THE DISAPPEARANCE OF REFUGEE RIGHTS IN SOUTH AFRICA

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SUMMARY

This article critically examines the nature and scope of the type of refugee protection offered by South Africa to people fleeing their home countries. It offers an analytical demonstration of how South Africa has gradually developed conflicted and ambivalent attitudes towards the protection of refugees and asylum seekers. South Africa's conflicted and ambivalent attitudes towards refugee protection are evident in several amendments made to the refugee regime, to restrict the enjoyment of refugees' socio-economic protection. The purpose of this article is therefore to demonstrate that the ongoing amendments to the refugee legal framework – without harmonisation with socio-economic laws – increasingly result in the disappearance of refugee rights. This, in turn, results in the creation of disgruntled refugees; through protests, they express their dissatisfaction with ineffective protection, and consequently demand to be resettled or relocated to other countries for better and effective protection.

1 INTRODUCTION

Refugee laws and regulations were adopted to control and govern the admission of persons (refugees) attempting to escape persecution and seeking asylum in South Africa, on the one hand, and to extend constitutionally based rights to them, on the other. The first refugee laws and regulations came into operation in 2000. For a long time, several domestic and international organisations, including the United Nations High Commissioner for Refugees, praised these laws and regulations as the most progressive in the world.[1] However, these laws and regulations were not without weaknesses, gaps and shortcomings, as demonstrated in previous

[1] Rulashe "UNHCR Chief Commends Pretoria's Refugee Policy, Pledges Cooperation" (27 August 2007) http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=36&docid=46cf10634&query=%22south%20africa%22 (accessed 2021-09-18); Khan *Patterns and Policies of Migration in South Africa: Changing Patterns and the Need for a Comprehensive Approach* Paper drafted for discussion at Meeting on Migration, Loreto, Italy (3 October 2007) and James "Seeking Refuge in South Africa: The Victimization of Vulnerable Persons" 2017 20 *Temida* 170 179.

papers and research projects.[2] The gaps and shortcomings of the initial refugee regime (and subsequent amendments) render it difficult, if not impossible, for individuals escaping persecution and seeking asylum to enjoy the refugee rights that are – owing to their universal nature – entrenched in the Bill of Rights. Difficulties arising from attempts to enjoy these rights were described in submissions to lawmakers by civil society organisations, lobbying and advocating for the plight of foreign nationals – particularly, refugees, asylum seekers and other vulnerable migrants.[3]

Against this background, this article discusses the shrinking of the refugee protection that South Africa has committed to offer asylum seekers escaping from repressive governments, political violence, civil war, or other events disrupting public order. The discussion is approached from the standpoint of social legal theory, which is based upon the notion that:

> "[l]aw is a social historical growth – or more precisely, a complex variety of growths – tied to social intercourse and complexity. Certain of these legal manifestations develop and evolve, while others wither or are absorbed or supplanted. Law has roots planted in the history of a society, develops in social soil alongside other social and legal growth, tied to and interacting with surrounding conditions."[4]

With reference to social legal theory, it is argued that the protection of refugees has become infinitely complex and contested. As a result, an interdisciplinary approach to the protection of refugees and asylum seekers is not followed. The gradual disappearance of refugee protection appears to emerge and evolve within the established institution of the post-1994 reconstruction and development agenda[5] and its procedural legal, political framework, which is morally informed by South Africa's history of discrimination, racism, repression and xenophobia. The post-1994 reconstruction and development agenda is also informed by section 9(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and is known as "substantive, remedial or restitutionary equality".[6] Within these

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2 Kavuro "Refugees and Asylum-Seekers: Barriers to Accessing South Africa's Labour Market" 2015 19 *Law, Democracy and Development* 232 232–260; Kavuro "Exploring the Full Legal Protection of Refugees and its Limitations with Reference to Natural and Positive Law" 2018 39 *Obiter* 17 17–44 and Kavuro ***Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity*** (doctoral thesis, Stellenbosch University) 2018.

3 Parliamentary Monitoring Group (PMG) "Issues That Affect Migrants and Citizens: Engagement with NGOs & Stakeholders" (29 October 2019) https://pmg.org.za/committee-meeting/29180/ (accessed 2020-03-25).

4 Calnan "Systematising Social Legal Theory" (2018) Academia.edu https://www.academia.edu/37158991/SYSTEMATIZING_SOCIAL_LEGAL_THEORY (accessed 2020-06-10).

5 ANC *The Reconstruction and Development Programme* (1994) 2 notes that the reconstruction and development agenda is needed because South African history "has been a bitter one characterised by colonialism, racism, apartheid, sexism and repressive labour policies… [and that South Africa's] income distribution is racially distorted and ranks as one of the most unequal in the world – lavish wealth and abject poverty characterise our society."

6 S 9(2) provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination must be taken." For the meaning of substantive equality, see Currie and De

contexts, refugee protection is shrinking and disappearing as the rights and interests of refugees and asylum seekers have not been given due consideration in transformative, remedial or restitutionary measures in the form of affirmative action or black economic empowerment approaches to improvement in the quality of life of citizens or redressing past injustices. This has culminated in the government's reluctance to include refugees and asylum seekers in the social welfare system, including the current emergency COVID-19 relief packages.[7] Exclusion from the social welfare system is usually justified by the State on the premise that it relies on the asylum management system to manage the influx of economic migrants and to regularise their stay in the country.[8] However, this justification is not supported by research findings, which, on the contrary, hold that exclusion and discrimination are embedded in the history of South African society.[9] Exclusion of others develops in the South African social soil, which is characterised by institutionalised ill sentiments and xenophobic tendencies towards fellow African foreign nationals.

Due regard is given to Lalbahadur's argument that there is "a history of institutionalised xenophobia that prevents refugees and asylum seekers from accessing state resources, securing the right to live and work in the country".[10] Institutionalised xenophobia is evident in political statements that describe both refugees and asylum seekers as bogus refugees who are in the country to benefit from the fruits of democracy.[11] Based on such political views and understanding, they are therefore not considered in efforts to address socio-economic problems affecting the South African society in which they live. As a result, socio-economic laws – adopted for remedial purposes – do not speak to refugee law. Moreover, it appears that the more the refugee regime is amended, the more measures are introduced to restrict access to social welfare, resulting in institutionalised exclusion, and not in addressing the gaps and shortcomings in the initial refugee system.

Waal *The Bill of Rights Handbook* (2017) 213–214 and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 41 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 60–61.

7 Kavuro "South Africa Excludes Refugees and Asylum Seekers from Covid-19 Aid" (2020-05-29) *Mail & Guardian*.

8 African National Congress (ANC) "Peace and Stability: Policy Discussion Document" (March 2012) 5; Department of Home Affairs "White Paper on International Migration for South Africa" (July 2017) in *GG* 41009 of 2017-07-28 59; and Department of Home Affairs "White Paper on Home Affairs" (August 2019) in *GG* 42162 of 2019-06-18 35.

9 Nyamnjoh *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* (2006) 38; Comaroff and Comaroff "Naturing the Nation: Aliens, Apocalypse and the Postcolonial State" 2001 7 *Social Identities* 252 and Ukwandu "Reflections on Xenophobic Violence in South Africa: What Happens to a Dream Deferred?" 2017 7 *African Journal of Public Affairs* 43 43–62.

10 Tamanaha "Law's Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society" 2018 95 *Washington University Law Review* 1 5.

11 Kavuro "Reflecting on Refugees and Asylum-Seekers Tertiary Education in South Africa: Tension Between Refugee Protection and Education Transformation Policies" 2013 4 *Global Education Magazine* 22 23–24.

2 DIFFICULTIES IN THE DIFFERENTIATION OF LEGAL PROTECTION

Legal indicators of a shrinking refugee protection regime in South Africa have developed or evolved through a number of issues including socio-economic transformation aspirations ingrained in historical racism, hatred, and discrimination. One cannot, however, ignore difficulties in the differentiation of legal positions of different categories of foreign national. An inability to differentiate between categories of foreign national renders the principle of international refugee protection opaque. Such inability is tied to the rules of conduct of South African society, which it has constructed for its own progress and prosperity. Tamanaha argues that there are certain fundamental rules of social intercourse that guide a particular society or community or group to viability or survival.[12] These fundamental rules of social intercourse are said to be tied to human nature and the need for self-preservation. They evolve or emerge from the fact that human beings are self-interested and also altruistic towards others and develop in such context.[13] Because members of the community or group understand that there are limited resources to meet their basic needs, they become unfriendly towards outsiders. Hence, they are not willing to compete with others.[14] As Tamanaha succinctly puts it, these self-interested desires ignite or motivate the need to protect personal, community or national resources.[15]

The viability or sustainability of South African society is accordingly centred on both self-interest and altruism as fundamental rules of social intercourse that seek to uplift the poor from inherited poverty, in particular, and the society from deep social inequalities, in general. Self-interest and altruism evolved into hate, discrimination and xenophobia against foreign nationals. This has developed into blurring the legal distinctions and positions of different categories of foreign national and thus viewing them collectively as economic migrants who are in the country to take over "jobs and resources [and to] foster crime, prostitution and disease".[16]

With these misconceptions in the public domain, there is a lack of clear legal distinction between four often-confused concepts – namely, asylum seekers and refugees, on the one hand, and temporary residents and permanent residents, on the other. Asylum seekers are usually viewed as economic migrants. It is important to point out at this stage that the immigration law makes distinctions between foreign nationals with temporary resident status and foreign nationals with permanent resident status. On the other hand, refugee law distinguishes between foreign nationals with refugee status and foreign nationals with asylum-seeker status. The term economic migrant cannot be found in immigration or refugee law. The framework of foreign nationals with temporary resident status is too broad to include refugees and asylum seekers. Other foreign nationals who were admitted in the country to sojourn temporarily include, but are not limited to, tourists,

12 Tamanaha 2018 *Washington University Law Review* 5.
13 *Ibid*.
14 *Ibid*.
15 Tamanaha 2018 *Washington University Law Review* 6.
16 Nyamnjoh *Insiders and Outsiders* 38

investors, international students, labour migrants and members of diplomatic corps. Pursuant to immigration law, economic migrants can be classified as *illegal foreigners*. They are temporary residents who sojourn in the country in contravention of the provisions of the Immigration Act 13 of 2002, as amended (Immigration Act), as the article turns to explain.

2 1 Temporary residents

2 1 1 Economic migrants

Emerging tendencies in which state officials view refugees and asylum seekers as either economic migrants or illegal migrants are tied to South Africa's history of institutionalised xenophobia, which motivates the desire to exclude refugees and asylum seekers from the post-1994 reconstruction and development agenda. The exclusion is driven by the conviction that South Africa is the largest economy in the Southern African Development Community region and the African continent and thus attracts a high number of economic migrants who use the asylum management system as an entry point.[17] Indeed, owing to gaps in the asylum regime, it cannot be denied that economic migrants use the loose asylum management system to enter, stay and work in the country on a ticket of asylum seeking. They do so simply because economic migrants do not meet the conditions and terms set by the twin principles of exclusion and self-sufficiency on which immigration law is constructed, as discussed later.

Legally speaking, economic migrants are illegal foreigners in the country and thus "undesirable persons". The term "undesirable person" is defined in the Immigration Act to include a foreign national who is in the country, but who cannot fend for him or herself and who is or is likely to become a public charge.[18] The meaning of being a public charge is implied or conceived in the notion of receiving and enjoying state support if they are unable to support themselves. Section 42(1)(*a*) of the Immigration Act prohibits anyone from aiding, abetting, or assisting economic migrants, except for necessary humanitarian reasons. This implies that even though economic migrants are socially vulnerable, they should support themselves unless for necessary humanitarian reasons. The Immigration Act does not define what may be *necessary* reasons to offer humanitarian aid to vulnerable economic migrants.

In principle, economic migrants must be detected and arrested for expulsion or deportation. It is, however, crucial at this point to note that South Africa offers, from time to time, exemption permits to certain categories of economic migrant from neighbouring or certain countries in order to allow them to work, study or conduct business.[19] These economic migrants are simply exempted from the requirement of self-sufficiency, but they are still not allowed to have access to state-funded public goods. The Immigration Act, not the Refugees Act 130 of 1998 (Refugees Act),

17 Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 59.

18 S 30 of the Immigration Act.

19 For e.g., the Exemption Permit Visa for citizens of Lesotho, Zimbabwe and Angola.

regulates the treatment of economic migrants with special permits – such as Angolan, Lesotho or Zimbabwean Exemption Permit Visas. Economic migrants with exemption permit visas – issued in terms of section 31 of the Immigration Act – must fend for themselves and should not seek state support to meet their basic needs. Based on the immigration rule of self-sufficiency, they are excluded from the social welfare system, including the emergency COVID-19 relief packages.[20] However, drawing on the principles of humanitarian emergencies contained in social assistance law, the Scalabrini Centre approached the court for review of their exclusion from, in particular, the COVID-19-based Unemployment Relief Fund.[21] The Scalabrini Centre argued that the exclusion of special permit holders, along with asylum seekers from the Fund was inconsistent with regulation 9(5) of the regulations in terms of the Social Assistance Act 13 of 2000.[22] As a result, the court agreed that the exclusion violated their constitutional rights to equality, dignity and access to social security,[23] as they ought to be included as beneficiaries in the social grant scheme in the event of a declared or undeclared disaster.[24] Based on this premise, economic migrants can only have access to social welfare if they are affected by a disaster on South African territory.

2 1 2 Asylum seekers

Until the decision of the Supreme Court of Appeal in the 2004 case of *Minister of Home Affairs v Watchenuka*[25] and the adoption of the Refugees Amendment Act 33 of 2008, asylum seekers were partially treated as people who can fend for themselves. Prior to these developments, they could not assert their right to have access to subsidised socio-economic services. While the *Watchenuka* decision demanded that the State allow asylum seekers to enjoy the rights to work and education, the 2008 Refugees Amendment Act stipulates duties, obligations and rights of asylum seekers. Section 27A(d) of the Refugees Act, as amended, provides that asylum seekers are entitled to the rights in the Bill of Rights, insofar as those rights apply to asylum seekers. The formulation of this provision creates legal uncertainties and raises interpretive difficulties. In fact, section 27A(d) sounds like a tautology: asylum seekers are entitled to the rights that apply to them. There is no expression of specific rights in the Constitution that apply to asylum seekers in particular. Rather, there are constitutional rights that apply to everyone. The Constitution vests universal rights in everyone;

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20 Kiconko "COVID-19 Pandemic and Racialized Risk Narrative in South Africa" (2020) COVID-19 ODA Rapid Response Research Report, University of Liverpool, https://www.liverpool.ac.uk/media/livacuk/research/heroimages/The,COVID-19,Pandemic,and,Racialised,Risk,Narratives,in,South,Africa.pdf (accessed 2021-09-25).

21 *Scalabrini Centre v Department of Social Development* 2021 (1) SA 553 (GP).

22 GN R162 in *GG* 8165 of 2005-02-22.

23 *Scalabrini Centre v Department of Social Development supra* par 7.

24 *Scalabrini Centre v Department of Social Development supra* par 5.

25 [2004] 1 All SA 21 (SCA).

these include socio-economic rights and benefits,[26] except for the right to land.[27]

It has been noted that law is rooted in the history of society and is a product of social influences. South Africa is a country that historically experienced racism, discrimination and oppression and xenophobic sentiments pervade South African society. Consequently, these ill sentiments influence the parameters within which refugees and asylum seekers seek protection. Against this background, the State displays conflicted and ambivalent attitudes towards the protection of asylum seekers. These conflicted attitudes manifest themselves in uncertainties on the part of the State on the question of whether asylum seekers should be included in the post-1994 reconstruction and development programmes that seek to mobilise national resources towards the eradication of the ravages of apartheid. The State is seen adopting (and is applauded for adopting) laws promoting the socio-economic inclusion of asylum seekers in the social welfare system (such as the Refugees Amendment Act 33 of 2008) but, at the same time, it shows no political will to implement those laws. The State is evidently willing to go to court to present reasons for non-implementation; to substantiate this arbitrary social exclusion; and, in return, to adopt anti-refugee policies that allow it to avoid obligations created by its own laws. These emerging legal conflicts and divergences are shaped by the behaviour, spirit and morals of South African society, which favours distributing or mobilising national resources for the benefit of citizens who struggled against the apartheid system.

Socially and economically, law is used as a social institution that constitutionally transforms South African society from an unequal to an egalitarian society. This ethos shapes the South African legal system in such a way that it focuses on or prioritises the improvement of the lives of the historically disadvantaged. This is evident in the case of *Watchenuka*, where the State justified the exclusion of asylum seekers from employment on the main ground that it deprived citizens of employment opportunities.[28] To ensure the protection of such opportunities, asylum seekers should therefore be prevented from developing their potential through education and training.[29] Exclusion from the right to undertake education and training is further politically justified on the premise that a large number of asylum seekers are bogus in that they do not deserve to enjoy constitutional rights that are accorded to *genuine* asylum seekers. Bogus asylum seekers are defined by the 2017 White Paper on International Migration for South Africa as an influx of economic migrants who abuse the asylum management system to regularise their stay and to get access to state resources and livelihoods.[30] However, the Supreme Court of Appeal rejected a general exclusion from the livelihood sphere on the ground that such exclusion will inevitably adversely affect genuine asylum seekers "who have no

[26] Ss 26, 27, 28(1)(*c*) and 29 of the Constitution.

[27] S 25(5) of the Constitution.

[28] *Minister of Home Affairs v Watchenuka supra* par 33.

[29] *Ibid*.

[30] Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 59.

reasonable means of support other than through employment".[31] A general prohibition against employment in such circumstances will amount to "a material invasion of human dignity that is not justifiable in terms of [section] 36 of the Constitution".[32]

The *Watchenuka* decision did not deter the State from its continued exclusion of asylum seekers (along with refugees) from accessing state resources and securing rights to lead a dignified life. This is given credence by the 2015 case of *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism,*[33] in which asylum seekers and refugees successfully challenged their exclusion from engaging in business and trading. The State sought to protect national interests on the ground that the right to self-employment in the form of running businesses was reserved for citizens. The State justified this argument based on section 22 of the Constitution and concluded that only citizens "have the right to engage in self-employment, and that there is thus a blanket prohibition against foreign nationals who are asylum seekers and refugees engaging in self-employment – which in this case would amount to a prohibition on trading."[34] Again, the court rejected this argument on the moral ground that the State was myopic concerning the real problems experienced by asylum seekers and refugees and that the prohibition of refugees and asylum seekers from trading has the effect of diminishing their status.[35] The court opined that section 22 of the Constitution does not prevent refugees from working.[36] Neither does it place a blanket prohibition on asylum seekers from working.[37]

Considering its earlier legal opinion in the decision of *Watchenuka*, the Supreme Court of Appeal in *Somali Association of South Africa*, therefore, concluded:

> "if, because of circumstances, a refugee or asylum-seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid."[38]

The court is seen to underline that asylum seekers should not be restricted from employment or self-employment in the form of trading if this is the only option available to leading a dignified life. Notwithstanding these judicial decisions, it should be noted that societal ill sentiments towards foreign

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31 *Minister of Home Affairs v Watchenuka supra* par 33.

32 *Ibid*.

33 2015 (1) SA 151 (SCA).

34 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 31.

35 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 33.

36 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 38.

37 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 40 43.

38 *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 43.

nationals always influence the actions of the State, which disregards both refugee-law principles and judicial reviews.

When the State sought to develop and bring refugee protection in line with these two decisions of the Supreme Court of Appeal through the 2017 amendments, the law evolved into a more restrictive form. Without deep analysis, one might think that the State moved away from the general prohibition of employment, self-employment and education for asylum seekers. However, the 2017 amendments allow asylum seekers to undertake these opportunities in very restricted circumstances, meaning that such opportunities can be enjoyed by asylum seekers only if such enjoyment is endorsed by the Standing Committee for Refugees Affairs.[39] For example, it comes as no surprise that the State emphasised that the right to work can only be endorsed by the Standing Committee on the condition that an asylum seeker must *not* be staying in an asylum processing centre (expected to be funded by humanitarian organisations).[40] The disappearance of the right to work and study is therefore more evident in the new approach to confine asylum seekers to asylum processing centres to be established close to the northern border posts.

What is implied in the endorsement condition is a reluctance to allow self-sufficient asylum seekers to undertake education and training. It appears that exemption from staying in an asylum processing centre will be afforded asylum seekers who can support themselves or who can be supported by their relatives.[41] This suggests that indigent asylum seekers, who will be accommodated in the asylum processing centres, are not entitled to the right to study or work. The gist of the 2017 amendments is to ensure that indigent asylum seekers are no longer integrated into communities. In other words, the 2017 amendments are aligned with the twin immigration principles of exclusion and self-sufficiency; the confinement of asylum seekers to asylum processing centres seeks to avoid competition between them and citizens. The removal of asylum seekers from the community and its economy is further underlined in the 2017 White Paper on International Migration for South Africa[42] and is applauded by the 2019 White Paper on Home Affairs, which stresses that such an approach will remove the need to allow asylum seekers to work.[43] Economic opportunities and national resources can clearly be safer if it is made difficult for asylum seekers to integrate themselves into South African society. In this regard, the 2017 amendments are indicative of the social and legal conditions in which the refugee protection system has evolved and developed.

Social and legal conditions surrounding the development of the refugee regime can be summarised as follows: first, asylum seekers are admitted

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39 The SCRA must endorse the right to work or study and further "determine the period and conditions in terms of which such asylum-seeker may work or study whilst awaiting the outcome of their application for asylum". See s 9C(1)(*b*) of the Refugees Act, as amended by the Refugees Amendment Act 11 of 2017.

40 S 22(7) of the Refugees Act as amended by s 18 of the Refugees Amendment Act of 2017.

41 See s 22(6) of the Refugees Act as amended by s 18 of the Refugees Amendment Act of 2017.

42 Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 61.

43 Dept of Home Affairs "White Paper on Home Affairs" (June 2019) 19–20.

into the country to process their asylum application and, secondly, they may be refused asylum if their applications are found to be fraudulent, abusive, or unfounded[44] or if they are disqualified from refugee status in terms of section 4 or 5 of the Refugees Act. Considering these grounds, the 2017 White Paper noted with concern that 90 per cent of claims of asylum made between 2012 and 2017 were merely abusive and did not deserve refugee protection.[45] In 2012, the ANC Document on Security and Stability also emphasised that 95 per cent of asylum claims were lodged by economic migrants. Both these documents classified these individuals who lodge abusive claims as *high-risk profiles* who must be deported to reduce the risk of threats to national security and stability. These abusive claims are detected using the risk-based approach. Based on the risk-based approach, rejection of applications is connected with or can be linked to national concerns that asylum seekers will first place a significant strain on the social welfare system and service delivery and, secondly, may engage in illicit activities for survival.[46] The inability to control the influx of economic migrants has been used by the government as a scapegoat for its failure to meet promises made to citizens to deliver core services for a better life. Municipal governments argue that they are faced with an inability to provide services and jobs for a burgeoning population.[47] In line with this concern, the refugee law evolves and develops in such a way that asylum seekers should not disturb the State's efforts to advance its citizens, in particular, the previously disadvantaged groups. From a socio-legal theory perspective, the protection of asylum seekers is not a burden South African society is willing to take on. National security is therefore an emerging socio-legal trend that is used by the South African government to close its borders to prevent asylum seekers from gaining access to the country and to arrest and deport them if they do gain access.[48] National security issues are further relied on to limit their access to the labour market and socio-economic programmes, even if they are granted refugee status.[49]

2 1 3 Refugees

In South Africa, the term "refugee" is used to refer to those asylum seekers who have formally been recognised as genuine refugees and thus granted refugee status. Unlike asylum seekers, refugees are fully protected by the Refugees Act, which accords to them full legal protection of the rights in the Bill of Rights that the Constitution vests in everyone.[50] This entails that refugees should be beneficiaries of subsidised economic programmes for the protection of their dignity and restoration of normalcy to their lives. This is in line with international refugee law, which provides that refugees, if admitted to a country, must have their situations improved and dignity

44 S 22(6) of the Refugees Act, as amended by the Refugees Amendment Act of 2017.
45 Dept of Home Affairs "White Paper on Home Affairs" (2019) 45.
46 James 2017 *Temida* 168.
47 PMG https://pmg.org.za/committee-meeting/29125/.
48 Moyo, Ronald and Zanker "Who Is Watching? Refugee Protection During a Pandemic: Responses from Uganda and South Africa" 2021 9 *Comparative Migration Studies* 1 5–7.
49 Moyo *et al* 2021 *Comparative Migration Studies* 14–17.
50 S 27(*b*) of the Refugees Act.

restored.[51] They must not simply be given humanitarian assistance such as food parcels; rather they must be enabled to be self-sufficient to become the master of their lives.[52] To become self-sufficient, their refugee rights must be harmonised with socio-economic, labour, and trade legislation.

Owing to the aforementioned reasons surrounding and shaping the evolution of the South African legal system, the Refugees Act is not harmonised with the legislation that gives effect to constitutional rights, such as the Housing Act,[53] the Healthcare Act,[54] and the National Student Financial Aid Scheme Act.[55] Of further concern is that the Refugees Act is not harmonised with the municipal laws (that is, by-laws) that are aimed at promoting socio-economic development at a local level or ensuring that socio-economic services are accessed by people at grassroots. The failure to harmonise the Refugees Act with socio-economic laws at national, provincial and local levels is rooted in and tied to laws that are adopted for various purposes to address inherited social inequality and economic disparities that had (and still have) a greater impact on the lives of historically disadvantaged communities. In this regard, legislation has been enacted to ensure that the national wealth of South Africa be restored to deserving citizens. Worth mentioning are the Broad-Based Black Economic Empowerment Act,[56] the Public Service Act[57] the Employment Equity Act,[58] the Competition Act,[59] and the Preferential Procurement Policy Framework Act.[60] Such laws and policies are adopted as remedial measures that give effect to the realisation of the visions of the post-1994 reconstruction and development agenda.

Whereas immigration law principles restrict the employment of foreign nationals in positions that can be filled by South Africans, refugees are hardly employed in these positions, when the question of addressing the past discrimination in the labour industry is raised. Low-skilled and semi-skilled refugees therefore struggle to find employment. Neither are they assisted in starting their own small business. The Department of Small Business Development does not consider them in its programmes. On top of this, financial institutions are reluctant to offer financial loans to refugees on the ground that they are temporary residents who can return home anytime. They are further excluded from student financial aid at higher learning institutions, as such aid was designed to redress unequal representivity of South Africans in education and training.[61] Based on the idea that they are economic migrants, refugees were excluded from the COVID-19 economic

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51 Art 2(b)–(c) of the Statute of the Office of the United Nations High Commissioner for Refugees of 1950.

52 Dryden-Peterson "Education of Refugees in Uganda: Relationship between Setting and Access" 2003 *Refugee Law Project, Working Paper No. 9* 14.

53 107 of 1997.

54 61 of 2008.

55 56 of 1999.

56 53 of 2003.

57 103 of 1994.

58 55 of 1998.

59 89 of 1998.

60 5 of 2000.

61 Preamble and s 4(*a*) of the National Students Financial Aid Scheme Act 56 of 1999.

relief packages. These include the debt relief finance scheme, the business growth/resilience facility, the tourism relief fund for small, medium and micro enterprises, the relief funding for distressed businesses, the employer relief fund or the national empowerment fund support.[62] Access to these funds relied either on compliance with black economic empowerment conditions[63] or on condition that a business or company was owned 100 per cent by citizens whose employees were 70 per cent citizens.[64] The development of these conditions for qualifications of COVID-19 relief packages were shaped and guided by emerging South Africa's post-1994 socio-legal theory that seeks to avoid any competition with non-citizens, on the one hand, and with previously advantaged citizens, on the other.

Politically, refugees are not viewed as members of the South African political community. They are consequently excluded from political platforms through which participatory democracy in the decision-making process takes place. As a result, policies that override the interests of refugees are taken. Rawls describes this exclusion in the context that participatory democracy in a constitutional transformation is always arranged in a manner that satisfies and advances the needs of citizens or is aligned to the will and desires of citizens.[65] As noted, the will of citizens is fundamentally shaped and guided by their history. In South Africa, socio-economic laws are engineered so as to address the socio-economic hardships experienced by historically disadvantaged people to the exclusion of previously advantaged people and vulnerable non-citizens. It is within this context that the interests of refugees and asylum seekers, whose voices are missing in political domains, are flouted. The State's desire to preserve national resources for citizens has gradually caused, shaped, and developed feelings of self-centredness, hatred and anger towards asylum seekers; this has eroded human nature and its capacity to share the painful feelings and distressful situation of refugees.

2 2 Permanent residents

Refugees, who are temporary residents, can apply to become permanent residents to enjoy more rights. However, this article intends to highlight the difficulties in distinguishing between the legal positions of a refugee and a permanent resident (which negatively impact on refugee protection) or in distinguishing between those rights they enjoy as foreign nationals with temporary resident status and those rights they enjoy as foreign nationals with permanent resident status. These difficulties arise from the provisions of section 27(*b*) of the Refugees Act and section 25(1) of the Immigration Act, respectively. Section 27(*b*) of the Refugees Act provides:

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62 Kavuro "South Africa Excludes Refugees and Asylum Seekers from Covid-19 Aid" (2020-05-29) *Mail & Guardian* https://mg.co.za/coronavirus-essentials/2020-05-29-south-africa-refugees-coronavrus-exclude-law/ (accessed on 18 June 2020).

63 Criteria to access relief for SMMEs within tourism sector.

64 Criteria to access the Debt Relief for Distressed Business, Business Growth/Resilience Facility and Spaza Support Scheme. Citizenship was a condition to have access to food aid parcels.

65 Rawls *A Theory of Justice* (1999) 195.

> "[a] refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution … except those rights that only apply to citizens."

On the other hand, section 25(1) of the Immigration Act provides that a permanent resident is granted the right to enjoy

> "all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which law or the Constitution explicitly ascribes to citizenship."

It appears challenging to make a clear distinction between those immigration rights conferred on permanent residents under the Immigration Act and those refugee rights conferred on refugees under the Refugees Act.

The differences between these two provisions start with the vesting of certain rights, privileges, duties and obligations of a citizen in foreign nationals with permanent resident status. The provisions of the Refugees Act vest the same duties and obligations in refugees, but not the privileges. It is then difficult to define the meaning, scope and ambit of "privileges". Such difficulties create confusion in judicial review of the question as to what extent the rights in the Bill of Rights and other legislated rights apply to permanent residents as opposed to refugees, or the question of what privileges permanent residents have in the entitlement and enjoyment of constitutional and legislated rights. Defining the scope and ambit of basic rights in the context of the immigration law framework and the context of the refugee law framework becomes extremely problematic and is of concern.

Difficulties arising from defining the scope and ambit of constitutional and statutory rights and privileges of permanent residents as opposed to refugees were not, in clear terms, addressed by the Constitutional Court in the 2007 case of *Union of Refugee Women v Director, Private Security Industry Regulatory Authority.*[66] The Constitutional Court simply disagreed with the contention that refugees should be treated similarly to permanent residents but gave no clear guideline on what constitutional rights should be enjoyed by refugees as opposed to permanent residents.[67] Because refugees are temporary residents, they should, in the view of the Constitutional Court, not enjoy the same socio-economic rights, privileges and benefits as permanent residents.[68] The salient question left unanswered is what the rights, privileges and benefits are that refugees are not entitled to. This question appears to reveal that in disputes on what refugees are entitled to, disputants have to approach a court for constitutional solutions.

The absence of clarity as to which socio-economic rights accrue to permanent residents to the exclusion of refugees has a deleterious impact on determining which socio-economic schemes will be extended to apply to refugees in actual situations. Refugees are denied access to certain rights on the ground that they are not permanent residents. However, in law and policy, there is no clear justification for why certain socio-economic rights, benefits and opportunities should be limited to permanent residents.

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66 2007 (4) BCLR 339 (CC).

67 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority supra* par 64–65.

68 *Ibid*.

Nonetheless, they enjoy limited rights concerning employment, business and trade, and related social security. When it is emphasised that refugees are temporary residents in the country, they are excluded from a large number of opportunities that could have contributed to their improvement and development at individual and community levels. As temporary residents, they do not enjoy the same access as permanent residents to socio-economic schemes designed to uplift the poor from poverty, or to economically empower historically vulnerable citizens,[69] or to address the national economic distress caused by the national lockdown and efforts to curb transmission of COVID-19.[70] Such exclusion is strengthened by the political belief that inclusion of refugees in the said schemes would act as a bar to the realisation of the spirit, object and purport of the post-1994 reconstruction and development agenda.[71] This belief of the most powerful group within South African society disregards the rights of refugees.

The spirit to exclude refugees from national benefits and privileges accorded to permanent residents can further be tied to Tamanaha's view that the law is not static, but changes to reflect the views and interests of the most powerful groups within society.[72] In this way, the law governing foreign nationals, in general, and refugees and asylum seekers in particular, changes from time to time to reflect the wishes and will of citizens, resulting in the institutionalisation of social exclusion and denial of social justice for refugees. Refugees are continuously stigmatised as undesirable people. This perceived undesirability can be better understood when viewing the attempts made by the State to deny refugees the possibility of becoming permanent residents.

Prior to the revision of the refugee law in 2017, refugees could apply for permanent residence status after five years of continuous residence in South Africa from the date on which they were granted asylum.[73] This period was however extended to 10 years by the 2017 Refugees Amendment Act. The extension of the period is intended to exclude refugees from access to those socio-economic benefits, privileges, and opportunities available to foreign nationals with permanent resident status. The government's intention to exclude refugees from permanent resident positions can further be inferred from the condition that such status can only be granted to a refugee after, and if, the South African government is satisfied that there is no peace, security and stability in the country of origin of that refugee.[74] Refugee applicants for permanent residency, whose home countries are relatively peaceful, will not qualify for permanent residency. This disqualifying ground for individuals seeking permanent residency is justified on the premise that refugees are inherently expected to return to their home countries once conditions exist to allow them to return safely.[75] In this regard, refugee

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69 Kavuro 2015 *Law, Democracy and Development* 249–255.

70 Kavuro https://mg.co.za/coronavirus-essentials/2020-05-29-south-africa-refugees-coronavrus-exclude-law/.

71 Kavuro 2013 *Global Education Magazine* 22 24.

72 Bix "A New Historical Jurisprudence" 2018 95 *Wash UL Rev* 1035 1039.

73 S 27(*c*) of the Refugees Act.

74 S 27(*c*) of the Refugees Act, as amended by the Refugees Amendment Act of 2017.

75 Dept of Home Affairs "White Paper on International Migration for South Africa" (July 2017) 42.

conditions are understood by South African society to be temporary and not permanent. This approach has a negative impact by excluding refugees from permanent residency on the ground that their countries of origin are politically stable. The stability and security approach does not apply to other foreign nationals who apply and qualify for permanent residency in terms of sections 26 and 27 of the Immigration Act.[76] Other foreign nationals are not subjected to a qualification period of 10 years. The period of 5 years applied to them. Refugees are, therefore, deliberately discriminated against, thus defeating the principle of favourable treatment.

3 CONCEPTUALISING ASYLUM PROTECTION

3 1 Meaning of the concept of asylum

To arrest the disappearance of the rights of refugees and asylum seekers, there is a need to understand that a segment of foreign nationals in South Africa have come to the country seeking asylum and that offering them such asylum comes with the responsibilities to take care of their socio-economic needs. Such responsibilities include an emergency response to their human suffering and assisting them to become self-reliant. To see mere economic reasons for staying in South Africa in a negative light impacts the principle of refugee protection and thus shapes the disappearance of essential socio-economic rights. The negative impact of such an approach potentially and gradually shrinks the protection of refugees so that it becomes meaningless. For this reason, it is important to conceptualise the term "asylum". To begin with, the term is contained in article 14 of the Universal Declaration of Human Rights, adopted in 1948, which stipulates that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution". It is further entrenched in article 12(3) of the African Charter on Human and Peoples' Rights, adopted in 1981. Article 12(3) of the African Charter stipulates:

> "[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions".

These provisions are adopted by the Refugees Act and are particularly underlined in section 1A of the Act, as amended by the Refugees Amendment Act 33 of 2008. Section 1A of the Act stipulates that international refugee protection in South Africa must be understood, interpreted and applied with due regard to international refugee law and international human rights law. It is within this context that asylum offered by the South African government should be understood by lawmakers and service providers and, ultimately, that refugees or asylum seekers should be

[76] These two provisions provide for various types of permanent resident permit that may be granted to foreign nationals. They are s 26(*a*) holder of a general work visa; s 26(*b*) spouse of South African citizen or PRP holder; s 26(*c*) child of South African citizen or PRP holder under 21 years; s 26(*d*) child of South African citizen; s 27(*a*) holder of a quota work visa; s 27(*b*) holder of critical skills visa; s 27(*c*) holder of a business visa; s 27(*d*) refugee; s 27(*e*) retired person; s 27(*f*) financially independent person; and s 27(*g*) relative of South African citizen or PRP holder within the first step of kinship.

entitled to enjoy asylum. Against this backdrop, this article critically analyses the treatment accorded to refugees and asylum seekers.

Bachrach defines asylum as "an inviolable refuge ... a sanctuary, or … a place where one is safe and secure".[77] Central to asylum is the idea of a safe haven, coupled with the safety and security of the person. Accordingly, individuals seeking asylum will be expecting the safety, security and social protection given by or flowing from a sanctuary or refuge. In the context of a safe haven, the term "asylum" is defined to refer to "something that may be provided within an asylum, a place where protection is offered".[78] In this regard, offering asylum comes with obligations to treat those seeking asylum (that is, asylum seekers) or granted asylum (that is, refugees) according to internationally accepted human rights standards – whether or not entrenched in the Constitution.[79] Human security is, therefore, key to asylum. In the refugee domain, human security is not only constituted by freedom from fear of political persecution, but also freedom from fear of destitution (or economic distress), victimisation, or other socio-economic vulnerabilities.[80] Refugee law should be expected to evolve and develop in the context of ensuring human security against physical insecurity, traumatic stress disorders, deprivation and destitution.

There is a radical need to develop a law governing refugees and asylum seekers at national level anchored in and informed by foundations of asylum, which can better be described with reference to the baseline principles of international refugee protection as emerged, evolved and developed under international refugee law. These principles are as follows:

(i) *Humanitarian*. Welcoming individuals escaping persecution and seeking asylum as well as responding to their problems is a social and humanitarian act, and therefore should not become a cause of tension between states.[81]

(ii) *Social justice*. A host state should refrain from taking re-distributive or remedial measures that may compel refugees or asylum seekers to return to a place where they will face persecution (*non-refoulement*). Causes that may compel refugees and asylum seekers to return to their persecutors include their exclusion from life-saving programmes or economic activities.[82]

(iii) *Socio-economic*. Humanitarian and socio-economic rights and benefits must be extended beyond citizens to include refugees and

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77 Bachrach "Asylum and Chronically Ill Psychiatric Patients" 1984 141 *Am J Psychiatry* 975 976.

78 *Ibid*.

79 In the case of *S v Makwanyane* 1995 (6) BCLR 665 par 35, the Constitutional Court held that public international law includes binding and non-binding law and that "[t]hey may both be used as tools of interpretation of the rights in the Bill of Rights".

80 This view was affirmed by the Supreme Court of Appeal in *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra* par 44 when it opined that deprivation of economic opportunities will induce refugees and asylum seekers to leave South African shores.

81 Feller "The Evolution of the International Refugee Protection Regime" 2001 5 *Journal of Law & Policy* 129 131–132.

82 Pursuant to the Convention Relating to the Status of Refugees, refugee rights must – in the most essential respects – be enjoyed on the basis of favourable treatment.

asylum seekers, based on the idea of equality in rights and dignity.[83] Unlike citizens who are equally entitled to all rights, benefits and privileges, refugees must be accorded full legal protection with respect to socio-economic rights and benefits they are entitled to. On the other hand, asylum seekers must be accorded favourable access with respect to life-saving or basic socio-economic rights and benefits. Unfair discrimination will give rise to the violation of the principle of favourable treatment.

(iv) *International cooperation*. Considering that socio-economic protection may place unduly heavy burdens on host countries, effective protection of refugees and asylum seekers can therefore be achieved through international cooperation and African solidarity.[84]

(v) *Non-punitive*. Inability to meet immigration law requirements cannot, in principle, be invoked to penalise individuals escaping from persecution, as they are not expected to leave their home countries and enter countries of asylum in a regular fashion.[85] Accordingly, asylum seekers cannot be classified as illegal foreigners or illegal (or irregular) immigrants or undesirable people based on contravention of rules and principles of the Immigration Act.

(vi) *Exceptional circumstances*. Exempting asylum seekers/refugees from immigration law requirements is however not absolute. Those seeking or granted asylum can be expelled by host countries "in exceptional circumstances directly impacting national security or public order".[86] National security cannot generally be used to exclude them from the social welfare system.

Rights flowing from these asylum principles demand special and differentiated treatment from those accorded to other foreign nationals generally. It is within this context that the Refugees Act was initially engineered. It was engineered to exempt refugees and asylum seekers from the emphasis, in immigration law, on self-reliance, and thus to afford them special and favourable inclusion in socio-economic and development programmes. Such exemption is based on recognition of their existing conditions of deprivation and human suffering. Special inclusion is, under the Refugees Act, grounded in a favourable or differentiated treatment in the sense of equal treatment with citizens concerning public goods and services for the protection, promotion and fulfilment of international refugee protection and for a better life for refugees and asylum seekers.[87] For that reason, equal treatment with citizens should be prioritised in legislation distributing social, economic and labour rights and benefits and in legislation promoting business and trade in informal and formal sectors. Such prioritisation, which could have a positive impact on refugee situations (such as their health and social conditions), was later deviated from. The dignity of refugees and asylum seekers can only be effectively protected if they are assisted to

83 Feller 2001 *Journal of Law & Policy* 131–132.

84 *Ibid*.

85 *Ibid*.

86 *Ibid*.

87 Refugees and asylum-seekers are accorded all rights in the Bill of Rights that apply to everyone.

become self-reliant through socio-economic laws. The evolution of refugee law protection has, however, taken a new turn in which the government appears to take measures, not aimed at improving the quality of life of refugees and asylum seekers, but rather ones that exacerbate their distressful situations through exclusion and victimisation.[88] Political willingness to implement the Refugees Act is severely lacking.

3 2 Denialism and non-compliance related issues

The implementation of refugee rights has, for over a decade, become highly problematic. The commitment to implement the refugee regime is gradually being abandoned, despite governmental commitment to offering refugees humane treatment as envisaged by the Refugees Act. Issues relating to non-compliance with principles of international refugee protection have been submitted to Parliament by civil society organisations. While briefing Parliament on issues affecting refugees, asylum seekers and vulnerable migrants, organisations presented a wide variety of examples illustrating the political unwillingness to observe refugee rights protection; some suggested concrete proposals for the amelioration of refugee protection, while others blamed politicians for the continual disappearance of such protection.[89] These organisations argued that refugees and asylum seekers are denied access to a number of the constitutional rights in the Bill of Rights to which the Refugees Act refers. They are denied access to the basic necessities of life despite the fact that (i) post-apartheid South Africa is built on a culture of inclusiveness, *ubuntu*, tolerance, and human rights norms (such as equality, human dignity and freedom) and (ii) the said culture informs the Refugees Act.[90] Favourable access to national resources is denied even though in post-apartheid transformative constitutionalism, South Africa is known as a rainbow nation (owing to its diverse communities) committed to the promotion of equal and humane treatment of all inhabitants of South Africa and to establishing social justice for all who live within South African boundaries.[91]

Denial of rights for asylum seekers and refugees is implied in various legal aspects. Worth mentioning is the closure of the Refugee Reception Offices in 2011 and 2012 by the government. The closure was aimed at barring asylum seekers from lodging new applications for asylum and at allowing only asylum seekers and refugees who had previously applied at these offices to renew their permits there. Three offices – Cape Town, Port Elizabeth, and Johannesburg – were closed for new applications or renewal

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88 James 2017 *Temida* 169; Khan & Lee "Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers" 2018 4 *African Human Mobility Review* 1205 1209.

89 PMG https://pmg.org.za/committee-meeting/29180/.

90 *Ibid*.

91 The Preamble of the Constitution proclaims, "South Africa belongs to all who live in it, united in our diversity". In the new nation, established in 1994, "unity has replaced segregation, equality has replaced legislated racism, and democracy has replaced apartheid". See James 2017 *Temida* 167.

of permits issued by another office.[92] If an asylum seeker is in Cape Town and their permit was, for example, issued by the Durban office, they must travel to Durban, along with their family, to renew their permits. The closure of these offices has implications for the lives of asylum seekers, who in many cases must stay in limbo as many were compelled to stay in the country illegally or with expired documents.[93] The closure was conceived in tandem with denying asylum seekers' entry into the country; and if they managed to enter, denying them access to documentation.[94] During the national lockdown, all refugee reception offices remained closed and no service was offered to refugees or asylum seekers. When online services were introduced for the extension and renewal of permits on 15 April 2021, these offices remained closed for new asylum applications and renewal of already-expired permits prior to the declaration of the national lockdown in March 2020. The exclusion of refugees and asylum seekers from these crucial public services augmented their anxieties and, in particular, their feelings that they are not welcome in South Africa.

Documentation is key to the legal protection of refugees and asylum seekers simply because documentation is the only enabling legal mechanism that determines the legal status of the holder.[95] Without clarity in the legal status of refugees and asylum seekers, their access to essential public and private services becomes impossible. Without a legal and valid document identifying them, refugees and asylum seekers become invisible in the host communities. Their stay becomes illegal and, based on the unlawfulness of the stay, they can be arrested. In fact, owing to their ambiguous legal status, they become victims of arrests, detention, and deportation.[96] This is done in contravention of the principle of *non-refoulement*. Denial of documentation means the denial of access to critical basic socio-economic services such as healthcare, schools/education, employment, drivers' licences, trade/business, social assistance, social security, accommodation, and banking.[97] Without access to these core aspects of human security and economic development, they do not find the asylum they were looking for in the first place; instead, they find themselves in a prison without walls.

In addition to making access to documentation difficult, there is evidence to suggest that the government is introducing changes in immigration and refugee law with intent to limit access to welfare programmes. Civil society organisations described these changes as "anti-immigrant and anti-refugee

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92 Zikhali and Keller "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers: 3 Case Studies" Sonke Gender Justice: Case Studies (June 2019) 2.

93 *Ibid*.

94 PMG https://pmg.org.za/committee-meeting/29180/ and James 2017 *Temida* 174–175.

95 In *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) par 28, Van Reenen J appropriately defined the significance and importance of documenting asylum-seekers as follows: "[…] until an asylum seeker obtains an asylum-seeker permit in terms of […] the Refugees Act, he or she remains an illegal foreigner and, as such [this] impact[s] upon […] his or her human dignity and the freedom and security of his or her person."

96 James 2017 *Temida* 176.

97 PMG https://pmg.org.za/committee-meeting/29180/.

policies".[98] Difficulties arising from the denial of access to welfare is further linked to the gradual development of refusal to engage with civil society organisations that advocate for refugee and migrants rights, the State's intentional ignorance of and disrespect for the rule of law and the State's loss of interest in debating migration and its characteristics.[99] The totality of denials has motivated refugees and asylum seekers to rely on illegal mechanisms to survive. These illegal mechanisms obviously amount to crimes. Even though refugees and asylum seekers are compelled to find alternative means to survive, they rarely engage in crimes in the ordinary sense of the word.[100] Rather, in their vulnerability, they submit themselves to labour exploitation. Labour exploitation of refugees and asylum seekers is one of the contributory factors encouraging hatred, racism and xenophobic violence.[101] It is trite to state that acceptance of cheap labour frustrates citizens' fight to be treated with dignity, respect and fairness in the workplace and for improved working conditions, and decent wages.

Nonetheless, relying on the right to protest under section 17 of the Bill of Rights, refugees and asylum seekers carried out protests in Pretoria and Cape Town at the offices of the UNHCR in which they denounced their continual victimisation and persecution. They protested to request the UNHCR to resettle them in third countries where they would not face the same denial of, exclusion from, or unfair discrimination in the human rights-based humanitarian, social, and economic protection to which they should be entitled.[102] To this request, the UNHCR responded that it could not offer group resettlement and relocation, as resettlement in another country was a remote possibility. Alternatively, the UNHCR encouraged voluntary repatriation and local re-integration.[103]

Local re-integration was prioritised even though, in their engagements with government, refugees and asylum seekers emphasised the point that they are denied effective refugee protection in the sense that they are denied legal documents such as identity documents, travel documents (or passports), and birth certificates for children born in South Africa.[104] Yet, children born, bred and grown in South Africa hardly access permanent resident permits and are thus denied the opportunity to be naturalised as citizens.

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98 *Ibid*.

99 *Ibid*.

100 Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* (2013) 17 reaffirms that "[t]here is also little evidence to suggest that a disproportionate number of asylum seekers are convicted of crimes".

101 Xenophobic violence is encouraged by assumptions that refugees and asylum seekers are placing a significant strain on service delivery and employment, see Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* 46.

102 Staff Reporter "UN Refugee Agency Wants Asylum Seekers to Respect SA Laws" (30 October 2019) https://www.iol.co.za/news/south-africa/western-cape/un-refugee-agency-wants-asylum-seekers-to-respect-sa-laws-36325607 (accessed 2021-09-18).

103 PMG "Refugee Situation in Cape Town: Stakeholder Engagement; With the Minister" (10 March 2020) https://pmg.org.za/committee-meeting/29992/ (accessed 15 May 2020).

104 Whereas refugees face challenges in extending or renewing their documents or applying for Refugee Identity Documents (IDs) and travel documents, both refugee and asylum-seeker children born in South Africa are denied birth certificates. See PMG https://pmg.org.za/committee-meeting/29180/.

The government has indeed been reluctant to implement section 4(3) of the Citizenship Amendment Act.[105] Section 4(3) states that children born in South Africa of parents who are foreign nationals (either with or without permanent resident status) qualify to apply for citizenship upon becoming majors, provided that (i) they have lived in the country from the date of their birth to the date of becoming majors, and (ii) they have been registered in accordance with the provisions of the Births and Deaths Registration Act.[106] The reluctance to naturalise foreign children has led to litigation, which was heard by the High Court and confirmed by the Supreme Court of Appeal in the 2018 case of *Minister of Home Affairs v Ali*.[107] The court turned down government arguments and thus ordered it to accept applications for naturalisation as citizens by foreign children who were born and grew up in South Africa.[108] However, it appears that the State is not willing to implement this decision as it has been making arguments that there are no regulations facilitating the implementation of the Citizenship Amendment Act.[109] These arguments date back to 2010 when the Citizenship Amendment Act was promulgated. However, draft regulations on Citizenship were, finally published for public comment on 24 July 2020.[110]

Issues motivating the protests by refugees and asylum seekers can be grouped in four categories: (i) closure of the refugee reception offices; (ii) denial of documents or their extension; (iii) xenophobic violence; and (iv) restriction of access to welfare, trading and employment systems. On xenophobic violence, protesting refugees and asylum seekers maintain that no efforts have been made on the side of the State to eradicate xenophobic violence. Xenophobic violence is rampant in the country and has a severe impact on their livelihoods. During xenophobic violence, businesses established by refugees and asylum seekers are looted. In the process, lives are lost, and some are left injured or maimed. However, little or nothing is done to compensate refugees and asylum seekers who are injured or have lost their businesses or loved ones. There are misconceptions among refugees and asylum seekers that the absence of criminal accountability is motivated by politicians' xenophobia. They believe that political statements are sources of xenophobic violence, which is incited to drive refugees and asylum seekers out of South Africa.[111] Violence against foreign nationals is believed to be politically motivated since refugees and asylum seekers cannot be expelled through legal procedures as they are protected by the

105 17 of 2010.

106 51 of 1991.

107 2019 (2) SA 396 (SCA).

108 The SCA rejected the Minister of Home Affairs' argument that s 4(3) of the Citizenship Amendment Act of 2010 must be interpreted to mean that it only applied to foreign children born in South Africa after the adoption of the amendment on 1 January 2013 (par 11, 16–17, 25–26).

109 After this contention was rejected by the SCA, the DHA appealed to the Constitutional Court, which dismissed the appeal. Commenting on this dismissal, the Minister of Home Affairs stressed that there was a need for regulations for the amendment Act to be implemented. These comments were made on 3 March 2020 while briefing the Portfolio Committee on Home Affairs on budget for the 2020/21 financial year.

110 Draft regulations on the Citizenship Act, 1995 for Comment, GN R815 in *GG* 43551 of 2020-07-24.

111 PMG https://pmg.org.za/committee-meeting/29180/.

non-refoulement principle. The socio-economic vulnerabilities of refugees and asylum seekers are politically viewed as an impediment to socio-economic transformation as they place an unduly heavy burden on the state purse. Accordingly, they are a threat to national security and public order. The issue of protecting national security and preserving national resources and opportunities for historically indigent citizens are invoked to victimise refugees and asylum seekers – particularly, denying them entry into the country or access to national resources.[112] The development of refugee law, as a result, evolves in social soil replete with hatred, racism and xenophobia against vulnerable foreign nationals, which is reflected in the State's attempts to eliminate any competition between citizens and undesirable people.

3 3 Impact of the twin principles of exclusivity and self-sufficiency

The negative impact on refugee protection of the twin principles of exclusivity and self-sufficiency cannot be ignored. It is important to note that self-sufficiency is the ground norm on which immigration law is constituted. The norm prohibits the entry of those foreign nationals who will negatively affect the economy and allows the admission of those foreign nationals who will contribute to economic growth. On the other hand, the exclusion norm denotes that, since foreign nationals are admitted on the condition that they are self-reliant, they should be excluded from any state support or access to social welfare. Exemption from these norms is largely based on the principle of international refugee protection, which requires sovereign nations to exempt asylum seekers from the immigration law requirements to be self-reliant and economically independent as conditions to be admitted and stay in the country of asylum.[113] The principle, therefore, imposes an obligation on the countries of asylum to include asylum seekers (if admitted) in socio-economic, business and employment programmes designed to respond or address their humanitarian, social and economic vulnerabilities.[114] In the South African context, asylum seekers must be precluded from application of the twin immigration law principles, which hold that foreign nationals must be admitted in the country on condition that they are self-sufficient and, therefore, that such foreign nationals cannot have access to subsidised socio-economic programmes until such time as they are granted permanent resident status.[115] It is crucial to note that an asylum seeker remains a temporary resident even upon being granted refugee status.

South African authorities have shown a tendency not to apply this exemption rule. The tendency is reflected in the denial of entry of asylum seekers into the country on the ground of poverty. It is further reflected in the

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[112] Crush, Skinner and Stulgaitis "Rendering South Africa Undesirable: A Critique of the Refugee and Informal Sector" (2017) *SAMP Migration Policy Series* No. 79. South African Migration Programme.

[113] Feller 2001 *Journal of Law & Policy* 131–132.

[114] UNHCR *Convention Relating to the Status of Refugees* 189 UNTS 137 (1951) Adopted: 28/7/1951; EIF: 22/4/1954.

[115] S 25(1) of the Immigration Act.

move to adopt restrictive policies that ensure their exclusion from eligibility for state-funded programmes. Critical basic services that would alleviate them from human suffering, caused by forced and unexpected displacement, become unattainable. They are therefore left to their own fates in desperate attempts to integrate into their host communities and, at the same time, satisfy their basic needs.

Since the adoption of the refugee regime in 1998, South Africa has shown no intention whatsoever to distribute basic constitutional rights to refugees, and asylum seekers, in particular. This places into legal question the nature of refugee protection afforded to them if their basic socio-economic rights remain vague. Except for legal protection in the form of providing legal and valid documents allowing them to stay in the country lawfully, asylum seekers – before being recognised as genuine refugees – are accorded the same treatment as other foreign nationals coming to South Africa for various purposes such as visiting, economic, labour, studying and diplomatic reasons. Equal treatment with other foreign nationals creates a conceptual confusion as to whether such treatment should also apply to formally recognised refugees. In reality, there is an undeniable conceptual confusion related to the question of when the Refugees Act applies in refugee situations or what the Act really means for asylum seekers. This question was dealt with in the 2012 case of *Bula v Minister of Home Affairs*[116] in which the Supreme Court of Appeal, after careful consideration, responded that the Refugees Act kicks in once a foreign national expresses his intention or desire to apply for asylum.[117] The granting of an asylum seeker permit in terms of section 22 of the Refugees Act allows the holder to live and move freely in the country, subject to the conditions determined by the Standing Committee for Refugees Affairs and not in conflict with the Bill of Rights and international law.[118] The condition of expression of intention to apply for asylum is what the 2000 regulations to the Refugees Act actually sets out.[119]

As noted, the desire to exclude refugees and asylum seekers is inherently connected to the shortcoming found in the Refugees Act. The shortcoming is that the Act neither differentiates between economic migrants and asylum seekers nor restricts economic migrants from being admitted into the country as asylum seekers. Immigrants gain access to South Africa through the asylum management system. In terms of the Refugees Act, read in tandem with the Immigration Act, every foreigner who expresses a desire to apply for asylum in the country must be recognised and be treated as "an asylum seeker". Being aware of the legal difficulties in rejecting an individual who is

116 2012 (4) SA 560 (SCA).

117 The SCA stated that "where a foreign national indicates an intention to apply for asylum, the regulatory framework of the [Refugees Act] kicks in, ultimately to ensure that genuine asylum seekers are not turned away" (par 72).

118 *Kiliko v Minister of Home Affairs supra* par 5.

119 Reg 2 of the Refugee regulations (Forms and Procedure) 2000 GN R366 of 2000-04-06 states: "An application for asylum in terms of s 21 of the Act must be lodged by the applicant in person at a designated Refugee Reception Office without delay … [and] any person who entered the Republic and is encountered in violation of the [Immigration Act], who has not submitted an application pursuant to reg 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a [RRO] to complete an asylum application."

abusing the asylum management system for personal gain, economic migrants apply for asylum. What is problematic is that no one can object to the intention of foreign nationals to apply for asylum, even if it is clear – on the face of it – that an individual is an economic migrant. The Refugee Status Determination Officer (RSDO) is the only person mandated to determine the genuineness of the claim. If the RSDO rejects their application, they have, a right to appeal to the Standing Committee. If the Standing Committee affirms the decision of the RSDO, they have a right to appeal to the Refugee Appeal Authority of South Africa. The appeal remedies can then still go through the High Court, all the way to the Constitutional Court. While the matter is before these judicial institutions, "bogus" asylum seekers are untouchable for deportation.

Legal difficulties relating to expelling economic migrants who abuse the asylum management system encourage government to victimise and marginalise both genuine asylum seekers and refugees by offering them inadequate protection. In the 2015 case of *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism*,[120] the Supreme Court of Appeal noted these legal problems and opined that it is incumbent on government to facilitate and expedite asylum applications to ensure genuine asylum seekers are formally recognised as refugees.[121] The court further stated that the frustration experienced by government officials as they deal with a huge influx of fake asylum seekers "must not blind them to their constitutional and international obligations".[122] It is not the fault of genuine asylum seekers and refugees that the refugee system is accessible to every foreigner who wishes to use it for their own benefit.

4 IMPACT OF LEGAL STATUS ON PROTECTION

4 1 Contested legal status

It has been noted that there are different legal statuses and positions applicable to a refugee. In an analysis of the legal position of different categories of refugee, the disappearance of their rights becomes clearer. There are refugees classified as "undocumented asylum seekers", "documented asylum seekers", "recognised refugees" and "refugees with permanent residence status". There are also refugees naturalised as "citizens." This section's emphasis on the disappearance of refugee rights lies in the introduction of strict conditions that must be met to move from the status of undocumented asylum seeker to the status of documented asylum seeker. It is therefore not clear what rights are enjoyed by undocumented asylum seekers, who in terms of the provisions of immigration law are classified as "illegal foreigners."

In principle, after being physically present in the country and having expressed a desire to apply for asylum, undocumented asylum seekers are

120 *Supra*.
121 Par 44.
122 Par 44.

granted the legal status of "documented" asylum seekers, if they are issued with the asylum-seeker permit in terms of section 22 of the Refugees Act. Undocumented asylum seekers include those individuals who were previously documented but whom the State assumes have now abandoned the asylum route if or because they did not renew their permits after a period of one month from the date of expiry of their permit.[123] Civil society organisations have contended that the State itself has taken measures that compel documented asylum seekers to become undocumented or illegal. Furthermore, any deprivation of opportunity to pursue their asylum claim will amount to a violation of the principles of asylum.[124] Irrespective of the State's attempt to push asylum seekers outside the refugee protection parameters, the legal status of documented asylum seekers requires that if they have resided in the country for a period of six months, they should be exempted from the twin principles of self-sufficiency and socio-economic exclusion. The 2000 regulations to the Refugees Act envisioned that asylum applications would have been finalised within this period. The 2018 regulations to the Refugees Act repealed the period of six months. As a result, it is not clear how long an individual can sojourn in the country as a documented asylum seeker without state support. This approach adopted by South Africa is not in line with international refugee protection; it rather points in the direction of denying refugees access to national resources. In other countries, the legal status of asylum seekers allows individuals to have access to emergency humanitarian assistance, which is not clearly offered by the South African government. The legal status of asylum seekers and the rights attached thereto (or which flow from that status) appear to be highly contested and controversial.

Traditionally, asylum seekers are viewed as individuals who are in the greatest need of humanitarian assistance upon arrival in the country of asylum – whether documented or not. Responding to their humanitarian needs usually requires a strong state commitment to emergency preparedness and response.[125] The Emergency Handbook notes that asylum seekers are among individuals in need of international refugee protection as asylum seeking is "the first step towards being formally recognised as refugees".[126] In situations such as this, the handbook says the international refugee protection should

> "include a range of concrete activities that ensure that all [asylum seekers] have equal access to and enjoyment of their rights in accordance with international law. The ultimate goal of these activities is to help them in permanently rebuilding their lives within a reasonable amount of time."[127]

The absence of humanitarian assistance, coupled with the denial of documentation and restriction on seeking employment, has a great impact on the lives of asylum seekers. It worsens their living conditions and compels them to find other means of survival. The Supreme Court of Appeal in the *Watchenuka* case opined that because no state support is offered to

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123 S 22(11)–(12) of the Refugees Act.

124 Zikhali and Keller case studies for Sonke Gender Justice 2.

125 UNHCR *Handbook for Emergencies* 3ed (2007) viii.

126 UNHCR *Handbook* 17.

127 *Ibid.*

asylum seekers (whether documented or undocumented), they should not be prohibited from engaging in productive activities. The general prohibition severely restricts their ability to support themselves and their families and exposes them to living with humiliation and degradation. According to 2017 amendments and the 2018 regulations to the Refugees Act as well as the 2017 White Paper, the State has emphasised that asylum seekers must stay in asylum processing centres where they will be cared for by humanitarian organisations. The introduction of asylum processing centres is, therefore, a way of erecting a physical and legal barrier to accessing social welfare, employment and trade.[128] This approach cements the idea that asylum seekers are unwanted in South Africa as was the case during the apartheid era.

4 2 Reinforcement of exclusion through political exclusion

South Africa's history is characterised by a reluctance to admit foreign nationals who are asylum seekers into the country. During the apartheid era, asylum seekers lived in the country as illegal or economic migrants. They were not accorded the legal status of asylum seeker or refugee. In the post-1994 democratic and human rights era, the State appears to be shifting towards confining asylum seekers to asylum processing centres. Although refugees are integrated into society, Polzer argues that they are also placed in detention, albeit without walls.[129] It is contended that without engaging in the democratic process and without political and economic participation, refugees become more vulnerable as they lack a political voice in decision-making processes. This situation, in which refugees are deprived of their right to participate in political platforms, is seen as a deprivation of precious liberties to act freely.[130] Without political engagement, refugees cannot voice their grievances about victimisation, exclusion and marginalisation in their host communities. Silencing the voices of refugees on political platforms is what the 2018 regulations to the Refugees Act aim to achieve. These regulations were adopted to restrict refugees and asylum seekers from any political engagement. Political restrictions negatively impact refugees' ability to engage in democratic processes or participatory democracy.

In the post-2018 refugee regulation era, refugees and asylum seekers are mandated to seek permission from the Minister of Home Affairs in a situation where they would like to engage in political activities or campaigns related to their countries of origin or nationality.[131] This prohibition is in line with the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, which prohibits refugees/asylum seekers from engaging in activities that may lead to diplomatic discord or fermenting subversion from outside their home country.[132] What may amount to unfair

[128] James 2017 20 *Temida* 189.

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

[130] *Ibid*.

[131] Regulation 4(1)(*i*) of the Refugee Regulations, 2018, GN R1707 of 2019-12-27.

[132] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45 (1969) Preamble par 4–5, read in tandem with art 3.

discrimination is the deprivation of all political rights for the sole purpose of excluding them from South African democracy. In its founding provisions, the Constitution underscores that South Africa is a democratic state founded on the values, among others, of human dignity, equality, human rights and freedoms.[133] As a free and democratic nation, the State should promote the active participation of people in politics and civic life. In this regard, the State should create political space for direct participatory democracy in which all people of South Africa are given direct and active participation in the decision-making process concerning matters that may adversely affect them.[134] Democracy is not only implemented through universal adult suffrage or national elections of leaders and representation, but also through securing liberties and freedoms of individuals, which are typically protected by the Constitution.[135]

The exclusion of refugees from political activities of the host country will result in denying them the opportunity to engage in active participatory democracy. At this point, it is crucial to analyse the impact of regulation 4(2) of the 2018 regulations to the Refugees Act on international refugee protection. Regulation 4(2) prohibits any refugee or asylum seeker from participating in any political activity or campaign in furtherance of any political party or political interests in South Africa. Political activity, political campaign and political interest are core elements of active participatory democracy; these are worth analysing.

Whereas political activity or campaigning in furtherance of a political party can be associated with political rights as set forth under section 19 of the Constitution, it is not clear what political interest entails. Refugees and asylum seekers are constitutionally entitled to political rights to which everyone is entitled. The only political rights restricted to citizens are the rights to stand for political office and to vote in any national, provincial, or municipal election in which political parties have to campaign and compete. The general prohibition against engaging in an activity that furthers political interests acts as a barrier to enjoyment of other constitutionally based political rights such as freedom of association, freedom of expression and freedom of demonstration or protest. The exclusion of recognised refugees and asylum seekers from political platforms renders them invisible in the South African political community and is intended to silence their voices. Voices of refugees and asylum seekers are consequently always missing in political platforms where concerns of people are communicated to the government through debates and discussions; or where the government accounts or is held accountable; or where people participate in the decision-making processes concerning the improvement of their well-being.

The exclusion of all refugees from political platforms led the Women and Children at Concern (a refugee-based organisation), in its 30 April 2019 Memorandum, handed to the Portfolio Committee on Home Affairs, to demand that Parliament consider the involvement and engagement of refugees in all decision making and discussions affecting them. They argued

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133 S 1(*a*) of the Constitution.

134 Nwogu "Democracy: Its Meaning and Dissenting Opinions of the Political Class in Nigeria: A Philosophical Approach" 2015 6 *Journal of Education and Practice* 131 131–132.

135 *Ibid*.

that because they were the ones facing problems, civil society organisations should not speak on their behalf as they do not fully grasp the challenges that refugees, asylum seekers and other vulnerable migrants are facing in South Africa.[136]

Women and Children at Concern claimed the right to participatory democracy. It has become evident that the lack of political voice of refugees and asylum seekers in participatory democracy works to aggravate their existing vulnerable situation as no one is there to speak on their behalf and claim or defend their humanitarian, social and economic rights and interests when state measures affecting them are proposed.[137] In light of this, one cannot hesitate to conclude that the constitutional objective of advancing and fulfilling human rights and freedoms are usually claimed and discussed through participatory democracy in which the voices of refugees and asylum seekers are completely excluded. The exclusion of these vulnerable voices in political dialogue or activities gives credence to arguments that refugees do not belong and do not form part of South African society. Their blanket exclusion from political engagement sends a clear message that recognised refugees and asylum seekers are not entitled to the rights and freedoms extended to them in terms of the Refugees Act. It nullifies refugee rights and renders them valueless and meaningless as they cannot engage in debates on transformative constitutionalism relating to their rights. The denial of political rights places them in the same position as minors since their interests and well-being are decided upon by others. This is the legal position that this article throws into the fray for discussion; it is fundamentally shaped by the socio-legal theory on the relationship between refugee protection and a constitutionally based transformative order. It is on this basis that the different layers and dimensions of institutionalised exclusion continue to evolve, emerge and become amplified, tested and contested.

5 CONCLUDING REMARKS

As has been demonstrated, a range of measures to redress past injustices stands in the way of implementation of the Refugees Act. These measures prioritise historically disadvantaged communities and overlook the protection of rights and interests of refugees and asylum seekers. In socio-economic development spheres, substantive, remedial or restitutionary measures throw their weight behind the need to advance these historically disadvantaged communities to liberate them from poverty, social inequality and economic disparities caused by apartheid. Such an approach to socio-economic transformation threatens to worsen the existing vulnerable positions of refugees and asylum seekers, respectively, in South African society. This threat manifests itself in the South African government's xenophobic attitude embedded in its political unwillingness to stretch its arm of authority to distribute national resources for the protection of refugees and asylum seekers. It is therefore deviating from its initial desire and commitment to offer refugees protection in the way the initial refugee regime envisaged. Over the past decade, the South African government has shifted

[136] PMG https://pmg.org.za/committee-meeting/29180/.

[137] Kavuro 2018 *Obiter* 35.

its laws and policies to exclude refugees from social, economic, labour and employment, and business and trade programmes. There have been several amendments to immigration and refugee legislation and regulations that have not been intended to improve or enhance constitutionally based inclusive refugee protection; instead they have decreased or shrunk the existing protection space for refugees and asylum seekers.[138] In doing so, measures have been taken to deny asylum seekers entry into the country and grounds have been introduced to deny asylum seekers opportunities to be protected as genuine refugees or to disqualify genuine asylum seekers from refugee protection. Existing grounds for disqualification from refugee protection were therefore extended.[139] As demonstrated, restrictive measures were also adopted to exclude refugees from becoming co-beneficiaries of social welfare and protection. As noted, the refugee regime was initially constructed on the provision of equal treatment with citizens. The State has deviated from such treatment by refusing to harmonise the Refugees Act with laws and policies that give effect to socio-economic rights in the Bill of Rights. The shrinking of the protection space for refugees and asylum seekers is more evident in the government's deliberate tactic of delaying the issuing of valid documents within a reasonable time. The delay in the provision of documents is justified on the premise that the State has insufficient human resource capacity to adjudicate applications, resulting in a backlog in processing asylum applications and appeals.[140] Although this might be true, this situation is worsened by the fact that the South African government's ill sentiment towards migrants is expressed in the adoption of restrictive and exclusionary policies that create a mass population of hidden or undocumented refugees and asylum seekers, which compels them to remain in the country as irregular immigrants without protection. If they are undocumented or in possession of invalid or expired documents or their documents are withdrawn, both refugees and asylum seekers cannot access public or private services.[141] If they feel insecure and unprotected, they will be compelled to leave South African shores.

The shrinking of refugee protection is also implied in the silencing of their political voice and the disregarding or disrespecting of different court orders. This is inimical to the ratification of international refugee agreements or conventions. In ratifying them, South Africa accepted responsibilities to protect refugees' dignity and moral worth by affording them a humanitarian-

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138 Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* 20–27, 33–36; Khan & Lee 2018 *African Human Mobility Review* 1205–1225.

139 Kavuro "South Africa's Refugee Policy: New Grounds to Exclude Refugees from Refugee Protection" (1 April 2017) *Rights in Exile Newsletter* http://rightsinexile.tumblr.com/post/159067508272/south-africas-refugee-policy-newgrounds-to (accessed 2021-09-18).

140 Postman "Home Affairs Asks United Nations for Help with Refugee Backlog" (19 May 2019) *Daily Maverick* https://www.dailymaverick.co.za/article/2019-05-19-home-affairs-asks-united-nations-for-help-with-refugee-backlog/ (accessed 2021-09-18).

141 In certain instances, permits are arbitrarily withdrawn, and persons are arrested and treated as illegal foreigners to be deported in terms of the Immigration Act; see *Director-General: The Department of Home Affairs v Dekoba* 2014 (5) SA 206 (SCA). For exclusion from access to services, see Legal Resource Centre (LRC) "A Practical Guide for Refugees: The Asylum Process in South Africa" (20 June 2013) http://lrc.org.za/lrcarchive/publications/booklets/item/a-practical-guide-for-refugees-the-asylum-process-in-south-africa (accessed 2021-09-18) 2.

based favourable treatment that would allow them to regain self-respect and self-esteem by restoring normalcy to their lives. Court orders, through judicial review, have set out guidance on the treatment of refugees and asylum seekers that is consistent with constitutional and human rights standards.

More worryingly, the restrictive and exclusionary policies cannot meet the international obligations to protect individuals who find themselves in a distressful situation. International obligations can be achieved through the constitutionally based inclusive approach. Such an inclusive approach can be implemented through the harmonisation of the rights recognised and protected by the Refugees Act with core socio-economic and development laws and policies aimed at promoting an equal and free society in which human dignity prevails. The State's efforts to promote much-needed socio-economic transformation in the post-apartheid constitutional order should not marginalise the most vulnerable people who look to it for relief from limbo and distressful situations caused by the tyranny, oppression and persecution perpetrated by their home governments. The gradual shrinking of their protection space is intrinsically linked to the current situation in which refugees and asylum seekers are protesting and requesting to be relocated to a third country that can offer them better protection. Without access to legal documentation, social welfare and gainful employment or business, the vulnerability of refugees and asylum seekers to human suffering is amplified and sustained. Consequently, they cannot restore normalcy to their lives or revive their dreams to realise their potential through human activities. Persecution becomes perpetual in their lives.