

**THE CONSTITUTIONAL IMPLICATIONS OF THE RIGHT TO SOCIAL SECURITY
FOR NON-SOUTH AFRICAN NATIONALS**

BY

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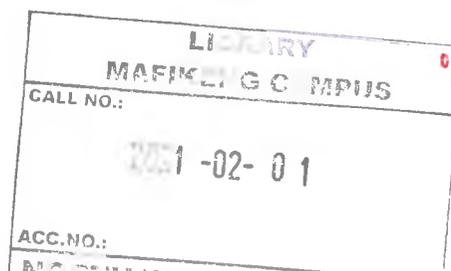
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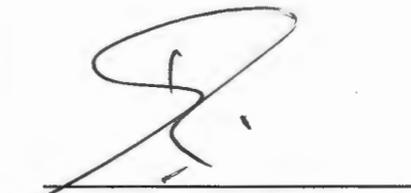
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FEBRUARY 201⁷



SOLEMN DECLARATION

I duly declare that this research entitled "The Constitutional Implications of the Right to Social Security for non-South African Nationals Living in South Africa", for the Degree of Master of Laws at the North-West University (Mafikeng Campus) has not been previously submitted by me for a degree at this institution or any other University. I further declare that this research study is my own work in design, structure and execution and that all materials and sources contained herein have been duly acknowledged.



Ayuketa Salita Arah

24/10/17
Date

DECLARATION BY SUPERVISOR

I, Professor Samuelson Freddie Khunou, do hereby declare that this dissertation by Ayuketa Salita Arah, for the degree of LLM, should be accepted for examination.

Signature

Date

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I thank God Almighty for giving me the strength, perseverance, courage and wisdom to undertake this tough journey in fulfilment of a dream.

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To my husband, Ndangoh Justin Nyambod, honey, you are my hero; you kept the fort in my absence while I was studying. The children were all well as though I was at home for them. I will forever be grateful to you.

DEDICATION

This research study is dedicated to my late parents, Ayuketa Mathew Egbe and Ayuketa Lucy Bessem, my husband Ndangoh Justin Nyambod and my children Karilar Ndangoh Mbacham, Shalom Ndangoh Ngomneb, Ndangoh Cindy Mah.

LIST OF ABBREVIATIONS

ANC	African National Congress
BIG	Basic Income Grant
CC	Constitutional Court
CESCR	Committee on Economic, Social and Cultural Rights
COIDA	Compensation of Occupational Injuries and Disease Act
CODESA	Convention for a Democratic South Africa
ECHR	European Court of Human Rights Jurisprudence
ESCR	Economic Social and Cultural Rights
EU	European Union
GEAR	Growth Employment and Redistribution Strategy
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IFP	Inkatha Freedom Party
ODMWA	Occupational Disease in Mine Workers' Act
RAF	Road Accident Fund
RDP	Reconstruction and Development Programme
RMA	Rand Mutual Assurance Company Limited
RSA	Republic of South Africa
SADC	Southern African Development Community
SADCC	Southern African Development Community Charter
UICA	Unemployment Insurance Contributory Act
UIF	Unemployment Insurance Fund

Abstract

This research examines the constitutional implications of the right to social security and status of non-nationals in South Africa and the exiting immigration laws, government policies and the legislative frame work of South African social security. This study reflects critically on access to South African social security benefits by non-south African nationals. The study further discusses this issue by examining section 27 (1) c and section 27 (2) of the 1996 Constitution together with the role of South Africa as a member state to multilateral, bilateral, regional and sub-regional organisations to implement the right to social security for non-nationals. Focus is on International Labour Organisations (ILO) treaties, the Southern African Development Communities Charter (SADCC), African Charter on human and Peoples' Rights (ACHPR), as far as they relate to social security and the International Committee on Economic Social and Cultural Rights (ICESCR). Legally and factually, the position of non-nationals in terms of South African immigration law is superimposed on their social security status, to an extent, this is qualified by the provisions of labour law agreements entered into between South Africa and some non-nationals states. This raises a lot of challenges and impediments on non-nationals as far as enjoying their right to social security.

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CHAPTER 1

INTRODUCTION

1.1 THE RESEARCH STUDY

This research examines the constitutional implication of the right to social security and the status of non-nationals in South Africa and the existing migration laws, government policies and the legislative framework of South African social security¹. Looking at the history of South Africa buttressed by data on present day movements within the Southern African Development Community, the movement of people for generations has been compelled primarily by the search of jobs and better working conditions.² South Africa particularly serves as a destination point for both internal and external migration due to employment opportunities arising from the presence of large mining operations and agricultural farms³.

In addition, lack of skilled labourers and a stable political atmosphere has made non-nationals from all over the world to be attracted to South Africa⁴. As Africa's largest economy, South Africa receives more migrants than any other country in Southern Africa. Migration to South Africa is a strategy which most poor households use to reduce poverty in their countries⁵. Apartheid⁶ with its racial discrimination left the country bleeding. After its abolition, the country was plunged into abject poverty and unemployment was at its peak. There was a desperate need for socio-economic reforms to be instituted. Socio-economic rights were introduced in the interim

¹ Stateless persons, refugees and asylum-seekers, documented and non-documented non-nationals.

² International Federation of Human Rights (FIDH) 2008 *Surplus people? Undocumented and Other Vulnerable Migrants in South Africa* Paris: International Federation for Human Rights 5.

³ Kanyenze "African Migration Labour Situation in Southern Africa" 2. Internal labour-market-related migration in particular in South Africa was not always voluntary. (The need for labourers initial results to the payment of taxes. This pushed peasants who were reluctant to work in to wage labour.) Kanyenze "African Migration Labour Situation in Southern Africa" 2.

⁴ Kanyenze "African Migration Labour Situation in Southern Africa" 2.

⁵ Bloch 2008 *University of Witwatersrand* 38.

⁶ Apartheid was a system of racial segregation in South Africa enforced through the Nationalist Party (NP) Government which was the ruling party from 1948 to 1994. This rule saw a situation whereby, the rights, movements and association of the black majority were curtailed and Afrikaans minority rule was maintained.

Constitution.⁷ These rights are found in the Bill of Rights which is contained in the present Constitution of the Republic of South Africa.⁸ The Constitution, together with immigration laws and other strategies, aim to promote and safeguard these social security rights for everybody living in South Africa.⁹ The Constitution is the highest law in South Africa.¹⁰ Laws or behaviours which are not consistent with it are void and the obligations imposed by such laws cannot be fulfilled. Consequently, all other laws of the land draw their strength from the Constitution.¹¹

Section 27 (1) (c) of the Constitution¹² provides the right to access to social security for everyone who is unable to provide adequate social security for himself and dependants while section 27 (2) of the Constitution¹³ obliges the state to take reasonable legislation and other measures within its available resources to ensure that there is equal enjoyment of the right as listed in section 27 (1) (c) of the Constitution.¹⁴ It should be noted that the right contained in section 27 (1) (c) of the Constitution¹⁵ speaks of the “right to access” as opposed to an unequivocal “right to social security.”

A complete and integrated approach is needed for the realisation of these rights because the rights are connected, depend on each other and cannot be separated. The “right to access” entails that, realising a particular socio-economic right such as the right to access to housing, would involve other elements which at times form the basis of other socio-economic rights, such as access to land, which must be in place

⁷ The *Interim Constitution of the Republic of South Africa Act 200* of 1993 was the fundamental law of South Africa after the first general elections of 27 April 1996 until it was superseded by the *Final Constitution of the Republic of South Africa, 1996* on 4 February 1997. This Constitution made provision for the restructuring of the government as a consequence of the abolition of apartheid. It also introduced and entrenched the Bill of Rights against which government actions and legislations can be tested.

⁸ *Constitution of the Republic of South Africa, 1996.* (Hereafter the *1996 Constitution*).

⁹ S 7 (2) of the *1996 Constitution*.

¹⁰ The *1996 Constitution* is the biggest law of the land. All other laws are subject to it. Any law that conflicts with a constitutional provision is considered null and void. S 172 (2) empowers the Supreme Court of Appeal, the high court and any court of similar status to make an order concerning the validity of an act of parliament, a provincial act or any conduct of the President which is inconsistent with the Constitution null and void.

¹¹ The preamble of the *1996 Constitution*.

¹² S 27 (1) (c) of the *1996 Constitution*.

¹³ S 27 (2) of the *1996 Constitution*.

¹⁴ S 27 (1) (c) of the *1996 Constitution*.

¹⁵ S 27 (1) (c) of the *1996 Constitution*.

as well.¹⁶ These rights support each other and have a substantial impact on the self-esteem of people and their quality of life. Apart from the right to social security, there are other rights found in the Bill of Rights which are interconnected to the right to social security. These rights have a limitation clause and are found in sections 25 to 29 of the Constitution and relate to housing,¹⁷ education,¹⁸ health care, food, water and social security.¹⁹ Even though these rights are subject to the limitation clause, they are still made available to both nationals and non-nationals because of their fundamental importance to human dignity, freedom and life.²⁰ The word “everyone” as stated above includes “everyone” living within the jurisdiction of the Republic of South Africa which includes non-nationals. As already highlighted, the effects of apartheid left the country badly in need of socio-economic reforms.

The responsibility of the State to change the South African society into one in which there would be respect of people’s dignity, liberty and equal treatment for all, lies at the heart of the new Constitution. Taking a close look at the present situation, one can easily say that, for obvious political reasons, the government’s attention is focused on solving the socio- economic problems of its nationals first, and deferring the constraints and challenges of other groups that might be just as vulnerable as South African nationals. The result is that the socio-economic needs for such groups who are unable to provide adequate social assistance for themselves and their dependants are often neglected, thereby exacerbating their untold hardships. One such group of people is non-nationals which is the focus of this study.

This discussion examines how social security has been conceptualised and developed in South Africa. Focus is on social security legislations introduced during colonialism and the impact on social security, social security legislations instituted during apartheid and their impact on social security. The road to constitutional democracy and the changes it brought to social security are examined. Focus is on the interim and the 1996 Constitution and the social security mechanism instituted

¹⁶ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169.

¹⁷ S 26 of the 1996 Constitution.

¹⁸ S 29 of the 1996 Constitution.

¹⁹ S 27 of the 1996 Constitution.

²⁰ S 36 of the 1996 Constitution.

during these periods.²¹ Institutions like the Reconstruction and Development Programme, Growth Employment and Redistribution Strategy, the Welfare White Paper and the Taylor Committee will be examined. The study examines the legislative framework of social security in South Africa.

Focus is on the various government policies directed to implement the right to social security, social security legislations in South Africa and the position of non-nationals. The study explores literature on the jurisprudential and international nature of social security and the position of non-nationals relative to the existing migration laws and policy regime in South Africa. Here, the role of South Africa as a member state to multilateral, bilateral, regional and sub-regional organisations to implement the right to social security for non-nationals is examined.

Focus is on International Labour Organisation treaties, the Southern African Development Communities Charter, African Charter on Human and Peoples' Rights, as far as it relates to social security, and the International Committee on Economic Social and Cultural Rights, *etc*'. Also, challenges and impediments facing non-nationals in South Africa concerning their rights to social security are discussed. The last chapter deals with conclusion and possible recommendations mapping the way forward to improve the dimensions and provisions of social security for non-South African nations.

1.1 DEFINITION OF CONCEPTS

Before exploring literature on this study, certain concepts which are cited regularly need to be defined for better understanding of the subject for undertaking this research study.

1.2.1 Non-Nationals

According to Article 1 of the United Nations Declaration on the Human Rights of individuals who are not Nationals of the country in which they live, 'Non-nationals' is defined as "any individual who is not a national of a state in which he or she is

²¹ *Constitution of the Republic of South Africa Act 200 of 1993.*

presently living.” This includes stateless persons, refugees and asylum seekers, documented and non-documented non-nationals, permanent residence status holders. These categories of non-nationals except permanent residence holders have been excluded from benefitting from social assistance grant and some social insurance schemes like the Unemployment Insurance Fund.²² This exclusion seems not to be justified by section 27 (1) (c) and (2) of the Constitution which accords the right to social security to “everyone” living in South Africa.

1.2.2 Social Security

The term social security is flexible; it reflects a specific content and is subject to constant changes and development over time. Structural and cultural factors amongst others determine the specific content of social security in a country at any given time.²³ The traditional Western-orientated concept of social security may not capture the characteristics of the African context sufficiently. It accepts that social security is not a fixed but relatively fluid concept.²⁴

According to ILO, a “basic social security package” constitutes access to basic and essential health care, income security for children, access to nutrition, education and care, a measure of social assistance to poor or unemployed persons, and ensuring income security through basic pensions for old or disabled persons.²⁵ It urges countries which have not yet achieved universal or widespread social security coverage to first aim to put in place for all residents in the country a basic and modest set of social security guarantees, consisting of the basic social security package.

The International Labour Organisation (ILO) concludes that, “this is the launching platform for a further social security development process that provides greater security when the ‘fiscal space’ of governments increases as economies continue to

²² Taylor 2002 *Department of Social Development* 41.

²³ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 4.

²⁴ Tshoose 2010 *PER /PELJ* 3.

²⁵ *Ibid.*

develop”.²⁶ Pieter criticises this definition because it defines the material scope of application and it is actually the description of intended schemes. This approach concentrate on the instrument and it is no different from the “container approach”.²⁷ He rightly submitted that this definition may leave insufficient space for the development of social security in relation to any wider problem that may arise. The difficulty is mainly caused by the different meanings attached to the notion of social security.²⁸ Pieters thus defined Social Security as the perceived income from paid labour or facing particular. ²⁹ According to the White Paper on Social Welfare, the definition of social security entails

Policies which ensures that all people have adequate economic and social protection during unemployment, ill health, maternity child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs. State social assistance (grants) includes the following four categories of benefits: those associated with old age, disability child and family care and relief for the poor.³⁰

One weakness manifested in this definition is it is employment based. Those in the informal sector, including non-nationals who are unemployed are excluded in this definition. Kaseke’s view of social security is wider and more inclusive. Kaseke views social security as comprising a complicated and related sets of structures (for example governmental, non-governmental, semi-formal, and traditional) which are organised to provide different categories of social security needs for people in different unforeseen events.³¹

1.2.2.1 Types of Social Security in South Africa

Looking at the concept of social security in South Africa, two types of social security can be identified: official (formal) and non-official (informal) social security. These two types of social security go hand in hand. All along in this discussion, the study

²⁶ International Labour Office “Committee on Employment and Social policy”

²⁷ Pieter *Introduction into the Basic Principles of Social Security* 4.

²⁸ Ibid

²⁹ Ibid.

³⁰ Ibid

³¹ Dekker 2000/ ISSR 53.

has been discussing formal social security. Informal social security, on the other hand as noted by Dekker, “constitutes survival strategies adopted by those that are excluded from official social security schemes, both public and private.”³² Dekker further states that “informal social security has only recently been identified in South Africa as a new ‘strand’ to the traditional concept of social security.”³³ She further advocates that:

Informal social security arrangements rely heavily on principles of reciprocity and solidarity. Such social security does not only manifest itself in the form of monetary transfers, but can also assume the form of support and services unique to a particular group or community. Informal social security is always delivered in a specific context in which people have something in common, reflecting the principles of solidarity (*Ubuntu*) and reciprocity.³⁴

She notes that “informal social security can manifest itself in the form of neighbourhood-based mutual aid schemes developed among people within a specific community or kinship-based social security”.³⁵ It is suggested that informal social security can assist the government to make available and augment a more inclusive formal social security.³⁶ Stokvels and burial societies are the most commonly cited informal types of social security in South Africa. It should be noted that, this study is not be limited to the traditional contingencies of social security in South Africa that are based on social assistance and social insurance.

The study views social security as a wider notion of social protection. According to the Taylor Report³⁷, social security is a form of social protection.³⁸ The concept cannot be limited to the traditional type of social protection and the usual list of unforeseen events. As mentioned by Pieters above, if social protection is limited to the traditional areas only, there may not be adequate room to provide answers to new social problems that may arise.³⁹ In line with the White Paper for social welfare,

³² Dekker *Informal Social Security: A Legal Analysis* 6.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Taylor 2002 *Department of Social Development* 41.

³⁸ *ibid*

³⁹ Pieters *Introduction into the Basic Principles of Social Security* 1.

a broader, cohesive and co-ordinated method of approach towards social protection is urgently required, set at the minimum requirements advanced by the Taylor Commission which remarked that "comprehensive social protection requires a variety of mechanisms".⁴⁰

1.3 BACKGROUND TO THE STUDY

Despite the fact that South Africa has a well-established social security structure, the system is still assailed with setbacks.⁴¹ The current system is not inclusive and comprehensive. The exclusionary nature of the system is rooted in its historical past that was steeped in racism. Also, the importation of the European social security system which was implanted in to South African soil during colonialism, and the massive influx of non-nationals during the gold and diamond rush, contributed to the exclusionary nature of the system.⁴²

Social security rights are among the numerous socio-economic rights guaranteed in the Constitution.⁴³ The Constitution is seen as one of the most liberal Constitution in the world. However, unlike other socio-economic rights like the right to education and children's rights, the realisation of the right to social security is subject to an internal limitation⁴⁴ as well as a general limitation clause in section 36 of the Constitution.⁴⁵ Section 27 (1) (c) of the Constitution⁴⁶ entrenches the right to social security. It states that, "everyone has the right to have access to social security including when they are unable to support themselves and their dependants and therefore deserve appropriate social assistance." Meanwhile section 27 (2)⁴⁷ obliges the state to take reasonable legislations and other measures within its available resources to ensure the equal enjoyment of this right.⁴⁸ Non-nationals, apart from those with permanent

⁴⁰ Taylor 2002 *Department of Social Development* 41.

⁴¹ Van den Berg 1997 *Development Southern Africa* 481.
Olivier and Kalula 2003 *Scope of Coverage* 123-124.

⁴² Dekker *Informal Social Security: A Legal Analysis* 29.

⁴³ Bill of Rights in Chapter 2 of the 1996 Constitution.

⁴⁴ S 27 (2) of the 1996 Constitution.

⁴⁵ S 36 of the 1996 Constitution.

⁴⁶ S27 (1) (c) of the 1996 Constitution.

⁴⁷ The 1996 Constitution.

⁴⁸ *Ibid.*

residence, have been excluded from social security thereby placing them in a difficult situation.

1.4 PROBLEM STATEMENT

The problem that prompted this study is the plight of non-nationals in South Africa *vis-à-vis* their social security status. The right to social security is found in Section 27 (1) of the Constitution⁴⁹ while section 27 (2)⁵⁰ obliges the state to ensure the equal enjoyment of all the rights as enumerated in the Bill of Rights. Basically, South African social security (formal) is made up of social assistance and social insurance. Non-nationals, except those with permanent residence, are excluded from accessing social assistance and also some social insurance schemes for example, the Unemployment Insurance Act requires non-nationals with fixed contracts to go back to their countries after their contracts, apprenticeship or learnership expires.⁵¹ Meanwhile, the Immigration Act as well as the Unemployment Insurance Act exclude non-nationals who are undocumented from benefitting.

Social assistance, on the other hand, is a state-funded system, also referred to as social grants in South Africa.⁵² The most adequate instrument regulating social assistance in South Africa is the Social Assistance Act.⁵³ Social assistance is non-contributory and financed entirely from government revenue. Basically, the government assists members of the society who are unable to provide for themselves with government grants.⁵⁴ Social grants or cash transfers (social assistance) target particularly vulnerable parts of the population like the disabled, children, foster children, people who need care and the elderly. Due to the categorical nature of the grant-system, many categories of people are left out,

⁴⁹ S 27 (1) of the 1996 Constitution.

⁵⁰ S 27 (2) of the 1996 Constitution.

⁵¹ S 3 (1) (d) of the *Unemployment Insurance Act* 53 of 1946.

⁵² This grant system is a system whereby those who are deemed to be unable to provide for themselves and dependants are provided government grants to assist them financially.

⁵³ Social Assistance Act 13 of 2004.

⁵⁴ This grant system is a system whereby those who are deemed to be unable to provide for themselves and dependants are provided government grants to assist them financially.

including non-nationals.⁵⁵ A means-test determines who grants are given to and the onus is upon individuals to prove that they are destitute. Grants provide an important source of income to households that would otherwise face severe and devastating challenges in order to survive. As highlighted above, non-nationals are virtually excluded from most of these grants. However, the Constitutional Court in the cases of *Khosa and Another v Minister of Social Development and Another and Makhaule and Another v Minister of Social Development and Another*,⁵⁶ (hereinafter called the *Khoza* case) extended the scope of social assistance to non-nationals to a limited extent, including non-nationals with permanent residence in South Africa.

Applicants in this case were Mozambican nationals who were permanent residence holders and had lived in South Africa for long. All the applicants were destitute and would qualify for the social assistance grant but for the fact that they were not South African nationals. All the applicants further qualified for an old age grant but for the requirement of South African citizenship which they did not have while in *Makhuale*.⁵⁷ The applicant applied for a child support grant for her two children who were under the age of seven and for her child aged twelve years who was diabetic. According to section 4 (b) (ii) 2 (g) of the Act⁵⁸ which regulated the issue of care-dependency grant, read alongside with regulations 5 and 9 promulgated under the Act,⁵⁹ the child would have qualified for a care-dependency grant. She was denied access to these grants on grounds of her nationality. The Constitutional Court held that:

There can be no doubt that the applicants are part of a vulnerable group in the society and in the circumstances of the particular case are worthy of constitutional protection. We are dealing with international statutory sanction, equal treatment of

⁵⁵ S 2 to 4 of the *Social Assistance Act* 59 of 1992 as amended by the *Welfare Laws Amendment Act* 106 of 1997 and clauses 4 to 12 of the new *Social Assistance Bill* B57D 2003 as amended by the select Committee on Social Services (first introduced in the National Assembly as a s 76 Bill; explanatory summary of Bill published in *Government Gazette* 25340 of 8 August 2003).

⁵⁶ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁵⁷ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁵⁸ S 4 (b) (ii) 2 (g) of the *Social Assistance Act* 59 of 1992 as amended.

⁵⁹ *Social Assistance Act* 59 of 1992 as amended.

part of the South African community. This has a strong stigmatising effect because both Permanent residence and South African citizens contribute for the welfare of the state by payment of taxes. The lack of congruence between benefits and burdens created the impression that permanent residents are in some ways inferior to citizens and less worthy of social assistance.⁶⁰

The Constitutional Court then ordered the extension of these two grants to permanent residence holders. Apart from permanent residence holders, those who have gained refugee status are qualified to enjoy all the rights as listed in the Bill of Rights like all South African nationals.⁶¹ Note must be taken of the fact that Social Assistance Act excludes refugees from social assistance coverage.⁶²

The other kind of social security in South Africa is social insurance. Social insurance is a contributory scheme which can be owned by the public (The government makes monthly contributions on behalf of its employees) or insurance owned by private individuals. (Employees can contribute to these schemes themselves). An example of a public insurance scheme is the Unemployment Insurance Fund (hereafter called the UIF).

These schemes, whether owned by individuals or public are contributory either by individuals making contributions to the schemes directly or their employers making contributions on their behalf. As highlighted above, section 3 (1) (d) of the Unemployment Insurance Act⁶³ excludes non-national migrant workers with fixed-term contracts from its coverage since they are required to go back to their country after their contract or apprenticeship comes to an end. As far as education is concerned, the children of non-nationals with work permit find it easy to study while children of holders of other forms of temporal residence permit might find it a bit challenging to study especially to register for matric exams.⁶⁴

⁶⁰ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁶¹ Chapter 2 of the 1996 Constitution with the exception of S 19 and 22.

⁶² According to the *Social Assistance Act* 13 of 2004, the condition for accessing the grant is that an applicant must be a South African citizen.

⁶³ S 3 (1) (d) of the *Unemployment Insurance Act* 53 of 1946.

⁶⁴ Kapindu 2011 *African Human Rights Law Journal* 113.

Some parents are forced to change the names of their children to appear as if they are South Africans to be able to register them for matric examinations.⁶⁵ These conflicts with section 27 (1) (a) and (c), section 28 (1) (f) (ii) and section 29 (1) (a) of the Constitution,⁶⁶ and the South African Schools Act,⁶⁷ which mandates that children between the ages of seven to fifteen years must attend school. However, non-nationals parents with work permit do not find it challenging since their permit gives them the legal backing they need.

The word “children” includes children of both nationals and non-nationals. The South African Schools Act⁶⁸ further provides that “no learner may be refused admission to a public school on grounds that his parents are unable to pay or has not paid his or her school fees”.⁶⁹ Refusing them access to public schools also infringes on their human rights and the Convention on the Rights of a Child which South Africa is a state party to.⁷⁰ Except for emergency cases, most non-nationals are excluded from accessing public health care. They can freely access private health care which depends on their financial capability.

This conflicts with section 27 of the Constitution⁷¹ which access to health care in case a person is unable to provide adequate health care for himself and their dependants. Furthermore, as far as enforcing the social security rights of non-nationals are concerned, the introduction of International Labour Organisation treaties shaped access to social security.⁷² The International Labour Organisation has set out international standards guiding the social security institutional framework of its members.⁷³ In line with this treaty, most countries have established institutions or government departments to administer social security schemes even though there

⁶⁵ Ibid.

⁶⁶ S 27 (1) (a) and (c) of the 1996 Constitution.

S 28 (1) (f) (ii) of the 1996 Constitution.

S 29 (1) (a) of the 1996 Constitution.

⁶⁷ South African Schools Act 84 of 1996.

⁶⁸ Ibid.

⁶⁹ S 5 (3) (a) of the South African Schools Act 84 of 1996.

⁷⁰ The Convention on the Right of A Child, November 1989

⁷¹ S 27 of the 1996 Constitution.

⁷² Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspectives*.3

⁷³ Ibid.

are private social security institutions.⁷⁴ The Social Security Minimum Standards Conventions⁷⁵ has a lot of influence on the legislative framework of social security in South Africa which negatively affect access to social security for non-nationals such as fragmentation,⁷⁶ unable to access some of the social grants as well as social insurance benefits as highlighted above. There are many routes that can be used to advocate for the right to social security in South Africa.

These routes include, stemming from a variety of social security statutes and the common law:

- The Courts: Constitutional Court, High Court, Labour Courts and Magistrates Courts.
- The Boards: Special Pensions Board, Special Pensions Review Board, Appeals Committee of the Unemployment Insurance Board, 'et cetera'
- Tribunals: Pensions Fund Adjudicator, Council for Medical Schemes, Commission for Conciliation, Mediation and Arbitration, 'et cetera'.
- Offices: Director General of the Department of Social Development, Minister for the Ministry of Social Development, 'etc' and Commissions.⁷⁷

All these avenues for litigants have led to serious inconveniences against non-nationals.⁷⁸ Matters can be unduly delayed and there can be little consistency. Also, as different bodies or officials are called upon to hear complaints and appeals in respect of different parts of social security,⁷⁹ the power of the courts to deal with these matters satisfactory is questionable.⁸⁰ For example, in the *Khosa case*,⁸¹ the decision of the Constitutional Court was limited to non-nationals with permanent residence and the right to access to social assistance accorded to them was limited.

⁷⁴ *Ibid.*

⁷⁵ *Social Security Minimum Standards Conventions* 102 of 1952.

⁷⁶ Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

⁷⁷ Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

⁷⁸ Kapindu 2011 *African Human Rights Law Journal* 113.

⁷⁹ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

⁸⁰ Kapindu 2011 *African Human Rights Law Journal* 113.

⁸¹ *Place*.⁸¹ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 96.

Non-nationals with temporary residence who actually constitute the bulk of non-nationals are still frustrated because their position was not dealt with, even though they are also a vulnerable group that needs constitutional protection.⁸² These bottlenecks situation place non-nationals in a precarious state since enforcing their social security rights is complicated.

Even though section 27 of the Constitution entrenches the right to social security for “everyone,” there is no direct assessment of the right. Documented non-nationals like permanent residence holders enjoy the rights event though to a limited extend like; they can access the child support grant and also make contribute to unemployment Insurance Fund. Undocumented non-nationals on the other hand are unable to access social security which from a human rights point of view and also considering social security to be a way in which a society cares for its members, it is unfair.

1.4.1 Research question

The following questions were derive from the above mention problem

- What can be done to enable a rapid change in the social security system in South Africa to accommodate all categories of people, irrespective of his or her nationality or statelessness without unfair discrimination between nationals and non-nationals
- Does the word “everybody” as stated in section 27 (1) (c) and section 27 (2) of the 1996 Constitution exclude non-nationals?
- Does the right to social security for non-nationals internationally recognised to warrant them to enjoy these rights in South Africa?
- What other platform or measure can be taken to which non-nationals can exercise their social security rights

⁸²

Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 96.

1.5 AIMS AND OBJECTIVES OF THE STUDY

This study aims to:

- Analyse the constitutional implications of the right to social security for non-nationals living in South Africa for instance their rights to accessing all the social assistance grants, some social insurance grants;
- Bring into focus the fact that the social security rights for non-nationals is constitutional. It is a right recognised by international treaties to which South Africa is state party to as well as a human right;
- Emphasise the need for a rapid change in the social security system in South Africa to be more inclusive to accommodate all categories of people, irrespective of his or her nationality or statelessness without unfair discrimination between nationals and non-nationals;
- Demonstrate the need for a clear and comprehensive standard governing the right to access social security for non-nationals, their implementation by South Africa and more effective monitoring and compliance; and
- Emphasises the need for a more standardised platform where non-nationals can enforce their social security rights that is different platforms from nationals.

1.6 SIGNIFICANCE OF THE STUDY

- This study is important because it will explore underlying reasons for non-nationals to be denied the right to social security;
- The study further explored literature concerning the social security status of non-nationals living in South Africa in which not much has been written on by scholars and
- Again the research study is important because the attainment of the aims and objectives of this research can assist the legislature to improve or enhance the current legislation in promoting access of the right to social security for non-nationals in South Africa.

1.7 RESEARCH METHODS

The research adopted a qualitative approach. Data collection was done through the use of primary sources such as text books, case law and statutes while secondary sources like articles were gathered and utilised thanks to the North West University library page (google scholar). Generally, the study is based on document analysis of different sources including books, articles, Sections of legislation, theses, dissertations, reports, internet sources and case law. The study analyse relevant South African literature and case law on the implementation of the right to social security and the status of non-nationals. Furthermore, the study discusses international, regional and sub-regional conventions that South Africa is a signatory. International legislations and case law will be utilised where applicable.

1.8 OUTLINE OF CHAPTERS

Chapter 1 elaborates the entire research and examines the background of the study, the problem statement, the aims and objectives, the significance of studies and the methods.

Chapter 2 elaborates the historical perspectives of social security in South Africa. This chapter explores the historical development of social security in South Africa and its impact on non-nationals. Here, the colonial era and social security mechanisms put in place is elaborated, social security mechanisms put in place during the apartheid era are also examined. The social security mechanism put in place in the interim Constitution of 1993 and the 1994 Constitution is explored.

Chapter 3 gives an inside view of the road to constitutional democracy and social security mechanisms put in place and their impact on non-nationals. Social security mechanisms put in place in the interim Constitution of 1993 and the 1996 Constitution are critically explored.

Chapter 4 explores the jurisprudential and international nature of social security. This chapter gives an inside position of international law as far as social security is concerned and the position of South Africa as far as non-nationals are concerned.

Chapter 5 gives the legislative framework of social security in South Africa. This chapter basically explores literature on government policies as well as legislations put in place after the democratic era and their impact on non-nationals.

Chapter 6 elaborates on the challenges and impediments faced by non-nationals from accessing their right to social security in South Africa.

Chapter 7 is a conclusion of the research, recommendations and possible solutions which if the government can implement, would alter for the better the situation of non-nationals.

CHAPTER 2

THE HISTORICAL PERSPECTIVES OF SOCIAL SECURITY IN SOUTH AFRICA

2.1 INTRODUCTION

This chapter discusses in detail the evolution of social security in South Africa. The chapter explores literature on how colonialism, the discovery of gold and diamond and the rise of apartheid provided the groundwork for the exclusionary nature of the current South African social security system. This study can be best understood when a critical look on the evolution of South African social security can be done.

The chapter further shows how the introduction of the social security system from Western Europe⁸³ only benefitted the white minority population in South Africa, thereby leading to the exclusionary nature of the present social security system in which non-nationals are victims. It further illustrates how the focus on racial segregation in the social security system shifted the focus away from expanding and improving the social security system to accommodate all categories of people.

2.2 Colonial Setting and Social Security Mechanism in South Africa

The social security system in South Africa developed mostly as a result of Western European influence imported through colonialism. The composition of colonialism in to South Africa pointed to the direction which South African social security has to follow. Before the coming of the colonial masters, South Africa had its own form of social security system based on an "extended family"⁸⁴ setting. The extended family⁸⁵

⁸³ It is a concept of government in which the state plays a key role in the protection and promotion of the economic wellbeing of its citizens. It is based on the principle of equality of opportunities and equal distribution of wealth and public responsibility for those unable to avail themselves for the minimal provisions for a good life. The general term may cover a variety of economic and social organizations.

⁸⁴ The Oxford Dictionary defines a family as parents and their children; a person's children; set of relatives; group of related plants or animals or things that are alike. The term "extended family" is used in this study to refer to a traditional (mostly) African social unit consisting of people who are genealogically related as well as those who are related to them through marriage. Traditionally, such a unit was often located in a single geographical area referred to as a homestead and headed by a senior male relative who directed important economic, religious and political activities for the unit. The extended family still plays an important role in social security protection. In the modern context, it often comprises a female-headed household and 3 to 4 generations living together. The word "extended family" is therefore

was organised and managed within a strong kinship framework which provided a social safety net for individual family members. Individual economic needs were seen as the economic need of the entire community.

The family was managed within a strong framework where the family was a centre of production, distribution and consumption. The system was a system whereby, tribes or clans provided protection against insecurity, and indigenous laws governed social security rights and responsibilities. A person's legal status, rights and obligations were determined by tribal membership, political status, gender, age, marriage and legitimacy. The dynamics within the tribe provided social security protection for the entire community.⁸⁶ Although tribes have mostly ceased to exist in modern society, family members still care for one another and there is still a very strong attachment amongst family members until today.

The extended family normally consist of three to four generations living together. Mutual support played a fundamental role in the preservation of traditional family units, commencing with care for young children and ending in reciprocal care for the elderly (Informal economic system)⁸⁷, Colonialism (formal economy) weakened the social net provided by the extended family system to an extent that family needs could no longer be met. The traditional system of social protection established by the extended family declined, creating a vacuum which unfortunately, the state could not fill.

The colonial masters⁸⁸ did not pay attention to issues concerning social security in the Cape.⁸⁹ The focus of the colonial masters was the prevention of poverty in accordance with the British welfare laws and not to provide social assistance to the destitute.⁹⁰ The church⁹¹ provided the necessary social assistance to destitute and

used as a convenient label to describe a group of individuals whose social and economic welfare is closely associated.

⁸⁵ *ibid.*

⁸⁶ Olivier and Olivier *Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 2-8.

⁸⁷ Huffman 2010 <http://www.sahistory.org.za>.

⁸⁸ British.

⁸⁹ Present day South Africa.

⁹⁰ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 18.

⁹¹ The Dutch Reformed Church.

retired soldiers funded by donations and legacies.⁹² The colonial masters brought in their own form of social security system which was based on a nuclear family system and employment based that was formal in nature⁹³. Social security was provided to the employed whereas majority of the black population at that time were unemployed. This system when implanted in to South African soil shaped the socio-economic as well as policies formation in South Africa as a whole thereby laying the foundation of present day South African social security with its exclusionary nature.⁹⁴ Dekker asserted that:

The system which was employment biased failed to produce the same result it produced in Europe due to the particular political climate and social set up which prevailed in South Africa at that time.⁹⁵

The colonial masters brought socio-economic structures familiar to those of the colonialists who were mostly from Europe and imposed them upon traditional communities like trade unions and insurance system. These structures did not acknowledge the intergenerational family, but rather chose to deal with individuals which were mostly men leaving out the entire communities. The colonial masters were not really interested in the wellbeing of the Africans but to make money.⁹⁶ The European system of social security was effective in Europe, when implantation into South African soil, lost some of its effectiveness resulting in many people falling out of the gaps in the social security net.⁹⁷

The colonial masters hijacked the African system of ruling through local kings and chiefs, implanting their own system. These new system, new economic arrangements were made incorporating European values, structures, norms, and custom. Employment related benefits were introduced contrary to family related

⁹² Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 18.

⁹³ It is a term used to define a pair of adult and their children. A nuclear family centres on married couples. It may have many children at times the children might be blood children while at times the children might be mixed. This is in contrast with the African extended family system which can include members of up to the fourth generation.

Collins English Dictionary 2012 <http://dictionary.reference.com/source-word-originnuclear>.

⁹⁴ Van den Berg 1997 *Development Southern Africa* 481.

Olivier and Kalula 2003 *Scope of Coverage* 123-124.

⁹⁵ Dekker *Informal Social Security: A Legal Analysis* 9.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

benefits which were there originally. A male bread winner was recognised as opposed to the extended family system where everyone has a place in the growth, production and consumption of goods and services.⁹⁸ Values such as trade unionism, the concept of social insurance and workers demanding for compensation for occupational injuries were introduced.

As highlighted above, the social insurance system introduced had a formal employment bias since it was linked mostly to the concept of “employee”. In South Africa, the concept of “employee” had and still has a restricted application and refers only to people in formal employment who constitute the minority of the population. The result is that a large number of people in informal employment were excluded from social security protection forming the base of present day exclusionary nature of South African social security of which non-nationals are one of the categories of people excluded.

The transferability of legal rules and institutions has always been problematic. This is because of the differences between the two systems (the old and the new systems). South Africa is the best place that clearly demonstrates the impact of the transplanting of the Western traditional social security model in to South African soil.⁹⁹

2.2.1 Gold and Diamond Rush and its Contribution to the Development of Social Security in South Africa

In 1867 and 1871 diamonds were found between the Vaal- and Orange rivers and Kimberley respectively.¹⁰⁰ In 1886, gold was discovered on the outskirts of present-day Johannesburg. The presence of gold and diamond mines attracted both internal and external migration from around the globe. Non-nationals from neighbouring countries rush in to South Africa in search of jobs and better working conditions.¹⁰¹ The gold and diamond rush contributed immensely to the exclusionary nature of the

⁹⁸ Ibid.

⁹⁹ Kahn-Freund 1974 *The Modern Law Review*.

¹⁰⁰ Cowan 2000 <http://mygeologypage.ucdavis.edu>.

¹⁰¹ Goerz 1857 <http://info.goldavenue.com>.

present social security system in South Africa. The discovery of Gold and Diamond catalysed industrialisation.¹⁰²

By 1892 there were more than 40 000 foreigners living in Johannesburg, number that exceeded the entire Afrikaner population of the then Transvaal Republic.¹⁰³ It propelled the creation of a wage-based workforce in South Africa.¹⁰⁴ As already highlighted above, Western European values and ideas, for example trade unionism and workers demanding protection against injuries were introduced. Various social security measures were introduced by legislation to protect workers in growing industries (mostly mining) fortunately or unfortunately the legislation did not benefit the black majority because they were formed on racial basis.¹⁰⁵

2.2.2 The 1910 Constitution and Social Security Mechanisms

The 1990 Constitution was adopted on the Before the unification of South Africa in 1910,¹⁰⁶ owing to the strong influence of non-nationals and the strong affiliation that the British had over South Africa as its colony, the same social security legislation implemented in Britain also found it's self into South Africa after the Boer War. According to Dekker,¹⁰⁷ "these legislations were never really based on comprehensive strategies." She pointed out that, "it seems the legislations were randomly created with the focus being the protection of white workers."¹⁰⁸ For the four provinces which were existing at that time, the Workers' Safety Legislation was enacted for all the provinces.¹⁰⁹

The first social security legislation introduced was called the Miners' Phthisis Act.¹¹⁰ This Act¹¹¹ compensated mine workers who contracted phthisis during work. From this Act,¹¹² the Miners Phthisis Allowance Act¹¹³ was created. However, this Act¹¹⁴

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Dekker *Informal Social Security: A Legal Analysis* 29.

¹⁰⁵ Dekker *Informal Social Security: A Legal Analysis* 32.

¹⁰⁶ South Africa was divided in to four provinces during the colonial rule. These four provinces were Natal, Orange Free State, Cape of Good Hope and Transvaal.

¹⁰⁷ Dekker *Informal Social Security: A Legal Analysis* 32.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Miners' Phthisis Act* 19 of 1912

¹¹¹ *ibid*

¹¹² *Ibid.*

only compensated European workers. Any local affected by a mine disease had to be compensated in terms of the Local Labour Regulation Act.¹¹⁵ In 1911 the Mine Workers Act¹¹⁶ was enacted which regulated working conditions in the mines. In 1913 the first pension legislation was introduced¹¹⁷ and in 1914 the first Workmen's Compensation Act¹¹⁸ was introduced.

The private domain developed legislations in mines, pension and health care but these legislations were never brought to the public domain.¹¹⁹ By 1916, the first social assistance pension was created by the War Special Pension Act.¹²⁰ The Act¹²¹ provided compensation for war veterans who were unable to provide for themselves and dependants due to injury sustained during the war. The Act¹²² also compensated the dependants of war veterans in case of the death of the bread winner as a result of the war.¹²³ Dekker asserted that, "the enactment of these statutes where probably for the purpose of encouraging the soldiers so that they could continue the war."¹²⁴

Social assistance developed categorically finally diverting to old age grant, child grant, and disability grant.¹²⁵ In 1937 the Unemployment Benefit Act¹²⁶ was passed.¹²⁷ This Act¹²⁸ covered a large number of workers but it was exclusionary as domestic workers, agricultural workers, mine workers as well as black workers earning less than seventy-eight hours per year were excluded.¹²⁹ It can be said that, the exclusionary nature of this Act¹³⁰ laid the foundation for the exclusionary nature

113

Ibid.

114

Ibid.

115

Section 30 of the *Miners' Phthisis Act* 19 of 1912.

116

Mine Workers Act 36 of 1913.

117

Miners' Phthisis Act 19 of 1912.

118

Workmen's Compensation Act 25 of 1914.

119

Dekker *Informal Social Security: A Legal Analysis* 32.

120

War Special Pension Act 29 of 1916.

121

Miners' Phthisis Act 19 of 1912.

122

Ibid.

123

World War One.

124

Dekker *Informal Social Security: A Legal Analysis* 34.

125

Ibid.

126

Unemployment Benefit Act 25 of 1937.

127

Tlolang Willie Letsie 2009 *What Causes Election-related Conflict within Democracies: A Case Study of Lesotho*.

128

Unemployment Benefit Act 25 of 1935.

129

Ibid

130

Ibid

of the present social insurance system in South Africa of which non-nationals are a victim of exclusion.¹³¹

In 1946 the first national unemployment insurance fund based on sound social insurance principles was created¹³² in the form of Unemployment Insurance Act. This Act removed the seventy-eight pounds earning per year restriction as required by the 1937 Unemployment Benefit Act but left other restrictions. This left many black workers without employment insurance.¹³³ The defects of the above period in relation to social security measures of non-nationals makes it imperative to examine how non-nationals were treated during apartheid.

2.2.3 Social Security Mechanisms under Apartheid

As highlighted above, the groundwork for the exclusionary nature of the current social security system in South African was laid down partly by the apartheid regime. The system was based on racial segregation which was basically exclusionary in nature.¹³⁴ In 1948 the Nationalist Party¹³⁵ came to power. The policy of the Nationalist Party was very clear on separate development and entrenching the supremacy of whites as a race. The white minority gradually instituted legislative measures to enhance the legacy of apartheid. Legislation classified South Africans in to four groups, blacks, whites, coloureds, and Indians.¹³⁶

By 1959, the administration of coloured affairs was transferred to the Department of the Coloureds while the administration of the blacks was transferred to the Department of Bantus Affairs.¹³⁷ These Departments became the instrument through which Apartheid was spread.¹³⁸ Access to social services, resources and economic

¹³¹ Dekker *Informal Social Security: A Legal Analysis* 34.

¹³² *Unemployment Benefit Act* 25 of 1937.

¹³³ Dekker *Informal Social Security: A Legal Analysis* 34.

¹³⁴ Midgley J and Piachaud D (eds) *Social Protection, Economic Growth and Social Change: Goals, Issues and Trajectories in China, India, Brazil and South Africa* (Edward Elgar Publishing Cheltenham, UK 2013) 2.

¹³⁵ The Nationalist Party was the ruling party at that time and it constituted white minorities.

¹³⁶ The first grand apartheid law was the *Population Registration Act* of 1950, which formalised racial classification and introduced an identity card for all persons over the age of 18, specifying their racial group. Official teams or Boards were established to come to a conclusion on those people whose race was unclear.

¹³⁷ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 18.

¹³⁸ *Ibid.*

opportunities were denied to black people. Apartheid legislation for separate living quarters were equally instituted.¹³⁹ The government instituted the Bantu Authorities Act no 8 of 1951.¹⁴⁰ This Act which formed different living structures for blacks and whites was the first piece of legislation to support the government's move of separate development in the Bantustans. In 1960 to 1983, blacks had separate houses from whites.

Before the coming in to force of this Act¹⁴¹, whites, blacks and colours were living together. Provisions in the Act determined where a person would live according to his race.¹⁴² Part of land was apportioned to each race. Later on, blacks were forcefully removed from this land. The apartheid system did not only infringe on the civil and political rights of black South African but also their socio-economic and cultural rights. The Land Acts of 1913 and 1936 denied the African population the right to use about thirteen percent of the whole land area in South Africa.¹⁴³

Over 3.5 million South Africans were forcefully evicted from their land and taken to live in overcrowded areas.¹⁴⁴ Non-whites political representation was abolished in 1970.¹⁴⁵ Apartheid legislation pertaining to separate living quarters were instituted. Beaches health facilities, educational facilities, public services were separately own by blacks and whites. Low-grade services were provided to black people while the whites had superior services.¹⁴⁶ Separate living conditions as well as separate areas of living permanently influenced the social security system laying the foundation of present day social security with its exclusionary nature of which blacks are a victim.

¹³⁹ *Group Areas Act of 1950.*

¹⁴⁰ *Bantu Authorities Act 68 of 1951.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Native Trust and Land Act 18 of 1936.*

¹⁴⁴ *Prevention of Illegal Squatting Act of 1951* allowed the government to demolish black town slums and forced white employers to pay for the construction of housing for those black workers who were permitted to reside in cities otherwise reserved for whites. Ancn. 2005 <https://us-mg5.mail.yahoo.com/hcc/launch?rand=an0sl1pnakdsf>.

¹⁴⁵ Dekker *Informal Social Security: A Legal Analysis* 35.

¹⁴⁶ Under the *Reservation of Separate Amenities Act 49 of 1953*, municipal grounds could be reserved for a particular race, creating, among other things, separate beaches, buses, hospitals, schools and universities. Signboards such as "whites only" applied to public areas, even including park benches. Blacks were provided with services greatly inferior to those of whites, and, to a lesser extent, to those of Indian and Coloured people. .

Access to facilities like values of housing, electricity, water, social assistance and social insurance were influenced by the policy of apartheid. This drastically increased poverty level for blacks while the whites were living in affluence. The Law violated the right to marry whom one chooses to be married to. Marriage or sex with a person from a different race were either prohibited or made criminal by the Prohibition of Mixed Marriages Act¹⁴⁷ and the Immorality Act¹⁴⁸. These Acts were just another way in which the whites strived to maintain white minority rule in South Africa.¹⁴⁹ Provisions in the Suppression of Communism Act¹⁵⁰ barred political parties from subscribing to being communist.¹⁵¹

The Act¹⁵² defined communism in a way that anyone who differed with government principles risked being branded as communism. The law further defined communism as an instrument to bring discord amongst the various races. It was frequently used to protect apartheid from opposition. All organisations as well as gatherings which were seen as gatherings to oppose or disrupt the government were barred. In this manner, all forms of resistance especially armed resistance to apartheid were checked. The Bantu Education Act,¹⁵³ created separate educational facilities for the blacks which were inferior to that of the whites. It was designed to prepare black people for low class live like domestic workers.¹⁵⁴ This history lays the foundation of the exclusionary nature of the present social security system.

Furthermore, in 1959, Blacks, coloureds and Indians had separate universities different from the whites. Blacks were not allowed to attend white universities. Universities which had already been established were not allowed to register new black students. No official recognition was given to the black language as they were looked upon as low-grade languages. A decree was passed called the Afrikaans Medium Decree, this decree required only English and Afrikaans to be used on equal stand in all high schools outside the remote areas. Even though there were no laws

¹⁴⁷ *Prohibition of Mixed Marriages Act 55 of 1949.*

¹⁴⁸ *Immorality Act 21 of 1950.*

¹⁴⁹ *Prohibition of Mixed Marriages Act 55 of 1949.*
Immorality Act 21 of 1950.

¹⁵⁰ *Suppression of Communism Act 44 of 1950.*

¹⁵¹ *Liebenberg 2000 Human Development and Human Rights South African Country Study.*

¹⁵² *Suppression of Communism Act 44 of 1950.*

¹⁵³ *Bantu Education Act 47 of 1953.*

¹⁵⁴ *Liebenberg 2000 Human Development and Human Rights South African Country Study.*

separating sports activities for blacks and whites, inter sports between the two racial was not allowed. Blacks were forced to carry identification papers while the government tightened pass laws to stop blacks from travelling to other countries. Blacks could not just move from one city to the other. For them to live in a city they needed to be working there.¹⁵⁵

Till 1956, women resisted to move around with identification papers which became a success to a greater extent because the government was met with fierce resistance each time they tried imposing it on them. The Promotion of Bantu Self-government Act¹⁵⁶ entrenched the National Party policy of supposedly self-governing "homelands" for blacks which were called "self-governing Bantu units". This move was supposed to prepare the blacks for independence and self-government but this was not the case. The Act set aside the seat of white representatives of Africans and further removed the vote rights of the few blacks who were capable of voting from the rolls.¹⁵⁷

Provisions were made by the Bantu Investment Corporation Act¹⁵⁸ to allocate funds to the homelands to stimulate employment there. The Legislation created in 1967 empowered the government to halt industrial development in "white" cities and instead develop the "homelands." The introduction of Black Homeland Citizenship Act¹⁵⁹ brought a different period in the Bantustan plan. This Act changed the position of blacks to people of one of the ten independent territories. This aimed to guarantee demographically that the bulk of people within South Africa were whites when all ten Bantustans get their complete independence.¹⁶⁰

The impact of apartheid on women was terrible since they suffered discrimination on racial and gender bases. Jobs were often hard to find. Due to lack of jobs, agricultural or domestic work was the many jobs available for most black and

¹⁵⁵ *ibid.*

¹⁵⁶ *Promotion of Bantu Self-Government Act 46 of 1959.*

¹⁵⁷ *Liebenberg 2000 Human Development and Human Rights South African Country Study.*

¹⁵⁸ *Bantu Investment Corporation Act 34 of 1959.*

¹⁵⁹ *Black Homeland Citizenship Act 26 of 1970.*

¹⁶⁰ *Liebenberg 2000 Human Development and Human Rights South African Country Study.*

coloured women. Most of them were paid little or no wages at all.¹⁶¹ Malnutrition and serious sanitation problems were common amongst children leading to high mortality rates. Families were broken up due to control of the movement of black and coloured workers in the country by the Natives Urban Areas Act¹⁶² as well as the pass laws. Usually, men moved to worked in urban cities while women were required to stay in rural areas.

Most marriage were broken, families and homes were ruined. The government and the pro-apartheid Dutch Reformed Church controlled births by trying to reduce the rate in which black and coloured women bring forth children.¹⁶³ There was great opposition and violence sparked by apartheid leading to arm embargo which lasted for long in South Africa. These series of protest and uprisings met with fierce opposition leading to the banning of opposition and the detention of those spear heading the fight against apartheid. As unrest continued, the government responded with violence killing thousands of black South Africans.¹⁶⁴

In the 1970's, international pressure was mounted on South Africa to abandon its apartheid policy. By the 1980's, apartheid reforms failed to quell the uprisings.¹⁶⁵ These evens forced the state to take the first step towards reforming the entire system. By 1990, President Frederick Willem De Klerk¹⁶⁶ introduced talks to bring an end to apartheid. By February 1990, he announced that he would abolish laws that discriminate against blacks and elevate the thirty years prohibition against top anti-apartheid groups like the African National Congress, the Pan African Congress, the South African Communist Party and the United Democratic Front.¹⁶⁷ He also brought the Land Act to a complete end¹⁶⁸.

¹⁶¹ Lapchick and Urdang *Oppression and Resistance: The Struggle of Women in South Africa* 48-52.

¹⁶² *Natives Urban Areas Act* 21 of 1923.

¹⁶³ Bernstein1985 <http://www.sahistory.org.za/people/hilda-bernstein>.

¹⁶⁴ Lodge 1983 <http://en.wikipedia>.

¹⁶⁵ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 20.

¹⁶⁶ The White South African President who ruled South Africa before the coming in to force of the democratic era in South Africa.

¹⁶⁷ Lapchick and Urdang *Oppression and Resistance: The Struggle of Women in South Africa* 48-52.

¹⁶⁸ *Native Land Act* 27 of 1913.

During this time, De Klerk for the first time promised the public to liberate Nelson Mandela,¹⁶⁹ stop death sentence as well as reinstatement of freedom of press. The Media was no more restricted. Political prisoners who were innocent of common-law crimes were set free. After more than twenty seven years of detention, Nelson Mandela was released from Victor Verster Prison on the 11th of February 1990. By 1993, the interim Constitution¹⁷⁰ was instituted under the leadership of Nelson Mandela. Borat¹⁷¹ observed that, “the National Party realised during this period that the economy could no longer rely purely on a small pool of white workers to sustain economic progress.”

As already highlighted above, socio-economic rights were introduced in the interim Constitution which in the final Constitution¹⁷² are found in Chapter 2 of the Bill of Rights.¹⁷³ The exclusionary character of the current social security system in South Africa can be traced from its history as seen above. There is no doubt that apartheid left an inheritance of deep rooted poverty and inequality in South Africa. South Africa was rated the top in income disparity in the world for a long time.¹⁷⁴

The income disparity distributed between the different races in South Africa significantly accounts for up to 37% of the entire income disparity.¹⁷⁵ Poverty also led to up to fifty percent poverty female providing for the households than male providing for the households.¹⁷⁶ In all of the key social indicators, including life expectancy, infant mortality, illiteracy, fertility and access to safe water, South African fares very poorly against comparable middle-income countries.¹⁷⁷

A close look at poverty and inequality in South Africa shows that, the poverty straps set by the apartheid regime explains why there is continuous poverty in South Africa.

¹⁶⁹ Nelson Mandela was the first democratic elected President of South Africa (1994 – 1999).

¹⁷⁰ *Constitution of the Republic of South Africa Act 200 of 1993.*

¹⁷¹ Borat 2012 *the Gender Wage Gaping the Post-Apartheid South African Labour Market.*

¹⁷² *The 1996 Constitution.*

¹⁷³ *Chapter 2 of the 1996 Constitution.*

¹⁷⁴ May 1998 *Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality 8.*

¹⁷⁵ May 1998 *Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality 8.*

¹⁷⁶ Haddad (Ed) *Achieving Food Security in South Africa: New Challenges, New Opportunities* (International Food Policy Research Institute Washington 1997) 4.

¹⁷⁷ Department of Land Affairs 1997 *White Paper on South African Land Policy 11.*

This is because there is the absence of assets, people are unable to fully utilise the few assets and services they have. This history of racial discrimination in South Africa may have impacted to the current system of social security mostly regarding the non-nationals in the country.

2.4 CONCLUSION

This chapter discussed the historical development of social security in South Africa. The lack of a coherent approach to South African social security is disenabled and need to be addressed properly and rectified. The Traditional or Western approach used in South Africa which is suitable to those qualified as “employees” does not cover the characteristics of the African context sufficiently. In light with the above challenges it is important to have a comprehensive integrated structure. The social security system was created to cater for the needs of the white minority, unfortunately; the system now has to cater for the entire South African population without inequality.

The system with its oppressive nature brought about inequality, poverty and exclusion a situation which must now be arrested by a system which seems not to be capable of doing so. As stated above, it can be said that, for reasons best known to the government, the government’s focal point has been to address the poverty needs of nationals first leaving out other groups who are also unable to provide for their social security needs as. As a result, the socio-economic needs for non-nationals who are unable to provide adequate social assistance for themselves and dependants are often seems neglected plunging them into untold hardship.

The governments focus had been on racial separation in the social security system thereby moving away from developing and improving the social security system to accommodate all categories of people thereby setting the foundation for the exclusion of many categories of people including non-nationals. This forms the bases of which a reform of the present social security system is needed so that non-nationals and other categories of people who have been excluded from the system is included. The system needs to get rid of past discrimination. The present system

suggest an archaic rigid distinction between social insurance and social assistance and need a general overhauling.

CHAPTER 3

THE ROAD TO CONSTITUTIONAL DEMOCRACY

3.1 INTRODUCTION

The last chapter examined the social security mechanisms put in place during the colonial period; the rise of apartheid and the effects it had on present day South African social security which led to non-nationals being excluded from the social security net. The development of the exclusionary nature of South African social security under the new democratic dispensation can only be understood and appreciated if there is a proper understanding of the historical setting based on colonialism and apartheid. This chapter discusses the activities that led to the introduction of democracy in South Africa.

It examines constitutional democracy; the Constitutions¹⁷⁸ and social security mechanisms put in place to redress the devastating effect of colonialism and apartheid. The chapter demonstrates how government interest shifted from formulating policies and laws that include “everyone” living in South Africa as entrenched in the Constitution¹⁷⁹ to focus on particular categories of persons. It further demonstrates how the social security status of non-nationals was not taken in to consideration when the interim Constitution¹⁸⁰ and the final Constitution¹⁸¹ were drafted explaining the exclusion of non-nationals from benefiting from social security policies.

3.2 Overview

In 1990 negotiations to transfer power to the black majority earnestly began, with two meetings between the governments of President Willem De Klerk of the National Party and the African National Congress.¹⁸² These negotiations aimed to lay concrete foundations for nonviolent talks towards a peaceful transition of power.¹⁸³

¹⁷⁸ *Constitution of the Republic of South Africa Act 200 of 1993.*
The 1996 Constitution.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Constitution of the Republic of South Africa Act 200 of 1993.*

¹⁸¹ *The 1996 Constitution.*

¹⁸² African National Congress was the main black opposition party to the white's National Party.

¹⁸³ The whites were afraid handing power over to the blacks might lead to bloodshed.

These meetings laid down preconditions were successful in laying down the preconditions for talks even though there was severe tension amongst the negotiating groups. It was also agreed that talks for the transition of power could only start if political prisoners who were on detention were released and those on exile allowed returning home.¹⁸⁴ This led to the release of Nelson Mandela in 1990 who became the first black democratic President of the Republic of South Africa in 1994.

Before Nelson Mandela came to power, there were fears arising from the fact that, relinquishing power of white minority to black majority might cause political unrest or even civil war. To avoid this, it was necessary for all the parties to reach a peaceful agreement. In December 1991, The Convention for a Democratic South Africa¹⁸⁵ started talks on how to form an intermediary government including all the races. It also held talks on how a new constitution is formed which will extend political rights to all the races. Convention for a Democratic South Africa adopted a "Declaration of Intent" in which it pledged to unite all the races in South Africa.¹⁸⁶

3.2.1 Convention for a Democratic South Africa (CODESA I)

Peace talks held in this convention gave birth to the interim Constitution.¹⁸⁷ The main focal point of Convention for a Democratic South Africa I was to arrange the creation of a transitional government and a representative parliament. Out of nineteen political parties, seventeen agreed to support the "Declaration of Intent"¹⁸⁸

¹⁸⁴ The first meeting was held at Groote Schuur, the President's official residence. The Groote Schuur minute, which said that before negotiations commenced political prisoners, would be freed and all exiles allowed to return.

¹⁸⁵ This conference took place at the World Trade Centre in Kempton Park on the East Rand Johannesburg. After several months of negotiations, delegations from 19 political organisations and the South Africa government convened to plan a transitional government and representative power.

¹⁸⁶ A South Africa where there is unity for all South African people both whites and blacks.

¹⁸⁷ *Constitution of the Republic of South Africa Act 200 of 1993.*

¹⁸⁸ In 1991, the duly authorised representatives of political parties, political organizations, administrations and the South African Government, coming together at the first meeting of the Convention for a Democratic South Africa, mindful of the awesome responsibility that rests on them at that moment in the history of South Africa, committed themselves to bring about an undivided South Africa with one nation sharing a common citizenship, patriotism and loyalty, pursuing amidst the diversity, freedom, equality and security for all irrespective of race, colour, sex or creed; a country free from apartheid or any other form of discrimination or domination, to work to heal the divisions of the past, to secure the advancement of all, and to establish a free and open society based on democratic values where the dignity, worth and rights of everyone are protected by law; to strive to improve the quality of life of our people through policies that will promote economic growth and human development and ensure

committing themselves to a multi-party system of government and the writing of a new Constitution for a democratic South Africa. There was increasing nervousness among members of the National Party¹⁸⁹ concerning their fate should governance go to the blacks forced Willem De Klerk.¹⁹⁰ In February 02 1992 which was the day when the Parliament was opening, Willem De Klerk used this opportunity to reassure his colleagues that power was still in the hands of the National Party. He further assured them that no official arrangement has been made to hand over power to the black minority.

Those criticising him continue to say that he is acting without authorisation. He responded by organising a white referendum in which he intended to prove that he still have the confidence of his followers even though the African National Congress and the British anti-apartheid movement strongly opposed the move. This referendum was held in March 17, 1992. The result of this referendum was that majority of whites voted for him.¹⁹¹ Negotiations resumed again between the National Party and African National Congress, it was captioned Convention for a Democratic South Africa II.

3.2.2 Convention for a Democratic South Africa (CODESA II)

In May 1992, talks began again between the Nationalist Party and African Congress under the banner of Convention for a Democratic South Africa II, stronger demands were made by the African National Congress. The two parties could not arrive to a compromise on how the new transitional government is run. The National Party still wanted to maintain a strong hold in the transitional government. Furthermore, it wanted to hold the power to change decisions made in the parliament if they do not favour the white. There was a lot of tension caused by continues violence.¹⁹² This violence was mostly perpetuated by disagreements between the Inkatha Freedom Party and the African National Congress and also fighting between some traditional

equal opportunities and social justice for all South Africans; create an atmosphere conducive to peaceful constitutional change to eliminate violence, intimidation and destabilisation and Interim *Constitution* by promoting free political participation, debate and discussions.

¹⁸⁹ Ruling party at that time.

¹⁹⁰ President of the National Party.

¹⁹¹ Anon 2011 <http://www.sahistory.org.za/codesa-negotiations>.

¹⁹² Anon 2011 <http://www.sahistory.org.za/codesa-negotiations>.

rivalries amongst the Zulu and Xhosa tribes. The violence could not be stopped even though Mandela and Buthelezi tried to sort out their differences. The Boipatong massacre which led to the death of 45 people was one of the worst cases of violence between ANC-IFP. De Klerk was warmly welcomed when he visited the scene of the incident. Later on, protesters attacked him waving placards and brandishing stones.

This incident created a forum for the African National Congress to take on to brinkmanship. According to Mandela, de Klerk as the president at that time had to bring the bloodshed to an end. He further blamed the South African police for provoking the ANC-IFP violence.¹⁹³ This caused African National Congress' to pull out from the talks, at this stage, Convention for a Democratic South Africa forum came to a completely end.¹⁹⁴ After the collapse of CODESA II, on 7th September 1972, the Bisho massacre caused negotiations to resume.

Furthermore, the Ciskei Defence Force on demanding for the return of the Ciskei homeland into South Africa opened fire on African National Congress marchers. This led to the death of 29 people and some 200 were hurt. As a result, Mandela and de Klerk decided to meet to see how the issue of violence and blood shedding can be put to an end.¹⁹⁵ Also the assassination of Christ Hani on 10 of April 1993 by Right-wing violence threatened to plunge the country into chaos all these activities led to the resumption of negotiations. President de Klerk and Nelson Mandela exchanged memoranda. The National Party decided to relax its conditions.

The meeting organised to maintaining quiet dialogue was put in place by August 1992 by the ANC. It was agreed that Cyril Ramaphosa hold talks with Roelf Meyer of the National Party. Great development was made and by the 26th of September 1993, a meeting was held by Mandela and de Klerk where they signed the "Record of Understanding."¹⁹⁶ They agreed on how the national and regional government is run, controlled by provisions from an interim Constitution.¹⁹⁷ Agreement was also reached on the creation of a temporary elected assembly to stand as an interim

193 Ibid.

194 Ibid.

195 Ibid.

196 Mandela and de Klerk held a summit to sign the Record of Understanding where they pledged their commitment to negotiations by signing the Declaration of Intent.

197 *Constitution of the Republic of South Africa Act 200 of 1993.*

parliament and to draft a constitution based on issues agreed on in previous multi-party talks. It was agreed that for there to be efficiency in prospective talks, there must first of all be a mutual agreement between African National Congress and National Party before other parties could give their contributions of which their contributions can be considered or left out.¹⁹⁸

3.2.3 South African General Election 1994

The election was held on 27 April 1994 and went off peacefully throughout the country as 20 million South Africans cast their votes.¹⁹⁹ There was some difficulty in organising the voting in rural areas, but people waited patiently for many hours to vote amidst a palpable feeling of goodwill.²⁰⁰ An extra day was added to give everyone the chance. International observers agreed that the elections were free and fair. The African National Congress won 62.65% of the vote, less than the 66.7% that would have allowed it to rewrite the Constitution. Nelson Mandela became the first democratic president of South Africa on 10 May 1994 with Thabo Mbeki and de Klerk as deputy presidents.²⁰¹ The Government of National Unity was established, the government was governed by constitutional provisions of the interim Constitution of 1993.

3.2.4 The Interim Constitutional Provisions

Apartheid left a society plagued with division, untold suffering, contention, and inequality. The Constitution²⁰² has to make available a historic link between a society with a profound divided history and a prospective society founded on democracy, a respect for human rights, non-violent, equal opportunities for all notwithstanding their race, sex, believe or colour. The prospective society has to provide peaceful co-existence, development and equal opportunities for all South.²⁰³ 26 political parties took part in the negotiation process; these negotiations gave birth to the interim or

¹⁹⁸ Anon <http://www.sahistory.org.za/article/history-separate-development-south-africa>.

¹⁹⁹ *Constitution of the Republic of South Africa Act 200 of 1993*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Post Amble on National Unity and Reconciliation: *Constitution of the Republic of South Africa Act 200 of 1993*.

transitional Constitution.²⁰⁴ The skeleton of the interim government was put in place while awaiting the approval of a final Constitution.²⁰⁵

Constitutional democracy for the first time in South African history, replaced the archaic parliamentary sovereignty system.²⁰⁶ The Constitution became the supreme law of the country and laws or conducts which are incoherent with the Constitution²⁰⁷ are rendered void. A chapter of justifiable "fundamental rights were introduced in the interim Constitution.²⁰⁸ This chapter is what is called the Bill of Rights in the present Constitution. It consisted of the traditional civil and political rights like the rights to vote, to a fair trial, and freedom of speech and assembly. These rights did not just end with these traditional rights, freedom and equality. It went as far as including what were relatively innovative rights for a national Constitution.²⁰⁹

These innovative rights include the right to access information without disturbances,²¹⁰ the right to administrative justice,²¹¹ a right capable of free pursuit of economic activity,²¹² the right to an atmosphere which is favourable to health or the well-being of all²¹³ the right for children to leave in a safe and secured environment, vital nutrition, a right to health facilities and social services.²¹⁴ It also comprises of a right to language and cultural rights,²¹⁵ a right to be educated. Labour rights²¹⁶ and property rights were also included.²¹⁷ For the first time in South Africa, Provisions establishing constitutional institutions were established such as the Constitutional

²⁰⁴ *Constitution of the Republic of South Africa Act 200 of 1993.*

²⁰⁵ *The 1996 Constitution.*

²⁰⁶ *Constitution of the Republic of South Africa Act 200 of 1993.*

²⁰⁷ *Ibid.*

²⁰⁸ *Constitution of the Republic of South Africa Act 200 of 1993:*

Interim Constitution was the fundamental law of South Africa from the first non-racial general election on 27 April 1994 until it was superseded by the final Constitution on 4 February 1997. As a transitional constitution it required the newly elected Parliament to also serve as a constituent assembly to adopt a final Constitution. It made provision for a major restructuring of government as a consequence of the abolition of apartheid. It also introduced an entrenched bill of rights against which legislation and government action could be tested, and created the Constitutional Court with broad powers of judicial review.

Constitution of the Republic of South Africa Act 200 of 1993.

²⁰⁹ *S 23 of the Constitution of the Republic of South Africa Act 200 of 1993.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *S 30 (1) (c) of the Constitution of the Republic of South Africa Act 200 of 1993.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

Court, the Human Rights Commission, and the Commission for Gender Equality.²¹⁸ The Interim Constitution also set forth measures for the adoption of the final Constitution.²¹⁹ The two houses of the then newly elected democratic parliament consisting of the National Assembly and Senate jointly created the Constitutional Assembly tasked which has to do with the drafting and adopting of a new Constitution.²²⁰ Parameters for the contents of the final Constitution was also set forth by the interim Constitution.²²¹ A set of 'constitutional principles' put in place in the interim Constitution has to be met with to lay down the final Constitution.²²²

There was wide range of principles containing provisions that the final Constitution²²³ should have a Bill of Rights or Freedom Charter which is justifiable, all forms of unfair discriminations like gender and racial discriminations were forbidden. The Bill of Rights also provide for freedom of information so as to guarantee proper accountability and management at all levels of the government. There were also provisions to protect the different languages and culture. National, provincial and local government powers were also provided. The final Constitution²²⁴ could only come into force if the Constitutional Court certifies that it has complied with all the principles laid down in the interim Constitution.

3.2.5 The Social Security Mechanism Instituted under the Interim Constitution

As stated above, the African National Congress which took over from the National Party inherited many socio-economic problems which needed to be redressed.²²⁵ The government put forward many programmes to address poverty and to remove racial inequality in social security legislations. The first democratic manifestation of the African National Congress to address the socio-economic problems that were plaguing the new democratic government was the institution of the Reconstruction and Development Programme.

²¹⁸ The 1996 Constitution.

²¹⁹ Constitution of the Republic of South Africa Act 200 of 1993.

²²⁰ *Ibid.*

²²¹ The 1996 Constitution.

²²² Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993.

²²³ The 1996 Constitution.

²²⁴ *Ibid.*

²²⁵ Dekker *Informal Social Security: A Legal Analysis* 35.

3.3 The 1996 Constitution

The 1996 Constitution²²⁶ also called the final Constitution²²⁷ was negotiated between May 1994 and October 1996, and was adopted by an overwhelming majority of the Constitutional Assembly on 8 May 1996. The Constitutional Court certified an amended text of the new Constitution on 4 December 1996 and it came into force on 4 February 1997.²²⁸ The Constitutional Assembly was committed to ensuring broad public participation in the drafting of the final Constitution.²²⁹ In the words of Ramaphosa²³⁰ calling on massive participation of the public for the drafting of the Constitution²³¹ stated "in the end the drafting of the Constitution must not be the preserve of the 490 members of this Assembly."²³²

It must be a Constitution which our people feel they own, a Constitution that they know and feel belongs to them."²³³ With this call, there was massive public participation on the drafting of the final Constitution.²³⁴ Extensive use was made of print, radio, television, a national advertising campaign, as well as the production of in-house media. Other communication tools included a regular newsletter (Constitutional Talk), a telephone talk-line, and an Internet home page. Submissions were solicited from the public on all aspects of the new Constitution.²³⁵

Workshops with civil society were organised by the Constitutional Educational Programme to assist people to participate meaningfully in the process. In addition to these public meetings, the Constitutional Assembly ran a National Sector Public Hearing Programme. In these hearings different sectors of civil society were consulted on the constitutional themes of particular relevance to them. Themes of these hearing included the judiciary, business, labour, children's rights, women and socio-economic rights. Organisations in civil society also conducted effective advocacy and lobbying campaigns on various aspects of the Bill of Rights.

²²⁶ The 1996 Constitution.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ Former Chairperson of the Constitutional Assembly.

²³¹ The 1996 Constitution.

²³² *Ibid.*

²³³ Hassen. *The Soul of a Nation: Constitution-Making in South Africa* 239.

²³⁴ The 1996 Constitution.

²³⁵ *The 1996 Constitution.*

For example, women's organisations lobbied successfully for a right in the Bill of Rights against all forms of public or private violence.²³⁶ The Reproductive Rights Alliance played a key role in ensuring the inclusion of reproductive rights and health in the Bill of Rights.²³⁷ The National Coalition on Gay and Lesbian Equality helped ensure that the right to equality expressly included sexual orientation as a prohibited ground of unfair discrimination.²³⁸ It is worth noting that, for whatever reason, there was no voice lobbying or advocating for social protection rights for non-nationals to be entrenched in to the Constitution²³⁹

3.3.1 Social Security Mechanisms in the 1996 Constitution

The coming in to force of the final Constitution brought about a turnaround in the history of South Africa social security.²⁴⁰ The preface of this Constitution²⁴¹ was adopted to bring unity in a country which has suffered from division and marginalisation. The Constitution aimed to make good of past injustice²⁴² based on freedom of expression, equality, liberty and basic human rights values. A society in which the government operates based on the will of the people and everyone is equal before the law. Again, the society further aimed to bring development in the lives of all its members and to free the potential of all of them as well as to institute democracy at the helm of the nation. This way South Africa was able to regain its dignity as a united and democratic nation able to take its rightful place as an independent state amongst other nations. The South African Constitution has been regarded highly due to the entrenchment of the Bill of Rights.

The Constitution²⁴³ also recognises rights such as the right of ownership of property; defending the rightful possession of land; restoration of chattels or fair restoration of assets that was taken away from people after 1913 because of the discriminative laws and practices;²⁴⁴ the ban on the destruction of houses and the right of access to

²³⁶ S 12 (1) (c) of the 1996 Constitution.

²³⁷ S 12 (2) (a) and 27 (1) (a) of the 1996 Constitution.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *The 1996 Constitution.*

²⁴⁴ S 25 (5) (9) of the 1996 Constitution.

sufficient housing as well as the prevention on the random expulsion of people from their homes.²⁴⁵ Furthermore, the right to have enough food, water and access to health care services, reproductive health care, as well as the right to social security,²⁴⁶ the right to have urgent medical treatment,²⁴⁷ basic food supply for children, shelter and education.²⁴⁸

Some of these rights are to be protected constitutionally, for example, a provision in the Constitution that deals with access to housing, health care, food, water and social security,²⁴⁹ specifically obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.²⁵⁰ This qualification is like Article 2 of the International Covenant on Economic, Social and Cultural Rights²⁵¹ which state what is expected of state parties in relation to the rights acknowledged in the Covenant.²⁵²

The fundamental right to basic education and the social security rights of children can be enforced directly since they are not subject to the same qualification of reasonable legislation and other measures within its available resources. The most important role of the state is to construct an atmosphere whereby people can have access to the different socio-economic rights listed in the Constitution. This kind of environment denotes an environment whereby the different social groups can enjoy equal opportunities without favouritism, adopting special policies to enable the disadvantaged to access the rights, as well as uplifting all barriers that may stand as an obstacle for the disadvantaged to enjoy all the rights. In this way, the rights can play a significant role in growth and empowerment of the disadvantaged people.²⁵³ These rights are integrally related to the civil rights in the Bill of Rights, like the right

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 03 January 1976, in accordance with article 27 (*Hereafter referred to as ICESCR, 1966*).

²⁵² General Comment No 3 (Fifth session, 1990), UN doc E/1991/23 The Nature of States Parties Obligations Art 2 (1) of the ICESCR, 1966 *adopted by UN Committee on Economic, Social and Cultural Rights*.

²⁵³ Section 32 (2) of the 1996 *Constitution*.

to equality, liberty to express oneself, liberty to meet together and relate with one another, the right to have access to information and administrative acts which are just.

The right to equality is an important constitutional value²⁵⁴ which calls for the protection and enjoyment of all the rights as listed in the Constitution.²⁵⁵ Those who have been disadvantaged by unfair discrimination can be protected by formulating legislations and other measures designed for the satisfaction and protection of such persons or categories of persons through the social security mechanism.²⁵⁶ Note should equally be taken of the fact that National legislations have been enacted to give effect to these rights. These rights can also play an important role in assisting people to gain access to economic and social rights through open and fair procedures. Also the possibility of obtaining a remedy through the courts for the violation of any of the rights in the Bill of Rights (including social and economic rights) is a significant safeguard. The Bill of Rights further guarantees everybody the right to access any information kept by the state or private individuals to protect their rights. Again, everyone has the right to access to lawful, rational and procedurally fair administrative actions.

Nevertheless, People should not see the courts as the fundamental body for the apprehension of the rights in the Bill of Rights. All the various arms of the state are charged with the responsibility to respect, protect, promote and accomplish the rights in the Bill of Rights.²⁵⁷ At the national, provincial and local levels of government, the executive and legislature have an important role to play in ensuring a successful realisation of the rights by adopting and implementing useful government policies, laws and programmes. Also, autonomous bodies which have powers to uphold and safeguard human rights have been created by the Constitution to supporting constitutional democracy.²⁵⁸

254

Ibid.

255

Ibid.

256

Ibid.

257

S 7 (2) of the 1996 Constitution.

258

The 1996 Constitution.

Another ground-breaking characteristic of the South African Bill of Rights is that it covers private actors, public as well as individuals companies. Some of these rights clearly bind private actors: for instance, private actors owe a duty not to differentiate unjustly²⁵⁹ and to make available information that others need to be able to implement or defend their rights.²⁶⁰ Determining the extent to which the other rights in the Bill of Rights are binding on private actors, the nature of the right and the nature of the duty it imposes must be examined.²⁶¹ With this, it can easily be argued for instance that an industry charged with toxic waste which is detrimental to its surroundings violates the rights of an environment which is not harmful to health or well-being under the Constitutional.²⁶²

3.4 Conclusion

This chapter brought into light the literature of the historic past of South African history and how it shaped the present day social security system with its exclusionary nature. As discussed above, the apartheid regime catered for the socio economic needs of the minority whites as opposed to the majority blacks. The imperatives of apartheid led to the fragmentation of provisions eventually in an uneconomic inefficiency²⁶³ welfare system and the entrenchment of an inferior quality of service to the majority of the South African population.

Furthermore, past apartheid policies created separate development this inevitably affected the economic growth of the bulk of South African people. After the institution of a democratic government in 1994,²⁶⁴ the government committed itself to a number of specific goals or policies in the area of social security to eliminate poverty and institute a reasonable and widely accepted mechanism for the distribution of income and proper policies to deal with poverty and the availability of a decent health care for all. Despite the advent of a post-apartheid government the

²⁵⁹ S 9 (4) of the 1996 Constitution.

²⁶⁰ S 32 (1) (b) of the 1996 Constitution.

²⁶¹ S 8 (2) of the 1996 Constitution.

²⁶² S 24 (a) of the 1996 Constitution.

²⁶³ Visser "Shifting RDP into GEAR: The ANC Government's Dilemma in Providing an Equitable System of Social Security for the 'New' South Africa".

²⁶⁴ The first democratic or non-racial elections were held where everybody was expected to cast their votes without any discrimination.

development of social security has been characterised by a history of apartheid and colonialism with its exclusionary nature.

Majority of people in South Africa are affected on a daily bases by the various mechanisms of what has become known as social security. One of such categories of people is non-nationals which is the reason for this study. Dekker noted that, from the historical development of social security in South Africa, the position of non-nationals had never been defined in the Constitution.²⁶⁵ The claim to the right to social security for non-nationals is based on section 27 (1) (c) of the Constitution²⁶⁶ which entrenches the right to social security for everyone and to a limited extend regulated through the framework of other legislations at national as well as international levels.²⁶⁷

A close observation of both the interim Constitution²⁶⁸ and the final Constitution²⁶⁹ reveals that, the drafters of both Constitutions²⁷⁰ seemed to have laid more emphasis in dealing with the ills of apartheid. As a result very little effort was made in the area of social security particularly the needs of other vulnerable groups such as non-nationals. However, this is often the case in most national constitutions where there is little or no direct constitutional provision to protect the rights of non-nationals thus making it difficult for them to enforce their socio-economic rights directly. They rely on section 27 of the Constitution particularly the word “everyone” which is feeble to allow them access social security.

²⁶⁵ Dekker, *Informal Social Security: A Legal Analysis* 44.

²⁶⁶ S 27 (1) of the 1996 Constitution.

²⁶⁷ Dekker, *Informal Social Security: A Legal Analysis* 150.

²⁶⁸ *Constitution of the Republic of South Africa Act 200 of 1993.*

²⁶⁹ *The 1996 Constitution.*

²⁷⁰ *Constitution of the Republic of South Africa Act 200 of 1993.*
The 1996 Constitution.

CHAPTER 4

THE LEGAL FRAMEWORK OF SOCIAL SECURITY IN SOUTH AFRICA

4.1 INTRODUCTION

The last chapter discussed the road to democracy in South Africa. This chapter will discuss the legislative framework of South African social security system, government policies, social security legislations and the position of non-nationals. Devoid of efficient policies and laws to execute the right to social security as entrenched in the Constitution²⁷¹ and international instruments, the rights will not serve any purpose. A rational structure of laws and policies are needed to convert large social security programmes into detailed and tangible programmes that can better transform the lives of millions of people.

Since the introduction of democracy in 1994, the democratic government has incorporated an extensive range of new policies and laws. The first main concern of the government was to crack-down the prejudiced build by apartheid laws and to put in place a non-discriminatory and united government out of the racially divided government inherited from the apartheid regime. Also, the new policies and laws also wanted to put into practice the government's political commitment to reconstruct and develop the South Africa society.²⁷² The laws were thus adopted to give effect to the rights in the Bill of Rights. The Bill of Rights therefore serves as a significant drive for the passing of legislations and also has a great influence in what the legislation consist of.

The impact on socio-economic rights has influenced the legislative policies and court cases in South Africa. An example of such measures include the scope to which socio economic rights have form the policy and the legislative context. These socio economic rights have influence a range of legislative and policy measure adopted to give effect to the government human right commitment. As such, these policies and

²⁷¹ The 1996 *Constitution*.

²⁷² Government's strategy for the fundamental transformation of society is set out in the *White Paper on Reconstruction and Development, Republic of South Africa, September 1994*.

legislations seems to exclude non-nationals who are a significant population of the South African community.

4.2 GOVERNMENT POLICIES

The following policies were implemented by the government in an attempt to enhance the differences of the past.

4.2.1 Reconstruction and Development Programme

In 1994, the African National Congress led by Nelson Mandela the first democratic president in South Africa instituted a socio-economic program called the Reconstruction and Development Programme.²⁷³ This program aimed to look in to the serious socio-economic issues which came as a result of the apartheid system such as violence, homelessness, shortage of jobs, high level illiteracy and poor health care system. It purposely aimed to address the socio-economic problems South Africa was facing at that time and to alleviate poverty. Building up a solid economy and achieving the wiping out of poverty were conceived to be related and mutually supportive objectives essential to transform South Africa's severely unbalanced and mostly poverty population.

4.2.2 Social Achievements of the Reconstruction and Development Programme

Indirect social security measures were introduced as the first priority of the Reconstruction and Development Programme so as to meet the urgent needs of the poor people. Government subsidised the building of over 1,1million low-cost houses between 1994 and the beginning of 2001 to provide houses for over 5 million of about 12, 5 million South Africans approximated to be without appropriate housing.²⁷⁴ This house delivery programme instead led to violence and conflicts in some areas. One million three hundred standpipes was installed within 200 meters of the homes of rural people by the beginning of 1998.²⁷⁵

²⁷⁴

Lodge 2002 *Indiana University Press*.

²⁷⁵

Statistics SA, Department annual report 1994.

By August 1998, more than 2, 5 million people have had the right to use fresh and safe water.²⁷⁶ There were about 236 projects to provide clean piped water to over 4.9 million inhabitants who were mostly from the former homelands.²⁷⁷ The number of rural homes with electricity rose from 12% to 45% between 1994 and May 2000. Again, around 1, 75 million homes had been connected to the national grid by this same time of the year. About 39,000 families by 1999 have been established on 3,550 square kilometres of land. Authorities claimed that 250,000 people had 'received land' within four years.²⁷⁸

About 500 new clinics were created to improve on the health of about 5 million people between April 1994 and the end of 1998. Programmes such as vaccination were instituted with about 8 million children vaccinated within two years under the polio-hepatitis vaccination programme which started in 1998. Furthermore, about 240,000 people were provided with jobs on the construction of road, building of sanitation facilities and water supplies, fitting of sewage by a community-based public works programme.²⁷⁹ Social security was provided for every person not withstanding their race, sex or physical ability.²⁸⁰

The pension system was reconstructed to meet the state system. Workers retire at the age of 60 to 65 years were entitled to government pension from 60 years.²⁸¹ The Reconstruction and Development Programme had to focus on those who had been marginalised by apartheid like the domestic workers, farm workers, seasonal workers, women and disabled, children who were victims of violence at home, street children and other young persons who had been faced with different kind of abuse. Take note that, non-nationals were not mentioned amongst these vulnerable groups.

The unemployment benefits were provided for the unemployed.²⁸² The Reconstruction and Development Programme further had to deal with the issue of the right of children. Children were to be taken off the streets. Those in prison

²⁷⁶ Lodge 2002 Indiana University Press. Kadar Asmal was the minister of waters by then.

²⁷⁷ Rabbani 1994 <http://www.africa.upenn.edu>

²⁷⁸ *Ibid*

²⁷⁹ Statistics SA, Department annual report 1994

²⁸⁰ *Ibid*

²⁸¹ *Ibid*

²⁸² *Ibid*

where to be released, homes for abandoned and homeless children where to be established. The Reconstruction and Development Programme together with non-governmental organisations such as traditional healers, religious organisations, trade unions, had to work hand in hand to realise this objectives. The programme also recognised workers' rights.

The government had to sign the International Labour Organisation Conventions on labour issues. The programme further focus on the reconstruction of the then department of manpower which is presently the department of industry, the Unemployment Insurance Board, the Workers Compensation Commission and other bodies. Unfortunately, the Reconstruction and Development Programme did not realised most of its targets.²⁸³ People have criticised the scope of change represented by many of the statistics put forward by this programme and argued that they do not tie down with what the government claims. According to writers like Rabanni, the government exaggerated the changes it claim the Reconstruction and Development Programme brought. For instance, the standards of housing and water delivery, healthcare and land reform policy as well as agricultural reforms were all closed down in 1996.²⁸⁴

4.2.3 The Growth, Employment and Redistribution Strategy (GEAR)

After the failure of the Reconstruction and Development Programme, the Growth Employment and Redistribution Strategy (here after called GEAR)²⁸⁵ was instituted. The aims of GEAR were to institute a competitive fast-growing economy which will create sufficient jobs for all work seekers; a redistribution of income and opportunities in favour of the poor; a society in which sound health, education and other services are available to all; and an environment in which homes are secure and places of work are productive. GEAR further recognised that, cash transfer through social grant will play a vital role in poverty alleviation.

²⁸³ Rabanni 1994 <http://www.africa.upenn.edu>.

²⁸⁴ *Ibid*

²⁸⁵ Department of Finance 1996. *The Growth Employment and Redistribution Strategy*.

4.2.4 Social Achievements of Growth Employment and Redistribution strategy

GEAR made some remarkable achievements like, securing a return to a long-term growth trend in excess of population growth; reducing the budget deficit, reforming the tax system and reprioritising public expenditure; bringing down inflation and easing the balance of payments constraint; opening the economy to international competition and securing access to new markets; integrating the civil service and transforming public sector institutions; and establishing policy frameworks for delivery of social services.²⁸⁶ Despite these achievements, GEAR, an elite market driven policy, based on neo-liberal assumptions departed from fundamental progressive values.

It became evidently clear that job creation, which is a primary source of income redistribution, was inadequate. The growth trajectory of about three percent per annum failed to reverse the unemployment crisis in the labour market at that time thereby providing inadequate resources for the necessary expansion in social service delivery, yielding an insufficient progress toward an equitable distribution of income and wealth.²⁸⁷ GEAR was unsuccessful to address the deep economic problems which were plaguing South Africa at the time.²⁸⁸

Mathe²⁸⁹ pointed out that, GEAR strategy has been a subject of much debate, and blamed for all social and economic ills, including job losses and high unemployment, poverty, problems in the education, health and welfare system, as well as poor delivery of social services.²⁹⁰ Dekker²⁹¹ submitted that GEAR was unsuccessful to address the deep economic problems which were plaguing South Africa at the time.

²⁸⁶ Department of Finance 1996. *The Growth Employment and Redistribution Strategy*.

²⁸⁷ Ibid.

²⁸⁸ Mathe *Policy Study of the Growth Employment and Redistribution Strategy with Respect to Social Development and Adult Basic Education and Training*.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Dekker *Informal Social Security: A Legal Analysis* 42.

4.2.5 The Welfare White Paper for Social Welfare of 1999

In 1999, the Welfare White Paper was instituted as the first move to reform the then welfare dispensation.²⁹² The White Paper based its policy framework on the interrelationship between social and economic development. It pointed out that “social welfare policies is developed which is targeted at poverty prevention, alleviation and reduction and the development of people’s capacity to take charge of their own circumstances in a meaningful way.”²⁹³ The ultimate aim of the White Paper was to “facilitate the provision of appropriate developmental social welfare services to all South Africans, especially those living in poverty, those who are vulnerable and those who have special needs.”²⁹⁴

The post-apartheid South Africa committed itself to proactively use and devise welfare as a poverty alleviation programme, linking social and economic development strategies and assigning an interventionist role to the state to bring about change and well-being in society as a whole.²⁹⁵ According to Dekker,²⁹⁶ the Welfare White Paper did not succeed to solve the serious socio-economic issues faced by South Africa at the time. She further quoted that, “the paper is criticised for being strong in rhetoric principles but weak in concrete target for restructuring and delivering.”²⁹⁷ The African National Congress government sought not only to restructure the existing welfare system in an equitable and non-racial way, but also to radically define the roles and responsibilities of the social security system as a whole through Bills and legislations.

4.3. The Bill of Rights

The Bill of Rights in the 1996 Constitution is termed the cornerstone for democracy for the people of South Africa. It is like the Freedom Charter in the Canadian

²⁹² Department of Welfare 1997 *White Paper for Social Welfare*.
Gen Not 1108 in GG 18166 of 8 August 1997.

²⁹³ Department of Land Affairs 1997 *White Paper on South African Land Policy*.
Gen INct 1108 in GG 18166 of 8 August 1997.

²⁹⁴ Department of Land Affairs 1997 *White Paper on South African Land Policy*.
Gen Not 1108 in GG 18166 of 8 August 1997.

²⁹⁵ Department of Land Affairs 1997 *White Paper on South African Land Policy*.
Gen Not 1108 in GG 18166 of 8 August 1997.

²⁹⁶ Dekker *Informal Social Security: A Legal Analysis* 42.

²⁹⁷ *Ibid.*

Constitution. It affirms values such as human dignity, equality and freedom. It contains a set of political, socio-economic, civil, as well as cultural rights for the people of South Africa.

4.4 The Taylor Report on social system

This Committee was created to deal with the issue of poverty, discrimination and under development which were issues brought about by the apartheid regime. The Committee of enquiry had to investigate on how to draw up a plan that will include the social security needs of everyone living in South Africa who are unable to provide for themselves.²⁹⁸ The Taylor Committee has to play the role of extending social protection to all. In 2002, the Committee published a report on their investigations into the social security system in South Africa.²⁹⁹ It noted that the current welfare system was inherited from the previous era without any substantial changes made in terms of its design.

The underlying assumption of the “old system” was that the employed could support themselves through work.³⁰⁰ The Committee noted that, there are several types of social assistance packages provided by the Social Assistance Act³⁰¹ which include:

- assistance to the aged (women over the age of 60 and men over the age of 65);
- assistance to medically diagnosed disabled people;
- assistance to foster care families;
- a care dependency grant; and
- A child support grant.

The report further noted that, despite this seemingly comprehensive coverage, the following people remain uncovered by the current system: children – 75% of children who cannot afford basic need to live a comfortable life and who fall under the age of seven years old do not get the child support grant. The report further pointed out

²⁹⁸ Taylor 2002 *Department of Social Development*.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Social Assistance Act 13 of 2004.*

that, all children above seven years do not get any support. Children without primary caregivers and child-headed households do not get any grant.³⁰² The report again pointed out that, due to the strict medically based criteria to qualify for the disabled grant the chronic ill disabled often do not meet these criteria.³⁰³

Furthermore, the Unemployment Insurance Fund covers only five percent of the unemployed.³⁰⁴ Non-nationals with temporary residence are excluded from the current social security system despite the Constitution's provision that "everyone" should be entitled to social security. About sixty percent of the poor do not receive any income support contribution.³⁰⁵ With all these short coming in the social security system, the Committee thus envisaged a comprehensive social security system to cater for these needs. The Committee recommended that there is a strong need for poverty to be tackled holistically.

This essentially calls for an urgent need to develop and put into action programmes to counteract capability poverty, asset poverty, special needs and social insurance. The Committee further proposed that, for acute poverty to be eliminated and the dignity of people restored, an inclusive social security package must be instituted. The Committee again recommended a Basic Income Grant as the best and quite effective and quick way of fighting against income poverty and to close the huge gaps in the current social security system.³⁰⁶ Furthermore, the Committee noted that, the current social security system can provide children support grants to at least 1, 2 million children.³⁰⁷

According to the Committee, children are highly prioritised in the Constitution;³⁰⁸ the Committee thus recommended that the implementation of the grant must start with the expansion of the income grant to cover all the children without applying the means test.³⁰⁹ The Committee further noted that, children are just a small part of

³⁰² Taylor 2002 *Department of Social Development*.

³⁰³ *Ibid.*

³⁰⁴ *The 1996 Constitution*.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ Taylor Report 2002 *Department of Social Development*.

many categories of susceptible or needy groups which really need social protection in the form of social security. Other categories or class of people who need social protection through social security include, women, rural dwellers, non-nationals refugees and asylum-seekers and unemployed or underemployed or unemployable adults.

Most of those listed above have little or no access to social grants in the present social security system. The Committee recommended a complete execution of the Basic Income Grant to tackle income poverty among these categories of people.³¹⁰ The Committee also made proposals on how to fight capability poverty. The Committee stated that, programmes which are concentrating closely on income poverty will have little or no significance except they are balanced with measures to tackle other ways in which poverty is manifested without which, homes will have to sacrifice some important needs just to meet up with others. (An example is, sacrificing education in order to pay for enough dirt-free water).

The Committee recommended that the government embark on concurrent projects to make sure that, the right to use free fundamental services for example lifeline water, hygiene, electrical energy; education. Also, the Committee recommended that, the government improve on skills training so that the job markets can be easily accessed by job seekers. Housing and public transport need be made less expensive so that all can afford. The Committee further recommended that the government should improve on health facilities so that all may have sufficient health care, liberty to access to primary and secondary education. Also, the government needed to improve on the credit ability of the poor household by making it possible for them to own assets so that they can have access to credits.

Furthermore, the Committee urged the government to make contributions of small amount of money towards retirement obligatory.³¹¹ A more humanitarian system of inclusive social protection was developed by the Committee. This system comprises of an important structure for coordinating and checking progress made toward the system which is in line with the values of social justice as laid down in the

³¹⁰ *Ibid.*

³¹¹ Taylor 2002 *Department of Social Development.*

Constitution.³¹² Although the Department of Social Development initiated this investigation, a large number of government departments, particularly those within the social group were touched. The Minister and departmental officials were urged to make sure these basic issues are placed directly on the national programme.

This needed the departments to carve out structures accountable for monitoring and assessing how far the Committee's recommendations have been implemented. Also structures to facilitating discussion and to make sure that important suggestion be given extra attention by suitable bodies. Take note that the situation of non-nationals who were also vulnerable were not mentioned in all this programmes instituted to redress the poverty situation in South Africa.

4.5 SCOPE OF LEGISLATION

4.5.1 Acts

4.5.2 Compensation of Occupational Injuries and Disease Act 130 of 1993

The Compensation of Occupational Injuries and Disease Act (hereinafter referred to as COIDA)³¹³ aimed at providing compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith. COIDA applies to all employers; casual and full-time workers who, as a result of a workplace accident or work-related disease are injured, disabled, or killed; or become ill.³¹⁴

This excludes workers who are totally or partially disabled for less than three days; domestic workers, anyone receiving military training; members of the South African National Defence Force, or the South African Police Service, any worker guilty of wilful misconduct, unless they are seriously disabled or killed; anyone employed outside the Republic of South Africa for twelve or more continuous months; and

³¹² The 1996 Constitution.

³¹³ Compensation for Occupational Injuries and Diseases Act 130 of 1993 S 22.

³¹⁴ *Ibid.*

workers working mainly outside the Republic of South Africa and only temporarily employed in South Africa.³¹⁵

COIDA is being administered by the Compensation Fund of South Africa which operates under the Department of Labour.³¹⁶ COIDA deals with the medical evaluation of occupational injuries and occupational diseases in the mining sector which is covered by the Occupational Disease in Mine Workers Act (ODMWA) such as occupational lung diseases in the mining sector which are covered by ODMWA.³¹⁷ The Rand Mutual Assurance Company Limited specifically deals with the above mentioned cases. Employees injured inside and outside the mining companies are being provided with compensation whether they are at fault or not by COIDA and ODMWA.

The Occupational Health and Safety Act³¹⁸ and the Health and Safety in Mines Act,³¹⁹ deal with the issue of safety for the workers. Domestic workers are excluded from the operation of COIDA, which keenly affects the position of non-nationals like Mozambicans who are or were involved in this sector.³²⁰ However, non-nationals with work permits qualified for damages for employment injuries and diseases. COIDA to a certain extent restricts the right of a returning non-national resident to claim benefits, but simultaneously provides for the portability of benefits, albeit not on a continuous basis.³²¹

Employees or those depending on them who live outside the Republic or have been out of the country for six months or more who are supposed to receive compensation can be awarded a lump sum, thereby losing their pension benefits.³²² South Africa and other countries can enter in to bilateral mutual cross-border agreements provided by COIDA. This agreement has to do with the compensation for employees

³¹⁵ *Occupational Diseases in Mines and Works Amendment Act 60 of 2002 S 32.*

³¹⁶ *Compensation for Occupational Injuries and Diseases Act 130 of 1993*

³¹⁷ *Occupational Diseases in Mines and Works Amendment Act 60 of 2002.*

³¹⁸ *Occupational Health and Safety Act 85 of 1993.*

³¹⁹ *Health and Safety in Mines Act 29 of 1996.*

³²⁰ S 1(xx) (d) (v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

³²¹ S 60 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

³²² *Ibid.*

involved in accidents causing death or disabilities. The potential benefit for returning non-nationals is clear. However, little use has been made of this provision.³²³

Olivier remarked that due to financial or medical constraints or both, formal mine workers from neighbouring countries might be frustrated since they might not be able to travel to South Africa for certification of their documents for them to be compensated.³²⁴ He further noted that previous mine workers from nearby countries do not have adequate medical examination services to affected former workers. He stated that quite often, services are focused on existing beneficiaries while formal workers who have not yet been examined are left out.³²⁵

He finally observed that, "streamlined and uniform payment mechanisms for cross-border workmen's compensation payments are largely absent, many beneficiaries and dependants in neighbouring countries suffer due to the absence of banking facilities or inaccessibility of banking facilities, transaction costs substantially reduce the value of a benefit paid out to beneficiaries."³²⁶ The Bill of Rights gives everyone the right to fair labour practices. The Labour Relation Act lays down code of fair labour practice which does not discriminate on anyone.

4.5.3 The Labour Relations Act 66 of 1995

Every employee has a right to a just and equitable labour practice to form and join trade unions as well as to strike. Employers also have the right to form and join an employer organisation.³²⁷ The Labour Relations Act 66 of 1995 set forth the ground rules for labour relations which regulate collective bargaining, strikes, lock-outs and establishes rules and codes of good practice on fair labour practices (e.g. in relation to dismissals).

Furthermore, it creates a forum, the Commission for Conciliation, Mediation and Arbitration to deal with cheap and accessible labour matters while a specialised

³²³ S 94 of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

³²⁴ Olivier 2011 *SADC LJ* 128.

³²⁵ Olivier 2011 *SADC LJ* 128.

³²⁶ *Ibid.*

³²⁷ S 23 of the *1996 Constitution*.

Labour Court and Labour Appeal Court was created to deal with more complex disputes like strikes, lockouts or retrenchments. Some categories of more vulnerable workers who from the past were excluded from labour legislation, such as farm workers and domestic workers are included in the Labour Relations Act.³²⁸ However non-nationals who are undocumented are not covered since they are not considered as employees because of their irregular status. The case of *"Kylie" v CCMA and Others*³²⁹ is yet another example evincing that the presence of unlawfulness in an employment contract does not necessarily signify that the employment relationship between the parties concerned will never enjoy any protection under the Labour Relation Act and its jurisprudence.

4.5.4 Pension Funds Amendment f Act 22 of 1996

The pension funds deals with the registration, incorporation, regulation and the dissolution of pension funds. South Africa does not have a public retirement or pension fund like is the case with Mozambique.³³⁰ Retirement insurance is covered by private mechanism in the form of pension and provident funds and is being regulated by the Pension Funds Amendment Act.³³¹ South Africa also does not have a national or public old age insurance scheme.³³² Retirement insurance scheme is being controlled by the Pension Fund Act 22 of 1996. The Financial Services board controls Pension and providence which are regulated by the Pension Funds Act³³³ while the Financial Services Board³³⁴ carries out regulatory and administration.

The Military Pensions Act,³³⁵ the Special Pensions Act³³⁶ the Pension and Providence Act 24 of 1956 and the General Pensions Act³³⁷ regulate occupation-

³²⁸ *Labour Relations Act* 66 of 1995.

³²⁹ [2010] 7 BLLR 705 (LAC). Para 11.

³³⁰ However, significant steps have already been taken by the South African Government towards establishing a comprehensive national social security scheme covering retirement benefits as well.

³³¹ *Pension Funds Amendment Act* 22 of 1996:

It is believed that around 75% of workers in the formal sector in South Africa are members of occupation-based or private retirement schemes.

³³² Significant steps have already been taken by the South African Government towards establishing a comprehensive national social security scheme covering retirement benefits.

³³³ *Pension Funds Amendment Act* 22 of 1996.

³³⁴ *Financial Services Board Act* 97 of 1990.

³³⁵ *Military Pensions Act* 84 of 1976.

³³⁶ *Special Pensions Act* 69 of 1996.

based retirement schemes for particular categories of workers. There is no general applicable mechanism which forces employers to make compulsory retirement provision for their workers even though the government is trying to provide solution to the situation.³³⁸ Large numbers of non-nationals are employed in the mining sector. Many of these non-nationals do not belong to any retirement scheme, at retirement they are left without retirement benefits. Provident funds pay out lump sums retirement benefits to both junior and manual level labourers by means of joint agreement while senior workers receive monthly benefits through pension funds.³³⁹

Dependants of a deceased member can be paid survivors' benefits if the member dies before being retired. However, delays in paying benefits to dependants of a deceased may be caused due to the fact that, the South African Pension Fund Amendment Act 22 of 1996³⁴⁰ allows twelve months within which to mark out and confirm dependants. Also, it can be required by the trustees of the provident fund that an independent institution form a so-call trust fund especially if the beneficiary is a minor. This fund is referred to as beneficiary funds.³⁴¹ These retirement schemes mentioned above also falls under the supervision and regulatory authority of the Financial Services Board. However, until recently, the Master of High Court had the responsibility to monitor trust funds formed for the benefit of minor children or minor children of migrant workers who have died.

Olivier pointed out that, documents need to be submitted before a lump sum payment or monthly payment is made possible.³⁴² He noted that this could be impossible to some surviving spouses and their children if they live in faraway areas with a low level of literacy. It might prove even more challenging for non-nationals to know which document is needed, where to submit it how to get hold of a marriage certificate and other important documents.³⁴³ This can bring about a serious setback as beneficiaries can only receive continuous payment if the required document(s)

337 *General Pensions Act 29 of 1979.*

338 *Olivier 2011 SADC LJ 128.*

339 *Olivier 2011 SADC LJ 128.*

340 *South African Pension Funds Amendment Act 22 of 1996.*

341 *S 37 (c) of the Pension Fund Act 29 of 1979.*

342 *Olivier 2011 SADC LJ 128.*

343 *Olivier 2011 SADC LJ 134*

are submitted quite often this may be beyond the reach of many illiterate dependants including non-nationals parents.³⁴⁴

4.5.5 South African Schools Act 84 of 1996

As mentioned earlier in this research, socio-economic rights are broad thus cannot be limited only to social security. Basic education forms part of the socio-economic rights in South Africa. Section 29 of this Act³⁴⁵ guarantees everyone the right to basic education, including adult basic education. Section 5(3) is to the effect that, school attendance for children between the ages of seven to fifteen years is obligatory. Section 5 (3) (a) particularly states that learners should not be refused admission to a public school on grounds that his parents are unable to afford for his or her fees.³⁴⁶

Section 29 of the Constitution guarantees the right to basic education and adult basic education. Education must be made available for all through reasonable measures.³⁴⁷ It is important to note that the right to basic education is not qualified by the phrases “within available resources” or “progressive realisation of the right” as is found in many of the other socio-economic rights of the Constitution.³⁴⁸ This means that the right to basic education is an immediate right, unlike the right to further education, which is subject to available resources as well as progressive realisation.

This would seem to imply that resource constraints would not be applicable in determining the content of the right to basic education. However, it may become relevant in a determination at the limitations phase. The National Education Policy Act³⁴⁹ empowers the Minister of Education to determine national norms and standards for education planning, provision, governance, monitoring and evaluation. The higher education sector in South Africa is predominantly public; whereas the private education sector is relatively small.

³⁴⁴

Ibid.

³⁴⁵

South African Schools Act 84 of 1996.

³⁴⁶

Ibid.

³⁴⁷

S 29 of the 1996 Constitution.

³⁴⁸

The 1996 Constitution.

³⁴⁹

National Education Policy Act 27 of 1996.

Government and its appointed agencies, such as the National Student Financial Aid Scheme and the Tertiary Fund for South Africa finance higher education. The private sector also provides financing in higher education, but this is to a limited scale. However, the principle of shared costs applies with regard to financing higher education meaning that the government and/or students share the costs of higher education.³⁵⁰

4.5.6 The Housing Act 107 of 1997

In its White Paper on a New Housing Policy and Strategy for South Africa adopted in 1994, the government recognised housing as a basic socio-economic right. It also acknowledges its duty to take steps and create conditions which will lead to an effective right to housing for all and to refrain from taking steps which promote or cause homelessness.³⁵¹ In *Grootboom*,³⁵² the Constitutional Court also recognised this right when it held that:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording Socio-economic rights to all people therefore enable them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.³⁵³

A range of measures have been adopted to give effect to the constitutional right of everyone to have access to adequate housing as provided in section 26 of the Constitution.³⁵⁴ The following legislative and policy measures illustrate this human rights-based approach to housing.

³⁵⁰ Ishengoma Johnson Financing Higher Education in Post-Apartheid South Africa: Trends, Developments and Challenges ahead. Anon <http://ahero.uwc.ac.za>. In colleges and other higher education institutions that produce "pure public goods" such as nursing, teacher training and police training colleges, the government is responsible for all financing.

³⁵¹ Department of Human Settlement *White Paper: A New Housing Policy on Strategy for South Africa* para 4.4.

³⁵² *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169 para 26.

³⁵³ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169 para 26.

³⁵⁴ S 26 of the 1996 Constitution.

The purpose of the Housing Act 107 of 1997 is to give effect to the constitutional right of access to adequate housing by facilitating a sustainable housing development process. It sets out the duties of the national, provincial and local spheres of government in promoting housing development, as well as the principles that must guide them in this process. These guiding principles include, giving priority to the needs of the poor; encouraging and supporting individuals and communities to fulfil their own housing needs by assisting them in accessing land, services and technical assistance; preventing unfair discrimination in the housing development process; and promoting the special housing needs of the disabled, marginalised women and other disadvantaged groups.

The Act further seeks to give effect to the constitutional right against being evicted from one's home without a court order made after considering all the relevant circumstances.³⁵⁵ It stipulates fair procedures for eviction proceedings such as written and effective notice. A court may only grant an eviction order if it is of the opinion that it is "just and equitable to do so, after considering all relevant circumstances." Relevant circumstances include the availability of alternative accommodation, and the rights and needs of the elderly, children, disabled persons and households headed by women.³⁵⁶

In *Grootboom*,³⁵⁷ a community of squatters, evicted from an informal settlement in Wallacedene had set up minimal shelters of plastic and other materials at a sports centre adjacent to Wallacedene community centre. They lacked basic sanitation or electricity. The group brought an action under sections 26 (the right of access to adequate housing) and 28 (children's right to basic shelter) of the Constitution³⁵⁸ for action by various levels of government. The High Court, relying on the principles of judicial deference outlined by the Constitutional Court in *Soobramoney*³⁵⁹ found that the respondents had taken "reasonable measures within available resources to

³⁵⁵ S 26 (3) of the 1996 Constitution.

³⁵⁶ S 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

³⁵⁷ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169.

³⁵⁸ S 26 and 28 of the 1996 Constitution.

³⁵⁹ *Soobramoney v Minister of Health* 1998 1 SA 765 (CC).

achieve the progressive realisation of the right to have access to adequate housing” as required by Section 26 (2) of the Constitution.³⁶⁰

However, because the right of children to shelter in Section 28³⁶¹ was not subject to available resources, the High Court held that the applicants were entitled to be provided with basic shelter. On appeal, the Constitutional Court found no violation of section 28³⁶² but found instead a violation of the right to adequate housing in Section 26.³⁶³ The court held that section 26³⁶⁴ obliges the state to devise and implement a coherent, coordinated housing programme and that in failing to provide for those in most desperate need the government had failed to take reasonable measures to progressively realise the right to housing.

The court ordered that the various governments devise, fund, implement and supervise measures to provide relief to those in desperate need. The South African Human Rights Commission agreed to monitor and if necessary report on the governments' implementation of the order. Dekker pointed out that “the court would step in (despite the possible infringement of the powers of the executive authority) to protect minority rights against majority oppression.”³⁶⁵ It is a constitutional provision that everyone has the right to have access to adequate housing and the state has a duty to, within its available resources, to progressively realise this right.³⁶⁶

In *Grootboom*,³⁶⁷ the Constitutional Court endorsed the idea that adequate housing entails “more than bricks and mortar” and for a person to have access to adequate housing, there must be land, services and a dwelling. It held that the Constitution³⁶⁸ requires the state to devise and implement, within its available resources, a comprehensive and coordinated program progressively to realise the right of access

³⁶⁰ S 26 (2) of the 1996 Constitution.

³⁶¹ S 28 of the 1966 Constitution.

³⁶² *Ibid.*

³⁶³ S 26 of the 1966 Constitution.

³⁶⁴ *Ibid.*

³⁶⁵ Dekker 2009 *African Human Rights Law Journal* 389.

³⁶⁶ Adequate housing is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.

³⁶⁷ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169 para 31.

³⁶⁸ The 1996 Constitution.

to adequate housing.³⁶⁹ The programme devised must include reasonable measures to provide relief for those people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations. Furthermore in order to give effect to section 26 of the Constitution,³⁷⁰ the Department of Housing administered two grants: the National Housing Subsidy Grant and the Human Settlement Redevelopment Grant. The National Housing Subsidy Scheme is government's primary housing delivery programme and beneficiaries are expected to make a minimum contribution in order to qualify for the subsidy.

This housing subsidy is not a cash pay-out but is paid directly to a financial institution or to a well recognised attorney.³⁷¹ In order to qualify for this housing subsidy, applicants are expected to fulfil the following qualities: one must be a resident of South Africa ie either citizen or permanent resident; must be competent to contract (that is above 18 years/married); there must be a monthly household income; must not yet be a beneficiary of government funding and must be a first time property owner. All other categories of non-nationals do not have access to public housing. Non-nationals who fall under this categories benefit from this housing subsidy.

4.5.7 The Basic Conditions of Employment Act 75 of 1997

This Act³⁷² provides fundamental rights for employees with regards to working hours and different types of leaves for all workers including non-nationals. For example it allocates at least four months maternity leave for women and also contains requirements for protecting the health of pregnant and nursing employees. Because the provision of this Act covers for all including non-nationals women employed either by government or private organisation, is an indication that there is no separate law that regulates the basic condition of employment for only non-nationals. However note must be taken of the fact that the non-nationals in this case includes

³⁶⁹ *S 26 (2) of the 1966 Constitution.*

³⁷⁰ *S 26 of the 1966 Constitution.*

³⁷¹ Anon 2006 <http://www.ffc.co.za>:

Individual housing subsidies are available to low-income households who wish to buy a residential property for the first time. The subsidies can be used to buy an existing house, including the property on which the house stands. Successful applicants will receive this subsidy only once. The housing subsidy is dependent on the gross (before deductions) monthly household income.

³⁷² *Basic Conditions of Employment Act 75 of 1997.*

those who have the required documentation including work permit, permanent resident and or Identification (ID) card.

4.5.8 The Employment Equity Act 55 of 1998

This Act³⁷³ places an obligation to employers to remedy unfair discrimination in the workplace as well as an obligation on larger employers to implement affirmative action strategies. This was meant to ensure that there is an equal representation in the workplace for a certain category of people called the designated group, comprising of black women and people with disabilities. The Skills and Development Act was enacted so that the uneducated population could be equipped with a skill. This legislation is particularly important in the light of the apartheid legacy of illiteracy and low educational levels as discussed below. The entire civil population including non-nationals has the right to use this Act to fight any unfair discrimination by the government provided they have the status that allows them to work in the country.

4.5.9 The Skills and Development Act 97 of 1998

This Act was enacted when the level of illiteracy was very high. Approximately twenty percent of South Africans aged twenty years or more had received no education. Only about six percent had post-school qualifications.³⁷⁴ Twenty-four percent of Africans were uneducated as compared to one percent of whites.³⁷⁵ The Act made it easy for workers to acquire proper skills. A National Training Fund as well as training authorities and boards were established. Employers had to pay one percent of their payroll so that training can be acquired by employees.

Laws, policies and programmes were put forward to fight against unfairness. As a constitutional provision, national legislations were enacted to the Constitution imposed duties on the state to enact national legislations to give effect to the right against unfair discrimination mostly in the private sector. The right to access to information, and the right to just administrative action were also given effect to.³⁷⁶ In order to carry out these obligations, the Parliament passed the following important

³⁷³ *Employment Equity Act 55 of 1998.*

³⁷⁴ *Skills Development Act 97 of 1998.*

³⁷⁵ *Statistics South Africa 1998 Statistics South Africa 37 and 41.*

³⁷⁶ S 9 (4), 32 and 33 read with item 23, Schedule 6 of the 1996 Constitution.

Acts:³⁷⁷ the Promotion of Equality and Prevention of Unfair Discrimination Act³⁷⁸, the Promotion of Access to Information Act³⁷⁹ and the Promotion of Administrative Justice Act.³⁸⁰

Non-nationals as well as the entire civil population have the right to use these three Acts i.e. the promotion of Equality and Prevention of Unfair Discrimination Act, The promotion of Access to Information Act and The promotion of Administrative Justice Act to fight against government policies as well as laws which seems to discriminate against them and insist on accountability and contribution in the development processes. It is on the basis of these legislations mentioned above that non-nationals in the *Khosa and Others v Minister of Social Development and Others* that some discriminatory provision in Social Assistance Act of 1994 was challenged. This is equally evident in the case *Mahkaule and others v Minister of Social Development and others*, where the applicants challenged Section 3(c) and Section 3 of the Social Assistance Act of 1994 as being discriminatory.³⁸¹

4.5.10 Medical Schemes Act 131 of 1998

This Act³⁸² provides the manner in which the Registrar of Medical Schemes is appointed, it organises some of the programmes of the medical schemes. Furthermore, it makes provisions on how to manage the medical schemes and also provides measures for the control of medical schemes. There is no national or public health insurance scheme in South Africa.³⁸³ A small part of the population is provided with health care through private schemes controlled by the Medical Schemes Act³⁸⁴ which is mainly occupation and insurance-based.³⁸⁵ Non-nationals

³⁷⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁷⁸ Act 4 of 2000.

³⁷⁹ Act 2 of 2000.

³⁸⁰ Act 3 of 2000.

³⁸¹ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

³⁸² Medical Schemes Act 131 of 1998.

³⁸³ Olivier 2011 SADC LJ 135.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

enjoy public health care even public health care. Non-nationals with work permit and permanent resident enjoy occupational based health and retirement schemes.³⁸⁶

4.5.11 The Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributory Act 4 of 2002

Issues concerning unemployment in South Africa are being controlled by these two Acts.³⁸⁷ The Unemployment Insurance Fund³⁸⁸ is created by the Unemployment Insurance Act³⁸⁹ which provides unemployment settlements for some employees as well as payment of illness, maternity, adoption and dependant's benefits concerning the unemployment of such employees. The Unemployment Insurance Board is also created by the Unemployment Insurance Fund. It establishes the functions of the Board and the designation of the Unemployment Insurance Commissioner. It further provides for procedure for the collection of benefits.

The Unemployment Insurance Act³⁹⁰ excludes non-nationals migrant workers with fixed-term contracts from its coverage. The workers do not contribute thereby creating a problem. The workers are expected to leave the country on expiration of their contract, apprenticeship or learnership.³⁹¹ Since they are not allowed to contribute, they lose insurance benefits on expiration of their contracts. In their country of origin, they are also excluded from insurance.³⁹² Non-nationals such as farm workers and mine workers who work on contract basis in South Africa are mostly affected. However, despite their role in the economy of the country, non-nationals do not contribute to the UIF which brings about a severe problem when they lose their employment and cannot receive any compensation both in SA and their country of origin.³⁹³

³⁸⁶

Ibid.

³⁸⁷

Olivier 2011 SADC LJ 135.

Unemployment Insurance Contributions Act 4 of 2002.

³⁸⁸

Unemployment Insurance Act 63 of 2001.

³⁸⁹

Ibid.

³⁹⁰

Unemployment Insurance Act 63 of 2001.

³⁹¹

S 3 (1) (d) of the *Unemployment Insurance Act 63 of 2001.*

³⁹²

Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective xiii.*

³⁹³

Olivier 2011 SADC LJ1 28.

Again, until now, the Unemployment Insurance Fund has no proper knowledge on how to pay benefits on matters outside South Africa. Furthermore, benefits can only be paid to non-nationals only with documents issued within South African borders.³⁹⁴ Besides, section 3 (1) (d) of the Unemployment Insurance Act³⁹⁵ excludes non-nationals migrant workers with fixed term contracts as they are expected to leave the country after termination of their contract³⁹⁶ This conflicts with section 27 (1) (c) of the Constitution³⁹⁷ which accords the right to social security to everyone living in South Africa. The conflict between section 3(1) (d) of UFA and section 27(1) (c) of the Constitution will require some consideration because the wordings of the Constitution indicates that “everyone” which means any person within South Africa should be accorded the right to Social Insurance and/or Social Insurance.

4.4.12 Occupational Disease in Mines and Works Act 60 of 2002

This Act governs the lifelong monitoring and surveillance of former miners and evaluation of both former and active miners for possible compensable occupational lung diseases.³⁹⁸ The surveillance of an active miner is the responsibility of the employer as stipulated under the Mine Health and Safety Act which was founded in 1997.³⁹⁹The aims of the Act are to provide for mandatory reporting of certain occupational lung diseases to the Medical Bureau for Occupational Diseases in the Department of Health, to provide certain benefits to workers who develop certain occupational lung diseases such as, pneumoconiosis silicosis, asbestosis (pleural & or interstitial), coal, other pneumoconiosis, tuberculosis (for the compensation of tuberculosis, the worker must perform at least 200 risk and has clinically active tuberculosis during employment or contracted tuberculosis within 24 months of working the last risk shift), Chronic Obstructive Airways Disease, progressive systemic sclerosis (not skin), manganese poisoning (usually cerebral).⁴⁰⁰

394

Ibid

395

S 3 (1) (d) of the *Unemployment Insurance Act* 63 of 2001.

396

Ibid.

397

S 27 (1) (c) of the 1996 *Constitution*.

398

Occupational Disease in Mines and Workers Act 60 of 2002.

399

Mine Health and Safety Act 29 of 1996.

400

Occupational Diseases in Mines and Workers Act 60 of 2002.

The Act⁴⁰¹ further provides for certain benefits for dependents of workers who die from such diseases. The Act is being enforced by the Department of Health and administered by the Medical Bureau for Occupational Diseases and the Compensation Commissioner for Occupational Diseases. The director of the Medical Bureau for Occupational Diseases in Braamfontein, Johannesburg is responsible for ensuring good quality of benefit medical examinations as well as post-mortem examinations for the removal of cardio-respiratory organs.⁴⁰² The Certification Committee of the Medical Bureau for Occupational Diseases is responsible for the medical assessment of claims for compensation, guided by standards set by the Minister of Health.

The Reviewing Committee of the Medical Bureau for Occupational Diseases will review referrals from the Certification Committee or from individuals or parties not satisfied by the decision of the Certification Committee.⁴⁰³ Mine workers can request to appear before either the Certification or the Review Committee to address their concerns. Compensation payment is made by the Compensation Commissioner for Occupational Diseases in Braamfontein, Johannesburg. The Compensation Commissioner for Occupational Diseases receives levies from operating mines on behalf of mineworkers. Occupational injuries and diseases which take place outside the mine sector and other occupational disease which are not covered by the Occupational Disease in Mine Workers Act ⁴⁰⁴ are covered by Compensation of Occupational Injuries and Disease Act.⁴⁰⁵ The provision of this Act extends to all mine workers including non-nationals like was analysed in the case of *Mankayi vs AngloGold Ashanti Ltd.*⁴⁰⁶

The applicant in this case claimed that during the course of his employment to the defendant as a mine worker, he was exposed to harmful dusts and gases, including silica dust, at his workplace and in the work environment. As a result of this exposure, he claimed that he contracted an occupational disease or diseases in the

401 *Ibid.*

402 *Ibid.*

403 Olivier 2011 *SADC LJ* 12:1.

404 *Occupational Disease in Mines and Workers Act* 60 of 2002.

405 *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

406 [2010] JOL 25268 (SCA).

form of silicosis, pulmonary tuberculosis and obstructive airways disease resulting in his suffering adverse physical and mental consequences, having a reduced life expectancy and being unable to work. Section 35(1) of COIDA requires all employees falling within the ambit of COIDA to be entitled benefits. The court ascertained the meaning to be that the employee's action for the recovery of damages in respect of an occupational injury or disease resulting in the disablement or death of the employee applies to all employees includes non-nationals without fear or favour.

4.5.13 The Immigration Act 13 of 2002

The Immigration Act as amended⁴⁰⁷ guides the entry and residence of non-nationals into South Africa. This Act⁴⁰⁸ differentiates between different categories of non-nationals depending on their reason of entering in to South Africa which also influences the kind of permit which is issued to them. Section 7 (b) of the Act,⁴⁰⁹ allows non-nationals with permanent residence permit (non-nationals who are allowed to live in South Africa for an indefinite period of time.) to reside in the country or non-nationals who possesses one of the fourteen temporary residence permits.⁴¹⁰ Legally, permanent resident holders have the same status like nationals.⁴¹¹

Looking at some Constitutional Court judgements in South African,⁴¹² for example, a permanent residence holder has the right to enjoy all the rights in the Bill of Rights,⁴¹³ except those rights explicitly reserved for South Africans nationals. They are able to apply for citizenship after five years⁴¹⁴ after which they are equality qualify to apply for a South African ID document. However it must be made clear that

⁴⁰⁷ *Immigration Act 13 of 2011 as Amended.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *S7 (b) of the Immigration Act 13 of 2011 as amended.*

⁴¹⁰ *Immigration Act 13 of 2011.*

⁴¹¹ A permanent resident is a non-national who has been granted permission to reside in the country indefinitely.

⁴¹² *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 83.

⁴¹³ Chapter 2 of the 1996 Constitution.

⁴¹⁴ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 83.

temporary residence holders differ from permanent residence holders in that, they are allowed to live in South Africa for a definite period of time.

Non-nationals migrant workers particularly those who work in the mines always work on temporary basis even though most of them have been working in South Africa for more than five years.⁴¹⁵ Those working under special conditions for instance labour agreements entered in to between South Africa and other countries need to have their permits renewed yearly.⁴¹⁶ The Act provides that, a temporary residence permit can only be issued to a person on grounds that the person does not become an undesirable element to the state.⁴¹⁷

One way in which this result is obtained is by including various financial requirements before a permit can be issued for a person to lawfully enter in to South Africa. According to the Act,⁴¹⁸ a non-national who lacks the required finances can be termed an undesirable person and refuse entry in to South Africa. The Act⁴¹⁹ further makes provision for corporate permits to be issued. In this case, a company or corporate client can employ lots of non-nationals on a corporate or communal basis without the need to comply with the burdensome requirements and procedures needed in terms of the Act⁴²⁰ for individuals permit.⁴²¹

Corporate employers are given special status in relation to non-nationals migrant workers from the signing countries according to Section 21 of the Act.⁴²² This means that, special treatment is accorded to corporate employers with those in SADC countries and selected sectors like the mining industries.⁴²³ Again, the corporate employer such as a mining house has to show financial security except in cases

⁴¹⁵ Olivier 2011 SADC LJ 121.

⁴¹⁶ S 30 of the *Immigration Act* 13 of 2011: An undesirable person includes anyone who is likely to become a public charge. this means, the following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration, do not qualify for a port of entry visa, visa, admission into the Republic, a temporary or a permanent residence permit.

⁴¹⁷ S 30 of the *Immigration Act* 13 of 2011: An undesirable person includes anyone who is likely to become a public charge.

⁴¹⁸ *Immigration Act* 13 of 2011.

⁴¹⁹ *Ibid.*

⁴²⁰ Oliver 2011 SAC LJ27.

⁴²¹ S 21 of the *Immigration Act* 13 of 2011.

⁴²² *Ibid.*

⁴²³ *Ibid.*

where they have been excluded partly or fully. This is to cover up for deportation cost or should in case the permit is withdrawn.⁴²⁴

Furthermore, financial security is also needed in cases whereby a person employed under the permit does not leave South Africa after he/she is no longer covered by the corporate permit. For instance if the time in which the worker was supposed to work has expired.⁴²⁵ This permit does not warrant its holder to reside permanently in South Africa. Also, the permit has a vital implication for the place of social security for migrant workers from SADC who are employed according to provisions of the permit read alongside with the terms of labour agreements entered in to with South Africa.⁴²⁶ Non-nationals migrant workers are excluded from benefiting from unemployment insurance benefits as explained below.

One looking at the provision of the Act, it seems as if it tries to strike an equilibrium between the need of skilled labourers who can be paid low wages and in the other hand to reduce the flow of huge population of unskilled non-nationals migrant workers.⁴²⁷ Hence there is also the concern that the working conditions of such unskilled migrant workers can cause challenges regarding labour practices regulated by law.⁴²⁸

According to Dekker,⁴²⁹ the Act⁴³⁰ seems not to be an appropriate instrument to control the entry of non-nationals migrant workers from other Southern African country and other countries in to South Africa.⁴³¹ Dekker further remarked that, many documented non-nationals seemingly are left on temporary permits for an extensive period of time⁴³² since quite often the period to apply for permanent residence after five years is not usually advertised and encouraged.⁴³³ Convention 118 on Equal Treatment (social Security) Convention, 1962 (No 118), Radiation and Protection

424 Ibid.

425 Ibid.

426 Ibid.

427 Immigration Act 13 of 2011

428 Ibid.

429 Dekker, 2009 African Human Rights Law Journal 389

430 Immigration Act 13 of 2011.

431 *Decker and Olivier Access to social Security for Non-Citizens and Informal Workers: An International German and South African Perspective xiii.*

432 Ibid.

433 Ibid.

Convention, 1960 (No. 155) all have provisions that protect the rights of all migrant workers.

4.5.13 The Social Assistance Act 13 of 2004

This is the main legislation which deals with social assistance in South Africa. The social assistance system in South Africa is categorically based and means-tested.⁴³⁴ Grants are given only to a particular category of people who seems to be vulnerable.⁴³⁵ As far as non-nationals are concerned, social assistance is only provided to non-nationals who are permanent residence holders and refugees. This excludes old age grant.⁴³⁶ The Minister of Social Development in accordance with the Minister of Finance can agree on special conditions which can enable a particular group or class of non-nationals with temporary residence to benefit from social assistance.⁴³⁷ However, no such bilateral agreement has yet been signed and this does not include international agreements.⁴³⁸

The Social Assistance Act⁴³⁹ as amended does not include refugees in its social assistance coverage, but refugees who are legal are supposed to enjoy complete legal and economic protection as provided in the Bill of Rights.⁴⁴⁰ The Refugee Amendment Act specifically deleted the provision which qualify refugees to the same basic health care and the same basic primary education as South African nationals.

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This does not tie with the provision of the 1951 United Nations Convention Relating to the Status of Refugees of which South Africa is a signatory. This Convention requires that, member states to this Convention provide refugees who are living legally in their country equal treatment as nationals in the area of public relief and assistance.⁴⁴² In the case of *Union of Refugee Women & Others v Private Security*

⁴³⁴ Social Assistance Act 13 of 2004.

⁴³⁵ Immigration Act 13 of 2011.

⁴³⁶ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 83.

⁴³⁷ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 267.

⁴³⁸ Olivier 2011 *SADC LJ27*.

⁴³⁹ Social Assistance Act 59 of 1992.

⁴⁴⁰ Chapter 2 of the 1996 Constitution.

⁴⁴¹ Ibid.

⁴⁴² Refugees Amendment No. 12 of 2011.

Industry Regulatory Authority & Others, the Constitutional Court held that, refugees with asylum status have the right to remain ad infinitum in South Africa.⁴⁴³

The Constitutional Court considering the position of refugees in South Africa, considered them as permanent residence holders and qualified them with equal rights and privileges as nationals even though not in all circumstances.⁴⁴⁴ Furthermore, the court allowed them to look for jobs even though not in all industries. It seems as if legally, refugees and asylum-seekers have the right to occupational social security schemes together with health insurance and retirement insurance. Also, they have the right to compensation for occupational injuries and diseases as well as motor vehicle accidents.

Olivier⁴⁴⁵ pointed out that, they fall outside those qualified as workers generally covered by retirement fund arrangements because of the impermanent nature of their stay in South Africa.⁴⁴⁶ He again noted that "it is unclear whether refugees and asylum-seekers are entitled to contribute to and benefit from unemployment insurance." He submitted that "one reading from the UIA⁴⁴⁷ leaves one with the impression that they are not allowed to contribute to the Unemployment Insurance Fund."⁴⁴⁸ However, the Social Assistance Act⁴⁴⁹ makes it possible for refugees to benefit from disability grant, the foster care grant, and social relief of distress.⁴⁵⁰ They are however exempted from other social assistance benefits like the old age grant. While the Refugees Act⁴⁵¹ qualifies refugees to take up jobs, it does not qualify asylum-seekers to work despite the fact that the problem of employment is a critical component of the fundamental dignity and wellbeing of both asylum seekers

⁴⁴³ *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others* 2007 28 ILJ 537 (CC).

⁴⁴⁴ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 83.

⁴⁴⁵ Olivier 2011 SADC LJ 27.

⁴⁴⁶ Ibid.

⁴⁴⁷ S 3 (1) (d) of the *Unemployment Insurance Contributions Act* 4 of 2002.

⁴⁴⁸ *Unemployment Insurance Contributions Act* 4 of 2002.

⁴⁴⁹ *Social Assistance Act* 59 of 1992.

⁴⁵⁰ Gen Not 518 in GG 31356 of 22 August 2008:

Regulation 3 (a) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance provides that a person is eligible for a disability grant if he / she is a South Africa citizen, permanent resident or refugee.

⁴⁵¹ *Refugee Amendment Act* 33 of 2008.

and refugees who are both a defenceless categories of non-nationals. In cases of emergency, Asylum-Seekers are provided with social assistance for instance emergency health care.⁴⁵²

In the case of *Minister of Home Affairs & Others v Watchenuka & Another*,⁴⁵³ the Supreme Court of Appeal decided the fate of asylum-seekers who are still awaiting the Home Affairs to decide on their application for asylum.⁴⁵⁴ In this case, the right to study and to work was accorded to them.⁴⁵⁵ They now have access to jobs and can be covered fully with all social insurance benefits which are needed even though government polices encourages self-dependence for refugees and their local amalgamation. Non-nationals with temporary residence are generally disqualified from the scope of social assistance which is the main social protection strand.⁴⁵⁶

Strydom noted that “the position of non-national migrant is not encouraging as they remain excluded from most benefits at the work place.”⁴⁵⁷ Lamarche pointed out that, “non-nationals are excluded from virtually all social assistants grant including some social insurance schemes for instance the unemployment insurance, she pointed out that, there is no constitutional justification for this exclusion.”⁴⁵⁸ She submitted that:

The exclusion of non-nationals migrant workers raises serious questions of a constitutional nature. Jurisprudentially the right to equal treatment has already in the area of employment been interpreted to imply that, there are no bases for distinguishing between South Africans and non-nationals who have obtained permanent residence status.⁴⁵⁹

To Lamarche, some of the exclusion may not tie with South Africa’s treaty obligations.⁴⁶⁰ According to her, the position of non-nationals is one of South Africa’s weaknesses in its social security system stating that:

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Ibid

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Minister of Home Affairs & Others v Watchenuka & Another 2004 1 All SA 21 (SCA).

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Regulation 7 of the Refugee Regulations 2000.

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Minister of Home Affairs & Others v Watchenuka & Another 2004 1 All SA 21 (SCA).

456

Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 267.

457

Ibid.

458

Jansen van Rensburg and Lamarche *The Right to Social Security and Assistance* 232

459

Ibid.

460

Jansen van Rensburg and Lamarche. *The Right to Social Security and Assistance* 232.

Apart from some exceptions for foreigners with permanent residence status, non-nationals are generally excluded from social security in South Africa. She further asserts that, this is particularly evident in social insurance in South Africa. As far as employment based schemes are concerned, entitlement to benefits mainly depends on employee-status. It follows that only those who have permanent residence, or whose stay in the country is otherwise legal, may qualify to be 'employees' in terms of the Unemployment Insurance Act or the Occupational Injuries Act.⁴⁶¹

She observed that, the only fund which is not tied to nationality and employment is the Road Accident Fund.⁴⁶² Dekker also noted that "although South Africa has a fairly well-developed social security system for a developing country, the system suffers from many deficiencies."⁴⁶³ At an instance, she states that "the system is in fact not comprehensive and many categories of people are excluded from its protective scope such as non-nationals, agricultural workers 'et cetera'⁴⁶⁴ The enjoyment of the right to social security is crowded with so many difficulties as is discussed below.

4.6 CONCLUSION

This chapter presented a descriptive analysis of the legislative framework of social security in South Africa. A closer examination of the present legislative framework confirms that the system suffers from many defects. The system's exclusionary nature, when looked at closely, is more than all other weaknesses in the system. This is particularly significant, because it lays the groundwork upon which this study is standing. Many groups of people are disqualified from social security protection, mainly because the system follows a limited risk-based approach (social insurance) and also envelops only persons who meet the requirements of "employees", or those who meet the criterion of a means test in the grant system (social assistance).

A close look at the system also reveals that, the system is fragmented. The administration of the system is also fragmented; there is no uniform law which deals

⁴⁶¹ Millard 2008 AHRLJ 37- 42.

⁴⁶² *Ibid*

⁴⁶³ *Decker and Olivier Access to social Security for Non-Citizens and Informal Workers: An International German and South African Perspective xiii.*

⁴⁶⁴ *The 1996 Constitution.*

with the issue of social insurance. Also, different governmental departments deal with different social insurance schemes and there are too many amendments which lead to increasing inefficiency. In all of this, non-nationals are placed in a precarious state because enforcing their social security rights is difficult. Some illiterate non-nationals might not know which law is enforceable at the time. Some might get confused about which department deals with their particular case.

Again movement from one place to another for instance, certification and medical examination for victims of occupational injuries under Compensation of Occupational injuries and Disease Act⁴⁶⁵ has to go to Johannesburg for certification. This can be strenuous and expensive for the beneficiaries especially if they are unable to afford transport cost to Johannesburg.

⁴⁶⁵

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

CHAPTER 5

JURISPRUDENTIAL AND INTERNATIONAL NATURE OF SOCIAL SECURITY

5.1 INTRODUCTION

The previous chapter examined the legislative framework of social security in South Africa. This current chapter will examine the jurisprudential and international nature of social security. The issue of social security is critical at international level. The right to social security is universal in nature since it focus on providing social society to members in the society who are unable to provide for themselves and dependents adequate social security. Due to this universal nature of social security, many international instruments on social security have been enacted and incorporated in to the national laws of members' states and implemented as part of their national laws.

The intention here is that there should be a universal coverage of the right to social security. Without international protection non-nationals find themselves in a precarious situation because, they stand the risk of not benefiting from social security from their home as well as the host nations where they have taken up residence.⁴⁶⁶ The issue of social security is problematic all over the world due to linkages and tensions between social security and redistribution, and between citizenship, immigration laws, policies, and human rights.⁴⁶⁷

The principle contained in international human rights instruments pertaining to the social security status of non-nationals is that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between nationals and non-nationals serves a legitimate state objective and are proportional to the achievement of that objective.⁴⁶⁸ Narrative coming from the social security sector shows a growing propensity to position the right to social security not

⁴⁶⁶ Kaseke 2000 *ISSR* 53.

⁴⁶⁷ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

⁴⁶⁸ *ICESCR* 1966: The states parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant is exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

only as a rhetorical flourish, as was the case with social rights previous to the 1990's, but as a lawful prerogative grounded in international law. Wouter van Ginnekin of the International Labour Organisation asserts that:

This situation of low coverage reflects a failure by governments of countries and the international community to meet their obligations under article 9 of the International Covenant on Economic, Social and Cultural Rights [ICESCR] which recognises the right of everyone to social security, including social insurance.⁴⁶⁹

In line with this intention, section 39 (1) (b) of the Constitution⁴⁷⁰ obliges courts, tribunals and forums to consider international law when interpreting the Bill of Rights. This section opens strong direction to courts and is clearly intended to secure wide spread exposure to and application of international law in South Africa. Section 232 of the Constitution⁴⁷¹ is to the effect that, customary international law is law in the Republic of South Africa unless it is not in line with the Constitution⁴⁷² or any Act of Parliament.

Section 232 of the Constitution enables courts of law to take into consideration international law when interpreting socio-economic rights. In the Constitutional Court decision in *S v Makwanyane*,⁴⁷³ it was held that "both 'hard' and 'soft' international law must be taken into consideration." In the case of *The Government of the Republic of South Africa and Others v Grootboom and Others*,⁴⁷⁴ the Constitutional Court cited with approval that "both 'binding' and 'non-binding' international law must be taken in to consideration when interpreting the Bill of Rights". Treaties as well as declaratory judgements such as the Universal Declaration of Human Rights are to be taken in to consideration when interpreting socio-economic rights.

⁴⁶⁹ Langford *The Right to Social Security and the Implication of Law Policy and Practice: Social Security as a Human Right* 1.

⁴⁷⁰ S 39 (1) (b) of the 1996 Constitution.

⁴⁷¹ S 232 of the 1996 Constitution.

⁴⁷² *Ibid*

⁴⁷³ *S v Makwanyane* 1995 3 SA 391 (CC) 28.

⁴⁷⁴ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169 32.

5.2 INTERNATIONAL INSTRUMENTS THAT MAKES PROVISION FOR THE RIGHTS TO SOCIAL SECURITY IN SOUTH AFRICA

5.2.1 The Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights is founded upon international human rights law. According to Eleanor Roosevelt,⁴⁷⁵ the document is referred to as "Humanity's Magna Carta."⁴⁷⁶ This document consists of thirty civil, political, economic, social, and cultural rights. Its preamble recognises the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.⁴⁷⁷ Section 28 of the Universal Declaration of Human Rights provides that "everyone, as part of the public, has the right to social security."⁴⁷⁸

It could be said that membership has to be largely seen to mean all persons that are under the jurisdiction of the state concerned, this includes non-nationals. Despite the fact that the Universal Declaration of Human Rights is a legal instrument which is not binding, through extensive acceptance has been elevated in a way that its authority cannot be considered as non-binding. Even though it is not a treaty, it has a *sui generis* character and some of its requirements have turned into norms of customary international law.⁴⁷⁹ It is therefore important that South Africa takes its provision on social security.

5.2.2 The International Labour Organisation International Instruments include:

- The Social Security Minimum Standards Convention;⁴⁸⁰
- The Equality of Treatment Social Security Convention;⁴⁸¹
- The Migration for Employment Convention (Revised);⁴⁸²

⁴⁷⁵ She chaired the United Nations Commission on Human Rights that was responsible for the drafting of the document.

⁴⁷⁶ *Universal Declaration of Human Rights 1948.*

⁴⁷⁷ Preamble of the *Universal Declaration of Human Rights 1948.*

⁴⁷⁸ S 28 of the *Universal Declaration of Human Rights 1948.*

⁴⁷⁹ *Filartiga v Pena Irala* 19 ILM 966 (1980).

⁴⁸⁰ *Social Security Minimum Standards Convention* 102 of 1952.

⁴⁸¹ *Equality of Treatment Social Security Convention* 118 of 1962.

⁴⁸² *Migration for Employment Convention (Revised)* 97 of 1949.

- The Migrant Workers (Supplementary Provisions) Convention,⁴⁸³ and
- Equality of Treatment Social Security Convention.⁴⁸⁴

As mentioned earlier in this research, South Africa has not ratified nor signed any of these conventions. However, the mere fact that South Africa has not ratified these conventions does not mean they cannot be implemented in South Africa. Public international law is law in the Republic of South Africa unless it is inconsistent with the Constitution or any act of Parliament.⁴⁸⁵ As mentioned above in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others*,⁴⁸⁶ the Constitutional Court cited with approval that “both ‘binding’ for instance conventions or treaties and ‘non-binding’ for instance declaratory judgements like The Universal Declaration of Human Rights are international law that must be taken in to consideration when interpreting the Bill of Rights.”

It can therefore be submitted that, compliance with these legal principle will ensure compliance with the constitutional values of South Africa. The most inclusive of all these international instruments is the Social Security Minimum Standard Convention 102 of 1952. This convention makes available minimum standards in nine different branches of social security; it also call for periodic and consistence access to cash benefits.⁴⁸⁷ These branches consist of the following: medical care,⁴⁸⁸ sickness;⁴⁸⁹ unemployment;⁴⁹⁰ old age;⁴⁹¹ employment injury;⁴⁹² family, maternity;⁴⁹³ invalidity;⁴⁹⁴ and survivors’ benefits.⁴⁹⁵ Signatories to this Convention need to recognise a minimum of three from the list of schemes stated above. One of these benefits, unemployment benefit, old age benefit, employment injury benefit or invalidity or

⁴⁸³ *Migrant Workers Supplementary Provisions Convention* 143 of 1975.

⁴⁸⁴ *Equality of Treatment Social Security Convention* 118 of 1962.

⁴⁸⁵ S 232 of the 1996 Constitution.

⁴⁸⁶ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169.

⁴⁸⁷ S 1 (2) of the *Social Security Convention 102 of 1952* defines the term benefit in articles 10, 34 and 49 as either direct benefit in the form of care or indirect benefit consisting of a reimbursement of the expenses borne by the person concerned.

⁴⁸⁸ Part II Articles 7-12 of the *Social Security Minimum Standards Convention 102 of 1952*.

⁴⁸⁹ Part III Articles 13-18 of the *Social Security Minimum Standards Convention 102 of 1952*.

⁴⁹⁰ *Ibid*

⁴⁹¹ Part V Articles 25-30 of the *Social Security Minimum Standards Convention 102 of 1952*.

⁴⁹² Part VI Articles 31-38 of the *Social Security Minimum Standards Convention 102 of 1952*.

⁴⁹³ Part VII Articles 39-45 of the *Social Security Minimum Standards Convention 102 of 1952*.

⁴⁹⁴ Part VIII Articles 46-52 of the *Social Security Minimum Standards Convention 102 of 1952*.

⁴⁹⁵ Part IX Articles 53-58 of the *Social Security Minimum Standards Convention 102 of 1952*.

survivors' benefit must be included amongst the schemes. The Convention through its minimum standard prescribes the extent to which security and benefits should be apportioned.⁴⁹⁶ Social security as a whole is greatly influenced by the International Labour Organisation Conventions. The majority of the International Labour Organisation Conventions encourage member states (either as sending or host countries) to conclude bilateral and even multilateral agreements with other countries.⁴⁹⁷ These agreements ensure reciprocity of treatment⁴⁹⁸ of non-nationals and portability, especially, of long-term social security benefits.⁴⁹⁹

Reciprocity of treatment here entails that member state to the SADC undertake to apply equal treatment to workers on a reciprocal basis.⁵⁰⁰ This principle however does not work well for South Africa because the flow of workers into South Africa is uni-directional, as such, there is little incentive seen in terms of the principle of reciprocity.⁵⁰¹ As far as portability of benefit is concerned, Dekker cited Morocco, as an example. Bilateral agreements concluded between Morocco and several European countries to ensure the portability of health and pension benefits enabled Moroccan nationals who have worked as labourers in Europe to still be entitled to their social insurance benefits on retirement.⁵⁰²

She noted that this agreements have reduced the return rate of Moroccan non-nationals migrant workers to their home country to 50%.⁵⁰³ A number of bilateral agreements have been signed by South Africa with its neighbouring states mostly to regulate payments of compensation for occupational injuries and diseases for mines

⁴⁹⁶ Part IX Articles 53-58 of the *Social Security Minimum Standards Convention* 102 of 1952.

⁴⁹⁷ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 259.

⁴⁹⁸ This means the equal treatment of workers between countries in which a bilateral treaty has been signed. For instance South Africa and other SADC countries (The E-Draft Protocol on the Facilitation of Movement of Persons in SADC).

⁴⁹⁹ Holzman *et al* "Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices: Social Protection Discussion" Series 4. Holzman explain that "portability in this context is understood as the migrant worker's ability to 'preserve, maintain and transfer acquired so "al security rights,' independent of nationality and country of residence.

⁵⁰⁰ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 259.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ Dekker 2009 *African Human Rights Law Journal* 393.

and other industries.⁵⁰⁴ However, it may be noted that, the success of these agreements is questionable.

For example, a survey in 1995 showed that compensation paid for formal non-nationals mine workers from Mozambique who used to work in South Africa was paid over to the Mozambican government, almost seventy percent of the eligible mine workers received no money or received less than they should have.⁵⁰⁵ It can therefore be submitted that the effectiveness of bilateral protection in Southern Africa is compromised where a country with a well-developed social security system like South Africa concludes a bilateral agreement with a country with a relatively less developed or strained social security system like Mozambique.

A further complicating factor is the limited scope of public involvement in the social security system which can either be public or privately sponsored. Long-term benefits such as health and pensions are provided by the private sector. Consequently, the scope for concessions is limited. This means that the government could not use entitlements to health or pension benefits as negotiating tools to gain concessions for non-nationals as a group at the negotiation table since health or pension benefits are being provided by private schemes.⁵⁰⁶ Public benefits, which are controlled by the state, are mostly in the realm of social assistance and are non-contributory. This kind of benefit cannot be portable.

An important advantage for a country as regards documented nationals relates to the fact that the portability of benefits could increase the return rate of non-nationals to their home countries. This, in turn, will ensure that the social assistance system is not unnecessarily burdened. For example, where a Mozambican is injured and cannot work, he or she can return to his or her home country and receive

⁵⁰⁴ 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) Treaty Series No. 10/1967. The Agreement between the Government of the Kingdom of Lesotho Treaty Series No 1/1973, the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana Treaty Series No 3/1973 and the Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland Treaty Series No 3/1986.

⁵⁰⁵ Paid by Rand Mutual Assurance as administering agency (COIDA S 3 and 94).

⁵⁰⁶ Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 125.

compensation. By contrast, if he or she were to stay on in order to access his or her compensation payment, chances are that he or she would later claim an old-age grant and increase the burden on the social assistance system.

5.2.3 International Covenant on Economic Social and Cultural Rights

Another important instrument which contains social security provisions for the protection of non-nationals is the International Covenant on Economic Social and Cultural Rights (ICESCR, 1996). ICESCR is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and entered into force on the 3 January 1976.⁵⁰⁷ It commits its parties to work toward the granting of Rights on Non-Self-Governing and Trust Territories and individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living.

As of 2014, the Covenant had 162 parties.⁵⁰⁸ The Covenant is monitored by the United Nations Committee on Economic, Social and Cultural Rights. ICESCR obliges state parties to the Covenant to ensure an adequate social security system accessible for everyone. The right to social security which is recognised by public and private sectors is dealt with particularly in article 9 of the Covenant.⁵⁰⁹ The Covenant further entrenches the right to an adequate standard of living to everyone.⁵¹⁰ Article 11 (1),⁵¹¹ requires that states guarantee an adequate standard of living to everyone. This includes the right to adequate food, clothing, housing, and the continuous improvement of living conditions.⁵¹² It is expected of a State to make available social assistance and other form of assistance either in monetary form or by providing physical need to the needy.⁵¹³ State parties also have an obligation to facilitate the right to social security by sufficiently recognising this right within the

⁵⁰⁷ ICESCR 1966.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Article 9 of the ICESCR 1966.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² Art 11 (1) of the ICESCR 1966: The states parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.

⁵¹³ Felice, *the Global New Deal: Economic and Social Human Roman Rights in World Politics* 122 - 123.

national political and legal systems, preferably by way of legislative implementation and adopting a national social security strategy.⁵¹⁴

Article 10 (1) and (2)⁵¹⁵ can be read and understood social security in a particular context. This article recognises the family as the natural and fundamental group unit of society and requires parties to accord it the widest possible protection and assistance. Parties must ensure that their citizens are free to establish families and that marriage are freely contracted and not forced.⁵¹⁶ Looking at sections 9 and 11 of ICESCR,⁵¹⁷ it is clear that a state cannot boast to be in line with the prescribed principles underlining the right to social security or the important content of the right if the social security in the country excludes more people and produces more poverty than security to some workers and the entire population.⁵¹⁸

Although the ICESCR has been widely ratified, only a handful of states like South Africa have taken steps to enshrine social rights constitutionally. This means that the question of how social rights should be enforced has received relatively little attention.⁵¹⁹ However, South Africa ratified the Convention on the 18 of January 2015 and it binds her as from 12 of April 2015. ICESCR plays an important role in South Africa. Its provisions have been cited by South African courts in deciding on issues concerning the interpretation of the Bill of Rights as seen above. The provision of ICESCR concerning non-nationals should therefore be considered.

5.2.3.1 Content of the Right to Social Security according to ESCR

The fourth Point of the General Comments of the Committee on ESCR states that the right to social security should not be discriminatory.⁵²⁰ This means that, the social

⁵¹⁴ Felice, *the Global New Deal: Economic and Social Human Roman Rights in World Politics* 122 - 123.

⁵¹⁵ Articles 10 (1) and (2) of *the ICESCR* 1966.

⁵¹⁶ Article 10 (2) of *the ICESCR* 1966:

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

⁵¹⁷ Ss 9 and 11 of *the ICESCR* 1966.

⁵¹⁸ GA Res 44/25, Annex 44 UN GAOR Sup (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

⁵¹⁹ Murray 2007 *Juridical International* 76.

⁵²⁰ Article 2 (2) of *the ICESCR* 1966.

security system should not just make available impartial, reasonable different schedules directly or indirectly based on forbidden grounds such as race, sex, marital status, disability and age but that there is an affirmative duty to eliminate such differences as time goes on.⁵²¹ United Nations Human Right Committee has criticised direct and indirect discrimination.⁵²² Becker pointed out that, at times access to social security can be complicated in different ways.⁵²³ According to him, two of these aspects are basic in nature and, as we may expect, thus universal as well.⁵²⁴ The first involves the protection of non-nationals which, despite its longstanding history, remains on the list of the most serious problems because of linkages and tensions between social security and redistribution, and between citizenship, immigration policies, the legitimacy of redistributive measures through voting, and human rights.⁵²⁵

The second relates to the fact that long-established social insurance systems are based on employment, with the consequence that this form of social security is selective as it focuses on employees and leaves out those of the informal sector.⁵²⁶ However, in its General Comments no 15, the United Nations Human Rights Committee explained that the rights set forth in the Covenant on Civil and Political Rights apply to everyone, irrespective of reciprocity of his or her nationality or statelessness. The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between nationals and non-nationals.⁵²⁷

⁵²¹ General Comments of the UN Committee on Economic, Social and Cultural Rights (CESCR).
⁵²² Although article 26 (right to equality and non-discrimination) requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any state to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a state's sovereign power, then such legislation must comply with article 26 of the Covenant.

Zwaan-de Vries v the Netherlands 182/1984 (9 April 1987) para 124.

⁵²³ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* xiii.

⁵²⁴ Ibid.

⁵²⁵ Ibid.

⁵²⁶ Ibid.

⁵²⁷ E/CN.4/Sub.2/2002/25/Add.1 paras 14, 50, 51, 63, 66.

In the Switzerland case of *V v Einwohnergemeine X und Regierungsrat des Kantons Bern*,⁵²⁸ in 1980, three brothers (V) lived in Switzerland as renowned refugees. These brothers were barred from entering Switzerland in 1987 because of criminal activities. They went and settled in Czechoslovakia. Without any authorisation, they re-entered Switzerland in September 1998. The new Czechoslovakian Republic rescinded their citizenship making it difficult for them to be re-expelled.⁵²⁹ Access to social support and welfare were refused to them on grounds that, they were illegal.

The Court held that:

There was an implied constitutional right to '*conditions minimales d'existence*' (basic minimum level of subsistence). The right was a condition for the exercise of other written constitutional rights, the right to life, "as a core content of personal freedom, which would no longer be guaranteed were the most minimum prerequisites for survival not guaranteed", "the constitutional principle of human dignity, which guarantees every person what they can expect from the community because of their humanity"; and the equality principle, seen as also having the function of guaranteeing minimum material justice.

A sufficient societal consensus for such an implication was found, particularly given the constitutional principle of human dignity. The right was not to be equated to a minimum level of income but rather what was necessary for a dignified human existence that prevented an undignified beggar's existence. The right can be invoked by both Swiss citizens and foreigners since it is a fundamental right based on human rights. The Court found that 'positive' claims upon State expenditure, arising from this right, are justiciable if they are capable of being normatively defined and the judge has the necessary means and procedures to concretise and implement such claims.

At the same time, the Court limited the scope of its potential to intervene by acknowledging it lacked the legal competence to set priorities for the allocation of resources. It nevertheless determined it would set aside relevant legislation when the outcome of the legislative framework failed to meet the minimum claim required by constitutional rights. The exclusion of three non-nationals from social welfare legislation was found to be in violation of the right.⁵³⁰

⁵²⁸ *V v Einwohnergemeine X und Regierungsrat des Kantons Bern* BGE/ATF 121 I 367 Swiss Federal Court 27 October 1995.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

From this case, the issue of social security should not be discriminatory. International law provisions advocates for an equal enjoyment of all the rights regardless of nationality. The Convention on the Elimination of All Forms of Racial Discrimination provides for the complete abolition of discrimination. The United Nations Human Rights Committee holds firmly on the more liberal definition of discrimination put forward in the Convention on the Elimination of All Forms of Racial Discrimination.⁵³¹ According to this Convention, member states are required to take responsibility to eliminate all forms of discrimination and to completely shy away from discriminatory practices.⁵³²

The belief that discrimination can accumulate from lack of responsibility to take constructive steps to guarantee that groups which are disadvantaged profit evenly from services which the public offers is generally acknowledged in the human rights field. Quite a number of national courts have followed this way and used same provisions. For instance in the case of *Eldridge v British Columbia (Attorney General)*,⁵³³ where the infant petitioners suffer from autism, a neurobehavioral syndrome that impairs social interaction, hindering communication and results in repetitive behaviour. Even though these children were not non-nationals, they were a vulnerable group of people like non-nationals who also need constitutional protection.

They brought an action against the province of British Columbia, alleging that by failing to provide the necessary fund for applied behavioural therapy for autism contradicts section 15 (1) of the Canadian Charter of Rights and Freedoms.⁵³⁴ In the

⁵³¹ Article 1 (1) of the ICESCR 1966.

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. *Eldridge v British Columbia* 1997 3 SCR para 78.

⁵³² Langford *The Right to Social Security and the Implication of Law Policy and Practice: Social Security as a Human Right* 43.

⁵³³ *Eldridge v British Colombia* 1997 3 SCR.

⁵³⁴ S 15 (1) of the *Canadian Charter of Rights and Freedoms* forms part of the *Constitutional Act* of 1982. The Charter guarantees certain political rights to Canadian citizens and civil rights of everyone in Canada from the policies and actions of all areas and levels of government. It is designed to unify Canadians around a set of principles that embody those rights. The Charter was signed into law by Queen Elizabeth II of Canada on April 17, 1982 along with the rest of the Act.

years leading up to the trial, the government acknowledged the importance of early intervention, diagnosis and assessment for autistic children but stated that services for their needs had to be balanced with services to children with other special needs. The government funded a number of programs for autistic children but did not establish funding for the therapy for all autistic children between the ages of three and six on grounds of financial constraints and the emergent and controversial nature of the therapy.

At the time of the trial, funding for therapy for autistic children was not universal and was only beginning to be recognized as desirable. The trial judge found that the failure to fund the therapy violated the petitioners' rights to equality and directed the province to fund the therapy for children with autism and awarded \$20,000 in damages to each of the adult petitioners. The matter went to the level of the Supreme Court and the Canadian Supreme Court held that:

The failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of Section 15 (1) of the rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons. Although the standard set is broad, this is not to say that sign language interpretation will have to be provided in every medical situation.

The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved. For deaf persons with limited literacy skills, sign language interpretation can be surmised to be required in most cases.⁵³⁵

This case is significant in the light of this study in that, even though the petitioners were nationals, they were a vulnerable class of people. It brings into focus the fact that, the socio-economic needs of the vulnerable categories in the society should not be neglected. Non-nationals (both documented and/or non-documented) are a vulnerable category of people and lack the political muscles to fight for themselves as compared to nationals. Discriminating against them or failure to take positive steps to eradicate all forms of discrimination against them is contrary to human rights

⁵³⁵ *Eldridge v British Columbia* 1997 3 SCR para 78.

principles. Langford⁵³⁶ discussing on what the right to social security entails, cited Lamanche's assertion which states that "social security laws are not discriminatory".

According to Lamanche "everybody is covered." The real question which need be answered is the question of how far does the government provides social security for everybody instantly and progressively. In the South African context, many categories of people are excluded from the social security coverage most especially non-nationals.⁵³⁷ Lamanche⁵³⁸ further argues that social security must be defined as a collective arrangement in accordance with the International Labour Organisation definition of social security. As highlighted above, the International Labour Organisation definition has been criticized for not covering all categories of people living in South Africa.⁵³⁹ The International Labour Organisation definition is employment based.⁵⁴⁰

Social security is provided mostly to those called "employees" which leaves many categories of people living in South Africa excluded from the definition including majority of non-nationals.⁵⁴¹ Far reaching decisions has been issued by Courts and quasi-judicial bodies chiefly dealing with civil and political rights and who have more superior powers to enforcement the rights to social assistance which are generally very contentious because, non-nationals contribution very little for taxes.⁵⁴²

In the case of *Gaygusuz v Austria*,⁵⁴³ the court linked the social insurance benefits which was in dispute as the possessions of nationals consequently a right protected for them. However, contributions paid to an unemployment scheme by the worker

⁵³⁶ Langford *The Right to Social Security and the Implication of Law Policy and Practice: Social Security as a Human Right* 35.

⁵³⁷ S 3 (c) of the *Social Assistance Act* 59 of 1992: Citizenship is one of the eligible criteria for accessing almost all the social assistance benefits.
S 12 (1) (b) (i) of the *Age Persons Act* 81 of 1967.

⁵³⁸ She states that social security, as a human right and not a commodity relies on collective funding. This can be of different types: public, professional community, private (if risks are assessed on the basis of a determined group and benefits paid to this group) or even mixed. In all cases, it is a basic and minimal requirement of the right that it be supervised by an independent, participatory and regulatory body.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² *Gaygusuz v Austria* 1996 17371/90.

⁵⁴³ *Gaygusuz v Austria* 1996 17371/90.

from Turkey seem to make the case to be decided in his favour.⁵⁴⁴ The verdict in this case established an important case law regarding the equal treatment of nationals and non-nationals. Gaygusuz, a Turkish national, had come to Austria in 1973 and worked for almost a decade with some gaps when he went back to Turkey. He later applied for emergency assistance in the form of advance pension according to the Unemployment Insurance Act on account of his failing health (his unemployment benefits had been exhausted).⁵⁴⁵

However, the application was rejected, on grounds that he is not an Austrian national. He decided to submit his petition at the European Court of Human Rights. The court unanimously found that the denial of social security benefit solely on the basis of a different nationality was a violation of Article 14 of the European Convention on Human Rights⁵⁴⁶ and Article 1⁵⁴⁷ of protocol guaranteeing the right to enjoy possessions.⁵⁴⁸ This case demonstrates the principle of equality and non-discrimination upholding the principle that, nationality cannot be made a ground for discrimination.

This is consistent with several other international human rights standards which also prohibit discrimination on basis of nationality. General comment No 19 of the International Covenant on Economic, Social and Cultural Rights⁵⁴⁹ especially states that whereas everyone has the right to social security, parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, which includes non-nationals, among others. The *Gaygusuz v Austria*⁵⁵⁰ case set a precedent in demonstrating that a person's foreign nationality is not sufficient reason for denying his or her right to social security.

⁵⁴⁴ Langford *The Right to Social Security and the Implication of Law Policy and Practice: Social Security as a Human Right*.

⁵⁴⁵ *Gaygusuz v Austria* 1996 17371/90.

⁵⁴⁶ Article 14 of the *European Convention on Human Rights* 1953.

⁵⁴⁷ Article 1 of the *European Convention on Human Right* 1953.

⁵⁴⁸ *Gaygusuz v Austria* 1996 17371/90.

⁵⁴⁹ General comment 19 para 31 of the *ICESCR* 1966.

⁵⁵⁰ *Gaygusuz v Austria* 1996 17371/90.

5.2.4 Social Security for Non-Nationals in Treaties Protecting Refugees and Stateless Persons

Treaties that make provision for social security for refugees include, the Convention Relating to the Status of Refugees (Refugees Convention),⁵⁵¹ the Protocol Relating to the Status of Refugees,⁵⁵² the International Convention on the Protection of the Rights of all and the Convention Relating to the Status of Stateless Persons (Stateless Persons Convention).⁵⁵³ International, regional standards and obligations concerning the right to social security for refugees and asylum-seekers are of great significance for South Africa to make use of their provisions to deal with social security for refugees and stateless persons.

This flows from the fact that South Africa is bound by several relevant international and regional instruments. Furthermore every court, tribunal and forum has to consider international law in a matter involving the entitlement of refugees and asylum-seekers to the constitutional right to access to social security and to appropriate social assistance.⁵⁵⁴ The Refugees Convention⁵⁵⁵ and the Stateless Persons Convention⁵⁵⁶ do not just forbid discrimination against refugees or other non-nationals on grounds of their nationality but in addition, require state parties to grant them some kind of positive benefits.

An example is Article 20 of the Refugees Convention⁵⁵⁷ that requires that where a rationing system exists for products in short supply for the population at large,

⁵⁵¹ *Convention Relating to the Status of Refugees* 189 UNTS 150, entered into force 22 April 1954 South Africa acceded on 12 January 1996.

⁵⁵² *Protocol Relating to the Status of Refugees* 606 UNTS 267, entered into force 4 October 1967 South Africa acceded on 12 January 1996.

⁵⁵³ *International Convention on the Protection of the Rights of all and the Convention Relating to the Status of Stateless Persons* 360 UNTS 117, entered into force 6 June 1960. Not yet signed or acceded to.

⁵⁵⁴ Article 20 of the Refugees Convention *Relating to the Status of Stateless Persons* 360 UNTS 117 of 1960.

⁵⁵⁵ *Protocol Relating to the Status of Refugees* 606 UNTS 267, entered into force 4 October 1967 South Africa acceded on 12 January 1996.

⁵⁵⁶ *International Convention on the Protection of the Rights of all and the Convention Relating to the Status of Stateless Persons* 360 UNTS 117, entered into force 6 June 1960. Not yet signed or acceded to.

⁵⁵⁷ Article 20 *Refugees Convention*: Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

refugees should be accorded the same treatment as nationals. This area of refugees and their status has been properly dealt with in Chapter 4 above under the heading Social Assistance.

5.3 REGIONAL INSTRUMENTS

5.3.1 The African Charter (Banjul) on Human and Peoples' Rights

This Charter⁵⁵⁸ was adopted on June 27, 1981 and was effected in October 21, 1986. The African Charter⁵⁵⁹ is also important in the area of social security. Article 18 (4) of the Charter⁵⁶⁰ accords the aged and the disabled the right to particular way of defence on how to maintain their physical or moral requirements. The African Charter⁵⁶¹ particularly in the case of the elderly and people with disabilities, the expressly guarantees the right of social protection. However, the African Charter⁵⁶² fails to include other categories of defenceless people who also deserve the right to social protection like the very poor people, those without jobs, non-nationals like asylum seekers and refugees. Considering that South Africa is a signatory to the African Charter,⁵⁶³ the implementation of its provisions should be well considered.

5.3.2 The 2003 Charter of Fundamental Social Rights in SADC

The main objective of this Charter is to facilitate through closed and active consultations amongst social partners to be able to bring labour relations in unity so that labour policies can be promoted. Article 9, provides for an environment where every worker in the region will be provided adequate social protection regardless of status. This is another regional instrument which has a bearing on the issue of social security. This treaty states that, "Member states shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall,

⁵⁵⁸ African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁵⁹ African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁶⁰ Article 18 (4) of the African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁶¹ African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁶² African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁶³ African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

regardless of status and the type of employment, enjoy adequate social security benefits.⁵⁶⁴ It also states that, "persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and assistance."⁵⁶⁵

Again, the Charter⁵⁶⁶ makes requirements establishing harmonised programmes for social security all over the state.⁵⁶⁷ Provisions for the social protection of workers and those who are jobless are made available in the Charter⁵⁶⁸ Member states are also encouraged to create a non-discriminating environment which provides adequate social protection for workers notwithstanding their nationality or the type of employment they are involved in.⁵⁶⁹ Parties have a right to adequate social protection. The Charter⁵⁷⁰ requires that those that are unable to either enter or re-enter the labour market and have no means of subsistence, should receive sufficient resources and social assistance.⁵⁷¹

The Charter⁵⁷² further encourages member states to promote the adoption of international standards. Article 3 (1)⁵⁷³ sets the baseline by stipulating that the Charter⁵⁷⁴ embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights.⁵⁷⁵ Oliver⁵⁷⁶ noted that "the faithful implementation of obligations under the Charter would revolutionise the social protection regime in SADC".

⁵⁶⁴ Article 10 of the African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁶⁵ Article 10 of the African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁶⁶ *Charter of Fundamental Social Rights in SADC* 2003.

⁵⁶⁷ Olivier *International Journal of Comparative Labour Law and Industrial Relations* 377-402.

⁵⁶⁸ *Charter of Fundamental Social Rights in SADC* 2003.

⁵⁶⁹ Article 10 of the African Charter African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁷⁰ *Charter of Fundamental Social Rights in SADC* 2003.

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ Article 3 (1) of the *Charter of Fundamental Social Rights in SADC* 2003.

⁵⁷⁴ *Charter of Fundamental Social Rights in SADC* 2003.

⁵⁷⁵ Article 18 (1), 18(4) and 22 of the *Universal Declaration of Human Rights* 1948.

⁵⁷⁶ Olivier *International Journal of Comparative Labour Law and Industrial Relations* 377-402.

Also Article 10(1) of the charter is significant in that,⁵⁷⁷ it provides a no discrimination provision for permanent and temporary workers with regards to social protection for all workers including non-nationals migrant workers. A manifest weakness of this provision is that it ties social protection to employment. However, this favours non-nationals since most of them are employed hence the importance of this charter to South Africa.⁵⁷⁸

5.3.3 The Draft Protocol on the Facilitation of Movement of Persons in SADC

This Protocol aims at developing policies to gradually eliminate obstacles to the movement of persons in and out of SADC members. This is another international instrument which protects the right to social security for non-nationals. This treaty suggests measures to achieving freedom of movement of persons, like movement of nationals of member state visa-free to any of the SADC countries, also to expand the network of bilateral agreements paving the way for a multilateral regional agreement. Furthermore, the Protocol also advocate for co-operation in preventing illegal movement of citizens and in improving control over outside boundaries of the SADC, and the promotion of common policies on immigration matters where necessary and feasible.⁵⁷⁹

Olivier⁵⁸⁰ observed that despite all these treaty provisions, immigration laws and policy in SADC Countries specifically centres on the effects of migration and not on what actually causes migration. He further noted that, immigration policy and the legislative structure always insist on restricting the entering of immigrants.⁵⁸¹ He cited the case of South Africa in particular, pointing out that, migration trend is characterised by the institution of confinement centres and the augmentation in repatriation of non-nationals who do not have documents.⁵⁸² He again pointed out that, apart from Botswana, no country has legislations which welcome immigrants.⁵⁸³

⁵⁷⁷ Article 10 (1) of the *Universal Declaration of Human Rights* 1948.

⁵⁷⁸ Olivier *International Journal of Comparative Labour Law and Industrial Relations* 377-402.

⁵⁷⁹ Article 2 of the *Universal Declaration of Human Rights* 948.

Limitations of bilateral agreements para 2.2.1.

⁵⁸⁰ Olivier 2011 *SADC LJ* 28.

⁵⁸¹ *Ibid.*

⁵⁸² Olivier 2011 *SADC LJ* 28.

⁵⁸³ *Ibid.*

Instead of migration being seen as a means to alleviate poverty, it is rather viewed as a predicament.⁵⁸⁴ It can be said that, immigration laws and practice in SADC need to tie with human rights expectations which requires accepting a human rights approach or encouraging migration.⁵⁸⁵ Also, more importance is accorded to immigration laws and policy leaving out of social security laws.⁵⁸⁶ Consequently non-nationals most especially those of SADC quite often find themselves in an insecure position as far as their social security position is concerned.⁵⁸⁷

Due to many legal restrictions, unsuitable and unclear policies, they go through seemingly impossible situations and cruel treatments especially in the host country.⁵⁸⁸ Quite often due to the operation of laws, non-nationals find themselves in a very difficult situation. They risk being excluded from social security in their home country while in their host country, due to lack of proper documentations, they are also disqualified from benefiting from social security.⁵⁸⁹

There are many other limits which are legal for instance, the issue of the portability of benefits.⁵⁹⁰ It can be submitted that, without concrete measures formulated particularly to arrest the inappropriate social security situation for non-nationals, and also without appropriate bilateral or regional instruments to enforce the right to social security, intra-SADC nationals are excluded from social security both legally and practically.⁵⁹¹ When states ratify human rights treaties, they agree to both refrain from violating specific rights and to guarantee enjoyment of those rights by individuals and groups within their jurisdictions.

Regional and international oversight bodies contribute to state compliance and provide opportunities for redress and accountability that may be non-existent or ineffective at the national level. However, becoming party to a treaty or agreeing to oversight by a supranational body generally remains voluntary. The level of

584 Ibid.
585 Ibid.
586 Ibid.
587 Ibid.
588 Ibid.
589 Ibid.
590 Ibid.
591 Ibid.

participation in the international human rights framework varies among states. Furthermore, the driving idea behind international human rights law is that because it states that in a position to violate individuals' freedoms, respect for those freedoms may be hard to come by without international consensus and oversight.

That is, a state which does not guarantee basic freedoms to its citizens is unlikely to punish or correct its own behavior, particularly in the absence of international consensus as to the substance of those freedoms and a binding commitment to the international community to respect them. Again, the duties of states to protect individuals or a group of individuals include positive and negative obligations. This means that, in limited circumstances, states may have a duty to take proactive steps to protect individuals' rights rather than merely refraining from directly violating those rights.

In addition, demand for protections beyond the traditional civil and political sphere have increased the number and variety of interests which are now considered rights particularly in the field of economic, social and cultural concerns. As a result we refer to states' duties to respect, protect, and fulfill the enjoyment of human rights. While international human rights courts and monitoring bodies oversee states' implementation of international human rights treaties, a variety of other sources are also relevant to the determination of individuals' rights and states' obligations. These include the judicial and quasi-judicial decisions of international and domestic courts on international human rights law or its domestic equivalents, the decisions of domestic and international courts on the related subject of international criminal law and analysis and commentary by scholars and others.

Also, a necessary component of human rights protection is the factual research identifying the conditions which may constitute violations, which is conducted by intergovernmental organizations, as well as by civil society. Below are some decided cases on how the European Court of Human Right has taken steps to oversee states' implementation of international human rights treaties on issues concerning social security for non-national.

5.4 European Court of Human Rights as an Enforcement Mechanism of the Right to Social Security for Non-nationals

The European Court of Human Right is based in Strasbourg, France. The court was initially established in January 21, 1959 and became permanent in 1998 on the basis of article 9 of the European Convention of Human Right with over 47 member state⁵⁹². In this convention there are both old and new democracies and they vary in the nature and scale of human rights violations with different experiences from the different territories. Some of the member state include key members like United Kingdom, France, United States, Ukraine and Sweden⁵⁹³

5.4.1 European Court of Human Rights Jurisprudence

The European Court of Human Rights is a regional court set up in 1959⁵⁹⁴. It rules on individual or State applications alleging violations of the political and civil rights set out in the European Convention on Human Rights. This Convention obliges member States of the convention to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction including non-nationals. The rights protected by this court includes the right to freedom of thought and expression, the right to be alive, the right to a fair hearing, the right to defend and protect private and family life, conscience and religion and the protection of property.

The Convention further prohibits in particular torture and inhuman or degrading treatment or punishment, slavery and force labour, death penalty, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms set out in the Convention. The case-law of this court makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe. The Court base most of its decision on the issue of social security for non-nationals on whether the complainant is legally residence in the country for instance the case of *Koua Poirrez v France*.⁵⁹⁵

⁵⁹² Donald A, Gordon, J & Leach, P. *Human Rights and Social Justice Research Institute London Metropolitan University, 2012*

⁵⁹³ *Ibid*

⁵⁹⁴ *Ibid*

⁵⁹⁵ *Koua Poirrez v France* 40892/98.

This case⁵⁹⁶ concerns the rejection by the competent authorities of the application made by the applicant in May 1990 for a disabled adult's allowance, the authorities rejected the application on ground that the applicant was a national of Côte d'Ivoire, in accordance with article 821-1 of the Code of Social Security, which excludes from entitlement to this benefit the nationals of countries which have not signed a reciprocity agreement with France in this field. The Court found that the refusal to award the applicant a disabled adult's allowance constituted a violation of Article 14 of the Convention reading alongside with Article 1 of Protocol No 1.

Note should be taken of the fact that the issue of legal residence was mentioned in this case.⁵⁹⁷ Also, in the case of *Surul v Bundesanstalt für Arbeit*⁵⁹⁸ decided by the European Court of Justice, where a woman from Turkey was allowed to live in Germany without being in possession of a residence permit which is regular. The court focused on the alliance between Turkey and the European Union. This union does not allow family allowance to be denied to Turkish nationals legally residing within a member state of the European Union.⁵⁹⁹ In the above mentioned cases of *Surul v Bundesanstalt für Arbeit*, *Guygusaz v Australia*⁶⁰⁰ and *Koua Poirrez v France*⁶⁰¹ the courts specifically made reference to the legal residence of the complainant.

5.4.2 The Legal Residence Test

The legal residence test focuses on illegal non-nationals who indeed, do not enjoy equality of treatment whatsoever, and very often have to cope with hardly any support. Some countries only grant minimal aid in kind or on a discretionary basis as far as social assistance are concerned. Meanwhile, other countries deny any form of emergency relief under their social assistance schemes. Medical care is only limited to emergency situations only. Increasingly, entitlement to benefits from social security is linked to immigration status. In law, the preference of migration law over

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Koua Poirrez v France* 40892/98 para 16.

⁵⁹⁸ *Sürül v Bundesanstalt für Arbeit* ECJ 4 May 1999, 262/96, ECR 1999 1210.

⁵⁹⁹ The denial of family allows would be in violation of the principle of equal treatment.

⁶⁰⁰ *Sürül v Bundesanstalt für Arbeit* ECJ 4 May 1999, 262/96, ECR 1999 1210.

⁶⁰¹ *Koua Poirrez v France* 40892/98.

social security status is apparent in the legal residence test. This test is widespread both in national law and in international law.

The legal residence test was also introduced in the United Kingdom (UK) for most work not related social security benefits in 2004 as part of a redefinition of the qualifying condition of “habitually resident”.⁶⁰² In France, it was introduced as a general condition of affiliation to the system. Since the second half of the last decade in the previous Bush and present Obama administrations in the USA, attempts have been made to introduce a “No Social Security for Illegal Immigrants Act” without success.⁶⁰³ Some other countries show no particular interest in the issue and allow the test to play its “original role” in social assistance only.⁶⁰⁴ In such countries contributory insurance schemes quite often includes illegal non-nationals despite their nationality.

This is probably because employers are normally under an obligation to make social insurance contributions even if they employ irregular workers. This is also the case for benefits in respect of industrial accidents and occupational diseases whose origins derive from the civil law liability of the employer but not in cases of unemployment insurance benefits that are based on an obligation to join the labour market, which is usually not possible in cases of illegal residence.⁶⁰⁵ In South Africa, asylum seekers are excluded from regular support schemes on grounds of their weak immigration status.⁶⁰⁶ At first, asylum seekers were incorporated in to their social assistance scheme at national level. As time went on, different schemes were gradually made, which provide different and most of the time very little forms of assistance such as benefits in kind, vouchers, pocket money, or in some cases, no assistance at all.

Quite often, prohibiting non-nationals from enjoying their social security rights usually attracts other forms of restrictions such as the choice of job and house which usually

⁶⁰² Gijsbert and Sarah *Access Denied European Journal on Social Security*. Vol. 15(2) 2013 (650-651).

⁶⁰³ *No Social Security for Illegal Immigrants Act of 2013*.

⁶⁰⁴ In the sphere of social assistance such a test was successfully introduced with the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*.

⁶⁰⁵ Kapuy *Access Denied European Journal on Social Security* 650-651.

⁶⁰⁶ Kapuy *Access Denied European Journal on Social Security* Bank 2000 (148-169).

makes the country less attractive especially for asylum seekers.⁶⁰⁷ In the United Kingdom, there has been continuous war between courts and the executives over the issue of denying social security rights to asylum-seekers to the extent of viewing the exclusions as being cruel and degrading treatment.⁶⁰⁸ A halt has been placed on the deterioration of social conditions in Europe by Directive 2003/9/EC on the reception of asylum seekers.

Interestingly, this directive is not devoid of the pressures exercised by immigration policies. Looking at the preamble of this Directive, it serves a double function, not only to secure a decent standard of living for asylum seekers, but also to ensure comparable living conditions in the member states in order to avoid secondary movements influenced by varying reception conditions. It has been suggested that the latter motive has been the decisive one for the adoption of the Directive.⁶⁰⁹ The legal residence test, which characterises access to social protection for non-nationals migrants in national law, is fully reflected in the protective clauses on equal treatment in international migration law.

The legitimising effect of the law with regard to the exclusion of asylum-seekers and irregular non-nationals is enhanced by the efforts of European governments to actively promote the adoption of restrictive clauses in international legal instruments that are relevant for the social security protection of non-nationals. The European Convention on Social and Medical Assistance provides equality of treatment to non-nationals who are "lawfully present". Furthermore, the United Nations Convention on the Status of Refugees,⁶¹⁰ makes provision for the rights and well-being of refugees however, this provisions are also limited to those who are "legally residing" in the state.⁶¹¹

The European Convention on the Legal Status of Migrant Workers⁶¹² restricts the application of the Convention to "nationals of a contracting party who have been

⁶⁰⁷ Kapuy *Access Denied European Journal on Social Security* Slingenberg.650-651.

⁶⁰⁸ *Ex Parte Adam and Others v Secretary of State for the Home Department* 2004 EWCA Civ 540.

⁶⁰⁹ Directive 2003/9/EC of 27 January 2003.

⁶¹⁰ *United Nations Convention on the Status of Refugees* 1951.

⁶¹¹ Articles 20 to 24 of the *United Nations Convention on the Status of Refugees* 1951.

⁶¹² *The European Convention on the Legal Status of Migrant Workers* 1977.

authorised to reside in the territory of another contracting party in order to take up paid employment". This also applies for International Labour Organisation Convention No. 97 (Art. 11). Only the 1990 UN International Convention on the Protection of Rights of all Migrant Workers Rights⁶¹³ seems to take a more benevolent stand in respect of illegal immigrants, at least providing a right to medical assistance in emergency situations (Art. 28). However, not even one Western Arab state has managed to ratify this Convention.⁶¹⁴

As far as the Euro-Mediterranean Association Agreement EC-Morocco of 1996 is concerned, access to social security is enjoyed only by those working and residing lawfully in the host nations.⁶¹⁵ Also, the recently founded Human Rights for the European Union of 2000 has same limitation as far as social security for non-nationals who move within the European territories are concerned.⁶¹⁶ This does not mean that non-nationals residence in Europe enjoys complete access to social security.

Non-nationals are only allowed to live if they meet the condition of having enough money to support themselves and desist from becoming a burden to the state. Social assistance is not for everybody but for non-nationals who are living lawfully in the State. In other words, the European scenario excludes non-nationals from social security should they lack a legal status as prescribe by the immigration law.

5.5 CONCLUSION

This Chapter discussed the jurisprudential and international nature of the right to social security and the position of non-nationals. It equally discussed the position of the ECHR to promote the right to Social Security for non-nationals. In conclusion therefore, as far as the social security status of documented and non-documented non-nationals is concern, there are many international cases that South African courts can draw inference to when deciding on issues concerning social security for

⁶¹³ *UN International Convention on the Protection of Rights of all Migrant Workers Rights 1990.*

⁶¹⁴ *UN International Convention on the Protection of Rights of all Migrant Workers Rights 1990.*

⁶¹⁵ Article 66 of the Euro-Mediterranean Agreement read:

The provisions of this article shall not apply to nationals of the parties residing or working illegally in the territory of their host countries.

⁶¹⁶ Article 34 (2) of the *Charter of Fundamental Rights of the European Union 2000*:
Everyone residing and moving legally within the European Union is entitled to so.

non-nationals. Illegal or undocumented non-nationals probably because of their condition of stay usually lack access to many, if not most, civil and social benefits. It seems as a result of their illegal status, they are afraid to avail themselves of the rights that they may enjoy for fear of exposure to immigration authorities.

Apart from their illegal status which restrain them from benefiting from social security, Section 27 of the Constitution as earlier mentioned, imposes an internal limitation to access to social security while Sections 36 imposes a general limitation clause. With these two limitation clauses, the state can exclude vulnerable categories of people justifying its action by saying that there are no available resources and that the right to social security can only be realised progressively.

In respect to this, the role of international and regional human rights instruments in protecting the human rights of all non-nationals has become increasingly important. The extent to which these international instruments protect the human rights of both documented and non-documented non-nationals in particular their right to access to social security, rest on the constitutional order and the fact that, South Africa has signed a lot of international and regional treaties to protect the rights of non-nationals and thus bound to respect them.

CHAPTER 6

CHALLENGES AND SUCCESSES OF SOCIAL SECURITY

6.1 INTRODUCTION

The previous Chapter discussed the international and jurisprudential nature of social security in South Africa. This Chapter discusses the challenges faced by non-nationals in South Africa with regards to their right to social security. The social security situation of non-nationals in South Africa is insecure mostly due to the unfavourable socio-economic state of affairs faced by most South Africans. This state of affairs came to judicial notice and was expressed in the case of *Soobramoney v Minister of Health*.⁶¹⁷ The Constitutional Court in this case stated that "millions of people in the country live in deplorable conditions and in great poverty".⁶¹⁸ Severity

The Court went further to enumerate the socio-economic challenges that South Africa is facing such as high levels of unemployment, insufficient social security and deficiencies in the right to use dirt-free water or the right to sufficient health services.⁶¹⁹ The Court pointed out that "these conditions already existed when the Constitution was adopted and that a commitment to address them, and to transform the South African society into one in which there is human dignity, freedom and equality, lies at the heart of the new constitutional order."⁶²⁰ If these conditions persist, it brings home the harsh reality that the Constitution's promise of dignity and equality for all remains a distant dream.⁶²¹

As stated above, the architecture of international human rights is designed upon the premise that all persons, by virtue of their essential humanity, should be able to enjoy all human rights unless exceptional disjunctions, for example between nationals and non-nationals, serve a legitimate state objective and are proportional

⁶¹⁷ *Soobramoney v Minister of Health* 1998 1 SA 765 (CC).

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.*

to the achievement of that objective.⁶²² Given the vulnerable place of non-nationals as a minority group in their host countries, they are extremely susceptible to human rights abuses as well as to exclusion from the socio-economic structure of the host state. With these difficulties, it has been noted that for monetary political reasons which are unclear, the government attention is based on addressing the social security needs of South Africans first before looking at those of other vulnerable and often helpless groups such as non-nationals.

This seems to make the government to be more focused in providing the social security needs of nationals first before providing the social security needs of non-nationals, leading to untold hardship for non-nationals.⁶²³ Accessing proper services such as national health and welfare systems is not always certain.⁶²⁴ One of the measures put in place in South Africa rests under section 27 (1) (c) of the final Constitution⁶²⁵ to ease the impact of the terrible conditions South Africans are living in and to lessen the openness and danger of low-income persons or households in South Africa. Note should be taken of the fact that Section 27 (1) (c) looked at entirely, is strong enough to assure social protection as a right in terms that go above the normal exclusionary compass of state-guaranteed social security.

It is a great sign that differentiates the South African Constitution⁶²⁶ as largely transformative of the socio-economic framework of the South African society, and makes it one of the most outstanding Constitutions⁶²⁷ in the world.⁶²⁸ Some analysts have observed the word “everyone” as stated in this section to mean everybody living within South Africa, i.e. both permanent residence and non-nationals.⁶²⁹

Access

⁶²² Weissbrodt. *Final Report on the Rights of Non-Citizens* para 6.

⁶²³ Kapindu. *African Human Rights Law Journal* 94. 2011

⁶²⁴ Non-nationals without permanent residence benefit from public health care only on emergency cases without which they can only access private medical schemes.

⁶²⁵ The 1996 *Constitution*.

⁶²⁶ *Ibid.*

⁶²⁷ *Ibid.*

⁶²⁸ The Bill of Right entrenched in Chapter 2 of the *Constitution* makes the *Constitution* one of the best in the whole world.

⁶²⁹ S 27(2) of the 1996 *Constitution*.

The word “everyone” in this section cannot be construed as referring only to “nationals”⁶³⁰. Unfortunately, the legislative framework and policies objectives and the immigration laws restrict the right to social security to nationals thereby putting non-nationals in “hell fire on earth”. In the subsequent paragraphs the challenges and impediments faced by non-nationals in South Africa as far as the implementation of their right to social security is concerned will be address. In the Khosa Case above, the Court differentiated between different categories of non-nationals and dealt specifically with non-nationals with permanent residence leaving out the bulk of non-nationals who are a vulnerable group and need social assistance.⁶³¹

6.2 The Immigration Status

As highlighted above, movement in to South Africa is seen as an established strategy to reduce household poverty.⁶³² With this, a lot of people drift into South Africa to seek greener pastures. As mentioned earlier, the Immigration Act⁶³³ as amended supervises the entry and residence of non-nationals in to South Africa. This Act⁶³⁴ differentiates among different groups of non-nationals depending on their reason for entering South Africa or their immigration status.⁶³⁵ The government has always used Immigration legislation to decide on who they will permit to live in South Africa and the conditions under which the person may live.⁶³⁶

It seems as if the Act⁶³⁷ strives to achieve equilibrium between the wants of the South African economy, chiefly workers who are high skilled, and on the other hand, to reduce the coming in of basically non-national migrant workers who are unskilled or economic refugees.⁶³⁸ The situation in the Khosa⁶³⁹ case and the judgement

⁶³⁰ S 27 (1) (a) of the 1996 Constitution.

⁶³¹ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 81-82.

⁶³² Olivier 2009 *SP Discussion Paper No 0908* 22.

⁶³³ *Immigration Act* 13 of 2011.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*

⁶³⁶ Perbedy <http://www.polity.org.za/govdocs/greenpapers/migration/hista.html>.

⁶³⁷ *Immigration Act* 13 of 2011.

⁶³⁸ Both for security reasons and because of the high level of unemployment prevailing in South Africa. International Federation of Human Rights (FIDH) 2008 *International Federation or Human Rights* 18. In particular the requirement that it has to be shown that nobody in South Africa has equivalent skills.

thereof it is evident that a person entitlement to social security grants should not be based on a person's original country alone but also on the current status of that person. Due to fear of being deported, some illegal non-nationals have to look for means to keep themselves away from deportation. Some of them use the asylum procedure to reduce the effects of socio-economic exclusions that they face. Meanwhile others use it as a hedge against deportation.⁶⁴⁰ Others use it to be able to reside in South Africa and to get better jobs or even to study.⁶⁴¹ However, there are some non-nationals who are genuine asylum seekers in terms of the Refugees Act of 1998.⁶⁴²

6.3 Non-nationals and/or social insurance

As mentioned above, South African social security comprises mostly of social assistance grants which consist of direct financial or material provision from the state and child protection grants, disability grants, and old age grants. The other leg of social security comprises social insurance schemes. All the grants mentioned in section 4 of the Social Assistance Act⁶⁴³ are tied to nationality. With the decision in the *Khosa case*, the scope of social assistance to some degree was extended to non-nationals with permanent residence status.⁶⁴⁴

The Minister of Social Development in agreement with the Minister of Finance can extend financial provision to a group of non-nationals under section 5 (1) (c) of the Act.⁶⁴⁵ Under section 13 of the Act,⁶⁴⁶ the Minister can prescribe social relief from distress to a person if the person qualifies for it. The exclusion of non-nationals without permanent residence is attributed to statutory requirements has reduces the right to social security for "everyone" as guaranteed under section 27 (1) (c) of the

⁶³⁹ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC):

⁶⁴⁰ Kapindu 2011 *African Human Rights Law Journal* 94.

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.*

⁶⁴³ S 4 of the *Social Assistance Act* 13 of 2004.

⁶⁴⁴ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC):

Constitutional Court ruled that non-nationals with permanent residence be included in the Act to benefit from social assistance grants.

⁶⁴⁵ S 5 (1) (c) of the *Social Assistance Act* 13 of 2004.

⁶⁴⁶ S 13 of the *Social Assistance Act* 13 of 2004.

Constitution. These defeats the actual purpose of social assistance which is a scheme put in place to fight against poverty and restore the virtues of dignity, life equality and freedom which are fundamental constitutional values.⁶⁴⁷

The fundamental principle upon which social security is based is the principle of solidarity. The purpose of solidarity is to avoid situations whereby a person is exempted from social life; this can be done by instituting social security methods such as social assistance. Social assistance can enable a person to be placed in a position to fulfil his or her role in society with dignity.⁶⁴⁸ The means-test is the criteria for awarding social assistance grants. Some permanent resident holders are income earners thus they are exempted from social assistance according to the means-test provision in the Social Assistance Act for accessing the grants.⁶⁴⁹ It should be noted that permanent residence holders are just a minority of the entire non-national population in South Africa.

Majority of non-nationals who benefit from the grant system are holders of Permanent Resident who are unable to provide for themselves and their dependants. It can be argued that exclusion of this category of non-nationals from this government safety net scheme which is instituted purposely to reduce the force of severe poverty or any circumstance of distressed such as joblessness, a person leaving without a roof over his or her head, hospitalisation and funerals, just to name a few, places non-nationals in a precarious situation. Most non-nationals who are unable to provide for themselves or their dependants, fall back on other forms of informal social security like family or community networks of other non-nationals from the same country of origin who normally help out.⁶⁵⁰ Grants such as social relieve of the stress can be instituted to assist them while go through the difficult situations they fine themselves.

Some non-nationals belong to traditional associations which are properly organised where they make financial contributions on regular bases. They can always fall back on these associations in case of adversity.⁶⁵¹ Some may lean on their personal

⁶⁴⁷ 27 (1) (c) of the 1996 Constitution.

⁶⁴⁸ Pieters *Introduction to social security* 1.

⁶⁴⁹ *Social Assistance Act* 13 of 2004.

⁶⁵⁰ Kapindu 2011 *African Human Rights Law Journal* 109.

⁶⁵¹ *Ibid.*

savings in case of rainy days meanwhile some who do not have relatives back home to potentially provide for them in such a situation can even die in the situation in the event of the problem persisting.⁶⁵² An example is when a non-national becomes unemployed due to illness, the common practice is that the non-national is sent back to his/her country of origin. This kind of informal social net is in line with the spirit of *Ubuntu*⁶⁵³ which received judicial expression in the Constitutional Court in the case of *S v Makwanyane*,⁶⁵⁴ where Langa J (as he then was) stated that:

Ubuntu is of some relevance to the values we need to uphold. It is a culture which places emphasis on community and on the interdependence of members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from members of the community such person happens to be part of...more importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.⁶⁵⁵

The value of *Ubuntu* has been evaluated and described in The White Paper for Social Welfare as follows:

The principle of caring for each other's well-being is promoted, and a spirit of mutual support fostered. Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual's humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and the responsibilities of every "Citizen" in promoting individual and societal well-being.⁶⁵⁶

Thus, Olivier noted that principles like *Ubuntu*, which deal with commonality, team spirit, sympathy, fairness, harmony, self-determination, respect for other humans,

⁶⁵² *Ibid.*

⁶⁵² *Ibid.*

⁶⁵³ Langa J describes *Ubuntu* in *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) para 224 as follows: "The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

⁶⁵⁴ *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

⁶⁵⁵ *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) para 224.

⁶⁵⁶ Gen Not 1108 in GG 18166 of 8 August 1997 para 45.

and respect for each other's dignity, are the foundation of closely-interlaced communities that can be perceived in the socio-economic and political activities of Africans.⁶⁵⁷ Dekker noted that "informal social security is not in itself sustainably reliable and it necessarily needs to be augmented with formal measures".⁶⁵⁸

It can be submitted that, government policies that exclude non-nationals other than permanent residence holders from benefiting from social grants like the social assistance grant and social insurance fund like the Unemployment Insurance Fund, seem to be irrational thereby falling short of section 27(1) (c) of the Constitution⁶⁵⁹. The extension of the scope of Social Security to Permanent Residence holders in the *Khosa-case*⁶⁶⁰ is a good move towards extending the scope of social security to non-nationals. Despite this move, non-nationals with permanent residence still face discrimination. A survey carried out by Kapindu on a Malawian permanent residence holder interviewed in Johannesburg said:

My ID indicates that I am a non-citizen of RSA and that has led to my being denied opportunities of different types on many occasions. My lack of strong command of local languages also contributes to similar instances. I therefore do not plan on staying in South Africa for much longer. Although savings are generally impossible from my modest income, I am starting off slowly with a small business to raise funds, and I have already acquired land in Malawi.⁶⁶¹

According to this statement, the reason for the Malawian residence in South Africa is mostly for social protection.⁶⁶² It also reveals xenophobic attitude which most permanent residence non-nationals face in different services in the country, which by law they are entitled to.⁶⁶³ Social security rights can be better enjoyed by all if there is an equal enjoyment of all the rights without any discrimination. There is a deep

⁶⁵⁷ Olivier *et al* "Formulating an Integrated Social Security Response: Perspectives on Developing Links between Informal and Formal Social Security in the SADC Region".

⁶⁵⁸ Dekker *Social Security: A Legal Analysis* 6.

⁶⁵⁹ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169.
S 27 (1) of the Constitution of the Republic of South Africa, 1996.

⁶⁶⁰ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁶⁶¹ Kapindu 2011 *African Human Rights Law Journal* 109.

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

connection between social rights and equality. In the case of *Larbi-Odam v MEC for Education (North-West Province)*,⁶⁶⁴ it was held that discrimination on grounds of citizenship is unfair. To enhance better enjoyment of the right to social security Principles such as reciprocity and sustainability of benefits needs to be introduced.

As already mentioned above, reciprocity of treatment and sustainability need to be properly administered. Reciprocity of treatment here entails that member state to the SADC undertake to apply equal treatment to workers on a reciprocal basis.⁶⁶⁵ This principle however does not work well for South Africa because the flow of workers into South Africa is uni-directional, as such, there is little incentive seen in terms of the principle of reciprocity.⁶⁶⁶ For example, a survey in 1995 showed that compensation paid for formal non-nationals mine workers from Mozambique who used to work in South Africa was paid over to the Mozambican government, almost seventy percent of the eligible mine workers received no money or received less than they should have.⁶⁶⁷ It can therefore be submitted that the effectiveness of bilateral protection in Southern Africa is compromised where a country with a well-developed social security system like South Africa concludes a bilateral agreement with a country with a relatively less developed or strained social security system like Mozambique.⁶⁶⁸

In *Harkson v Lane*,⁶⁶⁹ it was held that unfair discrimination occurs where the difference in treatment burdens people in disadvantaged positions compared to those who are relatively well-off. The situation of this Malawian mirrors is the

⁶⁶⁴ *Larbi-Odam v MEC for Education (North-West Province)* (CCT 2/97) 1997 ZACC 16; 1997 BCLR 1655; 1998 1 SA 745 1997.

⁶⁶⁵ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 259.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ Paid by Rand Mutual Assurance as administering agency (COIDA S 3 and 94).

⁶⁶⁸ Two other alarming events that brought the vulnerability of these groups to the fore took place. First, in June 2009 more than 70 illegal miners (also called zama-zamas) died underground. These workers (mostly non-citizens) were forced to resort to illegal mining activities, probably as a result of continuing retrenchments in the mining industry and their lack of access to any other sufficient social protection support.

De Lange *Kan Zama-Zamas se Grawery Gewettig Word?* 6. In November 2009, 3 500 Zimbabweans were violently chased away from their shelters in De Doorns in the Western Cape Province. News24 <http://www.news24.com>. One factor that leads to xenophobia is the 'widespread perception that immigrants are a drain on the resources of social security systems.

⁶⁶⁹ *Harken v Lane* 1998 1 SA 300 (CC) para 54.

situation non-nationals are facing in other parts of Africa and the world at large.⁶⁷⁰ As already mentioned above, the issue of social security for non-nationals all over the world is problematic.⁶⁷¹ This is specifically linked to the immigration policies of the current president of America (Donald Trump) who has gone ahead to sign certain laws preventing Arab Countries like Sudan and Libya from entering the country in fulfilment of his campaign promises.

6.4 Access to Employment, General Conditions of Work for Non-Nationals and their Position to own Asserts in South Africa

Access to employment for some non-nationals especially those without work permit at times is frustrating. Most non-nationals are not holders of work permit. In South Africa, a non-national can only obtain a good job if he/she is a holder of a valid work permit. This pushes those with permits order than work permit to work even when the wages are very low and receive little benefits associated with their employment. Non-nationals without work permits are prepared to perform more menial forms of labour relatively cheaply and are available in sufficient quantities.⁶⁷² Along with the phenomenon of globalisation, there has been a marked shift in the labour market in that, skilled workers who are mostly non-nationals provide skilled labour in foreign countries.⁶⁷³ In the case of South Africa, non-nationals provide cheap labour in large quantity of which South Africa due to lack of enough skilled labourers has employed large number of them.⁶⁷⁴ In a situation like this, one may expect greater effort on the part of South Africa and its employers to provide security of employment.⁶⁷⁵

One would further expect the same measure of social security to be accorded to non-nationals like nationals.⁶⁷⁶ This seems not to be the case; documented non-nationals without work permit as well as undocumented non-nationals employed in the formal sector quite often do not sign any definite official contract of employment with their employers or any type of written contract of employment. Most of them are

⁶⁷⁰ Kapindu 2011 *African Human Rights Law Journal* 109.

⁶⁷¹ *Ibid.*

⁶⁷² Strydom (eds) *Essential Social Security Law* (Juta & Co 2007) 258.

⁶⁷³ *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

not well paid compared to South Africans who are in the same job.⁶⁷⁷ At times, they are refused the privilege to join any form of labour union.⁶⁷⁸ To avoid being repatriated, they shy away from demanding better salaries or wages.⁶⁷⁹ As such they would rather bear the untold humiliation they go through.⁶⁸⁰ Note must equally be taken that some of these non-nationals are undocumented.

In South Africa Section 32(1) of the Immigration Act⁶⁸¹ explicitly states that undocumented non-nationals ought to be deported. In accordance with the Body of principles for the Protection of All persons under any form of detention or imprisonment⁶⁸², undocumented non-nationals who are apprehended and held in custody quite often do not have an opportunity to have their case reviewed promptly by a judicial or other authority. At times, they are detained for a long period of time.⁶⁸³

It is submitted that non-nationals under detention must have their case reviewed promptly by a judicial or other authority. Continuous detention should be on the basis of specified conditions, and should be subject to periodic review and to a maximum time limit. The current practices, allowing for the judicially unsupervised detention of undocumented non-nationals for an initial period of thirty days, are inconsistent with international human rights standards and the provisions of the Constitution. In the *Khosa-case* the court expressly exempts undocumented non-nationals from receiving social security.⁶⁸⁴

Amid temporary residence holders and permanent residence holders, the Court drew a distinction. It stated that "whilst with permanent resident holders they are legal in the country and may have been so for a very long time and have a solid connection

⁶⁷⁷ Strydom (eds) *Essential Social Security Law* (Juta & Co 2007) 258.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Kapindu 2011 *African Human Rights Law Journal* 110.

⁶⁸⁰ *Ibid.*

⁶⁸¹ S 32 (1) of the *Immigration Act* 13 of 2011.

⁶⁸² Nyeriti Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community 22.

⁶⁸³ *Ibid.*

⁶⁸⁴ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

with the country, while the connection for temporary residence holders is weak and even though they may be staying either legally or illegally in the country, they might not have stayed in the country for a long time.⁶⁸⁵ However, the reality of undocumented non-nationals in South Africa cannot be ignored as was in the case of the *Lawyers for Human Rights and Other v Minister of Home Affairs and Other* where the court decided to accord some protection under the law to some undocumented non-nationals.⁶⁸⁶

The Courts in the case of *Lawyers for Human Rights v The Minister of Home Affairs*,⁶⁸⁷ argued on the issue that undocumented non-nationals have no rights and as such can only be protected by international law. The Court further pointed out that at the point of entering; an undocumented non-national is protected by the Constitution of the land.⁶⁸⁸ Section 19 of the Immigration Act⁶⁸⁹ disqualifies non-nationals migrant workers from benefiting from compensation under COIDA and ODMWA; this is because they are not in possession of a valid work permit as prescribed by the Act. They are not classified as “employees” for labour law thus they cannot contribute⁶⁹⁰ as well as the purpose of social security. For example, to launch a complaint before a labour court for adjudication can only be done if it is well justifiable with or without a valid employment contract.⁶⁹¹

The Constitutional Court, however, in the case of *Discovery Health Ltd v CCMA & Others*,⁶⁹² granted labour law protection to a group of non-nationals whose work permit had expired. Normally an employee’s labour law status controls the right of that employee to social security benefits which are related to his/her employment. This judgement seems to imply that this group of non-nationals could also benefit

⁶⁸⁵ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁶⁸⁶ *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 para 32.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ The 1996 Constitution.

⁶⁸⁹ S 19 of the Immigration Act 13 of 2011.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Moses v Safika Holdings (Pty) Ltd* 2001 22 ILJ 1261 (CCMA).

Vundla v Millies Fashions 2003 24 ILJ.

⁶⁹² *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC).
<http://butterworths.uct.ac.za/nxt/gateway>.

from access to social insurance protection for example, the right for them to be able to be rewarded for occupational injuries and diseases, the right for them to benefit from housing allowances. As it stands, undocumented non-nationals do not have the right to housing subsidies, they cannot purchase a house even when they are financially capable of doing so due to lack of proper documentation.

Their illegal status excludes them from enjoying most social assistance in South Africa. Of a truth most of these undocumented non-nationals live in abject poverty and live in informal settlements and unhealthy environments. Even though they are excluded from most social protection in South Africa, the Constitution entrenches the right to dignity for everyone living in South Africa, so it follows that being a part of the South African society, they have the right to live in dignity in South Africa⁶⁹³.

In the Supreme Court case of *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*,⁶⁹⁴ sixteen illegal non-nationals were forcibly removed from their homes and their properties burnt down together with many other people. The court frowned at such attitude and stated that the act invaded the right to the property of the occupiers. Despite the fact that the court did not comment on the rights of illegal non-nationals, it insisted on the fact that the action had trodden on their emotions and reduced their self-esteem.

The Court further insisted that the right to inherent dignity is provided in the Constitution⁶⁹⁵ for "everyone" which must be respected, promoted and protected and it further stressed that the occupiers were bearers of constitutional rights.⁶⁹⁶ Undocumented non-nationals are open to abuse in the labour markets and they are also barred from enjoying some rights and privileges which are important for instance, the right to partake in activities crucial to protecting or promoting their rights like taking part in labour or trade union activities.⁶⁹⁷ Migration for many non-nationals

⁶⁹³ The 1996 Constitution.

⁶⁹⁴ *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 SCA 70 Case 303/2006.

⁶⁹⁵ The 1996 Constitution.

⁶⁹⁶ Ibid.

⁶⁹⁷ Kapindu 2011 *African Human Rights Law Journal* 110.

is a household poverty reduction strategy since they are expected to send remittances back home to take care of their families.⁶⁹⁸

Remittance can be seen as a weapon to combat poverty which is being suggested countries include in their strategies to fight against poverty.⁶⁹⁹ Excluding non-nationals from social security can be seen as fighting against the same spirit of poverty alleviation. Plagued with all these degrading situations non-nationals feel a sense of “not-belonging.” This “sense of not belonging” pushes them to the extreme margins of the society. Part of these exclusions are an outcome of issues which are more difficult to understand than mere social phenomena or issues of residential or immigration status.⁷⁰⁰

It passes beyond the general experience of the non-national and it appears it is founded in the xenophobic activities characteristic of South Africa and also, it may be due to lack of enthusiasm or the urge to become a part of the South African society on the part of the non-nationals. For instance, the recent xenophobic attacks on non-nationals in April 2015 started in Durban and spread to Johannesburg, Germiston and Alexandria leaving many non-nationals dead and their properties looted, burnt down and destroyed. Many non-nationals were deported to their home countries while many who were homeless were still in shelters provided by the government as the government sought for lasting solutions to the problem of xenophobia.⁷⁰¹ These attacks have been seriously condemned by some South Africans as barbaric arguing that they have no constitutional base.⁷⁰² A general lack of knowledge about the rights to social security for non-nationals also can stand as a challenge for them not to be able to receive their rights to social security.

In the case of *Discovery Health Limited v CCMA & Others*,⁷⁰³ the definition of “employee” was extended to cover an undocumented non-national benefits linked to formal employment. In this case, an illegal non-national was granted relief against

⁶⁹⁸ Olivier 2011 *SADC LJ* 32.

⁶⁹⁹ Olivier 2011 *SADC LJ* 32.

⁷⁰⁰ Ibid.

⁷⁰¹ Eye witness account.

⁷⁰² Honourable Julius Malema of the Economic Freedom Fighters condemned these attacks in the parliamentary session held in April 2015.

⁷⁰³ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633.

unfair dismissal after he had been dismissed because the employer could not obtain a valid work permit for him. He was considered as an employee and afforded legal protection despite his illegal status.⁷⁰⁴ Although his claim was for unfair dismissal, the effect of the court's approach was that the definition of "employee" was extended to include protection for an illegal non-national.

6.5 Access to Health Care

The right to access health care services is a constitutional provision in South Africa, which is guaranteed for everyone.⁷⁰⁵ Section 27(3) of the 1996 Constitution provides that emergency medical treatment must be guaranteed for everyone. Notwithstanding the nationality or status of an individual, both the right to access to health care services and the right to emergency medical care is a constitutional provision applicable to everyone. According to the Medical Scheme Act,⁷⁰⁶ private schemes provide health care to a little part of the population and it is controlled by the Medical Schemes Act.⁷⁰⁷ Membership in this regard is not tied to immigration status or nationality.

As long as one has the financial means to contribute towards the scheme, one can benefit from the scheme. Non-nationals with the necessary financial means therefore have equal access to health insurance as nationals. Quite often, private health care focuses on those employees and it is based on insurance. Public health care is not available for non-nationals with temporary residence except in emergency cases.⁷⁰⁸ However, occupational based health care and retirement benefits are available to non-nationals who are in possession of a work permit.⁷⁰⁹

Some non-nationals face xenophobia and hostility from health care personnel. Some are even reported to have been sent away from consulting in public hospitals

⁷⁰⁴ *Ibid.*

⁷⁰⁵ S 27 (1) (a) of the 1996 Constitution.

⁷⁰⁶ Medical Scheme Act 131 of 1998.

⁷⁰⁷ Nyenti Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community 22.

⁷⁰⁸ Nyenti Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community 22.

⁷⁰⁹ Nyenti. Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community 22.

because of lack of South African identity documents or a permit.⁷¹⁰ Denying access to health care services because of lack of South African identity or a permit which is valid abrogates section 27(1) (a) of the Constitution⁷¹¹ Section 9 of the Constitution⁷¹² which is to the effect that there should be equal enjoyment of all the rights as listed in the Bill of Rights. A major equality problem concerns the restrictions that are permitted concerning non-nationals *vis-à-vis* their social security status.

At one level, discrimination against non-nationals at times is a form of racism or xenophobia which is offensive. At another level, it is acceptable that states can control access to social security by controlling who gets access to it.⁷¹³ From a legal perspective one might wonder if discrimination is justifiable. What then qualifies as justifiable exclusion from social security? Equality may be pursued to the extent that it does not violate the dignity of members of the society who need constitutional protection. The very essence of social security is to protect ones dignity and pride. We need to understand the centrality of dignity in the South African Constitutional Court's equality analysis.⁷¹⁴ In the words of the court, "unfair discrimination principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity." Dignity therefore serves as the test of whether unfair discrimination has occurred. In so doing, it also tells us how far the remedial measures address this unfairness.⁷¹⁵ In the case of the *Republic of South Africa and Others v Grootboom and Others*,⁷¹⁶ Goldstone J in delivering his judgment stated:

At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new Constitution 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 or particular groups. The achievement of such a society in the context of our deeply in

⁷¹⁰ Kapindu 2011 *African Human Rights Law Journal* 111.

⁷¹¹ S 27 (1) (a) of the 1996 Constitution.

⁷¹² S 9 of the 1996 Constitution.

⁷¹³ Clapman *Human Rights: A Very Short Introduction* 146.

⁷¹⁴ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31.

⁷¹⁵ Strydom (Eds) *Essential Social Security Law* (Juta & Co 2007) 232.

⁷¹⁶ *The Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) 2000 ZACC 19; 2001 1 SA 46; 2000 11 BCLR 1169.

egalitarian past will not be easy, but that the goal of the Constitution should not be forgotten or over looked.⁷¹⁷

Equality may be pursued to the extent that it does not violate the dignity of members of the society who need constitutional protection. The extent to which the right has been impaired is important in determining whether discrimination has occurred. The court weighs the impact of legislative action and the objective in which they want to achieve and the extent to which the right of the complainant has been impaired in the light of reasonableness. Examined reasonableness in this light, there must be a relationship between reasonable legislation and the purpose served by social security.

In the *Khosa-case*,⁷¹⁸ Mokgoro conceptualised the relationship between reasonableness on one hand and the importance of social security for non-nationals and has this to say, "Equality in respect to access to socio-economic rights is implicit in the reference to 'everyone' being entitled to having access to such rights as in Section 27." From this statement, it would seem that where the state draws a line or formulates criteria that deny some people access to socio-economic rights while providing them for others amounts to a violation of equality and social guarantees. De Vos pointed out that the rights in the Bill of Rights relate to each other and are in support of each other. He further argued that socio-economic rights and equality are related and that the dream of the Constitution is to bring solutions to fight against the transformative vision of the Constitution⁷¹⁹ through socio-economic inequality.⁷²⁰

It can be submitted that excluding non-nationals without permanent residence permit from access to health care would seem as it denying them other interrelated constitutional rights. In serious cases of health hazard, non-nationals resort to private clinics or the burden of their treatment will rest on friends and relatives.⁷²¹ Consequently, an informal pattern which is well-known and based on one's country of origin or one's kinsman replaces the burden of providing access to health care

⁷¹⁷ *Ibid.*
Republic of South Africa and Another v Hugo 1997 4 SA 1 (CC) 1997 ZACC 1997 6 BCLR 708 (CC).

⁷¹⁸ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁷¹⁹ *The 1996 Constitution.*

⁷²⁰ De Vos 2011 *South African Journal on Human Rights* 258-276.

⁷²¹ *Ibid.*

from a constitutional stand point. This provides the non-nationals with a means to survive and hence a way of protecting themselves socially in a place where they are unable to access health care.⁷²²

It is necessary that, denying non-nationals who have no valid South African identity or a permit access to health care services needs be sanctioned officially by the authorities. In some areas in South Africa, non-nationals are being excluded from receiving anti-retroviral drugs on account of identity documents.⁷²³ This practice is dehumanising. Many commentators commenting in many aspects of rights entitlement commented that, “the policy may look good but it simply does not translate well in practice”.⁷²⁴ Landau criticised these practices of denying health care to non-nationals stating that, “providing health care for refugees, asylum seekers and other non-nationals is a critical public health concern.”⁷²⁵ He further argues that, “the denial of health care can lead to the spread of infections and diseases to non-nationals and communities in which they live in.”⁷²⁶ Moreover, besides infringement on the dignity and rights as human beings of the non-nationals, illness reduces the rate at which South Africans can use their potential to contribute for the building of South Africans.⁷²⁷

6.6 Access to Education for Non-Nationals

Basic education which involves basic education for adults is provided in Section 29 of the Constitution.⁷²⁸ Furthermore, it is mandatory for children between the ages of seven to fifteen years to go to school as provided by section 29 of the South African

⁷²² Ibid.

⁷²³ In a memorandum from the National Department of Health in Pretoria, dated 15 February 2007, the Department advised provincial departments that, patients should not be denied ART [anti-retroviral treatment] because they do not have an ID if all issues affecting adherence have been addressed and the treatment team is convinced that the patient stands to benefit from the intervention. Again, the Gauteng Department of Health issued another memorandum to hospitals and health care providers dated 4 April 2008, stating that it had come to its attention that the practice of excluding undocumented or irregular migrants from public health care services was continuing and that it was ‘not acceptable’. A directive was therefore issued that ‘no patient should be denied access to any health care service, including access to anti-retroviral irrespective of whether they have a South African identification document or not.

⁷²⁴ Belvedere *et al* *The Development of Health and Welfare Policies for Asylum Seekers and Refugees in South Africa* 37.

⁷²⁵ Landau Regional Integration, Protection and Migration Policy challenge in South Africa 37.

⁷²⁶ Ibid.

⁷²⁷ Ibid.

⁷²⁸ S 29 of the 1996 Constitution.

Schools Act.⁷²⁹ The duty to make sure that every learner of the above mentioned age group who is under the auspices of a parent or guardian go to school is entrenched in Section 3 (1) of the Act⁷³⁰ In addition, in section 5 (3) (a)⁷³¹ it is provided that, “no learner may be refused admission to a public school on grounds that his parents are unable to pay or has not paid school fees”.

The above provisions show that, it is a legal requirement that all children of the specifically named age group go to school. Besides, South Africa is a signatory to the Convention on the Right of the Child which creates an obligation for South Africa to recognise the right of the child to education, with a view to achieving this right progressively and on the basis of equal opportunity to all children.⁷³² Most of the discriminating provisions in the South African social security system do not tie with human rights as well as the obligations in international treaties in which South Africa is bound. Looking at the endanger position of children especially poor children, and the focus of the Constitution which is to protect children, exclusion some children from some social security protection is constitutional children,⁷³³ Irrespective of residence permit documentation, most non-nationals prefer sending their children to study back home.⁷³⁴ Furthermore, children find difficulties to register for matric examinations because of the formal requirement of South African identity document for purposes of the matric examinations.⁷³⁵

To appear like South African children so that they can be permitted to sit for the matric exams, children had to bear the surnames of South African children. Quite often, separating children from parents breaks the family union. O'Regan J in the case of *Dawood and Others v Minister of Home Affairs and Others*,⁷³⁶ pointed out that, “the institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of society and bear

⁷²⁹ South African Schools Act 84 of 1996.

⁷³⁰ S 3 (1) of the South African Schools Act 84 of 1996.

⁷³¹ S5 (3) (a) of the South African Schools Act 84 of 1996.

⁷³² Article 2 (1) of the Convention on the Rights of the Child of 1989.

⁷³³ S 28 of the 1996 Constitution.

⁷³⁴ Kapindu 2011 *African Human Rights Law Journal* 110.

⁷³⁵ *Ibid.*

⁷³⁶ *Dawood and Others v Minister of Home Affairs and Others* 2000 3 SA 936.

an important role in the rearing of children.”⁷³⁷ She further noted that, “although there is no provision in the Constitution guaranteeing the right, a number of constitutional rights might still be implicated and that the primary right implicated is the right to dignity.”⁷³⁸

The Constitution acknowledges a family and protects family life. The state through its policy frame work has an obligation to protect this right. ⁷³⁹ With regards to changing of names, for the purpose of sitting for the matric exams, it can be said that, it violates the right of a child to the name given to that child at birth, and the dignity of the child.⁷⁴⁰ Exclusion of non-nationals from access to public education means excluding them from one of the fundamental and essential rights of the “basic social security package” within the structure of social protection. The prohibiting of children of non-nationals from sitting for matric exams because of lack of South African identity seems not to be a state policy or legislation but a way which has become a tradition.⁷⁴¹ This practice does not conform to the requirements of the South African Schools Act,⁷⁴² requirements in the Constitution which makes fundamental education mandatory to the above mentioned age as well as the provisions of international treaties concerning the rights of children.⁷⁴³

6.7 LITIGATION

As highlighted above, the Social Security Minimum Standards Conventions⁷⁴⁴ have a lot of influence on the legislative framework of social security in South Africa. This has created problems which negatively affect access to social security for non-nationals such as fragmentation.⁷⁴⁵ The numerous avenues for litigations make it very difficult for non-nationals to enjoy their social security rights. For example in

⁷³⁷ *Dawood and Others v Minister of Home Affairs and Others* 2000 3 SA 936 para 36.

⁷³⁸ The right to human dignity is protected under s 10 of the *Constitution of the Republic of South Africa, 1996*.

⁷³⁹ *The 1996 Constitution*.

⁷⁴⁰ Kapindu 2011 *African Human Rights Law Journal* 110.

⁷⁴¹ *Ibid.*

⁷⁴² *South African Schools Act* 84 of 1996.

⁷⁴³ *Convention on the Rights of the Child* of 1989.

⁷⁴⁴ *Social Security Minimum Standards Conventions* 102 of 1952.

⁷⁴⁵ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

areas of adjudication and enforcement of the right to social security, there are a variety of routes that could be utilised to enforce or monitor social security rights.

These routes, stemming from a variety of social security statutes and the common law, include the following Courts: Constitutional Court, High Court, Labour Courts and Magistrates Court. There are also boards which hear matters concerning social security like Special Pensions Board, Special Pensions Review Board and Appeals Committee of the Unemployment Insurance Board. Also tribunals like Pensions Fund Adjudicator, Council for Medical Schemes, Commission for Conciliation, Mediation and Arbitration etc. hear matters concerning social security.

Furthermore, offices such as Director General of the Department of Social Development, Minister for the Ministry of Social Development, *etcetera* and commissions are all roads that a litigant to make their grievances heard. These numerous avenues for litigants to take social security litigations to have led to discrimination against non-nationals.⁷⁴⁶ There is little consistency, as different bodies or officials are called upon to hear complaints and appeals in respect of different parts of social security. Undue delays are common and the power of the courts to deal with these matters is unsatisfactory.⁷⁴⁷

In the *Khosa-case*,⁷⁴⁸ the decision of the Constitutional Court was limited to non-nationals with permanent residence and the right to access to social assistance accorded to them was limited.⁷⁴⁹ These bottlenecks place non-nationals in a precarious state since enforceability of their social security rights is complicated. Also, notice should be taken of the fact that, there are too many amendments of the laws and Acts guiding social security in South Africa. A non-national for instance who passes away from injuries in a gold mines might require that his beneficiaries come to South Africa for compensation from COIDA, in case the survivals are

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

⁷⁴⁸ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁷⁴⁹ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 96.

illiterates it can be very challenging and even frustrating to know which law applies at moment because of too many amendments. It can be argued that too many amendments of the social security Acts can instead lead to more frustrations to beneficiaries. Therefore a uniformed platform can rather be put into place where Social Security participants can advocate for their social security rights. This will further help non-nationals who need to advocate for their rights to Social Security to do so without fear or favour.

6.8 REMITTANCES

Migration for non-nationals is seen as an occupation, migrants despite the fact that they are far away from home, they still have very strong contacts with the home country.⁷⁵⁰ Non-nationals view migration as a way of combating poverty by sending home remittances to support their families back home. Remittance enables families in the home of origin of non-nationals to provide for their daily expenditures. Since remittance is received in cash it stimulates the economic growth of the countries of origin of the non-national as well as the economy of the host nation since remittances play an important role in the supply of foreign exchange.⁷⁵¹

Erroneous and excessively restrictive policy choices can shatter the outcome on poverty diminution and household survival in the host nation as well as the country of origin of the non-national. This is in line with Sabates-Wheeler and Waite perception of remittance. According to them, the reason why migrants send remittance back home is for the purpose of insurance and investment. In case of unexpected repatriation, they can always find something from the remittance they have been sending back home to settle on.⁷⁵²

⁷⁵⁰ Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 126.

⁷⁵¹ Crush *et al* 2008 *Migration, Remittances and Gender Responsive Local Development: The Case of Lesotho*. Santo Domingo/New York/ Maseru: UN International Research and Training Institute for the Advancement of Women & United Nations Development Programme 2.

⁷⁵² Sabates-Wheeler and Waite 2003 Institute of Development Studies, Sussex.

6.9 PROSPECTS AND SUCCESSES OF SOCIAL SECURITY IN SOUTH AFRICA

Even though non-nationals are excluded from most of the social security grants, in South Africa, South Africa still stands as a pace setter for other states to emulate as far as social protection in Africa is concerned. South African social security has registered some successes. Below are some cases demonstrating successes registered in South African Social security.

6.9.1 Cases that Extended the Right to Social Security to non-nationals in South Africa

Before the decision in the *Khosa case*, non-nationals were excluded from all social assistance grants which are the main source to fight against poverty for the vulnerable. The Constitutional Court decision in the *Khosa case* greatly succeeded to extend the right to social security to non-national even though to a limited extent. As already discussed above, the decision in the *Khosa case* extended social assistance grants to non-nationals particularly the right to child support grant.⁷⁵³

Furthermore, the Social Assistance Act⁷⁵⁴ does not include refugees in its social assistance coverage in many of the social assistance grants. As already highlighted above, it does not tie with the provision of the 1951 United Nations Convention Relating to the Status of Refugees of which South Africa is a signatory. This Convention requires that, member states to this Convention provide refugees who are living legally in their country equal treatment as nationals in the area of public relief and assistance.⁷⁵⁵ The case of *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others*, greatly extended the rights and privileges of refugees as that of nationals even though not in all circumstances.⁷⁵⁶ The court extended the right for them to look for jobs even though not in all industries. It seems as if legally, refugees and asylum-seekers have the right to

⁷⁵³ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 83.

⁷⁵⁴ Refugees Amendment No. 12 of 2011.

⁷⁵⁵ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) para 83.

⁷⁵⁶ *Ibid.*

occupational social security schemes together with health insurance and retirement insurance. Also, they have the right to compensation for occupational injuries and diseases as well as motor vehicle accidents.⁷⁵⁷

Take note that, refugees fall outside those qualified as workers who are generally covered by retirement fund arrangements because of the impermanent nature of their stay in South Africa.⁷⁵⁸ It is unclear whether refugees and asylum-seekers are entitled to contribute to and benefit from unemployment insurance, one reading from the UIA⁷⁵⁹ leaves one with the impression that they are not allowed to contribute to the Unemployment Insurance Fund.⁷⁶⁰ However, the Social Assistance Act⁷⁶¹ makes it possible for refugees to benefit from disability grant, the foster care grant, and social relief of distress.⁷⁶² They are however exempted from other social assistance benefits like the old age grant. In cases of emergency, Asylum-seekers are provided with social assistance for instance emergency health care

Asylum seekers who are still awaiting the Home Affairs to decide on their application for asylum was not allowed to work or study despite the crucial nature of jobs in South Africa. The case of *Minister of Home Affairs & Others v Watchenuka & Another* extended the right to work and study to asylum seekers waiting for the Home Affairs to decide on their applications⁷⁶³ which is in accordance with Regulation 7 of the Refugee Regulations 2000.

As already highlighted above, non-nationals who are undocumented normally do not possess a valid work permit and as such, they are not considered as employees under labour law provisions since there is no valid contract of employment between them and their employers. In the case of *Discovery Health Ltd v CCMA & Others*

⁷⁵⁷ *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others* 2007 28 ILJ 537 (CC).

⁷⁵⁸ Olivier 2011 SADC LJ 27.

⁷⁵⁹ S 3 (1) (d) of the *Unemployment Insurance Contributions Act* 4 of 2002.

⁷⁶⁰ *Unemployment Insurance Contributions Act* 4 of 2002.

⁷⁶¹ *Social Assistance Act* 59 of 1992.

⁷⁶² Gen Not 518 in GG 31356 of 22 August 2008: Regulation 3 (a) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance provides that a person is eligible for a disability grant if he / she is a South Africa citizen, permanent resident or refugee.

⁷⁶³ *Minister of Home Affairs & Others v Watchenuka & Another* 2004 1 All SA 21 (SCA).

cited above,⁷⁶⁴ labour law protection was granted to a group of non-nationals whose work permit had expired. Normally an employee's labour law status controls the right of that employee to social security benefits which are related to his/her employment. This judgement implies that, this group of non-nationals could also benefit from access to social insurance protection for example, the right for them to be able to be rewarded for occupational injuries and diseases, the right for them to benefit from housing allowances

6.10 CONCLUSION

From the above discussion, it is clear that both documented and non-documented non-nationals are vulnerable groups that need constitutional protection. This vulnerability is often exacerbated by the fact that non-nationals are frequently treated as persons outside the political community of the host country, and this entails exclusion from various rights, privileges and amenities accorded to nationals. They lack that political muscle to advocate for their rights like nationals. South Africa is bound to protect the social security rights of non-nationals as vested in international, regional as well as in the Constitution⁷⁶⁵ of South Africa. However, providing Social Security to a person should not be entirely based on the person's status but on the fact that a person belongs to that particular society and is in need of assistance and protection.

⁷⁶⁴ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC) para 39.
<http://butterworths.uct.ac.za/nxt/gateway>.

⁷⁶⁵ The 1996 Constitution.

CHAPTER 7

GENERAL CONCLUSION AND RECOMMENDATIONS

7.1 GENERAL CONCLUSION

The discussion in this research shows that, as far as social security is concern, it is clear that non-nationals do not have sufficient social protection despite their increased need for it. The right to social security for non-nationals lays bare the tension between improved access to social security for non-nationals on the one hand and the limited resources available as well as policy decisions in South Africa. According to the International Labour Organisation, due to the tension resulting from internal and external forces has tend to highlight prejudices, dislike of foreigners and racial discrimination of which non-nationals are victimised.⁷⁶⁶

According to Olivier, the issue of social security is problematic all over the world due to linkages and tensions between social security and redistribution, and between citizenship, immigration policies, and human rights.⁷⁶⁷ The problems faced by non-nationals all over the world regarding their social security rights have made this area of study very interesting. To Kanyongolo, social protection is a critical issue in international affairs with Africa generally as the focus point and Southern Africa particularly.⁷⁶⁸

He further observed that “increasing levels of poverty and calls for the reduction or elimination of poverty and social exclusion have heightened debates on the subject”.⁷⁶⁹ In the case of *Discovery Health Ltd v CCMA and Others*,⁷⁷⁰ the Labour Court of South Africa further strengthened this assertion accurately. Van Niekerk J stated that:

⁷⁶⁶ Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

⁷⁶⁷ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

⁷⁶⁸ Kanyongolo *Social Security and Women in Malawi: A Legal Discourse on Solidarity of Care* 32.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Discovery Health Ltd v CCMA and Others* 2008 7 BLLR 633 (LC) para 39.

Globalisation has had a profound effect on international migration and 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.⁷⁷¹

It is clear from this case that, there is a big unsettled pressure emanating from the right of states to guard their labour markets and in the other hand, safeguarding the essential rights of migrants whom either by choice or need search for jobs in other countries. In *Andrews's v Law Society of British Columbia*,⁷⁷² a case decided in Canada, Wilson J shed some light the challenges that migrants face, stating that:

Relative to nationals, non-nationals are 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..." Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation ... that "in the absence of its natural defenders, the interests of the excluded are always in danger of being overlooked."⁷⁷³

Again, the judge further stated that, "this was a determination which was not to be made only in the context of the law which was subject to challenge, but rather in the context of the place of non-nationals in the entire social, political and legal fabric of society".⁷⁷⁴ The situation in South Africa shows that, Justice Wilson's words are as significant in Canada same as in South Africa. The discussion further shows that the entitlement to adequate social security for documented and non-documented non-nationals is justified by international and regional obligations, the Constitution⁷⁷⁵ as well as the decisions in decided cases especially the decision in the landmark case of *Khosa and Mahlaule*.⁷⁷⁶

⁷⁷¹ *Discovery Health Ltd v CCMA and Others* 2008 7 BLLR 633 (LC) para 59.

⁷⁷² *Andrews v Law Society of British Columbia* 1989 BSCR 143

⁷⁷³ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁷⁷⁴ *Ibid.*
S 7 (2) of the 1996 Constitution.

⁷⁷⁵ The 1996 Constitution.

⁷⁷⁶ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).
S 7 (2) of the 1996 Constitution.

The Bill of Right expressly acknowledges the rights of everyone living within the borders of South Africa to social security. The state is obliged to progressively promote the equal enjoyment of all these rights in a free and democratic South Africa despite the limitation clause.⁷⁷⁷ Unfortunately, non-nationals find themselves excluded from certain social security benefits as well as social insurance. The discussion again shows that, the government has a legitimate concern on why it does not want to extend the scope of social security to undocumented non-nationals. An over-generous approach to inclusion can negatively affect existing benefits, which will lead to the lowering of existing benefits and/or to a possible magnetic effect that will attract more non-nationals (seeking permanent residence) to the country.

This argument was echoed by Graser⁷⁷⁸ as he expressed three areas of worry observing the judgement of the minority. Graser⁷⁷⁹ expressed three areas of concern. Firstly he felt that, by extending the scope of social assistance to non-nationals who are permanent residence holders, the social security system is excessively loaded by the additional costs of including permanent residence holders. Secondly to him the increase accessibility of the right to social security will attract more permanent residence holders in to the country. According to the welfare magnet argument, he also feared that, additional load on the welfare budget will lead to a decrease in the existing level of benefits. The first point raised by the majority was dealt with by drawing a conclusion that, the respondents in this case⁷⁸⁰ were unable to present the actual number of permanent residence holders in South Africa and worse of all they were unable to produce the actual number of permanent residence holders eligible for social assistance grants.⁷⁸¹

As far as the second point is concerned, reference were made to international procedures of same status for instance, after the 1969 ruling in the Supreme Court of

⁷⁷⁷ S 27 (2) of the 1996 Constitution.

⁷⁷⁸ Graser 2010 *African Journal of International and Comparative Law*.

Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective*.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ *Khosa and Others v Minister of Social Development and Others, Mahkaule and Another v Minister of Social Development* (CCT13/03, CCT12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

⁷⁸¹ *Ibid.*

the United States of America ⁷⁸² extending some welfare benefits to non-nationals in different states inside the United States of America, there was fright that this will become a crowd-puller for beneficiaries from more liberal states which can lead to a decline of the benefit level. Unfortunately, the “welfare magnet argument” did not work in this situation because extending the benefits did not cause any significant increase in the welfare budget.

Lastly, the third point raised can be solved by looking at the requirements for claim to social security. The South African government can control the number of non-nationals who meet the criteria for Permanent Residences. In this manner, the government will have a certain level of power over the augmentation in welfare expenditures.⁷⁸³ These fears pose a threat to the extension of social security benefits to non-nationals. By extending these benefits to non-nationals it means this vulnerable group will as well benefit from all state resources just like the civilians.

The discussion further highlights the fact that, migration for non-nationals is a livelihood and a strategy for combating poverty.⁷⁸⁴ This point is strengthened by Sabates-Wheeler’s⁷⁸⁵ concept of the various scope of social protection in the framework of migration, such as, migration as an occurrence exposing a non-national to unforeseen circumstances, susceptible to all kinds of attacks which needs proper prevention and migration seen as a social protection line of attack to fight against exposure to lack or economic connected risk in country of origin.⁷⁸⁶

Remittances sent back home acts as a strategy for combating poverty that serves various purposes. Some of these purposes include catering for the financial needs of family members back at home, investing back at home in case of deportation, and as well as prospective investments. Furthermore, it also stimulates economic growth in the host nation as discussed above. As highlighted above, Dekker pointed out

⁷⁸² *Shapiro v Thompson* 392 US 618 1969.

⁷⁸³ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective*165-169.

⁷⁸⁴ Bloch 2008 *University of Witwatersrand*.

⁷⁸⁵ Sabates-Wheeler and Waite 2003 *Institute of Development Studies, Sussex*.

⁷⁸⁶ *Ibid*.

that “the social security position of non-nationals from SADC countries is influenced by their immigration status”.⁷⁸⁷

She further remarked that, as a matter of fact and law, non-nationals benefit from social security according to their immigration position.⁷⁸⁸ The immigration Act⁷⁸⁹ basically decides on the position of non-nationals from SADC countries to South Africa while they are declared capable by the requirements of any mutual agreements signed by South Africa and their countries of origin.⁷⁹⁰ In the mining sector, most non-nationals from SADC are employed by way of the corporate permit or on work permits which are short termed. Some of them are permanent residence holders while others have their citizenship South Africa.

However, most non-nationals from SADC are illegal which seriously reduces their chances of benefitting from social security.⁷⁹¹ In the event that an employer hires undocumented non-nationals, there is no means to ensure that minimum wages are paid or any compensation for work-related injuries. Recommendation no 30 issued by the Committee on the Elimination of All Forms of Racial Discrimination,⁷⁹² states that once an employment relationship has been initiated and until it is terminated, all individuals, whether they have work permits or not, are entitled to the enjoyment of labour and employment rights, including freedom of assembly and association.

Since South Africa is a state party to the International Covenant on the Elimination of All Forms of Racial Discrimination, it has an obligation to ensure that, at minimum, employers must pay the prescribed minimum wages and incur responsibility for work-related injuries of even undocumented workers, including those whom the government seeks to deport.⁷⁹³ Past confirmation and information from data on

⁷⁸⁷ Decker and Olivier *Access to Social Security for Non-Citizens and Informal Workers : An International Germany and South African Perspective* 32.

⁷⁸⁸ Ibid.

⁷⁸⁹ *Immigration Act* 13 of 2011 as amended.

⁷⁹⁰ Olivier “Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC).”

⁷⁹¹ Crush 2008 *Policy Institute: Handmaker et al International and National Responses to the Challenges of refugees in South Africa.*

⁷⁹² Recommendation No 30 issued by the Committee on the Elimination of all Forms of Racial Discrimination.

⁷⁹³ Human Rights Watch *Keep Your Head Down Undocumented Migrants in South Africa.* <http://hrw.org/reports>.

current travelling activities inside SADC shows that travelling activities in search of jobs in southern Africa particularly to South Africa are well established.⁷⁹⁴

As highlighted above, Dekker stated that the industrialisation of countries around SADC together with South Africa, rely greatly on labourers from other Southern region countries. Despite this strong point, policy and immigration framework in South Africa is not migration friendly.⁷⁹⁵ Dekker further observed that, the regime has no respect for human rights and does not support and to promote migration.

Dekker again pointed out that, extensively, it is obvious that from the extent and direction of agreements relating to labour as far as providing migrant labour to South Africa by other SADC countries is concern, immigration laws and policy in South Africa, like other Southern African Countries always concentrate on the consequence of migration and not the reasons for migration. However, South Africa remains a leading light in the whole of Africa in setting up valuable principles displaying a dedication progressively realisation fully social protection in general, and particularly for the vulnerable groups such as non-nationals.

All in all, it is clear that social protection is a guaranteed fundamental human right in South Africa as provided by Section 27 (l) (c) of the Constitution but with an internal limitation as provided by section 27(2) of the Constitution⁷⁹⁶. The enjoyment of the right, however, as discussed above, is beset with multiple challenges. In light of these challenges, non-nationals often find themselves in a high-risk and vulnerable situation. The most obvious conclusion that can be reached is that the current South African social security system provides limited social protection. It is being reformed, and one of the groups that will have to be included within the expected scope of protection is non-documented (vulnerable) non-nationals.

⁷⁹⁴ Olivier 2011 *SADC LJ*.

⁷⁹⁵ *Ibid.*

⁷⁹⁶ The constitution of south Africa 1996

7.2 Recommendations

Any approach to combating discrimination against non-nationals should take into account the varying state interests at stake with due regard to categories of rights (for example, political rights, right to education, social security, other economic rights et cetera) as to various kinds of non-nationals with their distinct relationships to the country in which they are residing (for example permanent residents, migrant workers, temporary residents, tourists, undocumented workers et cetera.).

Also, more categories of non-nationals need be included in to the social security system besides permanent residents. Non-nationals children or unaccompanied minors need to be included for the purposes of social assistance. Extension could also include extending the level of protection: for example, entitlement will include not only social assistance benefits but also social insurance benefits, such as unemployment insurance or compensation for occupational injuries and diseases. These should be easier as they are contributory schemes.

Furthermore, access to social security like social grants which is the main social assistance net in South Africa needs to be respected and a serious commitment from the government to uphold and protect the rights of non-nationals is required. Furthermore, the African Charter (Banjul) Charter on Human and Peoples' Rights the government could institute, an appropriate human rights institution to ensure that non-nationals are being treated in accordance with laid down international, regional and national principles, to ensure better enjoyment of their rights it will be better.

The exclusion of non-nationals workers from contributing to the Unemployment Insurance Fund creates uncomfortable circumstances for them in the event of subsequent unemployment, which is in direct contrast to the constitutional guarantee of access to social security for everyone.⁷⁹⁷ Furthermore, the Social Assistance Act which is the main social assistance legislation does not include the refugees in social assistance even though the Constitution and the Refugees Act guarantee their right to social security. The researcher suggest that, the provisions of the Refugees Act⁷⁹⁸

⁷⁹⁷ Section 27 (3) of the 1996 Constitution.
⁷⁹⁸ Refugees Act of 1998.

and the Constitution⁷⁹⁹ need to be fully implemented since these two legislations guarantee the socio-economic rights of refugees in South Africa.

Again, the researcher recommends that, the social assistance grants should officially include refugees. This will urgently call for an amendment of the provisions of the Social Assistance Act⁸⁰⁰ as well as its regulations.⁸⁰¹ International human rights law defines the context of adequate reception standards for asylum seekers and amongst the standards set are, asylum seekers should not be left in a destitute condition while awaiting examination of their asylum status and time limits for regulation to lodge asylum claims should not be so short as to deprive persons of the protection they are entitled to under international law.⁸⁰²

The position of asylum seekers in South Africa, as highlighted, is a precarious one. National legislation does not guarantee adequate legal and social protection to asylum seekers while they are in transition. The outcome of asylum applications in South Africa is notoriously long with applications taking many years to be determined. There is the practice of consistently renewing asylum permits without granting final refugee status.⁸⁰³ It is recommended that, the smallest account of the circumstances of the dignity of people involved be taken in to consideration by South Africa. In this consideration, the researcher suggest that, South African government make the social relief of distress programme accessible to asylum-seekers who are still waiting for the procession of their refugee status.⁸⁰⁴

In the long term, the researcher recommends that, legislature and the various administrative organs involved institute programmes that will steadily initiate a test which will need that a means of subsistence be instituted before permanent residence can be granted to a non-national by the immigration.⁸⁰⁵ The temporary

799 The 1996 *Constitution*.

800 *Ibid.*

801 Treasury Document 72.

802 Ex Com Conclusion No 82. E/CN14/Sub.2/2003/23/Add.2 (2003) para 23.

803 Crush 1996 *Contract Migration to South Africa: Past, Present and Future*.

804 Treasury document 72.

805 It is in particular recommended that obtaining a temporary and a permanent residence permit be made subject to a clearly defined means of subsistence test.

permit can be taking away if the means of subsistence is no longer met.⁸⁰⁶ In this case, it is easier to protect asylum seekers who are legally residing in South African and are not a load to the state through social assistance grants without any negative impact on the South African budget.

This can be effective only if there is a communication network for the swapping of data between social assistance administrators and the immigration and an efficient method of repatriation.⁸⁰⁷ In all of this, the state has an integral role to play in this regard. Concerning SADC nationals, it is a good step to sign suitable two-sided treaties between South Africa and SADC nationals. The researcher suggest that the government formulate more suitable policies to better implement this treaties.

The primary starting point would seem to be the revamping and reforming of the legal and policy framework or the Immigration system. The scope and content of the suggested country-level reform relate to the issues discussed in this research and other issues that might appear to be relevant too. Fundamentally, it requires at least a re-direct of social security laws and policies as well as immigration and their performance so long as they concern non-nationals. In this case, the government can take on a policy for migration, a structure which balances the requirements for national safety and for immigration to flow methodically.

It is further recommended that the government should compare the wide range of applicable international norms, continental and regional policy frameworks and regional standards contained in important SADC instruments, as well as in relevant comparative best practices. It should also be evident that a human rights orientation should drive the suggested reform since the improvement of the position of non-nationals in the social security system in South African is the critical focus of the reform. There is a need to improve and extend the range of existing regional instruments.

⁸⁰⁶ But not the permanent residence permits, in view of the approach adopted by the Constitutional Court in the *Khosa* judgment.

⁸⁰⁷ Treasury document 72.

An appropriate instrument which gives effect to the migration policy framework suggested by the Africa Union, and which is mindful of the realities of intra-SADC migration, could go a long way towards ensuring the appropriate social security protection of intra-SADC migrants. Following a sequential, multi-dimensional and complementary approach is critical for developing a sound and logical framework for addressing the social security plight of intra-SADC migrants.⁸⁰⁸ This is a task which requires bold and innovative steps, yet sensitive and considered policy formulation, backed by research-based evidence and solutions.

Furthermore, the conclusion of bilateral agreements with suitable content could go a long way towards extending social security protection to intra-SADC migrants on the basis of impartiality in the way they are treated, aggregation of indemnity periods, and maintaining rights that have been acquired and portability of remuneration. This should ideally be undergirded by a many-sided mechanism which draws its ethical structure from global or worldwide and regional principles. As discussed in this research, the grant system is the main safety net available for those who are unable to provide adequate social assistance for themselves and dependants and it is a weapon for poverty alleviation.

Permanent residence holders represent only a small part of the entire non-nationals who are vulnerable or destitute and who need to be assisted by means of social security as a vital main concern. As far as the educational system is concerned, non-nationals are refused the opportunity to educate their children in public schools. It is even worse when they have to change the names of their children just to enable them register for matric examinations. The government should pay attention to the Taylor Committee report which has set aside a different chapter on issues concerning how children can be protected.

From a constitutional stand point as well as moral stand point, it is necessary to focus on the particular need of children in the background of the call of the Committee to guarantee an open entrance to primary and secondary education. The Department of Social Development need to work hand in hand with the Department

⁸⁰⁸ Treasury document 72.

of Education and important groups in the civil society to resolve the problem as a an issue of necessity. The researcher further recommends that, if the government of South Africa can open a proper investigation on the issue of whether the children of non-nationals have easy access to basic education so as to be sure that practically, there is worldwide and obligatory fundamental education for all children as provided for in the Constitution,⁸⁰⁹ the South African Schools Act,⁸¹⁰ and international treaties like the Convention on the Rights of the Child of 1989.⁸¹¹

The researcher further recommends that, there should be a uniform platform where non-nationals can advocate for their social security rights, also the researcher recommends a standardised or social security system so that accessing the right to social security is less confusing. Again, there are too many amendments to the laws that regulate the right to social security in South Africa. It is confusing to know which law is to be implemented at a particular time. It is recommended that the many amended laws be consolidated in to a standard law governing the right to social security. However as far as health care is concern, it is important to note that public health care is available to all groups of people living in the country

Moreover, as mentioned in the chapter dealing with challenges, non-nationals with HIV are refused anti-retroviral treatment in some areas because they are not in possession of South African documents. The researcher suggests that, Taylor Committees recommended that the health system be improved so that all South Africans can have sufficient access to health care be taken seriously. The HIV/AIDS pandemic has increased the need for a well-organised, sufficient-resourced and easily reached health system; it also need that the system be augmented to ensure that the system is capable to deliver excellence care to communities which are poor and exposed to diseases.

Finally, the dualistic character of the current structure of health care in the country, the researcher expressly proposes for a switch to a unitary incorporated health system. The functioning of a single system of health care would stop the use of

⁸⁰⁹ The 1996 *Constitution*.

⁸¹⁰ *South African Schools Act 84 of 1996*.

⁸¹¹ *Convention on the Rights of the Child of 1989*.

numerous risk-pooling and financing mechanisms, it is believe that the further discussion recommended by the Taylor Committee is crucial to make ensure that those who cannot have enough high health care expenses or insurance cover are not going to agree to have a lesser pattern of care.

As highlighted above, the constitutional right to social security is not the same as the right to social security. The Rights in the Bill of Rights are interrelated, interdependent and indivisible; it is important that abrader and integrated approach be instituted for the realisation of the rights. To realise a particular socio-economic right, such as the right to access to housing, would require that other elements which at times forms the basis of other socio-economic rights such as land, must be put in place as well.

The rights mentioned above have a significant impact on the dignity of people and their quality of life. The state is not the State is not the only party responsible for the provision of these rights. The responsibility must also be borne by individuals. The state has the duty to unlock the system so that all people at all economic levels are able to access the right to social security. The result is that those who have the financial means to access social security are placed in a position to be able to access them adequately.⁸¹²

The study will then recommend some forms of measures to improve better cater for the social security needs of non-nationals. Even though section 27 of the Constitution⁸¹³ entrenches the right to social security for "everyone", there is no direct assessment and upholding of this right,⁸¹⁴ and the responsibility of provided for those who are vulnerable can be borne by the state in the form of social assistance. This was seen in the case of *The Government of the Republic of South Africa and others v Grootboom and others*.⁸¹⁵ Rational government measures should be put in place to uphold and comprehend the right to social security. Social security

⁸¹² In the event of unemployment, benefits are paid out to the contributors the State has a duty to monitor such a fund this facilitates access to social security for those who cannot afford.

⁸¹³ S 27 of the 1996 Constitution.

⁸¹⁴ Kapindu 2011 *African Human Rights Law Journal* 113.

⁸¹⁵ Becker and Olivier *Access to Social Security for Non-Citizens and Informal Workers: An International German and South African Perspective* 3.

applicants' need an identical or unified policy to be able to properly advocate for their social security rights⁸¹⁶ against economic shocks.

In order to be reasonable the measures adopted to realise the right must not leave out of account the degree and extent of the denial of the right they endeavour to realise⁸¹⁷ and must be understood in the context of the Bill of Rights as a whole. The right to access to social security is limited internal. The right has to be progressively realised by the State. This means that the right to access is not absolute but limited by the availability of resources. Thus an unqualified obligation to meet this right is not capable of being fulfilled by the State, the State can only fulfil this right progressively.

In addition to the internal limitation contained in section 27 of the Constitution, section 36 contain the general limitation clause in section 36 is also relevant. A right in the Bill of Right can only be limited to the extent that the limitation is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom. Amongst relevant factors considered is the nature of the right, the important of the purpose of the limitation. Its nature and extend and whether there are less restrictive means. The way in which the section 27⁸¹⁸ internal limitation and section 36⁸¹⁹ general limitation interact with regards to the Right is that, if a legislative measure taken by the state fails to pass the required reasonableness for the purpose of section 27, the section 36 can only have relevance if what is "reasonable" for the purpose of section 27 internal limitation then section 36 can only have relevance if what is reasonable for the purpose of that section is different from what is reasonable for the purpose of section 27. With these two limitation clause, the state can exclude vulnerable categories of people from accessing the right to social security, justifying its action on grounds of that, there are no available resources and that such a right can only be achieved progressively.

In the case of *Paschim Banga khet Mazdoor Samity v the State of West Bengal*⁸²⁰ on interpreting article 21 of the right to Life in the Constitution of the Republic of India.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid*

⁸¹⁸ S 27 of the 1996 Constitution.

⁸¹⁹ *Ibid.*

Ibid.

⁸²⁰ *Paschim Banga khet Mazdoor Samity v the State of West Bengal (Supreme Court of India).1996 case No 169 SOL.*

The court had to answer the question of whether denial of emergency medical aid to a patient at a government hospital amounts to violation of that person's constitutional right to life. In this case a person fell off a train and suffered serious head injuries and brain haemorrhage. He was taken to a Primary Health Centre but since the centre did not have the necessary facilities he only got first aid and was referred to government hospitals that were well equipped. At the first hospital even after examination had revealed that the patient needed emergency medical treatment, admission was denied on the ground that there were no available beds. He was then taken to several other hospitals but could not get admission either because of lack of beds or facilities to handle his case. He ended in a private hospital where he was treated at his own cost. He petitioned the court, he claimed that by being denied emergency medical treatment, his right to life was violated. He claimed damages for this purpose. It was held by S.C. Agrawal, J. that:

The India Constitution envisages the establishment of a welfare state in which the primary responsibility of the state is to secure the welfare of the people. That the government discharges this obligation by running hospitals and health centres which provide medical care to persons seeking to avail those facilities. The Constitution imposes an obligation on the state to safeguard the right to life of every person and preservation of life is of paramount importance. The government hospitals and the medical officers in them are duty bound in this respect. Failure on their part amounts to violation of the individual right to life.⁸²¹

From this case, the responsibility of the State to provide social security for the vulnerable is a constitutional imperative. It stands irrespective of constraints in financial resources. The state was said should have a time bound plan for providing its constitutional obligations. This case shows the fundamental nature of the right to social security to provide safety net for vulnerable individuals in a society. It is suggested that, proper investigations as to the denial of a right to social security need be carried out each time the state formulates policies that exclude vulnerable individuals from benefiting from a right. Social security is a safety net that helps relieve poverty and protects people against economic shocks. Excluding the bulk of non-nationals apart from the minority with permanent residence from virtually all social assistance grants including some social insurance schemes is not justified constitutionally, and it also conflicts with South African treaty obligations both internationally and regionally. It is upon these challenges that recommendations will be

⁸²¹ *Paschim Banga khet Mazdoor Samity v the State of West Bengal (Supreme Court of India). 1996 Case No. 169 SOL.*

made on how the South African social security system can be made more inclusive to accommodate all categories of people.

Excluding the bulk of non-nationals from virtually all social assistance grants including some social insurance schemes is not justified constitutionally, and it also conflicts with South African treaty obligations both internationally and regionally. It is upon these challenges that recommendations can be made on how the system can be made more inclusive to accommodate all categories of people.

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