

REFUGEE RIGHTS IN SOUTH AFRICA: ADDRESSING SOCIAL INJUSTICES IN GOVERNMENT FINANCIAL ASSISTANCE SCHEMES

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ABSTRACT

The political debate on exclusion of refugees and asylum-seekers from socio-economic benefits and opportunities is arguably underpinned by assumptions, fallacies and misconceptions that a higher number of refugees are not “genuine.” Rather they are *bogus* refugees who are in South Africa to seek a better life. That belief has a dire consequence of treating refugee students as ‘international students’ at higher learning institutions, resulting in depriving refugees and asylum-seekers of the right to education and training and of other social opportunities. These assumptions fly in the face of international refugee law principles that refugees and asylum-seekers are to be accorded ‘treatment as favourable as possible’ with respect to tertiary education. Thus, the main objective of the paper is to argue for favourable extension of student financial aid and assistance to refugees and asylum-seekers in South Africa for educational purpose in line with the principles of fair and equitable treatment under international law.

The paper depends largely on the concept of social justice and the philosophy of *Ubuntu* (which means to be humane toward others). It argues that practicalizing *Ubuntu* demands a distributive justice system to ensure that the most vulnerable people have access to certain primary goods and they are afforded social opportunities to realise the most fulsome life. In so doing, the paper draws legal distinctions between two often-confused concepts *vis a* refugee student and an international student though the discussion of the two distinct regimes that regulate their sojourn in South Africa, namely the Refugees Act 130 of 1998, as amended and the Immigration Act 13 of 2002, as amended.

Keywords: Refugee, Ubuntu, social justice, rights, immigration, asylum.

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1. INTRODUCTION

Deprivation or exclusion is intertwined with poverty.¹ Both deprivation and exclusion are symptoms or seeds of “social injustice” that affect the ability of an individual to cope with stresses of life and economic shocks.² Social injustice is more likely to have adverse impact of depriving individuals of abilities to realise their human fulfilment or to uplift out of poverty. Conversely, poverty tends to be associated with criminal activities and social pathologies. It is argued that social injustice, such as deprivation, social exclusion, or poverty can be redressed by equitable and fair distribution of national resources and materials. It is however dynamic and complex and is often assumed to arise from unfair socioeconomic laws or discriminatory laws and policies. The term of social injustice is easy to describe than to define. It can be described as a relative theory about the claimed unfairness or unjustness of society in its distribution of resources, materials and opportunities and sharing burdens, duties and responsibilities. In a society characterised or was characterised by social injustice, social justice is a solution.

Arguably, there can be no real socioeconomic transformation without social justice. The South African Constitution, in its preamble therefore strives to ‘establish a society based on democratic values, social justice and fundamental human rights’. This constitutional aspiration places a duty on the South African government to guard against repetition of either social injustices, exclusions or deprivations. Social justice encompasses ‘the vision of a society that is equitable and in which all members are physically and psychologically safe [and in which] all people have a right to basic human dignity and have their basic economic needs met.’³ Within this perspective, Alana Van Gundy rightly states that no one can be excluded from socioeconomic schemes:

1 I Matanyaire, ‘Community Resilience: A Case Study of North East Sector 2 In-Situ Upgrading and Housing Project in Kwazulu Natal’ in GGLN, *Community Resilience and Vulnerability in South Africa* (Cape Town: GGLN Publication, 2014) 21 states that poverty is intertwined with factors of social vulnerability, ‘as the poor are more vulnerable socially, economically and environmentally.’

2 S Klasen, ‘Measuring Poverty and Deprivation in South Africa’ (2000) 46 (1) *Review of Income and Wealth* 33, 33-59.

People are not to be discriminated against, nor their welfare and wellbeing constrained or prejudiced on the basis of gender, sexuality, religion, political affiliation, age, race, belief, disability, location, social class, socioeconomic circumstances, or other characteristics of background or group membership.⁴

Seen from this viewpoint, it is a social injustice problem for members of refugee community (as group membership) to be excluded from governmental programs. The theory of social justice guards against any unjustified discrimination that restricts or prejudices individuals' benefits. Put it simply, the theory of social justice is concerned with fair and reasonable distributive justice system.⁵

John Rawls maintains that theory of social justice demands a basic structure of the society which enables everyone to have access to certain primary goods, that is, things that are essentially needed in everyone's life for sustainable socioeconomic development, such as rights, liberties, benefits, advantages, privileges, powers, opportunities, income, and wealth.⁶ Although social justice is more often equated to equality, Rawls rejects the notion which holds that it can be relied on to alleviate inequality and disparities as it is, for example, impossible for the people to earn same income.⁷ In Rawlsian fairness perspective, inequality would be fair and justifiable only if the distribution of advantages is to the greatest benefit of the least advantaged and their wellbeing is, at least, improving.⁸ According to David Miller, whether distribution is just or unjust thus depends on whether advantages, burdens, and responsibilities are appropriately allocated in society.⁹ If people attack some policies as socially unjust, they are claiming that a person, or a category of persons or a group of persons, enjoys fewer advantages (or bears more of the burdens) compared to that person or group of persons.¹⁰

3 B S. Levy and V W. Sidel, 'The Nature of Social Justice and Its Impact on Public Health' in Barry S. Levy and Victor W. Sidel (eds), *Social Injustice and Public Health* (New York: Oxford University Press, 2005). 8. See also Alana Van Gundy, *Feminist Theory, Crime, and Social Justice* (Oxford: Anderson Publishing, 2014) 17.

4 Levy and Sidel (n 3) 8.

5 C Kavuro, 'The South African Constitution and the Social Justice Jurisprudence of the Constitutional Court' (2012) 1 Young African Research Journal 100, 100-1.

6 John Rawls, *A theory of Justice* (Cambridge: Harvard University Press 2005) 62.

7 Rawls (n 6) 15. See also R Wacks, *Jurisprudence* (4th edn, London: Blackstone Press 1995) 190-7.

8 Rawls (n 6) 15.

9 D Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press 2003) 1.

10 Miller (n 9) 1.

On the other hand, Amartya Sen understands the theories of social justice through the lens of substantive freedoms.¹¹ He argues that distribution of advantages should be aimed at expanding and maximising everyone's freedom in the sense of developing their capabilities to enable them to do or to be what they want. To Sen, poverty is socially unjust as it is engendered by deprivation of freedom and opportunities which could allow a person's capabilities to function. The function of a person's capabilities is central to attainment of an acceptable standard of living as well as to a sustainable development.¹² Both Rawlsian and Senian philosophies illustrate that exclusion of a group of people from anti-poverty or socioeconomic measures would amount to social injustice and perpetual subjugation.

This paper focuses on tertiary refugee students at South African higher learning institutions, who are excluded from measures aimed at financially assisting the needy and deserving students for alleviation of inequality and non-representativity in South Africa's education system. It is of concerns that higher learning institutions tend to treat refugee students as if they are international students, whereby they are thoroughly treated as non-citizens, without taking into account their special vulnerability as well as their basic rights, expressed in the Convention Relating to the Status of Refugees, as they were incorporated in the South African asylum law. Such treatment meted out to refugee students is reinforced by the fact that measures and policies, adopted to respond to the past discrimination and to promote equal access to education, target the historically disadvantaged groups and, sometimes, are extended to include vulnerable foreign nationals in a possession of permanent resident status. The national measures in question, for example, include the National Skills Fund (NSF) and the National Students Financial Aid Schemes (NSFAS).¹³ These two governmental schemes restrict the financial assistance and aid to citizens.

The paper contributes to the theoretical understanding of social injustices from which refugee and asylum-seekers suffer, by providing an overview of the challenges they face and by proposing policy and legal

11 A Sen, *Development as Freedom* (New York: Anchor Books, 1999) 3.

12 Sen (n 11) 39.

13 Both NSF and NSFAS administer student financial assistance in the form of bursaries, scholarships, loans and grants at undergraduate and college levels.

solutions for alleviation of those injustices. The paper is divided into five sections. The first section delineates and assesses the importance of education in the context of expanding refugees and asylum-seekers' abilities to improve their livelihoods and human security. Section two explores the theories of justice. It shows that social justice requires the State to consider refugees and asylum seekers as equal members of its responsibility in the social improvement design. The third section draws the legal distinctions between two often-confused concepts: a refugee student and an international student. It argues that treating refugees and asylum seekers as international students deprives them their rights and opportunities to access funding arrangements. The fourth section demonstrates how the failure to effectively implement the refugee regime impacts negatively on the refugee's prospect of a better life. In the fifth section, the paper sums up the discussion and stresses that the duty to protect refugees and asylum-seekers is not the State's panacea. Social institutions, particularly higher education institutions and South African citizenry must ensure that refugees and asylum-seekers' right to dignity and wellbeing are holistically and consistently protected if the South African society still believes in an open and democratic nation in which the spirit of *Ubuntu* has a meaning.¹⁴

14 The concept of *Ubuntu* was first incorporated in the post-apartheid of the South African Interim Constitution of 1993, which declared that '... there [was] a need for understanding but not vengeance, and for reparation but not for retaliation, a need for *ubuntu* but not victimisation.' Mokgoro J, in the case of *S v Makwanyane* 1995 (3) SA 391 (CC) para 308 described the concept of *Ubuntu* as follows:

Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that [section 39(1)(a) of the South African Constitution] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.

According to J Sachs, *Ubuntu* suffuses post-apartheid constitutional order and it combines fundamental rights with a communitarian philosophy. The spirit of *Ubuntu* 'is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration...of the need for human interdependence, respect and concern.' See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

2. EXPANSION OF REFUGEES' CAPABILITIES THROUGH EDUCATION AND TRAINING

Education is the best – empowerment – mechanism that can be used to bring about social progress, economic growth and sustainable development. It is the catalyst of a better future for all people irrespective of their age, sex, or nationality hence it, as an empowerment mechanism, lifts the disadvantaged and vulnerable out of poverty and economic distress whereby they are enabled to fully participate in the development of their communities.¹⁵ Refugees and asylum-seekers should be empowered to alleviate their economic hardship through expansion of their capabilities. That will give them the opportunity to participate in social and economic activities that alleviates them from poverty and economic deprivation.

Tertiary education would help refugees and asylum-seekers to expand or develop their personal capabilities, attitudes, aptitudes and knowledge, and therefore realise their potential and human fulfilment. Educating a refugee is a way of assisting refugees to improve their refugee conditions and of restoring their hope through creating human capacity that allows them to do what they may choose to do or to be what they dreamt to become. Since refugees live in abject poverty and deprivation caused by forced displacement, education cannot apparently be accessed without State support and assistance.

The parties to the Refugee Convention recognised the importance of educating refugees, when they acknowledged that refugees should be accorded “treatment as favourable as possible” with respect to tertiary education.¹⁶ Favourable access to education includes the provision of financial support and assistance in the form of ‘the remission of fees and charges and the awards of scholarships’.¹⁷ This notion binds South Africa in terms of Refugees Act (1998).¹⁸ Legislatively and constitutionally, refugees and asylum-seekers are entitled to tertiary education. Like other socioeconomic rights, the enjoyment of the right to tertiary education is subject to reasonable State measures within available resources and progressive realisation.¹⁹

15 Office of the High Commissioner for Human Rights, CESCR, General Comment 13: The Right to Education (Art 13). E/C.12/1999/10, para 1.

16 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art. 22(2).

17 Refugee Convention: Art 22(2).

18 Refugees Act 130 of 1998, as amended by the Refugees Amendment Act 33 of 2008 and the Refugees Amendment Act 12 of 2011 entitles refugees and asylum-seekers to enjoy the rights in the Bill of Rights that apply to everyone.

19 Constitution of the Republic of South Africa 1996, s 29(1)(b).

The NSF and NSFAS are among reasonable State measures undertaken to ensure equal education for needy students who merit furthering their studies. Though refugees and asylum-seekers are poor and vulnerable, they are excluded from accessing the said financial schemes solely on the ground that they are non-citizens. Like economic migrants, refugees and asylum-seekers are viewed 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.²⁰

Furthermore, exclusion of refugees is justified on the basis of having an effective asylum management system in place which is significantly failing to differentiate between *bona fide* and false refugees. The argument that a higher number of refugees are not "genuine" acts as a bar to extending financial arrangements to refugee students. Ineffective asylum management system had been made a scapegoat by South African authority for failing to meet its international responsibility, whereby social injustice is perpetuated and uncertainties are prolonged. Having an ineffective asylum system in place is no fault of genuine refugees. Why should it adversely affect their basic rights? The response to this question can be inferred from the statement of Ms Fatima Chohan, Deputy Minister of the Department of Home Affairs:

It should be noted that that the majority of asylum applicants do not qualify for refugee status. The reason that we have such a high level of applicants is partly because our asylum management process is lacking in many respects. We are alive to the weaknesses in the system and are concerned that the huge influx of applications from individuals intent on abusing the relatively simple process presents, ultimately serve to disadvantage genuine refugees, as our sources are diverted away from offering them the level of service and protection we strive to achieve.²¹

20 For more discussion, see B Maharaj, 'Economic Refugee in Post-Apartheid South Africa – Assets or Liabilities: Implications for Progressive Migration Policies' (2001) 56 *GeoJournal* 47, 47-57; I Palmayr 'Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government' (2002) *Centre for the Study of Violence and Reconciliation* 1, 1-24; L B. Landau and others, 'Xenophobia in South Africa and Problems Related to It' (2005) FMSP, Forced Migration Paper Working No 13; CoRMSA, *Protecting Refugees, Asylum-Seekers and Immigrants in South Africa* (Johannesburg: CoRMSA, 2010) 14.

21 See the Address by Home Affairs Deputy Minister Fatima Chohan on the commemoration of World Refugee Day at the St Martins De Porres Catholic Church, Orlando West, Soweto, 19 June 2011.

It is apparent that the patterns of lack of effective asylum management system, in addition to wrong and unproven assumptions, fallacies and misconceptions are grounds that authority uses to justify exclusion. However, on a number of occasions, the South African courts have ruled that refugees and asylum-seekers as “special vulnerable members” of the South African society,²² who cannot be deprived of socioeconomic rights if such deprivation would impose restriction upon their capabilities to live without positive humiliation and degradation.²³ As a group of people who are susceptible to the above-mentioned social vulnerabilities, it is apparent that the State has an obligation to create a free environment that would allow their capabilities to function and, as a result, to cope with threats to human security. Education is one of the mechanisms that can lead to the realisation of the Senian real freedoms. However, as a starting point, refugees and asylum-seekers ought to be included in the Rawlsian basic structure. Is it theoretically just to restrict the distribution of national resources on the grounds of citizenship? Does refugee status demand inclusion in the political community and reconfiguration of the relationship between the state and refugees? Now, this paper turns to explore whether it is socially just to restrict distributive justice to citizens and permanent residents to the exclusion of refugees and asylum-seekers.

3. THE THEORIES OF JUSTICE VERSUS REFUGEES

In the parameters of justice, it is universally accepted, ‘that every sovereign Nation has the power, as inherent in sovereignty, and essential to self-preservation’, to deny entry of non-citizens or to determine conditions in which they can, if allowed to enter, be treated.²⁴ The treatment of refugees is elaborated on in terms of the Refugee Convention. Regardless of this, the State has discretion to admit refugees within its dominions only in such cases and upon such conditions, elaborated in the domestic asylum system. However, justice for refugees and asylum-seekers, who lack political muscles, is harder to come by, not only in South Africa, but even elsewhere.

The notion of justice is a basis and great insight of the contemporary human rights discourse and protecting refugees in a just manner puts liberal

22 In respect of the discussion of vulnerable position of refugees and asylum-seekers in South African society, see *Union of Refugee Women v The Director, The Private Security Industry Regulatory Service* 2007 (4) BCLR 339 (CC) paras 19,24, 28, 31, 82, 89, 123, 127 and *Ndikumdavayi v Valkenberg Hospital*, Case No: C970/2010 para 17.

23 *Minister of Home Affairs v Watchenuka* [2004] (4) SA 326 (SCA) para 32.

24 *Watchuneka* (n 23) para 29 referring to the decision of *Nishimura Ekiu v The United States* 142 US 651, 659.

and democratic nations to test. Although justice stands the test of time, justice is something that is not easily claimed, seen or done. However, it is truly a wonderful thing that every individual would like to enjoy and something that States individually or collectively focus on to ensure all humanity enjoy it in the context of guaranteeing universally fundamental human rights and freedoms.²⁵ Justice has, for millennia, been claimed in terms of political, social, economic, cultural, and environmental matters, but this theory is today still vague, malleable, axiomatic, and elusive. It is a difficult theory to define because ‘justice exists in its peculiar way.’²⁶ The complexities of justice arise from difficulties of interpretation and implementation of rights, laws, policies and strategies on the one hand and the conflicting theories, philosophical thoughts, and judicial opinions, on the other.

The theory of justice has been given actual meaning by various moral and political philosophers. It is narrowly described by Plato as ‘to render to each their due’ and by Ulpian as ‘to live honestly, to injure no one, and to render to each their own.’²⁷ Richard McKeon posits that Plato’s understanding of justice was refuted by Socrates who viewed it as to render to each man to perform his appropriate function in the State. Whereas Plato and Ulpian’s theory of justice confine the theories of justice to the relationship between individuals, the Socrates’ theory focuses primarily on the duties and responsibilities which individuals owe the State. Richard McKeon observes that it is the Platonian justice, and perhaps Ulpian justice, on which human rights instruments were developed, more precisely, the Universal Declaration of Human Rights (UDHR) of 1948.²⁸ In the Rawlsian basic structure perspective, justice is framed in fundamental rights and freedoms, which the State or a person cannot interfere with or require positive state action to ensure their full entitlements. The same justice was morally incorporated in the Refugees Act (1998) with a view to protecting refugees and asylum-seekers’ dignity, health, and equal worth.

Reformation of basic structure of the South African society for the purpose of achieving a just and equal society today takes a prominent position in the political debate on social transformation. The fundamental question

25 The responsibility to protect humanity stems from various global and regional human rights instruments.

26 M Valverde, ‘Derrida’s Justice and Foucault’s Freedom: Ethics, History, and Social Movements’ (1999) 23(3) *Law & Social Inquiry* 655, 657.

27 R McKeon, ‘Philosophy and History in the Development of Human Rights’ in H Kiefer and M K Munitz (eds), *Ethics and Social Justice* (Albany: State University of the New York, 1968) 316; A Flew ‘Social Justice Isn’t Any Kind of Justice’ (1993) *Libertarian Alliance (Philosophical Notes No 27)* 1, 2.

28 McKeon (n 27) 316.

is: how should social institutions distribute rights and benefits for the creation of a just society? Should refugee community be considered in transformation policies? In order to answer these questions, it is important to understand the idea of distributive justice and to evaluate it in the context of human rights and refugee rights perspectives.

Distributive justice can be traced back to Aristotle, who defines it as ‘distribution or allotment of honour, wealth, and other divisible assets of the community among its members either in equal or unequal shares.’²⁹ Aristotle is convinced that justice is the virtue which does not only render individuals apt to do just things, but which also renders the State to strive to do just things in respect of distribution of resources available. Richard McKeon argues that Aristotle’s definition is an ancient definition, which he formulated in terms of theories of citizenship. In the author’s view, the definition is not static. It can be reformed in accordance with modern human rights standards and principles.

John Rawls, who is the pioneer of the modern theory of justice, revisited the notion of justice through the lens of fairness. In so doing, he identified two principles of social justice.³⁰ Firstly, each individual must have ‘an equal right to the most extensive basic liberty compatible with a similar liberty to others’. Secondly, socioeconomic rights ought to be distributed in such a way that ‘they are both reasonably expected to be to everyone’s advantage’. In the Rawlsian context, the distribution of honor, wealth, and divisible assets must be directed at the protection of not only citizens’ but of individuals’ basic rights. The distribution must be to the greatest benefit of the poor, vulnerable, and least advantaged (i.e. homeless, women, aged people, disabled people, orphans, refugees and asylum-seekers). The protection of inherent dignity and equal worth of human person requires the socioeconomic policies to be arranged in a manner that might not perpetually subject the poor to poverty or the vulnerable to social vulnerabilities.

It is not necessary for the paper to discuss the horizontal context of theory of justice because as John Rawls puts it, principles of theory of justice for States should not be confused with norms which apply to people.³¹ Rather, the paper is concerned with the vertical context of theory of justice – distributive justice – which imposes a positive state action to treat people, fairly and reasonably in socioeconomic domains. The Constitutional Court,

29 McKeon (n 27) 316; Flew (n 27) 2.

30 Rawls (n 6) 60.

31 Rawls (n 6) 54.

in *Grootboom*, delineates the vertical context of justice as ‘the relationship between reasonable state action and the need to treat human beings with the appropriate respect and care for the dignity to which they have a right as members of humanity.’³² Yet, there is a consensus among nation states that refugees should be treated with concern and care by virtue of being members of humanity who are vulnerable to social, economic, and political deprivation. In that, the State ought to welcome them into its political community until a durable solution to their problem is found.

Refugee justice will ensue if the conditions concerning their treatment are procedurally and substantively observed. Procedural justice ‘concerns the way that the decisions are made rather than the nature of those decisions themselves or their implications on the outcomes.’³³ On the other hand, substantive justice concerns the justice of the outcome or the implications of the decisions.³⁴ These two forms of theory of justice are inseparable and both must be reasonably applied. The reasonableness ideal should, according to the Constitutional Court, guide the State in the allotment of rights and benefits.³⁵ Indeed, basic rights and benefits were allotted to refugees in terms of the refugee regime policy on one hand, and they were again restricted in terms of the socioeconomic schemes, such as NSF and NSFAS, on the other, resulting in legal conflict. Such legal conflict adversely impact on the freedom of indigent refugees and asylum-seekers to further their studies. In sum, the restriction is against the moral and legal commitment to protect refugees in a just manner and in conformance with refugee norms and standards. The paper turns to examine why refugees and asylum-seekers should be accorded favourable treatment at higher learning institutions.

4. DISTINCTION BETWEEN A REFUGEE STUDENT AND AN INTERNATIONAL STUDENT

The legal and social position of a refugee

The term refugee entails vulnerability and desperation. It refers to people who took flight in quest of asylum due to persecution, war or conflict.

32 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), paras 82-83. See also *Occupiers of 51 Olvia Road v City of Johannesburg* 2008 (3) SA 208 (CC), para 10; *Watchenuka* supra (n 23) para 26.

33 E. Allan Lind and Tom R. Taylor, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) 5.

34 Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Dordrecht: D. Reidel Publishing Company, 1985) 49.

35 *Grootboom* (n 32) para 44.

They are received and protected in terms of the Refugees Act 1998. Central to the protection of refugees is a well-founded fear of being persecuted by their own governments or due to their governments' failure to protect their basic rights and liberties. The rights to seek and enjoy asylum from persecution is an aspect of the basic rights and liberties set out under the UDHR (art. 14) and the African Charter on Human and Peoples Rights (art. 12).

An individual is recognised as a refugee if he or she meets the test set out in the definition of refugee, contained in the Refugees Act. A refugee is a person:

- a) owing to well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it, or
- b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality or
- c) is a spouse or dependant of a person contemplated in paragraph (a) and (b).³⁶

In light of the definition, asylum-seekers with a legitimate fear will be recognised as refugees. Recognition implies a lack of protection by an asylum-seekers' state and that the asylum-seekers are in need of alternative protection known as "international protection." As noted above, a host state has a prerogative to grant it, including the determination of the conditions associated with refugees' sojourn within its dominions. The conditions relating to accessing socioeconomic rights are prescribed and referred to as 'full legal protection.'³⁷ The full legal protection is not defined by the Act. Yet, it has not been interpreted by a South African court to determine its nature and

³⁶ Refugees Act 33 of 1998, as amended by the Refugees Amendment Act 33 of 2008: s3.

³⁷ Refugees Act 130 of 1998: s27.

scope. With reference to the South African Constitution, it compasses fundamental rights in the Bill of Rights, which include socioeconomic rights or the Rawlsian primary goods. In this context, South African government must fairly extend basic socioeconomic structure to refugees for enjoyment of certain elements of primary goods. Loren Landau argues that the extension of distribution of resources should not only ensure 'adequate and dignified means of subsistence' but aim at ensuring 'a life of dignity; or, at least, a life of comparable dignity' to that of members of host communities.³⁸

In Loren Landau's point of view, refugee situation should be financially assisted with a view to improve their conditions to attain a better life or recover from the effects of vulnerability and deprivation. The State cannot commit to improving the quality of life of South Africans and permanent residents only to the abandonment of refugees and asylum-seekers. Well, the constitutional aspiration of establishing social justice would be lived up if refugees – the most vulnerable's – capabilities are also developed to that level of functioning in a way that they can support themselves and their families. The responsibility to financially support refugees should be drawn on the notion of alleviating misery and suffering through humanitarian actions and social assistance. The responsibility should be understood in the context of extending the distribution of national resources for the protection of refugee positive rights such as social security, housing, education, healthcare, etc. The enjoyment of these basic rights will enormously contribute to securing a life of dignity and refugee community resilience.

Assisting refugees for them to recover from trauma, misery, shocks and stresses is a matter that requires solidarity or cooperation at national and international level. At national level, solidarity can, in the South African context, be equated to the principle of '*ubuntu*'. It is the culturally shared value that puts value on life, human dignity, and community resilience and calls for the idea of justice, equity and fairness in the balance of interest of society.³⁹ More importantly, it is the principle on which South African post-apartheid Constitution is founded and, as a result, permeates it.⁴⁰ Within this

38 L. B. Landau, 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 3 *Journal of Refugee Studies* 308, 309.

39 For more discussions of what the concept of *ubuntu* entails. See (n 14) above; *Makwanyane* (n 14) paras 224, 225, 237, 263, 308 (death penalty was found to be a violation of the right to life based on the philosophical concept of *ubuntu*); Irma Kroeze, 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* 252, 252-64; Yvonne Mokgoro and Stu Woolman, 'Where dignity ends and Ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *SAPL* 400, 400-7; and H Botha, 'Human Dignity in Comparative Perspective' (2009) 20 *Stellenbosch Law Review* 171, 204-6.

understanding, it can also be argued that the value of *ubuntu* should be infused in the protection of refugees' life and dignity. In the communitarian sense, refugee and asylum-seekers need to be afforded social opportunities to realise the most fulsome life. Politicians and the large segment of public should not stigmatize refugees and asylum-seekers as 'not belonging', 'unwanted aliens,' 'criminals' or 'economic vultures.' These misconceptions run contrary to the principle of *Ubuntu* and the main objectives of the refugee policy. The public and private agents should acknowledge that at the heart of international protection lies the recreation of legal protection refugees have lost, that is, the enjoyment of basic rights and liberties that they could not enjoy in their home countries. Of course, protecting refugees is "not" a burden – responsibility – that should be carried by a host nation only, but a burden which other countries must, through United Nations and African Union, lessen. The principle of burden sharing among nations also creates social justice at global level. At national level, South African people in terms of the virtue of *Ubuntu* should individually and collectively contribute to lessening such burden. By this virtue, policymakers must include refugees in the measures that seek to reduce social inequality and economic disparities.

The legal and social position of an asylum-seeker

Like refugees, asylum-seekers are in a vulnerable position in the South African society. They are individuals who were forced to migrate and entered South Africa for the purpose of seeking asylum. By definition, an asylum-seeker is 'a person whose request or application for asylum has not been finally decided on by a prospective country of asylum'.⁴¹ Under South African asylum law, he or she is 'a person who is seeking recognition as a refugee within South Africa dominions'.⁴² Clearly, the fact that an asylum-seeker is not yet recognised as a refugee cannot totally deprive him or her of social opportunities to access primary goods, hence, under asylum law, is entitled to access socioeconomic rights.⁴³ Unlike refugees, they are not entitled to full legal protection and this places them in a lower position compared to recognised refugees. Still, their legal position is distinct from

40 *Makwanyane* (n 14) para 237 and *Port Elizabeth* (n 14) para 37. See too C Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (Cape Town: ABC Press, 2009) 268-70.

41 Kate Jastram and Marlyn Achiron, *Refugee Protection: A guide to International Refugee Law* (Geneva: Inter-Parliamentary Union, 2001) 125.

42 Refugees Act 180 of 1998, s1.

43 Refugee Amendment Act 33 of 2008, s 22.

that of other types of non-citizens, for example, international students and economic migrants.

The UNHCR Reception Standards for Asylum-Seekers in the European Union of 2000 can guide in understanding the position of an asylum-seeker in a host society. It states that their legal position allows them to have access to primary goods that will ensure ‘the minimum threshold of an adequate standard of living.’⁴⁴ The UN Committee on Economic, Social and Cultural Rights, in its General Comment 4 of 1991, narrowly defines the conception of access to an adequate standard of living as of central importance for the enjoyment of all socioeconomic rights as well as cultural rights.⁴⁵ An asylum-seeker’s access to basic primary goods will accordingly be translated into entitlements if the social structure of society is designed to protect their health and dignity. In this respect, the UNHCR Reception Standards for Asylum-Seekers states that the needy should be supported socially and economically:⁴⁶

Needy asylum-seekers should be given all necessary support covering the basic necessities of life, including food, clothing and basic accommodation, throughout the asylum procedure until a final decision is taken on their application. If necessary, this should also apply to asylum-seekers who are permitted to work but are unable to find adequate employment.

In light of this, an asylum-seeker can access the minimum threshold of public benefits. In South Africa, asylum-seekers were, prior to 2004, not entitled to access socioeconomic rights, particularly education and employment, pending the outcome of their applications. An application was expected to be decided on or within 180 days. If not, an asylum-seeker could apply to the Standing Committee for Refugee Affairs to lift such restriction. The Supreme Court of Appeal (SCA) in the case of *Watchenuka* found the restriction to be unjust and unfair. It held that the prohibition to undertaking employment and study throughout the asylum procedure was in conflict with the principles of basic rights and liberties enshrined in the Bill of Rights.⁴⁷ In this case, Nugent JA acknowledged that asylum-seekers are also

44 UNHCR, ‘Reception Standards for Asylum-Seekers in the European Union’, Geneva, July 2000 (UNHCR Reception Standards) para 13.

45 UN Committee on Economic, Social and Cultural Rights, General Comment 4, 1991, para 1.

46 UNHCR Reception Standards (n 44) para 12.

47 *Watchenuka* (n 23) para 24.

members of the South African society, who like citizens, should be given opportunities to participate and contribute to South African economy, on the one hand, and to free their potential, on the other:⁴⁸

The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity...for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.

For becoming a socially useful, the education is an indispensable mechanism to free an individual's potential and to expand his or her abilities. In the Senian philosophy, individuals can be socially useless and, perpetually be stuck in poverty as a result of their abilities failure to function.⁴⁹ An individual would fulfil what it is to be human if the national resources are directed to develop the capabilities of all people, with a particular focus on empowering the poor and vulnerable.⁵⁰

It is crucial to note that the right to education has two fundamental aspects: physical accessibility and economic accessibility. Whereas the former aspect refers to education being within safe physical reach, the latter aspect refers to education being affordable to all.⁵¹ Should the state allocate funds to assist asylum-seekers that merit tertiary education but cannot afford tertiary education? If we analyse more carefully the case of *Watchuneka*, the answer would, be yes. In this case, the SCA upheld a relief granted by a *court quo* to an asylum-seeker complainant, who was an unemployed and needy widow and who was living with her disabled 20 years old son, and who challenged the prohibition to work and study as unjust and unfair. The motive behind challenging the prohibition to study was based on her desire to see her disabled son undertaking tertiary education. Given that she was facing financial hardship it could not be an easy task to fund her son's education without the State intervention.

For the sake of safeguarding rights and liberties, an asylum-seeker may not be deprived of access to the basic necessities of life. At minimum, this should include social and material support necessary not only for survival

48 *Watchuneka* (n 23) para 27.

49 Sen (n 11) 24, 25. See also M Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011) 19.

50 Sen (n 11) 24, 25. See also A Sen, *Inequality Reexamined* (Cambridge: Harvard University Press, 1992).

51 General Comments 13 (n 15) para 6.

but also for the realisation of a life of dignity. As a human being, an asylum-seeker should reasonably be treated in accordance with basic rights and liberties compatible with at least those enjoyed by others in the same social circumstances. In this context, their desire to study and to become socially useful in South African society cannot be impaired by their non-citizen status. Those who merit furthering their tertiary studies must be financially assisted, provided that they meet the means test designed to select the deserving and needy tertiary students. Having established that both a refugee and an asylum-seeker's positions in South African society require a reasonable state action, the paper now turns to discuss the position of an international student in the South African society, stressing the differences between the two groups. The focus would be paid to the refugee and immigration regime policies.

The legal and social position of an international student

There is a tendency to treat refugee students as if they are international students at South African institutions of higher learning. Realistically, the legal and social position of an international student significantly differs from that of a refugee or an asylum-seeker. By description, international students are individuals who came to South Africa with the purpose of furthering their education. Dissimilar to refugees and asylum-seekers, they are not in South Africa for the purpose of seeking asylum, notably an international protection. While in South Africa, they are still protected by their own governments and are, by law, expected to return upon the completion of their studies. Their stay is regulated by the Immigration Act 13 of 2002, as amended.

Whereas the granting of asylum is subject to a voluntary return when there is a fundamental change in the conditions that caused refugees to flee, an international student can go back and forth to his country as he pleases. It is also important especially to point out that the essential distinction and quality of a refugee or an asylum-seeker is that they have left their home countries, as a result of political conflict which render their continued residence intolerable. Having sought asylum, they are unwilling or unable to return without danger to their life, integrity, physical safety or liberty, or as a direct consequences of the political conditions prevailing in their home countries. On the contrary, international students' life and integrity is not in danger. Rather they are in the country because they voluntarily applied for a visa to stay and study in South Africa, the granting which is subject to

some conditions, as discussed below. Having said that, it follows to examine the motives why the distributive justice in the form of financial assistance is often not extended to include international students.

In fact, the immigration regime policy expressly excludes international students from distributive justice and thus it encourages them to be financially stable. In principle, a study visa is issued to those individuals who proved to have sufficient means to support themselves during their stay and are capable of paying their school fees.⁵² An international student who becomes destitute while undertaking his or her studies will be declared 'undesirable' because he or she may become a 'public charge'.⁵³ Within this view, an international student is not, in principle, entitled to national student funding arrangements. Government and private institutions are under no obligation to allocate national resources to them for the purpose of ensuring access to education. This position was confirmed by the Constitutional Court in the case of *Khosa v Minister of Social Development*.⁵⁴ Access to social welfare by non-citizen with temporary residence 'would impose an impermissibly high financial burden on the state'.⁵⁵ It follows that it is more likely to declare destitute international students as 'undesirable', resulting in their study visa being withdrawn. Once visa is withdrawn, they become illegal non-citizens, who are subject to deportation.⁵⁶

The deportation clause is not applicable to refugees/asylum-seekers. The principle of *non-refoulement* takes precedence over the deportation clause. An asylum-seeker or a refugee cannot be returned, deported or expelled. In terms of *non-refoulement* principle, host states are required to admit destitute asylum-seekers and to grant asylum to them.⁵⁷ Most of refugees or asylum-seekers are experiencing economic distress because they have lost all their possessions as a result of forced displacement. They are also rendered vulnerable by the fact that there is no legal connection between them and their home countries.⁵⁸ Their predicament arose in the line of not acquiring full benefits of citizenship of a host country and losing benefits of their home countries' citizenship. International students are not challenged by this predicament.

52 Immigration Act 13 of 2002, s 13(1).

53 Immigration Act 13 of 2002, s 30(1)(a).

54 [2004] 6 SA 505 (CC).

55 *Khosa* (n 54) para 59-60.

56 Immigration Act 13 of 2002, s 32(2).

57 Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428 (V) of 14 December 1950, Art 2(c).

58 J Dugard, *International Law: South African Perspective* (3rd edn, Lansdowne: Juta 2005) 279.

They still enjoy benefits and privileges attached to citizenship of their home countries. They do not face a problem in exercising their political rights or in participating in the national affairs of their countries whereby they contribute to their countries' economic growth and sustainable development.

The fact that refugees have fled their countries implies that they cannot participate in their nations' affairs because seeking asylum has an impact of cutting the tie of asylum-seekers' home country protection. They cannot return to their country if they reasonably still fear that they can be persecuted.⁵⁹ Otherwise, if they do go home, they lose their refugee status as it is deemed that they no longer have a well-founded fear of persecution.⁶⁰ On the other hand, international students are strongly tied to their home countries, which, in turn, deal with any legal difficulties they may be facing during their stay. Their home countries assistance is received or offered in the context of the 'diplomatic protection' mechanism.⁶¹ That is the core of difference between refugees and international students.

In light of the above, the higher learning institutions should not treat international students and refugees in a similar way because the legal regime policies that govern their stay are greatly different. Otherwise, the same treatment will have effect of denuding their refugee rights and thus prolonging social injustices and vulnerabilities. It has been established that the immigration regime does not distribute any social benefit to international students while the refugee regime extends social benefits to refugees and asylum-seekers and, in particular seeks to include them as "additional" members of the South African society. The rules that are set up by the higher learning institutions to govern non-citizens in the tertiary education sphere should, in order to avoid unnecessary impairments and alienation, take into account that refugees are members of South African society and that they live in similar conditions of the majority of South Africans. Their human fulfilment is challenged by poverty caused by forced displacement. Refugees or asylum-seekers and international students cannot at all be defined as the

59 Refugee Regulations (Forms and Procedure) 2000, s 9(2) states that: '[a]n asylum seeker who returns to the country of feared persecution or harm may, in terms of section 5 of the [Refugees] Act, cease to qualify for refugee status if there is evidence that, during the return, he or she sought protection of the country or became re-established there.'

60 Refugees Act 130 of 1998, s 5(1) states that a person ceases to qualify for refugee status if: (a) he or she voluntarily reavails himself or herself of the protection of the country of his or her nationality; or (b) having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or (c) he or she becomes a citizens of the Republic or acquires the nationality of some other country and enjoy the protection of the country of his or her new nationality; or (d) he or she voluntarily reestablishes himself or herself in the country which he or she left.'

61 Dugard (n 58) 281-7.

same group although they are all non-citizens.

Socioeconomic conditions of international students cannot be compared to that of refugees because their dreams, wellbeing and livelihoods was not destabilised by forced displacement and unspeakable human rights violations. First and foremost, they are admitted on South African territory subject to economic reliance and independency. Within this view, those who are destitute are allowed in the country because they have convinced and assured South Africa that their economic matters will be covered by their home countries through bursaries, scholarships, or student financial loans administered by their governments. All these place the international students in advantaged and privileged social situation.

Drawing from this discussion, it is self-evident that according to refugee students same treatment as it is accorded to international students would be unfair because their social and legal positions are not equal. Social inequalities are obvious. Refugee students should be treated in accordance with the refugee regime policy which also gives them social privileges to favourably access public resources allocated for social assistance and security. Furthermore, due to the trauma associated with forced displacement, refugees are in need of emotional and psychological support which must be provided by those around them. They must not be alienated or rejected as this will lead to the deprivation of freedom of choice to become what they dream to be or to do and exacerbate their hopelessness arising out of a refugee situation. In this state of continual precariousness, a refugee may drop out of school whereas others are unable to assume their studies. The State has to assume its responsibility to create the material, social, economic and political conditions that permit abilities to be put on use.

In the next section the paper will illustrate how the failure to take into account the plight of refugees and asylum-seekers in the social transformation institutions has created social injustice, which is known as protracted refugee situation.

5. NEXUS BETWEEN EXCLUSION AND PROTRACTED SOCIAL INJUSTICE

South Africa received an influx of refugees escaping from the political turmoil of the 1990s, mainly occurred and still occurring in the central and the horn of Africa. Some of these refugees are still in South Africa, whereas others have been in South Africa for more than ten years. They have no hope of returning home or being integrated in the South African society.

Due to the said discrimination stemming from socioeconomic policies, they are living in a long-standing and intractable state of limbo and uncertainty.

The protracted social injustice arises where refugees have been granted asylum but the years come and pass without a legal mechanism to integrate them in the national economy or a hope of repatriation in their native countries. The refugee regime is centred to self-integration approach,⁶² which assumes that refugee and asylum-seekers are economically independent and self-reliant. Self-integration approach implies that refugees and asylum-seekers are necessarily required to do everything in their power to integrate themselves in South African society without positive State action. Regardless of their potential destitution and vulnerability, they are left to sustain themselves and their families without prospect of having access to the most socioeconomic rights and benefits, such as humanitarian relief and socioeconomic empowerment measures. In the author's view, successful integration will ensue provided that South African government plays its part. That is introduction of measures that extends the distributive justice or Rawlsian basic structure (such as housing/shelter, education, employment, basic healthcare, water, food, and social security) to refugees and asylum-seekers.

According to Amartya Sen, development of capabilities is only possible if socioeconomic structures are arranged to influence an individual's substantive freedom to live better.⁶³ As alluded to earlier, the Refugees Act, at national level, makes social opportunities accessible to refugees and asylum-seekers, but there are, at provincial and local levels, no policies or strategies to ensure that those opportunities are available to beneficiaries. For that reason, access remains uncertain. The consequences of this failure to implement the refugee regime policy at provincial and local levels' are that refugees' communities are relegated to the margin of the South African society. The deprivation of the necessities of life – social opportunities – pervasively threatens individuals' security, life and health. The self-integration approach is inimical to the theories of social justice (discussed above) as it contributes to the exclusion of refugees and asylum-seekers from accessing socioeconomic rights and other national measures taken in the pursuit of redressing the past injustices. Such practices have bearing and relevance on the exclusion of refugees in the funding arrangements.

62 Landau (n 38) 308.

63 Sen (n 11) 39.

6. CONCLUSION

In addition to providing refugees and asylum-seekers the right to tertiary education, the concept of social justice provides theoretical and normative underpinnings on why the South African government must review practices around the protection of refugees in respect of access to equal education. The main objective of the Refugees Act is to ensure social justice in respect of access to social rights, benefits and opportunities and that the main objective will be achieved only if they have access to the Rawlsian primary goods. In that, social justice would be established if the refugee vulnerability and the rights attached to their refugee/asylum-seeker status are recognised and considered in the distributive justice system.

To meet its promise of protecting refugee dignity, health and wellbeing, South Africa must ensure that its national, provincial and local departments work towards improving the refugee situation to become socially useful and valuable members of the South African society. In this context, the Department of Higher Education as well as higher learning institutions should include deserving and needy refugee students in the NSF and NSFAS and other funding arrangements if they are committed to alleviate discrimination and social injustice in higher education domain at the forefront of their effort. The paper has argued that eradication of the inherited inequality cannot be said to be achieved if a segment of vulnerable people is perpetually excluded and subjected. Social justice requires that social opportunities, such as student funding arrangements be made to the advantages of the most vulnerable. The category of vulnerable people in South Africa includes the previously oppressed communities and refugee communities.

Higher institutions of learning must therefore become proactive in applying immigration rules applicable to refugee students and international students to ensure just and equitable treatments. It is not only the duty of the State, but also of social institutions to improve the situation of vulnerable groups that have fallen into poverty, destitution, and starvation. Equally, politicians, social institutions and the South African host communities at large must ensure that refugees and asylum-seekers are warmly welcomed and socially integrated in order to enthrone an open and democratic society founded on the virtues of *ubuntu*, dignity, equality, freedom and social justice.