

# The Contemporary Role of the Global Refugee Regime: Analysis of Equal Protection Under South Africa's National Refugee Regime

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## SUMMARY

This article analyses the role of the global refugee regime in protecting both *de jure* and *de facto* refugees in South Africa, with a specific focus on the principle of equality at the national level. It refers to South Africa's commitment to achieving equality, and to the interpretation of equality in the post-1994 constitutional order. Building on this, the article discusses the impact of the guiding standards of favourable treatment outlined by the global refugee regime on the implementation of provisions within the national refugee regime. The main argument of the article is that treating refugees the same as non-citizens, in accordance with these guiding standards, undermines the constitutional protection of refugees' socio-economic rights. Refugees are not in the same circumstances as vulnerable non-citizens with permanent residence permits or special dispensation permits, nor are they in the same circumstances as historically disadvantaged citizens. The position of refugees in South African society is unique. Therefore, a special and differentiated approach to their treatment regarding access to socio-economic rights is recommended. It is argued that this approach should be considered and implemented in the spirit of substantive equality to achieve a key objective of the global refugee regime.

**Keywords:** Refugee protection, socio-economic rights, constitutional equality, favourable treatment

## 1 INTRODUCTION

When the apartheid system was defeated, South Africa had not only a moral obligation but also a responsibility to bear the mantle of champion of the oppressed and persecuted.<sup>1</sup> Therefore, it focused on becoming a democratic country that upheld and observed human-rights norms and principles. On this basis, South Africa has committed itself to providing a safe haven for

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<sup>1</sup> *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) par 140.

victims of political persecution, civil war, generalised violence or other events that have disrupted public order.<sup>2</sup> It has also committed to respecting such victims' rights as refugees, as outlined in the global refugee regime.<sup>3</sup> This regime consists of the 1951 United Nations Convention Relating to the Status of Refugees<sup>4</sup> (and its 1967 Protocol)<sup>5</sup> and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>6</sup> These treaties were incorporated into the South African legal system through the adoption of the Refugees Act,<sup>7</sup> which came into effect in 2000.

The national refugee regime is aligned with and equally affected by constitutional values, rights and freedoms. It is infused with the notions of equality and human dignity. Nonetheless, it bears pointing out that while the *global* refugee regime is underpinned by the doctrine of standards of favourable treatment, grounded in the notion of non-discrimination,<sup>8</sup> the *national* refugee regime is underpinned by the principle of equal treatment, grounded in the notion of human dignity.<sup>9</sup> Under the global refugee regime, socio-economic rights accrue to refugees in the context of different entitlements and treatment. These depend on, or flow from, the four standards of favourable treatment that guide how a socio-economic right can be enjoyed or how a refugee's entitlement to it works, in accordance with the circumstances of non-citizens or citizens, depending on the nature of the socio-economic right involved. Under the national refugee regime, no differentiation is made in respect of entitlements to socio-economic rights, taking into consideration the circumstances of non-citizens. Refugees access all socio-economic rights equally – in the same way that citizens do – to protect their dignity and health.<sup>10</sup> In this regard, South Africa adopts equal treatment for refugees and citizens when it comes to their protection.

The equal-treatment approach implies that refugees should be equally entitled to the universal rights contained in South Africa's Bill of Rights. In this way, the national refugee regime entitles *de jure* refugees to full legal protection, including that of the Bill of Rights, except for those rights that only apply to citizens.<sup>11</sup> The national regime further entitles *de facto* refugees

<sup>2</sup> S 3 of the Refugees Act 130 of 1998 (as amended) (Refugees Act).

<sup>3</sup> *Union of Refugee Women supra* par 140.

<sup>4</sup> UN General Assembly *Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137.

<sup>5</sup> UN General Assembly *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267.

<sup>6</sup> Organization of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45; see *Union of Refugee Women supra* par 104 (see notes 24). See too s 1A of the Refugees Act, as amended by Act 33 of 2008.

<sup>7</sup> 130 of 1998.

<sup>8</sup> These standards are: (i) favourable treatment as accorded to citizens (or equal treatment with citizens); (ii) the most favourable treatment as accorded to non-citizens in the same circumstances; (iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and (iv) same treatment as accorded to non-citizens generally.

<sup>9</sup> Ss 27(b) and 27A(d) of the Refugees Act entitle refugees and asylum seekers to equal access to the rights in the Bill of Rights that apply to everyone.

<sup>10</sup> *Ibid.*

<sup>11</sup> S 27(b) of the Refugees Act.

(that is, asylum seekers) to the rights in the Bill of Rights that accrue to everyone.<sup>12</sup> The equal-treatment approach – it is argued – denotes treatment that is not less or more favourable than that accorded to citizens with respect to universal rights. In the national refugee-protection realm, the approach of equal treatment is further strengthened by the constitutional demands to promote its founding values of human dignity, equality and freedom,<sup>13</sup> and to interpret and apply rights in such a way that promotes human dignity, equality and freedom for achievement of an egalitarian society.<sup>14</sup> Achieving an egalitarian society requires addressing the issues of socio-economic-related inequality, discrimination, marginalisation, indignity, exclusion and deprivation that lead to human suffering or insecurities. Refugees are deprived people with human insecurities in humanitarian emergencies. Their conditions require humanitarian relief and assistance, on the one hand, and socio-economic protection, on the other, to protect their human dignity, promote their self-reliance, and restore normalcy to their lives.

In line with section 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution), the objects of the Refugees Act (as the national refugee regime) are to respond constitutionally to human insecurities, human suffering and vulnerabilities of refugees by reconciling the refugee rights contained in the global refugee regime and the human rights contained in South Africa's Bill of Rights.<sup>15</sup> Therefore, refugees' rights cannot be divorced from the constitutional rights that apply to everyone. The salient question that arises is whether the national refugee regime positions refugees in South African society to such a degree that it reconciles constitutional rights and refugee rights. This means there should be no constitutional differentiation in entitlements. While there can be considerable disagreement about the best way to reconcile the rights of refugees with the rights of citizens, the South African government appears to distance itself from the implementation of the national refugee regime. The political unwillingness to offer the protection set forth under the national refugee regime is justified on various grounds: economic migrants abuse the asylum system; a high number of bogus asylum seekers are a threat to national security; asylum seekers are unlawfully present in the country as they transgress the immigration-law rules; the condition of self-sufficiency to be admitted in the country must be adhered to; refugees do not suffer from past racial practices and therefore cannot benefit from the fruits of democracy; and so forth.<sup>16</sup> These grounds are therefore relied on to adopt the anti-immigration and anti-

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<sup>12</sup> *Ibid.*

<sup>13</sup> S 1(a) of the Constitution of the Republic of South Africa, 1996 proclaims that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

<sup>14</sup> S 39(1) of the Constitution.

<sup>15</sup> The Refugees Act vests the universal rights of the Bill of Rights in refugees whereas s 39(2) of the Constitution demands that any legislation be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.

<sup>16</sup> See the minority judgment delivered by Sachs J in *Union of Refugee Women supra* par 136, in which he noted: "[i]t would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime."

refugee measures that relegate treatment and protection to that accorded to self-reliant non-citizens and, thus, deprive refugees of more favourable treatment.

This article examines the principle of equality within the constitutional setting, and what equality means in the constitutional vision of achieving an egalitarian society, and in addressing the deprivation and suffering/insecurities of refugees. A critical-analysis approach is employed to illustrate the impact of applying standards of favourable treatment (espoused under the global refugee regime) on the accessibility of socio-economic rights in South Africa, and to provide recommendations on how favourable treatment and protection can be developed to meet the object and spirit of the global refugee regime. The absence of other groups of non-citizens in the same circumstances as refugees makes it difficult to provide refugees with, or to claim, necessities of life in the same or comparable way.<sup>17</sup> Non-citizens with permanent residence status are a category of non-citizen that is accorded more favourable treatment than refugees,<sup>18</sup> whereas non-citizens who are holders of special-dispensation permits are a category of non-citizen that is afforded less favourable treatment than refugees.<sup>19</sup>

That said, this article, in part two, discusses the global guiding standards of treatment and demonstrates how they may be subject to socio-economic exclusions if refugees are treated in the same way as non-citizens are generally treated. In part three, the article illustrates the incompatibilities, inconsistencies and deviations in the constitutional transformative approach adopted by South Africa to achieve equality. The approach adopted tends to sideline the interests of refugees, who are viewed as not belonging to historically marginalised communities. In part four, the article concludes by noting that the guiding standards of treatment are not principled mechanisms that can effectively protect refugees, as there are no groups of non-citizens in South Africa who are in the same circumstances as refugees. Besides, the treatment of non-citizens under the immigration system does not place non-citizens in a favourable position to claim socio-economic protection.

## 2 A CRITIQUE OF THE GLOBAL REFUGEE REGIME'S APPROACH TO EQUALITY

As noted above, the global refugee regime grounds the notions of equality and non-discrimination in standards of favourable treatment, which can be classified into four different treatments. A particular standard of treatment is generally linked to a particular right. Therefore, the standards are:

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<sup>17</sup> In the majority judgement in *Union of Refugee Women supra* par 64–65, the Constitutional Court agreed with the Government of South Africa that only non-citizens with permanent residence are treated more favourably than refugees and such favourable treatment cannot be extended to refugees.

<sup>18</sup> *Ibid.*

<sup>19</sup> Despite their socio-economic vulnerabilities, they do not have any state support to sustain their lives. Hence, they are excluded from social grants. See *Scalabrini Centre v Department of Social Development 2021 (1) SA 553 (GP)* in which it was argued that because of the impact of the COVID-19 pandemic, they should be considered for social relief of distress.

- (i) favourable treatment as accorded to citizens;
- (ii) most favourable treatment as accorded to non-citizens in the same circumstances;
- (iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and
- (iv) same treatment as accorded to non-citizens generally.<sup>20</sup>

In light of these guiding standards, the first standard of treatment accords refugees treatment that is “equal” to that accorded to citizens in respect of artistic rights and industrial property,<sup>21</sup> labour recruitment,<sup>22</sup> rationing,<sup>23</sup> basic education,<sup>24</sup> public relief and assistance,<sup>25</sup> and labour and social security.<sup>26</sup> The second standard of treatment accords to refugees “the most favourable treatment” accorded to non-citizens (in the same circumstances) in relation to the right to engage in wage-earning employment.<sup>27</sup> The third standard of treatment accords to refugees the same (not more or less favourable) treatment than is accorded to non-citizens with regard to the acquisition of property and rights pertaining to movable and immovable property,<sup>28</sup> self-employment,<sup>29</sup> the practice of a liberal profession,<sup>30</sup> housing<sup>31</sup> and tertiary education.<sup>32</sup> The fourth standard of treatment is provided for under article 7(1) of the 1951 Refugee Convention, which recommends the same treatment afforded to non-citizens generally, in line with conditions of reciprocity.<sup>33</sup>

Put more clearly, the fourth standard applies to those socio-economic rights that are not entrenched in or guaranteed by the 1951 Refugee Convention, such as the right to have access to medical care, food and water.<sup>34</sup> In a narrow sense, the four standards of favourable treatment can either be understood as the same treatment afforded to citizens or the same treatment afforded to non-citizens. This is due to the fact that three standards of favourable treatment must be measured or determined in accordance with the manner in which the host government treats other non-

<sup>20</sup> See Chapters III and IV of UN General Assembly *Convention Relating to the Status of Refugees* (1951) 189 UNTS 137. Adopted: 28/07/1951; EIF: 22/04/1954.

<sup>21</sup> Art 14 of the 1951 Refugee Convention.

<sup>22</sup> Art 17(3) of the 1951 Refugee Convention.

<sup>23</sup> Art 20 of the 1951 Refugee Convention.

<sup>24</sup> Art 22(1) of the 1951 Refugee Convention.

<sup>25</sup> Art 23 of the 1951 Refugee Convention.

<sup>26</sup> Art 24 of the 1951 Refugee Convention.

<sup>27</sup> Art 17(1) and 17(3) of the 1951 Refugee Convention.

<sup>28</sup> Art 13 of the 1951 Refugee Convention.

<sup>29</sup> Art 18 of the 1951 Refugee Convention.

<sup>30</sup> Art 19 of the 1951 Refugee Convention.

<sup>31</sup> Art 21 of the 1951 Refugee Convention.

<sup>32</sup> Art 22(2) of the 1951 Refugee Convention.

<sup>33</sup> Art 7(1) states that “[e]xcept where [the Refugee] Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to [non-citizens] generally.”

<sup>34</sup> It should be borne in mind that the right to public relief under art 23 of the 1951 Convention is widely interpreted to include “hospital treatment, emergency relief, relief for the blind and also the unemployed, where social security benefits are not applicable”. See Weis *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With a Commentary* (1990).

citizens. Out of the four standards of treatment, only one standard of treatment with citizens can be employed to determine whether refugees enjoy favourable treatment with citizens in the context of certain socio-economic rights falling within the scope of the said standard of treatment. This creates two different contextual analyses for the scope of favourable treatment: Equal protection with citizens and equal protection with non-citizens.

The article discusses the impact of the guiding standards of the aforementioned treatments, with a particular focus on the treatment afforded to refugees in the same way as to other non-citizens. Of concern is the shift made by the national refugee regime from offering protection of favourable treatment envisaged under the global refugee regime to offering protection of favourable treatment on an equal footing with citizens insofar the socio-economic rights are concerned. On the face of it, equal protection with citizens is set forth under South Africa's constitutional dispensation.

## 2 1 The treatment of non-citizens

In South Africa, the treatment of non-citizens is prescribed by the Immigration Act<sup>35</sup> (as amended). The Act is framed within an exclusionary model that espouses twin principles of exclusivity and self-sufficiency.<sup>36</sup> The twin principles are concerned with the sovereign nation's goal of self-preservation,<sup>37</sup> which is achieved through:

- (i) admitting non-citizens within South African boundaries on the condition that they are self-supportive and self-reliant; and
- (ii) excluding non-citizens with temporary residence visas or permits from accessing socio-economic programmes designed to address citizens' inequality and deprivation, thereby developing and empowering them economically.<sup>38</sup>

Drawing from our analysis of the standards of favourable treatment, this immigration approach to the treatment of non-citizens at the national level sets the benchmark for the equal treatment of refugees. This immigration approach requires that refugees – as non-citizens – be considered to be self-supportive and thus excluded from constitutionally based socio-economic programmes. In light of immigration law, treating refugees in the same or equal way to non-citizens renders certain socio-economic rights unrealisable to them. This is consistent with the fourth standard of

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<sup>35</sup> 13 of 2002.

<sup>36</sup> S 10(4) of the Immigration Act provides that "[a] visa is to be issued on terms and conditions that the holder is not or does not become ... an undesirable person". An undesirable person is defined in terms of s 30 of the Immigration Act to include, but not limited to anyone who is or is likely to become a public charge.

<sup>37</sup> The notion of self-preservation inherent in sovereignty is defined to refer to the responsibilities of the State to protect its citizens as sovereign, including those duties and obligations to "secure and maintain the peace, protect individual subjects and provide and maintain the conditions necessary for a commodious life". See Curran "Can Rights Curb the Hobbesian Sovereign? The Full Right to Self-Preservation, Duties of Sovereignty and the Limitations of Hohfeld" 2006 25 *Law and Philosophy* 243 252–253.

<sup>38</sup> S 42 of the Immigration Act provides that no one can aid, abet, assist, enable or in any manner help an illegal foreigner, save for necessary humanitarian assistance.

favourable treatment entrenched under article 7(1) of the 1951 Refugee Convention. The consequences of such treatment position refugees unfavourably in relation to access to socio-economic rights. The same treatment as non-citizens, in line with the rules of immigration law, implies that refugees cannot have access to subsidised socio-economic rights.

Any favourable treatment of non-citizens envisaged by the 1951 Refugee Convention implies depriving refugees of their rights, as the immigration-law standard of treatment requires non-citizens to be self-sufficient. A lack of self-sufficiency in non-citizens results in their classification as undesirable persons within the boundaries of South Africa. Undesirability implies being expelled from the territory of South Africa. A critical analysis of article 7(1) in light of the immigration rule of self-sufficiency illustrates that the South African government is obligated to apply immigration rules to refugees. Article 7(1) states: "Except where [the] Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to [non-citizens] generally." This provision requires a host country to accord refugees the same treatment as is generally accorded to non-citizens while they stay within its boundaries. Article 7(1) appears to set out a threshold standard, obligating the host state to define the treatment of refugees in comparison with the favourable treatment accorded to non-citizens generally,<sup>39</sup> or to accord refugees "the full protection enjoyed by other non-citizens with no special protection attached to their status".<sup>40</sup> Within the South African context, article 7(1) can only work to disadvantage refugees in their daily realities if it is prioritised in giving scope and meaning to the socio-economic rights of refugees.

However, the scope and ambit of the exceptions to the twin principles of exclusivity and self-sufficiency can be drawn from or defined by the provisions of the Constitution, social assistance legislation and bilateral agreements, as discussed below.

First, the provisions of the immigration system provide for some favourable treatment of non-citizens in certain circumstances. Vulnerable non-citizens can, in terms of section 42(1) of the Immigration Act, have access to socio-economic rights but only for necessary humanitarian relief and assistance. Given that refugees can be understood as vulnerable non-citizens, they can be accorded the same treatment as non-citizens in relation to humanitarian relief and assistance. This approach will be contrary to the standard of favourable treatment as accorded to citizens. As noted, this standard seeks to confer the right to public relief and assistance on refugees on par with citizens. In practice, refugees falling under section 42(1) are those who are still undocumented. If refugees are physically present in the country and have filed their applications for asylum, but their applications are still in the process of adjudication, they are legally recognised as "documented" asylum seekers. In these instances, their rights are protected under the national refugee regime.

<sup>39</sup> Commentary on the Refugee Convention 1951, art 2–11, 13–37, published by the Division of International Protection of the United High Commissioner for Refugees 1997 (Commentary on the Refugee Convention) 16.

<sup>40</sup> *Ibid.*

Secondly, section 35(2)(e) of the Constitution affords favourable treatment to non-citizens in the context of entitling all detained persons (regardless of their nationality) to social services at state expense, including “adequate accommodation, nutrition, reading material and medical treatment”. This provision not only applies to non-citizens detained at police cells or correctional service centres (or prisons) but also to those non-citizens who are held at deportation facilities.

Thirdly, regulation 9(5) of the Regulations to the Social Assistance Act<sup>41</sup> prohibits discrimination against non-citizens if they are affected by a (declared or undeclared) disaster that took place within South Africa’s territorial boundaries. They are entitled to access social relief and assistance if they are affected. In this context, non-citizens – holders of special dispensation permits, or asylum seeker permits – became beneficiaries of the COVID-19 grant for social relief of distress.<sup>42</sup>

Fourthly, section 2(1) of the Social Assistance Act<sup>43</sup> vests a right to social assistance for non-citizens if there is a bilateral agreement between South Africa and a non-citizen’s country of origin. In practice, there are non-citizens for whom the right to social assistance accrues in terms of bilateral agreements. Nonetheless, relaxation of the twin principles of exclusivity and self-sufficiency further manifests itself in South Africa’s move, in terms of section 31(2)(b) of the Immigration Act, to grant special-dispensation permits to non-citizens from certain countries that allow them to stay, work, study and run a business in the country. For example, the Zimbabwean Exemption Permit, previously known as “the Special Dispensation Permit”, was a result of bilateral agreements between the ministers of home affairs from Zimbabwe and South Africa.<sup>44</sup> These special permits allow the holders access to health-care services.

Fifthly, there are further instances in which citizens of certain countries are given access to socio-economic rights through regional treaties. For instance, the Southern African Development Community (SADC) Protocol on Education and Training of 1997<sup>45</sup> requires member states to treat SADC students as citizens of the member state when it comes to university tuition fees, charges and accommodation.<sup>46</sup>

Considering the above, the exclusionary model adopted under the South African immigration law appears to allow non-citizens in certain circumstances to have access to humanitarian relief (or social relief of distress), social assistance (or social grants), tertiary education, employment, self-employment and social security. Objectively analysed, refugees can, in line with the guiding standards of treatment, claim treatment

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<sup>41</sup> 13 of 2004.

<sup>42</sup> See *Scalabrini Centre v Department of Social Development supra*, in which the High Court decided that refugees and special-permit holders are also beneficiaries of the grant for social relief of distress of R350 a month.

<sup>43</sup> 13 of 2004.

<sup>44</sup> Parliamentary Monitoring Group “Briefing by the Department of Home Affairs on the Zimbabwean Documentation Project” (19 September 2021) <https://pmg.org.za/committee-meeting/13428/> (accessed 2024-03-14).

<sup>45</sup> SADC *Protocol on Education and Training* (8 September 1997).

<sup>46</sup> Art 7(A)(5) of the SADC Protocol on Education and Training.



as favourable as possible and, in any event, not less favourable than that accorded to non-citizens regarding the aforementioned exceptions to the twin principles of exclusivity and self-sufficiency. However, the right to the highlighted exceptions can hardly be claimed by refugees in practice as they are not in the same circumstances as the prescribed categories of non-citizens. For instance, *de facto* refugees could claim the COVID-19 social relief of distress grant because the COVID-19 pandemic was declared a national disaster, placing them in the same circumstances as citizens and non-citizens alike.<sup>47</sup>

## 2.2 The national refugee regime's approach to equality

On the face of it, the standards of favourable treatment found in the 1951 Refugee Convention do not inform the Refugees Act; rather, the Act is couched in the values of equality, dignity and freedom. This is because it was crafted in line with the spirit, purport and objects of the Constitution's Bill of Rights. However, it can also be argued that the guiding standards of favourable treatment were indirectly transposed into South Africa's refugee protection system if it is accepted that the Refugees Act domesticates the global refugee regime. The Refugees Act does not expressly refer to socio-economic rights contained in the global refugee regime or to socio-economic rights contained in the Bill of Rights. Equal treatment and protection in relation to constitutionally protected socio-economic rights are implied in the entitlements to universal rights enshrined in the Bill of Rights for *de jure* and *de facto* refugees. The equality that permeates the national refugee regime points to the treatment of refugees that is equal to that of citizens in relation to all universal rights in the Bill of Rights. In the context of the national refugee regime, it would be irrational, unlawful, and discriminatory to exclude refugees from access to socio-economic rights that the Constitution vests in everyone. Of concern is that the Refugees Act makes it mandatory to interpret and apply the constitutional rights conferred on refugees in light of international refugee and human-rights conventions.<sup>48</sup> It is within this mandate that the four guiding standards of favourable treatment in the determination of the ambit and scope of the socio-economic entitlements become important.

Equal treatment cannot, therefore, be interpreted and applied in line with the spirit and object of immigration law because, in all refugee matters, the national refugee regime supersedes immigration rules and principles. Regard must be had to the fact that refugee law is a special law dealing with refugee protection, whereas immigration law deals with the regulation of non-citizens generally.<sup>49</sup> The national refugee regime provides for the rights

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<sup>47</sup> In *Scalabrini Centre v Department of Social Development supra*, the High Court opined that the exclusion of *de facto* refugees and special permit holders from the COVID-19 Unemployment Relief Scheme or Social Relief of Distress was arbitrary and unreasonable and unconstitutional. The exclusion violated their constitutional rights to equality, dignity, and access to social security (par 5, 7, 40).

<sup>48</sup> S 1A of the Refugees Act.

<sup>49</sup> According to the *maxim generalia specialibus non derogant*, it is presumed that if lawmakers have, after considering all circumstances, adopted a special law for a particular

of those individuals formally recognised as refugees (*de jure* refugees) and those whose applications to be recognised as refugees formally are still pending (*de facto* refugees or asylum seekers). It is presumed that the universal socio-economic rights in the Bill of Rights apply to *de jure* and *de facto* refugees on an equal basis. However, the Refugees Act uses different terminology in relation to these two groups. On the one hand, section 27(b) of the Act states that refugees must enjoy full legal protection, which includes the rights in the Bill of Rights, except those that only apply to citizens. On the other hand, section 27A(d) of the Act states that asylum seekers are entitled to the rights in the Bill of Rights insofar as those rights apply to an asylum seeker. These differences in formulation raise interpretive difficulties. First, the rights of *de facto* refugees (i.e., asylum seekers) are not subject to the notion of full legal protection. Secondly, the provisions of section 27A(d) sound like a tautology (asylum seekers are entitled to the rights that apply to them). There are no rights in the Bill of Rights that are specifically or expressly vested in asylum seekers. These interpretive difficulties raise the salient question of the extent to which *de facto* refugees can access socio-economic rights.

The provisions of section 27(b) are presumed to confer on refugees full legal protection concerning the rights traditionally associated with citizenship.<sup>50</sup> These provisions thus extend socio-economic rights and some rights having political dimensions that apply to refugees.<sup>51</sup> Conversely, equality in entitlements has given rise to interpretive difficulties. The question that arises is whether section 27(b) entitles refugees (who are temporary residents) to the same treatment as non-citizens with permanent-resident status. Section 25(1) of the Immigration Act states that a non-citizen with permanent-resident status “has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship”. Although section 25(1) of the Immigration Act does not expressly refer to the rights in the Bill of Rights (as section 27(b) of the Refugees Act does), the Bill of Rights constitutes the foundation upon which the fundamental rights and freedoms of citizens and non-citizens are based.<sup>52</sup> It could be argued that despite the different language used in the framing of section 27(b) of the Refugees Act and section 25(1) of the Immigration Act, these provisions place both refugees and permanent residents in the same legal

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case, a law of general character would not interfere with a special law. In cases such as this, “the special provision stands as an exceptional proviso upon the general”. See, for e.g., *Edmond v US* 520 US 651; *Warden, Lewisburg Penitentiary v Marrero* 417 US 653; *Seward v Owner of “The Vera Cruz”* (1884) 10 App Cas 59 and *the Privy Council in Barker v Edger* [1898] AC 748. See further De Ville *Constitutional & Statutory Interpretation* (2000) 66, 79–81, 175.

<sup>50</sup> Some human-rights scholars maintain that the move from considering a state’s inhabitants as citizen or non-citizen to seeing them as human beings implies that entitlements and privileges, notably socio-economic rights, are extended beyond citizens. See Kofman “Rights and Citizenship” 1993 25 *American Sociology Review* 393 395 and Fix and Laglagaron “Social Rights and Citizenship: An International Comparison” 2002 *The Urban Institute* 4.

<sup>51</sup> Political rights, for example, include the right to freedom of association, the right to demonstrate and the right to freedom of expression.

<sup>52</sup> S 7(1) of the Constitution.

circumstance or the same position, in that they are all entitled to the same constitutional socio-economic rights.

Yet, according to the Constitutional Court in *Union of Refugee Women v Private Security Industry Regulatory Authority (Union of Refugee Women)*,<sup>53</sup> they are not in the same position or circumstances and, accordingly, they cannot be afforded the same or equal treatment. In this case, the issue before the court was the constitutionality of section 23(1)(a) of the Private Security Industry Regulatory Authority Act,<sup>54</sup> which only provided for the employment of citizens and permanent residents in the private security industry, to the exclusion of refugees who could not show good cause in terms of section 23(6) of the Act. The constitutionality of section 23(1)(a) was tested against the constitutional right to equality.<sup>55</sup> Furthermore, the constitutional right to choose employment, which is restricted to citizens under section 22 of the Constitution, was considered. In determining the scope and ambit of refugees' right to choose employment and whether refugees are in the same position as permanent residents, the court employed the standard of "the most favourable treatment" as accorded to non-citizens in the same circumstances.<sup>56</sup> Therefore, the core question revolved around whether the said standard entitled refugees to treatment that was equal to that of permanent residents. The majority judgment reasoned that refugees "may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence".<sup>57</sup> In other words, the majority judgment agreed with the State that permanent residents are the only non-citizens who are treated more favourably.<sup>58</sup> Hence, they are entitled to more rights, privileges and opportunities. Unlike refugees, they are holders of the same identification documents as citizens. Considering the position of permanent residents, Kondile AJ, delivering the majority judgment, held that section 23(1)(a) of the Private Security Industry Regulatory Authority Act is not unconstitutional, discriminatory, or unfair towards refugees and did not breach equality in rights at the threshold.<sup>59</sup>

The minority judgment was of the view that the notion of full legal protection under section 27(b) of the Refugees Act entitled refugees to treatment equal to that accorded to non-citizens with permanent-resident status.<sup>60</sup> In delivering the minority judgment, Mokgoro and O'Regan JJ observed:

"Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only. Permanent residents have a right to reside in South Africa and enjoy all the rights, privileges, duties and obligations of citizens save for those which a law or the Constitution explicitly ascribes to citizenship. Recognised refugees also

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<sup>53</sup> 2007 (4) BCLR 339 (CC).

<sup>54</sup> 56 of 2001.

<sup>55</sup> *Union of Refugee Women supra* par 20.

<sup>56</sup> *Union of Refugee Women supra* par 62.

<sup>57</sup> *Union of Refugee Women supra* par 66.

<sup>58</sup> *Union of Refugee Women supra* par 64.

<sup>59</sup> *Union of Refugee Women supra* par 67.

<sup>60</sup> *Union of Refugee Women supra* par 97–99.

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have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act so their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all.”<sup>61</sup>

According to this view, the special position of refugees in the South African legal system thus finds expression in the notion of full legal protection, which affords refugees the same constitutional treatment as citizens or permanent residents. The equal-treatment approach is grounded in the Constitution in such a way that certain rights in the Bill of Rights apply universally to all people within South Africa. It also flows from the understanding that the Refugees Act extends the socio-economic protection traditionally given to non-citizens by entitling refugees to access socio-economic rights on an equal basis with citizens.

Objectively analysed, the majority judgment, on the one hand, implies that section 25(1) of the Immigration Act confers more favourable treatment on non-citizens with permanent-resident status, whereas section 27(b) of the Refugees Act accords favourable treatment to *de jure* refugees. Hence, permanent residents and *de jure* refugees are not in the same circumstances. On the other hand, section 27A(d) of the Refugees Act accords to *de facto* refugees less and not more favourable treatment than that accorded to *de jure* refugees. This assessment of these provisions points to different levels of favourable treatment of non-citizens. It is, therefore, difficult to determine what constitutes each level of treatment or to differentiate these accesses to socio-economic rights. For instance, to what extent will *de facto* refugees have access to the right to adequate housing if they enjoy less favourable protection? To what extent can *de jure* refugees or permanent residents access this right? What can the right to housing mean if it is applied in accordance with the favourable standards of the global refugee regime? With regard to the guiding standards of favourable treatment, the right to housing must be accessed in the same way that non-citizens in the same circumstances have access. The Housing Act<sup>62</sup> allows only non-citizens with permanent-resident status to have access to housing. As noted, permanent residents are not in the same circumstances as *de jure* refugees. In terms of the Refugees Act, refugees (be it *de jure* or *de facto*) should receive the same treatment accorded to citizens. Despite this protection, the Housing Act excludes refugees from the housing programme.<sup>63</sup> Therefore, equality in constitutional rights for refugees appears to be hypothetical, as the State disregards the national refugee regime’s equal treatment under its socio-economic laws and policies.<sup>64</sup>

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<sup>61</sup> *Union of Refugee Women supra* par 99.

<sup>62</sup> 107 of 1997

<sup>63</sup> The exclusion stems from the definition of housing development in the Housing Act, which restricts access to adequate housing to citizens and permanent residents. See s 1(vi) of the Housing Act.

<sup>64</sup> The State tends to overlook the interests of refugees and disregards court judgments and binding legal rules and principles in the area of refugee law. See Botha “The Rights of Foreigners: Dignity, Citizenship, and the Right to Have Rights” 2013 130 *South African Law Journal* 837 854 and Gloppen “Social Rights Litigation as Transformation: South African Perspective” in Jones and Stokke *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 176.

It has also been argued that the Refugees Act grounds equal treatment for *de facto* refugees in the recognition that they are bearers of universal constitutional rights that reside in everyone, including socio-economic rights and benefits.<sup>65</sup> However, *de facto* refugees (asylum seekers) are not in the same situation as *de jure* refugees. There is also no doubt that there must be a differentiation between *de facto* refugees and other non-citizens (for example, economic migrants) if they are to qualify for more favourable treatment than that prescribed by the Immigration Act. Deviation from the immigration self-sufficiency rule is a prerequisite. In a number of cases, the Supreme Court of Appeal (SCA) has stressed that the duty to deviate from the immigration self-sufficiency rule applied to non-citizens with temporary status should be understood with reference to the principles of human dignity and *non-refoulement*.<sup>66</sup> Asylum seekers' dignity – like *de jure* refugees – should be protected favourably. The principle of *non-refoulement*, which is a cornerstone of the global refugee regime, protects both *de jure* and *de facto* refugees from being treated with indignity and contempt, as such treatment may result in constructive *non-refoulement*. The principle obligates states to take positive measures – devoid of legal deficiency or discrimination – to prevent involuntary returns arising out of a lack of state support. An involuntary return arising from ill-treatment or deprivation of state support is considered constructive *refoulement*. Whereas the principle of *non-refoulement* protects *de facto* refugees, other non-citizens do not enjoy such protection. The principle points to the fact that asylum seekers are not in the same circumstances as other groups of non-citizens. Put differently, there is no group of non-citizens whose treatment can serve as a favourable standard that asylum seekers can claim for better protection.

Different levels of treatment of non-citizens in South Africa, coupled with the standards of favourable treatment, can further be assessed with reference to the constitutional framework of the right to equality. The question is whether refugees can rely on the right to equality to claim inclusion in socio-economic protection and what the right to equality means in the constitutional transformative order.

### 3 THE MEANING OF EQUALITY IN SOUTH AFRICAN CONTEXT

As noted, the principle of equality is central to the protection of human rights, including refugee rights.<sup>67</sup> It occupies a special place in the Constitution of South Africa, considering the vast inequality and institutionalised discrimination characterising South Africa's past and the need to achieve an egalitarian society. Equality is recognised as a constitutional right, a foundational value, and an interpretative tool.<sup>68</sup> Its unique value lies at the

<sup>65</sup> S 27A(d) of the Refugees Act.

<sup>66</sup> *Somali Association of South Africa v Limpopo, Department of Economic Development, Environment and Tourism* 2015 (1) SA 151 (SCA) par 44, *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) par 32 and *Union of Refugee Women supra* par 135.

<sup>67</sup> See, for e.g., *Charter of the United Nations and Statute of the International Court of Justice* (1945) Preamble and art 1; UN General Assembly *The Universal Declaration of Human Rights A/RES217(III)* (10 December 1948) Preamble and art 1 and 7.

<sup>68</sup> Ss 1, 7, 9, 36, 39 of the Constitution.

heart of the Bill of Rights.<sup>69</sup> The principle of equality permeates and defines the Bill of Rights<sup>70</sup> and informs the interpretation of all laws and policies, including the national refugee regime, which establishes a special dispensation for refugees to be treated equally and with special concern.<sup>71</sup> In this regard, Albie Sachs maintains that the principle of equal protection was entrenched in the Constitution to demand “positive action on the part of the state to enable people to live in conditions consistent with the minimum standards of human dignity”.<sup>72</sup> Sachs views equal protection as a principled and powerful legal tool that the State can use to strengthen the position of those who were compelled “to live in disadvantage at the margins of society” by racial policies.<sup>73</sup>

As observed earlier, equal treatment with respect to access to socio-economic rights for refugees is controversial. Controversy arises from a number of factors, such as uncertainties about their treatment if they have to be accorded less favourable treatment compared to that afforded non-citizens with permanent-resident status, and uncertainties about their protection if they are to be excluded from preferential treatment afforded to vulnerable citizens who have been disadvantaged by the history of South Africa.

In addition, in policy and practice, refugees are regularly viewed as “outsiders”, not belonging to the political community and essentially as economic migrants who compete with citizens. As such, they are excluded from being beneficiaries of transformative or remedial measures. They often find themselves compelled to live in disadvantaged or inferior positions in a host society that struggles to overcome discrimination and racism. The State does little to protect refugees from anti-immigrant-sentiment victimisation. Issues of safety and security, coupled with uncertainties about the extent to which refugees should have access to socio-economic protection, have implications for their right to equality. The fact that equality is a contested concept adds to the complexity of its meaning, relevance and significance in the protection of refugees.<sup>74</sup> In South Africa, the notion of equality must – according to the Constitutional Court – be understood in its textual setting,

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<sup>69</sup> *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) par 85.

<sup>70</sup> *Fraser v The Children’s Court* 1996 (8) BCLR 1085 (CC) par 20; *Brink v Kitshoff* 1996 (4) SA 197 (CC) par 33; *S v Makwanyane* 1995 (3) SA 391 (CC) par 155–6 and 262; and *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) par 26.

<sup>71</sup> Its Preamble states that the passage of the Refugees Act creates an obligation to receive and treat refugees in accordance with the standards and principles established in international law.

<sup>72</sup> Sachs “The Judicial Enforcement of Socio-Economic Rights: The *Grootboom Case*” in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 137–138.

<sup>73</sup> Sachs in Jones and Stokke (eds) *Democratising Development* 137.

<sup>74</sup> It is sometimes even claimed that equality has no stand-alone substantive meaning and that it is not an independent right. See Ackermann “Equality and Non-Discrimination: Some Analytical Thoughts” 2006 22 *SAJHR* 597 597 601; Botha “Human Dignity in Comparative Perspective” 2009 20 *Stell LR* 171 213; and Botha “Equality, Dignity, and the Politics of Interpretation” 2004 19 *SAPR/PL* 724 746–751.

considering its social and historical context.<sup>75</sup> Accordingly, the meaning of equality within concrete situations is best explained by referring to the distinction between the formal and substantive dimensions of equality. These dimensions are moral and theoretical mechanisms to assess the entitlements of refugees to rights. Analysis of these dimensions of equality is particularly important to illustrate that the favourable treatment approach to refugee protection under the global refugee regime is similar to the substantive equality entrenched under the Constitution. Favourable treatment and substantive equality were adopted to alleviate misery, vulnerabilities, and suffering caused by deprivation and socio-economic inequality. It will, therefore, be argued that effective refugee protection in South Africa can meaningfully be achieved through an extension of a substantive-equality approach to the protection of the socio-economic rights of refugees. Factors that hinder such extension will be underlined.

### 3 1 Formal equality

Implementation of the global refugee regime in South Africa is constrained by formal equality as it does not favour preferential or favourable treatment of a person or a group of persons. From the perspective of formal equality, equality means sameness of treatment; that is, the State must “treat people in like circumstances alike”<sup>76</sup> or provide identical treatment to everyone.<sup>77</sup> It prohibits “laws from excluding anyone or drawing any distinction between people”.<sup>78</sup> In this context, the question of whether laws negatively and adversely affect individuals or groups of people is irrelevant. In a complex world, what counts is to treat “like cases alike” and “unlike cases differently”.<sup>79</sup> From a formal equality perspective, favourable or preferential treatment on the basis of specific distinctions, such as race, sex, poverty, refugee status or asylum seeker status, is presumed arbitrary.<sup>80</sup> This approach assumes that people are in an equal socio-economic circumstance or position.<sup>81</sup> Accordingly, it is not concerned with entrenched, systemic, systematic or structural inequality or vulnerabilities.<sup>82</sup> Hence, it does not seek to address or respond to actual human insecurities caused by socio-economic hardships and political persecutions from which vulnerable individuals and groups suffer. It is based on a standard that appears to be neutral with respect to humanitarian and socio-economic needs and experiences.<sup>83</sup> Formal equality is not a proper mechanism to protect the

<sup>75</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 22: A constitutional right in the Bill of Rights is interpreted in two contexts: (i) its textual setting and (ii) its social and historical context.

<sup>76</sup> Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 232.

<sup>77</sup> Greschner “Does Law Advance the Cause of Equality?” 2001 27 *Queen’s Law Journal* 299 302.

<sup>78</sup> Greschner 2001 *Queen’s Law Journal* 303.

<sup>79</sup> Greschner 2001 *Queen’s Law Journal* 302.

<sup>80</sup> *Ibid.*

<sup>81</sup> Kavuro “Refugees and Asylum Seekers: Barriers to Accessing South Africa’s Labour Market” 2015 19 *Law, Democracy & Development* 232 253.

<sup>82</sup> Albertyn and Kentridge “Introducing the Right to Equality in Interim Constitution” 1994 10 *SAJHR* 149 152.

<sup>83</sup> *Ibid.*

socio-economic needs of refugees because it does not allow for special consideration of their potential vulnerabilities. Formal equality is closely linked to a classical liberal understanding of equal opportunity,<sup>84</sup> which does not require the State to examine the actual conditions of individuals and groups to address social and economic disparities so as to achieve a just society.<sup>85</sup> Proponents of this form of liberalism would be more inclined to question the need for social welfare programmes that are used to channel resources to the poor or deprived.

Constitutionally, a commitment to formal equality is reflected in equal access to socio-economic rights and benefits by virtue of universal entitlement. This implies that everyone – regardless of their socio-economic status – can theoretically claim equality in access to social welfare.<sup>86</sup> At the same time, however, socio-economic rights are applied differently to different people, depending on their circumstances. Thus, a commitment to formal equality is unlikely to change human suffering or deep-rooted social inequalities, but rather, it will sustain them. The emphasis on addressing appalling conditions of the poor and vulnerable people led South Africa to view the formal equality approach as an inappropriate tool to ensure that socio-economic disadvantages be remedied, and social justice established.

A formal approach to equality, which is blind to the socio-economic differences between people, will not advance the object of the global refugee regime that seeks to restore normalcy to the lives of refugees and to provide them with a better life and future. Formal equality, therefore, appears to be inconsistent with the standards of favourable treatment, which require the host state to treat refugees differently and with special concerns. As will be discussed, substantive equality may be suitable to respond to their special concerns as it requires the government to consider the socio-economic vulnerabilities of individuals and groups to accord them differential or special treatment designed to address their vulnerabilities or deprivation.<sup>87</sup> The article next explores substantive equality and its significance in achieving the right to equality in refugee protection.

### 3 2 Substantive equality

In South Africa, refugees are granted the same socio-economic rights as citizens. The international obligations to provide favourable treatment to refugees should be implemented in accordance with the equality commitment of the Constitution, which is the supreme law in South Africa.<sup>88</sup>

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<sup>84</sup> The principle of equal opportunity as advocated by philosopher Robert Nozick revolves around the notion that it is unjust for the State to distribute wealth from the rich to the poor. Distribution should come about in accordance with the rules of acquisition, transfer and rectification regardless of how unequal such distribution may be. In addition, the State should ensure equal opportunities to raise their income and to own what they make. See Raphael *Concept of Justice* (2001) 214–215 and Kavuro “The South African Constitution and the Social Justice Jurisprudence of the Constitutional Court” 2012 1 *Young African Research Journal* 100 106–107.

<sup>85</sup> Albertyn and Kentridge 1994 *SAJHR* 152.

<sup>86</sup> *Khosa supra* par 42.

<sup>87</sup> Albertyn and Kentridge 1994 *SAJHR* 152.

<sup>88</sup> S 2 of the Constitution.



Constitutionally, the favourable, preferential or special treatment of citizens is derived from section 9(2) of the Constitution, which is based on a substantive vision of equality. The concept of substantive equality can be understood by its object and spirit, which are to restore the dignity of many citizens who have endured demeaning treatment, discrimination and prejudice owing to unjust laws and policies in the past. The Refugees Act does not deviate from this approach, as it grants refugees the same comprehensive legal protection in relation to the universal rights outlined in the Bill of Rights. With the goal of achieving substantive distribution of rights for social justice, section 9(2) of the Constitution stipulates:

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

Seen from this point of view, it can be argued that, while refugees are not disadvantaged by unfair discrimination, they are disadvantaged by human-rights abuses committed by state actors and/or non-state actors in their country of origin. They are therefore in South Africa seeking sanctuary and are expected to return home when the situation is conducive for them to return. Apart from these arguments, the reason for analysing substantive equality is to illustrate its meaning and significance in protecting vulnerable people, and to argue that a similar approach is required to protect refugees effectively. In fact, substantive equality invokes distinction of treatment – that is, the State must ensure equality of outcome and, in so doing, must “tolerate disparity of treatment to achieve this goal”.<sup>89</sup> It is concerned, through the equitable distribution of rights, benefits, opportunities, burdens and choices, with addressing issues related to major inequalities in people’s resources, political and social power, and their well-being arising from exploitation and oppression.<sup>90</sup>

According to Albertyn and Goldblatt, the doctrine of substantive equality can be used by the poor to claim “positive state action” for the protection of their dignity.<sup>91</sup> This view is echoed by Moseneke J, who states that substantive equality sometimes necessitates measures that “disfavour one class to uplift another”. In pursuit of substantive equality, socio-economic schemes must be designed to protect and advance disadvantaged groups.<sup>92</sup> Substantive equality can, therefore, be used in lieu of favourable standards to claim equal access to or inclusion in socio-economic laws and policies.

The notion of equality plays a major role in protecting the most vulnerable persons in South Africa. On this basis, the Constitutional Court has developed a substantive-equality jurisprudence, laying the foundation for transforming South African society “from a grossly unequal society to one in

<sup>89</sup> Currie and De Waal *Bill of Rights* 232.

<sup>90</sup> Greschner “Does Law Advance the Cause of Equality?” 2001 27 *Queen’s Law Journal* 299 303. See too Currie and De Waal (*Bill of Rights* 233): substantive equality requires the State to consider the actual socio-economic condition of groups and individuals in the achievement of constitutional equality).

<sup>91</sup> Albertyn and Goldblatt “Towards a Substantive Right to Equality” in Woolman (ed) *Constitutional Conversations* (2008) 247.

<sup>92</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) par 42–43.

which there is equality between men and women and people of all races".<sup>93</sup> The Constitutional Court, in *Port Elizabeth Municipality v Various Occupiers (Port Elizabeth Municipality)*,<sup>94</sup> reasoned that South African society is demeaned when national measures, rather than mitigating social inequality, intensify it through marginalisation, or when they drive vulnerable people from pillar to post.<sup>95</sup>

Socio-economic measures that are not harmonised with the national refugee regime have implications for marginalising refugees. In *Government of the Republic of South Africa v Grootboom (Grootboom)*,<sup>96</sup> the court reasoned that socio-economic rights are personal and substantive rights that place a positive obligation on the State. In so doing, special concern must be directed to the protection of the dignity of the most vulnerable people, "who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations".<sup>97</sup> Traditionally, refugees are people in the greatest need of special concern. Their needs include not only humanitarian interventions but also economic empowerment. Equality in refugee protection demands favourable socio-economic inclusion. In *Khosa*, the same court reiterated the importance of equality with respect to access to socio-economic rights, stating that the exclusion of vulnerable groups from access to such rights has a detrimental effect on their dignity.<sup>98</sup> In this case, the court confirmed the intersection between socio-economic rights and the values of equality, human dignity and freedom, which, in the court's view, "reinforce one another at the point of intersection".<sup>99</sup>

Proceeding from this line of reasoning, it is through the lens of substantive equality that the provisions of the Refugees Act must be understood and applied. Through this lens, the equal-treatment approach to refugee protection should be interpreted constitutionally to mean differentiated and special treatment tailored to meet refugees' socio-economic needs. This can only be achieved if the State is willing to deploy its resources to protect refugees. Unless refugees are included as equal beneficiaries of socio-economic programmes, the realisation of their substantive rights, which requires South Africa's action, will remain fanciful.

Unfair discrimination arises from South Africa's reluctance to include refugees (especially *de facto* refugees) as co-beneficiaries of subsidised public goods and services. Owing to the immigration self-sufficiency rule,

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<sup>93</sup> Moseneke ("Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa" 2003 *The Georgetown Law Journal* 749 761), quoting *Bato Star Fishing v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) par 74. See too *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) par 27 (all human beings must be accorded equal dignity, regardless of their position in society) and *Fraser v The Children's Court supra* par 20.

<sup>94</sup> 2005 (1) SA 217 (CC) (in respect of the eviction of homeless people).

<sup>95</sup> *Port Elizabeth Municipality v Various Occupiers supra* par 18. See too *Government of the Republic of South Africa v Grootboom supra* par 23.

<sup>96</sup> *Supra*.

<sup>97</sup> *Government of the Republic of South Africa v Grootboom supra* par 24, 45, 83, 94, 99.

<sup>98</sup> *Khosa supra* par 80.

<sup>99</sup> *Khosa supra* par 41; see also *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) par 154.

South Africa has mixed feelings about whether it should protect refugees, or limit the exclusion from protection to economic migrants, illegal migrants and bogus asylum seekers.<sup>100</sup> These categories of non-citizen fall within the ambit of “undesirable persons” or “illegal foreigners” because they do not meet the requirements of immigration and refugee laws. These mixed feelings result in their exclusion from socio-economic measures that tend to distribute socio-economic rights and benefits to advance and cater to historically disadvantaged people. The exclusion of both *de facto* and *de jure* refugees from socio-economic laws precludes them from enjoying equality as envisaged by the Refugees Act.

Conversely, socio-economic protection in the context of substantive equality demands that the State pay attention to people’s vulnerability and disadvantages and provide differentiated treatment tailored to alleviate their human suffering and poverty or to expand their freedom to live the life they wish to live.<sup>101</sup> The obligation to provide favourable or preferential treatment to poor citizens does not amount to a duty to refrain from interference with the enjoyment of the socio-economic rights of refugees, but involves a duty to include them in socio-economic measures designed to achieve equal and humane treatment. Substantive equality validates preferential, special or favourable treatment for the protection of the well-being, health, human dignity and equal worth of human persons.<sup>102</sup> The substantive-equality approach to the protection of refugees is not meaningfully applied as the State does not harmonise or reconcile the national refugee regime with its socio-economic measures. The absence of harmonisation results in socio-economic exclusion, which is justified by the sovereign need to safeguard the national resources for the happiness of citizens.<sup>103</sup> Such justifications are inconsistent with the commitment to protect refugees as proclaimed under the national refugee regime.

Owing to such inconsistency, refugee rights tend to be accommodated on the same terms that apply to non-citizens with temporary-residence status, whose admission, stay, and work are regulated by immigration law – in particular, the twin principles of exclusivity and self-sufficiency. The equal treatment of non-citizens does not address the social reality of the vulnerabilities of refugees. Since they live mostly in urban areas, often in poverty and deprivation, they cannot satisfy the basic necessities in life without positive state action.<sup>104</sup> Unlike some countries in the West, *de facto*

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<sup>100</sup> The government does not differentiate between genuine refugees and bogus refugees, and thus views all refugees as “bogus asylum-seekers and economic vultures that came into South Africa in search of a better life and thus a threat to South Africa’s security, economy, identity and sustainable development”. See Kavuro “Refugee Rights in South Africa: Addressing Social Injustices in Government Financial Assistance Schemes” 2015 *J Sustain Dev Law Policy* 182.

<sup>101</sup> See Currie and De Waal *Bill of Rights* 230–234; Kavuro 2012 *Young African Research Journal* 113–115; and Kavuro 2015 *Law Democracy & Development* 253–254.

<sup>102</sup> Kavuro 2015 *J Sustain Dev Law Policy* 185.

<sup>103</sup> See the minority judgment delivered by Sachs J in *Union of Refugee Women supra* par 136, in which he noted: “It would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime.”

<sup>104</sup> Kavuro 2015 *J Sustain Dev Law Policy* 181.

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refugees are not placed in centres where the State attends to their basic needs while they await decisions on their cases. Thus, their survival is dependent on access to socio-economic rights. This is important, given that the international obligation to protect refugees is not premised on their ability to demonstrate that they control sufficient available resources to maintain themselves during asylum. Rather, asylum is granted on the basis of the alleviation of human suffering and appalling conditions, as well as of protecting refugees against human-rights abuses. To achieve this, the national refugee regime envisages the full legal protection of refugees, which to achieve favourable treatment should be applied in the context of substantive equality. Substantive equality is a principled mechanism that can be used to offer refugees effective protection. Given that the global refugee regime demands that special vulnerabilities of refugees be responded to favourably, the constitutional substantive-equality approach becomes essential in advancing favourable or special treatment to meet the objectives of the global refugee regime. By virtue of the national refugee regime, the substantive-equality approach should apply to socio-economic rights and benefits that accrue to refugees in terms of the Bill of Rights.

#### 4 CONCLUSION

Determination of the role or impact of the standards of favourable treatment under the global refugee regime is complex and multifaceted owing to the need to harmonise various international laws (such as human-rights law and international refugee law) and national laws (such as constitutional law, immigration law, refugee law and socio-economic laws). It has been demonstrated that standards of favourable treatment for non-citizens serve as a guiding principle for entitlements to most socio-economic rights at the national level. Considering the treatment of non-citizens in South Africa, such guiding principles relegate the treatment of refugees to the treatment accorded to the general category of non-citizens who are admitted into the country on the condition that they are economically independent. Vulnerable non-citizens – whose well-being, health and dignity are highly likely to be dependent economically on state support – are classified as undesirable persons who are deemed not deserving to be in South Africa. Vulnerable non-citizens with permanent-resident status are the only group of non-citizens who enjoy favourable treatment and who can rely on state support for socio-economic protection. Non-citizens who are holders of special dispensation permits may also be allowed to engage in general work and in informal business. The Immigration Act regulates the treatment of permanent residents and holders of special dispensation permits.

Given that they are not in the same circumstances as refugees, the treatment of permanent residents or holders of special dispensation permits cannot serve as a benchmark for the standards of favourable treatment. According to the judgment of the Constitutional Court in *Union of Refugee Women*, refugees can only be treated as permanent residents if they are granted such status. Yet, being treated as holders of special dispensation permits would not place them in a more favourable situation than their current situation. Both *de jure* and *de facto* refugees are entitled – in terms of the Refugees Act – to undertake employment in skilled, semi-skilled or

non-skilled positions and to engage in formal or informal business.<sup>105</sup> On the other hand, the Immigration Act restricts employment to skilled non-citizens,<sup>106</sup> and businesses to non-citizens who wish to invest in South Africa.<sup>107</sup> It is, therefore, evident that the equality envisaged by the global refugee regime appears to be non-favourable to refugee protection in South Africa, especially since there are no other groups of non-citizens in the same circumstances who receive favourable treatment with regard to socio-economic protection.<sup>108</sup>

In light of the above, the national refugee regime deviates from the standards of favourable treatment to afford refugees equal treatment with citizens in all socio-economic matters. It further exempts both *de facto* and *de jure* refugees from the immigration rules of self-sufficiency, exclusion and undesirability. Such deviation and exemption imply that the guiding standards of favourable treatment are not the principal benchmarks against which socio-economic protection can be measured. Rather, the treatment of citizens – in the context of substantive equality – should serve as a principled tool to define, analyse, discuss and review the treatment of refugees in South Africa. Equality in constitutional rights is, as discussed, guided by the transformative and remedial socio-economic measures designed to redress past injustices. Most socio-economic laws and policies are designed to achieve this purpose, which has the negative implication of leaving the national refugee regime unreconciled. Without reconciling or harmonising the national refugee regime with the socio-economic laws and policies that give effect to constitutional socio-economic rights, refugees find themselves unable to access socio-economic programmes.

Like citizens, any limitation to equal access to socio-economic rights must be imposed in compliance with section 36 of the Constitution. The limitation of any right is constitutionally reasonable and justifiable if it is imposed to promote the spirit, purport and objects of the Bill of Rights as set forth under section 7(1) of the Constitution. Apparently, the standards of favourable treatment are not the principled mechanisms to advance the constitutional rights of refugees in South Africa, for the simple reasons discussed throughout this article.

Besides, it should be noted that the ratification and domestication of the global refugee regime points to an intention and commitment to recognise

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<sup>105</sup> S 27(f) of the Refugees Act states that “refugees are entitled to seek employment”. The Supreme Court of Appeal interpreted this provision in *Somali Association of South Africa v Limpopo, Department of Economic Development, Environment and Tourism supra* par 43, to mean that both *de jure* and *de facto* refugees had a right to be employed or self-employed.

<sup>106</sup> Par (i) of the Preamble to the Immigration Act states that the immigration law sets out to put in place immigration control that allows admission of foreigners who will contribute to the South African labour market and whose contribution will not adversely impact existing labour standards and the rights and expectations of South African workers. Reg 18(3)(a)(i) of the 2014 Immigration Regulations GN No R 413 in GG 37679 of 2014-05-22 sets out a condition that a non-citizen can be granted a general work visa if their prospective employer has shown that no citizen – despite a diligent search – is available to occupy the position.

<sup>107</sup> Reg 14(1) of the 2014 Immigration Regulation states that a business visa can be granted to a foreigner who intends to establish or invest in a business that is not yet established in South Africa.

<sup>108</sup> *Union of Refugee Women supra* par 64–65.

the fundamental rights flowing from refugee status, on the one hand, and to recognise refugees in South Africa as human beings endowed with certain inalienable rights, on the other. By recognising the necessity to protect them as humans, South Africa itself is obliged to respect, protect, promote and fulfil the doctrine of equal protection, which entirely rests on the belief that human beings are born free and equal in fundamental rights and human dignity as proclaimed under both the UN Charter and the 1948 Universal Declaration of Human Rights.<sup>109</sup> By virtue of being human beings and because of their vulnerabilities, refugee rights can be protected by means of a substantive-equality approach. Within this approach, a special and differentiated treatment of refugees can be re-engineered.

The role, significance, and importance of substantive equality in refugee protection is well expounded in the dignity jurisprudence. Relying on the right to human dignity, the SCA in the case of *Minister of Home Affairs v Watchenuka*<sup>110</sup> made it clear that the application of the treatment of non-citizens under the Immigration Act to refugees could, in some cases, lead to a serious impairment of their dignity by causing or perpetuating destitution.<sup>111</sup> The special and differentiated treatment of refugees is judicially reviewed from a human-dignity perspective.<sup>112</sup>

Differentiating the treatment of refugees from the treatment of other non-citizens is essential when determining the position of refugees with respect to the accessibility of socio-economic rights. This will occur when determining the meaning, scope and ambit of favourable treatment, not only in terms of the global refugee regime, but also within the framework of the national refugee regime. This differentiation is also essential when analysing the impact that the standards of favourable treatment have on refugees with regard to their ability to access aspects of public services and socio-economic programmes aimed at empowering the vulnerable, such as small businesses, loans, banking, social/financial assistance, humanitarian relief, employment, practising a liberal profession, social security, health care, housing, and education and training. The South African government must, therefore, align refugee protection with the object and spirit of the global refugee regime, which is to promote the widest possible exercise of refugees' rights and benefits contained in it.<sup>113</sup> To promote these rights, the principle of substantive equality should inform the implementation of the fundamental rights of refugees entrenched in the Bill of Rights as universal

<sup>109</sup> Preamble to the Geneva Refugee Convention. See also Weis (*Refugee Convention* 6–8), which states that the chief aim of the Refugee Convention is to respond to the concern of the international community for the protection of human rights and liberties without discrimination of any kind as given expression in the UDHR.

<sup>110</sup> *Supra*.

<sup>111</sup> The court held that a general prohibition, as applied to asylum seekers, that does not allow access to employment and education in appropriate circumstances, is a material invasion of human dignity that is not justifiable in terms of s 36 of the South African Constitution. See *Minister of Home Affairs v Watchenuka supra* par 33 38.

<sup>112</sup> The dignity jurisprudence was relied on in *Minister of Home Affairs v Watchenuka supra*, *Union of Refugee Women supra*, *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra*; *Minister of Home Affairs v Somali Association of South Africa, Eastern Cape* 2015 (3) SA 545 (SCA); and *Scalabrini Centre v Department of Social Development supra*.

<sup>113</sup> Preamble to the 1951 Refugee Convention.

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rights and, particularly, should be guaranteed by the Refugees Act. Within this view, it is therefore incumbent on South Africa to adopt socio-economic measures and strategies that speak equally to the national refugee regime and determine the extent to which socio-economic rights can be accessed. Refugees are not in the same circumstances as other non-citizens who are required to be self-reliant or who hold special dispensation permits. They are not in the same circumstances as citizens whose vulnerabilities were caused by past discriminatory practices. Refugees' position in South African society is unique. The favourable protection envisaged by the global refugee regime will, therefore, be defeated in situations where the standards of favourable treatment of non-citizens are deliberately applied to refugees, knowing that such application will result in depriving them of socio-economic rights. For instance, it is undesirable to exclude refugees from housing, health care, student financial assistance, small business loans, and COVID-19 relief packages on the ground that non-citizens are – in terms of immigration law – required to be self-sufficient and that they do not deserve state support, or on the ground that refugees do not fall within historically disadvantaged groups. In developing and adopting socio-economic laws and policies, the human suffering, deprivation, and trauma associated with the refugee situation should be taken into account and thus afford refugees special and differentiated treatment designed to respond to their plight.