EXPLORING THE FULL LEGAL PROTECTION OF REFUGEES AND ITS LIMITATIONS WITH REFERENCE TO NATURAL AND POSITIVE LAW

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SUMMARY

This article seeks to explore the limitation of the theory of full legal protection by illustrating with facts that the theory does not lack legal force, but rather that various concepts such as citizenship, national security, sovereignty, affirmative action, legal positivism, and democratic governance severely limit the application of theory. In particular, the limitation of full legal protection is analysed through the lens of legal positivism and the natural law doctrines whereby it is argued that the laws of South Africa are framed in the context of legal positivism which does not take cognisance of the moral values on which the natural law doctrine is based. As a result, the full legal protection of constitutional rights of refugees remains in theory. In order to convert this theory into an effective protection, it is argued that although the state has the power inherent in its sovereignty to design and frame laws as it deems best, South Africa should, with the natural law in mind, develop social transformative or remedial measures in such a way that extends constitutional socio-economic rights to refugees in a more favourable way. The article concludes by suggesting the manner in which the severe limitations imposed on the concept of full legal protection can conceptually and rationally be addressed.

1 INTRODUCTION

The construction of refugee rights takes root in the discourse of human rights and freedoms, which are usually perceived as a set of natural rights. The doctrine of natural law is narrowly defined to refer to the equal right of all human beings to be free.[1] Within the context of freedom, it is presumed that

[1] Hart "Are there any Natural Rights" 1955 64 *The Philosophical Review* 175 175. He defines the concept freedom on basis of three principles; *inter alia*, coercion, restraint and liberty. An individual must be free from coercion, meaning that he or she must not be prevented from doing what they choose and no one should make their choice less eligible by use of threats. Likewise, restraint refers to "any action designed to make the exercise of [an individual's] choice impossible". Being at liberty to do something refers to presupposition that "all men may have, consistently with the obligation to forbear from coercion, the liberty to satisfy if they can such at least of their desires as are not designed to coerce or injure

every human being – who is capable of choice – enjoys (i) "the right to forbearance on the part of all others from the use of coercion restraint against him and (ii) is at liberty to do (that is, is under no obligation to abstain from) any action, which is not coercing or restraining or designed to injure other persons".[2] However, the scope of the right to freedom is too wide to include freedom from arbitrary actions of a state or interference of such a state in individual freedom. A long and impressive historical claim of individual freedom is conceived in terms of the notion that all human beings are entitled to fundamental rights and freedoms by virtue of their common humanity. By nature, every person is a human being. Moreover, it is his or her essential human nature, which determines his or her entitlement to rights and a positive law governing the relations between him or her and other individuals or between him or her and the state.[3] Such relations must exist "independently of the laws of all particular societies concerning their artificial relations".[4]

The idea of natural or inalienable rights became a moral basis from which constitutions of free and democratic states derived and on which the protection of refugees is founded.[5] Like human rights, refugee rights are essentially conceived in the natural law, which holds that all individuals are born free and equal in respect of dignity and rights.[6] Every individual is accordingly owed certain humane treatment irrespective of his or her relationship with the state.[7] The natural relationship with the state is based on citizenship. The notion of citizenship is an attribute or a characteristic, which determines a strong tie to the state, and such relationship is a moral ground on which theorists of positive law advocates equal rights. Construing natural rights in terms of the citizenship paradigm has the impact of differentiating between the rights of citizens and those of non-citizens, resulting in different levels of entitlements to natural rights. Differentiating between persons or categories of persons may sometimes, give rise to defeating the vision of natural law.

As non-citizens, refugees enjoy a tenuous relationship with their host state, resulting in enjoying fewer rights comparable to those enjoyed by citizens. The South African society has, however, taken an approach to accord to refugees all those rights that the doctrine of natural law dictates to

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others, even though in fact, owing to scarcity, one man's satisfaction causes another's frustration".

2 Hart 1955 64 *The Philosophical Review* 176.

3 There are two reasons for defining the equal right of all human beings to be free, as a natural right. These include: (i) the equal right is one which all individuals have simply because they are capable of making choice; they have it by virtue of being humans and not on account of being members of a particular political community "or stand in some special relation to each other" and (ii) the equal right is not created or conferred on individuals by a state's voluntary action. It is a moral right. See Hart 1955 64 *The Philosophical Review* 175 and MacDonald "Natural Rights" 1947 47 *Proceedings of the Aristotelian Society* 225 228.

4 MacDonald 1947 47 *Proceedings of the Aristotelian Society* 228.

5 Weston "Human Rights" 1984 6 *Hum Rts Quart* 257 261–262.

6 Weston 1984 6 *Hum Rts Quart* 260.

7 Held "Principles of Cosmopolitan Order" in G Brock and H Brighouse (eds) *The Political Philosophy of Cosmopolitanism* (2005) 17.

be inalienable to humanity. These rights must be fully protected as outlined in terms of s 27(b) of the Refugees Act.[8]

> "A refugee enjoys full legal protection, which includes the rights set out in [the Bill of Rights] and the right to remain in [South Africa] in accordance with the provisions of [the Refugees Act]."

Inherent in the theory of full legal protection is constitutional norms, values and principles, which must apply to refugees and this creates an integral ground on which the state owes a duty of justice to them. It cannot be objected at this point that refugees must enjoy those rights contained in the Bill of Rights, the nature of which is universal or cosmopolitan. Those rights, which are cosmopolitan in character include socio-economic rights, such as, the right to emergency medical assistance, healthcare, basic and tertiary education, social assistance, social security, healthcare, adequate water, adequate food,[9] and housing.[10] Vulnerable children are entitled to the right to basic shelter[11] whereas individuals and families who find themselves in emergency situations are entitled to emergency housing for temporary relief.[12] In actual situations, the aforementioned constitutional rights must be enforced by the state.[13] Should those rights be violated or threatened, refugees must proceed to claim them.[14] Notwithstanding the legal recourse, it is particularly important to note that South Africa, as a sovereign nation, applies the citizenship principle as a precondition for the distribution of rights; this is when lawmakers give substance and effect to constitutional rights.[15]

This article highlights how the constitutional rights of refugees are fundamentally threatened by measures (that is, positive law) adopted by the state for the purpose of protecting its citizens. In doing so, the primary focus is placed on factors such as the restoration of the dignity of the historically disadvantaged[16] or the enhancement of national security or preservation of national resources.[17] These factors, which severely curtailed refugee rights, are analysed through the lens of the doctrine of natural law that is

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8 Act 130 of 1998, as amended by the Refugees Amendment Act 10 of 2015.

9 Or basic nutrition in cases of children.

10 S 26–29 of the Constitution of the Republic of South Africa (Constitution).

11 S 28(1)(c) of the Constitution.

12 Department of Human Settlement "Emergency Housing Programme" Part 3 Vol 4 of the National Housing Code (2009) 9.

13 There is an obligation imposed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights contained under s 7(2) of the Constitution.

14 For enforcement of the constitutional rights, see s 38 of the Constitution.

15 Whereas s 3 of the Constitution vests constitutional rights in citizens on equal basis, s 9(2) requires the state to accord preferential treatment to historically disadvantaged groups. Academically, it is acknowledged that the right to have rights is intrinsically linked to the notion of citizenship, see Arendt *The Origins of Totalitarianism* (1968) 296 299 and Botha "The Rights of Foreigners: Dignity, Citizenship and the Right to Have Right" 2013 130 *SALJ* 837 837.

16 For detailed discussion, see Stone and Erasmus "Race Thinking and the Law in Post-1994 South Africa" 2012 79 *Transformation: Critical Perspective on Southern Africa* 119 119–143 and De Vos "Looking Backwards, Looking Forward: Race, Corrective Measures and the South African Constitutional Court" 2012 79 *Transformation: Critical Perspective on Southern Africa* 144 144–167.

17 It is within the context of national security in which refugee and immigration laws were amended in 2011 and now they are tabled for further amendments.

understood as an ideal or standard against which positive law must be tested.[18] The standard of natural law denotes that human rights shall "apply impartially to all people in all circumstances, as the law of gravitation applies to all bodies".[19] Reason inherently sets the standard and is recognised because human beings have the ability to think, to reason and to determine what is right and wrong, good and bad, or fitting and unfitting. In constructing laws, adequate thought must be given to the protection of "the nature of a human being as a rational and social being".[20] Thus, if crafted laws are oppressive or discriminatory and, as a result, deprive a group of persons of their right to be free, it must be abolished.[21]

Central to the doctrine of positive law is the recognition of the sovereignty of the state to regulate human behaviours, to allocate rights in a fair manner, or to prescribe the conditions in which non-citizens can be admitted to and stay in the country.[22] Sovereignty is a key concept in legal positivism and the state is seen as the correct legislator.[23] As a legislator, it can adopt laws, which is understood as an effort to transform the social justice debate into one that is consciously situated within and responsible to its culture, norms and practices. The distinctive proposition of legal positivism takes into account that "[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits".[24] As noted above, it is contended that the positive law is valid only insofar as it is consistent with the natural law otherwise – if it is contrary to the law of nature – it must be declared null and void.[25]

This article is structured as follows. Part one sets out philosophical claims that the doctrine of natural law is ingrained in and derives from the essential human nature of a person and that it is the doctrine of natural law, which determines an individual's equal entitlement to fundamental rights that are, at domestic level, recognised in terms of the legal positivism. Part two of this article delineates the distinction between theories of natural law and theories of positive law. It argues that natural law lays down the standards against which full legal protection in the context of positive law must be measured even though positive law is premised on the key concept of state sovereignty. South Africa – as a sovereign nation – adopts laws that seek to preserve the national welfare of citizens to the exclusion on non-citizens, most notably, refugees and temporary residents.[26] Prioritisation of the

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18 MacDonald 1947 47 *Proceedings of the Aristotelian Society* 229 argues that the doctrine of natural law is conceived "as an ideal or standard, not yet completely exemplified in any existing legal code, but also as a standard fixed by nature to be discovered and gradually be applied by [human beings.]"

19 MacDonald 1947 47 *Proceedings of the Aristotelian Society* 230.

20 MacDonald 1947 47 *Proceedings of the Aristotelian Society* 231.

21 MacDonald 1947 47 *Proceedings of the Aristotelian Society* 227.

22 Burton "Ronald Dworkin and Legal Positivism" 1998 73 *Iowa L Rev* 109 111.

23 Wacks *Jurisprudence* (1987) 48.

24 Gardner "Legal Positivism 5 Myths" 2001 46 *Am J Juris* 199 199.

25 Kelsen "Natural Law Doctrine before the Tribunal of Science" 1949 2 *West Polit Q* 481 488.

26 For the sake of preservation of social welfare, exclusion of non-citizens is an accepted norm under public international law. In light of the exclusion norm, South Africa, in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), argued that it has an obligation towards its own citizens first and such obligation includes the preservation of social welfare for citizens. The Constitutional Court partially disagreed. It states that preservation of social

protection of citizens derives from the social contract model, whereas the responsibility to protect refugees flows from international agreements that bind South Africa upon ratification. This dimension indicates that refugees are not belonging in South African society and can therefore not enjoy the same full legal protection enjoyed by citizens, irrespective of the fact that both constitutional values and constitutional rights are rooted in the natural law doctrine.[27]

In part three, the question of taking measures that overlook or negate the theory of full legal protection of the rights of refugees is explored. It notes that developments prejudicial to aims of full legal protection stem from several limitations contained in the Constitution. These include remedial measures, equal rights of citizenship, the social contract model, ratification, democratic governance, and the utilitarian approach. These limitations denote that refugee- and human rights models cannot be applied on an equal footing. The presumption of inequality is justified on the principle of sovereignty, which inherently allows the state to decide who belongs and who does not belong within its political community and what rights insiders and outsiders can enjoy.[28] Whilst outsiders are usually excluded from social welfare schemes and political participation, socio-economic rights are extended to refugees (outsiders) in terms of the Refugees Act. The manner in which rights of refugees are protected and guaranteed by the Refugees Act is frustrated by the aforementioned limitations and this is elaborated on in detail. Such frustration gives credence to an argument, holding that refugees are, in fact, people without rights.

In part four, the article concludes by stating that a number of limitations constitutionally dilute the claim of natural rights to be inalienable to refugees by virtue of being human. Owing to these limitations, South Africa constructs laws in such a manner that they often override refugee rights irrespective of having both the Constitution and a refugee framework founded on and infused by the theories of natural law. Persistence in the denial of refugees' rights is reflected in the reluctance of the state to accept judicial remedies[29] and this gives credence to the claim that the state is the lawmaker and the

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welfare is not absolute; rather preservation is subject to the rationality test. Exclusion of non-citizens from having access to social welfare may amount to unfair discrimination if the government purpose to exclude them is illegitimate, irrational and arbitrary (par 66). Yet, the Supreme Court of Appeal in *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) emphatically stated that a sovereign nation enjoys the power, as inherent in sovereignty, and essential to self-preservation and, based on sovereign power, decides on who to welcome in the country subject to certain conditions (par 29).

27 Values of human dignity, equality and freedom are at the heart of the natural law doctrine. Likewise, the discourse of human rights and freedoms take root in the said values, see, Weston 1984 6 *Hum Rts Quart* 257–283 and Kent-Brown "Freedom and Equality: The Essence of Human Rights" 2003 38 *J Public Admin* 150 150–154.

28 It is rational to distinguish between citizens and non-citizens for the purpose of allocation of rights, see *Minister of Home Affairs v Watchenuka supra* par 29 and *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services* 2007 (4) BCLR 339 (CC) par 48. Legal and political scholars argue that the claim of whether human rights are universally applied to everyone has been and remains a controversial matter, see, Weston 1984 6 *Hum Rts Quart* 260–262; Arendt *The Origins of Totalitarianism* 267, Botha 2013 130 *SALJ* 837 and Agamben "Beyond Human Right" 2008 *Social Engineering* 90 90–95.

29 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape (SASA EC)* 2015 (3) SA 545 (SCA) par 35.

lawgiver. It also gives credence to the presupposition that rights cannot be attached to individuals on the sole ground of being human. However, the article argues that even though citizenship – or where one belongs – is a determinant factor of entitlements, constitutional rights should be extended to refugees and asylum-seekers by virtue of the obligations stemming from the international contract model.[30] Such extension must be done on a favourable basis in an attempt to enhance and observe the aims of full legal protection of refugees, evinced by the Refugees Act.[31]

2 NATURAL LAW VERSUS POSITIVE LAW

2 1 The natural law

The full legal protection in the context of the doctrine of natural law can be said to be premised on the protection of rights inalienable to humanity, which are seen as superior to positive law and the Constitution whereby it is contended that the proposed plan of governance cannot disparage natural rights.[32] Policymakers should, therefore, focus on securing and guaranteeing the natural rights of the people.[33] This view is premised on the notion that moral values of natural law is ingrained in the liberal notion holding that human beings "are born and remain free and equal in rights".[34] Indeed, the principles underlying natural rights are liberty, equality, dignity, security and resistance to oppression and, by its very nature, natural law objects to the notion holding that rights are the gift of the state.[35] Those rights, which are inalienable to an individual, were universally accepted and thus enumerated under the Universal Declaration of Human Rights of 1948.[36] Those rights were seen as essential for the protection of human dignity, individual freedom and individual autonomy in that the 1948 Declaration recognises the inherent dignity and the equal and inalienable rights of an individual as the foundation of freedom, justice, peace and prosperity.[37] It reaffirmed its faith in natural rights, in the dignity and worth of the individual and in the equal rights of the people.[38] For similar reasons, it recognises the right of the

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30 See the discussion under 2 2 (positive law).

31 The notion of full legal protection of the refugee rights is firstly underpinned on constitutional values and principles, aimed at the protection of the dignity, health and wellbeing of the person and, secondly, on the refugee norms, standards and practices, aiming at providing refugees and asylum-seekers with socio-economic rights on a favourable basis, as contemplated by the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (the Refugee Convention).

32 Brennan "Natural Rights and the Constitution: The Original 'Original Intent'" 1992 15 *Harv JL & Pub Pol'y* 965 969.

33 *Ibid*.

34 Weston 1984 6 *Hum Rts Quart* 260.

35 Weston 1984 6 *Hum Rts Quart* 259–260 and Vaišvila "Human Dignity and the Right to Dignity in terms of Legal Personalism" 2009 117 *Jurisprudence* 111 111–127.

36 Hereinafter "the 1948 Declaration". Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III).

37 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III) Preamble.

38 *Ibid*.

individual to seek asylum and enjoy natural rights in other countries.[39] On this basis, countries must generously open their doors to refugees and should adhere to obligations flowing from the 1948 Declaration requiring them to promote respect for equal rights, including abstaining from disparaging these rights.[40] For the special and favourable protection of refugees, inalienable rights are further spelt out in the 1951 Convention Relating to the Status of Refugees.[41] In lining the Refugee Convention with the natural law, its principles underpin the holding that "human beings shall enjoy fundamental rights and freedoms without discrimination".[42] The principles assure refugees "the widest possible exercise of fundamental rights and freedoms".[43] In this regard, Kelsen states that principles such as these, which are deduced from natural law, cannot be ignored or repealed, in contradiction to positive law that the state creates, due to its immutable nature.[44] From a natural law perspective, poor and vulnerable people can be said to be fully protected if they are accorded rights that enable them to enjoy the freedom to participate in the community development. This can only be made a reality by the enjoyment of socio-economic rights that are inalienable to humanity.[45] The theory of full legal protection of refugees would, therefore, require the state to include refugees in socio-economic measures that give effect and substance to constitutional rights.

2 2 The positive law

The full legal protection in the context of the positive law is premised on the notion that the state enjoys discretion to use its sovereign power to protect the national interest. In order to achieve this, the state regulates its members' social and civic lives as it deems best.[46] Moral values are given less importance in that unreasonable limitations or unfair discriminatory laws are valid insofar as they serve to maintain social order that is a prerequisite for human survival.[47] On the question of universally accepted natural rights, theorists of positive law posit and maintain that an individual is not a subject of public international law; rather that the sovereign state is the only subject. As a subject of international law, a sovereign state is under no international obligations, unless those obligations stem from treaties that the said state has signed and ratified, to give effect to universally accepted natural rights,

39 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III) art 14.

40 Art 2(c) of the Statute of the Office of the UNHCR states the UN General Assembly calls upon states to receive and protect refugees and to take, in cooperation with the UNHCR, necessary steps to improve the situation of refugees.

41 Hereinafter "the Refugee Convention".

42 Art 2(c) of the Statute of the Office of the UNHCR Preamble.

43 *Ibid*.

44 Kelsen 1949 2 *West Polit Q* 482.

45 Poverty is a result of deprivation of socio-economic rights and benefits, which is a deprivation of potential abilities to do or pursue one's wish or desire. See Sen *Development as Freedom* (1999) 20 and Sen "Development as Capability Expansion" 1989 *Journal for Development Planning* 41 47.

46 Marais and Jacobs *Law, Order and Freedom: A Historical Introduction to Legal Philosophy* (2010) 8–11.

47 *Ibid*.

morals, values and virtues.[48] An inference that can be deduced from this legal thinking is that refugees are not direct bearers of natural rights contained in the Refugee Convention or the 1948 Declaration as reflected in the Constitution. Neither are they direct bearers of the natural rights contained in other human rights treaties.[49] The fact that refugees appear to be indirect beneficiaries of natural or fundamental rights within a host state is of concern and such fact gives rise to the state of exception, in which entitlement of refugee rights are subjected to contractual agreements at international level.[50]

In principle, it is an accepted norm that rights, set out under international treaty, accrue to individuals (including refugees) only if the state having jurisdiction, performs two contractual duties: The state must first sign and ratify the treaty and second, the state must transpose such treaty into domestic law through the enactment of national legislation. A need to perform the said international contractual duties is reflected in and is given legal force by s 231 of the Constitution. Notwithstanding international contractual duties, there are also legal obligations to protect certain categories of persons stemming from peremptory norms (*jus cogens*) of customary international law. Peremptory norms are customs and practices that have obtained widespread acceptance and which do not need to be accepted universally through treaties. A key concept of customary international law is that there is no derogation from peremptory norms is ever permitted. Under South African jurisdiction, the rules of customary international law are regarded as laws in terms of s 232 of the Constitution. Given that most of the peremptory norms are incorporated into treaties, they are largely subject to s 231 of the Constitution. The principle of *non-refoulement* is, for example, a peremptory norm that is contained in Art 33 of the Refugee Convention in that it is guaranteed by s 2 of the Refugees Act. The principle of *non-refoulement* prohibits the state from refusing entry into the host country or returning a refugee or an asylum-seeker to the place where his or her life, integrity, physical safety or freedom would be threatened. The principle is the cornerstone of the refugee protection. It was implicitly or explicitly interpreted to be wide enough to encompass the provision of basic necessities of life to refugees and asylum-seekers hence deprivation of core socio-economic rights may put preventable pressure on them and thus leave.[51]

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48 Wright "Legal Positivism and the Nuremberg Judgment" 1948 42 *AJIL* 405 405.

49 Fundamental rights and freedoms are entrenched in the 1948 Declaration as it was given effect to by the International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, the International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 and other international treaties.

50 Botha 2013 130 *SALJ* 838 posits that refugees find themselves in a state of exception, in which refugee rights are violated by the state with impunity.

51 The British courts held that the provision of social assistance to asylum-seekers (including those whose applications were rejected but on appeal) so as to avoid putting pressure on them that may compel them to return, see *R (on the application of Nagatu) v SSHD* [2004] EWHC 1806 (Adimin) par 19, 21; *Limbuela v Secretary of State* [2004] EWCA Civ 540; and *R (Westminster City Council) v NASS* [2002] 1 WLR 2956 par 38. In South Africa, the Supreme Court of Appeal held that exclusion from conducting a small business (as a part of self-employment) would leave refugees with the uneasy feeling that the stance adopted by the authorities in relation to socio-economic rights was taken in order to induce them to

Obligations flowing from the principle of *non-refoulement* in the context of customary international law, coupled with obligations flowing from international treaties provide a stark background against which said refugee rights are recognised, interpreted and applied.[52] Although the constitutional norms are binding in nature, the enforceability (or full legal protection) of refugee rights is dependent on *consensus ad idem* or the concurrence of the subjective wills of the contracting states to the international refugee treaty. The international contract model points to the fact that refugees are outsiders whom the state is morally and contractually bound to protect in accordance with international obligations. The international contractual obligations can be termed indirect (or secondary) constitutional obligations because it is subject to constitutional approval prior to having legal force in South Africa.

By contrast, direct (or primary) constitutional obligations would refer to the state's mandate to protect its citizens and that mandate stems from the doctrine of the social contract advocated by theorists of natural law, such as Thomas Hobbes, John Locke, Jean Jacques Rousseau and, very recently, John Rawls.[53] The aforementioned theorists were of the view that citizens, out of their personal interest, should reach an agreement, leading to the establishment of sovereign power (that is, a state), which, in turn, protects their general interests.[54] However, refugees are not among people who have reached an agreement on how South African people should be governed because, by the very nature of international refugee protection, they are not allowed to participate in the political affairs or get involved in the democratic participation of their host country. Given that they are not involved in the democratic processes, the institutions of domestic law must protect them against possible subjection by citizens.

In the light of the above, there are two forms of contractual duties to protect humanity: The first form is the social contract model establishing primary constitutional obligations to protect citizens and the second form is

leave South African shores, see *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism* 2015 (1) SA 151 (SCA) par 44 (in respect of licensing spaza shops).

52 The Refugees Act was adopted to give effect to the relevant international legal instruments, principles and standards relating to refugee. It must be interpreted and applied with due regard to relevant conventions or international agreements to which South Africa is or becomes a party, see, Title, read in tandem with s 6 of the Refugees Act.

53 The concept of social contract is a legal mechanism under which people "surrender[s] to the state only the right to enforce the natural rights, not the rights themselves; and that state's failure to secure these reserved natural rights (the state itself being under contract to safeguard the interests of its members) gives rise to a right to responsible, popular revolution", see Weston 1984 6 *Hum Rts Quart* 259. The responsibility to safeguard the general interest of citizens is recognised by Mokgoro J, when she noted that in the context of social contract non-citizens cannot be entitled to the same benefit enjoyed by citizens (*Khosa v Minister of Social Development supra* par 57).

54 Marais and Jacobs *Law, Order and Freedom* 10–11. In his theory of justice as fairness, Rawls states that the guiding principle of the theory of social contract is the principle of justice, which is also the main object of a society to set a government and, equally, is a basis of the basic structures of society. Once an agreement is reached to set up a government, members of society decide on what form of government would be established, on what the foundation charter would be, and on which principles would be used to assign rights and duties to the people, see Rawls *A Theory of Justice* (1999) 10.

the international contract model, establishing, in general, minimum standards of treatment of humanity.

By using the principle of humanity as a basis of justice, the theorists of natural law – in contradiction to the positive law – view an individual as a subject of public international law and eventually give less significance to or ignore principles of citizenship, sovereign boundaries and national security. These principles are overlooked given that natural law theories are largely constructed on the truth-claims holding that all human beings are created equal and as such, all individuals – citizens and non-citizens alike – are similarly entitled to equality in dignity, rights and freedoms.[55] In the view of the natural law theories, core fundamental rights – to which refugees are also entitled – are not provided by the state. Neither can they be taken away by the state. In this way, the institutions of the state and law should only play a role of guaranteeing social harmony and creating an environment in which people – individually or collectively – can determine the course of their lives themselves.[56] Considering this line of reasoning, the theorists of natural law suggest that law should be construed in terms of moral principles of equity and justice.[57] Based on morals, the state bears moral obligations "to act in ways that are compatible with a will towards integral human fulfilment"[58] and to refrain from using human beings as a means to an end. Within this view, the theory of full legal protection of refugees requires the state to rearrange its national resources and material in a manner that extends socio-economic protection to refugees with a view to respond to their situations.

Besides, the moral philosopher Immanuel Kant advocates that an individual exists as an end in him- or herself and not as means to an end. This moral value should be a conceptual ground for the determination of the fairness of laws or policies.[59] It follows that socio-economic laws or policies should be framed in terms of morally liberal values, which give precedence to respect for human dignity and equal rights, which people naturally "possess simply by virtue of their humanity".[60] Kant states further that in the realms of ends, everything has a price except human dignity, which has no price or equivalent. For that reason, institutions or laws must not assail human dignity; rather these institutions or laws must protect the worth of every person.[61] This gives rise to the need to protect so-called inborn rights that are morally identified as those rights, which governments, as a matter of equity and justice, are bound to refrain from transgressing. Consequently, governments are bound to not only respect but, to the extent possible, also to protect, promote and fulfil these rights.[62] The refugee rights are also inborn rights that the state has no near-absolute discretion to overlook. They must be fully protected in all respects.

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55 Marais and Jacobs *Law, Order and Freedom* 12–13.

56 *Ibid*.

57 See for eg, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 par 13, 27, 41 where the Constitutional Court applied these principles to interpret the law regulating eviction.

58 George "Natural Law" 2008 31 *Harv JL & Pub Pol'y* 171 172.

59 Kant *Groundwork for the Metaphysics of Morals* (1975) (trans AW Wood, 2002) 37.

60 George 2008 31 *Harv JL & Pub Pol'y* 172.

61 Kant *Groundwork for the Metaphysics of Morals* 52.

62 George 2008 31 *Harv JL & Pub Pol'y* 172.

2 3 Protection of natural law through judicial reviews

The Constitutional Court is a guardian of the inalienable rights, which encompasses socio-economic rights of refugees. Indeed, the Constitution vests the power of constitutional judicial review of all legislation in the Constitutional Court to assess their constitutionality on the moral and liberal bases of equality, dignity and freedom. In its assessment, the court bears the primary responsibility to ascertain whether a law or policy protects the rights of everyone, especially minority groups or vulnerable groups in society "who cannot protect their rights adequately through the democratic processes".[63] In this way, the aims of natural law theories are protected. If anything, the Constitutional Court's application of norms of constitutional law – and the ensuing dignity-based jurisprudence this has generated – has the theoretical assumptions that have anchored the idea that state actions should not deviate from the protection of the moral worth of the person. The dignity-based jurisprudence, which is also utilised to protect the moral worth of refugees, is understood in the ideals of interrelatedness and indivisibility of rights.[64] According to Yacoob J, these ideals have immense human and practical significance in the protection of vulnerable people who are members of a society that values human dignity, equality and freedom.[65] Sachs J echoed this view and maintained that the state must attend to its constitutional and international duties "with insight and a sense of humanity".[66] However, the absence of the conceptual infusion of the notion of humanity into state actions would nullify the value and essence of the Constitution.[67]

To understand this moral obligation better, it is morally right to state that the exclusion of an individual from the protection of core fundamental rights and freedoms has no place in a society founded on intertwined and inseparable constitutional foundational values. These foundational values should inform legal state action, as they require the state to treat every individual as a bearer of constitutional rights, entitled to respect for his or her dignity.[68] Within this understanding, the Constitutional Court rejects the invocation of the utilitarian concept of justice – whose particular aim is to promote the greatest good for the people – for the protection of rights[69] and eventually supports the communitarian concept of justice for the protection of the rights and duties of society.[70] It is within this complex context in which the theory of full legal protection of refugees should be understood. It should be understood in the universalism or cosmopolitanism of human rights and freedoms. Refugees, as both a minority and vulnerable group, cannot be left

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63 *S v Makwanyane* 1995 (3) SA 391 (CC) par 88.

64 All fundamental rights "are inter-related and mutually supporting," see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 23, 83. The rights to life and dignity are intertwined, see *S v Makwanyane supra* par 327. All rights are inter-related and are all equally important, see *Khosa v Minister of Social Development supra* par 40–41.

65 *Government of the Republic of South Africa v Grootboom supra* par 83.

66 *Port Elizabeth Municipality v Various Occupiers supra* par 56.

67 *Government of the Republic of South Africa v Grootboom supra* par 83.

68 *Port Elizabeth Municipality v Various Occupiers supra* par 33, 56.

69 *Port Elizabeth Municipality v Various Occupiers supra* par 29.

70 *Port Elizabeth Municipality v Various Occupiers supra* par 37.

out in the cold in the allocation of constitutional rights at national, provincial and local level. Rather, they must be equally treated as people to whom universal constitutional rights apply. A need to treat them with care and concern and with insight and a sense of humanity is a prerequisite. The moral obligation thus stated, enforceable by the courts, derives from the humanitarian nature of asylum law and has a strong nexus with the cosmopolitan character of constitutional law and international human rights law.[71] Notwithstanding the cosmopolitan nature of rights, South Africa tends to severely or absolutely restrict constitutional rights of refugees – or refugee rights – through the invocation of conceptual grounds of citizenship and national security. A court usually finds these restrictions as being irrational or unreasonable; hence, they do not serve the governmental purpose. Despite a declaration of unreasonable limitation, the state is reluctant to comply with court orders, obliging it to ensure its positive laws are in line with natural law for the effective protection of refugees.[72] An infringement of refugee rights usually occurs when rules of legal positivism are normatively applied by lawmakers with the intent to exclude refugees from the enjoyment of certain constitutional rights on the sole basis that they are not citizens or permanent residents. In this respect, refugees are, for example, excluded from access to housing programme by the Housing Act,[73] to free healthcare services by the National Health Insurance[74] and certain health care policies of certain clinics, hospitals and other institutions,[75] and to public labour market by the Public Service Act.[76]

Unlike lawmakers, judges seem to rely heavily on natural law theories in the determination of the validity and rationality of a policy. Reason and rationality have engendered a reasonable test. By application of natural law theories, a policy would be accordingly found by the court to be invalid, irrational, or unreasonable if it fails to consider the human dignity of every person. It is within this context that the Supreme Court of Appeal (SCA) found the refugee policy excluding asylum-seekers from accessing employment and education opportunities, unreasonable.[77] The same court

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71 In *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs, Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35, the Constitutional Court held that "human dignity informs constitutional adjudication and interpretation" and that its infringement would result in breach of a number of core constitutional rights.

72 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape (SASA EC) supra* par 33–35, 37.

73 107 of 1997.

74 National Health Insurance Green Paper in South Africa: Policy Paper, 12 August 2011, par 64.

75 Treatment Action Campaign "Joint ALP / TAC Submission on Refugee Amendment Bill" 2008-03-26 http://www.tac.org.za/community/files/file/ALPTACSubmissionToParliamentOnRefugeeAmendmentBill.pdf (accessed 2016-01-14) 2, 11; IRIN "South Africa's Health System Shuns Asylum Seekers" 2014-10-31 http://www.irinnews.org/news/2014/10/31 (accessed 2016-01-15); Venter "Somali refugee girl needs urgent operation" 2014-07-17 http://www.iol.co.za/news/crime-courts/somali-refugee-girl-needs-urgent-op-1721220 (accessed 2016-01-10); Lawyers for Human Rights "Somali Girl to Receive Medical Treatment in SA" 2014-07-18 http://www.enca.com/gravely-ill-somali-girl-receive-medical-treatment-sa (accessed 2016-01-10).

76 103 of 1994.

77 *Minister of Home Affairs v Watchenuka supra*.

reached the same decision regarding the trading policy that excluded refugees from earning an income as traders.[78]

2 4 Limitation of refugee rights on basis of a utilitarian approach

The utilitarian approach, which is preferred by the state in its adoption and implementation of policies, has an impact on the theory of full legal protection of refugees. The pursuit of goals of utilitarianism is reflected in the commitment of the state to advance the majority of people who were historically disadvantaged. For this reason, positive law is crafted with a particular intent to accord to them preferential treatment mostly in the political, social, labour and economic spheres, resulting in discrimination against other categories of persons. It is trite to state that the need to protect and advance those historically disadvantaged by the past, is justified on the application of rules of substantive equality in terms of s 9(2) of the Constitution. These rules, which are applied in terms of the utilitarian concept of justice, are regarded as moral mechanisms to achieve a socially and morally just society.[79] Albie Sachs regards the utilitarian approach as efficient in "producing the great good for the greatest number" and he furthermore believes that its application should be a starting point, but its application should be based on respect for everyone's human dignity.[80] In pursuit of social-economic development for the greatest majority of the population, refugee rights – as a minority group – are not given the required full legal protection. Consequently, the constitutional rights become a pie in the sky for refugees. The state largely justifies the exclusion of refugees not simply on utilitarian justice, but also on political grounds. Politically, refugees are viewed as people who do not belong in the political community and whose needs impose unnecessary financial burdens on the state purse. They are unjustifiably blamed by government officials for the slow pace of service delivery and of national economic development in addition to claiming that they are imposing intolerable conditions on national security and stability.[81] This usually results in the tragedy of political violence that

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78 *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism supra*.

79 In *Soobramoney v Minister of Health: KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), the Court approved a utilitarian approach towards the provision of emergency medical treatment. The court reasoned that the state should design and adopt measures responding to the larger needs of society rather than to focus on specific needs of particular individuals within society (par 31). In *Government of the Republic of South Africa v Grootboom supra*, the state justified its remedial housing measures to be reasonable, stating that it, under its housing programme, sought "to build a larger number of homes for those in need of better housing" (par 54). The utilitarian approach was rejected by the court. It noted that constitutional rights are personal rights by holding that "[h]ousing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses" (par 45). The court, in *Port Elizabeth Municipality v Various Occupiers supra*, emphatically stressed that the pursuit of the greatest good for the many would be achieved merely at the cost of intolerable hardship for the few and therefore the state should adopt measures that would avoid causing human distress for the few (par 29).

80 Sachs *The Strange Alchemy of Life and Law* (2009) 171.

81 South Africans always attempt to expel foreign nationals who are blamed for "increased crime, sexual attacks, economic deprivation and other social ills", see Maharaj "Economic Refugee in Post-Apartheid South Africa – Assets or Liabilities: Implications for Progressive

from time to time, manifests in the form of xenophobic violence against foreign nationals. The informal withdrawal from the legal bond by virtue of which the state is expected to protect refugees in terms of moral and ethical obligations, nullifies the theory of full legal protection. It is evident that the recurrence and persistence of policies prioritising the interest of one group over others would render the claim of equality in rights and in dignity indefensible as this article now turns to discuss.

3 NEGATION OF THE CLAIM OF UNIVERSALISM

3 1 Limitation of rights under constitutional framework

The Constitution provides various ways in which human and refugee rights can be limited or their full legal protection can be diverted from. Unlike in the past where parliament could severely limit rights without any legal recourse, the Constitution introduced the doctrine of constitutional supremacy, departing from the previous doctrine of parliamentary sovereignty.[82] In terms of the doctrine of constitutional supremacy, the courts enjoy the constitutional power to declare any limitation of a right inconsistent with the Bill of Rights invalid,[83] unless such limitation is justified on the ground of serving a reasonably governmental purpose.[84] In this way, the restriction of refugee rights by a state action would be declared valid and reasonable, provided that the purpose of such limitation, for instance, serves to ensure national security, to preserve national welfare, and to promote the primary object of the Constitution, namely, to improve the quality of life of a disadvantaged group.[85] To avoid an absolute negation of a right, the restriction must, nonetheless, be proportionate to basic rights, since a right cannot be limited more than necessary.[86] In a natural law context, a right cannot, according to Hobbes, be contrary to reason, and that means contrary to the law of nature.[87]

The limitation of rights is constitutionally evaluated in terms of the limitation clause[88] in order to determine its rationality and reasonableness.[89]

Migration Policies" 2001 56 *GeoJournal* 47, 51. South Africans are convinced that foreign nationals should be expelled due to the fact that they compete with citizens living in poverty for scarce resources and public services, see Nyamnjoh *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* (2006) 41.

82 Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 2.

83 S 2 of the Constitution.

84 *Khosa v Minister of Social Development supra.* See too *Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1998 (1) SA 745 (CC) par 29–31.

85 See for eg, *Larbi-Odam v Member of the Executive Council for Education (North West Province) supra* par 29–31, *Khosa v Minister of Social Development supra* par 58, 106, 121 and *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism supra* par 24, 28, 44 quoting *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 66–67 with approval.

86 S 36(1)(e) of the Constitution. In limiting a right, account must be taken of less restrictive means to achieve the limitation of the right in question.

87 Kelsen 1949 2 *West Polit Q* 488.

88 S 36 of the Constitution.

89 *Ibid*.

In so doing, regard is had to the fact that the idea of transformative constitutionalism has elevated the post-apartheid society to an open and democratic society based on human dignity, equality and freedom. Special attention is also given to the factors set forth under the limitation clause.[90] Despite the limitation clause, there are other limitations contained in the Constitution that are not given adequate attention by refugee scholars to discern their normative impact on refugees' entitlement to constitutional rights. These limitations are primarily entrenched in the preamble to the Constitution and include the phrase "we, the people of South Africa", denoting sovereign power, and the values of democracy, along with the will of the people. Other limitations include the principles of equal citizenship (s 3); universal adult suffrage (s 1(d)); preferential treatment in the sense of positive measures or affirmative action (s 9(2)); the restriction of freedom to choose a vocation to citizens (s 22); land rights for citizens (s 25(5)) and finally political rights for citizens (s 19).

These limitations have the potential of impairing the rights of refugees, protected by the Bill of Rights and, concomitantly, have the potential of legitimising the state's reluctance to provide adequate attention to the dignities of refugees for the best reasons known to us: simply, they are outsiders.[91] The conceptual discourse of not belonging in the political community results in having policies in place that override refugee interests; hence the refugee group does not form part of the electorate to which a representative body is accountable. As John Rawls puts it, constitutional democracy is always arranged to satisfy and advance the principle of participatory democracy through which citizens' sentiments are expressed and through which the government explains its actions and directions and through which the public goods are promoted and fulfilled.[92]

On the other hand, having two legal frameworks regulating the admissions of non-citizens in South Africa seems problematic as far as legal interpretation is concerned. Whereas the Refugees Act particularly seeks to integrate refugees in the South African society based on their refugee status with a view to ensuring full legal protection, the Immigration Act[93] generally seeks to integrate non-citizens into the South African society on the basis of a self-sufficiency requirement and on the basis of understanding that each government or state is obliged to protect its own citizens, even if they are abroad.[94] The self-sufficiency requirement works to exclude non-citizens from social welfare policies or schemes. Usually, the self-sufficiency rule is applied generally whereby it is applied to refugees, resulting in their exclusion from the social welfare system.

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90 S 36(1)(a)–(e) of the Constitution.

91 Non-citizens are always outsiders and the state always draws structural distinction between citizens and non-citizens, see Vale "Migration, Xenophobia and Security-making in Post-apartheid South Africa" 2010 29 *Politikon: South African Journal of Political Studies* 7, 8.

92 Rawls *A Theory of Justice* 195.

93 13 of 2002.

94 In terms of the immigration framework, self-sufficiency and self-support are conditions on which an entry visa is granted.

3 1 1 The notion of the equal citizenship

In most progressive societies, it is however difficult and politically problematic to give value to the human nature of refugees, who are distinguished from other human beings, more particularly, members of the nation states on the sole ground of nationality.[95] When refugees lose the protection of their governments, their humanity is devalued simply because all governments primarily consider humanity based on the notion of equal citizenship. The notion of equal citizenship comes to the fore in the nation state's allocation of rights, privileges, benefits, duties and responsibilities in a way that would sustainably guard against a state of anarchy. In this sense, the distribution of rights is a complex legal system, and to understand how this distribution works, one must analyse it in relation to the sovereign power. The concept of sovereign power can be understood as working to set the discursive terrain for the protection of national security that is relied on to limit the natural rights, which apply to members of the political community. What the theory of national security does is to create exceptional circumstances that make it difficult for refugees to have access to national resources, reserved exclusively for citizens. Exceptional treatment of refugees led Giorgio Agamben to refer to these circumstances as the state of exception, which works to exclude refugees from enjoying similar rights and privileges enjoyed by citizens.[96] In the discourse of the socio-economic justice, account is taken of the fact that not all human beings belong in one nation-state but different nation-states whose own respective socio-economic systems cover. A general exclusion of non-citizens may be justified based on Aristotle's definition of the concept of distributive justice. Aristotle defines the concept as "distribution of honour or of wealth or of anything else, which is divided among those who have a share in the Constitution".[97] This model of justice as fairness is so evident that the national wealth should be distributed among those who have a share in the nation-state. These are people who freely, voluntarily, and equally reach an agreement (that is, social contract) in respect of legal norms that will govern them.[98] This social contract model is built and sustained on democratic governance or processes and this jeopardises the question of full legal protection of the rights of refugees as the voices of refugees are lacking in democratic forums or debates.

3 1 2 The notion of democratic governance

The full legal protection of rights and freedoms cannot be divorced from the notion of democratic governance, which is associated with a combination of

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95 The bearers of fundamental human rights are those individuals to whom the state makes their nativity or births the foundation of its sovereignty, see Owens "Reclaiming 'Bare Life'? Against Agamben on Refugees" 2009 23 *International Relations* 567, 572 and Agamben *Means without Ends: Notes on Politics* (2000) 21.

96 For Agamben, refugees are usually housed in camps to distinguish them from citizens and to subject them to various forms of violence, outside of reach of legal recourse, see Owens 2009 23 *International Relations* 572–573.

97 Flew "Social Justice Isn't any Kind of Justice" 1993 *Libertarian Alliance, Philosophical Notes No 27* 1, 3.

98 Rawls *A Theory of Justice* 10–11.

the principles of "we, the people" and "the will of the people", on which the Constitution is founded. It is through the will of the people that the sovereign power of the state was created and provides the conceptual grounds upon which domestic laws would be framed and designed. The phrase "we, the people", in a logical sense, embraces people who are natives of South Africa, including those who are granted citizenship through naturalisation processes. Having said that, the preamble of the Constitution plainly affirms that:

> "We, the people of South Africa … adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

Thus, the people of South Africa laid down the principle of democratic governance, which must be guided by the will of the people in the realms of a sovereign nation and through democratic processes. Here, the Constitution is seen as a just procedure satisfying the requirements of addressing the deep scars of the past and improving the quality of life of citizens by means of freeing their potential and maximising their autonomy, among other things. As Giorgio Agamben succinctly put it, a sovereign nation decides on the rights of insiders and on those of outsiders; hence it is the lawgiver.[99] From the point of view of theorists of positive law, rights cannot, therefore, be allocated based on a simple claim of being a human being; rather, it is the notion of citizenship on which the fundamental rights and freedoms should be arranged. The dissenting philosophies of theorists of the natural law contend that rights should be arranged to protect and respect the moral worth of the person without distinction of any kind.

Having grounded the constitutional system in natural law, South Africa, in an explicit way, extended the rights in the Bill of Rights to apply to refugees in the context of full legal protection.[100] At first glance, one could say that the strongest reason for referring to the rights in the Bill of Rights is that by constitutionalising the refugee rights paradigm, South Africa would be constitutionalising the aims of the theories of natural law to ensure the protection of refugees' liberty, dignity and autonomy. This is because the Bill of Rights contains core fundamental human rights that project the image of humanity. What is problematic is that the theory of full legal protection created by the refugee framework does not expressly recognise the rights in the Bill of Rights, which apply to refugees, and this has given rise to two conflicting interpretations. The first possible interpretation holds that refugees also belong in the political community and thus constitutional rights accrue to them. The second interpretation holds that they remain outsiders who have no claim to constitutional rights. It appears that the state prefers the second interpretation and thus proceeds to adopt remedial or positive

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99 A sovereign nation is "he who decides the exception" or he who decides when the can be suspended or when the right can be limited, see Schimitt *Political Theology: Four Chapters on the Concept of Sovereignty* (2005) 5 and Owens 2009 23 *International Relations* 571.

100 S 27(b) of the Refugees Act.

measures in accordance with s 9(2) of the Constitution. The latter approach completely excludes refugees from those positive measures, resulting in the affected refugees taking the state to court for mediation of constitutional disputes. Taking the state to court requires financial means and refugees generally rely on the friends of the court (*amicus curiae*) to litigate due to their economic hardships. All these legal issues restrict the possibility of refugees enjoying the same rights as citizens do and unequivocally affirm that the notion of equal rights is a mere aspiration, impossible to achieve in practice. The article now turns to discuss the theory of full legal protection within the rules of a positive law framework to delineate that it is not in fact supported by a political will to add to it a practical mechanism to convert refugee rights into tangible entitlements.

3 2 Full legal protection principle *vis à vis* refugees

The implicit nature of the theory of full legal protection suggests that it can be assumed that refugees are entitled to constitutional rights such as housing, healthcare, social security, food and water, and basic and tertiary education, which the Constitution affords to everyone. However, the need to confer these constitutional rights upon refugees clearly is of importance because of the need to draw a vibrant distinction between rights enjoyed by refugees and those enjoyed by others. In this perspective, the positive law must plainly define constitutional rights that accrue to refugees to avoid a struggle and conflict of entitlement. The right to work,[101] the right to healthcare,[102] and the right to elementary education[103] are the only constitutional rights that were accentuated by lawmakers under the Refugees Act as accruing to refugees. This begs the question whether refugees are not entitled to the other constitutional rights that reside in everyone. The absence of a clear definition of rights to which a refugee is entitled under the Refugees Act gives rise to legal disputes and, in order to mediate these disputes, the court had to invoke the constitutional foundational values so as to extend the said constitutional rights to refugees.[104] In particular, adequate consideration must be consistent with the assertion of theorists of natural law that there cannot be a better moral right than natural right.[105] Natural rights must always be protected.

3 2 1 Impact of the notion of constitutional democracy

The discourse of the full legal protection of refugees is frustrated by the tendency to exclude refugees from the debate of constitutional transformation, which is perceived in and built on the expression of the will of the "we, the people" within democratic justice spheres. Democratic concept

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101 S 27(f) of the Refugees Act.

102 S 27(g) of the Refugees Act.

103 *Ibid*.

104 *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism supra* in terms of the right to self-employment and *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* in terms of the right to choose a vocation.

105 Hart 1955 64 *The Philosophical Review* 176.

of justice is enhanced and claimed through forms of democracy, namely, representative democracy, participatory democracy and direct democracy.[106] Participatory democracy can be defined to mean "individuals or institutions [are] given the opportunity to take part in the making of decisions that affect them".[107] Representative democracy implies that people should participate in politics through their duly elected representatives or structures.[108] Direct democracy is understood in the context that a group of people or individuals can claim their rights or make their voices heard by means of protest action.[109] Refugees may, therefore, make use of direct democracy to assert their place in the host society. Despite the tool of direct democracy, refugees substantially lack political muscle to influence decision-making or to turn their rights into an entitlement by means of the democratic concept of justice.[110] Their exclusion from the constituency on whose will the government must be based and to which it must be accountable, works to aggravate the existing vulnerable situation of refugees. The absence of their political voice in democratic processes renders them invisible in the collective efforts to achieve an egalitarian society. Objectives of achieving equality and of advancing human rights and freedoms are enhanced through participatory democracy where the voices of refugees are lacking in various respects.

Instead, it is through democratic concept of justice, under which citizens request the representative structures to expel unwanted non-citizens who are competing with the historically disadvantaged to access labour market, social services and other opportunities.[111] This outcry over the protection of refugees has a connection with the misconceptions that refugees are illegal and criminals; they are bogus refugees; they are economic vultures; and as such, they came into South Africa in search of better socio-economic opportunities.[112] Based on these misconceptions, both citizens and politicians feel that refugees should not be allowed to have access to socio-economic rights.[113] In response, the government uses deprivation of the right

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106 Currie and De Waal *The Bill of Rights* 13–18.

107 Currie and De Waal *The Bill of Rights* 15.

108 Currie and De Waal *The Bill of Rights* 14–15.

109 Currie and De Waal *The Bill of Rights* 16.

110 *Khosa v Minister of Social Development supra* par 71, *Larbi-Odam v Member of the Executive Council for Education (North West Province) supra* par 19 and *Minister of Home Affairs v Somali Association of South Africa Eastern Cape (SASA EC) supra* par 37.

111 See for eg, Alexie *Realising the Socio-Economic Rights of Refugees under International Human Rights Law: A Case Study of South Africa*' (Unpublished LLM Thesis, University of the Western Cape 2005) 54; and Wamundiya *An Exploratory Study of the Role that Identity Documents Play in the Integration of Refugees and Asylum-Seekers in South Africa: Reflections from Cape Town* (Unpublished Masters of Social Sciences Thesis, University of Cape Town 2014).

112 See Maharaj 2001 56 *GeoJournal* 47–57 and Kavuro "Refugee Rights in South Africa: Addressing Social Justice in Government Financial Assistance Schemes" 2015 5 *J Sustain Dev Law Policy* 176, 182.

113 In 1995, Dr Mangosuthu Buthelezi, then Minister of Home Affairs was quoted saying that illegal migrants placed a financial burden on South Africa's national resources and Mr Penuel Maduna, then Deputy Minister of Home Affairs, was also quoted saying that illegal foreigners are unskilled workers who were accepting low wages for work and, in accepting exploitative work, they deprived citizens of livelihood opportunities, see Kotze and Hill "Emergent Migration Policy in a Democratic South Africa' 1997 35 *International Migration* 5 15–16. Recently, in 2011, Ms Fatima Chohan, Deputy Minister of the Department of Home

to documentation as one of the mechanisms to deny refugees access to their basic rights and to dissuade perspective asylum-seekers and economic migrants from making South Africa their destination. Issues like these led Peter Vale to conclude that South Africa is an aggressive state to refugees and migrants alike.[114]

In reality, the theory of full legal protection rests on possible exercise of political rights in the Bill of Rights through democratic justice principles and, unfortunately, two principles of democracy (that is, participatory and representative) are not available to refugees. These principles are constitutionally associated with and tied to the political rights in s 19 of the Constitution, which are reserved for citizens only. Self-evidently, s 19 excludes refugees from political activities and without inclusion in these activities; they cannot gain a political voice through an elected representative at local, provincial and national level.

Without the acquisition of full political rights, refugees' freedom to speak out and express their grievances, or criticisms, or opinions is being severely restricted, as they cannot organise politically to claim for social and economic security through democratic processes.[115] Without a political voice, refugees can be compared to people who are held-up in a prison without walls. This situation, in which refugees are deprived of their right to exercise their political autonomy, is referred to as legal encampment, which does not differ from the physical encampment, in this case, a refugee camp.[116] Without political autonomy, the nature of the theory of full legal protection of refugees is accordingly understood in the context of the oppressive logic of humanitarian protection.[117] In this regard, the full legal protection based on humanitarian reason implies that refugees may not vindicate their rights in the Bill of Rights as these rights are accrued to them solely on a moral basis. As noted, moral obligations cannot be legally enforced. Thus, without enforcement, their inborn rights would be meaningless.

The reduction of constitutional protection to moral protection based on mere compassion, kindness and generosity was rebuked by the SCA in *Minister of Home Affairs v Somali Association of South Africa Eastern Cape (SASA EC)*,[118] when it stated that refugees could not be left to the mercy of the state in the violation of both constitutional and judicial order:

Affairs, during the commemoration of refugee day, stated: "It should be noted that that the majority of asylum applicants do not qualify for refugee status. The reason that we have such a high level of applicants is partly because our asylum management process is lacking in many respects. We are alive to the weaknesses in the system and are concerned that the huge influx of applications from individuals intend on abusing the relatively simple process presents, ultimately serve to disadvantage genuine refugees, as our sources are diverted away from offering them the level of service and protection we strive to achieve." See address by Home Affairs Deputy Minister Fatima Chohan on the commemoration of World Refugee Day at the St Martins De Porres Catholic Church, Orlando West, Soweto (19 June 2011).

114 Vale 2010 29 *Politikon: South African Journal of Political Studies* 10.

115 Ignatief *Human Rights as Political and Idolatry* (2001) 90.

116 Polzer "Negotiating Rights: The Politics of Local Integration" 2009 26 *Refugee* 92 94–95.

117 Polzer 2009 26 *Refugee* 94–95.

118 *Supra*.

> "[I]t is a most dangerous thing for a litigant, particularly a state department and senior officials in its employ, to wilfully ignore an order of court. After all, there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed. There is a constitutional requirement for complying with court orders and judgments of the courts cannot be any clearer on that score. No democracy can survive if court orders can be shunned and trampled … Our present constitutional order is such that the state should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights.[119]

The SCA identified the unavailability of democratic justice as a conceptual reason that allows the state to frustrate the international and constitutional obligations to protect refugees as follows:

> "The refugees and asylum-seekers … are among those who are most in need of protection. They do not have powerful political constituencies and their problems, more often than not, are ignored by government to comply with their obligations. Previous orders of courts appear to have done little to make their problem visible and to cause the authorities to comply with their obligations."[120]

A lack of enforcement of constitutional rights reduces refugees to welfare dependency, which undermines their human capabilities to support themselves and isolates and stigmatises them in a way that over a long period legitimises and accentuates the local misconceptions that they are not economic contributors, but parasites.[121] Dependency, therefore, becomes a key in their social life.

As noted above, the drafters of the Constitution considered how best to protect the general interest of citizens and thus arranged political rights in a manner that accrues to citizens. The impact of non-inclusion of non-citizens causes a serious impediment to any possibility of influencing political decisions affecting them.[122] The lack of political autonomy diminishes the ability of refugees to assert their rights and this similarly severely impacts on refugees who constitute "a group lacking in political power and as such to having their interests overlooked and their rights to equal concern and respect violated."[123] The refugee group is among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[124] Failure to uphold a standard of treatment of refugees that encompasses both fundamental human rights and refugee-specific rights due to their lack of political power compels refugees and asylum-seekers to "end up as pariahs at the margins of host societies."[125] This is so because their distinctive potentials are not realised and their qualities and capabilities

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119 Par 35.

120 Par 37.

121 Generally, dependency undermines a person's motivation to support himself or herself, see Fraser and Gordon "A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State" in Munder (ed) *Law and Poverty* (2007) 309.

122 *Khosa v Minister of Social Development supra* par 71.

123 *Larbi-Odam v Member of the Executive Council for Education (North West Province) supra* par 19.

124 Par 19.

125 *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 134.

are not utilised for self-development in society, which does not consider socio-economic rights of refugees. This results in the theory of full legal protection of refugees being denuded and thus impossible to enforce.

3 2 2 Do refugees enjoy civil rights contained in the Constitution?

The question whether full legal protection of refugees is material cannot be assumed without further interrogations of some of its underlying assumptions that refugees fully enjoy civil rights like, equality, human dignity, life, and freedom and security of the person. Such assumptions need to be explored. Primarily, the right to equality is highly likely unattainable because it is largely confined to substantive equality, given effect to within the framework of affirmative action, and validating discriminatory measures designed to advance previously disadvantaged people. Within the affirmative action framework, the Constitution seeks to reverse unfair discrimination of the previous apartheid regime by introducing legislative measures aimed at remedying the social, economic and political injustice of the past and applies the principle of fair discrimination. This principle meets the constitutional test of reasonableness given that it is beneficial to those who were historically discriminated against.[126] Framed within this context of substantive equality, debating the inclusion of refugees in the remedial – or constitutional transformative – measures on the sole basis of justification of their humanity is difficult. Refugees are viewed as a vulnerable group in the South African society, but are not among the disadvantaged groups, because they are not historically disadvantaged.

Secondly, the right to human dignity is central to rectifying the iniquities of the past and to respond to immense violations of human dignity. This occurs when human dignity is at stake due to deep scars and economic inefficiency, caused by the apartheid system. Thus, it occurs when human dignity is applied discriminatorily as a contextual ground of justification to pursue socio-economic transformation or to attack inherited poverty and deprivation.[127] The interpretation of the right to dignity in the context of giving effect to substantive equality legitimises discriminatory policies that discriminate against minority groups, like refugees, asylum-seekers, migrants and previously advantaged people. Even though academic and judicial decisions maintain that people who are susceptible to severe social vulnerabilities or who live in intolerable conditions cannot lead a dignified life, the state rarely uses the rules of positive law to take positive measures aimed at protecting the dignity of refugees. Positive measures should be taken to give effect to refugee rights guaranteed by the Refugees Act or to at least harmonise the Refugees Act with positive measures, aimed at restoring human dignity, achieving equality and improving lives thereby realising a more just society. Rather, the court, when approached, applies the

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[126] In *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC), the Constitutional Court held that the prejudice caused by remedial measures was justifiable. The fact that remedial measures "may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial" (par 39).

[127] Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" 2005 21 *SAJHR* 1–31.

constitutional values – rooted in the Kantian moral philosophy – to rectify unfair state actions by means of extending its measures to include refugees in the transformative schemes. In so doing, the court invokes the value of human dignity, in conjunction with the values of equality and freedom – on which the interpretation and enforcement of rights are based – to extend certain rights traditionally associated with citizenship to include refugees. In safeguarding against aggravation and perpetuation of the social vulnerabilities of refugees, the court bases its reasoning on the discourse of humanity in the sense of respect for human dignity.[128]

Thirdly, working towards the protection of national resources and ensuring national security, the state adopts restrictive refugee and migration policies that impact on refugees' rights in respect of the right to freedom and security of the person. Thus, more stringent immigration and refugee policies are seen as a response to the demands of economic globalisation, which affected and changed the nature of traditional immigration regulation, leading only to opening "borders to trade, industry, culture, communication and capital and the movement of people, which must inevitably follow".[129] Through the lens of economic globalisation, refugees are usually viewed as unskilled people and, therefore, parasites and ultimately seen as undeserving people.[130] Viewing them as undeserving of social and labour protection, they are faced with a real threat of expulsion and deportation as undesirable persons. Administrative, political, and economic vulnerability consolidate this human insecurity. Clearly articulated, the refugee situation is threatened and pervaded by the protracted challenges arising from facing administrative hurdles, sporadic xenophobic attacks, socio-economic exclusion, crime, poverty, and prolonged detention, which wholly or in a part, constitute a constructive *refoulement*.[131] Little is done to alleviate these threats without legal assistance from human rights organisations. For instance, the fact that locals are not prosecuted for violence perpetrated against non-citizens, particularly, refugees gives credence to Hannah Arendt's claim that refugees have no rights at all and that refugees are just a burden, but not human beings.[132]

The right to security and freedom of the person is materially threatened by the following actions, attitudes or tendencies: (i) the state's justification of xenophobic violence on the basis of acts of criminality; (ii) the perpetration of xenophobic violence with impunity; (iii) the state's unwillingness to compensate refugees for physical injury and financial loss sustained; (iv) debasing refugee's humanity in the context of calling refugees' derogatory names; (v) blaming refugees for the ills of the country; (vi) refugees' daily struggle to voice their grievances; (vii) the attitude of the state denying refugees public services on the ground that they are bogus refugees; and (viii) refugees' daily struggle to put a bread on the table in a hostile community. The totality of these threats should be seen as tantamount to a violation of the principle of human dignity, which forbids state actions that

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128 *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs, Thomas v Minister of Home Affairs supra* par 35.

129 Maharaj 2001 56 *GeoJournal* 47.

130 Maharaj 2001 56 *GeoJournal* 50.

131 Botha 2013 130 *SALJ* 838.

132 Botha 2013 130 *SALJ* 838. See also Arendt *The Origins of Totalitarianism* 267.

may cause significant intolerable conditions or severe hardships to an individual.[133] More often than not, intolerable conditions impacts on and also impedes the development of a whole range of potentials of the person as well as human capabilities, including exercising autonomy to pursue and achieve life goals and to participate in socio-economic development activities that could have contributed to the South African economy.[134]

3 2 3 Impediments to enjoyment of socio-economic rights

Constitutional socio-economic rights and benefits – to which the Refugees Act refers – are inherent in everyone. On the face of it, they constitutionally accrue not only to citizens but also to non-citizens. Irrespective of their cosmopolitan nature, they are statutorily restricted to refugees and permanent residents.[135] However, the position of permanent residents in respect of access to social welfare is higher than that of refugees and the Immigration Act guarantees their privileged legal position as follows:

> "The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations, which a law or the Constitution explicitly ascribes to citizenship."[136]

A better legal position of permanent residents is justified by the Constitutional Court on the ground that they have made South Africa their home and owe a duty of allegiance to the state.[137] If refugees do not owe a duty of allegiance to South Africa, the fundamental question would be: Which aspects of socio-economic rights accrue to refugees or to what extent can refugees enjoy socio-economic rights and benefits if they do not enjoy the same treatment afforded to permanent residents? Responding to this question, Mokgoro and O' Regan JJ, in their dissenting judgment delivered in *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services*, explained that refugees' legal position is more closely aligned to that of permanent residents in that refugees should enjoy almost similar rights than those enjoyed by permanent residents.[138] Contrary to the dissenting views, the majority judgment delivered by Kondile J held that the distinctions between permanent residents and refugees must be maintained.[139] The maintenance of distinction implies that refugees are

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133 *Minister of Home Affairs v Watchenuka supra* par 23 and *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism supra* par 44.

134 For an account of human insecurity caused by deprivation, see Sen *Development as Freedom* (2001).

135 S 27(b) of the Refugees Act (in respect of refugees) and s 25(1) of the Immigration Act (in respect of permanent residents).

136 S 25(1) of the Immigration Act.

137 *Khosa v Minister of Social Development supra* par 59.

138 *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 99.

139 Regarding employment, citizens and permanent residents must receive preferential treatment. Therefore, differentiating between two classes of non-citizens, namely, permanent residents and refugees serves the legitimate governmental purpose and virtually constitutional, see *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 18, 35, 42, 44–50.

entitled to a lesser number of rights in comparison to those enjoyed by permanent residents. Kondile J based his reasoning on the fact that s 27(c) of the Refugees Act, read together with s 27(d) of the Immigration Act requires a refugee to apply for permanent residence status when he or she has continuously resided in South Africa for five years.[140] Until a permanent resident status is granted, a refugee cannot enjoy the same socio-economic rights and benefits conferred on citizens and permanent residents in terms of the law.

Challenged by defining the distinctive constitutional rights between permanent residents and refugees, on the one hand, and between refugees and asylum-seekers, on the other, Mokgoro J was, in *Khosa v Minister of Social Development* and *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services,* at great pains to stress that socio-economic rights in the Bill of Rights are not equally applicable to all groups of persons.[141] She recognised the existence of different levels of entitlement:[142] First, all socio-economic rights accrue to citizens based on equal citizenship whereas non-citizens are entitled to these rights in accordance with their legal positions. Permanent residents enjoy a higher number of socio-economic rights, benefits and privileges in accordance with s 25(1) of the Immigration Act.[143] Refugees enjoy a fair number of socio-economic rights and benefits in accordance with s 27(b) of the Refugees Act. At the lowest level of entitlement, asylum-seekers are simply entitled to socio-economic rights by virtue of their humanity. The same applies to other types of temporary residents unless the principle of reciprocity (that is, the most-favoured-nation treatment) applies. The conceptual distinction is unclear and thus points to a gap in the law regarding clarification of the hierarchies of socio-economic rights with respect to the protection of different categories of non-citizens. Notwithstanding these different legal positions, the state makes no attempt to distinguish refugees from other classes of temporary residents and this has a greater impact on refugees as they are juxtaposed to migrants, resulting in subjecting them to the requirement of self-sufficiency, as alluded to earlier.

Assuming that refugees are capable of supporting themselves, the state has adopted numerous remedial socio-economic measures that seek to address inequality in the economic, education, and labour spheres without giving adequate consideration to the plight of refugees. In this way, certain measures were taken with a view to redressing social inequalities and economic disparities through empowering black South Africans on the preferential treatment basis.[144]

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140 *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 50.

141 *Khosa v Minister of Social Development supra* par 57.

142 *Khosa v Minister of Social Development supra* par 55, 59 and *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 98–104.

143 It states that a permanent residents are "entitled to all the rights, privileges, duties and obligation of a citizen, save for those rights, privileges, duties and obligations of a citizen which a law or the Constitution explicitly ascribes to citizenship".

144 They include, for eg, the Skills Development Act 98 of 1998, the Skills Development Levies Act 9 of 1999, the Higher Education Act 101 of 1997, the National Student Financial Assistance Act 56 of 1999, the Employment Equity Act 55 of 1998, the Public Service Act

In labour spheres, refugees face insurmountable challenges in accessing the local labour market. Whereas s 10 of the Public Service Act blatantly excludes refugees from having access to public permanent employment opportunities, their access to the private labour market is also inhibited by the following implications: First, refugees' lack of freedom to choose a vocation in terms of s 22 of the Constitution. Second, the Employment Equity Act[145] seeks to advance black South Africans by obligating employers to prioritise their recruitments so as to comply with the affirmative action. Third, the Immigration Act creates a strict rule regulating recruitment of non-citizens. The recruitment rule obligates employers to offer employment to non-citizens provided that, first, they are in possession of a work permit; second, they are registered with the professional council for their occupational field;[146] and third, no suitably qualified citizen, despite a diligent search, is available to fill the position.[147] The immigration recruitment rule is erroneously extended to apply to refugees by virtue of their non-citizenship status. Little attention is paid to the fact that refugees are exempted from the scope of the immigration recruitment rule by the international refugee law, except registration with the professional council.[148] It is trite to state that refugees are struggling to have access to the labour market given that the aforementioned exemption rule is not aligned with the labour recruitment laws and policies. By applying the immigration recruitment rule, the state also contends that refugees cannot recruit themselves. In other words, refugees have no right to self-employment. Such contention led the state to close refugees' businesses down and to deny them trading licences.[149] This attitude of the state gives credence to the claim that refugees are unwanted migrants to whom constitutional rights cannot be extended.[150]

4 CONCLUDING REMARKS

Refugees are entitled to the standard of treatment projected by the Bill of Rights and its full protection thereof. They are, by virtue of their humanity, entitled to the rights that South Africa's positive law has taken away from them. It has been demonstrated that a number of limitations contained in the Constitution dilutes their human and refugee rights that take the form of

103 of 1994, the National Health Act 61 of 2003, the Housing Act 107 of 1997, the Social Housing Act 16 of 2008, the Social Assistance Act 13 of 2004, and the Broad Based Black Economic Act 53 of 2003, the Marine Living Resources 18 of 1998, the Mineral and Petroleum Resources Act 28 of 2002, the Competition Act 89 of 1998, and the Preferential Procurement Policy Framework Act 5 of 2000.

145 55 of 1998.

146 Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market" 2015 19 *Law, Democracy & Development* 232, 255–260.

147 S 19(2)(a) of the Immigration Act.

148 Art 17(3) of the Refugee Convention states that a host state must give sympathetic consideration to integrating the rights of all refugees in respect of employment within those of citizens. This was noted with approval in *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism supra* par 37.

149 *Somali Association of South Africa (SASA) v Limpopo Department of Economic Development Environment and Tourism supra* par 1.

150 Uehling *Unwanted Migration: Combating and Unwittingly Creating Irregular Migration in Ukraine* UNHCR, (2004) Working Paper No. 109 1–18 and Harrell-Bond *Cessation Clause Uganda Style* Keynote Speech delivered at the North-Western University Conference on Human Rights, (January 2011).

constitutional rights. Drawing from an international standard of treatment of refugees, refugees should be accorded the full legal protection in the context of most favourable treatment. At a minimum, their treatment must at least, be as favourable as possible; and not less favourable than that accorded to non-citizens generally.[151] In a social life, refugees are particularly socially vulnerable and cannot be subjected to the requirement of self-sufficiency as they are applied to non-citizens in general. Instead, by applying the rules of positive law, the state should, because of their special social vulnerability, re-engineer socio-economic laws to also give an account to the needs of refugees based on the principle of the most favourable treatment, which normatively obliges the state to respond to the refugee situation in a more favourable way. However, as has been demonstrated, the requirement of self-sufficiency is given precedence in the treatment of refugees and little is done by lawmakers to distinguish them from other types of non-citizens when re-arranging and re-engineering social welfare schemes for the purpose of healing the divisions of the past.

Laws could have been developed to give effect and substance to the theory of full legal protection, especially in the civil, social, economic and political domain and they would specify which rights could be enjoyed by refugees in clear terms. From a natural law theory point of view, rights of refugees should be favourably incorporated in the constitutional transformative or restitutionary measures. It is true that the apartheid policies did not cause their deprivation, but there is a need to effectively and sufficiently respond to their deprivation and such need should not be dependent on a humanitarian reason, but rather on the international obligations to protect them against social and political vulnerabilities. In order to attend to and respond to their problems, there is a need to include refugees in the participatory democratic process in order to enable them to assert their specific constitutional and refugee rights through engagement with state officials. An absence of participation in the democratic processes renders refugees invisible within the South African society and their existence is forgotten, hence their voice is not among the voices calling or appealing for social change. Without a political voice, the theory of full legal protection loses all its significance as nothing is done to change the lives of the most vulnerable people in society. They end up as second-class citizens and as pariahs at the margins of a host society that could have given them comfort and restored their sense of dignity through availing material means essential to rebuilding their social lives and essential to re-establish a means of livelihood. As pariahs, they lose their sense of humanity and their loss of dignity is perpetuated. They are driven from pillar to post in a desperate quest for safety, security, and freedom. This is contrary to the principle of equity and justice, which requires the state to refrain from taking socio-economic measures augmenting desperateness, homelessness and poverty and, rather, obligates it to reduce people's vulnerabilities for a decent existence.[152] The state's application of the norms of legal positivism, leading to a contribution of intolerable conditions, punctures the integrity of the right-based vision of humanity, as envisaged by constitutional law, international

[151] See chap IV of the Refugee Convention.

[152] *Port Elizabeth Municipality v Various Occupiers supra* par 18.

human rights law, and asylum law.[153] The theory of full legal protection is thus in conflict with a number of valid and legitimate limitations rendering the commitment to protect refugees unfulfilled in practice.

Following from and in further pursuance of the above analysis, the article recommends that the lack of full legal protection of refugees and challenges connected therewith can, in practical ways, be addressed in the following way:

- The socio-economic rights contained in the Bill of Rights, which are vested in refugees in terms of the Refugees Act, should be interpreted and applied on the basis of understanding that refugees have become members of the South African community given that welcoming refugees comes with the responsibility to offer them the international refugee protection in the form of a surrogate national protection. Accordingly, the full legal protection must be enforced in the realms of surrogate national protection simply because international refugee protection is designed to "substitute the national protection that [refugees] have lost and cannot claim at home."[154]
- Policymakers must clearly define the constitutional socio-economic rights that accrue to refugees and entitlement of each right must separately be defined in terms of national legislation giving effect and substance to such right. In other words, the Refugees Act must be harmonised with the constitutional transformative measures on a favourable basis.
- The state must not be seen as a violator of refugee rights or contributing to furthering the desperation and destitution of refugees, but as a protector and promoter of refugee rights. The willingness to protect refugees can manifest itself in the swift and effective documentation of refugees and asylum-seekers; hence, documents are the main tool that can be used to access public services, such as social assistance, education, healthcare and employment.
- The state should be a model of compliance with the rulings of the court and thus implement court orders.
- Even though the protection of refugees derives from international obligations, the state must protect the refugees' physical safety by ensuring that locals who commit xenophobic violence against refugees are prosecuted and rebuked in addition to compensating refugees for physical injury and financial loss sustained.
- The state must establish a body entrusted with overseeing the admission and integration of refugees in South African society, including monitoring and overseeing the implementation of the Refugees Act.
- The state must establish mechanisms that would ensure the inclusion of refugees in the democratic process in order to enable them to engage with state officials. This would enable refugees to voice their needs and to have a sense of belonging.

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153 *Ibid*.

154 *Union of Refugee Women v The Director, The Private Security Industry Regulatory Services supra* par 136.