necessary. This infusion of domestic law with international norms is necessary for the desirable interpretation of what is often considered ambiguous domestic provisions. While the primary focus of this chapter is on the South African experience, comparison is made to the situation in the United States and (to a lesser extent) Europe.

Accordingly, this chapter examines unauthorised foreign workers' entitlement to domestic social protection rights, at least a basic form, against existing international instruments. In embedding human rights principles in the migration context, it examines the extent to which domestic protection regimes comply with applicable international, continental, and regional instruments that seek to protect the right of access to social protection of foreign workers.

The argument here is that policymakers ought to move away from emphasising punitive immigration control measures to an approach that effectively deals with clandestine migration and is at the same time cognisant of the human rights of the most vulnerable role players of the clandestine migration phenomenon, unauthorised foreign workers. There needs to be a move away from absolute security-centred approach to a more human rights approach to migration management if principles of fairness and social justice are to be upheld or achieved in any democratic society.

Section 6.2 of the chapter surveys possible sources of domestic law, including available case law, in order to provide an understanding of the general difficulties and obstacles associated with social protection provision in the country. It does so by giving a brief overview of the South African legal framework providing employment-related social protection.

Sections 6.3 and 6.4 of the chapter then analyse the protection measures, if any, put in place to address unauthorised foreign workers within the domestic framework. It does so by measuring domestic provisions against the existing international norms and standards explored in preceding chapter in order to ascertain the extent of the adequacy of the domestic protection

offered to unauthorised foreign workers in light of these international norms. This comparative exercise assists in revealing domestic deficiencies in the field of social protection.

Finally, sections 6.5 and 6.6 the chapter examine how improvements could be made in terms of domestic legal reform so as to improve the social protection of unauthorised migrants. In doing so, it surveys relative best practices from countries that offer comparably better protection for this class of workers. Through examining how other (similar) jurisdictions have successfully developed available international protection norms, it makes a case for how policymakers can reinterpret these international norms to suit South Africa's socio-economic context.

## **6.2 Overview of domestic legal framework providing labour and social protection**

The nature and state of the South African social protection (and labour) framework warrants a brief account as it severely impacts on the position and treatment of unauthorised foreign workers as regards their right of access to social protection. There has been a fair progress in the adjudication of the right to social security in South Africa. The Constitutional Court has intervened where necessary in advancing the jurisprudence in a number of groundbreaking judgments, as it pertains to socio-economic rights.<sup>3</sup>

However, there is little to no case law setting the scope of the rights of unauthorised foreign workers in this respect. Hesitation on the part of unauthorised migrants to invoke the domestic judicial protection to improve their position out of fear of drawing attention to their immigration status may explain, in part, the present dearth of judicial scrutiny into the rights of unauthorised migrants in the country.<sup>4</sup> Hesitancy notwithstanding, there are some existing constitutional principles and statutory provisions that can be used to protect the rights of these vulnerable class of workers.

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<sup>3</sup> See for example, the following judgments of the Constitutional Court: *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC); and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>4</sup> Neil A Friedman 'A Human Rights Approach to the Labor Rights of Undocumented Workers' (1986) 74(5) *California Law Review* 1715 at 1717.

### 6.2.1 Constitutional provision

The South African Constitution is supreme and influences all areas of domestic law and the wider South African society. In *Lawyers for Human Rights v The Minister of Home Affairs*,<sup>5</sup> the court established that the rights in the Constitution also protect ‘illegal’ foreigners at ports of entry. Given this liberal precedent, all issues pertaining to the plight of irregular foreign workers should be considered in light of constitutional principles, including the rights contained in the Bill of Rights (Chapter 2 of the Constitution). In this respect, the Constitution is a fitting departure point for understanding the domestic regulatory framework protecting work-related and social rights of foreign nationals in South Africa.

Despite the South African Constitution having been lauded as one of the most progressive in the world, the question still remains as to whether unauthorised foreign nationals can invoke the Constitution in domestic settings. The general language of relevant provisions already suggests that the Constitution, for the most part, can provide an adequate legal framework for protecting the rights of foreign workers.<sup>6</sup> That is, unauthorised migrants, as included in the notion of ‘everyone’ within the natural language of the Constitution, can turn to the Constitution to secure protection against unfair discrimination and the right to fair labour practices, as well as the right of access to social security.<sup>7</sup> However, it is arguable whether the general application of these fundamental rights is consistent with the Bill of Rights when unauthorised foreign nationals are particularly concerned.

#### (a) *Equality of treatment*

Contemporary South African society presupposes a foundation built on the democratic values of human dignity, equality and freedom of all people.<sup>8</sup> In *Khosa and Others v Minister of Social Development and others*; *Mahlaule and Others v Minister of Social Development and Others*,<sup>9</sup> the court established that socio-economic rights in the South African Constitution are closely

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<sup>5</sup> 2004 (4) SA 125 (CC).

<sup>6</sup> DJ Meyer ‘Migrant workers and occupational health and safety protection in South Africa’ (2009) 21 *SA Merc LJ* 831 at 833.

<sup>7</sup> S 9 (the equality clause), s 23, and s 27 of the Constitution respectively.

<sup>8</sup> Sections 1(a) and 7(1) of the Constitution.

<sup>9</sup> 2004 (6) SA 505 (CC).

connected to the constitutional founding values of human dignity, equality, and freedom.<sup>10</sup> In consequence, the constitutional principle of equality, as an envisaged fundamental value and right,<sup>11</sup> becomes an increasingly salient correlative provision when looking at the rights of unauthorised foreign nationals, particularly their right of access to social protection.

The equality clause of the Constitution, specifically s 9(1) reads: '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.' The word 'everyone' suggests that unauthorized foreign nationals are included in the scope of protection, and can therefore enjoy the same right to equal protection under labour and anti-discrimination laws as do their legal and local counter-parts. In this respect, the Constitutional Court, in *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*,<sup>12</sup> endorsed the equal treatment of foreign workers when it established that the differential treatment between foreign teachers and their local counterparts was unfairly discriminatory as it had the potential to impair the dignity of the foreign nationals.<sup>13</sup> Besides, the right to equality for all is not simply treating everyone equally in the hopes of eradicating inequalities. It transcends mere formal application of the right (form) to include its context and impact (substance), as the constitutional equality jurisprudence has often reiterated.<sup>14</sup>

In *Minister of Home Affairs and Others v Tsebe and Others*,<sup>15</sup> the Constitutional Court reaffirmed its ruling against the deportation of foreign nationals suspected of crimes to death penalty jurisdiction. In this judgement, the majority of the court held that the human rights provided for in the Constitution applied to everyone, therefore even 'illegal' foreigners accused of a crime are equally protected.<sup>16</sup> This is consistent with an earlier precedent-setting judgment on a similar issue handed down by the same court.<sup>17</sup> The case affirmed equality of treatment

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<sup>10</sup> Ibid para 40.

<sup>11</sup> Sections 7 and 9 of the Constitution respectively.

<sup>12</sup> 1998 (1) SA 745 (CC), hereafter referred to as *Larbi-Odam*.

<sup>13</sup> Supra note 9 para 24.

<sup>14</sup> See discussions in chapter 2.

<sup>15</sup> 2012 (5) SA 467 (CC). This case concerned the obligations of the South African State regarding the deportation of foreign nationals who are also a fugitive of justice to a State where they are at risk of being subjected to the death penalty.

<sup>16</sup> Ibid para 65.

<sup>17</sup> See *Mohamed and Another v President of the RSA and Others* 2001 (3) SA 893 (CC).

between citizens and foreign nationals regarding the rights to life, human dignity, and the right of protection from cruel, inhuman, or degrading treatment or punishment.

The provisions of the equality clause, as it reads currently, seemingly provide a blanket protection that conceivably reads wide enough to include protection for unauthorised foreign workers. In spite of this progressive doctrine, the limitation clause (s 36) of the Constitution leads us to understand that equality is not an absolute right and is therefore capable of permissible restriction. Moreover, since the meaning of the equality clause is reasoned on an *ad hoc* basis per individual cases,<sup>18</sup> it is doubtful that discrimination against unauthorised foreign workers regarding their right to equality cannot be justified.

**(b) Fair labour practices**

The right to fair labour practices is vital in employment law.<sup>19</sup> Yet, the concept is too broad and imprecise, making it rather difficult to delineate the precise boundaries of what in fact constitutes unfair labour practice.<sup>20</sup> Whilst it is impossible to give an exact definition of this right, the CC has stated that ‘what is fair depends on the circumstances of a particular case and essentially involves a value judgment’.<sup>21</sup>

Section 23(1) of the Constitution provides that *everyone* has the right to fair labour practices (emphasis added). The term ‘everyone’ could broadly imply an extension of the right to all people. However, subsections (2) to (4) of s 23 qualify the scope of the right by limiting it to four beneficiaries: workers, employers, trade unions, and employer organisations.<sup>22</sup> The conventional view is that the provisions in subsections (2) to (4) restrict the concept to the ‘relationship between the worker and the employer and the continuation of that relationship on

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<sup>18</sup> Ralph Matheka ‘The Formulation of Equality Clause in the South African Constitution: a Juristic question, or a Political Point of Departure’ (2003) at 3 available at [http://www.clearcontent.co.za/storage/files/prev\\_Formulation\\_of\\_equality\\_clause.pdf](http://www.clearcontent.co.za/storage/files/prev_Formulation_of_equality_clause.pdf), accessed 18 February 2015.

<sup>19</sup> Avinash Govindjee & Adriaan van der Walt ‘Labour law and the Constitution’ in AJ van der Walt, R le Roux and A Govindjee (eds) *Labour law in context* (2012) 4.

<sup>20</sup> Meyer op cit note 6 at 846.

<sup>21</sup> See *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC) para 33.

<sup>22</sup> Rochelle le Roux ‘The new unfair labour practice’ in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* 2012 *Acta Juridica* 41 at 43.

terms that are fair for both'.<sup>23</sup> Thus, the correct interpretation of s 23 is one that seemingly guarantees the right to fair practices to individuals involved in an employment relationship or a similar relationship only. Whether this approach is correct or not is not at issue here; the real question is whether the term 'worker' in subsection (2) can also include irregular migrant workers.

There is, however, certainty in the law that this protection extends to migrant workers. Both the decisions of the Constitutional Court in *Larbi-Odam* and the Labour Court in *Discovery Health* are evident of the extension of this right to foreign nationals. Moreover, the *Discovery Health* decision meant that the right to fair labour practices extends to workers engaged in 'illegal' employment contracts. Perhaps these judgments coupled with the presumably blanket protection offered by s 23(1) could be read wide enough to provide work-related social protection for unauthorised foreign workers because access to employment-related social protection can be a form of fair labour practice.

**(c) Access to social protection**

Social security is a protected human right in the South African Constitution of 1996.<sup>24</sup> South Africa is currently the only country in SADC that specifically references social security as a distinct constitutional and justiciable right.<sup>25</sup> It enshrines socio-economic rights by providing for the right of access to social security, including the right to social assistance, as well as other social protection-related rights such as housing and education.<sup>26</sup>

Section 27(1)(c) of the Constitution explicitly reads that '[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance'.<sup>27</sup> The use of the term 'everyone' suggests no limiting

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<sup>23</sup> Ibid.

<sup>24</sup> Section 27(1)(c) of the Constitution. Some SADC constitutions, such as those of Botswana, Namibia and Zimbabwe, do not make mention of social security (protection). Others, the Zambian Constitution of 1996 and Tanzanian Constitution of 1998, allude to social security rights as 'principles of state'.

<sup>25</sup> Charles M Fombad 'An overview of the constitutional framework of the right to social security with special reference to South Africa' (2013) 21 *African Journal of International and Comparative Law* 1-31 at 21.

<sup>26</sup> Sections 27, 26, and 29 of the Constitution respectively.

<sup>27</sup> Section 27(1)(c) of the Constitution.

criteria such as citizenship, migration status or legality of work.<sup>28</sup> However, s 27(2) defines the nature of the government's mandate by providing that '[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the realisation of this right'. A broad interpretation of s 27(1)(c), read together with s 27(2), suggests that unauthorised migrants are entitled to the constitutional protection of their social protection rights, provided the state has sufficient resources to meet the rights. In *Khosa*,<sup>29</sup> the court expressed that:

[s]ection 27(1) vests a right of access to social security in "everyone". The constitutional reference to "everyone" implies that all in need must have access to the social welfare scheme that the state has put in place. Where some who are in need are excluded, everyone does not have access to the scheme. The word "everyone" is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.<sup>30</sup>

The *Khosa* case presented an excellent opportunity for the CC to extend crucial social security benefits to both regular and irregular migrants.

### 6.2.2 Statutory law provisions

Aside from the Constitution, unauthorised foreign workers may also look to statutory provisions, particularly those legislation regulating employment conditions, for rights protection. As previously indicated, the Bill of Rights (Chapter 2 of the Constitution) applies to all area of the law.<sup>31</sup> In order to give effect to the employment rights enshrined by the Constitution, the government has enacted various legislation. Some of these legislation deal extensively with equality as it pertain to the workplace,<sup>32</sup> whilst others give expression to the constitutional rights to fair labour practices,<sup>33</sup> and access to social security.

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<sup>28</sup> Bruno Paul Stefan van Eck and Felicia Snyman 'Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) 59(2) *Journal of African Law* 294 at 310.

<sup>29</sup> The case involved a constitutional challenge lodged by Mozambican migrants, with permanent resident statuses in South Africa.

<sup>30</sup> *Supra* note 9 para 111.

<sup>31</sup> Section 8(1) of the Constitution.

<sup>32</sup> See the Employment Equity Act.

<sup>33</sup> Both the Labour Relations Act and the Basic Conditions of Employment Act contain provisions in that respect.

**(a) Labour Relations Act**

The Labour Relations Act (LRA), the centerpiece of South African employment law, aims at realising and regulating the fundamental employment rights in the Constitution in order to promote economic development, social justice, labour peace, and a democratisation of the workplace.<sup>34</sup> In doing so, it entrenches a number of fundamental labour rights including the all-ambiguous right to fair labour practices.

Up until 2008, South African labour law repeatedly excluded unauthorised foreign workers from its scope. This meant that unauthorised migrants had their constitutional right to fair labour practices habitually denied. Interpretations as to who qualified for protection under the LRA and BCEA often short-changed unauthorised migrants because they lacked ‘employee’ status as defined by s 213 of the LRA since their employment contract breached the Immigration Act, making it illegal.<sup>35</sup>

Pre-2008 jurisprudence, the conventional view was that a person working without a valid work permit is not an ‘employee’ under labour law because there is no existing valid employment contract. This conventional view is parallel with the approach adopted by the US Supreme Court in *Hoffman Plastic Compounds v. National Labor Relations Board*,<sup>36</sup> where the majority of the court denied unauthorised migrants labour law protection because their employment was in contravention of immigration laws.

However, the South African Labour Court has purposively interpreted the definition of ‘employee’ to incorporate irregular migrants into the legislative scope. In *Discovery Health Ltd v CCMA & Others*,<sup>37</sup> the court ruled that an employment contract in violation of the Immigration Act is not necessarily invalid and unenforceable because s 213 of the LRA does not necessarily fix eligibility for ‘employee’ status on an employment contract.<sup>38</sup>

Consequently, individuals who are engaged in work without a valid employment contract, as are unauthorised foreign workers, now qualify as employees and eligible for

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<sup>34</sup> See s 1 of the LRA.

<sup>35</sup> See judgments in the following CCMA cases: *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA), *Vundla v Millies Fashions* (2003) 24 ILJ 462 (CCMA), and *Georgieva-Deyanova v Craighall Spar* (2004) 9 BALR 1143 (CCMA).

<sup>36</sup> 535 U.S. 137 (2002).

<sup>37</sup> (2008) 29 ILJ 1480 (LC).

<sup>38</sup> *Ibid* para 49.

protection under the LRA and BCEA, and can have their constitutional right to fair labour practices protected. The conclusion drawn in *Discovery Health* is similar to that of the Advisory Opinion (OC-18) by the Inter-American Court of Human Rights.<sup>39</sup> Although the *Discovery Health* judgment primarily concerned the definition of ‘employee’ in terms of the LRA, it has the potential to impact on other areas (like social security) that make use of similar classifications.

However, it is worth noting that the government has introduced an Employment Services Act (ESA)<sup>40</sup> as an attempt, among other things, to regulate the employment of foreigners.<sup>41</sup> The ESA adopts the same stance as the Immigration Act regarding the employment of foreign nationals.<sup>42</sup> It prohibits an employer from employing a foreign national unless the employer can prove that the foreigner holds an applicable and valid work permit issued in terms of the Immigration Act prior to employment.<sup>43</sup> Moreover, the employer must ensure that there are no South African citizens or permanent residents suitable for the vacancy before hiring a foreign national.<sup>44</sup> The ESA may further require employers to prepare skills transfer plans for any position occupied by a foreign national.<sup>45</sup> The above provisions of the ESA regarding the employment of foreigners ostensibly appear protectionist and restrictive. Nonetheless, s 8(4) grants an employee who is employed without a valid work permit (i.e. an unauthorised foreign worker) the right to enforce ‘any claim that s/he may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law’.

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<sup>39</sup> See Advisory Opinion OC-18/03 of 17 September 2003 requested by the United Mexican States, *Juridical Condition and Rights of the Undocumented Migrants*, Series A No. 18. Available at [http://www.corteidh.or.cr/docs/opinions/seriea18\\_ing.pdf](http://www.corteidh.or.cr/docs/opinions/seriea18_ing.pdf).

<sup>40</sup> Act 140 of 2014

<sup>41</sup> Andre van Niekerk, Nicola Smit, Marylyn Christianson, Marie McGregor & Stefan van Eck (eds) *Law@work* (2015) 73. See also s 2(1)(h) of the ESA.

<sup>42</sup> A foreign national, in terms of s 1 of the ESA, is a person who is not a South African citizen or does not have a permanent-residence permit.

<sup>43</sup> Section 8(1) of the ESA. The Act does not explicitly provide for criminal penalties for hiring foreign nationals who do not possess a valid work permit; it (s 9) merely prohibits the act.

<sup>44</sup> Section 8(2)(a) of the ESA.

<sup>45</sup> Section 8(2)(c) of the ESA.

**(b) Social security legislation**

The South African social security system provides for all the nine classical risks contained in the ILO Social Security (Minimum Standards) Convention 102 of 1952.<sup>46</sup> Social security in South Africa encompasses four main elements: social insurance, social assistance, private savings, and social relief.<sup>47</sup> The state-funded social assistance (or social grants) and employers-employees contributory social insurance schemes make up the two common forms. Additionally, two other forms of social security are available; they include private savings, voluntarily done in the event of certain employment contingencies, and non-contributory needs-tested social relief should emergencies arise.

For the purpose of this study, the chapter will mostly focus on the two common sub-categories of social security, namely social assistance and social insurance. It is only feasible to assess the common forms of social security provisions because they are more relevant, relatively better developed, and more accessible. It is also worth noting that the South African social security system is rather fragmented across government departments, with little coherence or integration.<sup>48</sup>

**(i) Social insurance**

Social insurance typically relates to benefits earned by workers (and their families) and often tends to presuppose formal employment.<sup>49</sup> Moreover, social insurance usually necessitates a ‘reciprocal insurance relationship between an insured person and a social insurance institution.’<sup>50</sup> South Africa has three main statutory social insurance mechanisms: Unemployment Insurance

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<sup>46</sup> Letlhokwa George Mpedi & Avinash Govindjee ‘Social protection for workers posted to and from South Africa: A critical assessment’ (2009) 30(2) *Obiter* 774 at 775. The nine branches include medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, maternity benefit, family benefit, invalidity, and survivors’ benefits.

<sup>47</sup> Marius Olivier ‘Critical issues in South African social security: The need for creating a social security paradigm for the excluded and the marginalized’ (1999) 20 *ILJ* 2199 at 2200.

<sup>48</sup> MP Olivier & ER Kalula ‘Scope of Coverage’ in M P Olivier et al (eds) *Social Security: A Legal Analysis* (2003) 137.

<sup>49</sup> Ockert Dupper ‘The human rights of (irregular) migrants: An international, regional and South African perspective (Part 2)’ (2011) 3(1) *International Journal of Social Security and Workers Compensation* 55 at 56.

<sup>50</sup> *Ibid* at 55.

Fund (UIF), Compensation Funds, and the Road Accident Fund.<sup>51</sup> The relevant employment-based social insurance schemes, the product of the intersection of employment and social security laws, are the UIF and the Compensation Funds. The Unemployment Insurance Act 75 of 1966 (UIA) regulates the UIF, whilst the Compensation for Occupational Injuries and Diseases Act 30 of 1993 (COIDA, amended in 1997) and the Occupational Diseases in Mines and Works Act 73 of 1973 (ODIMWA) both regulate compensation funds.

The UIF offers temporary income relief in the event of the loss of a job, illness, maternity, adoption, and death; the Compensation Funds offers medical care and wage reimbursements to workers for employment-related disease or injury.<sup>52</sup> These schemes are mandatory contribution schemes regulated and administered by the State. Coverage of the social insurance system, however is limited to people in formal employment as entitlement is restricted to persons who fit the ‘employee’ concept or a similar term used in the applicable legislation.<sup>53</sup>

In addition to the statutory funds, workers may rely on voluntary insurance schemes or private savings to insure themselves against work-related risks. Voluntary insurance arrangements such as private medical schemes, private pensions, and provident funds are a common feature in South Africa.<sup>54</sup> However, the state also regulates private funds. For instance, the Pension Funds Act 24 of 1956 and Medical Scheme Act 131 of 1998 regulate private pension and provident funds, and private medical schemes respectively.<sup>55</sup>

However, legislation does not legally require workers to belong to a pension or provident fund. This lack of a legal obligation to participate coupled with high levels of unemployment prevalent in the country suggests that many economically active individuals are without protection against certain inevitable social risks. Consequently, the workers who do not belong to

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<sup>51</sup> The Road Accident Fund is the only social insurance that is not employment based. It aims to compensate a third party for any loss or damage suffered because of any bodily injuries or death, caused by the negligent driving of motor vehicles.

<sup>52</sup> National Planning Commission (NPC) ‘Chapter 11: Social protection’ in *National Development Plan: Vision 2030* (2011) 330.

<sup>53</sup> Olivier op cit note 47 at 2205.

<sup>54</sup> Ibid.

<sup>55</sup> Van Eck & Snyman op cit note 28 at 312.

any pension or provident fund scheme, and are ineligible for the statutory funds, become reliant on state social assistance mechanisms.<sup>56</sup>

(ii) *Social assistance*

Unlike social insurance, social assistance presumably implies a ‘notion of unilateral charitable obligation’ because taxes wholly finance such measures.<sup>57</sup> Social assistance provisions are exclusively the responsibility of government and are means tested.<sup>58</sup> Social assistance in South Africa is often synonymous to social grants and encompasses five main social relief provisions: the Old-Age Pension, the Disability Grant, the Child Support Grant, the Foster Care Grant, and the Care Dependency Grant. The Social Assistance Act 13 of 2004 and the Aged Persons Act 81 of 1967 regulate social welfare in South Africa.

Social assistance measures are by their nature limiting because they are State-provided non-contributory and income-tested benefits targeted at identified vulnerable groups.<sup>59</sup> For instance, policy specifically provides social grants for the aged (old age grant), the disabled (disability grant), and children (childcare grant). Coverage is subject to availability of funds because tax revenues typically finances these grants.

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<sup>56</sup> Olivier op cit note 47 at 2205.

<sup>57</sup> Gijsbert Vonk *Migration, social security and the law: Observations on the impact of migration policies upon the position of migrants in social security law in Europe* (2001) available at [https://www.rug.nl/research/portal/files/14631876/Migration\\_and\\_social\\_security.pdf](https://www.rug.nl/research/portal/files/14631876/Migration_and_social_security.pdf), accessed 26 March 2015.

<sup>58</sup> Ibid.

<sup>59</sup> NPC op cit note 52 at 329.

Table 1: *Overview of the forms and nature of social security in South Africa*<sup>60</sup>

<b>Forms of social security</b>		<b>Nature of social security</b>
<b>Social insurance</b>	Unemployment Insurance Fund (UIF)	Offers temporary income relief in the event of wage-related risks such as job loss, illness, maternity, adoption and death.  Contributory: joint contributions by employers and employees.  Regulated through the Unemployment Insurance Act 75 of 1966 (UIA).
	Compensation Funds	Offers medical care and wage reimbursements to workers for employment related disease or injury.  Regulated through the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and the Occupational Diseases in Mines and Works Act 73 of 1973 (ODIMWA) <sup>61</sup> .
	Road Accident Fund	Offers protection against risks with regard to motor vehicle accidents  Not employment-based
	Private savings (Voluntary insurance arrangements)	Individuals voluntarily save for unexpected contingencies. Voluntary contribution, e.g. private medical schemes, private pensions and provident funds.  Pension Funds Act 24 of 1956 Medical Scheme Act 131 of 1998
<b>Social assistance (Social grants)</b>		Safety net for impoverished individuals. Non-contributory; means-tested  Old-Age Pension Disability Grant Child Support Grant Foster Care Grant Care Dependency Grant.  Regulated and administered through the Social Assistance Act 13 of 2004 and the Aged Persons Act 81 of 1967.
<b>Social relief</b>		Offers temporary relief for major disasters e.g. floods, fire. Non-contributory, means-tested

<sup>60</sup> Table adapted from Jean Triegaardt *Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa* (2005) 2 available at <http://www.dbsa.org/en/AboutUs/Publications/Documents/Accomplishments>, accessed 10 October 2014.

<sup>61</sup> The ODIMWA applies only to the mining industry and compensates for mineral related occupational diseases like pneumoconiosis, tuberculosis, permanent obstruction of airways and progressive systemic sclerosis.

Evidence presented in *Table 1* is indicative of the fact that there are existing domestic public and private measures intended to offer protection ‘in the event of an individual’s earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost...’.<sup>62</sup> However, the extent to which these available legal mechanisms adequately protect is arguable. The reality is that the South African social security system is not very inclusive. Since social security in South Africa predominantly focuses on the formal wage economy,<sup>63</sup> people locked out of the formal sector are consequently out of reach of social protection, despite their willingness and ability to work.

### **6.3 Rights of unauthorised foreign workers to the South African social security system**

Foreign nationals (particularly unauthorised migrants) face a plethora of social, economic, and political barriers to get to their destination countries and even worse hardships once they are inside.<sup>64</sup> The uncertainties associated with labour migration, particularly the clandestine kind, raise the question of the adequate protection of migrant workers, specifically their right of access to social security.

It is therefore important to assess critically the social protection of migrant workers for at least two reasons. First, most foreign nationals, with exception of permanent residents, do not qualify for equal treatment with citizens in the field of social protection as far as policies in host nations are concerned. Secondly, migrant workers have specific interests in obtaining equal access to coverage and entitlement to benefits as national workers.<sup>65</sup>

#### **6.3.1 Access to coverage**

When considering foreign workers’ right of access to social protection, the issue of coverage becomes important. When assessing the social protection status of migrant workers in South Africa, this question of coverage plays out in two ways. The first relates to personal scope of coverage, and the second to territorial scope of coverage. Typically, various pieces of applicable

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<sup>62</sup> Department of Welfare *The White Paper for Social Welfare* (1997) 49.

<sup>63</sup> Triegaardt op cit note 60 at 2.

<sup>64</sup> International Labour Organization (ILO) *International labour migration: A rights-based approach* (2010) at 36.

<sup>65</sup> Nilim Baruah & Ryszard Cholewinski *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006) 6-7.

regulating legislation define the personal scope of coverage (i.e. who is or should be covered) and territorial scope of coverage (i.e. territorial reach and exportability of benefits).<sup>66</sup>

Underlining the subject of coverage is yet another issue that speaks broadly to access: that is the availability of both legal and physical or actual accesses. While legal access speaks to either restrictions or equal treatments embedded in the actual laws and regulations, physical access relates to the lived reality outside of the law or legislative provisions. The idea is that legal access (what is in the law) does not automatically assure or translate into physical access (practice or lived experience).

In South Africa, like in many other destination countries, migrant workers encounter particular difficulties in the field of social protection. This is because the law typically links social protection rights to periods of employment, contributions, or residency.<sup>67</sup> Thus, South African social policy tends to exclude some people on the principle of territoriality, nationality, migration status, and/or other statuses.

**(a) *Social insurance***

The scope of coverage of social insurance in South Africa has both personal and territorial dimensions. In South Africa, different pieces of legislation define who is or should be covered by the various applicable social insurance scheme(s). However, the personal scope of coverage of social insurance in South Africa is restricted to persons who qualify as ‘employee’ or other similar term used in the relevant pieces of legislation.<sup>68</sup> In this respect, both the UIA and the COIDA, the pieces of social insurance legislation key to the discussion, rely on the definition of ‘employee’ or similar term in defining who is or should be included in their protective ambit.

An ‘employee’, for the purposes of the UIA, is ‘any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor’.<sup>69</sup> This definition of ‘employee’ in the

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<sup>66</sup> Mpedi & Govindjee op cit note 46 at 776-77.

<sup>67</sup> Baruah & Cholewinski op cit note 65 at 6.

<sup>68</sup> Olivier & Kalula op cit note 48 at 137.

<sup>69</sup> Section 1 of the UIA.

UIA, although different, does not substantially differ from those provided in the LRA and BCEA.<sup>70</sup>

However, sometimes the reliance on ‘employee’ or a similar term in setting out the personal scope of coverage of social insurance scheme(s) is problematic because it usually necessitates the existence of a valid employment contract.<sup>71</sup> The resulting outcome is often the exclusion of those who do not fall within that ambit of the definition of ‘employee’. A case in point is the description of an ‘employee’ in the COIDA.

For the purposes of the COIDA, an ‘employee’ is ‘a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing and whether the remuneration is calculated by time or work done, or is in cash or in kind’.<sup>72</sup> The COIDA definition of ‘employee’ is substantially different to those provided in labour relations policy and other social security legislation.<sup>73</sup> The COIDA description of an ‘employee’ is too narrow as it explicitly necessitates the existence of a valid employment contract.<sup>74</sup> This means that foreign workers who do not possess valid work permits, such as unauthorised migrant workers, are statutorily and categorically excluded from the protection scope of COIDA because they do not fit the concept of ‘employee’.

This is perhaps where the *Discovery Health* judgment falls short in its possible extension to the field of social protection. While the progressive interpretation in *Discovery Health* can be equally beneficial in the area of social security, in that case a contract was not required to show the existence of an employment contract, a prerequisite for assessing certain branches of social insurance. The current reality is that the statutory definitions of ‘employee’ in the UIA and COIDA differ from the definition in the LRA and BCEA.<sup>75</sup> Therefore, policymakers need to reassess and realign the statutory meaning of ‘employee’ in social security and occupational

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<sup>70</sup> Van Niekerk *et al* op cit note 41 at 66.

<sup>71</sup> Meyer op cit note 6 at 837.

<sup>72</sup> Section 1(xix) of the COIDA

<sup>73</sup> Van Niekerk *et al* op cit note 41 at 66.

<sup>74</sup> Meyer op cit note 6 at 837.

<sup>75</sup> Van Niekerk *et al* op cit note 41 at 66.

legislation with that of labour law, in order to harmonise the fragmentation and limit interpretational problems.<sup>76</sup>

In some instances, the regulating legislation explicitly excludes certain categories of migrants from the scope of coverage and benefit entitlements. For example, the UIA does not apply to people who enter South Africa to carry out a contract of service, apprenticeship, or learnership if a law or contractual agreement or undertaking requires them to leave the country or repatriate once the contract ends or expires.<sup>77</sup> Consequently, the UIA deliberately excludes from its protection foreign workers requiring repatriation or returning home at the end of their employment engagement in South Africa,<sup>78</sup> such as migrants on contracts or seasonal workers.<sup>79</sup> By implication then, the Unemployment Insurance Fund (UIF) does not require those migrant workers to contribute.

In other instances, the exclusion and marginalisation of some persons from the ambit of social insurance is a result of their position in the economy, whether the formal or informal sector. Informal sectors are often outside the purview of labour laws. Social protection mechanisms generally tend to exclude or marginalise workers in the informal economy.<sup>80</sup> Social insurance mechanisms fail to reach those outside standard formal employment because they are restricted to those who make up the formal workforce.<sup>81</sup> It is unsurprising that the UIF covers less than half of the South African workforce.<sup>82</sup>

The concentration of coverage in the formal sector has led some people to liken social security to the protection of the interests of the working elite.<sup>83</sup> In view of that, foreign workers who operate on the periphery of the formal economy (thus informally employed migrants), as is the case with many unauthorised migrants, are categorically excluded from the South African social insurance system. Social protection through contributory schemes, such as the UIF and

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<sup>76</sup> Ibid at 67.

<sup>77</sup> Section 3(1)(d) of the UIA.

<sup>78</sup> This includes all categories of foreign nationals with the exception of Permanent residents.

<sup>79</sup> See s 2(2) of the UIA.

<sup>80</sup> Olivier op cit note 47 at 2205.

<sup>81</sup> Ibid.

<sup>82</sup> Triegaardt op cit note 60 at 5.

<sup>83</sup> Marius Olivier *Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)* (2009) (Report prepared for the World Bank, 2009) 42.

COIDA, is limited to workers who are or have been formally employed and contributed to the fund.<sup>84</sup> Hence, atypically employed foreign workers or those active in the informal sector, particularly the unauthorised, are vulnerable in the event of loss of work and work-related injuries and diseases.

Finally, the territorial scope of coverage of South Africa social insurance scheme(s) differs across laws.<sup>85</sup> For instance, application of the UIA is limited to the geographical borders of the country. COIDA applies to persons who are ordinarily employed in the South Africa but are working outside the country on a temporary basis by an employer who carries on business chiefly in South Africa,<sup>86</sup> provided the employees do not work outside the country for a continuous period of more than 12 months.<sup>87</sup> The degree of the territorial scope of coverage of the social insurance scheme(s) has a bearing on the provisions of benefits.

**(b) Social assistance**

Access to social assistance for migrants generally tends to be more problematic than their access to social insurance.<sup>88</sup> This is because social assistance measures are by their nature limiting since benefits are government financed through tax revenues. Since they are non-contributory schemes (i.e. no contribution from beneficiaries or their employers), the government sets the scope of coverage and condition of entitlement to the relevant benefits. As a result, South African social assistance is means-targeted at specific vulnerable groups or categories of the population.

However, the South African Constitutional Court has aided in attempts to extend the scope of social assistance policy to some categories of foreign nationals. In the landmark duo-judgment of *Khosa*,<sup>89</sup> the court expanded the constitutional right to social security, particularly

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<sup>84</sup> Francie Lund 'Work-related social protection for informal workers' (2012) 65(4) *International Social Security Review* 9-30 at 26. However, a 2001 amendment of the UIF extended coverage to some informal workers, notably domestic and seasonal workers.

<sup>85</sup> Mpedi & Govindjee op cit note 46 at 777.

<sup>86</sup> See s 23(1)(a) of COIDA.

<sup>87</sup> Section 23(1)(c) of COIDA.

<sup>88</sup> Gijsbert Vonk 'Migration, social security and the law: Observations on the impact of migration policies upon the position of migrants in social security law in Europe' in Berghman, J. *et al* (eds) *Social Security in Transition* (2002) 80.

<sup>89</sup> *Supra* note 9.

social assistance, to include foreigners permanently residing in South Africa. The *Khosa* court held that ‘the Constitution vested the right to social security in ‘everyone’...’,<sup>90</sup> though the social assistance inquiry did not proceed further as it stopped short of legally residing foreign workers. The start of the pronouncement was a promising sign of what could have been a vital purposive interpretation that could have extended an important constitutional coverage to unauthorised foreign workers.

Nevertheless, the court failed to do so when the majority of the court opted to limit the right to social (security) assistance to some foreign nationals reasoning that the barring of permanent residents from enjoying social assistance was not an equitable means to achieve the realisation of the right to social security.<sup>91</sup> Therefore, the Constitutional Court failed to take advantage of an excellent opportunity and instead interpreted the meaning of ‘everyone’ in the Constitution to exclude unauthorised migrants, consequently precluding these vulnerable people from any social assistance protection.<sup>92</sup> In summation, coverage of social assistance in South Africa, like in most places, is subject to conditions such as nationality, residency, and/or lawful immigration status.<sup>93</sup>

**(c) Labour security**

As already indicated, the labour security status of foreign workers in South Africa is determinant on the definition of ‘employee’ contained in the applicable labour laws. South African labour laws, such as the LRA, BCEA and EEA, apply to employees and their employers.<sup>94</sup> Post the *Discovery Health* judgment, unauthorised migrant workers in South Africa are included in the

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<sup>90</sup> Ibid para 85.

<sup>91</sup> Ibid para 84.

<sup>92</sup> Ingrid Palmary & Loren Landau ‘Citizenship, human rights, empowerment and inclusion, and the implications for social protection and social security harmonisation/coordination policies in SADC’ in Mpedi & Smit (eds) *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (2012) 151.

<sup>93</sup> Sections 5(1)(c) and 5(1)(b) of the Social Assistance Act. Letlhokwa George Mpedi, Nicola Smit & Mathias Nyenti ‘Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A synthesis’ in Mpedi & Smit (eds) *Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community* (2012) 57.

<sup>94</sup> Mpedi & Govindjee op cit note 46 at 779.

personal scope of coverage of labour laws because they fall within the ambit of the definition of ‘employee’.

The Labour Court based its reason to extend labour rights to irregular foreign workers in South Africa primarily on the constitutional right to fair labour practices (i.e. s 23(1) of the Constitution).<sup>95</sup> This progressive jurisprudence differs from other similar jurisdictions. In Australia, the United States, and the United Kingdom the irregular immigration status of an employee disentitle the employee to the labour law protection of the host nation,<sup>96</sup> simply because the employment contract violates immigration laws and is therefore *void ab initio* and unenforceable.<sup>97</sup>

Even so, the South African position as it currently stands is that unauthorised migrant workers can refer employment disputes, in terms of the LRA, to the Commission for Conciliation, Mediation, and Arbitration (CCMA) for adjudication. The court in *Discovery Health* held that the CCMA has jurisdiction to determine an unfair dismissal dispute brought by an unauthorised migrant worker.<sup>98</sup> This is contrary to and overturns previous CCMA decisions that it lacked jurisdiction to entertain such matters.<sup>99</sup> Thus, an irregular migrant worker has *locus standi* to approach the CCMA in circumstances of an alleged unfair dismissal and to pursue the processes and remedies envisaged in the LRA.<sup>100</sup> However, the CCMA cannot award reinstatement or reemployment of the migrant, should the migrant successfully prove his or her dismissal unfair.<sup>101</sup>

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<sup>95</sup> Dawn Norton ‘Workers in the shadows: An international comparison on the law of dismissal of illegal migrant workers’ (2010) 31 *ILJ* 1521 at 1525.

<sup>96</sup> *Ibid* at 1551.

<sup>97</sup> *Ibid* at 1553.

<sup>98</sup> *Supra* note 37 para 33.

<sup>99</sup> See *Moses v Safika Holdings (Pty) Ltd* (2001) 22 *ILJ* 1261 (CCMA), *Vundla v Millies Fashions* (2003) 24 *ILJ* 462 (CCMA), and *Georgieva-Deyanova v Craighall Spar* (2004) 9 *BALR* 1143 (CCMA).

<sup>100</sup> Norton *op cit* note 95 at 1550.

<sup>101</sup> *CCMA Practice and procedural manual* 7 ed (2014) para 2.5.5, available at <http://www.ccma.org.za/UploadedMedia/CCMA%20Practice%20and%20Procedure%207th%20Edition%202014>, accessed 10 December 2015.

Additionally, South African employment law operates with reference to the *lex loci laboris* (legislation of the place of employment) and is thus territorial in nature.<sup>102</sup> In a recent case, *Monare v South African Tourism and Others*,<sup>103</sup> the LAC had to address the issue of territorial jurisdiction of the CCMA and the applicability of the LRA.

The brief facts of the case are as follows: Mr Monare worked in the London office of the South African Tourism Board as Finance and Administration Manager. His employer charged him with misconduct relating to dishonesty and fraud and subsequently dismissed him following a disciplinary hearing. Monare then referred an unfair dismissal dispute to the CCMA. At the CCMA, the Commissioner found his dismissal to be procedurally fair but substantively unfair and ordered his reinstatement with back pay. The employer applied to the Labour Court (LC) for reviewing and setting aside of the Commissioner's arbitration award. The LC concluded that the LRA has no extra territorial application and consequently the CCMA lacked jurisdiction. On appeal, the LAC held that the lower court erred in its review of the Commissioner's award. The court found that the London office is not in fact separate but intricately linked to the South African undertaking. Consequently, the court concluded that the CCMA had jurisdiction to hear the matter and the award made by the Commissioner was reasonable.

The *Monare* judgement by no means refutes the *lex loci laboris* principle. The courts have reaffirmed their position on the territorial jurisdiction of the CCMA and the applicability of the LRA.<sup>104</sup> In both instances the answer is the same; the CCMA has no extraterritorial jurisdiction and the LRA has no extra territorial application, unless the overseas business is functionally and operationally reliant on the South African office.

The court has consistently emphasised that the primary consideration in determining the territorial application of the LRA is the location of the undertaking carried on by the employer. Thus, labour security is limited to persons employed within the territory of the country or those employed outside the country by a South African-based employer. In this respect, migrant

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<sup>102</sup> Mpedi & Govindjee op cit note 46 at 780.

<sup>103</sup> (JA45/14) [2015] ZALAC 47; [2016] 2 BLLR 115 (LAC); (2016) 37 ILJ 394 (LAC).

<sup>104</sup> See *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC); *Chemical & Industrial Workers Union v Sopelogg CC* (1993) 14 ILJ 144 (LAC); *Kleynhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC); and *MECS Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2014) 35 ILJ 745 (LC).

workers can enjoy the labour law protection provided in the LRA, BCEA, and EEA, provided they work within South African borders.

### 6.3.2 Access or entitlements to benefits

The reach of coverage of national social protection systems affects the level of access to its benefits and ultimately the social protection status of the interested individuals. Owing to the conditionality of social security coverage, access or entitlement to its benefits is equally conditional.

Regarding social insurance scheme(s), legislation extends benefits only to people who qualify as ‘employee’ or a similar term. For instance, most foreign workers, with the exception of those with permanent residence status, do not qualify for unemployment insurance benefits since they fall outside the personal scope of coverage of the UIA. Supposing the law permitted unauthorised migrants and their employers to make monthly contributions to the UIF because they qualify as ‘contributor’ in terms of s 1 of the UIA,<sup>105</sup> they would be unable to benefit from such contributions owing to other restrictive clauses embedded in the Act. The law obviously connects unemployment benefits to lawful work.<sup>106</sup> Even if they could contribute to the scheme, the prospect of them actually being able to claim its benefits is tenuous because of their legal position. Legal access in this instance will not automatically translate into physical access.

In any case, residency is a requirement for accessing benefits under the UIA.<sup>107</sup> In addition, a beneficiary must be present in South Africa in order to draw benefits. Therefore, foreign workers with temporary residence status, who stand to be repatriated or deported out of the country, are unable to access benefits. Thus, social insurance schemes in South Africa often presuppose a contract of employment or nationality.<sup>108</sup>

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<sup>105</sup> A ‘contributor’ in terms of s 1 of the UIA is defined as

‘a natural person –

- (a) who is or was employed;
- (b) to whom this Act, in terms of section 3, applies; and
- (c) who can satisfy the Commissioner that he or she has made contributions for purposes of the Act’.

<sup>106</sup> Ockert Dupper ‘Migrant workers and the right to social security: An international perspective’ (2007) 2 *Stellenbosch Law Review* 219-254 at 220.

<sup>107</sup> Meyer op cit note 6 at 838. See also s 56(1)-(3) of the UIA.

<sup>108</sup> Dupper op cit note 49 at 55.

COIDA, on the other hand, does not necessarily preclude any foreign nationals from claiming from the compensation fund. In fact, employees who suffer injuries during the course of their job or contract work-related diseases because of their job are entitled to no-fault compensation under COIDA.<sup>109</sup> However, the documentation requirement of COIDA tends to create obstacles for most foreign nationals regarding the submission of claims for compensation.

For instance, s 41(1) of COIDA requires any employee reporting work-related diseases, injuries, or deaths to produce certain particulars and documentation, including a valid South African ID or passport.<sup>110</sup> Failure to meet such a requirement would mean inaccessible relief from health and safety claims. Consequently, foreign workers who are unable to produce such documents, as is the case with all unauthorised migrants, cannot claim compensation and are inevitably left defenceless against work-related injuries or diseases.

Similarly, almost all social assistance benefits virtually preclude most non-nationals,<sup>111</sup> despite the fact that citizenship is no longer the sole eligibility criterion for assessing South African social assistance benefits. The reality is that unauthorised foreign workers and foreigners with temporary residence permits simply have no recourse to short-term relief (social assistance measures) except for emergency healthcare or treatment, as far as the Social Assistance Act 13 of 2004 is concerned.<sup>112</sup> This is because access to social assistance in South Africa is limited to citizens and foreign nationals and their children who have permanent resident status.<sup>113</sup>

The exclusion of unauthorised migrants from accessing social assistance benefits is not exclusive to South Africa. Some countries in the global north contain similar exclusionary provisions in their national policy.<sup>114</sup> However, the exclusion of some foreign nationals from South African social assistance not only threatens the spirit of the Constitution; it ignores the fact

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<sup>109</sup> Marius Olivier 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)' (2011) 1 *SADC Law Journal* 121 at 131.

<sup>110</sup> Meyer op cit note 6 at 837.

<sup>111</sup> Mpedi, Smit & Nyenti op cit note 93 at 10.

<sup>112</sup> Meyer op cit note 6 at 839.

<sup>113</sup> Supra note 9 para 59.

<sup>114</sup> Child grants are limited to citizens and migrants in possession of a residence permit in Germany. Similarly, migrant workers cannot access non-contributory benefits in the UK. See also Gijsbert Vonk 'Migration, social security and the law: Some European Dilemmas' (2002) 3 *European Journal of Social Security* 315 at 319.

that migrants too are co-contributors to the financing of the social security system owing to the fact that they pay taxes.<sup>115</sup>

Given that general taxes and the VAT levied on the goods and services consumed by people typically funds social assistance,<sup>116</sup> irregular migrants do contribute indirectly to the South African social assistance coffers through VAT paid on food and other goods.<sup>117</sup> The exclusion of some contributors from profiting from their contributions raises issues of fairness and social justice. It is posited here that any partial or complete exclusion of irregular foreign workers from tax-funded benefits is unjust as such denial can adversely affect their human dignity. These migrants, at the very least, should qualify for social relief as citizens do during times of crisis or and dire need such as the event of a natural disaster. This discretionary assistance, albeit not a claimable right for migrants, is conceivable in terms of the Social Assistance Act of 2004.<sup>118</sup>

Moreover, the scope of application of welfare legislation is generally limited to South African territory, consequently restricting the legal access to benefits or rights acquired. The legal restriction of access through the principle of territoriality negatively affects nationals and foreign nationals alike.<sup>119</sup> In the case of nationals working out of the country, they lose coverage and benefits they would otherwise accrue. Similarly, foreign nationals without permanent residence status lose their right to claim insurance benefits once they leave the country because South African social insurance legislation does not make provision for the exportability or transferability of benefits.<sup>120</sup> These workers stand to lose out doubly as they are often ineligible to benefits at home owing to their work abroad. Additionally, some social insurance scheme(s)

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<sup>115</sup> Dupper op cit note 49 at 62.

<sup>116</sup> Black Sash *Social assistance: A reference guide for paralegals* (2010) 13.

<sup>117</sup> This is unlike the billions of dollars in taxes into state and local coffers contributed by irregular immigrants in the United States.

<sup>118</sup> Sections 5(1)(c) and s 13 of the SAA.

<sup>119</sup> Wouter van Ginneken 'Social protection for migrant workers: National and international policy challenges' (2013) 15(2) *European Journal of Social Security* 209 at 213.

<sup>120</sup> Meyer op cit note 6 at 838.

exclude all domestic workers, including migrant domestic workers, from its ambit and subsequent benefits.<sup>121</sup>

The conditionality, especially those based on the territoriality principle, attached to social security coverage in South Africa poses barriers for some foreign workers to access social security benefits, both in the legal and physical sense. In view of that, South African law and practices do not recognise the rights of irregular migrants to benefit from the socio-economic rights entrenched in the Constitution.

#### **6.4 Adequacy of domestic social protection for unauthorised migrant workers**

Evidently there are a number of laws intended to safeguard the social protection right of workers in South Africa. However, the present inquiry turns to the extent to which these laws protect the rights of unauthorised foreign workers. In this regard, analysis of domestic social protection framework reveals obvious gaps in the protection of foreign workers and their families in the current context.

Migrants, as a category of workers, generally have tenuous claims to social protection rights in South Africa. Foreign workers, particularly the unauthorised, compared to citizens experience differential treatment in the field of social protection to the detriment of the former. In South Africa, unauthorised foreign workers' right of access to the formal social security system is restricted both legally and physically.

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<sup>121</sup> Olivier op cit note 47 at 2203. See also s 1 of COIDA. This seems to be at odds with article 14 of ILO Convention No. 189 (decent work for domestic workers).

Table 2: *Metric on access to formal social security (protection) in South Africa.*<sup>122</sup>

	Social assistance	Pensions	Unemployment benefits	Health care (health insurance)
Citizens	Yes	Yes	Yes	Yes
Permanent residents	Yes	Yes	Yes	Yes
Temporary residents	No	Yes	No	Yes
Refugees	Yes	No	Yes	Yes
Asylum seekers	No	No	Yes	Yes
Irregular migrants	No	No	No	No* Except emergency healthcare

Table 2 is evidence of the fact that there is indeed discrimination in both law and practice in the formal social protection system based on its exclusionary nature. The analysis, thus far, shows gaps and shortcomings in the South African formal social security system as far as foreign nationals are concerned. For this reason, perhaps the responsibility for social protection provision should not fall solely on the state. Where the formal state-regulated system is not responsive or protective of their rights, migrants will need to consider alternative avenues for protection.

In this respect, foreign workers may need to organise, or where they already exist, rely on informal social protection arrangements to survive.<sup>123</sup> Unauthorised foreign workers in South Africa could perhaps organise social networks from which they can draw support and monetary transfers.<sup>124</sup> This informal social network can constitute community members in their area,

<sup>122</sup> Table adapted from Letlhokwa George Mpedi & Nicola Smit (eds) *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (2012) 26-7.

<sup>123</sup> Informal social security is a form of social security provided by family and/or community members. While this thesis does not intend to go into depth about informal social protection, it is worth a brief look as it is often the only alternative source of protection for those excluded from the scope of the formal social security system.

<sup>124</sup> Adriette Hendrina Dekker 'Mind the gap: suggestions for bridging the divide between formal and informal social security' (2008) 12(1) *Law, Democracy & Development* 117 at 119.

ranging from other foreign nationals to empathetic South Africans, with a shared social solidarity.

Although informal social security has ‘only recently been identified in South Africa as a new “strand” to the traditional concept of social security’ and therefore under-researched,<sup>125</sup> it manifests as a useful form of neighbourhood-based mutual aid schemes that can help reduce poverty and vulnerability.<sup>126</sup> However, the reliance on informal systems of social protection alone is not feasible. In *Khosa*, the court acknowledged both the existence and limitation of informal networks of social protection organised by migrants.<sup>127</sup>

Nonetheless, the reality is that access to social protection for unauthorised foreign workers is limited both legally and physically. The inherent conflict between immigration and social security laws perhaps explains this lack of both legal and physical access to formal social protection rights as it relates to unauthorised foreign workers. There appears to be a direct connection between immigration policy and access to social (security) and labour protection.<sup>128</sup> As Olivier and Govindjee suggest, ‘the level of protection enjoyed by migrants in social security law can be explained by the immigration policies in operation’.<sup>129</sup>

In South Africa, the immigration status of the worker is often linked to benefit entitlements.<sup>130</sup> That is to say, the legal status of foreign workers, to some extent, determines the degree of access to social protection. So the more tenuous one’s immigration status is the more barriers to access to social security.<sup>131</sup> This is because social security rights in South Africa are generally linked to nationality, residency, contributions, or periods of employment.<sup>132</sup> These

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<sup>125</sup> Adriette Hendrina Dekker ‘Informal social security: A legal analysis’ unpublished LLD thesis, University of South Africa, 2005 at 6.

<sup>126</sup> Redson Edward Kapindu ‘Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies’ (2011) 11 *African Human Rights Law Journal* 93 at 96.

<sup>127</sup> *Supra* note 9 para 76.

<sup>128</sup> Dupper *op cit* note 106 at 222.

<sup>129</sup> <sup>129</sup> Marius Olivier & Avinash Govindjee ‘Labour rights and social protection of migrant workers: In search of a coordinated legal response’ Paper presented at the Inaugural conference of the Labour Law Research Network (LLRN), Barcelona, Spain, 13-15 June 2013, 1-40 at 9.

<sup>130</sup> Olivier *op cit* note 83 at 50.

<sup>131</sup> ILO *op cit* note 64 at 77.

<sup>132</sup> *Ibid* at 109.

restrictive conditions or provisions, according to Olivier, ‘adversely affect social security rights of non-citizen workers’.<sup>133</sup>

Consequently, the legal criteria used in deciding who is deserving of rights protection under South African law are unwarranted given that the broad aim of social protection is to reduce poverty and inequality in society.<sup>134</sup> The incongruity of such differentiation is emphasised by the High Commissioner for Human Rights in the following statement:

Policies that deny access of irregular migrants social security on an equal basis with citizens often fail to take into account the fact that migrants, even when in an irregular situation, participate in the workforce and economy of States of employment, and thus contribute to social security schemes. Even when they do not participate directly in contributory schemes, they still pay into to social protection schemes through the payment of indirect taxes.<sup>135</sup>

The overt exclusion and marginalisation of such a vulnerable group brings to the forefront the tension between immigration, labour, and social security laws.

Where the Constitution seems promising in providing an adequate legal framework or guide for protecting the rights of migrants, the Constitutional Court has not always taken advantage of opportunities to create a progressive jurisprudence as far as unauthorised migrants are concerned. It is conventional practice for fundamental rights — in terms of s 36 of the constitution (the limitation clause) — to be limited in terms of law of general application, if said limitation is sound and defensible in an open and democratic society based on human dignity, equality, and freedom.<sup>136</sup> It is understandable that rights of some non-citizens under the Bill of Rights can be limited in so far as such limitation is justifiable and reasonable taking into account certain relevant factors.<sup>137</sup>

However, it is submitted that even after careful consideration of the various factors provided in the general limitations inquiry under s 36(1)(a) of the Constitution, the exclusion of some migrants from social protection cannot be deemed constitutionally reasonable or justifiable.

First, the Constitutional Court has held that the limitation analysis is a test of proportionality. A court must balance the nature and importance of the right and the impact of

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<sup>133</sup> Olivier op cit note 83 at 48.

<sup>134</sup> Ibid at 44.

<sup>135</sup> OHCHR op cit note 1 at 11.

<sup>136</sup> Section 36(1) of the Constitution.

<sup>137</sup> Ibid.

the limitation on one side, and the purpose and importance of the limitation on the other.<sup>138</sup> It is suggested that it cannot be said that denying vulnerable migrants of certain forms of social protection is more compelling than protecting other marginalised members of society.

Secondly, the limitation must be reasonable in a democratic society based on foundational values of human dignity, equality and freedom. Considering the historical, social and economic context of labour migration in South Africa and the plight of irregular migrants,<sup>139</sup> their exclusion from social protection cannot be deemed to be constitutionally reasonable. Unauthorised migrants should be counted among those vulnerable people ‘whose ability to enjoy all rights is most in peril’.<sup>140</sup>

Essentially, the proposition here is that any further permissible limitation of the rights of unauthorised migrants, however justifiable, serves to exacerbate the plight of these individuals. Taking into account the spirit of the Constitution and the much-documented plight of irregular migrants globally, any limitation or differential treatment that unbearably affects the lives of these migrants cannot be compatible with the spirit and letter of the Constitution.

The proposition is that a limitation on their fundamental rights (be it equality, fair labour practices, or access to social security) will not in fact help reduce clandestine migration, and since there are no current protection against abuse, any limitation will destroy the very essence of the Constitution. Public policy debates that suggest otherwise, i.e. that rights extension will encourage immigration, are not entirely accurate. It is highly improbable that irregular migrants will exploit the South African social security system. Contrary to public discourse, irregular foreign nationals are unlikely to claim benefits, out of fear of detection.<sup>141</sup>

#### **6.4.1 Compromised protection and questions of equality**

Domestic laws and practices offering access to social protection discriminate between categories of workers. The differential treatment of nationals and non-nationals, and even among non-nationals, in accessing social protection is a form of inequality of opportunity. This unequal opportunity, treatment, or access to social protection hampers the capabilities or freedoms of

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<sup>138</sup> *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>139</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 43.

<sup>140</sup> *Ibid.*

<sup>141</sup> See detailed argument outlined under section 4.6 of chapter 4.

foreign workers to choose the life they desire to live in host nations. As commented by Owen Fiss, ‘laws imposing social disabilities on immigrants are at odds with constitutional guarantees of equality, which bar not just discrimination, but also laws that create or perpetuate caste-like social structures’.<sup>142</sup>

South African social protection policies do not confer on everyone equal opportunity to participate. South African law and practices, except for a few cases like emergency care, deny some people access and entitlement to the social rights entrenched in the Constitution. Irregular foreign workers are constrained from accessing work-related social protection due to restrictive migration policies that deny them the right to work. Their status as ‘unauthorised’ or ‘irregular’ automatically precludes them from any considerations as their very presence is in direct contravention of immigration law. They are least likely to qualify as ‘citizens’ or ‘residents’, a defining prerequisite for most benefit entitlement.

What is more, most of them do not have the means to make payments towards contributory schemes through savings, since they operate in the informal labour market living from hand to mouth, unable to migrate to the formal economy.<sup>143</sup> Thus, in South Africa, work-related social protection coverage is concentrated in the formal economy (i.e. reserved for formal sector workers). In the event that it is not, nationality or residency is a key eligibility requirement for accessing social security benefits. This and other similar legislative provisions unfavourably affect the social protection rights of foreign workers in the country. The adverse impact is particularly severe for the irregular migrants since legal coverage categorically precludes them because to their precarious legal position in the country. This exclusionary national regulatory framework invariably leaves many vulnerable workers open to exploitation and social marginalisation.

Inequalities embedded in the legislative framework, in part, enforce the labour exploitation, human right abuse, and general maltreatment of foreign nationals in South Africa, particularly the unauthorised. Most domestic welfare provisions tend to limit coverage and benefits to nationals and permanent residents, essentially denying access to (exclude) many foreigners. The legal exclusion of foreigners coincidentally legitimises their social exclusion. There needs to be some expansion of freedoms so that irregular migrants are able to choose one

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<sup>142</sup> Owen Fiss ‘The Immigrant as Pariah’ (1998) 23 *Boston Review*.

<sup>143</sup> NPC op cit note 52 at 333.

type of life over others, should they desire.<sup>144</sup> The removal of the systematic social deprivation of these people is imperative in order for this human development to occur.

In any case, it is rather contradictory to profess to establish a society based on democratic values, social justice, and fundamental human rights,<sup>145</sup> while enacting policies that habitually exclude and marginalise this small but significant segment of the society. Given the lack of progressive domestic doctrine where unauthorised migrants are concerned, perhaps the courts should consider importing some principles of international human rights law to interpret and fill gaps where deficiencies exist in domestic law.<sup>146</sup>

### **6.5 Policy directions for enhancing social protection for migrant workers**

Chapter 5 of this study reveals that there are existing international developments on the rights of migrant workers, particularly unauthorised foreign workers, which can be instructive for the improvement of the domestic legal system. However, the impact this international protection regime for migrant workers has on the domestic legal system is only as strong as the relationship between the two spheres.

The Vienna Convention on the Law of Treaties, 1969, helps explain better the relationship between international norms and any domestic legal system. In terms of the Vienna Convention, an international treaty binds states only if they have expressed consent to it through ratification, accession, or signature.<sup>147</sup> Only when the treaty is ratified, acceded to, or signed, do states accept a duty to implement the provisions of the treaty in good faith. In addition to implementing the provisions, states then agree to avoid doing anything that may defeat the objectives of the treaty in question.<sup>148</sup> As part of the relationship, the treatment and application of international treaties in the domestic legal system becomes significant.

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<sup>144</sup> Mathias Risse 'Immigration, ethics and the capabilities approach' (2009) *34 Human Development Reports Research Paper 1* at 2.

<sup>145</sup> See preamble to the Constitution.

<sup>146</sup> Friedman op cit note 4 at 1736.

<sup>147</sup> See articles 13, 14 and 15.

<sup>148</sup> Article 26.

### 6.5.1 Infusing domestic law with transnational norms to enhance protection

In the South African context, the Constitution makes allowance in a number of provisions for the use of international law in interpreting and closing gaps in domestic law. Three sections of the Constitution, i.e. ss 39, 232 and 233, express the need for the infusion of domestic law with international standards. Section 39(1) explicitly states:

- 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.

Sections 232 and 233 further emphasise the interpretational function of international norms.<sup>149</sup>

What is more, the South African Constitution has domesticated a number of provisions of international treaties, particularly those found in International Bill of Human Rights, through the Bill of Rights. For instance the language of sections 27(1)(c) and 27(2) of the South African Constitution and Articles 9 and 2(1) of the ICESCR are rather similar.<sup>150</sup> Whilst the wording of the relevant provisions may be similar, their practical application is questionable.

Although the Constitution mandates the consideration of international treaties and standards where domestic law is lacking, the question remains whether these international instruments are suitable for bridging these gaps. It is important to reiterate that South Africa is yet to ratify any of the major international treaties on labour migration, namely the ILO Conventions 97 and 143 and the UN ICRMW. Since South Africa has failed to endorse this international charter on migration,<sup>151</sup> the provisions of those instruments are not legally binding and the government is not required to implement them. Nonetheless, the court might still consider the terms of a non-ratified Convention when interpreting domestic legislation. For

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<sup>149</sup> Section 232 provides that '[c]ustomary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament'; whilst s 233 states that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

<sup>150</sup> Olivier op cit note 47 at 2212.

<sup>151</sup> Piyasiri Wickramasekara 'Protection of migrant workers in an era of globalization: The role of international instruments' in R Blanpain (ed) *Comparative labour law and industrial relations in industrialized market economies* (2010) 281.

instance, in *S v Makwanyane*,<sup>152</sup> the Constitutional Court affirmed that both binding and non-ratified international instruments could serve as tools of interpretation in South African law.

In spite of the domestic difficulties in accessing social protection benefits, it is unlikely that international human rights standards related to migrant workers and their families will help improve the social protection position of unauthorised foreign workers.<sup>153</sup> Van Ginneken argues that these human rights standards have had little impact on the social protection situation of most migrants.<sup>154</sup> International law is rather vague on the issue of social protection, where it concerns unauthorised migrant workers. The previous chapter has established that the international protection regime for migrant workers remains ambivalent to the social protection rights of unauthorised migrants.

Even if South Africa was to ratify these important international instruments on labour migration, it is questionable whether the position of unauthorised foreign workers in the country would improve. The truth of the matter is that although these important international instruments may offer significant protection, they are also indirectly contradictory and discriminatory. On the one hand, unauthorised foreign workers are beneficiaries of some economic, social, civil, and political rights under international law.<sup>155</sup>

On the other hand, these rights are inconspicuously limited. The indirect limitation of the rights of unauthorised migrants in international law is evident in provisions that give countries the scope, in their national laws, to determine conditions of benefits.<sup>156</sup> Thus, the strong recognition of states' sovereignty over migration matters in international law, i.e. the sovereign right of nations to determine their own labour migration policies, is damaging to unauthorised foreign workers. In effect, such internal limitation provisions embedded in most of these international norms do little to improve the legal position of these vulnerable workers.<sup>157</sup>

Despite the lack of ratification of binding migrant workers instruments by the government, South Africa is still a member of both the UN and ILO organisations, and therefore

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<sup>152</sup> 1995 (3) SA 391 (CC).

<sup>153</sup> Dupper op cit note 49 at 56.

<sup>154</sup> Van Ginneken op cit note 119 at 210.

<sup>155</sup> Ibid at 212.

<sup>156</sup> See for instance Article 6(b)(ii) of the ILO Convention No. 97 of 1949.

<sup>157</sup> Vonk op cit note 88 at 319.

has a responsibility to uphold their institutional values. Besides, South Africa has agreed to a number of fundamental international labour and human right norms that apply to all foreign workers. These fundamental international labour and human right norms make up the international normative framework for the protection of migrant rights.<sup>158</sup>

Consequently, the South African government is required to bring all domestic law, policies, and practices in line with this international normative framework. The implementation of the provisions of this international framework into domestic policy would mean that access of foreign workers to social protection measures would not be exclusively dependent on their legal status. At a policy level, unauthorised foreign workers would secure social protection rights, in at least a basic form, by virtue of their shared humanity if not for their vulnerability or marginalisation.<sup>159</sup>

At a regional level, regional best practice reveals that unauthorised foreign workers can and should benefit, albeit limitedly from social insurance in host nations. The Council of Europe recognises that unauthorised migrants who have contributed to social insurance schemes should benefit from their contributions or at the least have their contributions refunded.<sup>160</sup> This limited entitlement adopted by the Council of Europe finds support in international law. Article 27(2) of the UN ICRMW, article 9(1) of ILO Convention No. 143 and paragraph 34(1)(c)(ii) of ILO Recommendation 151 all lend support to the right of unauthorised migrants to reimbursement of any social security contributions. Importing these international and regional norms and standards into domestic interpretation would mean unauthorised foreign workers who have contributed to the South African unemployment insurance coffers, however indirectly, should at least be entitled to a reimbursement of their contributions.

Additionally, at a sub-regional level, unauthorised foreign workers could rely on the SADC Code on Social Security for the substantive protection of their rights. The Code expressly calls for the provision of a basic minimum protection to irregular migrants in host countries.<sup>161</sup> Infusion of the SADC Code with domestic law would mean that unauthorised foreign workers in

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<sup>158</sup> Wickramasekara op cit note 151 at 281.

<sup>159</sup> OHCHR op cit note 1 at 14.

<sup>160</sup> Council of Europe Parliamentary Assembly 'Human rights of irregular migrants' Resolution 1509 (2006) para 13.4.

<sup>161</sup> Article 17(3).

South Africa are constitutionally entitled to basic social assistance benefits, even if it is a non-monetary service or benefit such as food, clothing, or vouchers.<sup>162</sup> Such an interpretation would not only promote the spirit of the Constitution, but also bring South Africa in line with international and regional best practices.

The Council of Europe, for instance, calls on its members to offer needed social assistance to irregular migrants in order to ‘alleviate poverty and preserve human dignity’.<sup>163</sup> An extension of constitutional entitlement to basic social assistance would also mean a realisation of the African Charter for South Africa, specifically art 15 that mandates the provision of equitable and satisfactory working conditions to everyone.

## **6.6 Realistic options for policy reform**

Evidently, the above discussions and previous chapters confirm that there are gaps in the protection of foreign workers, particularly in the South African context. In this respect, the responsibility for the social protection of foreign workers should not fall squarely on the state or regional and/or global authorities. There needs to be a joint effort by all stakeholders if there is to be real change.

Where current efforts fail or are too weak in improving the social position of unauthorised foreign workers in South Africa, other possible directions for change must be considered. In this regard, scholars have identified three options that may prove useful for South African policymakers in improving the social and labour position of unauthorised foreign workers.

First, the South African government could unilaterally amend national laws or policies to bring unauthorised foreign workers into the social protection fold. Secondly, the government could enter into coordination (bilateral) agreements with other SADC states. Thirdly, it could enter into multilateral social security agreements with other countries. Each of these options is examined individually in order to determine how these possible policy directions can improve the social protection situation of unauthorised migrants in South Africa.

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<sup>162</sup> Dupper op cit note 49 at 62.

<sup>163</sup> See Council of Europe Parliamentary Assembly ‘Human rights of irregular migrants’ Resolution 1509 (2006) para 13.3.

### 6.6.1 Unilateral government action

Research suggests that the ratification and implementation of international and regional instruments relating to labour migration and social protection best provide protection to migrant workers.<sup>164</sup> However, ratification often fails, as evident from the low ratification rate of relevant transnational instruments. In the absence of ratification, unilateral efforts have proven to secure the protection of migrant workers. In this respect, some countries (both countries of origin and destination) have instituted unilateral measures granting some measure of social protection rights to migrant workers.

In this regard, the Philippines stand out as a case of best practice in extending a level of domestic protection coverage to their citizens working abroad.<sup>165</sup> The Memorandum of Agreement of 1988 in the Philippines essentially secures the social security of Philippine seamen working abroad. In terms of the Agreement, all recruitment agencies which hire and place Philippine seamen on foreign ships must pay quarterly contributions to the national social security system.<sup>166</sup> This contribution then goes toward the medical care, compensation, and other social security needs of the workers.

Although the example of the Philippines do not necessarily relate to or address the precarious position of irregular migrant workers, it suggests that unilateral measures or actions can prove effective in securing rights protection for all migrant workers. Also, it is further acknowledged that the Philippines is not directly comparable with South Africa — South Africa is a migrant-receiving country and the Philippines, a migrant-sending country. However, the example illustrates that government is capable of unilateral action that can shape the position of foreign nationals.

Even so, migrant-receiving countries are still capable of unilateral government action. For instance, in April 2009, the Department of Home Affairs proposed the ‘special dispensation permits’ in response to the large number of Zimbabweans residing illegally in South Africa.<sup>167</sup>

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<sup>164</sup> Baruah & Cholewinski op cit note 65 at 157.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid at 158.

<sup>167</sup> Consortium for Refugees and Migrants in South Africa ‘Regularizing Zimbabwean migration to South Africa’ (2009) *Migration Policy Brief* at 2.

This special permit would allow its holders to live, work, conduct business, and study in South Africa on a temporary basis for the duration of the permit.

Cabinet approved this proposal in August 2014 and will run till 2017. The objectives of the exemption are to:<sup>168</sup>

- Regularize Zimbabweans residing in South Africa illegally
- Curb the deportation of Zimbabweans who were in SA illegally
- Reduce pressure on the asylum seeker and refugee regime, and
- Provide amnesty to Zimbabweans who obtained SA documents fraudulently

The special concessions for Zimbabwean nationals was made in terms of s 31(2) of the Immigration Act 13 of 2002.

The Minister of Home Affairs can take advantage of the discretionary power conferred by s 31(2) to extend to other unauthorised foreign workers similar concessions. The special permit can be issued for duration of twelve or eighteen months depending on circumstances, allowing irregular migrants the right to legally live and work in South Africa. During this period, these migrants should be encouraged to seek the necessary legal documentation and apply for the relevant visas and permits under the Immigration Act, before the expiration of their special dispensation permits.

Although the example of special concessions may grant a right to work and not necessarily social security, it is an encouraging step nonetheless. As argued in chapter 4, the right to work is an extension of social protection for these vulnerable migrants. Moreover, it is foreseeable that similar arrangements can be made in term of social security.

Unilateral measures or action are also necessary because the responsibility for domestic legislation that regulates access to and conditions of formal social protection schemes belongs solely to the individual state.<sup>169</sup> The willingness of government to adopt or amend domestic

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<sup>168</sup> Department of Home Affairs 'Remarks by Minister Malusi Gigaba, on the announcement of the Zimbabwean special dispensation permit in Pretoria, 12 August 2014' (2014), available at <http://www.dha.gov.za/index.php/statements-speeches/506-remarks-by-minister-malusi-gigaba-on-the-announcement-of-the-zimbabwean-special-dispensation-permit-in-pretoria-12-august-2014>.

<sup>169</sup> Rachel Sabates-Wheeler 'Social security for migrants: Trends, best practice and ways forward' (2009) *ISSA Project on examining the existing knowledge on social security coverage extension*, Working Paper No. 12, Geneva at 7.

policies to protect certain groups of people, for example low-skilled migrant workers, is dependent on and indicative of strong commitments to rights protection and ultimately to social justice.

Domestically, the South African legislature or parliament, coupled with other arms of government, develop and pass national laws that dictate provisions for the needs of the people in the country.<sup>170</sup> As indicated above, ratification of treaty law or instruments is the first goal. Thus, the South African government should first look to ratify and implement the relevant social security, human rights, and labour migration conventions or instruments of the ILO and UN. In the absence of ratification, parliament can unilaterally amend existing national laws and/or pass new policies — to extend social protection to all categories of migrant workers — in line with international human right norms.

A useful unilateral measure will be for the South African government to adopt a human rights approach to migration and social protection regulation. As discussed in chapter 4, the current approach to labour migration is less than effective. It is too restrictive and control-focused. Adopting a human rights approach to migration is particularly important because immigration law often intersects with other policies aimed at regulating the affairs of foreign nationals. Irrespective of the domestic measures the government chooses to develop in addressing the rights position of irregular migrants, it needs to be mindful of the interplay between immigration and labour law.

**(a) *Policy intervention: marrying immigration goals with labour objectives***

The government will need to amend existing policies or promulgate new labour and social policies providing rights to irregular migrants. However, it is simply not enough to legislate; there needs to be adequate enforcement of implemented mechanisms. Any policies put in place need to be practically enforceable to be effective. Enforcing the fundamental rights of all workers, irrespective of status, highlights tensions of a jurisdictional nature between immigration and labour laws.

Thus far, the central theme of this study has been that migrant workers, irrespective of their status, are best protected from mistreatment when they are included in and covered by

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<sup>170</sup> Section 44 of the Constitution.

national protective regimes — both in law and practice — on par with local workers.<sup>171</sup> In practice migrant workers are typically clustered in those economic sectors of host countries (e.g. agriculture, construction and domestic work) completely unregulated or under-regulated by employment legislation.<sup>172</sup> This is particularly true for unauthorised migrant workers who are often employed in sectors where labour law violations are more frequent. The rights protection and equality of treatment of these migrant workers vis-à-vis regular migrants or national workers becomes challenging when state's sovereign prerogative to police foreign nationals (i.e. immigration enforcement) interferes with the protection of workers' rights.

The two approaches (immigration enforcement and workers' rights) need not be antagonistic. In fact, it is the tendency for policymakers to treat the two as opposing duties that causes problems. Indeed a state has the right to enforce immigration laws in the workplace, as part of its broader sovereign right to determine the conditions of admission and employment of foreign nationals within their borders. But a state equally has an important duty to protect the fundamental rights of workers inside its borders. These two seemingly opposing obligations need to be carefully balanced. Where immigration enforcement takes precedence over workers' rights, irregular migrants are disentitled to the protection of labour laws to enforce their rights.<sup>173</sup> In this instance, policymakers not only fail in their legislative mandate but give unscrupulous employers the incentive to undermine employment laws and workers' rights. It is a known fact that most national immigration enforcement policy requires labour inspectors to report irregular migrant workers to immigration authorities, potentially resulting in deportation.<sup>174</sup> This risk of deportation creates fear, preventing workers from reporting employers who do not comply with employment regulations. This policy approach essentially delineates immigration law and labour law as mutually exclusive with unrelated or incompatible goals.<sup>175</sup> Such an approach fails to

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<sup>171</sup> Christiane Kuptsch 'Inequalities and the impact of labour market institutions on migrant workers' in Janine Berg (ed) *Labour Markets, Institutions and Inequality: Building Just Societies in the 21<sup>st</sup> Century* (2015) 356.

<sup>172</sup> Ibid at 341.

<sup>173</sup> Elaine Dewhurst 'The role of irregular immigrants to back pay: The spectrum of protection in international, regional, and national legal systems' in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) 216-238 at 217.

<sup>174</sup> Kuptsch op cit note 166 at 355.

<sup>175</sup> Dewhurst op cit note 168 at 216.

capture the extent of the labour exploitation or even human right violation these workers endure daily.

The polar opposite of the debate also holds true. Prioritising the labour rights of workers (labour law) over immigration enforcement creates the risk of perversely incentivising or encouraging clandestine migration.<sup>176</sup> However, there cannot be a policy that grants labour protection to irregular migrants but the enforcement of those rights will mean detection and potential detention or deportation. Such an approach is as good as nothing at all because the consequences of enforcing their labour rights for the migrants undermine the right itself.<sup>177</sup>

It is from this premise that the study proposes and supports the establishment of a ‘firewall’ between immigration and labour laws, to ensure that irregular migrant workers can access the courts to seek redress against abusive employers without fear of detection and/or removal by immigration authorities.<sup>178</sup> A ‘firewall’, as a unilateral measure, is particularly important for the protection of the rights (including the right to non-discrimination and equality) of irregular migrant workers vis-à-vis regular migrant or local workers by enforcing workers’ rights without regard to immigration status. Such a measure has proven to be particularly effective in addressing the balance between immigration and labour law enforcement in the United States jurisdiction.<sup>179</sup>

In the United States, the Department of Labour’s (DoL) Memorandum of Understanding (MoU) with the Immigration and Naturalisation Service (INS, now ICE)<sup>180</sup> creates a firewall between DoL inspections and INS enforcement actions, in an attempt to balance immigration and labour law enforcement.<sup>181</sup> The two agencies, per the MoU, agree to collaborate in their work

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<sup>176</sup> Ibid at 221.

<sup>177</sup> Ibid at 219.

<sup>178</sup> Shauna Olney & Ryszard Cholewinski ‘Migrant workers and the right to non-discrimination and equality’ in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) 259-281 at 276.

<sup>179</sup> The European Union Agency for Fundamental Rights has recommended a “firewall”. See particularly page 11 of its report on Fundamental rights of migrants in an irregular situation in the European Union (2011) Luxembourg: Publications Office of the European Union.

<sup>180</sup> Then Immigration and Naturalization Service (INS) renamed to Immigration and Customs Enforcement (ICE).

<sup>181</sup> Rebecca Smith, Ana Avendaño & Julie Martínez Ortega *Iced Out: How Immigration Enforcement Has Interfered with Workers’ Rights* (2009) 13, available at <http://digitalcommons.ilr.cornell.edu/laborunions/29/>, accessed 10

except in instances where the collaboration ‘would have either the purpose or the effect of placing immigration enforcement in a position to trump labor law enforcement, because the DoL has recognised that immigrant workers will be reluctant to bring complaints about abusive employers to its attention if the situation were otherwise’.<sup>182</sup> Similarly, an internal immigration policy, INS Operating Instruction 287.3(a),<sup>183</sup> sets the boundaries of immigration enforcement during labour disputes by cautioning non-interference in such instances. Both the MoU and Operating Instruction have proven useful in protecting the rights of workers, immigration status notwithstanding, in encouraging unauthorised migrant workers to bring labour law violations-related complaints.<sup>184</sup>

In South Africa, there is an overlap between immigration and labour laws. Immigration law is often superimposed on labour law, undermining the goals of the latter. This practice has proven ineffective in realising the distinct purposes of the two areas of law. Accordingly, there needs to be a measure to ensure that the enforcement of one set of laws complement the goals of the other.<sup>185</sup> To this end, the effective enforcement of labour and social rights of migrant workers will require the removal of any threat of retaliation or deportation. To this end the South African government will need to adopt a status-blind enforcement regime. Like the United States, the South African Departments of Labour and Home Affairs will need to adopt a policy agreement in which they commit to coordinate their work without compromising the operations and goals of the other. A ‘firewall’ agreement will ensure that South African employers who employ irregular foreigners do not abuse the enforcement powers of immigration authorities or the DHA for their financial gains.

A simple scenario helps justify the rationale for a ‘firewall’. Some employers hire irregular migrant workers contrary to legislative prohibition for the obvious reason that they are cheap. However, should the migrant become a nuisance, all the employer has to do is simply call

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December 2015. The MoU has been in operation since 1998, however in 2011, the ICE and DoL revised the MoU but reaffirmed the broader goals and principles.

<sup>182</sup> Ibid at 13.

<sup>183</sup> A policy initially created by the INS but later renamed the ICE Special Agents Field Manual 33.14(h), operational since 1996.

<sup>184</sup> Donald Kerwin & Kristin McCabe *Labour standards enforcement and low-wage immigrants: Creating an effective enforcement system* (2011) 37.

<sup>185</sup> Ibid at 36

or threaten to call immigration authorities. An enforcement approach too focused on immigration status at the expense of employment standards fails to address the real perpetrators of clandestine migration.<sup>186</sup>

In reality, an immigration-focused enforcement approach only serves to perpetuate clandestine migration and reward unscrupulous employers doubly. Fixating on workplace immigration enforcement by means of immigration prosecutions of unauthorised migrant workers, instead of those who employ them, perversely encourages some employers to continuously hire and abuse irregular migrant workers. Moreover, those employers who employ irregular migrants benefit from the competitive advantage gained by operating outside the law, and escape criminal prosecution for economically exploiting vulnerable workers.<sup>187</sup>

In consequence, enforcement solely focused on immigration status does little for workers, particularly those trapped in abusive employment relationships. The impact of increased labour standards enforcement on clandestine migration is uncertain; nonetheless the enforcement of one set of laws should not undermine the goals of the other. To this end, policymakers need to ensure an appropriate balance between both enforcement systems. In this respect, a ‘firewall’ between the two areas of law in terms of enforcement is perhaps a good option for unilateral action.

**(b) *Judicial intervention: using the courts to advance migrants’ position***

Policy intervention to address the current protection position of irregular migrants in South Africa is definitely a priority. However, commitments by the legislature alone will not suffice in effectively addressing the social protection concerns of these vulnerable foreign workers. There will need to be some judicial activism from the courts to complement any legislative intervention because the courts possess the authority to ensure the conformity of legislation and executive conduct with the Constitution.<sup>188</sup> More importantly, the courts are suitably positioned to provide the momentum or stimulus needed for policy changes.

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<sup>186</sup> Smith *et al* op cite note 176 at 10.

<sup>187</sup> Ibid.

<sup>188</sup> David Bilchitz ‘Are socio-economic rights a form of political rights?’ (2015) *SAJHR* 86 at 100. Also see s 165(1) of the Constitution.

In South Africa, social protection is a judicially enforceable human right.<sup>189</sup> Initially, all foreign nationals were exempt from accessing socio-economic rights (mainly social security rights) on the same basis as South Africans. The exclusion was owed to the fact that citizenship or nationality was the main eligibility criterion for assessing most social benefits. However, the Constitutional Court has been instrumental in extending social protection rights to some foreign nationals, specifically those permanently residing in South Africa.<sup>190</sup>

In the *Khosa* case,<sup>191</sup> the court adopted a purposive interpretation of the Bill of Rights and found the exclusion of permanent residents from social assistance to be unconstitutional.<sup>192</sup> This extension of access to social assistance to permanent residents was a welcome change to the Social Assistance Act that sought to preclude all foreign nationals from important socio-economic rights. Likewise, the Labour Court has taken a liberal stance and willingly extended employment rights to foreign workers deemed ‘illegal’ and previously undeserving of labour protection.

In the *Discovery Health* case, the Labour Court similarly adopted a purposive interpretation of the concept of ‘employee’ in extending labour law protection to unauthorised migrant workers. The extension of labour rights to unauthorised migrant workers meant an improvement in their labour market conditions and labour security, an important component of social protection.

It is evident from the above emerging jurisprudence that the courts are a crucially important mechanism for the enforcement of socio-economic rights for foreign nationals in South Africa. Therefore the judicial system is perhaps a good alternative avenue for irregular migrant workers in their quest to improve their position. The Constitution grants to everyone

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<sup>189</sup> See for example: *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>190</sup> See *Khosa* case.

<sup>191</sup> This case concerned a constitutional challenge to certain sections of the Social assistance Act 59 of 1992 that disqualified non-citizens from receiving certain social grants. The applicants were Mozambican nationals with South African permanent resident status. The court held that the Constitution vested the right to social security in “everyone” and that permanent residents were bearers of this right. The court then concluded that the exclusion of permanent residents from social security was discriminatory, unfair and infringed on the right to equality.

<sup>192</sup> Mpedi, Smit & Nyenti op cit note 93 at 10.

(‘everyone’ can be read to include irregular migrants) the right to access the courts to have any dispute that can be resolved by application of law decided in a fair public hearing.<sup>193</sup> This access to the courts may be difficult for many migrants, particularly irregular migrants, due to expensive litigation costs and a real fear of detection and possible deportation.<sup>194</sup>

However, for the courageous few who can overcome the barriers to access, there are two possible ways they could seek judicial redress. They can either allege a violation or threatened violation of any of their fundamental rights (e.g. equality, human dignity, fair labour practices, or social security) in the Bill of Rights. Alternatively, they can inquire into the constitutionality of a specific Act, part of an Act or conduct of another party. In both scenarios, the litigant is essentially framing the dispute as a ‘constitutional matter’.<sup>195</sup>

In the first option, an alleged violation or threatened violation of any fundamental rights, the dispute relates more to the interpretation, application, or enforcement of the Constitution.<sup>196</sup> Here, the litigant can strongly rely on the positive duties of the state to realise the rights entrenched in the Bill of Rights (Chapter 2 of the Constitution).<sup>197</sup> This approach will involve direct reliance on constitutional provisions or values.

However, direct reliance on the Constitution is not really an option if there is an existing legislation giving effect to a constitutional right.<sup>198</sup> This is particularly true in this instance where there is a variety of legislation giving effect to the constitutional right to social (protection) security. Consequently, a litigant alleging a violation or threatened violation of any social security-related fundamental rights cannot simply circumvent legislation and instead directly rely

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<sup>193</sup> Section 34 of the Constitution. This is also established in international law (i.e. art 14(1) of the ICCPR).

<sup>194</sup> A detailed discussion of access to the courts is beyond the scope of this study. For a detailed discussion, see Mathias Nyenti ‘Access to justice in the South African social security system: Towards a conceptual framework’ (2013) *De Jure* 901.

<sup>195</sup> Both the Constitution and Constitutional Court qualifies what dispute constitutes a constitutional matter. For a detailed list see s 167 of the Constitution. Also see *S V Boesak* 2001 (1) SA 912 (CC), and *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC).

<sup>196</sup> Section 167(7) of the Constitution.

<sup>197</sup> Section 7(2) of the Constitution.

<sup>198</sup> Dawn Norton ‘What is (and what isn’t) a “constitutional matter” in the context of labour law?’ (2009) 30 *ILJ* 772 at 775.

on the constitutional provision; the principle of subsidiarity still holds.<sup>199</sup> The aggrieved person will need to challenge the constitutionality of any of the legislation and/or specific provisions within the relevant legislation.

For example, an irregular migrant could challenge the constitutionality of the whole or parts of the COIDA. So taking s 1 of COIDA as a specific example, the definition of ‘employee’ in terms of s 1 explicitly prescribes a valid contract of employment as a prerequisite for accessing protection. Following from this narrow description of the ‘employee’ concept, all irregular migrant workers are categorically precluded from the coverage and benefits of COIDA because their immigration status does not qualify them as ‘employee’. The restrictive nature of the provision violates the equality rights of irregular migrants who, but for their lack of a valid employment contract, would qualify for important work-related social protection benefits. Therefore, the description of ‘employee’ in COIDA arguably discriminates unfairly against a vulnerable group.

Additionally, the Bill of Rights entrenches the right of ‘everyone’ to ‘have access to social security’.<sup>200</sup> The framing of the word ‘everyone’ in s 27 could include all non-citizens because ‘everyone’ does not refer only to ‘citizens’.<sup>201</sup> COIDA is seemingly lenient regarding the right to compensation. Section 27 of COIDA grants special circumstances in which the Director-General of the Department of Labour may make an award. Section 27 explicitly states that ‘[i]f in a claim for compensation in terms of [COIDA] it appears to the Director-General that the contract of service or apprenticeship or learnership of the employee concerned is invalid, he may deal with such claim as if the contract was valid at the time of the accident’.<sup>202</sup> It is on these premises that an irregular migrant worker could attack the constitutionality of this provision on the basis that it violates his or her right to equality.

The option to challenge the constitutionality of a law or part thereof is broadly premised on the notion that the South African regulatory system protecting workers is not isolated from

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<sup>199</sup> *SA National Defence Union v Minister of Defence & Other* 2007 (5) SA 400 (CC) paras 51-52.

<sup>200</sup> Section 27(1)(c) of the Constitution.

<sup>201</sup> *Supra* note 9 paras 46-7.

<sup>202</sup> It must be noted however that in practice the interpretation by the court into workers’ compensation legislation persistently discounts invalid contracts of service. See *Van Wyk obo Van Wyk v Daytona Stud Farms & Others* [2007] JOL 20730 (C).

the Bill of Rights which provides and protects certain employment and socio-economic rights. The Constitution provides the right context for understanding and interpreting other legislation. Therefore, scrutinising other laws using a constitutional lens will help with analysing the treatment of migrant workers.

A consideration for the courts in any allegation of an infringement of a right by law or the conduct of another person is the issue of limitation. The idea is that the rights in the Bill of rights are not absolute and can be limited. Subsequently, not all infringements of fundamental rights are unconstitutional.<sup>203</sup> Some infringements may be reasonable and justifiable. Central to the Constitutional Court's jurisprudence on the limitation of rights is an assessment of proportionality or balancing. A limitation must satisfy the following requirements of proportionality mandated by s 36 of the Constitution: importance of the purpose of the limitation, the relationship between the limitation and its purpose (rational connection requirement), the availability of less restrictive ways to achieve the purpose, and the proportionality of the limitation considering the extent of the infringement and the nature of the right.<sup>204</sup>

The reasonableness of any limitation is crucial to the justiciability of any socio-economic right in the Constitution. For instance, the social protection rights entrenched in s 27 of the Constitution impose both negative and positive duties on the state. On the one hand, the state must not impair or allow private individuals to interfere in peoples' attempts to access social security.<sup>205</sup> On the other hand, the state has a duty to 'take reasonable legislative and other measures' to achieve the 'progressive realisation' of access to social security.<sup>206</sup> Therefore, even if a court should find that the interference of the state or a law or a third party in an irregular migrant's access to social security is reasonable, there is still the question of whether the state has taken positive measures to ensure the progressive realisation of access to social protection.

Given the aim of social (protection) security and the vulnerability of irregular migrants generally, it can be argued that the exclusion of some vulnerable (if not the most vulnerable)

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<sup>203</sup> Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 26.

<sup>204</sup> Section 36(1)(a) to (e) of the Constitution. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 104, *Phillips and Another v Director of Public Prosecutions, (Witwatersrand Local Division) and Others* 2003 (3) SA 345 (CC) para 22, *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) paras 33-7.

<sup>205</sup> Section 27(1)(c) of the Constitution.

<sup>206</sup> Section 27(2) of the Constitution.

members from protective measures is unreasonable. If it is maintained that the right of access to social security is aimed at vulnerable members of society,<sup>207</sup> and the Constitutional Court has formally acknowledged the vulnerability of non-nationals then how can access to one class of needy people and not to others be justified? Note, however, that although an in-depth analysis goes beyond the scope of this study, an infringement can be justifiable.

In any event, South African courts are mandated to interpret any legislation in line with international law, including customary international law.<sup>208</sup> As previously indicated, international law proffers some substantive protection to migrants in an irregular situation. Interpreting legislation consistently with international law will require South African courts to adopt some pragmatism in their judicial interventions of cases involving irregular migrants in the pursuit of improving their protection position.

Given the progressive nature of South Africa's constitutional democracy and its liberal substantive enjoyment of rights, it is possible for irregular migrants to lay strong claims to certain constitutional socio-economic rights. In this respect, Liebenberg and Goldblatt propose that 'an interdependent interpretation of equality and socio-economic rights has significant potential to enhance the responsiveness of our jurisprudence to the complex causes and manifestations of poverty and inequality in South Africa'.<sup>209</sup>

However, this is not to overstate the transformative power of this avenue for change. It is acknowledged that the judicial route for claiming and/or enforcing socio-economic rights for this class of migrants is rather a weak one, but an option nonetheless. It is accepted that any successful constitutional challenge will make a symbolic rather than real contribution to improving the position of irregular migrants. This is because there is a variety of applicable legislation enacted to give effect to the socio-economic rights in the Constitution, any one of which could be constitutionally challenged. Going about changing the status-quo will likely be piecemeal requiring challenge to deficient legislation individually.

Nonetheless, the courts have a part to play in improving the protection position of vulnerable groups in society. Application of liberal judicial muscle that is sensitive to individual

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<sup>207</sup> John Mubangizi *The protection of human rights in South Africa: A legal and practical second edition* (2013) 157.

<sup>208</sup> Sections 232 and 233 of the Constitution.

<sup>209</sup> Sandra Liebenberg & Beth Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 335 at 361.

circumstances will be necessary to bring all non-citizens, including irregular migrant workers, into the fold of South African social security law. As Mbazira aptly observes, the courts need to be open-minded and conscious of context when interpreting socio-economic rights in individual cases.<sup>210</sup>

### **6.6.2 Bilateral social security agreements**

Where host governments are reluctant to commit independently to improving the social protection of migrant workers, bilateral social security agreements between countries of origin and destination can be useful in bridging the domestic gap. Bilateral social protection agreements usually include provisions of equal treatment of citizens and foreign nationals regarding social security and rules of cooperation between participating countries.<sup>211</sup> Such arrangements present opportunity for migrant-sending countries to negotiate for better rights, especially for low-skilled workers, and to provide significant minimum rights for these migrants, including the export of benefits between the countries.<sup>212</sup>

Increasingly, governments are choosing to conclude international social security agreements with one another to share responsibility for and coordinate social security protection across national boundaries, instead of going at it alone. Countries like the United States, Canada, Australia, Ireland and those belonging to the EU have entered into bilateral treaties with other countries to secure benefit protection for their citizens who work abroad. Canada alone boasts 50 such agreements.

In the South African context, legislation makes (limited) provision for the establishment of social security (reciprocal) agreements. For example, s 94 of COIDA permits the government to enter into arrangements with other states regarding compensation. Thus, the COIDA provision allows for limited portability of contributory schemes benefits. This means that workers could maintain and transfer some of their benefits from one job or country to another without losing all the social security rights acquired in the host country.

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<sup>210</sup> Christopher Mbazira ‘Grootboom: A paradigm of individual remedies versus reasonable programmes’ (2011) 26 *SAPL* 60 at 62.

<sup>211</sup> Sabates-Wheeler op cit note 169 at 9.

<sup>212</sup> Van Ginneken op cit note 119 at 214.

Similarly, s 2(1) of the Social Assistance Act provides for the extension of coverage to other foreign nationals should there be an existing bilateral agreement. These legal provisions suggest reciprocity of treatment in coverage. Despite the legislative mandate to conclude bilateral social security arrangements, the actual execution and enforcement of this authority is absent or dismal to say the least.

Nonetheless, South Africa has entered into bilateral labour agreements with a number of neighbouring countries including Botswana,<sup>213</sup> Lesotho,<sup>214</sup> Malawi,<sup>215</sup> and Mozambique.<sup>216</sup> Most of these labour agreements contain conditions and obligations on issues related to recruitment, contracts, deferred pay, taxation, and the appointment of labour representatives into South Africa.<sup>217</sup>

Besides the absence of important provisions — such as equality of treatment with citizens of host nation in social protection, maintenance of acquired rights, and accumulation of insurance periods<sup>218</sup> — the current bilateral regime cannot qualify as true reciprocal bilateral social security agreements for several reasons. First, evidence suggests that the government settled these agreements in an attempt to control the influx of foreign labour to South Africa

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<sup>213</sup> Labour Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana relating to the Establishment of an Office for a Botswana Government Labour Representative in the Republic of South Africa, Botswana Citizens in the Republic of South Africa and the Movement of such Persons across the International Border – SA Treaty Series 3 of 1973.

<sup>214</sup> Labour Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho relating to the Establishment of an Office for a Lesotho Government Labour Representative in the Republic of South Africa, Lesotho Citizens in the Republic of South Africa and the Movement of such Persons across the International Border – SA Treaty Series 1 of 1973.

<sup>215</sup> See the South Africa Treaty Series 10 of 1967 for an agreement between the Governments of the Republic of South Africa and Malawi relating to the employment and documentation of Malawi nationals in South Africa.

<sup>216</sup> See the South Africa Treaty Series 11 of 1964 for an agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal regulating the employment of Portuguese workers from the Province of Mozambique on certain mines in South Africa.

<sup>217</sup> Marius Olivier ‘Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part II)’ (2012) 2(2) *SADC Law Journal* 129 at 134.

<sup>218</sup> *Ibid* at 135.

from those countries.<sup>219</sup> Secondly, with the limited exception of the 1964 labour agreement with Mozambique,<sup>220</sup> the government treats social (security) protection and related arrangements as a by-product of most of these agreements.<sup>221</sup> Lastly, these agreements are limited in scope and effect because they are not reciprocal in nature in that they seek to regulate the position of nationals of only the sending countries.<sup>222</sup>

The available labour agreements between South Africa and the surrounding SADC countries, now obsolete,<sup>223</sup> could do with renegotiations to improve the protection they offer foreign workers. Mpedi and Smit counsel that ‘efforts to modernise these agreements should include provisions geared at the (facilitation) of cross-border payment of social security benefits’.<sup>224</sup> Although conclusion of bilateral social security agreements is a good avenue to guarantee the social protection of migrants,<sup>225</sup> some scholars warn of it becoming a ‘highly complex and hardly administrable set of provisions on the portability of social security benefits’.<sup>226</sup>

Nevertheless, best practices in the Europe reveal that a solid legal foundation can help overcome these administrative complexities and hurdles. EU member states have managed to escape these supposed bureaucratic traps because all bilateral agreements center on one primary legal instrument, the EC Regulation 883/2004 of 29 April 2004 on the coordination of social security systems.<sup>227</sup> The EU regulation on the coordination of social security systems establishes common rules to protect social security rights when moving within the EU. Therefore, it essentially guarantees to beneficiaries their social security benefits regardless of where they move to within the EU.

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<sup>219</sup> Ibid at 134.

<sup>220</sup> South Africa Treaty Series 11/1964 regulating the employment of miners on certain South African mines.

<sup>221</sup> Olivier op cit note 109 at 147.

<sup>222</sup> Olivier op cit note 217 at 135.

<sup>223</sup> Olivier op cit note 109 at 146.

<sup>224</sup> Mpedi, Smit & Nyenti op cit note 93 at 32.

<sup>225</sup> Olivier (2012) at 158.

<sup>226</sup> R Holzmann, J Koettl & T Chernetsky ‘Portability regimes of pensions and healthcare benefits for international migrants: An analysis of issues and good practices’ (2005) *World Bank Social Protection Discussion Paper No. 0519*.

<sup>227</sup> Olivier op cit note 217 at 158.

### 6.6.3 Multilateral social security agreements

Where bilateral agreements may result in administrative red tape, literature suggests that a multilateral agreement concluded in the framework of regional economic integration can ease this bureaucracy as it set common standards and rules for implementing agreements.<sup>228</sup> Aside from this moderating role, multilateral agreements have the added advantage of creating a standardised framework, i.e. the harmonisation of labour and social protection policies of member states.<sup>229</sup> Here the role of regional integration becomes critical in the development of successful multilateral arrangements.

Currently there are no multilateral agreements in the SADC region.<sup>230</sup> However, comparative experiences from other jurisdictions reveal that multilateral agreements are effective in extending social protection. In this respect, best practices in Europe, Latin America and Caribbean, and most recently the East African Community (EAC) warrant brief mention. The European region has the most developed multilateral framework to date. All EU nationals have full access to all social benefits without discrimination, in addition to the portability of most social benefits.<sup>231</sup> The EU system also grants equal treatment to third-country nationals after a period of residence, usually no longer than five years.<sup>232</sup>

Likewise, the multilateral frameworks of the Caribbean Community (CARICOM)<sup>233</sup> and the 'Common Market of the South' (MERCOSUR)<sup>234</sup> contain social security protection for migrants in the Latin American and Caribbean region.<sup>235</sup> In particular, the provisions of the CARICOM Agreement on Social Security of 1996 largely draw from the guidelines set out in the

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<sup>228</sup> Ibid.

<sup>229</sup> Van Ginneken op cit note 119 at 214.

<sup>230</sup> Mpedi, Smit & Nyenti op cit note 93 at 56.

<sup>231</sup> Van Ginneken op cit note 119 at 215.

<sup>232</sup> Sabates-Wheeler op cit note 169 at 7. Also see the EU Directive 109/2003.

<sup>233</sup> The Caribbean Community (CARICOM) consists of 15 states in the Caribbean, including: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Haiti, Jamaica, Grenada, Guyana, Montserrat, St. Lucia, Suriname, St. Kitts and Nevis, St. Vincent and the Grenadines, and Trinidad and Tobago.

<sup>234</sup> This is a sub-regional bloc consisting of Argentina, Brazil, Paraguay, and Uruguay.

<sup>235</sup> Ibid.

ILO Maintenance of Social Security Rights Recommendation 167 of 1983.<sup>236</sup> Countries to this Agreement essentially coordinate their social security systems. The reciprocal nature of the Agreement ensures and secures the benefits (mainly pension benefits) of individuals who are moving to work or have worked in any of the member states.<sup>237</sup>

It must be noted that the multilateral social security measures canvassed are not in respect of unauthorised migrants. It is submitted that these measures can contain provisions that address the position of irregular migrants.

Although it is not as advanced as the EU or the Latin America and Caribbean, a multilateral framework is currently underway within the EAC Common Market.<sup>238</sup> A similar approach to social protection across borders in the SADC context is required and reasonably possible. The current SADC Code on social security,<sup>239</sup> albeit not a legally binding agreement, can be an optimistic start for the conclusion of regional social security agreements to improve the position of intra-SADC migrants.

## 6.7 Conclusion

A review of existing sources of South African domestic law unsurprisingly reveals that foreign workers generally enjoy fewer social and legal rights because of immigration policies. Policies distinguish between different types of non-nationals and subsequently award differentiated social protection rights according to the legal strength of immigration status. Different foreign nationals with different immigration statuses translate to a succession of rights ranging from full equal treatment to total exclusion.

In South Africa, there is a visible social protection gap. Access to social protection by some foreign workers is limited because of exclusions in the legislation of the host country. The South African social security system exempts many categories or groups of people. The domestic social protection framework mostly bars foreign nationals, with the exception of those with

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<sup>236</sup> Olivier op cit note 83 at 110.

<sup>237</sup> W Salas Hamilton (ed) *Social security in CARICOM* (2010) 5, available at <http://www.ilo.org/dyn/migpractice/docs/93/Info.pdf>, accessed 12 August 2012.

<sup>238</sup> Olivier op cit note 217 at 158.

<sup>239</sup> See article 17(2).

permanent residence status. This is because access to social protection rights usually relates to periods of employment, contributions, and/or residency.

This means that some migrants (mostly those with permanent residence status) enjoy the same rights as citizens,<sup>240</sup> whilst others are left wanting. Granted that unauthorised foreign workers are at the bottom of the rights chain as far as typology of migrants go, this precarious legal status means they experience much restricted economic and social rights compared to other groups of non-nationals. Essentially, the differentiation embedded in the legal regime weakens the South African domestic protection framework.

Where domestic provisions are ineffective, the hope is that international norms and standards on migrant workers can help improve situations. To this effect, international legal instruments do little to improve the situation. The inadequacy of international instruments can be attributed either to the provisions themselves or inaction on the part of governments. In the case of South Africa, the latter point rings true. South African policymakers are reluctant to endorse formally important international instruments on labour migration. Non-ratification renders the instruments that pronounce better protection for this class of workers non-binding and ineffective. On the other hand, some of the instruments offering universal protection inadvertently limit the protection of unauthorised migrant workers because of the prominence given to principles of territoriality.

Nonetheless, research and comparative best practices reveal that it is possible to improve the protection position of unauthorised foreign workers. In this respect, three policy options — unilateral government action, bilateral, and multilateral agreements — are promising in enhancing the protection position of these migrants.

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<sup>240</sup> Except for those rights specifically reserved for only citizens, such as the right to vote, right to a passport, and the right to choose occupation.

## **CHAPTER VII CONCLUSIONS AND RECOMMENDATION**

### **7.1 Introduction**

The study sought to address one of the most salient issues in the international migration discourse, i.e. the rights protection position of migrant workers in countries where they work. Particularly, it sought to examine the right of access to social protection of migrant workers in an irregular situation in South Africa. The broader underlying question was ‘To what extent do South African laws protect the rights of unauthorised migrant workers?’ The key question was broken down into the following specific inquiries:

- Do South African laws adequately safeguard the social protection rights of unauthorised foreign workers?
- Is there any labour migration policy or framework in South Africa?
- What is the nature of the existing labour migration policy?
- What are the realistic options for policy reform?

In determining their adequacy, the study employed a contextual policy and legal analysis in examining the domestic regulatory social protection framework, with references to international human rights norms and comparative best practices. Accordingly, this chapter provides general conclusions and some recommendations for resolving some of the issues raised.

### **7.2 Summary of conclusions and observations**

Chapter 2 provided a literature review of the equality discourse generally and in South Africa specifically. It revealed the elusive and contested nature of equality as a theory. Generally, different schools of thought construct equality in a way that serves their purpose and needs. Nonetheless, the South African context indicates a substantial body of constitutional and legislative provisions promoting equality and non-discrimination. In South Africa particularly, equality, owing to the country’s oppressive history, takes two forms. Pre-and post-constitutional equality jurisprudence in South Africa employs both the form (formal equality) and substance (substantive equality) of the law. South African courts, committed to redressing the inequalities inherited from the apartheid regime, emphasise substantive equality. This form of equality links intricately with dignity.

Since equality is a desirable ideal, the next logical consideration was how to measure the parameters of this concept. Chapter 3 sought to identify the best measure of equality by focusing on three conceptions of distributive equality (welfare, resource and opportunities). Both welfare and resource as metrics for equality failed because they were impractical and indefensible. The chapter settled on the equal opportunity theory coupled with the human capability approach as the best possible measure to explain and address inequalities embedded in South Africa law. The study then proceeded to use equal opportunity theory coupled with the capability approach as an evaluative tool to determine adequacy of domestic regulatory framework.

Chapter 4 delineated arguments on the need for protection of social protection rights from three dominant perspectives: namely migration, labour, and human rights. The chapter dealt with technical issues relating to the conceptualisation of social protection to arrive at a working definition of the concept for the study. It then proceeded to examine social protection from a migration perspective. In this respect, it discussed trends, patterns and the regulatory framework underlying the institutionalisation of international labour migration. It also surveyed existing policy and legislative framework regulating labour migration in South Africa.

The chapter also explored social protection from a labour and human rights contexts. In a labour view, wage work is an essential component in justifying entitlements to work-related social protection. Work is shown to be both a means to and a source of social protection. It then explored social protection from a human rights angle since the plight of migrants is inherently a human rights issue.

Regarding labour migration regulation, the discussion established that indeed there is a labour migration framework in South Africa. However, the nature of existing South African labour policy is too restrictive and security-centred, lacking the necessary human rights aspects to address sufficiently the labour migration issues in the country. The study observed a relationship between immigration, labour, and social protection laws in South Africa. However, policymakers give preference to immigration law over labour and social security laws. This then affects the employment and human rights position of irregular migrant workers.

In terms of employment, the legal channels to the South African labour market available to foreign nationals are very limited, which indirectly creates scope for clandestine migration. Moreover, the working conditions of migrant workers in general tend to be poor compared to

citizens. Compared to regular migrants, unauthorised migrant workers fare far worse concerning conditions of work.

Finally, the general treatment of migrants overall is dismal and raises human rights concerns. The study observed that South Africa's harsh immigration discourse coupled with hostile anti-migrant sentiments and political rhetoric exacerbates the plight of non-nationals. Irregular migrants face and endure severe challenges as they are often relegated to the lowest legal position and treatment.

Chapter 5 examined a range of international, continental, and regional human rights instruments that relate specifically to the social protection of irregular migrant workers and their families. It reflected on relevant instruments for the protection of migrant worker developed by transnational bodies such as the UN, ILO, AU, and SADC. It particularly focused on provisions relating to the social protection of unauthorised migrant workers. It also examined the conflicting relationship between states' sovereign territorial prerogative and human rights law.

The transnational instruments examined give an image of a body of international human rights law that theoretically adequately focus on the rights protection of migrant workers and their families. Both the UN and ILO have made considerable developments in promoting and protecting the rights of migrants, evident from existing standards regulating their treatment. However, detailed analysis revealed underlying problems in these transnational instruments that weaken the recognition of and access to fundamental rights.

The first of these problems relates to their content, viewed against the backdrop of an important common theme of international human rights law, namely equality of treatment. International, continental, and regional instruments dealing with migrant workers seemingly do not envisage parity of treatment between regular and irregular migrants. In fact, they tend to exclude irregular migrant workers from the scope of their content, thereby compromising the equal treatment principle. Where irregular migrants are included in the content of protective instruments, as is the case in the UN's ICRMW, their protection is often limited and comparably inadequate.

The second problem relates specifically to social protection. Standards and norms instituted by both the UN and ILO acknowledge social protection as a human right. Yet, these transnational instruments tend to confine social protection rights of irregular migrants to

statements of general principles. This calls for a re-interpretation and re-formulation of these international standards, as they are important guideposts for improving national policies.

The last problem relates to ratification and implementation. Advancing the protection of vulnerable migrant workers requires ratification of relevant instruments, yet these instruments have poor ratification and implementation records. In the absence of state commitment to these instruments, international law does very little to improve the social protection position of irregular migrants.

Chapter 6 gave a comprehensive overview of the South African legal framework providing work-related social (security) protection. It evaluated sources of domestic law containing provisions, including constitutional, statutory, and case law. The overview yielded a substantial body of legal mechanisms intended to protect workers, including foreign workers.

It subsequently analysed the adequacy of those South African domestic protection by weighing them against international norms and standards. The comparative exercise revealed that South African social protection are deficient where unauthorised migrant workers are concerned. Domestic coverage, and by extension benefits entitlements, wholly or partially excludes unauthorised migrant workers. Irregular migrants lack both legal and real (physical) access to South African social security system owing to certain restrictions and conditions embedded in the relevant legislation.

Finally, the chapter examined possible avenues for improving the domestic legal framework. It highlighted three measures as relative best practices from countries that offer comparatively better protection. These measures included unilateral government action, bilateral or social security coordination agreements, and multilateral social security agreements. In order to improve the social protection position of irregular migrant workers specifically and their human rights generally, the study proposed the implementation of a 'firewall' between immigration and labour enforcement systems. It also recognised that judicial activism will be crucial to stimulate the necessary policy changes. Alternatively, South Africa should enter into bilateral social security agreements with other SADC members, particularly those major migrant-sending sources. Moreover, SADC-wide coordination and arrangements are necessary in improving conditions of all migrant workers in the region.

### **7.3 General remarks**

To reiterate, the study set out to answer one key question, ‘To what extent do South African laws protect the rights of unauthorised migrant workers?’ Mindful that this question raised a number of issues about the current disparities in access to social protection, both in law and practice, between different categories of migrant workers, it identified four specific questions for consideration in answering the main question.

In each of the chapters examining critical protection issues, the adequacy of the relevant provisions was measured against international norms and/or comparative best practices. Thus, South African domestic labour migration and social protection policies were examined in light of international norms and comparative best practices. It has been found that the South African regulatory framework is inadequate on both fronts, i.e. on labour migration and social protection. Equality, one of the foundational blocks of the South African Constitution and democracy, is seemingly limited to citizens and some categories of non-nationals. The notion of equal access becomes problematic when the socio-economic rights of foreign nationals are concerned. Generally, most foreign nationals do not enjoy equal opportunity to socio-economic rights. The Constitutional Court has not been very helpful in giving life to the socio-economic rights in the Constitution as it limits the social protection rights of a significant group of vulnerable foreign nationals.

### **7.4 Recommendations and strategies**

International labour migration is inevitable. It is a phenomenon that is bound to rise steadily, given the increasingly complex process of globalisation. South Africa is an attractive destination in the SADC region and the broader continent. This position as a major destination country for migrants is unlikely to change in the near future. Consequently, South Africa needs to embrace labour migration and take advantage of its benefits. In order to benefit from international labour migration, however, South Africa will need to make substantial changes to its current system, approach, and/or perception.

#### **7.4.1 Rights-based approach to labour migration**

Undoubtedly states have a broad right to regulate who they admit into their territories. However, migration management policies and systems must appropriately serve both domestic needs and

those of migrants. South Africa's approach to migration management tends to be inward-looking, overly focused on security, control, and exclusion at the expense of development. A restrictive and control-oriented approach does very little to manage the challenges and social pressures associated with migration. This is evident in the increasing number of foreigners that enter, stay, and/or work in South Africa without formal authorisation from the government.

In order to manage migration and combat clandestine migration into the country, some important policy interventions are required. The first step in any effective migration management system is the availability of good and adequate data. The study has noted that domestic immigration figures, particularly those concerning irregular migrants, are unreliable. Migration statistics in South Africa are deficient as they tend to be grossly exaggerated and/or politicised. This is particularly true in the case of measuring the clandestine migration discourse where people contest the precise number of irregular migrants. In short, there is no reliable data about clandestine migration, let alone unauthorised migrant workers. Therefore, for developing an efficient regulatory framework that adequately addresses labour migration needs and concerns, the government will need to improve the collection of immigration data. It is recognised that measuring or quantifying accurately the number of foreigners in an irregular situation is difficult. Moreover, any measurement will have to be indirect. Perhaps researchers and policymakers will have to come up with a good proxy for clandestine migration since deportation data does not accurately capture the full reality of clandestine migration. The point is that measures that improve the collection of useful and accurate statistics as well as capacity-building of institutions (such as DHA or StatsSA) responsible for data collection are urgently needed. A policy that is built on up-to-date information is bound to direct efforts and resources into the right areas. It is better to design a good system than strongly enforce a flawed system.

Beyond acquiring good data, the current South African migration policy needs a complete immigration policy overhaul to produce a more progressive migration framework. The preceding discussions show how strongly migration policies govern the legal position of migrants in social protection. A progressive immigration regime will mean adopting a rights-based approach to international migration, and creating more and simpler channels for regular migration.

First, South African policymakers should implement an immigration framework that carefully balances human rights and national development interests, instead of the current

control-oriented method. Discussions in chapter 4 have shown that certain sectors of the South African economy are dependent on foreign labour. More so, unscrupulous employers depend on the cheap exploitative labour of irregular migrants to gain competitive advantage. The benefit of an immigration approach that takes cognizance of the protection concerns of foreign workers is three-fold.

- First, the national economy can garner the full economic contributions of all migrant workers.
- Secondly, policymakers indirectly remove the element that makes vulnerable migrants attractive to unscrupulous employers.
- Thirdly, the government can raise its human rights image.

In any case, the traditional approach of control and exclusion has proven costly and ineffective. It is perhaps time policymakers shifted to a rights-based approach that focuses on the human aspect of migration. Here the ILO Multilateral Framework on Labour Migration should prove useful in guiding the government towards formulating a balanced and human rights-friendly regulatory framework.

Secondly, the government needs to realign incentives of migrants and employers with the goals of its immigration policy. Currently, the government employs a protectionist approach to the domestic labour market as a way of preserving local jobs and curtailing national unemployment. This means an admission policy that makes it excessively difficult for people to migrate legally, inadvertently raises the rate of clandestine migration into the country. Unfortunately, South Africa's stringent admission policy or procedure, often favouring migration of highly skilled migrants, makes it very difficult for low skilled migrants to migrate legally. The government will need to revise its admission policy and extend the avenues available for regular migration. It should create more and simpler opportunities for low-skilled foreign nationals to enter and work in the country through legal channels. This is by no means suggesting that South Africa become a borderless state. The government, while exercising its territorial discretionary power, should recalibrate the incentives of migrants and employers and the goals of its admission policy.

#### 7.4.2 Ratification and incorporation of transnational legal instruments

International instruments, as concluded in chapter 5 of the study, are necessary for the guidance and synchronisation of various national legislation, policies, and practices. Regarding international labour migration, international instruments ‘provide a solid foundation for formulation of migration policies’.<sup>1</sup> In this respect, the international community, through efforts by the UN and ILO, provides some standards or norms that can prove useful for the appropriate treatment of all migrant workers. Accordingly, the South African Constitution recognises the applicability of international human rights instruments in its domestic law.

Regrettably, South Africa has failed to ratify any of the main international instruments specifically applicable to migrant workers and their rights of access to social protection. Non-ratification of existing standards setting benchmarks is a serious issue as it constrains migrants from fully enjoying the rights enshrined in them.<sup>2</sup> The government should strongly consider ratifying and incorporating the international normative framework for protection of migrant rights, particularly ILO Conventions 97 and 143 and the UN’s ICRMW, into the national legal system.

Generally, ratification and subsequent incorporation and implementation of these international norms are good for alleviating the ‘tension between international law to protect human rights and national laws where the primary concern is to protect and promote the rights and welfare of citizens’.<sup>3</sup> More importantly, ratified international norms are necessary for easing the exploitation of migrant workers, in particular irregular migrants. Aside from the general reasons for ratifying these norms, South Africa is a member of both the ILO and UN, and therefore its national policies and practices need to comply with and echo the principles of both international bodies.

However, the current international regulatory framework contains general principles regarding the protection of the rights of migrants. While it is advised that South Africa should

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<sup>1</sup> Piyasiri Wickramasekara ‘Protection of migrant workers in an era of globalization: The role of international instruments’ in R Blanpain (ed) *Comparative labour law and industrial relations in industrialized market economies* (2010) 245-283 at 260.

<sup>2</sup> Bimal Ghosh *Elusive protection, uncertain lands: Migrants’ access to human rights* (2003) 10.

<sup>3</sup> *Ibid* at 11.

adopt international standards and instruments, it will need to re-interpret and adapt its principles to its specific situation or socio-economic context.

Additionally, international and regional bodies provide for the conclusion of bilateral and multilateral agreements to improve the protection position of migrants in party states. However, these agreements are only effective if the countries concluding them have compatible systems offering comparable protection. On a regional level, SADC should first create a proper framework for managing migration in the region. A regionally-coordinated approach to migration will ensure the alignment of goals and interests of participating states, promote more effective management of migration in the region, and lay the foundation for the harmonisation of social protection policies in the region.

### **7.4.3 Rights-based approach to the right to social (security) protection**

The previous discussions noted gaps in the treatment of migrants in social protection, both internationally and domestically. The protection of migrant workers, particularly irregular migrant workers, is less than desirable. It is the main contention of this study that the differential treatment of irregular migrants vis-à-vis regular migrants in the enjoyment of social protection is legally unjustifiable. It has been argued that the migration status of unauthorised migrant workers places them in a precarious legal position, open to excessive exploitation and violation by unscrupulous employers that engage them economically. Their exclusion from protective measures like social protection policies only serves to exacerbate their plight.

South African policymakers have a constitutional obligation to promote and protect access to social security for everyone. South African courts have significantly advanced the realisation of this obligation by extending the scope of social protection instruments through liberal interpretation. However, realisation of the right of access to social protection in South Africa is far from adequate. South African social protection mechanisms, in law and practice, still exclude some categories of migrant workers. South African policymakers should consider a rights-based approach to social protection regulation which will require extending basic human and social rights to all migrants, independent of their immigration status. Additionally, policymakers should guarantee irregular migrants equality of treatment with regular migrants and citizens for human rights.

Moreover, a liberal social protection framework will require carefully balanced enforcement systems by well-coordinated institutions. Currently, the South African government is too focused on immigration enforcement, control, and exclusion at the expense of workers' rights. Both duties are equally important and need to be prioritised. In this respect, it is recommended that the government adopt a 'status-blind' approach to enforcement by erecting a firewall between its immigration enforcement and labour law enforcement. In this regard, labour inspectors will primarily enforce labour laws without regard for immigration status, leaving the enforcement of immigration law solely to the Department of Home Affairs.

## BIBLIOGRAPHY

### Books and chapters in books

- Anderson, B 'Precarious pats, precarious futures' in Cathryn Costello & Mark Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) United Kingdom: Oxford University Press, pp 29-43.
- Anderson, E 'Justifying the capabilities approach to justice' in Harry Brighouse & Ingrid Robeyns (eds) *Measuring justice: Primary goods and capabilities* (2010) Cambridge: Cambridge University Press.
- Arneson, R 'Egalitarianism' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2013) available at <http://plato.stanford.edu/archives/sum2013/entries/egalitarianism/>.
- Arneson, R 'Distributive justice and basic capability equality: "Good enough" is not good enough' in A Kaufman (ed) *Capabilities equality: Basic issues and problems* (2006) London: Routledge, pp 17-43.
- Baker, J 'Equality' in Healy, S., Reynolds, B. and Collins, M. L. (eds). *Social Policy in Ireland: principles, practice and problems, 2nd ed.* (2006) Dublin: Oak Tree Press.
- Barnard, C *The substantive law of the EU: The four freedoms* 3 ed (2010) the United States: Oxford University Press, chapters 9 and 14.
- Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006) Jointly produced by the Organization for Security and Co-operation in Europe (OSCE), International Organization for Migration (IOM) and the International Labour Office (ILO).
- Bassoon, AC, Christianson, MA, Garbers, C, le Roux, PAK, Mischke, C & Strydom, EML *Essential labour law* 4 ed (2005) Centurion: Labour Law Publications.
- Battistella, G 'Migration and human rights: the uneasy but essential relationship' in Cholewinski, Guchteneire & Pecoud (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) United Kingdom: UNESCO/Cambridge University Press.
- Benjamin, P 'Different routes to equality and empowerment' in Dupper and Garbers (Eds.) *Equality in the workplace: Reflections from South Africa and beyond* (2009) Cape Town: Juta.
- Black Sash *Social assistance: A reference guide for paralegals* (2010) Cape Town: Black Sash.
- Böhning, R *A brief account of the ILO and policies on international migration, paper prepared for the ILO Century Project* (2009) Geneva: International Labour Office.

- Cassel, D 'Equal Labor Rights for Undocumented Migrant Workers' in Anne Bayefsky (ed) *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (2005) Leiden: Martinus Nijhoff Publishers, pp 477-516.
- Castels, S & Davidson, A *Citizenship and Migration: Globalization and the Politics of Belonging* (2000) New York: Routledge.
- Chaskalson, A 'Human dignity as a constitutional value' in Kretzmer & Klein (eds) *The concept of human dignity in human rights discourse* (2002) Netherlands: Kluwer Law International, pp 133-144.
- Cohen, R *Migration and its enemies: Global capital, migrant labour and the nation-state* (2006) Oxford: Ashgate.
- Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Consolidated Report) (2002) available at <http://www.cdhaarmann.com/Publications/Taylor%20report.pdf>.
- Consortium for Refugees and Migrants in South Africa (CoRMSA) 'Protecting Refugees, Asylum Seekers and Immigrants in South Africa during 2010' (2011) Johannesburg: CoRMSA, available at <http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf>.
- Currie, I & de Waal, J (eds) *The Bill of Rights Handbook* 6 ed (2013) Cape Town: Juta and Company Ltd, pp 209-249.
- Davies, R 'The class character of South Africa's industrial conciliation legislation' in E Webster (ed) *Essays in South African labour history* (1978) Johannesburg: Ravan Press.
- Davis, D *Democracy and deliberation* (1999) Cape Town: Juta & Co Ltd.
- De Vos, P & Freedman, W (eds) *South African constitutional law in context* (2014) Cape Town: Oxford University Press Southern Africa (Pty) Ltd, pp 417-461.
- Dewhurst, E 'The role of irregular immigrants to back pay: The spectrum of protection in international, regional, and national legal systems' in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) United Kingdom: Oxford University Press, pp 216-238.
- Du Plessis, JV & Fouche, MA *A practical guide to labour law* 6 ed (2006) Durban: LexisNexis.
- Dupper, O & Garbers, C (eds) *Equality in the workplace: Reflections from South Africa and beyond* (2009) Cape Town: Juta.

- Esselaar, V & Garbers, C 'Migrant workers' in E Strydom (ed) *Essential social security law* 2 ed (2006) Cape Town: Juta, pp 284-305.
- Fauvelle-Aymar, C *MiWORC Report No. 6 Migration and employment in South Africa: An econometric analysis of domestic and international migrants (QLFS (Q3) 2012)* (2014) Johannesburg: African Centre for Migration & Society, University of Witwatersrand.
- Ghosh, B *Elusive protection, uncertain lands: Migrants' access to human rights* (2003) Switzerland: International Organization for Migration.
- Giliomee, H & Mbenga, B *New history of South Africa* (2007) Cape Town: Tafelberg
- Glenn, HP *Strangers at the gate: refugees, illegal entrants and procedural justice* (1992) Cowansville, Quebec: Éditions Y. Blais.
- Goodin, R & Pettit, P (eds) *Contemporary political philosophy: An anthology (second edition)* (2006) UK: Blackwell Publishing Ltd.
- Grogan, J *Employment rights* (2010) Cape Town: Juta & Co. Ltd.
- Guild, E 'The EU's internal market and the fragmentary nature of EU labour migration' in Cathryn Costello & Mark Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) United Kingdom: Oxford University Press, pp 98-118.
- Hamilton, WS (ed) *Social security in CARICOM* (2010) Barbados: The CARICOM Secretariat, available at <http://www.ilo.org/dyn/migpractice/docs/93/Info.pdf>.
- Hanson, G *The economic and policy of illegal migration in the United States* (2009) Washington, DC: Migration Policy Institute.
- Hansungule, M 'The African Charter on Human and Peoples' Rights' (2012) in Yusuf, A & Ouguergouz, F (eds) *The African Union: Legal and institutional framework* Leiden: Martinus Nijhoff Publishers.
- Harris, N *Thinking the Unthinkable: The Immigration Myth Exposed* (2002) London: L.B. Tauris.
- Holtug, N and Lippert-Rasmussen, K (eds) *Egalitarianism: New essays on the nature and value of equality* (2007) Great Britain: Oxford University Press.
- International Labour Organization *Preventing discrimination, exploitation and abuse of women migrant workers – Booklet 1* (2003) Geneva: International Labour Office.
- International Labour Organization *Facts on labour migration* (2006) Geneva: International Labour Office, available at [www.ilo.org/communication](http://www.ilo.org/communication).

- International Labour Organization *International labour migration: A rights-based approach* (2010) Geneva: International Labour Office.
- International Labour Organization (ILO) *World social Protection Report 2014-15: Building economic recovery, inclusive development and social justice* (2014) Geneva: International Labour Office.
- Ivins, C 'Inequality matters: BRICS inequality fact sheet' (2012) *BRICS Policy Center*.
- Kalula, E; Ordor, AO & Fenwick, C *Labour law reforms that support Decent Work: The case of Southern Africa* (2008) Issue Paper No. 28 (ILO Sub-Regional Office for Southern Africa, Harare)
- Kentridge, J 'Equality' in Chaskalson et al (eds) *Constitutional law of South Africa* (1999) Cape Town: Juta.
- Kerwin, D & McCabe, K *Labour standards enforcement and low-wage immigrants: Creating an effective enforcement system* (2011) Washington, DC: Migration Policy Institute.
- Klaaren, J 'Immigration & the South African constitution' in Jonathan Crush (ed) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) Cape Town: South African Migration Project.
- Klug, H 'A constitutional history of South Africa' in Currie and de Waal (eds) *The new constitutional & administrative law, volume one: Constitutional law* (2001) Cape Town: Juta.
- Kok, P & Collinson, M *Migration and urbanization in South Africa* (2006) Pretoria: Statistics South Africa, available at <http://www.statssa.gov.za/publications/Report-03-04-02/Report-03-04-02.pdf>.
- Kuptsch, C 'Inequalities and the impact of labour market institutions on migrant workers' in Janine Berg (ed) *Labour Markets, Institutions and Inequality: Building Just Societies in the 21<sup>st</sup> Century* (2015) UK: Edward Elgar Publishing
- Lansink, A 'Migrant workers and non-discrimination in the workplace: an international law perspective' in Dupper & Garbers (eds) *Equality in the workplace: Reflections from South Africa and beyond* (2009) Cape Town: Juta, pp 259-282.
- Mason, A *Levelling the playing field: The idea of equal opportunity and its place in egalitarian thought* (2006) New York: Oxford University Press.
- Millard, D 'The portability of social security benefits: The position of non-citizens in South Africa and the Southern African Development Community' in Becker, U & Olivier, M (eds) *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (2008) Stellenbosch: Sun Press.

- Mpedi, LG & Smit, N (eds) *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (2012) Bloemfontein: Sun Media.
- Mubangizi, J *The protection of human rights in South Africa: A legal and practical second edition* (2013) Cape Town: Juta & Co. Ltd.
- National Planning Commission 'Chapter 11: Social protection' in *National Development Plan: Vision 2030* (2011) pp 325-348. Available at <http://www.gov.za/documents/national-development-plan-vision-2030>.
- Nyenti, M 'Adjudication and enforcement mechanisms and the administrative framework: A South African perspective' in Becker, U & Olivier, M (eds) *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (2008) Stellenbosch: Sun Press.
- Office of the High Commissioner for Human Rights (OHCHR) *Out of the shadows: a human rights perspective on irregular migration and development* (October 2012).
- Olivier, M 'Political and regulatory dimensions of access, portability and exclusion: Social security for migrants, with an emphasis on migrants in Southern Africa' (2012) in Sabates-Wheeler, R & Feldman, R *Migration and social protection: Claiming social rights beyond borders* England: Palgrave Macmillan, pp 117-139.
- Olivier, MP and Kalula, ER 'Scope of Coverage' in M P Olivier et al (eds) *Social Security: A Legal Analysis* (2003) Butterworths: LexisNexis.
- Olney, S & Cholewinski, R 'Migrant workers and the right to non-discrimination and equality' in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) United Kingdom: Oxford University Press, pp 259-280.
- Orr, G 'Unauthorised workers: Labouring beneath the law?' in Christopher Arup (ed) *Labour law and labour market regulation: Essays on the construction, constitution and regulation of labour markets and work relationships* (2006) Australia: Federation Press, pp 677-695.
- Oxfam *Left behind by the G20: How inequality and environmental degradation threaten to exclude poor people* (2012) Oxfam International. Available online at [www.oxfam.org](http://www.oxfam.org)
- Peberdy, S & Crush, J 'Rooted in racism: The origins of the Aliens Control Act' in Jonathan Crush (Ed.) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) Cape Town: IDASA.
- Robeyns, I 'The Capability Approach' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2011) available at <http://plato.stanford.edu/archives/sum2011/entries/capability-approach>.

- Roemer, JE 'Equality of opportunity' in Steven N Durlauf and Lawrence E Blume (eds) (2008) *The New Palgrave dictionary of Economics, second edition*.
- Ross, R, Mager, AK & Nasson, B (eds.) *The Cambridge history of South Africa, volume 2 1885-1994* (2011) Cape Town: Cambridge University Press.
- Ruhs, M 'Immigration and labour market protectionism: Protecting local workers' preferential access to the national labour market' in Costello & Freedland (eds) *Migrants at work: Immigration and vulnerability in labour law* (2014) United Kingdom: Oxford University Press, pp 60-78.
- Seekings, J & Nattrass, N *The post-apartheid distributional regime, CSSR Working Paper No. 76* (2004) Cape Town: Centre for Social Science Research, University of Cape Town.
- Setai, B *The making of poverty in South Africa* (1998) Harare: Southern African Political Economic Series Trust.
- Shelley, T *Exploited: Migrant labour in the new global economy* (2007) London: Zed Books.
- Singh, BD *Industrial Relations and Labour Laws* (2009) New Delhi: Excel Books.
- Slinckx, I 'Migrants' rights in UN human rights conventions' in Cholewinski, Guchteneire & Pecoud (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009) United Kingdom: UNESCO/Cambridge University Press.
- Smith, R., Avendaño, A. & Ortega, JM *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (2009) Washington, DC: AFL-CIO.
- Standing, G *The Precariat: The new Dangerous Class* (2011) London: Bloomsbury Academic, pp 90-114.
- Strydom, E (ed.) *Essential employment discrimination law* (2004) Lansdowne: Juta Law.
- Terreblanche, S *A history of inequality in South Africa, 1652-2002* (2002) South Africa: University of Natal Press and KMM Review Publishing Company Pty Ltd.
- Van Niekerk, A, Smit, N, Christianson, M, McGregor, M & van Eck, S (eds) *Law@work 3 ed* (2015) South Africa: LexisNexis (Pty) Ltd.
- Van Rensburg, LJ and Olivier, MP 'International and supra-national law' in M P Olivier et al (eds) *Social Security: A Legal Analysis* (2003) Butterworths: LexisNexis.
- Vigneswaran, D 'Undocumented migration: risks and myths' in Aurelia Wa Kabwe-Segatti and Loren Landau (eds) *Migration in post-apartheid South Africa: challenges and questions to policy makers* (2008) Paris: Agence Française de Développement.

Vonk, G 'Migration, social security and the law: Observations on the impact of migration policies upon the position of migrants in social security law in Europe' in Berghman, J. et al. (eds) *Social Security in Transition* (2002) Kluwer Law International, pp 77-92.

Wickramasekara, P 'Protection of migrant workers in an era of globalization: The role of international instruments' in R Blanpain (ed) *Comparative labour law and industrial relations in industrialized market economies* (2010) The Netherlands: Kluwer Law International

Zlotnik, H, Guest, P, Hovy, B & Henning, S *Data and analysis: Partnering to better understand and address the human development implications of migration* (2010) Geneva: UN-DESA.

### Journal articles

Ackermann, L 'Equality and non-discrimination: some analytical thoughts' (2006) 22 *SAJHR* 597.

Albertyn, C H 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act — An opportunity missed? *South African Police Service v Solidarity obo Barnard*' (2015) *SALJ* 711.

Albertyn, C & Goldblatt, B 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248.

Albertyn, C & Kentridge, J 'Introducing the right to equality in the interim Constitution' (1994) 10 *SAJHR* 149.

Anderson, E 'What is the point of equality?' (1999) 109 *Ethics* 287.

Arneson, R 'Equality and equal opportunity for welfare' (1989) 56 *Philosophical Studies* 77.

Barrett, J 'Dignatio and the human body' (2005) 21 *SAJHR* 525.

Basnet, G 'State sovereignty vs. human rights' (2013) available online at [http://www.nepalnews.com/archive/2013/others/guestcolumn/feb/guest\\_columns\\_05.php](http://www.nepalnews.com/archive/2013/others/guestcolumn/feb/guest_columns_05.php)

Benjamin, P 'Informal work and labour rights in South Africa' (2008) 29 *ILJ* 1579.

Berg, L 'At the border and between the cracks: The precarious position of irregular migrant workers under international human rights law' (2007) 8 *Melbourne Journal of International Law* 1.

Bilchitz, D 'Are socio-economic rights a form of political rights?' (2015) *SAJHR* 86.

- Bosniak, L 'Human rights, state sovereignty and the protection of undocumented migrants under the international migrant workers convention' (1991) 25(4) *International Migration Review* 737.
- Botha, H 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1.
- Bouare, O 'Determinants of internal migration in South Africa' (2001-2002) 8(1) *SA Journal of Demography* 23.
- Burawoy, M 'The Functions and Reproduction of Migrant Labor: Comparative Material from Southern Africa and the United States' (1976) 81(5) *American Journal of Sociology* 1050
- Carpenter, G 'Of prostitutes, pimps and patrons - some still more equal than others?' (2004) 19(1) *SAPR/PL* 232.
- Carpenter, G 'Motifs inscribed on our social fabric: Equality in *Brink v Kitshoff*' (1997) 13 *SAJHR* 304.
- Cavallero, E 'An immigration-pressure model of global distributive justice' (2006) 5 *Politics Philosophy Economics* 97-127
- Cheadle, H 'Reception of international labour standards in common-law legal systems' in le Roux and Rycroft (eds) *Reinventing labour law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* 2012 *Acta Juridica* 348-364.
- Cohan, GA 'Equality of what? On welfare, goods and capabilities' (1990) 56 *Louvain Economic Review* 357.
- Consortium for Refugees and Migrants in South Africa 'Regularizing Zimbabwean migration to South Africa' (2009) *Migration Policy Brief*. Available at <http://www.cormsa.org.za>.
- Cooper, C 'The boundaries of equality in labour law' (2004) 25 *ILJ* 813
- Cowen, S 'Can 'dignity' guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34.
- Crush, J 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2000) 38 *International Migration* 103.
- Crush, J 'South Africa: Policy in the face of xenophobia' (2008) *Migration Information Source*. Available at <http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobi>. Accessed on 13 February 2014.
- Crush, J 'Contract migration to South Africa: Past, present and future' (1997) *Southern African Migration Project* 1.

- Crush, J, Williams, V & Peberdy, S Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration (2005). Available at <http://www.gcim.org>
- Davis, DM 'Equality: The majesty of legoland jurisprudence' (1999) 116 *SALJ* 398.
- Deane, T & Brijmohanlall, R 'The constitutional court's approach to equality' (2003) 44(2) *Codicillus* 92
- Dekker, AH 'Mind the gap: suggestions for bridging the divide between formal and informal social security' (2008) 12(1) *Law, Democracy & Development* 117
- Devereux, S & Sabates-Wheeler, R 'Transformative social protection' (2004) *IDS Working Paper* 232.
- Du Toit, D 'Protection against unfair discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623.
- Du Toit, D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007) *Law, Democracy & Development* (Special Edition) 67.
- Du Toit, D 'The evolution of the concept of "unfair discrimination" in South African labour law' (2006) 27 *ILJ* 1311.
- Dumont, J & Hovy, B 'World migration in figures' (2013) *OECD-UNDESA*. Available at <http://www.oecd.org/els/mig/World-Migration-in-Figures.pdf>. Accessed 22 October 2014.
- Dupper, O 'The human rights of (irregular) migrants: An international, regional and South African perspective (Part 2)' (2011) 3(1) *International Journal of Social Security and Workers Compensation* 55
- Dupper, O 'The human rights of (irregular) migrants: An international, regional and South African perspective (Part 1)' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 61.
- Dupper, O 'Migrant workers and the right to social security: An international perspective' (2007) 2 *Stellenbosch Law Review* 219-254.
- Dupper, O, Olivier, M & Govindjee, A 'Extending coverage of the unemployment insurance-system in South Africa' (2010) 3 *Stellenbosch Law Review* 438-462.
- Dworkin, R 'What is Equality? Part 1: Equality of Welfare' (1981a) 10(3) *Philosophy & Public Affairs* 185.

- Dworkin, R 'What is Equality? Part 2: Equality of Resources' (1981b) 10(4) *Philosophy & Public Affairs* 283.
- Fagan, A 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220.
- Farrant, M, Grieve, C & Sriskandarajah, D *Irregular migration in the UK* (2006) London: institute for public policy research (ippr).
- Feys, T 'Labour standards in Southern Africa in the context of globalization: The need for a common approach' (1999) 20 *ILJ* 1445.
- Fiss, O 'The Immigrant as Pariah' (1998) 23 *Boston Review*.
- Fombad, C 'An overview of the constitutional framework of the right to social security with special reference to South Africa' (2013) 21 *African Journal of International and Comparative Law* 1-31.
- Freedman, W 'Understanding the right to equality' (1998) 115 *SALJ* 243.
- Friedman, NA 'A human rights approach to the labor rights of undocumented workers' (1986) 74(5) *California Law Review* 1715.
- Goldblatt, B 'Regulating domestic partnerships — a necessary step in the development of South African family law' (2003) 120 *SALJ* 610.
- Govender, K 'Equality, sexuality and taking rights seriously' (2008) 29(1) *Obiter* 1.
- Handmaker, J & Parsley, J 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refuge* 40.
- Haque, T 'Dynamic risk management and the poor: developing a social protection strategy for Africa' (2001) 1 *Africa Region Human Development Series* 1.
- Harris, B 'A foreign experience: Violence, crime and xenophobia during South Africa's transition' (2011) 5 *Violence and Transition Series*.
- Hevia, M & Colon-Rios, J 'Contemporary theories of equality: A critical review' (2009) 74 *Revista Juridica Universidad de Puerto Rico* 131; *Victoria University of Wellington Legal Research Paper* No 15/2013. Available online at <http://ssrn.com/abstract=1338840>
- International Organization for Migration 'Labour Migration' (2015). Available online at <http://iom.int/cms/en/sites/iom/home/what-we-do/labour-migration.html>

- Internal Labour Organization 'Labour migration to South Africa in the 1990s' (1998) *Policy Paper Series No. 4* available online at [www.ilo.org/public/english/region/afpro/harare/download/.../pps4.doc](http://www.ilo.org/public/english/region/afpro/harare/download/.../pps4.doc).
- Jagwanth, S 'Expanding equality' 2005 *Acta Juridica* 131.
- Jagwanth, S 'South Africa: the inequality challenge' (2000) 15(3) *SAR* 30.
- Jagwanth, S & Murray, C 'Ten years of transformation: How has gender equality in South Africa fared?' (2002) 14 *Canadian Journal of Women & Law* 255.
- Jakubowski, L 'International Commerce and Undocumented Workers: Using Trade to Secure Labor Rights' (2007) 14(2) *Indiana Journal of Global Legal Studies* 509-525
- Kapindu, RE 'Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies' (2011) 11 *African Human Rights Law Journal* 93.
- Klaaren, J 'Human rights protection of foreign nationals' (2009) 30 *ILJ* 82.
- Klavert, H 'African Union frameworks for migration: current issues and questions for the future' (2011) *European Centre for Development Policy Management Discussion Paper No. 108*.
- Kok, A 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislation-driven societal transformation' (2008) 19 *Stellenbosch Law Review* 122.
- Kok, A 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *SAJHR* 445.
- Kruger, R 'Equality and unfair discrimination: Refining the Harksen test' (2011) 128 *SALJ* 479.
- Kruger, R 'Sex work from a feminist perspective: A visit to the Jordan case' (2004) 20 *SAJHR* 138.
- Le Roux, R 'The new unfair labour practice' in le Roux and Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* (2012) *Acta Juridica* 41-57.
- Le Roux, R 'The evolution of the contract of employment in South Africa' (2010) 39(2) *ILJ* 139.
- Le Roux, R 'The world of work: Forms of engagement in South Africa' (2009) *Development and Labour Monograph Series* 1.
- Legassick, M 'Legislation, ideology and economy in post-1948 South Africa' (1974) 1(1) *Journal of Southern African Studies* 5.

- Liebenberg, S 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1.
- Liebenberg, S and Goldblatt, B 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 335.
- Loenen, T 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 401.
- Lombard, A 'The implementation of the white paper for social welfare: A ten-year review' (2008) 20(2) *The Social Work Practitioner-Researcher* 154.
- Lund, F 'Work-related social protection for informal workers' (2012) 65(4) *International Social Security Review* 9-30
- Lyon, B 'Tipping the balance: why courts should look to international and foreign law on unauthorized immigrant worker rights' (2007) 29(1) *Journal of International Law* 169.
- Mabin, A 'Comprehensive segregation: the origins of the Group Areas Act and its planning apparatus' (1992) 18(2) *Journal of Southern African Studies* 405.
- Machava, A & Polzer, T 'Bad work if you can get it: Cycles of exploitability among Mozambican immigrants in South African labour markets' (2006) 36(2) *Africanus* 166-179
- Malherbe, R 'Some thoughts on unity, diversity and human dignity in the new South Africa' (2007) 70(1) *Journal of South African Law* 127.
- Mathekga, R 'The Formulation of Equality Clause in the South African Constitution: a Juristic question, or a Political Point of Departure' (2003)  
[http://www.clearcontent.co.za/storage/files/prev\\_Formulation\\_of\\_equality\\_clause.pdf](http://www.clearcontent.co.za/storage/files/prev_Formulation_of_equality_clause.pdf).
- Mbazira, C 'Grootboom: A paradigm of individual remedies versus reasonable programmes' (2011) 26 *SAPL* 60.
- McConnell, C 'Migration and xenophobia in South Africa' (2009) 1 *Conflict Trends* 34.
- McGregor, M 'A legal-historical perspective on affirmative action in South Africa (Part 1)' (2006) 12(2) *Fundamina* 87.
- Meyer, DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 831.
- Mpedi, LG & Govindjee, A 'Social protection for workers posted to and from South Africa: A critical assessment' (2009) 30(2) *Obiter* 774.

- Nobala, M 'De Doorns Farm Workers' Strike' (2012) 11(43) *Umsebenzi Online*.
- Norton, D 'What is (and what isn't) a "constitutional matter" in the context of labour law?' (2009) 30 *ILJ* 772.
- Norton, D 'Workers in the shadows: An international comparison on the law of dismissal of illegal migrant workers' (2010) 31 *ILJ* 1521.
- Nyenti, M 'Access to justice in the South African social security system: Towards a conceptual framework' (2013) *De Jure* 901.
- Nyenti, M & Mpedi, LG 'The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries' (2012) 15(1) *Potchefstroom Electronic Law Journal* 244.
- Olivier, M 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)' (2011) 1 *SADC Law Journal* 121.
- Olivier, M 'Critical issues in South African social security: The need for creating a social security paradigm for the excluded and the marginalized' (1999) 20 *ILJ* 2199.
- Orrenius, P & Zavodny, M 'Irregular immigration in the European Union' (2016) 2 *European Policy Analysis* 1.
- Paoletti, S 'Human rights for all workers: The emergence of protections for unauthorized workers in the inter-American human rights system' (2004) *Human Rights Brief* 5
- Parfit, D 'Equality and priority' (1997) 10 *Ratio* 202.
- Petrova, D 'The Declaration of Principles on Equality: A Contribution to International Human Rights' (2008) 2 *The Equal Rights Review* 58.
- Philips, K 'Towards a right to work: The rationale for an employment guarantee in South Africa' (2010) available at <http://www.tips.org.za/publication/tips-policy-brief-towards-right-work-rationale-employment-guarantee-south-africa>.
- Pojman, L 'Theories of equality: a critical analysis' (1995) 23(2) *Behavior and Philosophy* 1.
- Putterman, L, Roemer, JE & Silvestre, J 'Does Egalitarianism Have a Future?' (1998) 36(2) *Journal of Economic Literature* 861.
- Rautenbach, IM & Fourie, E 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' 2016 *TSAR* 110.

- Reitzes, M 'Alien issues' (1994) 12(1) *Indicator South Africa* 7.
- Risse, M 'Immigration, ethics and the capabilities approach' (2009) 34 *Human Development Reports Research Paper* 1.
- Robeyns, I 'The capability approach: a theoretical survey' (2005) 6(1) *Journal of Human Development* 93.
- Roemer, JE 'Equality of opportunity: A progress report' (2002) 19 *Social Choice and Welfare* 455.
- Sabates-Wheeler, R & Macauslan, I 'Migration and social protection: Exposing problems of access' (2007) 50(4) *Development* 26.
- Sachs, A 'Equality jurisprudence: the origin of doctrine in the South African Constitutional Court' (1999) 5 (1) *Review of Constitutional Studies* 76.
- Schachter, JP 'Data assessment of labour migration statistics in the SADC region: South Africa, Zambia, Zimbabwe' (2009) *International Organization for Migration* 1.
- Schindlmayr, T 'Sovereignty, Legal Regimes and International Migration' (2003) 41(2) *International Migration* 109.
- Sen, A 'Equality of what' (1980) 1 *The Tanner Lecture on Human Values* 197.
- Smith, B 'Rethinking Volks v Robinson: The implications of applying a "contextualised choice model" to prospective South African domestic partnerships legislation' (2010) 13(3) *PER/PELJ* 238/508.
- Van Eck, BPS & Snyman, F 'Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) 59 *Journal of African Law* 294.
- Van Ginneken, W 'Social protection for migrant workers: National and international policy challenges' (2013) 15(2) *European Journal of Social Security* 209.
- Van Niekerk, A 'In search of justification: The origins of the statutory protection of security of employment in South Africa' (2004) 25 *ILJ* 853.
- Westen, P 'The empty idea of equality' (1982) 95(3) *Harvard Law Review* 537.
- Wolff, J 'Equality: The recent history of an ideal' (2007) 4 *Journal of Moral Philosophy* 125.

### **Papers, reports and theses**

- Crush, J & Williams, V *Labour Migration In Southern Africa: Contemporary Trends and Issues, A Preliminary Review Paper Presented at the ILO Tripartite Forum on Labour Migration in Southern Africa, Pretoria, 26-29 November (2002)* 7.
- Dekker, AH ‘Informal social security: A legal analysis’ unpublished LLD thesis, University of South Africa, 2005.
- Oduro, AD ‘Formal and informal social protection in sub-Saharan Africa’ Paper prepared for the ERD August (2010).
- Olivier, M *Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)* (2009) (Report prepared for the World Bank, 2009).
- Olivier, M & Govindjee, A ‘Labour rights and social protection of migrant workers: In search of a co-ordinated legal response’ Paper presented at the Inaugural conference of the Labour Law Research Network (LLRN), Barcelona, Spain, 13-15 June 2013, 1-40.
- Rowthorn, R ‘The economic impact of immigration’ (2004) Civitas. Online Report available at [www.civitas.org.uk/pdf/Rowthorn\\_Immigration.pdf](http://www.civitas.org.uk/pdf/Rowthorn_Immigration.pdf).
- Secretary of State for the Home Department, *Human Trafficking* (Command Paper 6996, Government Reply to the Twenty-Sixth Report From the Joint Committee on Human Rights, session 2005–06, HL Paper 245, HC 1127, 19 December 2006) [13].
- Taran, P, Tennant, E, Bertin, A & Lin, B *Migrants and refugees have rights: Impact of EU policies on accessing protection* (2016) Brussels: Caritas Europa.  
[http://www.caritas.eu/sites/default/files/160317\\_migration\\_report\\_migrants\\_have\\_rights.pdf](http://www.caritas.eu/sites/default/files/160317_migration_report_migrants_have_rights.pdf).
- United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World: Report of the Secretary-General* (39<sup>th</sup> Session of the Commission for Social Development) (2002), <http://www.globalaging.org/waa2/documents/socprotect.pdf>.
- Vimont, P ‘Migration in Europe: Bridging the solidarity gap’ (2016) *Carnegie Europe*, available at <http://carnegieeurope.eu/2016/09/12/migration-in-europe-bridging-solidarity-gap-pub-64546>.